



## ECF SHORT GUIDE 4

# How to get legal aid Exceptional Case Funding (ECF) in housing law



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# How to get Exceptional Case Funding in housing cases

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# How to get Exceptional Case Funding in housing cases

This guide is intended to assist legal aid providers with a housing 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. Practitioners may also wish to refer to PLP’s guide: [\*How to get Exceptional Case Funding in Welfare Benefits cases\*](#).

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



## 1. Introduction

**At the outset, it is important to remember that several areas of housing law remain in scope for legal aid.** These are set out below.

Clients are sometimes under the impression that legal aid has been removed completely and may delay seeking advice as a result of fear of having to pay for legal services.

Notwithstanding the above, many housing law matters were 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. 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, funding 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, principally under the Charter of Fundamental Rights of the European Union (“the Charter”).



ECF is only available in cases that are outside the scope of legal aid. You cannot apply for ECF in cases where legal aid is unavailable because the ordinary means or merits criteria are not met.

As was well publicised 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 1% 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 54% in the last quarter for which statistics are available (October – December 2017).

Despite this, the number of applications for ECF in housing cases has been very low, with only 19 applications made in the last quarter, 5 of which were granted.

However, ECF is potentially available in a range of housing law issues, 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 housing 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.

Broadly speaking, housing cases were retained in scope where they involved homelessness or the threat of the loss of a person's home. The following types of housing case are still in scope (paragraph numbers refer to paragraphs of Part 1 of Schedule 1):

- Loss of home (paragraph 33). This includes services provided in relation to:
  - Possession proceedings.
  - Proceedings for eviction of the individual or others.
  - Bankruptcy proceedings where the person's estate includes the individual's home (but not if the individual presented the petition for bankruptcy themselves).
  - Claims for assault, battery, trespass to goods or land, damage to property, and claims for breach of statutory duty which are either:
    - pleaded as a counter-claim in possession proceedings; or
    - brought in relation to unlawful eviction.
- Homelessness (including those who are threatened with homelessness)
  - advice and assistance on homeless applications, decisions, and appeals in the County Court or above (paragraph 34). Funding should be available for anyone living in unsuitable accommodation wanting a transfer as it will not be reasonable for them to occupy their current accommodation and so they will be 'homeless'.
- Advice in relation to allocation of accommodation in discharge of a local authority's homeless duties (paragraph 34).
- Deficiencies in a rented home – but only in order to secure repair/remedial works in circumstances where the deficiency poses a serious risk of harm to the health or safety of the tenant and/or their family (paragraph 35). Damages claims for damage to property or breach of statutory duty are covered in these circumstances, but are not in scope simply because there are repair works which still need to be carried out.

- Anti-social Behaviour – defending claims against individuals for injunctions sought under section 1 of the Anti-social Behaviour, Crime and Policing Act 2014 (paragraph 36).
- Harassment – advice and assistance relating to obtaining injunctions under section 3 or 3A of the Protection from Harassment Act 1997, or the variation or discharge of a restraining order under section 5 or 5A of that Act (paragraph 37).
- Asylum support – advice in relation to accommodation provided to asylum seekers and refused asylum seekers under ss4 and 95 of the Immigration and Asylum Act 1999 (paragraph 31).

Most of the proceedings set out above are covered by the Housing category, except mortgage possession proceedings and bankruptcy proceedings, which fall under the Debt category.

In the proceedings set out above, legal aid is available for advice and advocacy in court, except for asylum support cases where advocacy is excluded.

## Equality Act claims

Legal aid is also available for services provided in relation to contravention of the Equality Act 2010 or a previous discrimination enactment (paragraph 43).



## Community care

Advice in connection with community care services provided by a local social services authority also remains in scope (paragraph 6), including in relation to disabled facilities grants (paragraph 7). Where the community care services sought include the provision of accommodation for an individual who is homeless or threatened with homelessness, then these also fall under the housing contract.

## Judicial review

Judicial review also remains in scope for legal aid (paragraph 19). It is important to consider areas of housing law that may be amenable to judicial review. Examples include:

- Challenging 'gatekeeping' by local housing authorities when dealing with people who present themselves as homeless
- Challenging the lawfulness of housing allocation schemes
- Challenges to decisions of local authorities about the exercise of their community care powers;
- Challenges to public body enforcement measures in respect of licensing of landlords and letting agents



## 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 his or her 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. Property law rights are civil rights, and therefore are protected by the first limb of Article 6. Whether housing cases which do not involve property rights engage Article 6 or other relevant Convention rights is considered further below.

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. This may be relatively unlikely to be an issue in housing cases for matters that are not already in scope.



## 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 “*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 housing cases

In order to obtain ECF for a housing case, the first consideration is whether the case engages a relevant Convention right, or Article 47 of the EU Charter. The most likely Convention rights to be engaged in housing cases will be Article 6 (right to a fair trial), Article 8 (right to respect for private and family life), and Article 1 of Protocol 1 (right to ‘peaceful enjoyment of possessions’).

### Article 6

As noted above, property rights are established to be “civil rights” and will therefore engage Article 6. The Lord Chancellor’s [Guidance](#) on ECF advises decision-makers that claims between parties about housing issues, in contract or tort, are generally likely to involve the determination of civil rights and obligations (at para. 56).

Note, however, that in *Poshteh v Royal Borough of Kensington and Chelsea* [2017] UKSC 36 the Supreme Court held that a homelessness application does not give rise to a civil right, and therefore the review procedure and the statutory appeal process does not engage Article 6 – albeit with the qualification (at para. 36) that clear guidance from the European Court of Human Rights that says otherwise may change this position. As homelessness cases are generally already in scope for legal aid this is unlikely to be an issue in any ECF applications.

### Article 8

There is no right under Article 8 to be provided with a home. However, many aspects of private life will overlap with home life. The European Court of Human Rights has interpreted ‘home’ very broadly to include not only where one lives on a settled basis (*Giacomelli v Italy* [2006] 45 EHRR 871), but also a holiday home (*Demades v Turkey* [2003] ECHR 416), properties where the applicant does not have a legal right to reside (*Buckley v UK* [1996] 23 EHRR 101), and even a professional person’s office (*Niemietz v Germany* [1992] 16 EHRR 97).

Family life can also overlap with home life and the desirability of ensuring that families can be accommodated together (*Bah v UK* [2011] ECHR 1448, at para. 15). In *R (H) v Ealing LBC* [2017] EWCA Civ 1127, a case about the lawfulness of a local authority's housing allocation scheme, the Court of Appeal held that so far as it concerns single parents with children who are not already in secure accommodation, or indeed not accommodated at all, 'their right to permanent accommodation falls within the scope of family life protected by Article 8' (at para. 102).

## **Applying the ECF criteria**

The key to making a successful ECF application is showing that the importance of what is at stake, or the particular complexities of the applicant's case, taken together with their individual ability or lack of it, means that the applicant will be unable to present their case effectively.

## **Complexity**

Legal, factual and procedural complexity are all relevant to whether a grant of ECF is appropriate. An individual without legal training is unlikely to be able to effectively conduct cross-examination, to make legal submissions during a final hearing, or be able to obtain expert evidence. In order to make a successful ECF application it is necessary to spell out all the procedural and other complexities to the LAA. The LAA seems to take the approach that the relatively straightforward legal issues in many cases means that ECF is not required. This approach is incorrect, but it is essential to demonstrate that there are complex procedural steps that must be taken, arguments to be made, or evidence to analyse, in order to show that the complexity requires a grant of funding.

An individual without legal training is also less likely to be able to understand the evidential requirements, or the criteria that their evidence (or their opponent's) must address. For example, in demotion cases in which there are allegations of anti-social behaviour, the applicant will have to analyse the evidence presented by the other side, to be aware of the test that they are required to meet, and present their own evidence to address that test. The Court of Appeal's comments in relation to the claimant in *Gudanaviciene* are useful in these cases; the Court found that although the issues in her case were essentially factual and this was *"the kind of factual question which the Tribunal would readily be able to determine if all the relevant evidence was placed before it...in order to ensure that all of the relevant evidence was placed before the Tribunal TG will have to be able to identify this key question; and to produce evidence, and make submissions as to present risk"* (paragraph 90).

### **The importance of the issues at stake**

It should be possible to show that any proceedings affecting a client's home are of importance to an applicant, and in particular any proceedings which will alter or determine the nature of the relationship an applicant will have with their family will be of vital importance. Proceedings which are purely about money (such as out-of-scope proceedings for obtaining damages in deficiency/disrepair cases) may be less significant. But if your client has suffered loss or incurred expenses that affect their ability to meet his or her basic needs, or those of any children, or to keep a roof over their heads without a satisfactory outcome then that should be emphasised in order to show the importance of the issue.

### **The ability of the applicant to present their case effectively**

Housing cases can sometimes involve highly emotive issues and will often mean that an applicant for ECF would find it difficult to present their case with the objectivity required, especially where the proceedings concern an applicant's relationship with their landlord, their neighbours, or where the applicant's health is a central issue.



Other 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.

### **Equality of arms**

In *Gudanaviciene*, the Court said that "*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). In many housing cases, one party will be represented and the other will not. Where one party has the benefit of representation, there will often be an obvious unfairness faced by the other. It is also worth pointing out that the court will not be able to address the disadvantage faced by the unrepresented party. The court cannot advise a litigant or advance one party's interests, but must remain impartial, even if it is used to dealing with litigants in person.



### **Housing cases where it might be worth applying for ECF**

The Legal Aid Agency's 2015 Category Definitions document provides guidance on what issues are covered under the Housing Contract (paragraph 29):.

*29. To the extent that any relevant grant of exceptional funding is made (in accordance with section 10 of the Act) this category also includes any matters which concern the possession, status, terms of occupation, repair, improvement, eviction from, quiet enjoyment of, or payment of rent or other charges for premises (including vehicles and sites they occupy) which are occupied as a residence, including the rights of leaseholders under the terms of their lease or under any statutory provision (including enfranchisement). Cases including allocation, transfers and the provision of sites for occupation are also included.*

The two most likely, or pressing, types of housing cases where legal advice might be required that aren't covered by LASPO are those where advice is needed on important matters relating to a client's tenancy, that are not connected to possession proceedings or homelessness, and disrepair cases where the criteria in LASPO are not met. It may also be necessary to apply for ECF for certain types of counterclaim (see below). An application for ECF could also be made in an asylum support case for representation on appeal to the First-tier Tribunal (Asylum Support). Applications for ECF in these areas will still need to consider whether a Convention right or EU law obligation would be at risk of violation if funding for legal representation is not made available.

## **Out-of-scope advice**

Early advice may justify an application for ECF even before possession proceedings are in contemplation. For example, where issues arise about a client's succession to a tenancy of a family member, this may raise issues about their right to respect for their private and family life or home which engage Article 8, and legal advice may be necessary to enable them to effectively participate in decisions about whether they will be allowed to succeed to the tenancy – and if not whether (and if so where) alternative accommodation will be provided. This is most likely to be applicable where the client is residing in social housing, as local authorities and housing associations are considered to be 'public bodies' for the purposes of the Human Rights Act 1998 and Article 8. Following *McDonald v McDonald* [2016] UKSC 28, possession proceedings involving private landlords are not considered to engage Article 8.

A landlord may seek to recover rent arrears through a money claim rather than seeking possession. Advice on demotion of tenancy and demotion orders is also out of scope. As such matters involve a determination of an individual's civil rights and obligations, these types of cases may engage Article 6, and are arguably of sufficient importance to individuals to justify public funding for legal services. Having a County Court Judgment against you for a money claim brought to recover rent arrears is likely to affect your credit rating, for example.

You will need to be clear about what precisely you are providing advice about when contemplating applying for legal aid. For example, you may find that the substantive work is to do with ensuring that a client's welfare benefits payments are all in order, and that problems such as sanctions or overpayments that may be affecting your client's ability to keep up with rent are being dealt with. This work would not be in scope for legal aid either. PLP has published a separate guide on [how to get ECF in welfare benefits cases](#).



## Deficiencies and disrepair

As noted above, legal aid is still available for disrepair cases that meet the criteria in Paragraph 35, Part 1 Schedule 1 of LASPO (emphasis added):

### **35: Risk to health or safety in rented home**

- (1) Civil legal services provided to an individual in relation to **the removal or reduction of a serious risk of harm to the health or safety of the individual or a relevant member of the individual's family** where –
- (a) the risk arises from **a deficiency in the individual's home**,
  - (b) **the individual's home is rented or leased** from another person, and
  - (c) the services are provided with a view to **securing that the other person makes arrangements to remove or reduce the risk**.

“Deficiency” is defined in paragraph 35(4) of Part 1 Schedule 1 as “any deficiency, whether arising as a result of the construction of a building, an absence of maintenance or repair, or otherwise”. This definition, as well as covering deficiencies in the home arising from lack of maintenance and lack of repair will also for example include poor design of a home that leads to a risk to health, such as condensation dampness.

Note that ‘disrepair’ itself has a narrower meaning. *Woodfall: Landlord and Tenant* (Sweet & Maxwell) provides a useful definition:

**13.029 The concept of repair is the converse of disrepair.**

Accordingly before liability can arise under a covenant to repair, the subject-matter of the covenant must be out of repair. Disrepair cannot exist unless the subject-matter of the covenant is “in a condition worse than it was at some earlier time,” for **disrepair “connotes a deterioration from some previous physical condition”**. There must be damage to the subject-matter of the covenant, for repair “connotes the idea of making good damage so as to leave the subject so far as possible as though it had not been damaged”. The test is not merely one of functional effectiveness, for **part of a building may be functionally ineffective and yet not be in disrepair**.

(Emphasis added.)

Cases that fall outside of the definition in Schedule 1 of LASPO may therefore be amenable to ECF applications. This could include where legal advice is needed to secure damages arising from deficiency or disrepair, as securing damages would go beyond the criteria at Para. 35(1)(c) above. The Legal Aid Reform Implementation FAQs published by the Government explain (para. 81) that:

*“...In relation to housing disrepair, Paragraph 35 Part 1, Schedule 1 only describes services in relation to the removal or reduction of the serious risk of harm to health, it does not outline any claim for damages. Damages arising from a disrepair claim will fall outside of scope and therefore must be funded separately from the injunction or order for repairs claim.”*

Disrepair claims involve the determination of civil rights and obligations so will engage Article 6. The availability of ECF will depend on showing that a claim for damages is important enough for the individual, and on the issues of complexity and ability of the individual to represent themselves. When considering an application for ECF in such cases it is worth bearing in mind the Guidance issued by the Lord Chancellor to LAA decision-makers (at para. 58):

- Where the applicant is seeking to claim damages, what is the level of damages sought? Do they include damages to compensate for items of particular importance to the applicant, such as damage to important medical equipment?
- To what extent is expert evidence necessary to resolve disputes concerning the allegations of disrepair, the medical effects of disrepair or the nature of remedial work required?

Another example of a case that may require recourse to ECF is where the person who may suffer a risk to their health is **not** an individual or ‘relevant member of the individual’s family’ within the meaning of Para. 35.

Under Para. 35(3)(a), a child is a ‘relevant member of an individual’s family’ if the individual is the child’s parent or has parental responsibility for the child.

Under Para. 35(3)(b), an adult (“A”) is a relevant member of an individual’s family if they are relatives (whether of the full blood or half blood or by marriage or civil partnership) or cohabitants, **and** the individual’s home is also A’s home.

So, LASPO does not permit legal aid to be provided where the risk is to the health of a family member who does not also live at that property, but who may be visiting. ECF applications may be required to cover cases where the risk is to, for example, a visiting adult relative with a respiratory condition who may be more vulnerable if exposed to damp.

## Counterclaims

As set out above, legal aid is available to pursue damages for disrepair when the claim is brought as a counterclaim to possession or eviction proceedings, for example in cases where those damages will be used to set off rent arrears.

Similarly, as noted above, counterclaims for assault, battery, unlawful eviction, breach of covenant for quiet enjoyment and trespass to goods and land are in scope, as well as damage to property. However, it appears from practitioners' experience that the LAA considers claims for personal injury (which are excluded by paragraph 2 of Part 2 of Sch 1) are not in scope, even when that is the loss caused by a counterclaim which is in scope, such as a claim for breach of statutory duty (or even for assault or battery).

A claim for personal injury arising from disrepair or an unlawful eviction, whether brought as a counterclaim or in separate proceedings, would engage Article 6 because it involves the determination of civil rights and obligations. An application for ECF could be made to bring such a claim, subject to consideration of the other factors set out in this guide.



## 4. Case studies

It may also be necessary to explain clearly to the LAA why a case is particularly complex. Below are hypothetical examples of cases that could arguably justify making an application for ECF:

### Example 1: Deficiency and disrepair

Your client Charlie has a number of medical problems, including depression, schizoaffective disorder, paranoia, and severe persistent asthma that makes him vulnerable to things like damp and mould.

Because of Charlie's mental health problems, Charlie's cousin, Mark, has been looking after Charlie's medicine and helping with administering the dosages, as Charlie has been identified by his GP and therapist as presenting a risk of suicidal ideation and overdosing. This means that Charlie does not feel able to keep the medicines in his own home and does not trust anyone enough to visit him at home to help. Due to his paranoia Charlie never lets anyone into his home. Furthermore, Charlie's depression has contributed to a sense of isolation and loneliness, and so making daily visits to Mark's home to collect his medicine is a useful way of ensuring that Charlie leaves his home and has some social interaction.



Charlie has come to see you because Mark's property has recently had problems with penetrating damp and mould, which are particularly bad in the bathroom due to the extractor fan having stopped working. Charlie says that he coughs and wheezes for the entire duration of his visits, and is almost breathless by the time that he sets off for home again. Charlie never has breathing problems like that in his own home, and even though he knows that he has to take his medicine, Charlie does not think that he can keep going to his cousin's house to get his dosages.

At the moment the damp has not affected Mark's health, and Mark has no medical issues of his own. However, both Charlie and Mark do not want to wait for the problems to get worse for the purposes of qualifying for legal aid, and want the matter resolved as soon as possible. So far the landlord has not responded to any requests to inspect the damp or repair the extractor fan as he does not consider it to be a serious enough problem. Mark rents from a private landlord and has an assured shorthold tenancy.

As Charlie does not live in Mark's home, this matter would not fall within Para. 35(1) of Part 1, Sch 1 of LASPO, and is therefore out of scope for legal aid. Subject to a means and merits test, this type of case may be amenable to an ECF application. This case can be said to be complex because of the need to demonstrate Charlie's need to continue to visit his cousin's home, as well as establishing that the deficiency in the property is causing Charlie's health problems, and creating a risk of other problems. This may involve consulting medical professionals as well as commissioning an expert's report.

## **Example 2: Damages for disrepair**

Another client, Debbie, was successful in bringing a disrepair case against her landlord, in a case that was in scope for legal aid. In Debbie's case, the problem was flooding caused by a burst pipe in the shower. Last month, Debbie managed to obtain an injunction from the court, ordering the landlord to carry out the necessary repair work by a set deadline. The deadline passed last week and Debbie has come to see you for advice, as the landlord has not carried out any work.

Moreover, the flooding meant that Debbie had to take several days off work in order to clean up the house and re-arrange the furniture. As Debbie works on a zero-hours contract, this meant that she had to cancel lots of shifts with her employer, and was not paid any wages for the time she had to take off.

The pipe still has not been replaced or repaired and so Debbie has had to use the shower at her nearby gym, which has been expensive because she has to pay for a membership in order to access the changing rooms. As Debbie does not use the other facilities, the gym has kindly given her a discounted fee, but it still amounts to a significant sum, and using a gym instead of her own bathroom causes Debbie a lot of inconvenience and delay. Debbie wants to know if she can seek compensation from the landlord.

Enforcement proceedings have been held by Strasbourg to engage Article 6 of the Convention, and such proceedings would still be in scope for legal aid under LASPO as they would qualify as work relating to the injunction (e.g. *Hornsby v Greece* [1997] ECHR 15, at para. 40). However, damages claims for disrepair are not in scope for legal aid. The case is made more complicated by the fact that Debbie suspects the landlord will try to move his money from his accounts in order to try and avoid paying any damages. Debbie wants to know if there is anything that can be done to prevent this.

Evidencing the ability of a client to represent themselves without **legal** assistance requires something of a balancing act. Many housing advisers do fantastic work for their clients but without having legal qualifications or backgrounds, so it will be necessary to show that the case justifies funding for legal advice or representation without demonstrating that a non-lawyer could do the work just as well. This may require an estimate of the time required for a particular client or piece of work, as well as evidence of the adviser's stretched capacity and limited resources – for example, showing that there are no appointments available at a suitable local advice agency/organisation within the time limits for a case.

Demonstrating the importance of the issue in housing cases may be more straightforward where the property in question is the client's only home.



## 5. Practicalities – how to apply for ECF

### Knowing when to make an application

While the rate of grants in housing 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, 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. It is not a good idea to delay making an application until it becomes urgent, as there are problems with the urgency procedure.

### 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 is 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 local authority, housing association or landlord, 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 or interpreter’s fees) then that should be made clear. You should of course 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 asked for extensive documentation and information in the past. 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 purpose 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.









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