



A PUBLIC LAW PROJECT TOOLKIT



Public
Law
Project

Exceptional Case Funding Clinics





Exceptional Case Funding Clinics

This toolkit is intended to provide organisations with all the information required to set up a clinic providing advice and assistance in making ECF applications.

The toolkit is aimed at:

- ◆ Clinics operating in university law schools
- ◆ Pro bono schemes in private practice law firms
- ◆ Not for profit organisations

Thanks and acknowledgements

This toolkit simply would not exist but for the work of Emma Marshall, Research Fellow at the Public Law Project. In particular her report 'Exceptional Case Funding Clinics' which you can find in PLP's research resources online.

We would also like to thank Freshfields and especially Hannah Tye, Jennifer Blair at No 5 Chambers and City University legal clinic, Lucy Yeatman at Liverpool University law clinic, and the Migrant and Children's Legal Unit (MiCLU) at Islington Law Centre.

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Why set up an ECF clinic?

Exceptional Case Funding (ECF) applications are an important and effective tool to promote access to justice. The ECF scheme was designed as a human rights ‘safety net’, to ensure that individuals whose rights would be breached without legal aid could access it, even where it would not normally be available for a certain area of law. However, in practice, individuals can find it difficult or even impossible to access ECF without assistance. The role of an ECF clinic is to help those individuals access ECF, so that they can have funded legal representation for vital legal cases.

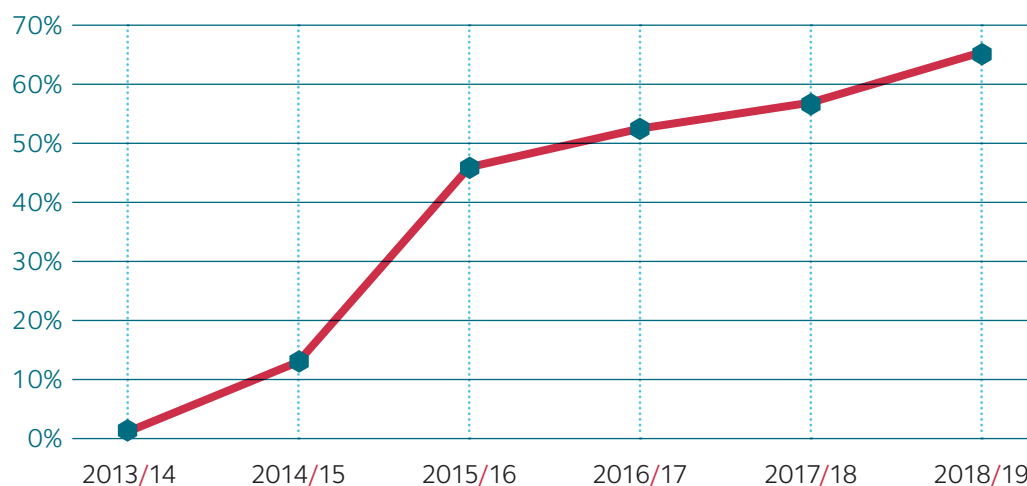
The ECF scheme was introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) which removed a significant number of areas of law from within the scope of legal aid, limiting the availability of legal aid for immigration, family, housing, debt, and welfare benefits. However, ECF funding is **still available** in out of scope cases where without it, there would be a risk of a breach of an individual’s rights under the European Convention on Human Rights.

An increasing number of organisations are providing support to people with ECF applications. These include not-for-profit organisations, university law clinics and pro bono teams within commercial law firms.

In contrast to ‘normal’ applications for in scope cases, individuals can make applications for ECF directly to the Legal Aid Agency (“LAA”) themselves, without instructing a legal aid provider. However, the application process can be difficult for an individual to navigate without any assistance. Legal aid providers often lack the capacity to help clients apply for ECF, as the process of making the applications is unfunded.

As a result, at the outset of the scheme it was very difficult for many people 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 changes to the Legal Aid Agency’s ECF guidance, practical improvements to the scheme and increasing support for applicants, the grant rate has risen significantly, to 65% in the year 2018–19.

Grant rate of Exceptional Case Funding applications



In 2018, PLP published a research paper¹ into the feasibility of ECF clinics within university law schools. The research found that ECF clinics can play a vital role in facilitating access to justice and ensuring that individuals are able to access legal advice to which they are entitled. They offer students and volunteers an invaluable opportunity to develop their legal skills and increase their awareness of access to justice issues. They also provide an opportunity for institutions to gather data and monitor the operation of the scheme, in order to inform policy work with the Ministry of Justice.

“I have found the client interaction extremely valuable. Gaining knowledge of the practical application of different areas of law, like the human rights act, has also been hugely valuable. It has given me real experience of interacting with clients, enhanced my knowledge of different areas of law and made me more passionate about the problems surrounding legal aid.”

Student Volunteer, University of Exeter ECF Clinic

¹ PLP, 'Exceptional Case Funding Clinics', April 2018

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Setting up a clinic: what to think about

Before setting up a clinic, consider the following:



Need

Map existing service provision in the local area and identify potential referral agencies. Referral agencies could include local law centres without the capacity to make ECF applications themselves, as well as not for profit organisations looking to help their clients find legal representation.



Partnerships

Establish referral pathways and consider how to screen referrals to identify the cases that may be eligible for ECF. Identify local legal aid providers that will take on cases which have been successful and set up accessible signposting lists where possible.



Capacity and expertise

Applications can be time-consuming. Consider staff and student capacity and whether you can meet demand. Speak to partner organisations and referral agencies to identify the resources that are required to run the project effectively, and establish whether those resources can be provided.



Scope

You may want to focus on a specific area of law: consider existing strengths and explore areas of law where staff have relevant expertise, as well as local capacity to take on cases in certain areas of law.



Training and supervision

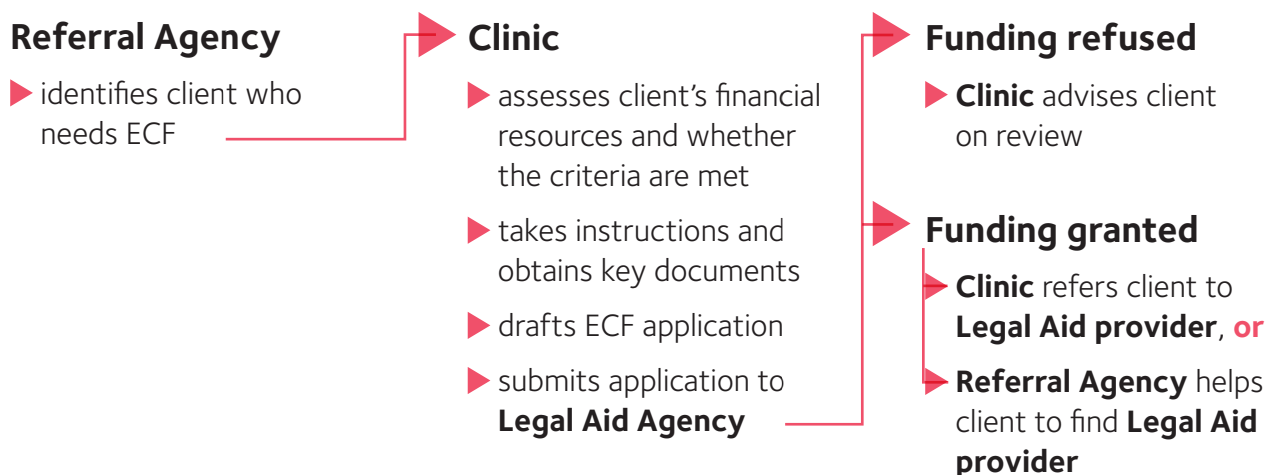
Consider the supervision arrangements and training required. Ensure that the clinic is sustainable, for example extra hours of time for paid staff.



Clinic models

The first step in setting up a clinic is to think about the type of service you are going to offer. Broadly, there are two approaches that a clinic could take to making ECF applications.

Client model



This model involves client contact and more intensive client care, oversight and supervision. Under this model, the clinic provides advice and assistance directly to an ECF applicant, helps to draft the ECF form, and submits it to the Legal Aid Agency. If the application is successful, the clinic can either refer the client to a legal aid provider, or refer them back to the original referral agency for help in identifying a lawyer. If the application is unsuccessful, the clinic should advise the client and if appropriate submit a review request. (Further information on requesting reviews of unsuccessful applications is contained in the 'How to make an ECF application' section.).



CASE STUDY

Exeter University

The ECF clinic at Exeter University primarily takes on referrals from local partner organisations. Students interview the client under supervision, and produce a draft application, which is checked by the clinic coordinator. It is often necessary for the student to go back to the client to clarify details and to get further information before the application can be finalised, and on average it takes about a month from the first interview for the application to be submitted. The clinic submits the application to the LAA online. If the application is successful, the clinic attempts to refer the client to a legal aid provider.

Partner model



This model is much less intensive for the clinic. It requires a strong partnership relationship with a referral agency, which may also be the organisation or legal aid provider that will ultimately represent the client if ECF is granted. The clinic is provided with all the information and documents necessary to draft the application, but does not have any direct contact with the client. The clinic provides a draft application to the partner organisation, which then submits it to the Legal Aid Agency.



CASE STUDY

Freshfields and Islington Law Centre

Since 2015, Freshfields has worked in partnership with the Migrant and Refugee Children's Legal Unit (MiCLU) at Islington Law Centre to draft exceptional case funding applications. Initially this was to unlock immigration advice for undocumented young people: individuals under 30 who are unable to provide proof of their identity or right to reside in the UK and therefore face difficulties accessing employment, education and other services. The scheme then expanded to help a broader range of clients access immigration advice, including those seeking family reunion in the UK and victims of the Grenfell Tower fire.

MiCLU's immigration specialists delivered training to our lawyers on drafting ECF applications and then started referring cases. Our volunteer lawyers draft the applications with a two week turnaround with supervision and expert support provided by MiCLU throughout the drafting process. We use previous applications as templates so that our lawyers can develop each successful application to make further compelling arguments in future cases.

In total we have now undertaken 18 ECF applications in Article 8 immigration and family reunion cases with a 100% success rate to date. A successful application unlocks the expert immigration advice needed to resolve the client's underlying problems. For example, we successfully sought ECF for a young man who then, with the help of MiCLU's immigration team, was able to seek further leave to remain in the UK following a harrowing childhood in Bangladesh where he was beaten and sold into domestic servitude.

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Establishing need

Local provision

For a client model clinic it will be necessary to map existing service provision in the area in order to identify referral organisations, as well as legal aid providers to refer successful cases to. This will help to determine the scope of the clinic. Existing University pro bono clinics may already be aware of local need, based on the demand for their services.

A partner model clinic does not necessarily need to be based in the same location as the referrals it is taking on. Under this model a clinic can operate remotely, and it may be possible to partner with an organisation in another part of the country. For a partner model clinic, the key will be to work with an organisation whose clients are in need of ECF and which has the capacity to provide the clinic with the information required to draft an application.

The number of referrals received is likely to relate closely to the local infrastructure of a particular area, in terms of awareness of the ECF scheme and whether other providers or agencies have capacity to make ECF applications. The number of legal aid providers that a successful applicant could be referred to is also important, as being granted ECF is only the first part of the process, and the next step is seeking a representative to take on the case.



CASE STUDY

Liverpool University

Liverpool University Law Clinic already provided family law and immigration advice to clients within the clinic. Following LASPO, the Clinic initially considered making ECF applications in immigration cases, as we considered that we had the expertise to make ECF applications for our immigration clients. However, we discovered that local legal aid provision in Liverpool for immigration cases was extremely limited, and that it would be very difficult to refer successful cases. Instead, we make ECF applications in family law cases arising from our drop in at the family court, which we are then able to refer to local providers.

Partnering with referral agencies

Under the client model, the referral agency's role will be to refer potential ECF clients to the clinic. Once this has happened, the clinic takes on full responsibility for progressing and submitting the application. Depending on capacity, a clinic may also want to take on responsibility for making onward referrals to a legal aid provider, or may want to refer the client back to the original referral agency for this step.

You may want to consider the level of screening that the referral agency undertakes: for example, they could carry out a financial means test for legal aid, or check that the problem that the client is seeking ECF for is definitely out of scope.

Alternatively, you may have capacity to sift referrals yourself, particularly if you have decided to only make ECF applications in a particular area of law.

Under the partner model, the partnership with the referral agency is even more important. The clinic will be drafting ECF applications for the referral agency's clients, and you will need to ensure that you have clear systems and time frames established to manage the flow of referrals, drafting, and reviewing. For example, the partnership between Freshfields and the Migrant and Refugee Children's Legal Unit at Islington Law Centre, sets a two week timeframe for volunteers to draft the applications. It will be necessary to build in time for any supervision required for the time frames agreed with the referral agency.

Capacity and expertise

Managing capacity: the process of making an ECF application can be lengthy. For client model clinics, it will be important to be clear with clients about the time frame, and to manage their expectations. For partner clinics, setting up clear procedures and time frames with referral agencies will be the key to managing this process.

ECF application timeline

- Take initial instructions from client:
What area of law do they need advice in? Is it in scope or not?
What do they need advice about – what type of decision or dispute is it?
What steps do they need to take – are there court or tribunal proceedings taking place?
Do they meet the ECF criteria?
- Determine whether the client meets the ECF criteria*, what type of funding they require, and what evidence you might need to gather to make an application.
- If the client meets the ECF criteria, take further instructions from client: background to their case, their ability to engage with it themselves, the importance of the proceedings.
- Draft the application*, setting out the background to the case, the importance of the issue to the client, their ability to engage with it, and the complexity of the legal/procedural steps that the client needs to take.
- Compile any relevant evidence: Home Office decision letters, Court letters, medical evidence, correspondence between the parties.
- Draft cover email, clearly stating if the application is urgent, and reasons for urgency.
- Submit application to the Legal Aid Agency.

Twenty working day target for a non-urgent application

Ten day target for an urgent application

- Receive ECF determination. If a refusal, 14 days to request a review.
- Submit review to LAA.

Ten working days to determine a review request.

* Information about the ECF criteria and how to submit an application, including the forms to use, can be found in the section 'How to make an ECF application'.

Clinics should think about the scale of the project: the number of referrals they are likely to receive, and the capacity of staff and students to make ECF applications for those referrals. The number of referrals will be partially determined by the partner organisation or by the need in the local area, but until the clinic has made a few applications it may be advisable to limit the number of new ECF cases accepted. Once the clinic has a good idea of the time commitment involved in each application, the project can expand to train more volunteers and take on more cases.

Scope

The areas of law which are out of scope of legal aid (and therefore potentially the subject of an ECF application) are those areas not listed in Schedule 1 to LASPO. Broadly speaking, non-asylum immigration law, private family law, welfare benefits cases, and housing cases where there is no immediate risk of homelessness or serious disrepair are all out of scope of legal aid without ECF.

It is worth considering whether to focus a clinic on a specific area of law, for example immigration or family law. These are areas where there is a high level of demand, and where it is fairly well established that ECF will be appropriate in certain types of cases.



CASE STUDY

Exeter University

The ECF clinic at Exeter initially decided to focus on immigration cases, because that was the area of law that the supervisory team and the steering group has expertise in, and the area of law in which students were trained. However, there was also a risk in focusing on immigration advice, as the availability of immigration providers in the South West is very limited.

The scope of the clinic will also depend on the demand faced by partner organisations and referral agencies. Organisations which support refugees and migrants are likely to have clients who require ECF for immigration advice. University clinics which already have links with local courts may be more likely to see clients who need ECF in relation to a family or housing case. For example, Liverpool Law clinic has a support scheme at the local family court, which provides referrals for family cases, some of which are suitable for ECF applications.

Focusing on one area of law can make it easier to train staff and students and to supervise the work carried out. In order to complete an ECF application it is beneficial to have some knowledge of the area of law in order to identify whether a case may be eligible for legal aid and on what basis, and identify the relevant facts of a case and translate them into an ECF application. However, it should not be necessary to have in depth expertise in a particular area of law in order to make a successful application. PLP's guides to making ECF applications in immigration, family, welfare benefits and housing² are designed to assist in determining the types of cases which may be eligible for legal aid and provides guidance on how to present an ECF application in a range of different areas of law.

Training, supervision and compliance

It is important for a clinic to develop procedures to ensure that clients receive a high quality service. While the less stringent regulatory framework means that clinics can take a flexible approach to designing systems, for clinics that work directly with clients, supervision needs to be carefully considered. Clinics will need to develop methods of working that do not place an unsustainable burden on supervisory staff, but nevertheless provide sufficient support and guidance to students where necessary.

² Further Resources section

For client model clinics, as well as designing template attendance notes and client care letters, clinics may want to consider detailed documents for volunteers to guide them through the whole process from interview to submitting the application. For example, this could steer volunteers towards the appropriate questions to ask in sensitive matters, and prevent them from inadvertently providing immigration advice with a script of questions to follow.

The level of training provided to students will be of crucial importance to the level of responsibility that they take on.



CASE STUDY

City University/No 5 Chambers

No 5 Chambers and City University set up an ECF project where legal drop in services could refer clients they had identified as needing ECF for assistance in making a direct application. Students were trained and given a handbook, referrals were screened by a lawyer for suitability and Student Directors of the project would assign, monitor and assist with casework placed with volunteers. The idea was that most people would have had triage immigration advice before being referred to the project, meaning that a student could just get to work on applying for ECF straight away with limited further supervision. The student volunteer was not giving legal advice, but just helping the client with the ECF process and so – hopefully – putting them in a better position than they would have been otherwise. The client retained ultimate responsibility for their case and when the ECF application was complete the referral agency could work with the client to help them find a lawyer. Jennifer Blair, Immigration Barrister at No5 Chambers.

For clinics operating under the client model, it will be essential to think about how you will manage your clients' files, client care, and data protection. Clients should be sent an advice letter after their initial appointment, and a copy of their ECF application as submitted to the Legal Aid Agency. It will be good practice to establish procedures in relation to client files, for example, think about whether you need to carry out a conflict check, particularly if you plan to make ECF applications in family cases. A basic checklist of what you might include in a standard ECF client file could include:

- Form of authority
- Conflict check
- File cover sheet with client's contact details
- Client care and advice letter

Your client care letter should set out your advice to the client in relation to their ECF application and the steps that the clinic will take in order to apply for funding. You should also explain that you are only advising the client in relation to the ECF application, and not in relation to their substantive legal matter. The letter should set out whether or not you will be able to make a referral to a legal aid provider if their application is successful, as well as what steps you will take (and the relevant time frames) if their application is unsuccessful.

The regulatory framework

Making ECF applications is a legal activity, but it is not a reserved legal activity.³ This means that the ECF process is not subject to regulation by the Solicitors Regulation Authority.

However, there are regulatory issues that need to be considered by clinics. These will depend on whether the clinic volunteers are qualified solicitors or students. There are also particular issues to consider when making ECF applications for immigration cases. We recommend that organisations thinking of setting up an ECF clinic join the LawWorks clinic network if they have not already. LawWorks publish a clinic manual which provides a step by step guide on regulation, insurance, GDPR and complaints.

REGULATORY FRAMEWORK: **STUDENT CLINICS**

Students can assist individuals to complete an ECF form and compile the evidence, but arrangements will need to be in place to ensure that the student does not provide legal advice to an individual during the process. Providing legal advice is not a reserved legal activity, but students should avoid giving legal advice in areas of law where they are not qualified to do so.

To mitigate the risk of a student providing advice, for example by commenting on whether the facts of an individual's case have merit in the context of the claim itself rather than for the ECF application, it is necessary for universities to ensure that there are protocols in place to prevent this. Training and supervision can be used to this end, as well as having specific procedures in place, such as providing a structured list of questions to follow and students taking a note of attendance to ensure that an accurate version of the conversation is recorded.

³ Reserved legal activities are defined in s12(1) Legal Services Act 2017

REGULATORY FRAMEWORK: **PRO BONO CLINICS**

Qualified solicitors and trainees providing legal advice are carrying out a legal activity, but not a reserved legal activity. Only a reserved legal activity must be regulated by the Solicitors Regulation Authority, so providing advice in relation to ECF applications and submitting them to the Legal Aid Agency falls outside the Practice Framework Rules.

APPLICATIONS FOR ECF FOR IMMIGRATION CASES

In the case of applications for ECF on immigration grounds, the issue of regulation is particularly relevant, as immigration is a highly regulated area of law. It is a criminal offence to provide immigration advice without the appropriate regulation. The Office of the Immigration Services Commissioner (OISC) provides details of what counts as the provision of regulated immigration advice. The OISC Guidance on Competence states that immigration advice “relates to an individual; and is given in connection with a relevant immigration matter”. It does not cover work that is restricted to signposting or the provision of general information. The OISC has published guidance⁴ to specify that ECF applications are not a regulated matter.

Training

STUDENT CLINICS

Training will play an important role in developing the knowledge and confidence of staff and student volunteers to work on ECF applications. Students will need training in both the legal criteria for granting ECF and in the practicalities of making ECF applications.

⁴ www.gov.uk/government/publications/clarification-of-the-oiscs-jurisdiction/clarification-of-oiscs-jurisdiction#direct-exceptional-case-funding-applications

In order to draft high quality applications, students will need an understanding of the ECF criteria, and how to apply them to the facts of clients' cases. The section 'Making an ECF application' is a good starting point for training volunteers and students on how to spot the key facts to raise in ECF applications, as well as the practicalities of the scheme. The key topics that any training should cover include:

- ◆ The statutory framework that provides for legal aid in the UK
- ◆ The legal test for granting ECF and when a failure to provide funding is likely to breach ECHR rights
- ◆ The usual timeframe for ECF decisions, which is 20 working days, or ten working days for an urgent application
- ◆ When to mark an application as urgent, and the evidence to provide
- ◆ How to provide evidence that an individual is unable to represent themselves on a matter
- ◆ The relevant case law and how to include it in an application.



Some suggested training materials are listed in SECTION 7: FURTHER RESOURCES

Depending on the clinic model and on the experience of students or volunteers, it may also be necessary to provide training in basic interview techniques and client care. Students may be covering these practical competencies in other areas of study, and an ECF clinic can be an opportunity to build on these key legal skills.

PRO BONO CLINICS

Where a pro bono clinic is partnering with a referral agency, the referral agency may want to provide training to volunteers. For example, Islington Law Centre provided training to Freshfields volunteers based on previous experience of making ECF applications. Referral agencies are also likely to have extensive knowledge of the types of cases they will be referring to the clinic, and will be able to provide tips on how to address the ECF criteria in specific types of cases.

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How to make an ECF application

This section deals with the practicalities of making and submitting an ECF application. It is primarily relevant to client model clinics, although the section on completing the form is essential reading for partner model clinics.

The Legal Aid Agency deals with ECF applications in two separate ways: provider applications, and 'direct client' applications. Client model applications will be treated by the Legal Aid Agency as a direct client application, on the basis that a clinic is not a legal aid provider that intends to take on the case. This section is aimed at client model clinics and provides guidance on how to submit a direct client application.

Forms

The LAA's ECF Provider Pack (see resources) states that direct applicants are not required to complete the 'normal' legal aid forms. However, in practice the clinic should try to complete all the relevant forms to ensure that application is dealt with as quickly as possible by the Legal Aid Agency.

The form for making an application for ECF is form **CIV ECF1**, which is available online.

You can provide your arguments for why ECF should be granted either in the form itself or in separate 'grounds' or 'statement of case'. This can be drafted as if the client is writing in the first person, or by the clinic in the third person.

As well as completing form ECF1, it is necessary to complete the same forms as a legal aid provider would for a 'normal' in scope application. These are:

- ◆ For initial advice in **all** areas of law, before any court action has been commenced: form **CW1**
- ◆ For appeals to the Tribunal in immigration cases: form **CW2 IMM**
- ◆ For family cases, where court proceedings have begun: form **CIV APP3**
- ◆ For cases where court action is immediately required or has already commenced: form **CIV APP1**

You will also need to demonstrate that your client meets the financial eligibility requirements for legal aid. There is an online tool which you can use to check your client's eligibility available at civil-eligibility-calculator.justice.gov.uk

Forms CW1 and CW2 IMM have sections asking for information about applicants' financial situation. **Forms CIV APP1 and CIV APP3 only ask questions about the merits of the case, and form CIV MEANS1 or CIV MEANS2 must also be completed.** Form MEANS1 is the form for most applicants; form MEANS2 is the form for applicants who are in receipt of certain 'passporting' means tested benefits: Universal Credit, Jobseeker's Allowance, Employment and Support Allowance, Pension Credit and Income Support.

Means evidence: evidence of a client's financial means must be submitted with the application. For clients on passporting benefits, this means the most recent benefit award letter. For other clients, three months' bank statements, payslips and proof of housing costs will be required.

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 that is about to expire;
- A delay would cause risk to the life, liberty or physical safety of the applicant.

If you are making an urgent application, it is also worth setting out why the application is urgent in your cover letter and/or email.

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.

The LAA's own time frames are that it will decide non-urgent applications within 20 working days and urgent applications within ten working days. The Legal Aid Agency will first consider whether it accepts that the application is urgent and if it accepts that it is, then it will prioritise it over non-urgent work.

You will not be notified if the LAA decides not 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).

You can chase up applications by emailing contactECC@legalaid.gsi.gov.uk or by calling the LAA customer service centre on 020 300 2020. It is generally better to call rather than email, as emails can take up to two days to reach the correct caseworker.

Adjournments

In cases where you are approached by a client with an imminent hearing date, you may want to think about whether your client can request an adjournment from the Court or Tribunal, pending the outcome of the ECF application. Where you are arguing that ECF is required because a lack of representation would risk a breach of an individual's rights, it follows that an adjournment is necessary in order to avoid a breach of the individual's rights.

A request for an adjournment should state:

- Any reasons for any delay in making the ECF application at an earlier stage, for example: the applicant not being aware of the ECF scheme, or difficulties experienced by the applicant in locating a provider to make an ECF application;
- A brief explanation of the reasons the applicant is unable to represent themselves;
- The Legal Aid Agency's standard and urgent time frames for making a decision;
- A brief explanation of what work would be required following a grant of ECF.

Making an application for an adjournment involves the provision of immigration advice and services and so you should only advise the client about applying for an adjournment or assist them to do so if you are a qualified immigration adviser i.e. registered with the OISC at the appropriate level or a solicitor, barrister or legal executive authorised to do immigration work.

In non-immigration cases, requesting an adjournment will still require you to go on the record with the court, and so any request should come from the client and not from the clinic.

ECF for ECF

Page 3 of the ECF1 form provides space for an applicant to request a grant of ECF in order for a legal aid provider to investigate the legal merits of a full application for ECF for a substantive matter. This was designed to remedy the problem of legal aid providers not being paid to put together complex and uncertain ECF applications. It is unlikely that a clinic would want to apply for ECF for ECF, and so this section of the form should be left blank.

Evidence

You should supply key documents relating to the individual's case.

For example, in an immigration case, the key documents will include any Home Office decisions or Tribunal determinations.

It is also important to consider whether you have 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

There is a section on the form at page 4 which allows you to set out the basics of the case. This does not need to be particularly long, but you should 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, obtain relevant information, or because it is not clear what action the client needs to take. In this case, you need to make clear what points the client needs legal advice on.

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 detention, or interpreter's fees) then that should be made clear. State what you know – but the function of ECF is to provide funding for the case, and the Legal Aid Agency should not demand extensive information which is beyond your power to obtain.

If you have 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, and the Official Solicitor cannot become involved until it has been determined that the client lacks capacity. As such, the fact that you have genuine doubts as to a person's capacity should be enough to present to the Legal Aid Agency a prima facie case for ECF to be granted (subject to means, merits and any other relevant considerations).

Completing the forms

The crucial section of form ECF1 are pages four and five. This is where you set out how the client meets the ECF criteria, which are:

- The **importance** of what is at stake to the client
- The legal, factual and procedural **complexity** of the matter
- The **ability** of the client to represent themselves without legal assistance.

Importance

In family cases it should be possible to show that any proceedings affecting a family relationship are of importance, and in particular any proceedings which will change or determine the nature of the relationship a client will have with their child will be of vital importance. Proceedings which are purely about money may be less obviously significant but if your client will be unable 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.

In immigration cases it will generally be possible to show that any proceedings affecting the ability of the applicant to remain in a country in which they have built a life and in which members of their family reside, or to enter a country in which close family members reside, to be of vital importance.

In other types of cases, for example welfare benefits or housing, the importance may be preventing the client's destitution.

Complexity

Legal, factual and procedural complexity are all relevant to whether a grant of ECF is appropriate.

In immigration cases, an individual without legal training is unlikely to be able to effectively engage with the relevant provisions of the Immigration Rules and case law, to make legal submissions during a hearing, or be able to obtain expert evidence. Despite the evident complexity of immigration law, in order to make a successful ECF application, it is essential to demonstrate the particular complexity in a case, including the steps that need to be taken, arguments to be made and evidence to be obtained.

Procedural complexity is also relevant. Many applicants in immigration cases will not be able to navigate the Home Office website in order to work out which form they need to complete. Applicants may not understand that they need to apply for a fee waiver, how to go about doing so, nor what evidence they would need to provide. If applicants are unable to understand how to take these steps, an application to the Home Office will have no chance of success.

In family cases, 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; 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.

Ability

In cases of great importance to individuals, the highly emotive issues 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 children, or their ability to remain in the UK.

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. It is not necessary for an applicant for ECF to be prevented from engaging with their case by a language barrier, disability 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.

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 legal aid firm holding a public law contract with the Legal Aid Agency for advice on the merits of challenging an ECF refusal.

What to do if your client is granted ECF

A successful application will result in a grant of ECF for your client, unlocking legal aid for the client and thereby access to the expert advice needed to resolve the client's legal issue.

However, it will first be necessary for the clinic or client themselves to find a legal aid provider who is able to take their case on. The client will normally need to find a provider with a legal aid contract in the relevant area of law. For example, if the client has been granted ECF for an out of scope immigration case, they will need to find a legal aid provider with a contract for in scope immigration cases. This can be more difficult in areas of law which are entirely out of scope or where there are very few providers, for example in welfare benefits.



Monitoring and data collection

Clinics can play an important role in monitoring the way in which the ECF system is operating, by monitoring the number of referrals and the availability of legal aid providers in a particular region and area of law. Monitoring is an important part of being able to engage in meaningful conversations with policy-makers, because it provides evidence of the issues arising from the scheme. For university clinics, the work done on ECF projects can also open new routes of enquiry for specialists in relevant fields, particularly where there may be opportunities to develop research alongside casework.

PLP has developed a monitoring database designed to capture key information about the process of making an ECF application, and about the LAA's decision making. The database can be found at the Appendix to the Toolkit. Clinics can play a vital role in contributing to the collection of data about the ECF scheme (see case study below), and PLP would encourage clinics to use this database to gather information about the operation of the ECF scheme.



CASE STUDY

Freshfields and Islington Law Centre

Islington Law Centre used evidence from its project with Freshfields, including the length of time it took solicitors to prepare the applications, in a judicial review case last year challenging the removal of immigration advice for children from the scope of legal aid. The case was successful in restoring legal aid for unaccompanied migrant children seeking immigration advice.

7 Further resources

PLP ECF guides

PLP has published guides to obtaining ECF in specific areas of law. They are all available on our website publiclawproject.org.uk

- *How to get ECF in family cases*
- *How to get ECF in immigration cases*
- *How to get ECF in housing cases*
- *How to get ECF in welfare benefits cases*

Legal Aid Agency ECF Provider Pack

The Legal Aid Agency has published guidance aimed at legal aid providers. It provides useful guidance for student clinics on urgency, the relevant forms, and decision-making timeframes.

Lord Chancellor's Guidance

The Lord Chancellor has published guidance on the ECF criteria that caseworkers should apply to ECF applications. This is essential reading for anyone making an ECF application, and should be provided to students and volunteers as part of any ECF training.

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

The Lord Chancellor's Guidance was the subject of a legal challenge; the resulting Court of Appeal judgment is now the definitive guide to the law on when the European Convention on Human Rights requires an individual to have legal aid. It should form part of any training for students and volunteers.



Freshfields