

Workshop 9 (Afternoon seminar: 14.10-15.10)

Obtaining Exceptional Funding Under LASPO – is it worth applying?

Workshop summary

1. Number Crunching: Ad hoc Statistical Release- Ministry of Justice
2. Outline of the Scheme
3. Gudaviciene & Ors v Director of Legal Aid Casework & Anor [2014] EWHC 1840 (Admin) and other litigation
4. Worked case studies
5. Conclusion

1. Number Crunching: Ad hoc Statistical Release - Ministry of Justice

The 'Ad hoc Statistical Release' published by the Ministry of Justice recorded the first year's figures for claims made under s10(3) of the Legal Aid Sentencing and Punishment of Offenders Act (LASPO).

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/305843/exceptional-case-funding-statistics-apr-13-mar-14.pdf

Exceptional Case Funding statistics- Ministry of Justice. This document lists all applications with the area of law identified and if granted or not.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/305772/exceptional-case-funding-data-apr13-mar14.csv/preview

In the debates in Parliament on LASPO, government representatives said there would be about 5000-7000 applications per year and these would be a safety net for those cases which fell outside LASPO. In fact in the first year of operation (1 April 2013 – 31 March 2014):-

- 1,519 ECF applications were received. (1468 had been determined by 31 March 2014 with the remaining 51 awaiting assessment). Of these
 - 1,186 were new applications and
 - 333 were requests to review an earlier determination
- There were 821 applications in family law and 235 applications in the immigration category.
- 80 ECF applications were made by clients without solicitors and 1439 applications were made by Legal Aid providers.
- 57 ECF applications were granted
 - Family: 8
 - Immigration: 4
 - Inquests: 42
 - Other: 1
 - Housing/Land Law: 1
 - Inquiry/Tribunal 1

The government's view, as expressed recently in the Lords by Lord Faulks, is that these statistics are not a cause for concern, and the system is working as intended.

Further Reading:

More analysis is set out on the Legal Aid Handbook website:

<http://legaidhandbook.com/2014/03/14/moj-publishes-exceptional-case-funding-stats/>

2. Outline of the Scheme

This section is extracted from Public Law Project's excellent project pages:

<http://www.publiclawproject.org.uk/exceptional-funding-project>

'Background: the changes to legal aid

On 1 April 2013, major changes were made to the legal aid system in England and Wales by the [Legal Aid, Sentencing and Punishment of Offenders Act 2012](#). As a result of these changes, it is now more difficult to get legal aid. There are a number of areas of law that are no longer eligible for legal aid. These areas are:

- **Asylum support** (except where accommodation is claimed);
- **Criminal Injuries Compensation Authority** cases;
- **Debt**, except where there is an immediate risk to the home;
- **Education**, except for cases of Special Educational Needs;
- **Housing**, except those where the home is at immediate risk, homelessness assistance, housing disrepair cases that pose a serious risk to life or health and anti-social behaviour cases;
- **Immigration** cases that do not involve detention, domestic violence, human trafficking or the Special Immigration Appeals Commission;
- **Private family law** cases that do not involve issues of domestic violence, child abuse, child protection or forced marriage or where a child is a party to the proceedings;
- **Welfare benefits** cases except for appeals to the First-tier Tribunal where the tribunal reviews its own decision because there has been an error of law and appeals to the Upper Tribunal, Court of Appeal and Supreme Court on a point of law.

If you have a case falling within one of these areas of law, the only way that you will be able to get legal aid is if you are eligible for exceptional funding.

What is exceptional funding?

Exceptional funding will only be available to people whose human rights or European Union rights would be breached if they did not have legal aid ([section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#)). The Government intends this to be a high threshold and

envisages that only a small number of cases will get exceptional funding. The most relevant human right in this context is Article 6 of the [European Convention on Human Rights](#), which guarantees the right to a fair hearing when someone's rights and obligations are being determined.

This means that where the refusal of legal aid would make it practically impossible for someone to bring their case or would result in obvious unfairness in the proceedings, legal aid may have to be provided under Article 6. Other human rights may also require the provision of legal aid, including the right to a private and family life under Article 8 of the [European Convention](#) and the right not to be tortured, or treated in a way that is inhuman or degrading under Article 3 of the [European Convention](#).

Legal aid may also have to be provided under European Union law as a result of Article 47 of the [Charter of Fundamental Rights of the European Union](#): the criteria for this are similar to the criteria under Article 6 of the European Court of Human Rights. [Guidance on exceptional funding](#) has been published by the Government.

Exceptional funding may also be available for inquests where the right to life under Article 2 of the European Convention on Human Rights is engaged. For more detail on funding for inquests see the Government's [guidance](#): this is not something that the Public Law Project are able to advise on, as inquests do not fall within PLP's Exceptional Funding Project. You may want to contact [Inquest](#) for advice and assistance.

How does the exceptional funding system work?

Solicitors are unable to grant exceptional funding. This means that all applications for exceptional funding must be sent to the Exceptional Cases Team at the Legal Aid Agency using form [CIV ECF1](#). Applications for exceptional funding must be accompanied by the relevant [means and merits forms](#). The application forms can be filled out by an applicant on their own, or by a legal representative. An application for exceptional funding will be determined by the Legal Aid Agency within 20 working days.

If the applicant has applied for exceptional funding without a legal representative, they will be offered a preliminary view on the application, subject to the receipt of a valid means form and any other relevant information from a solicitor. It is then open to the applicant to take the preliminary view to a solicitor to get the solicitor to make a full exceptional funding application on their behalf.

If an application for exceptional funding is unsuccessful the applicant can apply for an internal review of the refusal by submitting grounds of review and supporting documentation to the Legal Aid Agency. If the refusal of funding is upheld on the internal review, the only way of bringing a further challenge is by [judicial review](#).

Are you eligible for exceptional funding?

In order to be eligible for exceptional funding, you will have to show five things:

- [Legal aid is not ordinarily available for your case](#)
- [Your case is strong](#)
- [You are financially eligible for legal aid](#)

- [Human rights law or European Union law require the provision of legal aid in your case](#)
- [Without legal aid it would be practically impossible for you to bring your case or there would be obvious unfairness in the proceedings](#)

Each of these factors will be looked at in turn.

Legal aid is not ordinarily available for your case

In order to be eligible for exceptional funding you need to check that legal aid is not ordinarily available in your case. Legal aid is available for the following areas of law (subject to financial eligibility):

- Community care
- Actions against public authorities
- Mental health
- Judicial review
- Special educational needs
- Asylum and immigration detention
- Discrimination
- Debt where the person's home is at risk. This includes mortgage possession of the home, orders for sale of the home and involuntary bankruptcy where the person's estate includes their home.
- Housing where the person's home is at risk or the person is homeless. This includes possession of the home, eviction, disrepair in rented accommodation where the disrepair poses a serious risk to health or safety, homelessness assistance and anti-social behaviour cases.
- Public family law regarding the protection of children.
- Private family law where there is evidence of domestic violence or child abuse, child abduction cases, forced marriage protection cases and cases where a child is a party to the proceedings.
- Clinical negligence where a child suffers a neurological injury resulting in them being severely disabled during pregnancy, child birth or the postnatal period
- Non-detention immigration where there are issues of domestic violence, proceedings in the Special Immigration Appeals Commission or issues of human trafficking.
- Welfare benefits, where there is an appeal to the First-tier Tribunal where the tribunal reviews its own decision because there has been an error of law or an appeal to the Upper Tribunal, Court of Appeal or Supreme Court on a point of law.

If your case falls into one of these areas, you may be eligible for legal aid and you should seek legal advice from a solicitor specialising in that area. You can identify solicitors in your area by using the search function on the Law Society website: www.lawsociety.org.uk/find-a-solicitor/

Your case is strong

In order to be eligible for legal aid you need to be able to show that you have good arguments in support of your case. The need for strong arguments differs depending on what sort of legal service you are seeking funding for. In order to receive legal advice and assistance from a solicitor you need to be able to show that it is reasonable for the government to provide you with legal aid and that the cost of providing you with legal advice and assistance is outweighed by the benefit you will gain from it. However, in order to get legal representation at a court or tribunal, you need to meet a higher threshold.

For legal representation you need to be able to show, among other things:

- You would have good reasons, if it became necessary, for instituting, defending or being a party to the proceedings for which legal aid is sought
- You are reasonably likely to be successful in winning your case or solving your legal problem in the way that you want
- The proceedings for which legal aid is sought are the most satisfactory means of achieving the result that you are seeking

Having regard to all the circumstances (including the cost of providing legal aid, measured against the likely benefit to you), it is reasonable for the government to give you legal aid.

You are financially eligible for legal aid

The Legal Aid Agency will only grant legal aid to people who do not have very much money. This means that you will have to provide information about your income, your savings and whether or not you own your home, have a mortgage and receive a pension, as well as whether or not you have dependent children. If you have a partner, you will also have to provide information about their financial position. This is why we ask for financial information on the referral [form](#). When considering whether or not you are eligible for legal aid, the Legal Aid Agency will look at your disposable income (the money you have left after paying basic living expenses) and your disposable capital (any savings, property, investments or valuable belongings that you could use or sell to pay for a lawyer).

For a more detailed assessment of whether you might be eligible for legal aid you can use the Ministry of Justice 'eligibility calculator', which is available [here](#), although it should be noted that this is a fairly complex and time consuming tool.

Human rights law or European Union law require the provision of legal aid in your case

The law that governs the provision of legal aid (the Legal Aid, Sentencing and Punishment of Offenders Act 2012) states that exceptional funding will only be granted when the failure to provide legal aid would result in a breach of the applicant's human rights or European Union rights. As stated above, the most relevant human right for these purposes is the right to a fair hearing under Article 6 of the European Convention on Human Rights, which will be engaged where someone's legal

problem involves a dispute over their civil rights and obligations. Most civil claims involve a dispute over a person's civil rights and obligations including family law cases, housing cases, education cases and non-discretionary welfare benefits cases.

Other human rights may also require the provision of legal aid, including the right to a private and family life under Article 8 of the European Convention on Human Rights. This will be relevant in family law cases, particularly where legal aid is necessary to allow a parent or spouse to properly participate in the proceedings.

Where a person's civil rights and obligations are not in dispute, they may still be able to get legal aid as a result of European Union law, namely Article 47 of the Charter of Fundamental Rights of the European Union. The factors listed below are relevant to the assessment of whether either Article 6 of the European Convention on Human Rights, or Article 47 of the Charter of Fundamental Rights of the European Union, require the provision of legal aid.

Without legal aid it would be practically impossible for you to bring your case or there would be obvious unfairness in the proceedings

In order to demonstrate that you are eligible for exceptional funding, you will need to show that you would not be able to bring your case if you did not have legal aid and/or that the absence of legal aid would result in obvious unfairness to you in solving your legal problem. The following factors will help demonstrate this and you should consider whether any or all of them apply in your case. On an application for exceptional funding you will need to give as much detail as possible for each factor. If none of these factors apply to your case, it is unlikely that you will be eligible for exceptional funding.

- Your case is factually, procedurally or legally complex
- The issues at stake are of great importance for you, for example, issues of life, liberty, independence, family life, protection from abuse and the welfare of children and vulnerable adults
- The financial implications of losing your case are ruinous for you
- You have characteristics which make it difficult for you to represent yourself, such as a physical or mental disability, a communication problem, a limited understanding of English, fluctuating capacity or limited education or literacy levels
- You have a deep emotional involvement with subject matter of the legal problem, which will make you unable to advocate objectively in court, for example, where there are allegations of abuse
- There are no other means of assisting you, for example, there is no pro bono legal help available, there are no other sources of funding available and there are no other ways of getting your legal problem dealt with effectively without paying for a lawyer.

This page provides information about exceptional funding under the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The Exceptional Funding Project is designed to help people secure exceptional funding. The information on this page will help you work out whether you might be eligible for exceptional funding. In order to refer your case, or your client's case, to PLP, please read the information below and fill out the referral form [here](#), attaching all relevant documentation. If you have trouble using the form, there is another version compatible with older versions of word [here](#) (this is saved as a .doc not a docx extension).

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

How can the Public Law Project help you?

PLP's exceptional funding project is designed to assist people in need of legal advice, assistance or representation with making exceptional funding applications and challenging refusals of funding where appropriate.

From 1 April 2013, many areas of law for which legal aid had been available will be out of the scope of legal aid. But some such cases may nonetheless be awarded legal aid, if it can be shown that the refusal of legal aid would breach the applicant's rights under the European Convention on Human Rights, or the applicant's rights under EU law. More information on who is eligible for exceptional funding is available [here](#).

Solicitors can in principle assist you to make an application for exceptional funding. However, legal aid for making the application will only be available retrospectively if the application is subsequently granted. It is widely anticipated that such applications will only very rarely be granted, and as they are likely to be time-consuming for solicitors, PLP is concerned that many solicitors will refuse to make them.

For this reason, PLP has developed this Exceptional Funding Project to assist those that cannot get help from another source to make an application for exceptional funding. However, PLP is a small organisation with limited capacity. Whilst we will do our best to assist, we cannot guarantee that we will be able to help all applicants that refer their cases to us, and applicants are strongly advised to exhaust all other advice options before applying to PLP for assistance.

For the same reason, PLP cannot accept emergency cases as we do not have an out-of-hours service and we cannot guarantee that anyone will look at an applicant's case within a specific period of time.

Applicants should be aware that PLP is only able to offer the limited service of assisting with the application for exceptional funding or challenging a refusal of exceptional funding where appropriate. PLP is not able to offer a casework or advisory service for the applicant's underlying legal problem and nor is PLP necessarily able to take on cases that have received funding.

By referring your case to us, you understand and agree that:

- PLP may draft an application for exceptional funding for you, or else may (at our discretion) refer your case to our network of volunteer lawyers (who might be solicitors, barristers or law students working under a supervising solicitor) who will draft grounds for your application.

- PLP or any volunteer lawyer to whom we refer your case may seek to contact you through the contact information you put on the [referral form](#), to take instructions or request further documents from you where further instructions and/or documents are considered necessary to assist with drafting your application for exceptional funding.
- All information provided will be kept strictly confidential by PLP save that information may be passed to our network of pro bono lawyers on equivalent terms of confidentiality.
- In the event that PLP or any volunteer lawyer to whom we refer your case considers that further instructions or documents are required to assist with drafting your application for exceptional funding, but are unable, after making reasonable efforts, to take instructions or obtain required documents from you, we may at our discretion refuse to assist you further with drafting your application, and return any documents you have sent us.
- The purpose of the [referral form](#) is to enable the Public Law Project to understand your legal problem and establish whether you might be eligible for legal aid, in the form of exceptional funding. PLP may not be able to respond to (and may have to disregard) incomplete referral forms.
- In the event that PLP or any volunteer lawyer to whom we refer your case considers that on the basis of the instructions and documents you have provided, an application for exceptional funding would be very likely to be rejected, we reserve the right to so notify you, to return your documents to you, and to refuse to assist you further.
- Neither PLP nor any volunteer lawyer to whom we refer your case will be acting for you as your solicitor.
- This service is being offered by PLP on a pro bono basis drawing heavily on the use of volunteer lawyers. While every effort is taken to ensure that the work that is produced for you will be of a high standard, PLP make no warranties and accepts no professional liability in relation to the correctness of any advice given or document drafted by any third party, whether or not you are made aware of the third party's involvement in your case
- So far as you are aware, you do not have any business, professional or other association with PLP or any client of PLP (if you consider that you might have some such association, please let us know).
- You agree to raise any complaint about the service we provide as a complaint in accordance with our complaints procedure

How to contact the Public Law Project

If you need assistance with making an exceptional funding application or challenging a refusal of exceptional funding, please fill out the referral form and attach all relevant documentation. Please return the form and documentation by post to:

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

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

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

3. Gudanaviciene & Ors v Director of Legal Aid Casework & Anor [2014] EWHC 1840 (Admin) and other litigation

<http://www.bailii.org/ew/cases/EWHC/Admin/2014/1840.html>

Collins J held that the decisions refusing ECF by the Legal Aid Agency in six immigration cases had been unlawful and that the Lord Chancellor's Exceptional Funding Guidance (Non-Inquests) – a publication for LAA caseworkers was unlawful in that it

- Set the threshold for finding that legal aid is necessary to prevent a breach of Article 6/Article 47 too high
- It failed to recognise that the procedural requirements of Article 8 may require legal aid to be granted in immigration cases
- It gave incorrect guidance as to the circumstances in which legal aid must be granted because of the risk of a breach of rights under s.10(3) (b) LASPO

<http://www.doughtystreet.co.uk/news/article/high-court-holds-that-decisions-refusing-exceptional-case-funding-in-a-rang>

Guidance non inquests: <http://www.justice.gov.uk/downloads/legal-aid/funding-code/chancellors-guide-exceptional-funding-non-inquests.pdf>

<http://legaidhandbook.com/2014/07/01/exceptional-cases-high-court-widens-scope-of-laspo-and-declares-guidance-unlawful/>

4. Worked case studies

Examples include:-

a. Will Mother in this case be likely to succeed? Father has legal aid pre-LASPO. He served M post LASPO and she couldn't provide evidence of DV so not eligible for legal aid. She had a forced marriage at 15, raped and conceived a child by 16years. By the age of 18/19 she fled with her child. 8 years later F is caught by immigration authorities and decides to apply for contact. There will be a Finding of Fact hearing.

b. A schizophrenic tenant facing eviction

c. A national of Lithuania pursuing an appeal against deportation. She stabbed her abusive violent husband and received 18 months for s.18 wounding. She has a 2 year old daughter in foster care. Her English is poor.

5. Conclusion

Position post Gudanaviciene

Funding for practitioners

PLP project update

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