



irwinmitchell <sup>(IM)</sup>  
solicitors

# COSTS IN JUDICIAL REVIEW PROCEEDINGS – RECENT DEVELOPMENTS AND PRACTICAL TIPS

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Lisa Richardson  
Solicitor, Public Law Department  
Irwin Mitchell LLP, Manchester

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# RECENT CHANGES

- Legal Aid - LASPO
- Impact of these changes and ways to manage them
- Proposed further changes – “Transforming Legal Aid Consultation”

# LASPO

## What is LASPO?

- Legal Aid, Sentencing and Punishment of Offenders Act 2012
- Key parts for legal aid are:
  - Part 1 (legal aid) – contains the enabling powers for the new scheme
  - Schedule 1 (Civil legal services) – sets out what work will be in scope.
    - Part 1 sets out types of proceedings in scope
    - Part 2 sets out exclusions for some types of actions covered by Part 1

# LASPO

What does LASPO do?

- Requires the Lord Chancellor to make legal aid available in certain categories of case (section 1)
- Creates the LAA to administer legal aid /abolishes the LSC (section 38)
- Vests decision making powers in the Director of Legal Aid Casework (section 4) who delegates to LAA staff who make decisions in respect of individual cases (section 5)

# LASPO

## What are the new rules?

- The Funding Code (3 parts in volume 3 of the LSC manual – criteria, procedures and guidance) has been replaced by various sets of regulations:
  - The Funding Code Criteria is replaced by the Civil Legal Aid (Merits Criteria) Regulations. <http://www.legislation.gov.uk/ukxi/2013/104/contents/made> Chapter 2 relates specifically to public law claims.
  - The Funding Code Procedures are replaced by the Civil Legal Aid (Procedure) Regulations. <http://www.legislation.gov.uk/ukxi/2012/3098/contents/made>
  - The Funding Code Guidance is being replaced by a number of ad hoc guidance documents, found on the Ministry of Justice website at: <http://www.justice.gov.uk/legal-aid/funding>.
    - The Costs Assessment guidance is a useful guide to the LAA's approach to costs assessments.
    - Similarly useful is the Lord Chancellor's Guidance on Civil Legal Aid which sets out some of the factors that caseworkers are to take into account in determining applications for civil legal services: <http://www.justice.gov.uk/downloads/legal-aid/funding-code/lord-chancellors-guidance.pdf>

# LASPO

## Guidance and commentary

- The MOJ have a summary of legal aid reform changes on their website:  
<http://www.justice.gov.uk/legal-aid/news/latest-updates/legal-aid-reform>
- There is also a FAQ page for legal aid providers:  
<http://www.justice.gov.uk/downloads/legal-aid/legal-aid-reform/legal-aid-reform-faq.pdf>

# ISSUES ARISING

## 1. Abolition of devolved powers

- As of 1 April 2013 devolved powers (now known as “delegated functions”) can no longer be exercised in relation to the majority of judicial review cases.
- The Standard Civil Contract Specification, section 5.3 (2013)/5.5 (2010) provides that:

*Judicial Review: you do not have the power to make a determination that a Client qualifies for authorised representation provided on an emergency basis, or to amend or refuse to amend a limitation or condition to which a determination in respect of Emergency Representation is subject, in relation to Judicial Review in any Category of Law, other than in relation to proceedings under Part VII Housing Act 1996 (as amended), section 21 National Assistance Act 1948 (as amended), section 20 Children Act 1989 (as amended) or section 47(5) National Health Service and Community Care Act 1990 (as amended) unless we have specifically delegated this function to you by way of an Authorisation.*

# ISSUES ARISING

## Applying to the LAA for emergency funding

- If the case is urgent, and does not fall within the scope of s5.3/5.5, you will need to apply to the LAA for emergency funding.
- For emergency applications not requiring an immediate grant of funding, applications are made in the usual way (CIV APP1 + means form) and should be dealt with in 48 hours
- For requests to undertake work within less than 48 hours, the application should be submitted using the CIV APP6 form and emailed to the designated emergency applications email address.
- There is an out of hours applications procedure if you need funding outside of the working day e.g. an urgent immigration case which comes in at 5pm which you need funding on that night
- If emergency funding is refused a fully completed substantive application must be submitted, and the LAA do not have the power to backdate funding. The applicant still has a right of review before the Independent Funding Adjudicator and if appropriate the LAA can request a decision within 24 hours.



# ISSUES ARISING

In practice:

- LAA deal with APP6 applications the same day – anything that can wait 24/48 hours should be sent as an APP1, making sure this is marked urgent both by ticking the box on the APP1 and by noting this in the covering letter
- As of the end of June, urgent APP1s were reportedly being turned around in 3 days.
- However, delays (up to 14 days) being experienced - caused by hold up in means assessment process
- Also issues with means assessments being rejected or requesting unnecessary information – if this applies worth contacting LAA to ask if can submit an APP6.
- Issues re. not marrying up emailed APP6 with posted APP1/means forms

# ISSUES ARISING

## 2. Introduction of the new Exceptional Funding scheme

<http://www.legislation.gov.uk/ukpga/2012/10/section/10/enacted>

- There is a right under s 10 LASPO to civil legal aid for any out-of-scope matter where an exceptional case determination ['ECD'] has been made.
- An ECD must be made where not to provide legal aid would breach:
  - a) the individual's Convention rights (within the meaning of the Human Rights Act 1998); or
  - b) any rights of the individual to the provision of legal services that are enforceable EU rights: s 10(3)(a).
- An ECD may be made where there is a risk of such an outcome: s10(3)(b).

# ISSUES ARISING

- Be aware that there is no emergency ECF, nor can providers self grant funding. However if marked urgent, in certain circumstances the LAA will expedite the application – e.g. if there is an imminent date (within 14 calendar days) for an injunction or other emergency proceedings
- Applications are made by submitting the usual application forms, along with the new ECF1 form.
- There is no right to appeal decisions on the refusal of ECF, however you can request the LAA to carry out an internal review of the decision.
- For Licensed Work, an ECF case will proceed in the same way as an in scope case. Funding will usually be backdated to the date of the clients first attendance in connection with the matter
- For Controlled Work, ECF cases will be paid at the fixed fee that would have applied had the case remained in scope.

# ISSUES ARISING

- PLP, supported by the Law Society, is running a project to assist people with:
  - making exceptional funding applications
  - challenging funding refusals where appropriate.
- The aim is to help individuals get EF and to identify test case litigation under the EF regime so as to widen access to justice under LASPO and challenge unlawful and unfair MoJ decision making.
- PLP is also running an advice line on civil legal aid issues aimed at advisers with LASPO Act queries (0808 165 0170)

# ISSUES ARISING

## 3. Changes to legal aid eligibility

- The same capital eligibility rules apply to applicants in receipt of passported benefits as to other applicants
- Capital disregard of £100,000 if one of the couple is aged over 60.
- New eligibility calculator - <https://www.gov.uk/check-legal-aid>
- You can print controlled work forms pre-populated with means information from the calculator ready for client signature and dating.
- Levels of income based contributions increase to a maximum of approximately 30% of monthly disposable income.

# ISSUES ARISING

## 4. General Issues

- Applications

- greater scrutiny of costs incurred before issuing when seeking cost extensions
- LAA insisting on application including:
  - LBA (unless applying for IH)
  - evidence of steps taken to resolve issue before funding applied for (however, inconsistently applied)
  - 3 months bank statements – original or certified copy
- Unclear reasons for rejecting App8s

- Claims

- POAs being refused where substantive certificate does not include date of emergency certificate (if submitted within 3 months of this date)

# FUTURE CONCERNS

- In April the MOJ launched an eight-week consultation “Transforming Legal Aid”. The MOJ intends to respond in September
- What’s proposed?
  1. Legal aid will only be given for post issue but pre-permission work in cases where permission is granted. The rationale given is that in 2011/12 only 1799 of the 4074 cases that received legal aid reached permission stage.

The implication is that a case that fails to reach permission stage is a weak or failed case. That is not true.

# FUTURE CONCERNS

- Problems this may cause:
  - Law firms will be unwilling or unable to risk not being paid for this work given high threshold for permission being operated by the courts.
  - Real risk public bodies will not take pre-action correspondence seriously if they think the law firm will not be able to afford to issue proceedings
  - Satellite litigation to obtain pre-permission injunctions will also be at risk
  - More aggressive litigation – forces providers to litigate to point at which they get paid rather than negotiating to settle.



# FUTURE CONCERNS

2. Legal Aid providers will be required to carry out the following residence test (and retain evidence on file for audit):
  - The individual applying for civil legal aid must:
    - i. be “lawfully resident” in the UK at the date of the application for civil legal aid; and
    - ii. be or have been “lawfully resident” in the UK continuously for 12 months.

# FUTURE CONCERNS

## Asylum-seeker exception

- Asylum-seekers (deemed “lawfully present”) are exempt from the residence test. However, on the grant of leave to remain an asylum seeker becomes “lawfully resident” and therefore although on-going civil legal aid funding will continue, the 12-month lawful residence test will apply to any post-grant application for funding.

# FUTURE CONCERNS

- Problems this may cause:
  - trafficked persons who do not have a claim for asylum (which is about risk on return, not what has been suffered in the past) will not be able to obtain legal aid;
  - For those whose claims for asylum have failed, but who cannot be removed there will be no legal aid to make further representations (including a fresh claim for asylum), a claim for damages for false imprisonment, and/or challenge decisions denying support and accommodation;
  - Those facing removal or deportation whose challenges are based on rights to private and family life, rather than asylum claims will also be ineligible.

# FUTURE CONCERNS

- Other proposals to be aware of:
  - Removal of legal aid for “borderline” cases (even those with significant wider public interest or are of overwhelming importance to the client);
  - Experts’ fees to be reduced by 20%;
  - Limiting the scope of legal aid for prison law