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**WRITTEN EVIDENCE OF THE PUBLIC LAW PROJECT
TO THE JOINT COMMITTEE ON HUMAN RIGHTS' INQUIRY
INTO HUMAN RIGHTS: ATTITUDES TO ENFORCEMENT
FEBRUARY 2018**

The Public Law Project

1. This submission is made on behalf of the Public Law Project ('PLP'). PLP is an independent national legal charity which aims to improve access to justice and to public law remedies for those whose access is restricted by poverty, discrimination or other similar barriers. To fulfil our objectives PLP undertakes research, casework, training and policy work. PLP is based in London but has a national presence and standing. We run conferences and training events across England and Wales, undertake and publish independent empirical research, and conduct public law litigation, both in our own name where appropriate, and representing others. PLP is recognised as having particular expertise in this area: in 2013 we were awarded the Special Rule of Law award by Halsbury's Laws and in 2015 received the Legal Aid Lawyer of the Year award for Outstanding Achievement and were shortlisted for the Liberty Human Rights Lawyer of the Year award for our work on legal aid.
2. In response to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO'), PLP developed a Legal Aid Support Project ('LASP') to enable us to focus specific casework resources on the post LASPO legal aid scheme, with a view to mitigating, where possible, the anticipated impact on access to justice. A significant part of our work has been to promote access to Exceptional Case Funding ('ECF') for individuals who would have been unable to effectively represent themselves without public funding.
3. Since PLP's March 2017, we have shifted our focus from assisting individuals ourselves to building capacity in the wider sector, in an effort to make the scheme more sustainable in the longer term. We have continued to promote the use of ECF by speaking at relevant events, writing articles, and providing training on accessing ECF to legal aid providers and not for profit organisations. We continue to provide information about ECF on our website,



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and have published a guide intended to assist individuals in making applications themselves¹, and a guide for legal aid providers on obtaining ECF in family cases.²

Summary of PLP's evidence

4. PLP welcomes the opportunity to provide evidence to the Joint Committee on Human Rights' inquiry into factors which may impede individuals from using the UK's human rights framework effectively. Our submission addresses the question of access to resources and in particular the impact of LASPO on the ability of individuals to access the courts as a means of enforcing their human rights, and focuses in particular on access to immigration advice, including the accessibility of the ECF scheme and the issues posed by advice deserts.

5. In summary, it is PLP's evidence that:
 - The legal aid cuts which followed LASPO removed important areas of social welfare law from the scope of civil legal aid, thus impeding individuals' ability to protect their rights.
 - Cuts in real terms in civil legal aid fees have threatened the sustainability of legal aid practice.
 - ECF remains inaccessible in practice for many people, particularly those who are trying to apply without the assistance of a legal aid provider. The scheme is not providing the much-needed human rights safety net to enable people who need legal advice and representation in areas removed from scope by LASPO to secure their fundamental rights.
 - The statistics show that in the majority (over 70%) of cases where ECF applications are made for immigration matters, the application is granted. These will mainly be cases based on private and family life rights. They reveal a strong case for reinstating legal aid for Article 8 immigration cases to ensure effective participation in proceedings which determine individuals' rights to live with their family or remain in their communities. This case for reinstating legal aid is even stronger for unaccompanied and separated children making immigration applications.

¹ <http://www.publiclawproject.org.uk/resources/254/legal-aid-exceptional-case-funding-ecf-applying-without-the-assistance-of-an-adviser-or-solicitor>

² <http://www.publiclawproject.org.uk/resources/274/how-to-get-legal-aid-exceptional-case-funding-ecf-in-family-law>



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- The number of applications being made for ECF in other areas of law, including private family cases, remains troublingly low despite the very serious issues which are often at stake in these cases.
- Another consequence of LASPO has been the further closure of advice and not-for-profit organisations which had previously provided initial advice in areas of law which are not out of scope. These closures have contributed to ‘advice deserts’: areas where there are very few or no legal aid providers in a certain area of law.

Case study: the case of AT & family
Practical difficulties in obtaining access to legal aid to protect family life

6. The case of AT³ and his family illustrates the difficulties in accessing legally aided representation in the context of an immigration Article 8 case and how, notwithstanding a strong case, their ability to enforce their fundamental rights was impeded by a lack of resources.
7. AT eventually won his judicial review of the Home Office’s refusal of his Article 8 human rights claim⁴ and removal from the UK.⁵ The Court declared that the refusal of the Article 8 claim was unlawful and therefore his removal was unlawful. The Home Office were ordered to bring him back to the UK.⁶
8. Prior to his removal, AT, who was detained at an Immigration Removal Centre for nearly 8 weeks, was unable to find a legal aid lawyer who was prepared to apply for ECF to assert his Article 8 rights.⁷ AT made representations to the Home Office himself. His Article 8 claim was refused and the Home Office refused to treat his representations as a ‘fresh claim’⁸ meaning that he had no right of appeal.

³ [R\(AT and ors\) v SSHD \[2017\] EWHC 2714 \(Admin\)](#)

⁴ AT’s wife had ILR. Their infant child was born the week after AT was taken into detention and is British. AT’s wife is Gambian. There are insurmountable obstacles to her returning there engaging Article 3 ECHR. See the judgment §19, §79

⁵ PLP represented AT and his family.

⁶ [R\(AT and ors\) v SSHD \[2017\] EWHC 2714 \(Admin\)](#) §86 - §88

⁷ *Ibid.* §35, §41, §83

⁸ *Ibid.* §48



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9. The only way to challenge the refusal and to prevent AT's removal was by issuing judicial review proceedings. A judicial review was within the scope of legal aid, but AT was still unable to find a legal aid lawyer to act for him. His inability to access resources meant that 9 days after the Home Office refusal he was unlawfully removed from the UK. He was separated from his wife and infant British son for a year.
10. The Judge in AT's judicial review made the following key findings:
- AT and his family had an Article 8 claim that would have had a realistic prospect of success if it had been considered by an independent Immigration Judge on appeal⁹.
 - AT was disadvantaged since he was unrepresented and in detention. He had difficulties in accessing information and could not be expected to know what evidence the Home Office needed from him to assert his Article 8 rights.¹⁰
 - The inability of AT to obtain legal representation meant that he was unable to effectively assert his Article 8 rights because he could not meaningfully engage with the decision making process.
 - If AT had had the benefit of legal representation he would have been able to issue judicial review proceedings and would have halted his removal¹¹.
 - 'The very real practical difficulty for AT was...in obtaining "proper" access to justice in such a short time frame.'¹²
11. Following the successful judicial review, the Home Office brought AT back to the UK on 14 November 2017. AT must now pursue his Article 8 claim as no decision has been taken on that by the Home Office. However since the judicial review has concluded AT must apply for ECF to do so. PLP submitted an application for ECF to the Legal Aid Agency on 20 December 2017. No decision has been taken on the application for ECF at the time of drafting these submissions. It has been pending with the LAA for over 6 weeks.
12. AT's case is not an isolated example. PLP is instructed in other similar judicial reviews for individuals who were removed or who faced removal and were unable to obtain legally aided representation (both ECF and in scope legal aid) when detained for removal and where fundamental rights under Article 3 or 8 ECHR were engaged. We have obtained

⁹ [R\(AT and ors\) v SSHD \[2017\] EWHC 2714 \(Admin\)](#) §80, §84

¹⁰ Ibid. §40, §71

¹¹ Ibid. §83

¹² Ibid. §96



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Court orders for those individuals, either for return to the UK or preventing removal from the UK. We are unable to provide further details as part of this submission to the Committee as their cases are currently before the Court.

LASPO

13. LASPO was borne of the 2010 Coalition government's drive for austerity. The stated intention in the November 2010 consultation paper 'Proposals for the reform of Legal Aid' was to cut £350 million from the legal aid budget.¹³ As is well known, LASPO introduced a fundamental shift in the legal aid scheme, from a presumption that a matter was 'in scope' for legal aid, absent express provision otherwise, to the presumption that a matter was 'out of scope', absent its express inclusion in Part One Schedule One of LASPO. In so doing, LASPO took many areas of law, including many areas of social welfare law, out of scope for legal aid. The matters retained in scope were those identified as being priority areas in the context of access to justice. In the context of social welfare law, the following key changes in scope had a significant impact on the availability of advice and representation:

- all non-asylum immigration cases were taken out of scope, subject to narrow exceptions for some applications by victims of domestic violence, and victims of trafficking and modern slavery. Importantly, this included applications for leave to enter or remain based on an individual's right to private and family life under Article 8 of the European Convention on Human Rights ('ECHR'), including where the applicant is an unaccompanied or separated child or otherwise vulnerable;
- most private family law was taken out of scope. Legal aid was retained for children in family proceedings; for cases involving allegations of child abuse (but not for the alleged perpetrator); and for victims of domestic violence who could meet the evidence threshold set in Regulations;
- welfare benefits advice is only available for appeals to the Upper Tribunal on a point of law, for which no advocacy is normally in scope, and appeals to the higher courts;
- the availability of debt and housing advice was restricted to cases involving an immediate threat of loss of the home.

¹³ Ministry of Justice: Proposals for the reform of Legal Aid; November 2010
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228970/7967.pdf



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14. The impact of LASPO on the number of civil cases funded by legal aid was dramatic: the November 2014 report of the National Audit Office ('NAO') observes that 28% fewer civil legal representation certificates were issued by the LAA in 2013-2014 than in 2012-2013, and that there was a drop of 70% in civil legal help (initial advice and assistance) matters funded in the same period.¹⁴ LASPO came into force at a time when there had been no increase in civil legal aid fees since 1998-99, and a 10% cut in 2011. The NAO has calculated that this amounts to a 34% real-terms reduction in civil legal aid fees over that 13 year period.¹⁵ In these circumstances it is not surprising that the Law Society has warned that 'the future sustainability of legal aid practice is in significant doubt.'¹⁶

The right to legal aid and access to ECF

15. The common law right to access to the court has not yet been recognised to encompass a right to legal aid. Thus for now, and other than those contained in domestic statute, the only sources of enforceable rights to legal aid for individuals in England and Wales are the Human Rights Act 1998 ('HRA') and European Union law. Section 10 of LASPO provides for ECF to be made available in a case, which would otherwise be out of scope, where a failure to do so would breach, or risk breaching, an individual's Convention rights (as protected by the HRA) or enforceable EU law rights. The ECF scheme was introduced as the 'safety net' by which LASPO was supposedly made compliant with the UK's obligations under the HRA and EU law.

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

16. As a result of our LASP and work on ECF, PLP soon identified real problems with the ECF scheme. In the first year of the scheme, fewer than 2% of non-inquest applications were granted funding¹⁷. The process of applying was an onerous one: the form was lengthy and required detailed answers to a range of questions derived from case law on Article 6 ECHR; there was no procedure for urgent cases; and in PLP's experience the LAA required a large amount of evidence to support factual assertions in an application.

¹⁴ 2 National Audit Office: Implementing Reforms to Civil Legal Aid; 19.11.2014

<https://www.nao.org.uk/wpcontent/uploads/2014/11/Implementing-reforms-to-civil-legal-aid1.pdf> p.22

¹⁵ National Audit Office: Implementing Reforms to Civil Legal Aid p.33

¹⁶ House of Commons Justice Committee, Impact of Changes to Civil Legal Aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, 12 March 2015, HC 311 of session 2014-15, p 31

¹⁷ <https://www.gov.uk/government/statistics/legal-aid-statistics-july-to-september-2017>



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Solicitors were reluctant to make applications at risk given the poor chances of success and for applicants in person the scheme was almost impossible to navigate. The Lord Chancellor's Guidance set the test for getting funding extremely high and stated that it did not consider that there was an obligation to provide funding in immigration proceedings in order to meet the procedural requirements of Article 8 ECHR.

17. These problems represented very significant barriers to access to the courts and to procedures for securing human rights. PLP acted for the Claimant 'I.S.' in two cases which arose out of the problems with the ECF scheme: *Gudanaviciene and Ors v Director of Legal Aid Casework and the Lord Chancellor* [2014] EWCA Civ 1622, and *I.S. v Director of Legal Aid Casework and the Lord Chancellor* [2015] EWHC 1965 (Admin) and [2016] EWCA Civ 464
18. Mr I.S. was a blind Nigerian man who lacked the capacity to conduct litigation. He sought ECF in order to obtain advice and assistance with an application to the Home Office to regularise his immigration status in the UK. His application for ECF was refused by the Legal Aid Agency, including on the basis that immigration cases do not engage the right to a fair hearing under Article 6 ECHR, and that Article 8 ECHR did not require the provision of legal aid in immigration cases.
19. Mr I.S. (acting by the Official Solicitor as his litigation friend) was one of six claimants in *Gudanaviciene and Ors* who challenged the lawfulness of the Government's interpretation of section 10 of LASPO, and the lawfulness of the ECF Guidance used by Legal Aid Agency caseworkers when deciding ECF applications. All six cases involved immigration matters: four depended on the need for legal aid to ensure effective participation in proceedings which determined Article 8 rights, and two also relied on the right to an effective remedy in EU law.
20. Both the High Court and Court of Appeal upheld the challenge, with the Court of Appeal confirming that the need for Convention rights to be '*practical and effective*' meant that a right to funding could arise under Article 8 ECHR (and other Convention Articles), and that ECF would be required where it was necessary to enable an individual '*to present their case effectively and without obvious unfairness*'¹⁸. This was a different, and lower,

¹⁸ *Gudanaviciene and Ors v Director of Legal Aid Casework and the Lord Chancellor* [2014] EWCA Civ 1622, para 56



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threshold than that which had been set out in the Lord Chancellor's Guidance prior to these cases. The Director of Legal Aid Casework conceded shortly before the hearing in the Court of Appeal that it had been unlawful to refuse legal aid to Mr I.S.

21. In the case of *I.S. v Director of Legal Aid Casework and Lord Chancellor*, the Court had the opportunity to consider a challenge to the operation of the ECF scheme. It was argued by the Official Solicitor, on behalf of Mr I.S., that the way in which the scheme had been set up was unlawful because it gave rise to an unacceptable risk that individuals would not be able to secure ECF when their human rights required it. The claim was initially successful in the High Court but the Government appealed and, in a judgment handed down on 20 May 2016, the Court of Appeal allowed the appeal. The lead judgment was given by Laws LJ, who, in finding that the scheme was '*not inherently or systemically unfair*' (and therefore that the high legal threshold for a finding of systemic unfairness was not met) observed that '*it is heavily dependent on the participation of providers, given the difficulties clearly faced by lay applicants and the absolute need of assistance for those with disabilities...Moreover, the website and helpline are, I think, of significant material assistance to potential applicants.*'¹⁹ He further observed that '*there have plainly been many difficulties, and the complexity of the ECF form has been common to many of them.*'²⁰ Whilst Laws and Burnett LLJ found that the ECF scheme was not operating unlawfully, Briggs LJ disagreed, finding that it was '*the combination of those two features, namely an application process which is inaccessible to most [Litigants in Person] and the absence of an economic business model sufficient to encourage lawyers to apply on their behalf, which makes the ECF scheme inherently defective and therefore unfair.*'²¹

Accessing ECF after *I.S. v Director of Legal Aid Casework and the Lord Chancellor*

22. In response to the claims in *Gudanaviciene* and *I.S.*, the government made a number of changes to the ECF scheme. In particular:

- Revised ECF Guidance was published on 9 June 2015, which incorporated the test established in *Gudanaviciene* for granting ECF of '*whether the withholding of legal aid would mean that the applicant is unable to present his case effectively and without obvious unfairness*'. It also acknowledged that the procedural obligations imposed by

¹⁹ *I.S. v Director of Legal Aid Casework and the Lord Chancellor* [2016] EWCA Civ 464, para 55

²⁰ *I.S. v Director of Legal Aid Casework and the Lord Chancellor* [2016] EWCA Civ 464, para 56

²¹ *I.S. v Director of Legal Aid Casework and the Lord Chancellor* [2016] EWCA Civ 464, para 78. An application for permission to appeal was made to the Supreme Court but was refused.



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Article 8 ECHR could require the provision of legal aid for immigration proceedings and applications.

- In November 2015 a new, shorter, application form was introduced which also allows for an application for funding to investigate whether a full ECF application could be made.
- In the course of the litigation, the guidance on urgency in the Provider Pack was amended to state that *'We will consider the information that you have provided including information as to how the urgent situation has arisen and why exceptional funding is needed to deal with the emergency situation and if we agree, then we will deal with your case ahead of non urgent applications and within 5 working days.'*²²

23. According to the Legal Aid Agency's published statistics, since the High Court's judgment in *I.S.*, there has been an increase in the number of people applying for ECF in general, and for immigration claims in particular. The most recent Legal Aid Agency statistics, published on 14 December 2017,²³ show that in the financial year 2016/17 there were 1,591 applications for non-inquest²⁴ ECF, 830 of which (52%) were granted. In the same period there were 1,008 applications for ECF in immigration cases of which 693 (71%) were granted. Around 80% of these applications were made by legal aid providers, with the remainder being made either by individuals, or – in PLP's experience more commonly – with the assistance of charities or *pro bono* lawyers who help individuals to navigate the application process. In the first two quarters of 2017/18 alone, there were 978 non-inquest applications, 55% of which were granted.

24. However, these figures are still well below the number of applications for ECF which was anticipated pre-LASPO. In advance of LASPO, the Government's best estimate of the annual number of ECF applications for non-inquest ECF was 6,500 with further applications anticipated for legal help.²⁵

25. The significant rise in numbers of ECF applications (and grants of ECF) over the last few years is to be welcomed: each grant of ECF represents an individual whose human rights

²² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/588924/ecf-provider-pack.pdf, page 5

²³ <https://www.gov.uk/government/statistics/legal-aid-statistics-july-to-september-2017>

²⁴ ECF for inquests is covered by a separate scheme and has not been the focus of PLP's work.

²⁵ Ministry of Justice: Legal Aid Reform: Excluded Cases Funding Process Equality Impact Assessment; March 2012 pg. 9



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would have been breached without legal aid. However, the increase both in application numbers and in grants has largely been driven by immigration cases brought following the *Gudanaviciene* decision (81% of non-inquest ECF applications in 2016/17 were in immigration matters). In PLP's experience, many of the issues identified in *I.S.* continue to act as barriers to people accessing ECF. In the next part of this evidence, we explore the continuing difficulties with the ECF scheme which act as a barrier to people accessing ECF.

Ongoing difficulties with accessing ECF

(1) The lack of information and assistance available

26. As noted above, in *I.S.*, the Court of Appeal considered the availability of information on the LAA website and helpline to be '*of significant material assistance to potential applicants*'. However, in PLP's view:

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

27. Further details about these concerns are set out in an annex to this submission.

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



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

(2) Complexity of the forms

30. The Legal Aid Agency's ECF website, under '*How to apply – for the public*' states that:

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

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

32. PLP encourages the Committee to look at the forms that an applicant for ECF will have to complete and submit in order to understand the difficulties which an individual is likely to face when attempting to apply for ECF using these forms.

33. The first form is the ECF1 form. It is available to download from the LAA's website.²⁶ Despite the ECF1 form being shortened following *I.S. v Director of Legal Aid Casework and the Lord Chancellor*, it remains primarily aimed at legal aid providers. The language used in the form ECF1 is unlikely to be familiar to direct applicants or to those assisting direct applicants if they are not legal aid providers. For example, on page 2 of the form under the heading '*Type of case*', the form states:

'Complete this section if either:

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

²⁶ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/636742/ecf1-version-4-april-2017.pdf



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

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

34. In addition to form ECF1, applicants who need legal aid in order to make an immigration application would need to complete form CW1, and for advice and representation in the First Tier Tribunal or Upper Tribunal, would need to complete form CW2. Applicants who require legal aid for family proceedings would need to complete form CIV APP3 and either form CIV MEANS1 or CIV MEANS2, depending on the source of their income. None of these forms is designed for completion by a person who is not familiar with the legal aid scheme. They are all designed to be completed by legal aid providers who have detailed knowledge of the legal aid contract and relevant Regulations.
35. The difficulties that the forms can present are illustrated by an enquiry we received on 26 July 2017 from an organisation that assists its service users to make ECF applications, but which is not a legal aid provider. The organisation was helping a parent to apply for funding for a child’s immigration application, but was unsure whether the application should be made on behalf of the father or the child; of what income should be included on the form; and of what was meant by “Dependents’ allowances’. The organisation was also not sure whether their client should tick the box stating that they not had already received legal help on the matter, because the child had previously been in receipt of legal aid for his asylum matter. We were able to advise them how to complete the form, but without our assistance they would not have been able to provide the correct information.
36. The same organisation had contacted PLP on 22 June 2017 in relation to an enquiry they had made to the central LAA telephone line. They had not been able to work out which was the correct form to fill out from the LAA website, and had called the telephone line for advice about the correct form. The call handler advised them to use form CIV MEANS1. When the organisation explained the nature of the proceedings to PLP, we advised that the correct form for the level of service applied for was a Controlled Work form (CW1) – which is not one of the forms linked from the ECF page of the LAA website.

(3) The procedure for urgent cases



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37. Even if an individual is able to complete the correct forms and provide the required information, they may not be granted ECF sufficiently quickly. The Provider Pack²⁷ and the LAA website²⁸ state that, if the Legal Aid Agency agrees that a case is urgent, it will be dealt with ahead of non-urgent applications and within five working days. In contrast to this procedure, for in-scope applications there is a separate procedure for emergency applications for representation. In emergency in-scope cases, the LAA has the power determine a funding application on the basis of limited information and documents, in order to allow work to be done on an urgent basis, and aims to process such applications in 48 hours. In some categories of law, providers have 'delegated powers' and can self-grant funding for urgent cases, subject to subsequently applying to the LAA to confirm the grant of funding. This is not available for ECF applications.

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

(4) Additional hurdles once ECF is granted

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

40. First, they have to find a legal aid provider with the capacity to take on their case. This can be difficult. In one case where we successfully obtained ECF for a client it took nine months from the grant of ECF for the client to obtain an appointment with a legal aid provider with the capacity to take his case on. In another case, six months after the grant of ECF, the client had still not found a solicitor to take on her case.

41. On 21 December 2016 PLP made a Freedom of Information Act request to the MoJ, seeking to discover how many of grants of ECF which had been made in each category of law were being used, i.e. whether a controlled work matter had been opened or a certificate of public funding issued for the matter for which ECF was granted. The response dated 15 February 2017 shows a gap between the number of grants of ECF for immigration matters

²⁷ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/588924/ecf-provider-pack.pdf, page 5

²⁸ <https://www.gov.uk/guidance/legal-aid-apply-for-exceptional-case-funding>



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and their use. In the year 2015-2016, 313 matters of 326 grants of ECF were in use. For the first two quarters of 2016-2017, 278 matters of 301 grants of ECF were in use.

42. If an individual who has been granted ECF as a direct applicant does find a legal aid provider to take on their case, the provider must then complete and submit to the Legal Aid Agency a further ECF1 form and the relevant means and merits forms, and the Legal Aid Agency must confirm again that ECF has been granted, before work can begin on their case. This requirement that the forms are submitted twice creates further delay.

Conclusion

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

Advice Deserts

52. Another consequence of LASPO has been the further closure of advice and not-for-profit organisations which had previously provided initial advice in areas of law which are not out of scope. These closures have contributed to 'advice deserts'; areas where there are very few or no legal aid providers in a certain area of law. The House of Commons Justice Committee report on the impact of changes to civil legal aid²⁹ criticised the Government for the lack of information concerning the geographical coverage of advice. Data published by the Legal Aid Agency has shown that a third of areas in the country have either one or no source of housing advice, and the Law Society called for the commission of a second provider in areas that only have one in a parliamentary brief in 2016³⁰. It noted that families on low income may not be able to travel where a provider may be a long way from where they live and one firm may not have the capacity to advice all those in need.

²⁹ <https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/31102.htm>

³⁰ <https://www.lawsociety.org.uk/Policy-campaigns/documents/legal-aid-deserts-parliamentary-brief>



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53. Ministry of Justice statistics show that over the last 10 years more than 50% of not for profit agencies have closed³¹ and the Bar Council 2014 Report³² reported that the Citizens Advice Bureau (CAB) has found it hard to refer people to specialist advice needed. Similarly, the Low Commission report, *Tackling the Advice Deficit*³³ found that many not-for-profit agencies have had to generalise their services, so that specialist advice is not always available. A survey of local advice agencies found that Shelter has had to close nine of its advice centres and the CAB in Gloucestershire, for example, went into administration.³⁴
54. In relation to immigration advice, The Children's Society 2015 report, *Cut Off From Justice*³⁵ found a 30% reduction in regulation immigration advice services across the country and almost a 50% decrease in the number of non-fee charging services regulated to deal with appeals and representation. It also reported that for children who are in local authority care, the advice they can access is limited and inconsistent, with significant variance across local authorities.
55. By way of illustration, the availability of immigration advice in the county of Devon is very limited; there is only one, small, provider with a legal aid contract in immigration in the whole of Devon and Cornwall, which is based in Plymouth. Plymouth is about an hour from Exeter by train and a return ticket costs £9.80. As Plymouth is a dispersal area for asylum seekers, most of the capacity of the legal aid provider is taken up by advising people with initial asylum claims, who are living in accommodation provided by the Home Office. People who have other types of immigration application, for example fresh asylum claims or Article 8 applications usually have to wait many weeks or months to see an adviser in Plymouth, and sometimes there is no capacity at all for new referrals.
56. Since the closure of Devon Law Centre in 2010, Devon has not had a law centre and, other than the legal aid provider in Plymouth, the only free advice available in the area is short (half hour) appointments with private firms on a pro bono basis. For example, there is one firm in Exeter that will offer an initial free consultation, but they do not hold a legal aid contract and are unable to provide further advice unless individuals are able to pay.

³¹ <https://www.gov.uk/government/publications/survey-of-not-for-profit-legal-advice-providers>

³² http://www.barcouncil.org.uk/media/303419/laspo_one_year_on_-_final_report__september_2014_.pdf

³³ <https://www.lowcommission.org.uk/dyn/1389221772932/Low-Commission-Report-FINAL-VERSION.pdf>

³⁴ Ibid

³⁵ https://www.childrensociety.org.uk/sites/default/files/LegalAid_Summary.pdf



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57. If individuals cannot see an immigration adviser in Plymouth, the next nearest place with a legal aid provider is Bristol, where capacity is also limited. Avon and Bristol Law Centre will only take referrals from the Bristol area, and other providers with legal aid contracts do not always have appointments immediately available for new referrals available.
58. In response to the lack of local legal aid provision for immigration advice in Devon, an immigration clinic has been set up at the University of Exeter to assist individuals who are unable to find assistance elsewhere. The clinic is being supervised by lawyers, and will screen cases and provide assistance with ECF applications where necessary. Whilst this is a significant step to improve availability of immigration advice in the local area, the clinic is unable to meet the need. It is still in its early stages and has limited capacity. It is unable to take urgent referrals, and will have less capacity to assist individuals out of University term time.
59. The University of Exeter has also set up an ECF Clinic, with the assistance of PLP, to run alongside the immigration clinic in the Law School. The aim of the ECF clinic is to address the need for such a service in the local area, in the absence of a Law Centre or other services that can provide assistance with these applications, and to provide students with the opportunity to develop their skills and knowledge. Students have been trained to assist individuals with ECF applications for immigration cases, using guidelines to construct the applications. All applications are then checked by clinic staff to ensure quality. Currently the clinic is only able to assist with applications for ECF for immigration matters. Crucially, the decision has been made to operate the ECF clinic through the immigration clinic, to ensure that individuals receive help from students that is supervised by a qualified and regulated team of legal practitioners, and that individuals receive substantive advice from the outset of their referral to the service.
60. Setting up the ECF Clinic at the University of Exeter has taken significant time and resources. Whilst in theory ECF applications can be made by anybody, and law students can bring expert skills and knowledge to assist individuals in making the applications, it has been the Clinic's experience that the applications take a significant amount of time and require intensive supervision, including the involvement of qualified legal practitioners to ensure that a) ECF applications are the most helpful form of action for a particular case, and b) the application contains all of the information required to ensure that it carries the best chance of being granted by the LAA. Knowledge of ECF has been very limited in the



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local area, which means that part of the remit of the ECF Clinic has also been to raise awareness of the scheme, in order to generate potential referrals.

Conclusion and recommendations

61. The implementation of LASPO has created barriers to access to justice, as is borne out by the evidence set out above. The issues identified in *I.S.* continue to present barriers to people accessing ECF, particularly when they do not have the assistance of someone with an understanding of the legal aid scheme. Even when ECF is granted, or an issue remains in scope for legal aid, the significant advice deserts now opening up mean that in practice they may not be able to secure legal advice or representation.

62. PLP makes the following recommendations in light of its evidence:

63. (1) The Legal Aid Agency should take steps to address the practical difficulties in accessing ECF identified above, particularly for those who do not have the assistance of legal aid provider. Such steps could include:

- a. improving and simplifying the information about ECF available on the LAA website;
- b. reinstating a dedicated helpline and email address for enquiries about ECF from members of the public, and/or ensuring that helpline staff are trained on answering such enquiries;
- c. shortening and simplifying the forms to be completed, perhaps by reference to a clear list of questions designed to elicit the information required;
- d. designing an online eligibility calculator for use by individuals³⁶ and accepting a completed calculation as *prima facie* evidence of financial eligibility;
- e. introducing a proper emergency application procedure, similar to that which exists for in scope matters;
- f. simplifying the process for granting ECF to a provider where an individual application has already been approved.

64. (2) In addition to these practical steps, we would highlight three features of the ECF scheme which the Committee may want to explore as part of its inquiry:

³⁶ Similar to the one which exists for providers to check their clients' eligibility: <http://civil-eligibility-calculator.justice.gov.uk/>



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- a. The statistics show that in the majority (over 70%) of cases where ECF applications are made for immigration matters, the application is granted. These will mainly be cases based on private and family life rights. They reveal a strong case for reinstating legal aid for Article 8 immigration cases to ensure effective participation in proceedings which determine individuals' rights to live with their family or remain in their communities. This would still be subject to the normal means and merits tests in the legal aid legislation (which was the basis for refusal in nearly $\frac{1}{4}$ of refused immigration ECF cases), but would greatly facilitate access to advice in cases which concern matters of the greatest importance to the individuals concerned, such as separation from family members or removal from a country in which the person may have been born or spent most of their lives.
- b. This case for reinstating legal aid is even stronger for unaccompanied and separated children making immigration applications. Unaccompanied children should not be expected to engage with the immigration system without the benefit of legal advice and representation. The evidence is that alarmingly few such children apply for ECF. This is consistent with PLP's experience. Reinstating legal aid for this group would help ensure that vulnerable children's rights are protected.
- c. The number of applications being made for ECF in other areas of law, including private family cases, remains troublingly low despite the very serious issues which are often at stake in these cases, such as contact between parents and children or where a child should live, and the obvious impact on families' human rights. The Ministry of Justice should urgently investigate the reasons for the low uptake of ECF in private family law and whether families are able to secure effective access to justice without legal aid.

65. The Ministry of Justice should take steps to address the need for advice in areas of the country where the number of providers is significantly lower than is required to meet the levels of need. Steps to address that need could include the commissioning and direct funding of specialist advice services in these areas.



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Annex: further detail about PLP's concerns about the information about ECF on the LAA's website

44. The Legal Aid Agency provides some information on its website (<https://www.gov.uk/guidance/legal-aid-apply-for-exceptional-case-funding>) for people who need to apply for ECF, and also provides a customer service telephone line and email address that applicants can use to contact them. However, PLP considers that the information provided is in fact not enough to make ECF genuinely accessible to people who would otherwise be unable to effectively participate in their cases.

45. The first question for many will be whether legal aid is available for their case. On the Legal Aid Agency's website there is a 'check if you can get Legal Aid' facility.³⁷ An individual wanting to know if there is legal aid available for an out of scope immigration case will reach a screen which states in large type that '*Legal aid doesn't cover all types of problem.*' It then states below '*You can still ask a solicitor for help – you will have to pay for their advice.*'³⁸ To the right of this, the screen shows the heading '*Exceptional cases*' in a smaller type. This states that '*In exceptional cases, legal aid may still be available.*' There is nothing to explain the circumstances in which legal aid may still be available, beyond that it is in '*exceptional*' cases, and there is no express reference to ECF. In context, this reference to '*exceptional*' cases may be misleading, in view of the Court of Appeal's decision in *Gudanaviciene* in which it held that "*The fact that section 10 is headed "exceptional cases" and that it provides for an "exceptional case determination" says nothing about whether there are likely to be few or many such determinations. Exceptionality is not a test. ... there is nothing in the language of section 10(3) to suggest that exceptional case determinations will only rarely be made.*"³⁹ PLP is concerned that many individuals – and even some providers – will not realise from this information that ECF may be available to them. They will therefore fall at the first hurdle.

46. If an individual follows the link to '*apply directly*' in an '*exceptional case*', it will take them to the ECF information page.⁴⁰ The advice for ECF applicants on that page explains for direct applicants (those applying without help from a legal aid provider) that:

'How to apply

³⁷ <https://www.gov.uk/check-legal-aid>

³⁸ <https://checklegalaid.service.gov.uk/scope/refer/immigration-and-asylum>

³⁹ *Gudanaviciene and Ors v Director of Legal Aid Casework and the Lord Chancellor* [2014] EWCA Civ 1622, para 29

⁴⁰ <https://www.gov.uk/guidance/legal-aid-apply-for-exceptional-case-funding>



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The forms are designed to help you provide the right information in your legal aid application, but you don't have to use them. You must sign your application, whatever format you have made it in.

The CIV ECF1 form asks questions about why you're applying for exceptional case funding. The means and merits forms ask questions about your financial circumstances and your case. If you have questions about which form to use, phone us or email the Exceptional Case Funding Team (ECF).

As a minimum, send the following to us in writing:

- *Background to your case, including all the main facts.*
- *What you need legal advice on or what court proceedings you need representation in. Explain why you cannot represent yourself.*
- *What outcome you wish to achieve.*
- *Information that will support your application eg court applications and orders, expert and medical reports, copies of any decisions you wish to challenge.*
- *Information on your financial situation. '*

47. The links 'CIV ECF Form' and 'means and merits forms' under the heading 'How to apply for the public' all lead to a page which contains a link to the CIV ECF1 form and the CIV APP 5, which is used for Special Children Act 1989 cases, which are in-scope and for which ECF would not be required, as well as the Provider Information Packs and Lord Chancellor's Guidance on ECF (for Inquest and Non-Inquest cases). It's only if the person scrolls down to the bottom of the page, under the heading 'Details' that they will find the following information and links to some of the relevant forms:

'Included in this publication are:

- *CIV ECF 1*
- *provider information pack (inquest and non)*
- *Lord Chancellor's funding guidance (inquest and non)*

Submit all ECF forms with a relevant merits form:

- *CIV APP 3 for family cases*
- *CIV APP 1*

Also with a relevant means form:

- *CIV MEANS 1*
- *CIV MEANS 2 '*



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48. There is nothing on the page which tells a person wanting to apply for ECF which is the relevant 'means' form. In addition, these forms are relevant for applications for 'licenced' work (such as court proceedings) but there are no links or references to the 'controlled' work application forms which need to be completed when an individual wants ECF for initial advice or representation which is controlled work, for example before the First-tier Tribunal or Upper Tribunal in an immigration case.
49. The Lord Chancellor's Guidance on Exceptional Case Funding (Non-Inquests) which is available on the website explains that:
- 'All exceptional funding applications are also subject to the legal aid means and merits criteria (section 10(2)(b) and 10(4)(c)). Therefore, in order for an exceptional case to be funded under section 10, the applicant must also qualify for legal aid under the financial eligibility criteria set out in regulations made under section 21 and the merits criteria set out in regulations made under section 11. The merits criteria include, for example, an assessment of the availability of alternative funding.'*
50. However, there is no further guidance about the financial eligibility criteria or means criteria in the Lord Chancellor's Guidance, in the Provider Pack, or on the section of the LAA website dealing with ECF. An individual applicant looking at this section of the LAA website would have no way of knowing what the 'means' and 'merits' criteria against which his or her application for ECF will be considered.