

Legal Aid and Exceptional Case Funding

This fact sheet provides information on legal aid for migrant and refugee children in England and Wales. This includes what legal aid is, what is covered by legal aid, eligibility for legal aid and exceptional case funding.

If you have any questions about legal aid or relating to a refugee or migrant child, young person or family, you can call our Migrant Children's Project advice line on 0207 636 8505 or email mcp@coramclc.org.uk.

What is legal aid?

Legal aid is funding provided by the government to help meet the costs of some types of legal advice to people otherwise unable to afford legal representation.

Since April 2013, as a result of changes introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, there have been a number of areas of law that are no longer eligible for legal aid, including most immigration cases. This means that applications based on family or private life, citizenship applications and statelessness applications are not covered by legal aid.

What is still covered by legal aid?

Asylum & Protection Cases

Asylum cases remain in the scope of legal aid, which means that anyone making an asylum claim is still eligible for legal aid funding to be represented by a solicitor without having to pay, subject to a means and merits test.

Protection cases covered by legal aid also include:

- a claim for humanitarian protection (based on a real risk of suffering serious harm) under the Qualification Directive
- a claim based on Article 2 or Article 3 of the European Convention on Human Rights (right

to life, prohibition on inhuman and degrading treatment or punishment)

- a claim based on the Temporary Protection Directive. [1]

Victims of trafficking

Although access to legal aid was severely cut under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, it is available for victims of trafficking or modern slavery, as long as they have a positive reasonable grounds or a positive conclusive grounds decision. Legal aid is available for applications for leave to remain, rights under employment law and in cases for damages or compensation. [2]

Domestic Violence

Legal aid is available for those with ILR applications under the domestic violence rule – for those who came to the UK as a wife, partner or civil partner of someone who is British or settled in the UK.

Judicial Review

Judicial review is when a decision, action or lack of action by a public body is challenged in court. Judicial review is a remedy of last resort, where there are no further appeals or alternative procedures to deal with the dispute. In the context of children and immigration issues, this will be relevant in age disputes, immigration decisions with no appeal rights, trafficking decisions and certification of asylum claims.

Legal aid is available for investigative representation (investigating the strength of a proposed judicial review) and full representation (covering the judicial review).

Who is eligible for legal aid?

If a child or family need legal advice and representation and this is covered by legal aid, they will be subject to a means and merits test –

essentially a financial test and a judgement on the strength of their case.

Merits

There are three different levels at which asylum services are provided:

- Legal Help covers work by a solicitor or caseworker prior to any court or tribunal proceedings.
- Controlled Legal Representation covers representation and advocacy in proceedings for appeals against Home Office asylum decisions at the First-Tier Tribunal and Upper Tribunal
- Licensed Work covers representation in the higher courts, including the High Court.

There are different tests depending on the type of legal aid that someone needs.

At the legal help stage, the legal representative must be satisfied that there is 'sufficient benefit' in the case being pursued in light of the client's circumstances. This can be assessed by asking, 'would a privately paying client pay?'. This should be continually assessed by the legal representative as the case progresses.

At the Controlled Legal Representation stage (i.e. at appeal stage), the legal representative can only grant legal aid funding if they consider the case passes the merits test. They must be satisfied that the prospects of success are above 50% (unless the case raises a significant public interest, significant human rights issues, or is of overwhelming importance to the client) and the likely benefits justify the likely costs.

If a legal representative refuses legal aid for Controlled Legal Representation, they must complete a CW4 form with reasons for their decision and give it to the client. They must advise the client of their decision and the client's right to have it reviewed. If the client wants the decision reviewed, the legal representative should send the CW4 appeal to the Independent Funding Adjudicator for the client.

It is also possible for the client to go to another legal representative, who may take a different view of the case and help the client challenge the refusal of legal aid for the appeal and then represent them at appeal.

Means

The financial requirements relate to an individual's income and assets. Generally, disposable income should not exceed £733 per month and disposable capital not exceeding £8,000 (£3,000 for certain immigration matters). For further information, see the gov.uk website and the Legal Aid Agency keycard. [3]

For a child seeking legal representation in their own right, it may be only their own resources that are to be assessed, but this varies and the resources of other persons (such as parents or guardians) can be considered in some circumstances.

For looked after and accommodated children seeking asylum, the local authority should provide a letter to the legal representative confirming that they are caring for the child and the financial and accommodation support that child receives.

Exceptional Case Funding

General

When the government made these cuts to civil legal aid, it created a 'safety net' provision to grant legal aid in exceptional cases where funding is necessary to avoid a breach of someone's human rights or a breach of European Union law. [4]

The most relevant human right for ECF is Article 6 of the European Convention on Human Rights (ECHR), which guarantees a right to a fair hearing when an individual's rights and obligations are being determined. Other human rights may also require legal aid so they can be protected, including the rights to a private and family life under Article 8 of the ECHR. [5]

If there are compelling reasons why someone particularly needs legal aid funding, an application for Exceptional Case Funding (ECF) should be made to the Legal Aid Agency.

Where Article 8 is engaged in relation to a particular decision-making process, caseworkers deciding whether to grant funding will need to consider:

- the importance of the issues at stake;
- the complexity of the procedural, legal and evidential issues; and
- the ability of the individual to represent themselves (or to participate in the process) without legal assistance, having regard to their age and mental capacity. [6]

For children, there are particular reasons why legal aid funding should be available if they are to participate in any meaningful way in the complex administrative and judicial processes that determine their fate. Immigration cases are usually procedurally and legally complex, and the issues at stake, such as family life and the welfare of children, are of great importance.

The government's domestic and international duties to children are also relevant, including the duty to treat the best interests of the child as a primary consideration (Article 3, UN Convention on the Rights of the Child – 'UNCRC') and the duty to assure the right of the child to be heard in any judicial and administrative proceedings affecting them (the voice of the child, Article 12, UNCRC). These and other arguments should be put forward in an application to the Legal Aid Agency for exceptional funding.

In order to qualify for exceptional funding, the person must pass the normal financial eligibility test and merits criteria for legal aid (see above).

Application

Solicitors are unable to grant ECF to a client. Instead, where a solicitor is making the application for the person, they must apply using the form CIV ECF1 (available at www.gov.uk/government/publications/legal-aid-exceptional-case-funding-form-and-guidance and submit this to the ECF team at the Legal Aid Agency, along with other financial means and merits forms. Applications must be posted to The ECF Team, Legal Aid Agency, Post Point 6.42, Sixth Floor, 102 Petty

France, London SW1H 9AJ or sent by email to ECF@legalaid.gsi.gov.uk.

If an application for ECF is successful, it can be backdated so that funding for all work done on the case can be claimed for. [7]

Someone in need of legal aid funding can apply to the Legal Aid Agency directly without the assistance of a solicitor. They would need to provide information about their income and explain why they are applying for ECF. This can be done using the CIV ECF1 form and the relevant means form. However, the existing forms are very complicated and 'designed to be filled in by providers and not by applicants in person'. [8]

An individual applying themselves does not have to use the specified forms. They can instead write a letter, setting out the following information in order to get a 'preliminary view' on their case:

- Background to the case, including all the main facts;
- What they need legal advice on or what court proceedings they need representation in;
- Reasons why they cannot represent themselves;
- What outcome they wish to achieve;
- Information to support the application, e.g. court applications and orders, expert and medical reports, copies of any decisions to be challenged; and
- Information on their financial situation.

The letter must be signed and dated. Evidence of their income should be provided. More information can be found at www.gov.uk/legal-aid-apply-for-exceptional-case-funding.

How long will a decision take?

The Legal Aid Agency has set up a team to handle applications for exceptional funding. Information provided states that the team aims to process applications within 20 working days. [9]

If an applicant wants the application to be treated as urgent, page 13 of the CIV ECF1 should be completed, providing details of the urgency of the case. The Legal Aid Agency does not guarantee that an application will be determined before, for example, a court hearing date.

If an ECF application is refused

There is a review process for the ECF scheme. The applicant can apply for a review within 14 days of the Legal Aid Agency's refusal. The applicant should complete form APP9E (this is normally included when the written refusal is provided by the Legal Aid Agency) with the reasons why the decision should be reviewed and submit this to the ECF team by post or by email. **[10]** The review will be undertaken by a different caseworker to the original decision-maker. The Legal Aid Agency aims to process review applications within 10 working days.

At present, there is no right of appeal or further review process. Any further challenge will have to be through the process of judicial review to the High Court. It is possible to get legal aid in some circumstances for this kind of judicial review and a solicitor with an asylum and immigration or public law contract could advise on this.

Further assistance

The Public Law Project runs a limited Exceptional Funding Project which was designed to assist people in need of legal advice, assistance or representation with making exceptional funding applications and challenging refusals of funding. At this time the Public Law Project is only providing assistance and representation to challenge refusals of funding. It should be noted that PLP is a small organisation with limited capacity and cannot guarantee that it will be able to help all applicants. For more information and a referral form, see: www.publiclawproject.org.uk/exceptional-funding-project

The City University and No5 Chambers run the Immigration Human Rights Project, a project designed to provide one-off help to vulnerable people (such as families, young people and victims of human

trafficking) where public funding is not available and the individual cannot pay privately. All referrals must be sent from a referral organisation, usually a registered charity. The referral organisation will normally have to confirm that an immigration legal adviser has confirmed that a referral is suitable.

NOTES

- [1]** Para. 30, Part 1, Schedule 1, Legal Aid, Sentencing and Punishment of Offenders Act 2012, <http://www.legislation.gov.uk/ukpga/2012/10/introduction/enacted>
- [2]** Para. 32, Part 1, Schedule 1, Legal Aid, Sentencing and Punishment of Offenders Act 2012 <http://www.legislation.gov.uk/ukpga/2012/10/schedule/1/enacted>
- [3]** Gov.uk website, Legal Aid Agency, keycard 52 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/528095/eligibility-keycard.pdf
- [4]** Section 10 (3) (a) and (b), Legal Aid, Sentencing and Punishment of Offenders Act 2012
- [5]** Para 28, Lord Chancellors Exceptional Funding Guidance (Non-Inquests),at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/433502/legal-aid-chancellors-guide-exceptional-funding-non-inquests.pdf,
- [6]** Para 29, Lord Chancellors Exceptional Funding Guidance (Non-Inquests) <https://www.gov.uk/government/publications/legal-aid-exceptional-case-funding-form-and-guidance>
- [7]** Regulation 68(1) Civil Legal Aid (Procedure) Regulations 2012
- [8]** Para 32, *IS (by the Official Solicitor as Litigation Friend) v The Director of Legal Aid Casework and Anor* [2015] EWHC 1965 (Admin) (15 July 2015)
- [9]** Legal Aid Agency Exceptional Cases Funding – Provider Pack, p. 5.
- [10]** Legal Aid Agency Exceptional Cases Funding – Provider Pack, p. 7

This fact sheet should not be used to give legal advice and is for information and guidance only. For advice on individual cases, assistance should be sought from an independent regulated legal adviser.

For further assistance contact our advice line. Call 0207 636 8505 or email mcp@coramclc.org.uk