

Evidence for the LASPO Post-implementation Review Exceptional Case Funding, September 2018

As a safeguard to protect those without access to legal aid, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) provided for the Legal Aid Agency (LAA) to grant legal aid in 'exceptional cases', where it is deemed necessary to prevent a breach of human rights, or an EU law right, protecting access to justice for the most vulnerable in society.

Coram Children's Legal Centre (CCLC) runs a small Exceptional Case Funding (ECF) project, funded by trusts and grants, making direct ECF applications on behalf of children, young people and families with immigration issues. Where ECF applications have been successful, CCLC refers cases on to solicitors with capacity to take on new clients. Since December 2015, CCLC has assisted individuals to make 124 ECF applications. Of those applications, 83 were successful and 3 were withdrawn without a decision. Of the 38 which were refused in first instance, CCLC requested that they review 35 of those decisions. 11 were granted following the LAA's reconsideration. We referred some of these cases to other lawyers to start judicial review proceedings, five of which were subsequently granted, without proceedings being issued at court.

In CCLC's experience, the ECF scheme is woefully inadequate, and does not provide a safety net for vulnerable or disadvantaged children, young people and families we work with, who struggle to navigate complex legal processes and effectively advocate for their rights. We outline our concerns below.

Very few people are granted ECF

During the passage of LASPO, the Ministry of Justice predicted that between 5,000 and 7,000 applications for ECF would be made annually. In reality, the number of people applying has fallen far short of this estimate, with just 2,628 applications made in 2017-2018. The grant rate is also low: only 55% of applications were granted in the same year. These figures are the highest since the ECF scheme was introduced.

There are two ways to be granted ECF: to make an application yourself and then find a provider to represent you, or to persuade a legal aid provider to make an application on your behalf. The majority of applications for ECF are currently made by providers. However, this work is taken on at risk, as providers are not paid for making an application if ECF is not subsequently granted, and so there is a disincentive for them to apply. Only a small number of applications are made by individuals directly – 349 between 2016 and 2017 across all areas of law.¹

The LAA has emphasised the significant increase in applications from individuals on earlier years (there were 54 applications from individuals between 2014 and 2015), and attributed the increase to 'simplifications brought in to the ECF application form'.² However, in reality there is a third category of cases that has emerged: applications made with the support of a charity or other organisation which is not subsequently able to take on the case as a legal aid

¹ Data on direct applications from a Freedom of Information Request to the Ministry of Justice made by CCLC in July 2018

² The Legal Aid Agency, 'Legal Aid Statistics in England and Wales, April to June 2016: Ministry of Justice Statistics bulletin', September 2016

provider. CCLC alone assisted with one fifth of the direct applications made between 2016 and 2017, submitting applications written or supervised by a qualified solicitor, running on average to 20 pages of representations. CCLC is not the only charitable organisation making such applications on behalf of vulnerable individuals,³ and funding for this type of charitable support is insecure and unsustainable in the long-term.

The ECF scheme is not child-friendly

To be successful, an ECF application requires detailed information and evidence, and children and young people may find this a particular challenge. Even practitioners making an application on a child's behalf may face difficulties in obtaining sufficient instructions and evidence. It is very difficult to explain the process to a child client. Perhaps as a result, very few applications have been made by or on behalf of children and young people. For example, of the 2,628 applications in 2017-2018, only 116 applications (4%) were made by or on behalf of applicants aged 18 or under, 63% of which were granted. This is around nine applications per month across all areas of law combined. For young people aged 18-24, 262 (10%) of applications were made, and 60% of these were granted.⁴

The ECF application process is complex

The ECF application process itself is difficult for individuals applying by themselves. Applicants are expected to complete 25 pages of forms. They also have to demonstrate that their human rights or rights under EU law would be breached without legal representation, which requires at least a basic legal understanding. If applicants apply in another format, for example by writing a letter to the LAA, they will be asked to complete the required forms before their application will even be considered. Individuals who have high enough needs to meet the threshold to be eligible for ECF are likely to face additional barriers. The children, young people and families we advise across immigration, education and family law are vulnerable, and many have limited English, a learning difficulty or do not have access to a computer. These groups in particular are likely to struggle to navigate the forms and to explain why they need a lawyer.

Applications from unsupported individuals are much more likely to be refused or rejected by the LAA than applications from providers: applications from providers relating to an immigration case had a refusal rate of 32% in 2016- 17 while applications from individuals failed significantly more often – 50% were rejected or refused.⁵

Unsupported individuals are also less likely than providers to request a reconsideration of a refusal to grant ECF, or know how to go about doing so. Yet this can be essential for ensuring access to justice. In CCLC assisted cases in 2017, the LAA granted ECF on reconsideration in 86% of cases (six of seven cases).

³ Others include Rights of Women, Haringey Migrant Support Centre and City University and No5 Chambers Immigration Human Rights Project

⁴ Data on age of applicants provided in a response Freedom of Information Request to the Ministry of Justice made by CCLC in July 2018

⁵ We have subtracted our cases from the percentages calculated relating to direct individual applications because, as legally-trained individuals, our numbers would otherwise distort figures

ECF is not an adequate safety net for urgent cases

The ECF scheme is not an adequate safety net for urgent human rights cases. LAA guidance states that ECF applications will be processed within 20 working days⁶ and that urgent applications will be dealt with within five working days. If an application is refused, a reconsideration request should be processed within 10 working days. We have found that many cases are resolved outside those timeframes. In 2018 so far, it has taken 32 days on average to receive a decision. For cases we marked as urgent, it has taken 27 days to make a decision – with serious consequences. In a FOI response to CCLC in August 2018, the LAA revealed that there are currently 88 applications for ECF outstanding from the period January-March 2018.

Lack of information about ECF and legal aid

The majority of children, young people and families with children we work with who were eligible for ECF were not aware of the scheme before we advised them. Given the extent of the changes to legal aid provisions, it is surprising that the Ministry of Justice has not undertaken a clear and accessible public campaign to raise awareness of the availability of ECF. If it is to work as a ‘safety net’, the promotion of the scheme should be made a priority, so that the most vulnerable people are not denied the opportunity to access advice and assistance that is available to them.

Recommendations

- We would urge the Legal Aid Agency to reform the ECF system. In the immediate term, a question should be added to the CIV ECF1 form to ask about the rights and interests of any affected children. Where the applicant is a child, a presumption should operate so that the child could expect to have their case for civil legal aid funding granted, in line with children’s rights standards. The LAA should accordingly publish guidance for its casework staff deciding ECF applications on how to handle applications affecting children.
- ECF applications should be simplified for those applying without support. Step-by-step guidance through the whole application process should also be available.
- There should to be a public information campaign on exceptional case funding and legal aid eligibility in general. In particular, further work should be done to promote the use of the ECF to those working with children and young people, in an effort to counter the low proportion of applications from them.
- The Legal Aid Agency should ensure that sufficient resources are allocated to allow for urgent cases to be decided within an appropriately quick time-frame.

⁶ The LAA now tells applicants the time frame is 25 working days, although the guidance has not been amended.

Case studies

CLAS advised a father seeking advice on the care arrangements for his two young children, following their mother leaving. The mother had initially taken the children to stay with the maternal grandparents. The father claimed that the children did not want to do this, and that they were afraid of the grandmother who had previously been violent. The father applied for and was granted an emergency residence order. A further hearing was scheduled for eight weeks' time and he sought advice on his legal position and what process would follow. He could not read or write, was dyslexic, and was unable to complete court forms on his own. With an ECF application made on the basis of the father's learning difficulties and the children's rights, the father could have representation in the family court. However, the forms were too long and daunting, and the caller stated that he could not apply. Unable to pay, he had to go to court alone.

Having become destitute, Jonathon, his wife Mary and their son, who had complex medical issues including severe epilepsy were about to be evicted from their home. They were refused support from social services because they were unable to show that they had an immigration status in the UK. They also needed to make an immigration application based on the life they have built here in the UK and their son's medical needs.

After coming to an outreach session, the family were helped to secure emergency accommodation and support from their local authority. CCLC then prepared an application for ECF for the family's immigration matter. This was refused and CCLC then prepared and submitted a request that the LAA reconsider its decision. Three days later, Jonathon was detained, and notified that he would be removed from the UK.

The mother of the family, Mary spoke limited English and was caring for the couple's son, who required 24 hour care. She very clearly struggled to understand what had happened, what steps she needed to take to request his release, and how to gather the evidence required. CCLC updated the LAA immediately and requested an urgent response. Despite the obvious urgency, a decision was not received until 17 working days after the LAA had been notified of the fact the father had been detained (20 working days after the reconsideration request had been submitted). CCLC's request was successful and the family were granted ECF, 55 working days after the initial application had been made. CCLC then secured representation for the family and an immigration application was submitted.

Had CCLC not intervened, the family would have been left to deal with a complex and traumatic experience by themselves, and it is likely that Jonathon would have been removed from the UK, away from his ill child.

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