

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.

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 ('LASPO'), there have been a number of areas of law that are no longer eligible for legal aid. This includes 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

Anyone making an asylum claim is still eligible for legal aid funding, 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

Legal aid is available for advice on leave to enter or remain or discretionary leave to remain to those found by the National Referral Mechanism to be potential victims of trafficking (a reasonable grounds decision) or those found to be definitely a victim of trafficking (conclusive grounds decision).

Legal aid is also available in claims under employment law in connection with exploitation of a person found to be a victim of trafficking, and in cases for damages or compensation arising from the trafficking. [2]

Domestic Violence

Legal aid is available for those making an application for Indefinite Leave to Remain (ILR) under the domestic violence provision of the Immigration Rules – a person granted leave to enter or remain in the UK as the spouse/partner/civil partner of someone British/settled in the UK, and the relationship permanently broke down as a result of domestic violence during the leave.

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).

Children in care

In July 2018 the UK government announced that they would be bringing legal aid back in scope for immigration matters for children in care. [3] This

followed a judicial review brought by the Children's Society.

This has not yet been brought into force as of 31st July 2019. It is currently going through parliamentary procedure. There is a presumption that unaccompanied and separated migrant children require legal aid and exceptional case funding applications do not require detailed evidence. [4] For further guidance, please see the guidance on ECF for separated children. [5]

Who is eligible for legal aid?

If a child or family need legal advice and representation on an area of law 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 to determine whether they are eligible for legal aid funding.

Merits

There are three different levels of legal aid at which 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 appeal proceedings against Home Office decisions in the First-Tier Tribunal and Upper Tribunal
- Licensed Work covers representation in the higher courts, including the High Court

There are different merits 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. 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 that 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 exceed £8,000 (£3,000 for certain immigration matters). For further information, see the gov.uk website. [6] For a child seeking legal representation in their own right, only their own financial resources may be assessed, but this varies. The financial resources of other persons (such as parents or guardians) need to be considered in some circumstances.

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

Exceptional Case Funding

General

The government sought to create a 'safety net' provision to grant legal aid in exceptional cases when

they made cuts to legal aid. This was intended for situations where funding is necessary to avoid a breach of someone's human rights or a breach of European Union law. [7]

The most relevant human right for Exceptional Case Funding (ECF) is Article 6 of the European Convention on Human Rights (ECHR), which guarantees a right to a fair hearing. 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. [8]

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 (LAA).

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, the complexity and the ability of the individual to represent themselves/participate. [9]

For children, there are particular reasons why legal aid funding should be available. This rests on their ability 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 duties to children are 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 to assure the right of the child to be heard in judicial/administrative proceedings affecting them (Article 12, UNCRC). These and other arguments should be put forward in an application to the LAA.

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 <https://www.gov.uk/government/publications/legal-aid-exceptional-case-funding-form-and-guidance>).

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. [10]

Someone in need of legal aid funding can apply to the LAA 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'. [11]

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 ECF team at the LAA aims to process applications within 20 working days. [12]

If an applicant wants the application to be treated as urgent and decided within 5 working days, page 13 of the CIV ECF1 should be completed, providing details of the urgency of the case. The LAA 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 LAA's refusal. The applicant should complete form APP9E (this is normally included when the written refusal is provided by the LAA). [13] The review will be undertaken by a different caseworker to the original decision-maker. The LAA 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 ('PLP') provides information on applying for ECF -

<https://publiclawproject.org.uk/what-we-do/current-projects-and-activities/legal-aid/exceptional-funding-project/> PLP also have a database of organisations that may be able to assist with ECF applications - <https://publiclawproject.org.uk/what-we-do/current-projects-and-activities/legal-aid/exceptional-funding-project/database-of-organisations-supporting-ecf-applications/>

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.

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, *ibid*
- [3] Justice Update: Written statement, HCWS853, 12 July 2018
<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-07-12/HCWS853/>
- [4] Ministry of Justice, Legal aid for unaccompanied and separated children, August 2018
<https://www.gov.uk/government/publications/legal-aid-for-unaccompanied-and-separated-children>
- [5]
- [6] Gov.uk website, Legal Aid Agency
<https://www.gov.uk/guidance/civil-legal-aid-means-testing>
- [7] Section 10 (3) (a) and (b), Legal Aid, Sentencing and Punishment of Offenders Act 2012
- [8] 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,
- [9] Para 29, Lord Chancellors Exceptional Funding Guidance (Non-Inquests)
- [10] Regulation 68(1) Civil Legal Aid (Procedure) Regulations 2012
- [11] 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)
- [12] Legal Aid Agency Exceptional Cases Funding – Provider Pack, p. 5.
- [13] 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: mcpadvice@coramclc.org.uk