

Practical Tips for Possession: The View from the Housing Possession Duty Desk and Exceptional Funding under LASPO

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Exceptional Funding Under LASPO – the housing law perspective

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1. The jurisdiction to grant exceptional funding

The jurisdiction to grant exceptional funding is contained in s10 Legal Aid Sentencing and Punishment of Offenders Act 2013. It is a considerably narrower jurisdiction than under the old regime, pursuant to s6(8)(b) Access to Justice Act 1999, whereby funding would be provided for cases of significant wider public interest, overwhelming importance to the client, or where there were other exceptional circumstances such that without public funding for representation it would be practically impossible for the client to bring or defend the proceedings, or the lack of public funding would lead to obvious unfairness in the proceedings (Jarrett Complexity); see chapter 27 of the funding code guidance¹.

10 Exceptional cases

- (1) Civil legal services other than services described in Part 1 of Schedule 1 are to be available to an individual under this Part if subsection (2) or (4) is satisfied.
- (2) This subsection is satisfied where the Director—
 - (a) has made an exceptional case determination in relation to the individual and the services, and
 - (b) has determined that the individual qualifies for the services in accordance with this Part, (and has not withdrawn either determination).
- (3) For the purposes of subsection (2), an exceptional case determination is a determination—
 - (a) that it is necessary to make the services available to the individual under this Part because failure to do so would be a breach of—
 - (i) the individual's Convention rights (within the meaning of the Human Rights Act 1998), or
 - (ii) any rights of the individual to the provision of legal services that are enforceable EU rights, or
 - (b) that it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach.

Now funding will be granted only in four situations:

- where it is necessary to avoid a breach of the individual's rights under the ECHR
- where it is necessary to avoid a breach of the individual's EU rights

¹ [http://www.justice.gov.uk/downloads/legal-aid/funding-code/
Funding Code Chapter 27 Exceptional Funding Oct 11.pdf](http://www.justice.gov.uk/downloads/legal-aid/funding-code/Funding_Code_Chapter_27_Exceptional_Funding_Oct_11.pdf)

- where it is appropriate having regard to the risk of a breach of the individual's rights under the ECHR
- where it is appropriate having regard to the risk of a breach of the individual's EU rights

Note: funding is only available to cover services other than services described in Part 1 of Schedule 1, i.e. excluded services. So, for example, exceptional funding cannot cover small claims where funding would have been available had the case not been allocated to the small claims track.

In relation to cases, where there is a risk of breach, the Lord Chancellor's Exceptional Funding Guidance (Non-Inquests)² states that the jurisdiction will arise:

7. ... in those rare cases where it cannot be said with certainty whether the failure to fund would amount to a breach of the rights set out at section 10(3)(a) but the risk of breach is so substantial that it is nevertheless appropriate to fund in all the circumstances of the case. This may be so, for example, where the case law is uncertain (owing, for example, to conflicting judgments).

2. When will exceptional funding be granted?

2.1 The first gateway: funding to avoid a breach of the individual's rights under the ECHR

The Article of the ECHR most likely to be relevant to housing work is Art.6:

Article 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Although note that other Articles of the ECHR may also entail procedural protections sufficient to give rise to a "right to legal aid" e.g. Art.2 and Art.8.

As will be seen below, the right to legal aid is linked to the individual's procedural rights rather than the substantive right in question.

2.1.1 Civil rights?

In order to establish that the provision of legal aid is necessary to avoid a breach of an individual's rights under Art.6, the first stage is to establish that the case involves a "determination of his civil rights".

² <http://www.justice.gov.uk/downloads/legal-aid/funding-code/chancellors-guide-exceptional-funding-non-inquests.pdf>. This is statutory guidance issued by the Lord Chancellor to the Director of Legal Aid Casework under section 4(3) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012

In *Tsfayo v United Kingdom* [2007] ECHR 656, 48 EHRR 457 it was conceded by the UK that a housing benefit decision involved the determination of civil rights.

In other cases involving benefits there is no bright line. The test, distilled from the Strasbourg case law was set out by Lord Hope in *Ali v Birmingham City Council* [2010] UKSC 8, [2010] 2 A.C. 39:

43. ...a distinction can indeed be made between the class of social security and welfare benefits that are of the kind exemplified by *Salesi v Italy* 26 EHRR 187 whose substance the domestic law defines precisely and those benefits which are, in their essence, dependent upon the exercise of judgment by the relevant authority.

2.1.2 A fair hearing...

Once it has been established that the case involves a determination of the individual's civil rights, the second stage is to show that legal aid is necessary to ensure that the individual has a fair hearing, to avoid a breach of Art.6.

In assessing this, a sensible starting point is the Lord Chancellor's Exceptional Funding Guidance (Non-Inquests)³. The guidance is based on the Strasbourg jurisprudence which can be traced back to the case of *Airey v Ireland* (1979-80) 2 EHRR 305; the first instance where the ECtHR ruled that the the state may be under a positive obligation to provide legal aid to avoid a breach of Art.6:

24. The Government contend that the applicant does enjoy access to the High Court, since she is free to go before that court without the assistance of a lawyer. The Court does not regard this possibility, of itself, as conclusive of the matter. The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. ...the Court considers it most improbable that a person in Mrs. Airey's position (see para. 8 above) can effectively present his or her own case.

26. The conclusion appearing at the end of paragraph 24 above does not therefore imply that the State must provide free legal aid for every dispute relating to a 'civil right'... [but] Article 6 (1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.

...
28. Having regard to all the circumstances of the case, the Court finds that Mrs. Airey did not enjoy an effective right of access to the High Court for the purpose of petitioning for a decree of judicial separation. There has accordingly been a breach of Article 6 (1).
[emphasis added]

The court was at pains to stress that the provision of legal aid may not be the only way to avoid a breach of Art.6. For example, simplifying proceedings may suffice.

The court also found that there had been a breach of Mrs Airey's Art.8 rights.

³ <http://www.justice.gov.uk/downloads/legal-aid/funding-code/chancellors-guide-exceptional-funding-non-inquests.pdf>

33. ...Effective respect for private or family life obliges Ireland to make this means of protection effectively accessible, when appropriate, to anyone who may wish to have recourse thereto. However, it was not effectively accessible to the applicant: not having been put in a position in which she could apply to the High Court (see paras. 20–28 above), she was unable to seek recognition in law of her *de facto* separation from her husband. She has therefore been the victim of a violation of Article 8.

Over time, the principles in *Airey* have been “distilled” into a single test:

11. Thus the principle distilled by the Commission from the decision of the Court in *Airey* was that:

"only in exceptional circumstances, namely where the withholding of legal aid would make the assertion of a civil claim practically impossible, or where it would lead to obvious unfairness of the proceedings can such a right be invoked by virtue of Article 6(1) of the Convention."

Pine v The Law Society [2001] EWCA Civ 1574, [11] per the Vice Chancellor citing *X v United Kingdom* (1984) 6 EHRR 136, [3]-[4].

The next landmark case is that of *Steel and Morris v United Kingdom* (2005) 41 E.H.R.R. 22, where the factual circumstances which will give rise to a breach of Art.6 were discussed in rather more detail:

59 The Court recalls that the Convention is intended to guarantee practical and effective rights. This is particularly so of the right of access to court in view of the prominent place held in a democratic society by the right to a fair trial. It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side.

60 Article 6(1) leaves to the state a free choice of the means to be used in guaranteeing litigants the above rights. The institution of a legal aid scheme constitutes one of those means but there are others, such as for example simplifying the applicable procedure.

61 The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, *inter alia*, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively.

62 The right of access to a court is not, however, absolute and may be subject to restrictions, provided that these pursue a legitimate aim and are proportionate. It may therefore be acceptable to impose conditions on the grant of legal aid based, *inter alia*, on the financial situation of the litigant or his or her prospects of success in the proceedings. Moreover, it is not incumbent on the State to seek through the use of public funds to ensure total equality of arms between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage *vis-à-vis* the adversary.

...

72 In conclusion, therefore, the Court finds that the denial of legal aid to the applicants deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms with McDonald's. There has, therefore, been a violation of Art.6(1) .[emphasis added]

So, the overarching question is whether the withholding of legal aid would make the assertion of a

civil claim practically impossible, or where it would lead to obvious unfairness of the proceedings. This is a question of fact and circumstance. The following factors may be relevant but are not exhaustive:

- the importance of what is at stake for the applicant (e.g. loss of liberty, home or financial implications);
- the complexity of the relevant law;
- the complexity of the relevant procedure;
- factual complexity (e.g. many or expert witnesses);
- the applicant's capacity to represent him or herself effectively (e.g. disabilities, level of education, emotional attachment to the case);
- inequality of arms.

2.2 The second gateway: funding to avoid a breach of the individual's EU rights

The starting point in most cases will be Art.47 of the EU Charter of Fundamental Rights:

Article 47

Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Read with Art.51(1) of the Charter, this provides a right to legal aid where it is necessary to secure an effective remedy in cases which involve the implementation of EU law. Predictably enough this is not an absolute right. The effect of Art.52 is that the right to legal aid will arise in the same circumstances as under the ECHR

Article 52

Scope of guaranteed rights

...

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

See also, the Explanation of Art.47 contained in the Explanations relating to the Charter of Fundamental Rights 2007/C 303/02⁴:

In Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Union is a community based on the rule of law as stated by the Court in Case 294/83, *Les Verts v European*

⁴ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF>

Parliament (judgment of 23 April 1986, [1986] ECR 1339). Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union. With regard to the third paragraph, it should be noted that in accordance with the case-law of the European Court of Human Rights, provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy (ECHR judgment of 9 October 1979, *Airey*, Series A, Volume 32, p. 11).

In summary, the test for providing legal aid to avoid a breach of EU rights is the same as under the ECHR, though the case does not need to involve a determination of civil rights. However, the case must involve the implementation of EU law.

3. Making the application

3.1 Will I get paid for making the application?

See section 6 pp5-6 of the Legal Aid Agency publication, the Exceptional Cases Funding – Provider Pack⁵:

Clause 1.37 of the 2013 Standard Civil Contract Specification and Clause 1.50 of the 2010 Standard Civil Contract Specification both say that you may charge privately for civil legal services which are not described in Part 1 of Schedule 1 to the Act (including for making an application for a determination under section 10 of the Act). If the case later becomes an Exceptional Case you may not charge privately for any work which becomes payable under Legal Aid pursuant to a determination under section 10 of the Act. Where you have already received payment from the Client for work which has become payable under Legal Aid pursuant to a determination under section 10 of the Act, you must refund such payment to the Client.

Note, p4 section 5: “[n]o payment will be made for unsuccessful applications”.

Successful controlled work applications will be backdated to the point at which the client signed the forms. Successful applications for licensed work will be backdated to the date of instruction.

3.2 What form(s) do I use?

See section 5 pp4-5 Exceptional Cases Funding – Provider Pack and <http://www.justice.gov.uk/legal-aid/funding/exceptional-cases-funding>.

- Licensed work - form CIV ECF1 must be submitted as a supplement to CIV APP1 (for non family licensed work or special case work) and the relevant means form;
- For Controlled Work applications CIV ECF1 must be submitted with the relevant controlled work form and the means assessment for Controlled Work must be undertaken in accordance with the usual requirements

⁵ <http://www.justice.gov.uk/downloads/legal-aid/funding-code/ecf-provider-pack.pdf>

All completed applications for an exceptional case determination must be sent to the ECF Team at Legal Aid Agency, Post Point 6.42, Sixth Floor, 102 Petty France London SW1H 9AJ or Legal Aid Agency, DX 16144, Westminster 8. Applications may also be scanned and submitted by e-mail to the ECF team e-mail address: ECF@legalaid.gsi.gov.uk.

Note that a successful application for exceptional funding for controlled work will not use up one of your matter starts. See LAA Frequently Asked Questions: Civil Legal Aid Reforms⁶ Q126.

3.3 Do I still need to apply the merits test? Which merits test do I apply?

The relevant merits test in respect of the substantive matter will still need to be addressed in the App1. Regulations 49-50 of the Civil Legal Aid (Merits) Regulations 2012⁷ dictate which merits test should be applied:

Application of the merits criteria in cases which are exceptional cases excluded from Part 1 of Schedule 1 to the Act

49.—(1) The Director must apply the merits criteria in paragraph (2) for the purpose of making a determination under section 10(2)(b) of the Act (exceptional cases) in relation to civil legal services in any matter which would fall within a description in Part 1 of Schedule 1 to the Act, but for an exclusion in Part 2 (excluded services) or Part 3 (advocacy: exclusions and exceptions) of that Schedule.

(2) The criteria referred to in paragraph (1) are the merits criteria which would have applied in relation to that matter had it not been subject to that exclusion.

A housing benefit matter connected to possession proceedings would fall within this regulation since the matter would fall within paragraph 33 part 1 Schedule 1 LASPO (legal services in relation to court orders for possession of the individual's home) but for the general exclusion of welfare benefits cases in paragraph 15 part 2 Schedule 1. The merits test at regulation 61 Civil Legal Aid (Merits) Regulations 2012 would apply.

Application of the merits criteria in cases which are exceptional cases other than by virtue of the exclusions in Part 2 or 3 of Schedule 1 to the Act

50.—(1) To the extent that regulation 49 does not apply, the Director must apply the merits criteria in paragraph (2) for the purpose of making a determination under section 10(2)(b) of the Act (exceptional cases) in relation to any matter in which civil legal services are not otherwise available because they are not described in Part 1 of Schedule 1 to the Act.

(2) The criteria referred to in paragraph (1) are the merits criteria which appear to the Director to be most appropriate in all the circumstances of the case.

A housing benefit matter not connected to possession proceedings would fall within this regulation. The generic merits test at regulation 41 Civil Legal Aid (Merits) Regulations 2012 would apply.

3.4 Can I use devolved powers to make the application?

⁶ <http://www.justice.gov.uk/downloads/legal-aid/legal-aid-reform/legal-aid-reform-faq.pdf>

⁷ <http://www.legislation.gov.uk/ukxi/2013/104/contents/made>

Devolved powers, under the new civil contract, are now referred to as delegated functions. They are only available in limited circumstances e.g. urgent homelessness judicial review under part 7 Housing Act 1996; see paragraph 5.3 2013 Standard Civil Contract Specification⁸.

Providers are not and will not be authorised to use delegated functions to make exceptional funding applications. All exceptional case determinations must be made to the Legal Aid Agency. See section 4 pp3-4 Exceptional Cases Funding – Provider Pack.

3.5 What if the case is urgent?

The usual procedures for dealing with urgent applications do not apply to applications for exceptional funding. See regulation 66 of the Civil Legal Aid (Procedure) Regulations 2012⁹:

General

66.—(1) This Part makes provision about the making and withdrawal of determinations under section 10 of the Act about exceptional cases.

...
(3) The provisions in these Regulations about—

...
(c) emergency representation,

do not apply to the making and withdrawal of determinations under section 10 of the Act.

See also sections 5-6, pp5-6 of the Exceptional Cases Funding – Provider Pack:

We will aim to process the application within 20 working days...

If you wish the application to be treated as urgent you should complete page 13 of the CIV ECF1 to provide us with details as to the urgency of the case, for example an imminent date for a hearing or the imminent expiry of a limitation date or reasons why delay would cause risk of harm or prejudice to the client's case. We will consider the information that you have provided and if we agree, then we will deal with your case ahead of non urgent applications... However we cannot guarantee that the application will be determined before a hearing day or before specified urgent work is needed. We can provide information if you call our ECF telephone enquiry line about the likely timeframe for completion of a pending application.

3.6 If the application is successful can I carry out the work myself?

The answer to this question is governed by regulation 67 of the Civil Legal Aid (Procedure) Regulations 2012.

The application

⁸ <https://www.justice.gov.uk/downloads/legal-aid/civil-contracts/2013-standard-civil-contract-general-specification.pdf>

⁹ <http://www.legislation.gov.uk/ukSI/2012/3098/regulation/26/made>

67.—(1) Where the civil legal services which are the subject of an application are described in a category in the Category Definitions that form part of the 2010 Standard Civil Contract or 2013 Standard Civil Contract, the application must specify—

- (a) the category within which the civil legal services are described; and
- (b) if the individual has identified a proposed provider, a provider with whom the Lord Chancellor has made an arrangement under section 2(1) of the Act for the provision of services which fall within the category specified in the application (unless the effective administration of justice test is satisfied).

The effect of this is that if the area of law falls within the scope of an existing contract type, and the client wishes to nominate a particular provider, then within the ECF1 you are required to specify either:

- A proposed provider with a contract in the relevant area of law; OR
- Explain why the effective administration of justice requires that you (or another firm without a contract) should be able to undertake the work.

So, to carry out the work yourself, the efficient administration of justice test must be satisfied. What does this mean?

Interpretation

2. In these Regulations—

...

“the effective administration of justice test” has the meaning given in regulation 31(5);

The application

31.— (5) The effective administration of justice test is satisfied if the Director decides that it is necessary for a provider to provide the services which are the subject of the application under an individual case contract having considered—

- (a) the provider’s knowledge of the particular proceedings or dispute and expertise in providing the civil legal services which are the subject of the application;
- (b) the nature and likely length of the particular proceedings or dispute;
- (c) the complexity of the issues; and
- (d) the circumstances of the individual making the application.

If you are successful in your application and satisfy the LAA that the efficient administration of justice test is met, then you will be offered an individual case contract to carry out the work. See section 9, pp7-8 of the Exceptional Cases Funding – Provider Pack.

4. Reviews and appeals

What if the LAA rejects the application for exceptional funding? In respect of the vast majority of determinations made under the Civil Legal Aid (Procedure) Regulations 2012, there exists a right to a review by the Director followed by a right of appeal from the decision of the Director to an

independent adjudicator. In respect of applications for exceptional funding, only the former right exists.

General

66.—(1) This Part makes provision about the making and withdrawal of determinations under section 10 of the Act about exceptional cases.

...
(3) The provisions in these Regulations about—
(a) appeals;
(b) review (other than in this Part);

...
do not apply to the making and withdrawal of determinations under section 10 of the Act.

Review

69.—(1) The individual may, in accordance with paragraph (2), apply for a review of—
(a) a refusal to make a determination under section 10(2)(a) or 10(4)(b) of the Act;
(b) a determination that an individual does not qualify for the services under section 10(2)(b) or 10(4)(c) of the Act;
(c) an amendment of, or refusal to amend, a limitation or condition to which a determination under section 10(2)(b) or 10(4)(c) of the Act is subject; or
(d) a withdrawal of a determination.

(2) Within fourteen days of receipt of a refusal, determination, amendment, or withdrawal described in paragraph (1) (a “decision”), the individual may—
(a) apply to the Director for a review of the decision in a form specified by the Lord Chancellor; and
(b) include written representations supporting that application.

(3) The Director must consider the application and any written representations and may—
(a) confirm or amend the decision which is the subject of the review; or
(b) substitute a new decision.

(4) Where the decision which is the subject of the review was the withdrawal of a determination and, following the review, the Director substitutes a determination for that withdrawal, the determination takes effect (unless the Director directs otherwise) as if the original decision had not been made.

(5) The Director must ensure that a certificate accurately records the civil legal services for which the individual qualifies following the review (unless the services are to be provided as Controlled Work).

(6) The Director must notify the individual and the provider or proposed provider identified in the individual’s application of the decision following the review.

The review must be sought within 14 days of receipt of the decision. For the procedure see section 8 p7 of the Exceptional Cases Funding – Provider Pack:

The applicant should provide Form APP9E together with grounds for review and any supporting documentation to the ECF Team at Legal Aid Agency, Post Point 6.42, Sixth Floor, 102 Petty France London SW1H 9AJ or Legal Aid Agency, DX 161440 Westminster 8 or by e-mail [see details on our ECF webpage].

We will aim to process the application for review within 10 working days and notify the outcome.

If the review process does not achieve a satisfactory decision then the remedy is by way of judicial review.

5. The PLP exceptional funding project

See http://www.publiclawproject.org.uk/exceptional_funding_project_page.html

The Public Law Project is looking for exceptional funding referrals from solicitors and advisers who do not have the capacity to make exceptional funding applications under LASPO 2012 for their clients or challenge unfair refusals of funding.

...

The Public Law Project's (PLP) exceptional funding project is designed to assist people in need of legal advice, assistance or representation with making exceptional funding applications and challenging refusals of funding where appropriate.

...

Solicitors can in principle assist you to make an application for exceptional funding. However, legal aid for making the application will only be available retrospectively if the application is subsequently granted. It is widely anticipated that such applications will only very rarely be granted, and as they are likely to be time-consuming for solicitors, PLP is concerned that many solicitors will refuse to make them.

For this reason, PLP has developed this Exceptional Funding Project to assist those that cannot get help from another source to make an application for exceptional funding. However, PLP is a small organisation with limited capacity. Whilst we will do our best to assist, we cannot guarantee that we will be able to help all applicants that refer their cases to us, and applicants are strongly advised to exhaust all other advice options before applying to PLP for assistance.

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