

Public
Law
Project

A practical introduction to legal aid and Exceptional Case Funding

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A practical introduction to legal aid and ECF

1. Background
2. Is it in scope?
3. Does your client qualify financially?
4. Does the case meet the merits test?
5. Questions



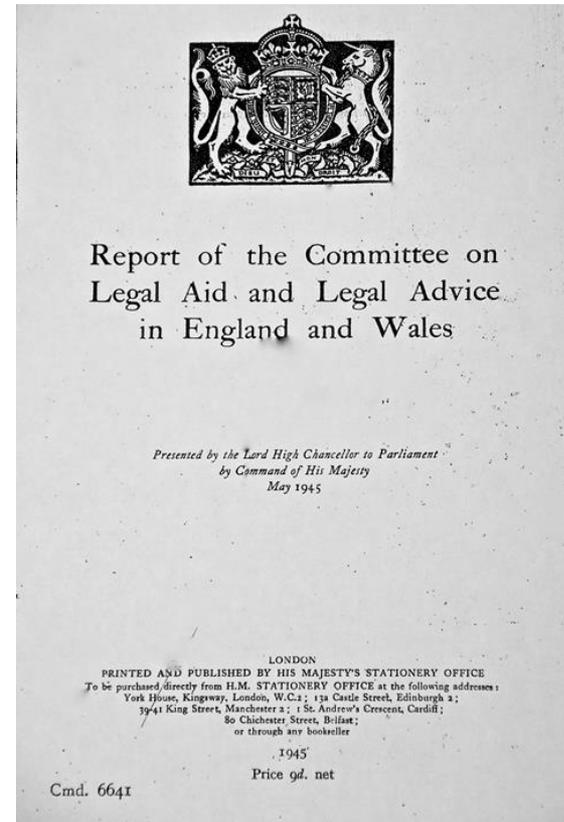
Legal aid – quiz question

A study of the decisions made by the Asylum Support Tribunal (AST) found that the direct impact of legal representation at the AST was:

- A) 38.6% of appellants with no legal representation or pre-legal advice were successful in their appeals
- B) 44.4% of appellants with no legal representation or pre-legal advice were successful in their appeals
- C) 56.4% of appellants with no legal representation or pre-legal advice were successful in their appeals

Legal aid – some history

- Established by the Legal Advice and Assistance Act 1949
- In 1950, 80% of the population was financially eligible for legal aid
- Initially predominantly in family and criminal cases
- Law Centres movement of the 1970s expanded the reach of legal aid into other areas of social welfare law



Legal aid - some history

- Until 1988 legal aid administered by the Law Society
- Access to Justice Act 1999 established the Legal Services Commission
- Certain areas of law excluded from legal aid including personal injury, conveyancing, wills and trusts, and company law
- Representation before most Tribunals also excluded

LASPO

- Legal Aid, Sentencing and Punishment of Offenders Act 2012 came into force in April 2013 introducing severe limits on civil legal aid
- Reversed position under Access to Justice Act – instead of specifically excluding areas of law, LASPO specifies what is “in scope”
- Provided for Exceptional Case Funding to be available in some out of scope cases

What is in scope?

- 'Transforming Legal Aid'
Consultation: legal aid refocused on the most serious cases and those who need it the most
- Section 9 LASPO: Civil legal services are available if they are a service described in Schedule 1
- Schedule 1 is effectively a list of the types of cases which remain funded, including public law family cases, asylum, homelessness, Human Rights Act claims



Exceptional Case Funding

Section 10 LASPO:

(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.**

When does a failure to provide legal aid breach Convention Rights?

- Articles 6 and 8 ECHR
- Article 47 Charter of Fundamental Rights
- Gudanaviciene v Director of Legal Aid Casework [2014 EWCA Civ 1622]
- Challenge to the Government's interpretation of s10 LASPO and lawfulness of Lord Chancellor's ECF guidance

Gudanaviciene - principles

*“the critical question is whether an unrepresented litigant is able to present his case **effectively and without obvious unfairness.**” (paragraph 56)*

“the question is whether the applicant’s appearance before the court or tribunal in question without the assistance of a lawyer was effective, in the sense of whether he or she was able to present the case satisfactorily.” (paragraph 46)

“it is relevant whether the proceedings taken as a whole were fair” (paragraph 46)

Gudanaviciene - principles

“the importance of the appearance of fairness is also relevant: simply because an applicant can struggle through ‘in the teeth of all the difficulties’ does not necessarily mean that the procedure was fair” (paragraph 46)

“Equality of arms must be guaranteed to the extent that each side is afforded a reasonable opportunity to present his or her case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent” (paragraph 46)



Gudanaviciene - ECF criteria

“The answer to this [question] requires a consideration of all the circumstances of the case ... These factors must be carefully weighed. Thus the greater the complexity of the procedural rules and/or the substantive legal issues, the more important was it at stake and the less able the applicant may be to cope with the stress, demands and complexity of the proceedings, the more likely it is that article 6(1) will require the provision of legal services.” (paragraph 56)

“(a) the importance of the issues at stake; (b) the complexity of the procedural, legal and evidential issues; and (c) the ability of the individual to represent himself without legal assistance, having regard to his age and mental capacity.” (paragraph 72)

Qualifying for legal aid: means

- Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013
- Means Assessment Guidance
- Legal aid Keycard

Qualifying for legal aid: means

- Some cases are exempt from a means assessment (Reg 5): eg. public law children cases
- Certain state benefits “passport” applicants for legal aid
- **Evidence!**

HSBC  20 Jul 2009

Account Type :	BANK A/C		
Account Name :	[REDACTED]		
Account Number :	[REDACTED]		
International bank account number :	[REDACTED]		
Branch identifier code :	[REDACTED]		

20 Jun		Balance brought forward		6450.00
22 Jun	VIS	[REDACTED]	11.46	6438.54
23 Jun	VIS	[REDACTED]	2000.00	4438.54
01 Jul	DD	[REDACTED]	10.00	
01 Jul	SD	[REDACTED]	5.00	4423.54
03 Jul	CR	[REDACTED]	39.00	
03 Jul	ATM	[REDACTED]	100.00	4352.54
15 Jul	BP	[REDACTED]	700.00	
13 Jul	VIS	[REDACTED]	15.30	3557.24
15 Jul	CR	[REDACTED]		
17 Jul	SD	[REDACTED]	700.00	
18 Jul	ATM	[REDACTED]	100.00	
20 Jul		Balance carried forward		

Qualifying for legal aid: merits

- Civil Legal Aid (Merits) Regulations 2012
- Lord Chancellor's Guidance under s4 LASPO
- 7 Forms of Service: most importantly, Legal Help and Legal Representation
- Costs benefit test
- Prospects of success test

Applying for legal aid - practicalities

- CCMS – online application process
- Paper applications – ECF only
- Emergency procedure for urgent cases

ANY QUESTIONS?