



ECF SHORT GUIDE 3

How to get Exceptional Case Funding for immigration cases



The Public Law Project (PLP) is a national legal charity which aims to improve access to public law remedies for those whose access to justice is restricted by poverty or some other form of disadvantage.

Within this broad remit PLP has adopted three main objectives:

- increasing the accountability of public decision-makers;
- enhancing the quality of public decision-making;
- improving access to justice.

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How to get Exceptional Case Funding for immigration cases

This guide is intended to assist legal aid providers in determining the cases where it might be appropriate to apply for Exceptional Case Funding (“ECF”) for immigration proceedings, and to assist providers in making successful applications for ECF.

PLP has produced a separate guide for individuals making ECF applications without assistance which is available [here](#).



1. Introduction

Most immigration proceedings were removed from the scope of legal aid by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”), along with vast swathes of other areas of law. In response to concerns raised prior to LASPO, the Government included provision for funding to be made available in certain cases which would otherwise be outside the scope of legal aid: ECF. Accordingly, funding is available where without it, there would be a breach, or the risk of a breach, of an individual’s rights under the European Convention on Human Rights (“ECHR”), or their rights to legal aid under EU law, principally under the Charter of Fundamental Rights of the European Union (“the Charter”).

ECF is only available in cases that are outside the scope of legal aid. You cannot apply for ECF in cases where legal aid is unavailable because the ordinary means or merits criteria are not met.

As was well publicised, at the outset of the scheme it was very difficult for many people, even those with strong cases for ECF, to obtain the funding that they needed. The number of grants was very low in the first year of the scheme; approximately one per cent of applications in non-inquest cases were successful. Following the cases of *Gudanaviciene and ors v Director of Legal Aid Casework and the Lord Chancellor* [2014] EWCA Civ 1622 and *IS (by way of his litigation friend, the Official Solicitor) v Director of Legal Aid Casework and the Lord Chancellor* [2016] EWCA Civ 464, and subsequent changes to the ECF guidance and practical improvements to the scheme, the grant rate has risen significantly, to 54% in the last quarter for which statistics are available (April – June 2017).

The grant rate for immigration cases is higher than the average; in the last quarter the grant rate was 78%. It is therefore clearly worthwhile making an ECF application in an immigration case, where the applicant's circumstances require it. This guide is intended to help to identify those cases where making an ECF application is worthwhile and to maximise the chances of making a successful application.



2. Case studies

These case studies are based on some of the factual scenarios of successful ECF applications made by PLP in immigration cases.

Article 8 application stage proceedings

Mary had arrived in the UK from Nigeria aged 15. Two years after she arrived in the UK, she sought advice from solicitors, who made an application for leave to remain, and she was granted three years limited leave to remain. When that leave expired, Mary tried to make a further application for leave to remain without the help of a solicitor. Her application was refused because she failed to provide the fee. In the meantime, Mary had two children. Her younger child was a British citizen, by virtue of the father's nationality.

Following her separation from her younger child's father, Mary claimed Income Support and Child Tax Credit. Three years later she was informed that she had been incorrectly claiming benefits. She also received a section 120 notice from the Home Office, requiring her to state her reasons for staying in the UK.

Mary applied for ECF in order to get advice about making an application for leave to remain on the basis of Article 8 ECHR. She applied for ECF on the basis that the proceedings were of critical importance to her, as they would determine whether she was able to remain in the same country as her children. Alternatively, the family life of Mary and her children would be drastically affected if she were forced to leave the UK without them.

She was able to argue that the application procedure was sufficiently complex that she would not be able to engage with it effectively herself. She did not know the correct form to use, or how to apply for a fee waiver. She had previously tried to make an application that had been rejected. Even if she were able to identify the correct forms, she did not know how to fill them out. She did not know how to show that she met the eligibility criteria for leave or what evidence she would need to obtain.

Mary also argued that she did not have the ability to make the application herself. She had no legal training, and her education had ended when she was 15. Further, she and her children were facing destitution as result of her immigration status. The stress and anxiety of her situation prevented her from thinking clearly about the steps that she needed to make in her immigration matter.



Family reunion

Faith was a victim of trafficking from the Gambia who had been forced to work as a domestic servant for five years following her arrival in the UK. The Home Office had made a conclusive grounds decision that she was a victim of trafficking and granted her five years humanitarian protection in the UK.

Faith was HIV positive, had other serious health issues as a result of her experiences at the hands of her traffickers, and struggled to care for herself. Her two daughters aged 14 and 19 were living in the Gambia, and wanted to apply for entry clearance to join her in the UK.

It was of the utmost importance to Faith that she be reunited with her daughters. She was extremely distressed by their long separation. She also hoped that her daughters would help to care for her if they were able to come to the UK.

The application was complex, because Faith's elder daughter's case did not fall within the immigration rules as she was over 18. She would need to argue that her rights under Article 8 ECHR would be breached if her daughter was not allowed entry to the UK. Further, evidence would be required of both daughters' relationship to Faith, potentially including DNA tests. Her younger daughter would have to evidence that she had formed part of Faith's family unit at the time Faith left the Gambia, and would have to show that she had not formed an independent family unit in Faith's absence. Faith did not know how to address these criteria, nor what evidence would be needed. She needed a legal adviser to prompt her towards the relevant issues. Further, she suffered from serious health problems and was deeply emotionally involved in being reunited with her daughters. She did not have the ability to engage effectively with the application.

For other examples of cases that were successful in getting ECF in immigration cases, see the Reported Cases section below.



3. The case of *Gudanaviciene* – individual cases

Gudanaviciene concerned six cases in which ECF had been applied for in relation to immigration proceedings. In the Court of Appeal, one was conceded, three succeeded and two were unsuccessful. The application of the principles outlined above is assisted by a review of the individual cases which the court considered.

I.S. (conceded) – paragraphs 78 to 80 of CA judgment

- Funding was sought for application to regularise immigration status on the basis of Article 8 (i.e. Legal Help).
- Applicant lacked capacity to litigate – in this case there was evidence of his lack of capacity because of ongoing community care proceedings: *“It is impossible to see how a man suffering from his disabilities could have any meaningful involvement in the decision making process without the benefit of Legal Representation”* (paragraph 80).

T.G. (successful in CA) – paragraphs 81 to 91 of CA judgment

- Funding required for appeal before the First-Tier Tribunal (IAC) (i.e. controlled Legal Representation) concerning a Lithuanian national subject to deportation.
- Important since it concerned residence in the UK and TG’s future contact with a child (who was in foster care at the time, although having contact with the mother).
- Involvement in the proceedings was made difficult by TG’s low level of English (availability of an interpreter at the FTT (IAC) was not enough to compensate).
- There was a need for expert evidence on the risk posed by TG (which was something she could not give convincing evidence on herself).
- TG lacked objectivity due to the sensitivity and importance of the issues at stake.

- Although the issues were essentially factual (the key question being the applicant’s propensity to reoffend) and this was “*the kind of factual question which the Tribunal would readily be able to determine if all the relevant evidence was placed before it ... in order to ensure that all of the relevant evidence is placed before the Tribunal TG will have to be able to identify this key question; and to produce evidence, and make submissions as to present risk*” (paragraph 90).

Reis (successful in CA) – paragraphs 125 to 135 of CA judgment

- Funding required for deportation appeal before the First-Tier Tribunal (IAC).
- Immigration proceedings before FTT (i.e. controlled Legal Representation).
- Important since it was a deportation case (see para 37 above), i.e. would split applicant from his UK citizen family.
- Complex legal issues involved – there was a relevant point of unresolved EU law and the case involved “*complex legal submissions*” – although NB: that legal point was not resolved finally in Mr Reis’s case. Had the case not involved complex legal submissions, Mr Reis might well have been able to effectively represent himself, due to his education and ability (paragraph 135).
- Although such a case raising several legal points was “*far from unusual*” this did not make the case any less suitable for exceptional funding (paragraph 135).

B. (successful in CA) – paragraphs 155 to 173 of CA judgment

- Funding sought for initial application to Home Office for entry clearance under refugee family reunion (i.e. Legal Help) and subsequently for an appeal to the First-Tier Tribunal (controlled Legal Representation).
- The first issue in B was whether refugee family reunion was in scope – the CA held it was not. As an alternative, the CA held that exceptional funding should have been granted.
- It was a matter of vital importance (as family reunion would normally be).
- Particular circumstances gave rise to particular complexity – applicant’s child without documents and separated from parents after her husband’s family reunion application was granted.

- Applicant vulnerable due to traumatic experiences and *“did not have the first clue”* about how to apply for refugee family reunion.
- Applicant without English.
- *“Without legal advice and assistance it was impossible for her to have any effective involvement in the decision-making process”* (paragraph 172) even though the process of applying involved filling in an online form and submitting factual evidence.

Edgehill (unsuccessful) – paragraphs 174 to 180 of CA judgment

- Funding was required for immigration proceedings before the Court of Appeal (i.e. full representation).
- This case succeeded in the High Court but lost on appeal. It lost because the case for which funding was required was linked to another (funded) case in the Court of Appeal in which the same legal points would be argued, and therefore ECF was considered unnecessary. It appears that, were it not for the linked case, funding would have been required.
- Complex because a point of law which *“would have been over the head of Ms Edgehill”* (paragraph 180).
- Applicant did not have sufficient education / legal understanding to be able to effectively participate.
- *“If her appeal to the Court of Appeal had not been listed with HB (Mauritius) it is clear that without legal aid she would not have been able to have any meaningful involvement in the critical stage of the decision making process in her case”* (paragraph 180).

L.S. (unsuccessful) – paragraphs 92 to 124 of CA judgment

- L.S. claimed to be a victim of trafficking. His primary argument was that the Trafficking Directive required that he be granted legal aid to make an immigration application, even in the absence of a National Referral Mechanism decision that he was a victim of trafficking. That argument was not successful.
- In the alternative, L.S. sought exceptional case funding on the basis of Article 8 ECHR.
- The Court agreed that the matter was of great importance, but this alone was not sufficient.

- Referral in to the National Referral Mechanism was not complex, and there were organisations who would assist, so that if L.S. then obtained a ‘reasonable grounds’ decision he would receive in scope legal aid funding (para 123(a)).
- Some individuals might, in their particular circumstances, require legal aid before being referred in to the National Referral Mechanism, but not in L.S.’s case, or as a matter of course. It is implied that ECF would only be required where the individual would otherwise be precluded from entering the NRM due to a lack of advice.



4. In scope immigration proceedings

Before making an application for ECF it is essential to check that the matter is not within scope of legal aid. Section 9 LASPO states:

“(1) Civil legal services are to be available to an individual under this Part if –

They are civil legal service described in Part 1 of Schedule 1, and

The Director [of Legal Aid Casework, i.e. the LAA] has determined that the individual qualifies for the services in accordance with this part (and has not withdrawn the determination).”

The types of immigration cases left in scope for legal aid following the introduction of LASPO are set out in paragraphs 24 – 32A of Schedule 1 LASPO.

Refugee law and other protection claims

Paragraph 30 of Part 1, Schedule 1 allows the provision of civil legal services ‘in relation to rights to enter, and to remain in, the United Kingdom arising from the Refugee Convention, Article 2 or 3 of the Human Rights Convention, the Temporary Protection Directive, and the Qualification Directive.’

Legal aid is therefore available for available for:

- Asylum claims (meaning claims to be entitled to refugee status under the Refugee Convention and/or Qualification Directive);
- Claims that removal would breach Articles 2 or 3, ECHR (and under Art 15(a) and (b) of the Qualification Directive);
- Claims under the Temporary Protection Directive;
- Claims for humanitarian protection under Article 15(c) of the Qualification Directive (that is, primarily, claims brought by those who claim to face a 'serious and individual threat to [their] life or person by reason of indiscriminate violence in situations of international or internal armed conflict').

This includes advice at the application stage (under Legal Help), advocacy for appeals in the First-Tier Tribunal and onward appeals to the Upper Tribunal and Court of Appeal, as well as appeals heard in the Special Immigration Appeals Commission.

Attendance at an immigration interview is excluded from scope except for:

- Children (Reg 3)¹;
- Those in the detained fast track other than for screening interviews (Reg 4(a)(i) and (b));
- Persons lacking capacity (Reg 4(a)(ii) and (b)), other than for screening interviews.

Paragraph 30 does not include human rights claims made other than on Art 2 and 3 grounds (e.g. Art 8 claims). There was some debate following the introduction of LASPO about what other rights to enter or remain in the UK could be included under this paragraph. The case of 'B', which was joined to *Gudanaviciene and Ors v Director of Legal Aid Casework and The Lord Chancellor* [2014] EWCA Civ 1622, concerned whether the right of refugees to family reunion was a right to enter or remain 'arising from' the Refugee Convention, and therefore in scope under paragraph 30. Following the judgment of the High Court in that case, refugee family reunion was briefly in scope, until the Court of Appeal reversed the decision in December 2014, finding that family reunion does not fall within the scope of paragraph 30.

¹ Civil Legal Aid (Immigration Interviews) (Exceptions) Regulations 2012

In immigration cases which raise out-of-scope issues as well as in-scope issues, for example, deportation appeals and in asylum or human rights claims made by those who have also established private or family lives in the UK, the out-of-scope elements of the case cannot be funded under paragraph 30.

Other immigration claims

Advice in respect of all other kinds of immigration case are excluded from the scope of legal aid, except for in relation to two particularly vulnerable categories of people:

- **Victims of domestic violence.** Advice may be given in connection with an application for indefinite leave to remain by a person with leave to remain by a partner whose relationship with a British or settled person has permanently broken down due to domestic violence (para 28) or for an EEA residence permit under Regulation 10(5)(d)(iv) of the EEA Regulations 2006 where a person has retained a right of residence following the breakdown of a marriage due to domestic violence (para 29); and
- **Victims of trafficking or modern slavery** where either (a) there has been a conclusive determination that the individual is a victim of trafficking or modern slavery or (b) a competent authority has determined that there are reasonable grounds to believe the individual is a victim of trafficking or modern slavery and there has not been a conclusive determination that they are not (para 32 and 32A).

In relation to victims of trafficking, immigration advice is only available to a person who has been accepted by the competent authority, either on reasonable grounds or at the conclusive decision stage, as a victim of trafficking or modern slavery. This means that people who have not yet been referred to the National Referral Mechanism (“NRM”), or in respect of whom a reasonable grounds decision has not yet been made, will not be able to access immigration advice under legal aid. The availability of ECF for victims of trafficking who have not yet been referred to the NRM was considered in the case of the claimant *LS*, in the case of *Gudanaviciene*. The Court found that in the particular circumstances of *LS*, exceptional funding was not required to prevent a breach of Article 8. However, this does not preclude funding being required for a victim of trafficking in a different position, for

example, where there is a risk that victims of trafficking will be forced to remain in an exploitative situation, or return to their traffickers, because they cannot access advice about their immigration position.

Special Immigration Appeals Commission

Legal aid is available for all proceedings in SIAC (para 24), including judicial review type proceedings (under para 19).

Immigration detention

Paragraphs 25 – 27A allow for the provision of advice and representation (including advocacy in the First-Tier Tribunal in a bail application) in connection with:

- Decisions to detain under immigration powers;
- Bail proceedings (under Schedule 10 of the Immigration Act 2016);

The imposition of conditions on bail (or other forms of release from detention) and the nature of the conditions imposed. However, paragraphs 25-27A are subject to the exclusions in Part 2 of Schedule 1, and claims for damages arising out of immigration detention are excluded from scope unless brought as a judicial review, where there is an abuse of powers by a public authority or where there is a significant breach of Convention rights.

Asylum support

Legal aid is available for advice in connection with asylum support accommodation provided under the Immigration and Asylum Act 1999 (para 31). This does not include advocacy in appeals to the First-Tier Tribunal (Asylum Support), or advice which is solely connected with subsistence payments (and not with accommodation).



Out-of-scope proceedings

The main types of immigration cases in which legal aid is **not** available without ECF are:

- Claims based on **Articles of the ECHR other than Articles 2 and 3**, especially Article 8.
- **Applications based on EU law**, for example under the Citizens' Directive or derived rights. This would include applications for residence permits by EU nationals and their family members; applications for permanent residence documents; and appeals against exclusion/deportation decisions made under the EEA Regulations. The only type of application remaining in scope would be in a case where a person was claiming a retained right of residence following the dissolution of a marriage under Regulation 10 of the EEA Regulations (as set out above).
- **Deportation cases**, including those making representations against deportation and exercising the right of appeal against a deportation order, as well as applications for revocation of deportation orders (and refusal to revoke a deportation order), unless brought on asylum or humanitarian protection grounds.
- **Cancellation or curtailment of leave** including on deception grounds.
- **Applications for British citizenship** and related applications including applications and appeals connected with the deprivation of British citizenship and applications relating to the right of abode.
- **Family applications** including refugee family reunion and any application under the Immigration Rules for leave to enter or remain on the grounds of a family relationship with a person present and settled here or under Appendix FM.
- **Managed migration**. This includes applications by students, those seeking employment or training in the United Kingdom, retired persons of independent means, investors, entrepreneurs, etc.

Judicial review

Legal aid is retained for judicial review proceedings (para 19), including in immigration cases which are otherwise out-of-scope. For example, legal aid is available for judicial review of the refusal of an application to remain in the UK based on Article 8 grounds (in cases where there is no right of appeal).

However, there are specific exceptions for immigration cases, where legal aid is not available for judicial review proceedings. This concerns the following kinds of case:

- (1) Where the individual has had a previous judicial review or appeal on the same, or substantially the same, issue decided against them within the previous 12 months (para 19(5));
- (2) Where the judicial review is of removal directions, and less than 12 months have passed since a decision was taken to remove the person, or any appeal or judicial review of that decision was determined or withdrawn (para 19(6)).

These exceptions however don't apply to judicial review of:

- a negative decision in relation to an asylum application in relation to which there is no right of appeal (i.e. decisions that further submissions do not amount to a fresh claim under paragraph 353 of the Immigration Rules) (para 19(7)(a)). 'Asylum application' is defined for these purposes by reference to the Procedures Directive, so is limited to applications (expressly or implicitly) based on the Refugee Convention, rather than 'pure' humanitarian protection or human rights claims;
- A certificate under s. 94 (a 'clearly unfounded' certificate) or s. 96 (claim that could have been raised previously) of the 2002 Act (para 19(7)(b)).
- There is also an exception for judicial review of removal directions where prescribed criteria relating to notice are met (para 19(8)), but no such criteria have ever been prescribed.



5. Exceptional Case Funding

Statutory framework

All civil legal services which are not within the scope of Schedule 1 LASPO are out-of-scope and may potentially be funded as an ‘exceptional case’. Section 10 of LASPO provides that:

“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.”

Sub-section (4) is only relevant to inquests. Sub-section 10(2) states that this sub-section is satisfied where the Director has made an exceptional case determination in relation to the individual and the services, and has determined that the individual qualifies for the services in accordance with this Part and has not withdrawn either determination. **The case must satisfy the same merits, means and any other regulations made under LASPO.** But instead of being a type of case listed in Schedule 1, the other qualifying feature is being the subject of an exceptional case determination.

Sub-section 10(3)(a) states that:

(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.

In other words, an exceptional case determination is one that finds that it is necessary to make legal services available to an individual because a failure to do so would amount to a breach of his or her Convention rights within the meaning of the Human Rights Act 1998 or because he or she has an enforceable right to such services under EU law. In addition, sub-section 10(3)(b) states that an exceptional case determination will also be made if it is appropriate to do so in the particular circumstances of the individual case in order to avoid a risk of a breach of the ECHR or EU law.



When does a right to legal aid arise under the ECHR/EU law?

Unlike criminal legal aid, there is no express right to legal aid in civil proceedings in the ECHR. Since the decision in *Airey v Ireland* (1979) 2 EHRR 305, it has been accepted that some Convention rights may have an associated right to legal aid in some civil cases in order for the rights to be practical and effective. A Convention right to civil legal aid is most likely to arise under Article 6 ECHR, the right to a fair hearing, and Article 8 ECHR, the right to respect for private and family life. In *Maaouia v France* (2001) 33 EHRR 1037 it was established that Article 6 is not engaged in the determination of an individual's ability to enter or remain in a country of which they are not a national. However, in *Gudanaviciene and ors v Director of Legal Aid Casework and the Lord Chancellor* [2014] EWHC 1840 (Admin); [2014] EWCA Civ 1622 it was determined that the procedural obligations arising under Article 8 ECHR can require the provision of legal aid in immigration cases.

The relevant provision of EU law is Article 47 of the Charter of Fundamental Rights of the European Union. Article 47 states that *"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"* and is engaged when the matter for which funding is required falls within the scope of EU law. It will apply in immigration cases which fall within the scope of EU law.

The case of Gudaviciene

The Lord Chancellor’s published Exceptional Funding Guidance (“the Guidance”) sets out the tests applied by the LAA when determining whether a grant of ECF is required. The approach originally taken in the Guidance was challenged in *Gudaviciene and Others v Director of Legal Aid Casework and Anor* [2014] EWCA Civ 1622 and it was subsequently amended to take account of that judgment.

The Court of Appeal judgment in *Gudaviciene* is now a fairly definitive guide to the law concerning when the Convention and/or Charter require legal aid to be made available. The Court referred to a significant body of European and domestic case law in its judgment, but it is unlikely that any of this would now be required to make an application for ECF. The pertinent principles are largely summarised in the judgment, and are set out below.

The critical question under Article 6(1) ECHR is whether an unrepresented litigant is able to present his case effectively and without obvious unfairness (paragraph 56). The test is essentially the same for Article 8 and Article 47 as it is for Article 6, although the Article 8 test is broader than the Article 6(1) test in that it does not require a hearing before a court or tribunal, but only involvement in the decision-making process. This means that it is possible for apply for ECF in immigration cases for applications for leave to enter or remain.

An effective right is one which is “*practical and effective, not theoretical and illusory in relation to the right of access to the courts*” and “*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).

In relation to fairness, the court said “*it is relevant whether the proceedings taken as a whole were fair*”, “*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*” and “*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).

Factors relevant to whether ECF is required

Assessing whether Convention rights require funding is effectively a three-way balancing act. The factors which need to be addressed are:

1. The legal, factual and procedural complexity of the matter;
2. The importance of what is at stake; and
3. The ability of the applicant to represent themselves without legal assistance.

An extremely complex case might in some cases require funding despite having a relatively capable client. Likewise, a really incapable client might need assistance with a relatively straightforward matter. It will be very much case sensitive.



6. Applying the ECF criteria in immigration cases

The case studies in this guide are all examples of successful ECF applications in immigration proceedings. As they illustrate, ECF can be available for many types of out-of-scope proceedings. The importance of what is at stake in immigration proceedings will often be obvious, since proceedings will often concern the rights of individuals to remain in a country in which their family resides, or where they have built a life. Whether a case is a suitable one for an ECF application will depend as much on the applicant's ability to cope with the demands of the proceedings as on the complexity of the case. The key to making a successful ECF application is showing that the particular complexities of the applicant's case, taken together with their individual ability or lack of it, means that the applicant will be unable to present their case effectively.

Complexity

Legal, factual and procedural complexity are all relevant to whether a grant of ECF is appropriate. In relation to immigration cases, the Court in *Gudanaviciene* said that *“the following features of immigration proceedings are relevant: (i) there are statutory restrictions on the supply of advice and assistance...(ii) individuals may well have language difficulties; and (iii) the law is complex and rapidly evolving”* [paragraph 72].

An individual without legal training is unlikely to be able to effectively engage with the relevant provisions of the Immigration Rules and case law, to make legal submissions during a hearing, or be able to obtain expert evidence. Despite the evident complexity of immigration law, in order to make a successful ECF application, it is essential to demonstrate the particular complexity in a case, including the steps that need to be taken, arguments to be made and evidence to be obtained.

For example, an individual without legal training is also less likely to be able to understand the evidential requirements, or the criteria that their evidence must address. Even at application stage, the applicant will have to be aware of the test that they are required to meet, and present their own evidence to address that test. The Court of Appeal’s comments in relation to the claimant in *Gudanaviciene* are useful in these cases; the Court found that although the issues in her case were essentially factual and this was *“the kind of factual question which the Tribunal would readily be able to determine if all the relevant evidence was placed before it...in order to ensure that all of the relevant evidence was placed before the Tribunal TG will have to be able to identify this key question; and to produce evidence, and make submissions as to present risk”* (paragraph 90).

Procedural complexity is also relevant in immigration cases. Many applicants will not be able to navigate the Home Office website in order to work out what form they need to complete. Applicants may not understand that they need to apply for a fee waiver, or how to go about doing so, or what evidence they would need to provide. If applicants are unable to understand how to take these steps, an application to the Home Office will have no chance of success.

The importance of the issues at stake

It will generally be possible to show that any proceedings affecting the ability of the applicant to remain in a country in which they have built a life and in which members of their family reside, or to enter a country in which close family members reside, will be of vital importance.

The Court of Appeal also made some helpful comments in relation to deportation cases in *Gudanaviciene*: *“It will often be the case that a decision to deport will engage an individual’s article 8 rights. Where this occurs, the individual will usually be able to say that the issues at stake for him or of great importance. This should not be regarded as a trump card which usually leads to the need for legal aid. It is no more than one of the relevant factors to be taken into account. The fact this factor will almost invariably be present in deportation cases is not, however, a justification for giving it reduced weight.”* [paragraph 77]

The ability of the applicant to present their case effectively

In immigration cases, the highly emotive issues will often mean that an applicant for ECF would find it difficult to present their case with the objectivity required, especially where the proceedings concern an applicant’s ability to remain in the same country as close family members.

Other factors relevant to an applicant’s ability to present their case effectively will include their physical and mental health, their level of education, and their ability to communicate in English. However, an assessment of an applicant’s ability to engage in the proceedings should not be limited to these obvious barriers. In the case of ‘B’, a claimant in *Gudanaviciene*, the Court said “B was wholly unable to represent herself or other family members. It was not simply that she was unable to speak English but that “[s]he did not have the first clue””. It is not necessary for an applicant for ECF to be prevented from engaging with their case by a language barrier or lack of capacity to litigate; it may simply be that they do not have the ability to understand or carry out the steps they need to take in their case.



7. How to apply for ECF – practicalities

Knowing when to make an application

It will almost always be possible to state that an immigration application or proceedings are complex, but this will not guarantee a grant of ECF. The Legal Aid Agency will be reluctant to accept that the complexity of certain proceedings will always require ECF. It is therefore essential to consider your client's particular ability to understand and present the issues in their case.

The fact that some work needs to be done urgently should not be a complete deterrent – urgency is dealt with below, and there are some provisions for backdating funding, also discussed below. Where you think an ECF application may be worthwhile, it is likely to be a good idea to make it sooner rather than later. For example, do not wait until an appeal is listed for hearing: because of the problems with the urgency procedure, it is not a good idea to delay making an application until it becomes urgent.

If you are unsure about whether your client might qualify for ECF, one option is to apply for “ECF for ECF”: see below.

Forms

In addition to the normal legal aid forms for controlled work (or CCMS for Legal Representation), providers should get clients to sign form CIV ECF1 for any ECF application.

You can provide your arguments for why ECF should be granted either in the form itself or in separate ‘grounds’ or ‘statement of case’.

Urgency

At the top of the first page, there is a box marked 'Urgent Application'. Tick this whenever you want the application to be considered in less than 20 working days. There is space on page 6 of the form to provide information about urgency. Scenarios that require urgency include where:

- There is an imminent date for an injunction or other emergency proceedings;
- A hearing in existing proceedings;
- A limitation period that is about to expire; and
- A delay would cause risk to the life, liberty or physical safety of the applicant.

In practice, only a limitation deadline or imminent hearing is likely to be accepted by the LAA as requiring an urgent decision. If the hearing is not imminent, but significant work is required in order to prepare for the hearing, then it will be necessary to set out the steps that need to be taken, and to explain why this means that the application is urgent.

Unlike in scope legal aid applications, there are no specific regulations allowing the LAA to make grants of ECF on an urgent basis. The LAA's own time frames are that it will decide non-urgent applications within 20 working days and urgent applications within five working days. The LAA first considers whether it accepts that the application is urgent and if it accepts that it is, then it will prioritise it over non-urgent work.

However, unlike in scope legal aid applications, the LAA may backdate funding:

"A determination under section 10 of the Act may specify that the determination is to be treated as having effect from a date earlier than the date of the determination." (Procedure Regulations, reg. 68(1))

The LAA's policy, as stated in the Provider Pack is that:

"Controlled Work – Provided the application is submitted within two months of the date when the client signs the controlled work form we will backdate any successful exceptional case funding application to the date the client signs the Legal Help form (i.e. CW1 or CW2 form)"

“Legal Representation – Where the application is submitted within 2 months from the date recorded in the CIVAPP1 or CIVAPP3 as the date of the client’s first attendance/instruction on the matter at the firm making the application we will backdate the certificate to this date ... Where the date of first attendance is recoded as more than 2 months before the application for funding (for example a client who has been helped by the provider in the case for a period before making the application) then we would generally expect to backdate the certificate to the date of receipt of a successful application.”

The ECF Provider Pack states that in cases where the applicant has completed the ‘Urgent Case Details’ section of the form, the LAA will consider the information provided, and if it agrees that the case is urgent, it will be dealt with within five working days.

Providers are not notified if the LAA declines to treat the application as urgent. It is therefore worth chasing urgent applications with the ECF team, in order to determine the time frame in which the application will be dealt with. If the LAA refuses to treat an application as urgent or fails to deal with it with the degree of urgency required, the remedy is an application for judicial review (for which in-scope legal aid may be available).

Adjournments

In cases where you are approached by a client with an imminent hearing date, it may be possible for the client to request an adjournment from the Tribunal, pending the outcome of the ECF application. Where you are arguing that ECF is required because a lack of representation would risk a breach of an individual’s rights, it follows that an adjournment is necessary in order to avoid a breach of the individual’s rights.

A request for an adjournment should state:

- Any reasons for any delay in making the ECF application at an earlier stage, for example: the applicant not being aware of the ECF scheme, or difficulties experienced by the applicant in locating a provider to make an ECF application;
- A brief explanation of the reasons the applicant is unable to represent themselves;
- The Legal Aid Agency’s standard and urgent time frames for making a decision; and

- A brief explanation of what work would be required following a grant of ECF.

Note that making an application for an adjournment involves the provision of immigration advice and services and so you should only advise the client about applying for an adjournment or assist them to do so if you are a qualified immigration adviser i.e. registered with the OISC at the appropriate level or a solicitor, barrister or legal executive authorised to do immigration work.

“ECF for ECF”

There may be cases in which you cannot determine whether or not your client meets the ECF criteria without further investigative work, for example, where it is not yet clear what steps your client needs to take, or how complex their case is.

Where it is necessary to undertake investigative work to determine whether funding is required, Legal Help is available in order to carry out that work. Page three of Form ECF1 allows you to make an application for ECF Legal Help in order to investigate the merits of making a full ECF application. You should set out what work is required in order to determine whether ECF is required; for example, it may be necessary to take instructions from the client, or to obtain further papers.

It is possible to claim disbursements under a Legal Help matter granted for the purpose of investigating an ECF application. For example, the guidance in the Provider Pack states that funding for counsel’s advice on the merits of making an ECF application may be appropriate. That advice could then be attached to the back of an application for full ECF. It is also appropriate to claim for interpreter’s fees, but funding for expert reports including medical reports is less likely to be appropriate at this stage.

It is important to note that the Costs Assessment Guidance states when incurring disbursements for investigatory work under ECF, the provider must be able to show that the disbursement was necessary for the purpose of investigating the possibility of making a full application for ECF, rather than for use in the proceedings for which ECF is ultimately being sought. The relevant section of the Costs Assessment Guidance is at 3.51 – 3.54.

Assessment of means

The same means forms and evidence are required for an ECF application as for an 'in-scope' application.

Other Evidence

As with all legal aid applications, some evidence of the client's situation and relevant decisions/correspondence will be necessary. You will need to supply key documents, e.g. substantive correspondence from the client's opponent, any claim or appeal forms.

It is also important to consider whether you have in your possession, or can readily obtain, any evidence relevant to why your client's case is exceptional. This may be particularly relevant where the client has a medical condition which would affect their ability to present their case.

What information to include

The LAA are likely to need some kind of account of the basics of the case. This does not need to be particularly long, but to give a concise account of the relevant background, and make clear what the proposed action is.

It may be that you cannot provide a clear account of the action to be taken because you have not been able to take sufficient instructions or obtain relevant information. In this case, you need to make clear what points you wish to advise upon or investigate further. You could ask the LAA to grant 'ECF for ECF' as an alternative to granting full ECF, if they are not satisfied on the information that you are able to provide that full ECF should be granted.

Absence of Evidence

When there are restrictions on your ability to take instructions (e.g. because doing so would incur travel costs for a client in detention, or interpreter's fees) then that should be made clear. You should obviously state what you know – but the function of ECF is to provide funding for the case, and the LAA should not demand extensive information which is, for good reasons, beyond your power to obtain without funding.

If you have genuine doubts about your client's capacity to instruct you (e.g. from taking instructions, or because the client was assessed as lacking capacity in relation to another matter), then you should make that clear, even if you do not have evidence that he or she lacks capacity in relation to your case. Many professionals will charge to make such an assessment, and the Official Solicitor cannot become involved until it has been determined that the client lacks capacity. As such, the fact that you have genuine doubts as to a person's capacity should be enough to present to the LAA a prima facie case for ECF to be granted (subject to means, merits and any other relevant considerations).

The LAA have, in the past, asked for extensive documentation and information. This is now less common, but if such documentation or further instructions are difficult to obtain (or would incur a charge which cannot be met) then the LAA need to be informed of this and why the documents or information are unavailable.

Arguments or Evidence as to Complexity

In some cases, explaining how complicated a matter is can be a significant task in itself, requiring digestion of case law, statute and close analysis of the client's circumstances. It is important to bear in mind that the LAA should not demand of you more than is reasonable, and that funding should be provided for you to do the case, not that you have to do all the work on the case and then get funding.

For instance, where a case raises (or appears to raise) a complex legal issue which will take time to research and analyse, then you are not obliged to 'bottom out' the issue fully before applying for funding. The point of the funding is to enable you to be paid for the time this takes and not that you need to present a complete case to the LAA before they make a decision.



What to do if your client is refused ECF

Applicants can apply to the LAA for an internal review of a refusal to grant ECF. The internal review should be made on form APP9E, which should be provided with any refusal. A request for internal review must be made within 14 days of the refusal. The LAA aims to process applications for internal review within 10 working days.

There is no further right of appeal or review process. A refusal to grant ECF on internal review can only be challenged by judicial review. Judicial review is in scope for legal aid, and you may be able to refer the case to a firm holding a public law contract with the Legal Aid Agency for advice on the merits of challenging an ECF refusal.



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