

Briefing for House of Commons Westminster Hall debate – Legal aid and the post-implementation review, 4 September 2018

Coram Children's Legal Centre's (CCLC) is a charity which provides free advice for children and young people relating to legal issues in immigration, asylum, family, education and community care law. Our 2018 report *Rights without Remedies*¹ outlined several major issues with the legal aid system and the changes that arose following the Legal Aid Sentencing Punishment and Offenders Act 2012 (LASPO). This briefing focuses on one area particularly in need of reform that impacts all areas of law: the exceptional case funding (ECF) system.

As a safeguard to protect those without access to legal aid, LASPO provided for the Legal Aid Agency (LAA) to grant legal aid in 'exceptional cases', where it is deemed necessary to prevent a breach of human rights, or an EU law right, protecting access to justice for the most vulnerable in society. In reality, the ECF scheme is woefully inadequate, and does not provide a safety net for vulnerable or disadvantaged children, young people and families we work with, who struggle to navigate complex legal processes and effectively advocate for their rights.

Key messages

- * Very few people are applying for exceptional case funding (ECF), and only a small minority of cases – even lower than current Ministry of Justice estimates – are coming from people who are not already supported by a solicitor. This means the system is failing the most vulnerable.
- * The ECF scheme is not child-friendly. It is difficult to explain to children, and children are likely to struggle to present the detailed information and evidence required. Numbers of children applying for ECF are extremely low – but the grant rate for their applications is high. There should be a simpler process in place for children, with the presumption of a grant where the applicant is a child.
- * The ECF application process is extremely complex. If applicants try to apply in another format, for example by writing a letter to the Legal Aid Agency (LAA), they will be asked to complete multiple, lengthy forms before their application will even be considered.
- * ECF is not a safety net for urgent cases. The LAA's decision-making times are slow and getting slower, and the current system in place for urgent cases doesn't work, leading to applicants suffering serious consequences without access to redress.

Very few people are granted ECF

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

There are two ways to be granted ECF: to make an application yourself and then find a provider to represent you, or to persuade a legal aid provider to make an application on your behalf. The majority of applications for ECF are currently made by providers. However, this work is taken on at risk, as providers are not paid for making an application if ECF is not subsequently granted

¹ <https://www.childrenslegalcentre.com/rights-without-remedies/>

and so there is a disincentive for them to apply. Only a small number of applications are made by individuals directly – 349 between 2016 and 2017 across all areas of law.² The LAA emphasised the significant increase on earlier years (there were 54 applications from individuals between 2014 and 2015), and attributed the increase to ‘simplifications brought in to the ECF application form’.³

However, in reality there is a third category of cases that has emerged in recent years: applications made with the support of a charity or other organisation which is not subsequently able to take on the case as a legal aid provider. CCLC alone assisted with one fifth of the direct applications made between 2016 and 2017, submitting applications written or supervised by a qualified solicitor, running on average to 20 pages of representations. CCLC is not the only charitable organisation making such applications on behalf of vulnerable individuals,⁴ and funding for this type of charitable support is insecure and unsustainable in the long-term.

The ECF scheme is not child-friendly

To be successful, an ECF application requires detailed information and evidence, and children and young people may find this a particular challenge. Even practitioners making an application on a child’s behalf may face difficulties in obtaining sufficient instructions and evidence. It is very difficult to explain the process to a child client. Perhaps as a result, very few applications have been made by or on behalf of children and young people. For example, of the 2,628 applications in 2017-2018, only 116 applications (4%) were made by or on behalf of applicants aged 18 or under, 63% of which were granted. This is around nine applications per month across all areas of law combined. For young people aged 18-24, 262 (10%) of applications were made, and 60% of these were granted.⁵

The ECF application process is complex

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

Unsupported individuals are also less likely than providers to request a reconsideration of a refusal to grant ECF. Yet for CCLC assisted cases in 2017, the LAA granted ECF on reconsideration 86% of the time (six of seven cases). Applications from unsupported individuals are much more likely to be refused or rejected by the LAA than applications from providers:

² Data on direct applications from a Freedom of Information Request to the Ministry of Justice made by CCLC in July 2018

³ The Legal Aid Agency, ‘Legal Aid Statistics in England and Wales, April to June 2016: Ministry of Justice Statistics bulletin’, September 2016

⁴ Others include Rights of Women, Haringey Migrant Support Centre and City University and No5 Chambers Immigration Human Rights Project

⁵ Data on age of applicants from a Freedom of Information Request to the Ministry of Justice made by CCLC in July 2018

applications from providers relating to an immigration case had a refusal rate of 32% in 2016-17 where applications from individuals failed significantly more often – 50% were rejected or refused.⁶

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

ECF is not an adequate safety net for urgent cases

The ECF scheme is not an adequate safety net for urgent human rights cases. LAA guidance states that ECF applications will be processed within 20 working days⁷ and that urgent applications will be dealt with within five working days. If an application is refused, a reconsideration request should be processed within 10 working days. We have found that many cases are resolved outside those timeframes. In 2018 so far, it has taken 32 days on average to receive a decision. For cases we marked as urgent, it has taken 27 days to make a decision – with serious consequences.⁸

Jonathon, Mary and their son Jake, who had severe epilepsy, were about to be made homeless. Refused support from social services, they needed to make an immigration application based on their human rights. After helping with their homelessness issue, CCLC prepared an application for ECF. This was initially refused, but CCLC requested that the LAA reconsider its decision. Soon after, late on a Friday, Jonathon was detained and told that he would be removed from the UK. Mary spoke limited English and was caring for Jake, who required 24-hour care. She very clearly struggled to understand what had happened and what steps she needed to take to request his release. CCLC updated the LAA immediately and requested an urgent response. Despite the obvious urgency, a decision was not received until nearly a month later. The family were finally granted ECF after waiting for 55 working days, and were finally able to instruct a lawyer. Had CCLC not intervened, the family would have been left to deal with a complex and traumatic experience alone, and it is likely that Jonathon would have been removed from the UK away from his ill child.

Lack of information about ECF and legal aid

The majority of children, young people and families with children we work with who were eligible for ECF were not aware of the scheme before we advised them. Given the extent of the changes

⁶ We have subtracted our cases from the percentages calculated relating to direct individual applications because, as legally-trained individuals, our numbers would otherwise distort figures.

⁷ The LAA now tells applicants the time frame is 25 working days, although the guidance has not been amended.

⁸ In a FOI response to CCLC in August 2018, the LAA revealed that there are currently 88 applications for ECF outstanding from the period January-March 2018.

to legal aid provisions, it is surprising that the Ministry of Justice has not undertaken a clear and accessible public campaign to raise awareness of the availability of ECF. If it is to work as a 'safety net', the promotion of the scheme should be made a priority, so that the most vulnerable people are not denied the opportunity to access advice and assistance that is available to them.

Recommendations

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

Suggested questions to the Minister

1. What assessment has the Minister made of the ability of vulnerable children and young people who need it to access Exceptional Case Funding through the current scheme?
2. The exceptional case funding scheme was expected to support up to 7,000 cases per year, whereas in reality it only funds hundreds of cases. Does the Minister accept the Joint Committee on Human Rights' recommendation for urgent reform so that barriers to accessing Exceptional Case Funding are removed?⁹

Who we are

CCLC is an independent charity working in the United Kingdom and around the world to protect and promote the rights of children, through the provision of direct legal services; the publication of free legal information online and in guides; research and policy work; law reform; training; and international consultancy on child rights. The Migrant Children's Project (MCP) at CCLC provides specialist advice and legal representation to migrant and refugee children and young people on issues such as access to support and services, and runs a project to make applications for grants of legal aid under the exceptional case funding (ECF) scheme. The Child Law Advice Service (CLAS) at CCLC provides free legal advice and information to members of the public on family, child and education law. It is one of the very few alternative sources of free advice on out of scope family and education law issues.

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⁹ Joint Committee on Human Rights, 'Enforcing human rights, July 2018 at <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/669/669.pdf>, Recommendation 3