

# **ILPA** information sheet

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## **Legal Aid 15: Exceptional Case Determinations**

2 May 2013

This information sheet provides information further to, and should be read in conjunction with, Legal Aid 13 Update which can be found at: <http://www.ilpa.org.uk/data/resources/16615/12.12.19-legal-aid-13-update.pdf>

The new legal aid provisions came into force on 1 April 2013. The Legal Service Commission has ceased to exist and has been replaced by the Legal Aid Agency.

### What is Exceptional Case Funding?

Exceptional case funding is legal aid for a case that ordinarily is not in a category covered by legal aid. It is the Government's intention that to get exceptional funding it must be shown that failure to provide legal aid for the particular case will breach the individual's human rights or rights under European Union law.

### Which cases will get exceptional funding?

The Government has made its view very clear; it does not think that immigration cases will qualify for exceptional case funding on the basis of the European Convention in Human Rights and it thinks that such cases will only rarely qualify on European Union law grounds. This is because it think that most cases that get exceptional funding to avoid a breach of human rights will be cases under Article 6 of the European Convention on Human Rights, the right to a fair trial, and it has been decided by the European Court of Human Rights that Article 6 does not apply to immigration cases for technical reasons, because immigration cases are not considered to be about the determination of civil rights and obligations.

The Government's view is likely to be challenged. First, legal representatives are likely to argue that Article 6 is not the only human right at stake and that legal aid should be provided to avoid breaches of other rights. Second, there is a right to a fair trial under Article 47 of the EU Charter of Fundamental Rights that is not limited to civil rights and obligations and therefore people making an application that engages European Union law will be able to argue Article 47.

## Applications for exceptional funding

Legal representatives will not be paid extra for making an application for exceptional funding and will not be paid at all if the application for exceptional funding does not succeed. Therefore, legal representatives will be limited in how many of these applications they can make. The application form is 14 pages long and very detailed. There is more information about this on the Ministry of Justice website at <http://www.justice.gov.uk/legal-aid/funding/exceptional-cases-funding> .

The Ministry of Justice has said that people who are not represented can ask for an indication as to whether they would qualify for exceptional funding and that they do not have to use the big form. However, even if they get an indication that they will qualify, a lawyer then has to fill in the big form, as well as ordinary legal aid “means” and “merits” forms, for an exceptional funding application to be considered and granted. Unfortunately, there is no information for individual applicants on the Ministry of Justice website yet. Given the Government’s position as described above, we anticipate that most people will be told they do not qualify. It is likely that legal representatives will need to make applications and to go to court to challenge refusals before we shall find out which immigration cases qualify and which do not.

The charity the Public Law Project has a project to support exceptional funding applications, see [http://www.publiclawproject.org.uk/exceptional\\_funding\\_project\\_page.html](http://www.publiclawproject.org.uk/exceptional_funding_project_page.html) . The Public Law Project’s 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. Applicants are strongly advised to exhaust all other advice options before applying to the project for assistance. The project cannot accept emergency cases and cannot guarantee that anyone will look at an applicant’s case within a specific period of time. The project is only able to offer the limited service of assisting with the application for exceptional funding or challenging a refusal of exceptional funding where appropriate. It is not able to represent applicants once the case has received funding, or do other work on the case.

The Public Law Project helps individuals’ access justice through the courts or other complaints procedures where they are unable to do so because they are poor or otherwise disadvantaged. The Public Law Project focuses on enabling access to justice for individuals who have a challenge against a public body, which includes the Legal Aid Agency, UK Border Agency (using the former name in the absence of a new one), prisons etc. The project is really important in the current climate of legal aid restrictions and can help individuals in many ways, particularly their exceptional case project.

## Refusals of exceptional funding

There is a right to an internal review of a refusal of exceptional funding. An application for a review must be submitted within 14 days. If the refusal is upheld the only remedy will be to apply for judicial review of the decision to refuse exceptional funding. Legal aid will be available for this judicial review, subject to the means and merits tests. This is difficult, as it involves the Legal Aid Agency deciding that there is a good case and that it has got the decision wrong.