OBLIGATIONS TO PROVIDE CIVIL LEGAL AID AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A SOCIO-LEGAL STUDY OF THE EXCEPTIONAL CASE FUNDING SCHEME IN ENGLAND AND WALES.

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ABSTRACT

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Obligations to provide civil legal aid and the European Convention on Human Rights: a socio-legal study of the Exceptional Case Funding scheme in England and Wales.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO'), in force since 1 April 2013, radically scaled back the provision of civil legal aid in England and Wales. LASPO s.10 provides for an Exceptional Case Funding ('ECF') scheme where an absence of legal aid might lead to a breach of fundamental rights. This thesis therefore asks whether the UK Government can rely upon the ECF scheme in order to fulfil its obligations to provide legal aid arising from the European Convention on Human Rights and EU law.

The research analyses the ECF scheme from the perspective of the 'legal' (the scheme itself as drawn) and its interaction with the 'administrative' (how the scheme is operated). Accordingly, the research employs both a black letter legal analysis and a qualitative empirical inquiry into how the scheme is being implemented. A thematic analysis is presented drawing on data from a sample of ECF applications, semi-structured interviews with legal practitioners and ECF decision makers at the Legal Aid Agency, as well as evidence submitted in the case of *IS*[1] and to the Bach Commission on Access to Justice.

This research reveals that whilst in law the responsibility for ensuring that fundamental rights are protected rests with the state, the burden of doing so in practice has been substantially shifted on to the legal professions. A number of structural biases can be seen within the scheme which undermine the potential for ECF to fulfil its purpose. In addition the full range of bases upon which ECF should be available are not considered in the Lord Chancellor's Guidance to the scheme and decision-making is not sufficiently sensitive to the nuances of individual cases. The available means of challenging refusals of ECF are not well used and the scope for independent oversight of the scheme is very limited. A number of recommendations for reform are therefore made.

[1] *IS v The Director of Legal Aid Casework & Anor* [2015] EWHC 1965 (Admin); *The Director of Legal Aid Casework & Anor v IS* [2016] EWCA Civ 464.

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ABBREVIATIONS

AJA	Access to Justice Act 1999
DLA	Disability Living Allowance
DWP	Department for Work and Pensions
ECF	Exceptional Case Funding
ESA	Employment and Support Allowance
FTT	First Tier Tribunal
HB	Housing Benefit
HMCTS	Her Majesty's Courts and Tribunals Service
HMRC	Her Majesty's Revenue and Customs
IAT	Immigration and Asylum Tribunal
JSA	Jobseeker's Allowance
LAA	Legal Aid Agency
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act 2012
MoJ	Ministry of Justice
MR	Mandatory reconsideration
OISC	Office of the Immigration Services Commissioner
PIP	Personal Independence Payment
UC	Universal Credit
UT	Upper Tribunal

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CHAPTER 1 - INTRODUCTION

1.1 Introduction

Exceptional Case Funding (ECF), provided for by s.10 Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) and Guidance published by the Lord Chancellor, is the basic system for the protection of human rights within the legal aid scheme in England and Wales.[2] In cases where legal aid is not otherwise available, due to the subject matter of the individual case, ECF must be granted where a failure to provide legal aid would be, or would risk leading to, a breach of an individual's rights under the European Convention on Human Rights (ECHR) or the law of the European Union (EU). As is generally the case for the legal aid scheme as a whole, eligibility for ECF is means-tested. It is also often dependent upon the individual having a sufficient likelihood of achieving a successful outcome in their case.[3] As well as introducing the ECF scheme, LASPO significantly reduced the types of cases that legal aid would ordinarily fund.[4] Consequently, since 1 April 2013 publicly funded legal advice and representation is no longer available, with some limited exceptions, for problems concerning debt, welfare benefit entitlements, housing, employment law, private family law issues (including divorce, financial settlements on divorce and contact and residence arrangements for children), education and immigration.[5] The impact of the wholesale removal of these areas from general legal aid provision is considerable because of the numbers of people previously assisted regarding such matters and the level of need in these categories of law in England and Wales (see 1.3).

1.2 Research questions, methodology and design

This thesis analyses, for the first time, the extent to which the UK can rely upon the ECF scheme under s.10 LASPO in order to discharge its obligations to provide legal

[2] The Lord Chancellor's Guidance on Exceptional Case Funding (Non-Inquests) is published pursuant to Legal Aid, Sentencing and Punishment of Offenders Act 2012 (hereafter 'LASPO'), s 4. The latest version of the Guidance is available here <https://www.gov.uk/government/publications/legal-aid-exceptional-case-funding-form-and-guidance> Last accessed 18 January 2018.

[3] This does not apply to ECF applications for Legal Help. Legal Help can be granted if there is a 'sufficient benefit' to the applicant.

[4] LASPO 2012, s 8 and schedule 1.

[5] This is not the full list of exclusions which also includes clinical negligence, asylum support, and criminal injuries compensation claims.

aid under the ECHR and EU law; this being the scheme's explicitly stated purpose.[6] The research questions are: (i) what do the obligations/rights under the ECHR require? (ii) does the ECF scheme, as drawn, meet those obligations in theory? and (iii) has the scheme been implemented in a manner which meets the requirements identified? These questions necessitate looking at the scheme itself and the way in which it is operated by the Legal Aid Agency (LAA), the part of the Ministry of Justice (MoJ) responsible for administering it. As an area of public administration legal aid decision making can also be viewed through an administrative justice lens.

This research is socio-legal in character as it seeks to analyse the ECF scheme from the perspective of the 'legal' (the scheme itself, as drawn) and its interaction with the 'administrative' (how the scheme is operated). This is reflected in the research design; with both a black letter legal analysis and an empirical component to the research. The empirical aspect of the project is a qualitative study utilising several strands of inquiry: desk-based review, in-depth semi-structured interviews and analysis of published statistics. The evidence included in the desk-based review consisted of a sample of 20 applications for ECF, all evidence pertaining to the ECF scheme submitted to the Bach Commission on Access to Justice,[7] and a summary of the witness evidence from the key piece of litigation in which the systemic fairness of the scheme has been challenged.[8] In order to further illuminate the themes and issues arising from the desk-based review, semi-structured interviews were conducted with six legal practitioners and three ECF decision makers from the LAA. A thematic analysis of the qualitative data was carried out. This analysis principally focussed on how the relevant tests for ECF were applied in individual cases and systemic matters pertaining to how the scheme was operated more generally. Further discussion of the research design and methodology is contained within chapter three of this thesis.

[6] LASPO 2012, s 10(3).
[7] Bach Commission on Access to Justice, 'The Right to Justice' (Fabian Society September 2017).
[8] *IS v Director of Legal Aid Casework and Anor* [2015] EWHC 1965 (Admin); *Director of Legal Aid Casework and Anor v IS* [2016] EWCA Civ 464.

1.3 Why do this research?

Background

The possibility of funding for cases that are ordinarily excluded from legal aid is not a new one. Prior to LASPO there was also a mechanism for out of scope cases to be brought 'back in' in certain circumstances.[9] The Access to Justice Act 1999 (AJA) provided that cases routinely excluded from legal aid provision[10] could be funded if one of the following three criteria were met: (1) the case was of wider public interest; (2) the case was of overwhelming importance to the client; or (3) there were other exceptional circumstances which 'were such that without funding it would be "practically impossible" for the client to pursue or defend their case or would lead to "obvious unfairness"…'. Whilst this last criterion mirrored the test embodied in the first version of the Lord Chancellor's Guidance on ECF (hereafter 'the Guidance'), the AJA scheme was wider in its scope overall.[11] It was, however, a much smaller scheme mainly covering inquests, tribunal hearings and business disputes.[12] For example, in 2004/05, 308 applications were made, of which 141 (46%) were granted.[13] In 2005/06 there were 350 applications, of which 147 (42%) were granted.[14] The reason for the modest size of the AJA scheme is because most of the areas of law that are now only funded via the ECF scheme were then ordinarily within the scope of legal aid provision. Consequently, in the much more restricted post-LASPO landscape the proper operation of the ECF scheme assumes a much greater importance because it is the only way in which many more thousands of people can now access publicly funded advice and representation in many areas of law. For that reason this thesis focusses on the civil (non-inquest) areas of law which fall within the ECF scheme for the first time following the implementation of LASPO. In particular, this includes private family law, immigration and welfare benefits

The removal of welfare benefits appeals in the First Tier Tribunal (FTT) from legal aid is particularly concerning because it came at a time when the Senior President

[9] Access to Justice Act 1999 (hereafter AJA), s 6 (8) (b).
[10] AJA, sch 2.
[11] LASPO does not provide for ECF to be granted in cases of overwhelming importance to the applicant. The wider public interest criterion is only applicable in inquest cases.
[12] The full list of excluded cases was contained within AJA, Schedule 2.
[13] Legal Services Commission, *Annual Report 2004/05* (HC167, TSO 2005) 36.
[14] Legal Services Commission, *Annual Report 2005/06* (HC1215, TSO 2006) 21.

of Tribunals reported that the number of appeals being brought was increasing and was expected to increase still further.[15] This was due to the numerous welfare reforms taking place at the same time that LASPO was implemented. For example, between April 2011 and April 2014 it was estimated that approximately 1.5 million people with an entitlement to Incapacity Benefit (IB) would be re-assessed and potentially moved on to the then new benefit, Employment and Support Allowance (ESA). From April 2013, again over three years, individuals in receipt of Disability Living Allowance (DLA) of whom there were estimated to be 1.7 million, were to be re-assessed and potentially moved on to the new Personal Independence Payment (PIP). Finally, in April 2013 Universal Credit (UC) was introduced as the intended replacement for many benefits. Approximately 12 million people were expected to be in receipt of Universal Credit by 2017.[16] At a time of such upheaval the need for legal assistance on benefit entitlements would be expected to increase. As stated above, there was expected to be an increase in the number of welfare benefit appeals being dealt with by tribunals which had been steadily increasing for several years leading up to LASPO.

Incidence of problems and clusters

The proper operation of the ECF scheme demands scrutiny because from 1 April 2013 it is the only means through which individuals in England and Wales, with some of the most common civil legal problems, can access publicly funded legal advice and representation. It is accepted by the MoJ that the LASPO reforms were driven solely by the need to save money.[17] It is therefore entirely by design that the case types taken out of scope of the ordinary legal aid scheme include some of the most common civil legal problems.[18] Data on the extent of civil legal need in England and Wales pre-LASPO is provided by the work of Hazel Genn[19] and the

[15] Senior President of Tribunals, 'Senior President of Tribunals' Annual Report' (February 2013) 29. Available at <https://www.judiciary.gov.uk/publications/spt-annual-report-2013/> Last accessed 2 November 2017.
[16] ibid 30.
[17] Public Accounts Committee, 'Oral Evidence: Implementing Reforms to Civil Legal Aid' (HC 808 4 December 2014), evidence of Dame Ursula Brennan at Q39-Q51. Available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/public-accounts-committee/reducing-the-cost-of-civil-legal-aid/oral/16101.html> Last accessed 11 November 2017.
[18] Pascoe Pleasence and others, *Causes of Action: Civil Law and Social* Justice (TSO 2004) 13, 14; Pascoe Pleasence and others, *Civil Justice in England and Wales 2009* (Legal Services Commission 2010) 11; Nigel Balmer, *English and Welsh Civil and Social Justice Panel Survey: Wave 2* (Legal Services Commission 2013) 9.
[19] Hazel Genn, *Paths to Justice* (Hart 1999).

Legal Services Research Centre.[20] Both of their work involved large scale surveys of adults in England and Wales from 1996 onwards.[21] This body of work illustrates the frequency of common civil legal problems. Patterns in their occurrence also tell us who is most likely to face such problems and what their consequences are likely to be.

What is also clear is that it is common for more than one problem to be experienced at a time. Multiple problems occur in two 'clusters' in particular: an 'economic' and a 'family' cluster. The family grouping includes divorce, domestic violence and issues associated with relationship breakdown (and in a 2001 survey this also included problems with children).[22] The economic cluster includes problems with money, welfare benefits, employment and housing (whether the home is owned or rented).[23] In the decade or so leading up to LASPO research has consistently shown that in the region of one third of the population had experienced more than one civil legal problem.[24] Over the same time span the proportion of people experiencing more

[20] Pascoe Pleasence and others, *Causes of Action: Civil Law and Social* Justice (TSO 2004) 37; Pascoe Pleasence, Nigel Balmer, Alexy Buck, *Causes of Action: Civil Law and Social Justice* (2nd ed. TSO 2006) 66; Pascoe Pleasence and others, *Civil Justice in England and Wales 2009* (Legal Services Commission 2010) 41; Pascoe Pleasence et al, *Civil Justice in England and Wales* (Legal Services Commission/Ipsos MORI 2011) 33; Nigel Balmer, *English and Welsh Civil and Social Justice Panel Survey: Wave 2* (Legal Services Commission 2013) 37. The Legal Services Research Centre closed in April 2013 upon the implementation of LASPO. Since then the MoJ has carried out some research itself. This is reported in Ramona Franklyn and others, *Findings from the Legal Problem and Resolution Survey, 2014-15* (MoJ 2017).

[21] The surveys upon which Hazel Genn's Paths to Justice was based were carried out between 1996 and 1998. From 2001 until 2009 the Legal Services Research Centre conducted the Civil and Social Justice Survey (hereafter CSJS). Thereafter, from 2010 to 2012 this changed to a longitudinal survey, the Civil and Social Justice Panel Survey (hereafter CSJPS).

[22] Pascoe Pleasence and others, *Causes of Action: Civil Law and Social* Justice (TSO 2004) 37; Pascoe Pleasence, Nigel Balmer, Alexy Buck, *Causes of Action: Civil Law and Social Justice* (2nd ed. TSO 2006) 66; Pascoe Pleasence and others, *Civil Justice in England and Wales 2009* (Legal Services Commission 2010) 41; Pascoe Pleasence et al, *Civil Justice in England and Wales* (Legal Services Commission/Ipsos MORI, 2011) 33; Nigel Balmer, *English and Welsh Civil and Social Justice Panel Survey: Wave 2* (Legal Services Commission 2013) 37.

[23] Pascoe Pleasence and others, *Causes of Action: Civil Law and Social* Justice (TSO 2004) 40; Pascoe Pleasence, Nigel Balmer, Alexy Buck, *Causes of Action: Civil Law and Social Justice* (2nd ed. TSO 2006) 70/71; Pascoe Pleasence and others, *Civil Justice in England and Wales 2009* (Legal Services Commission 2010) 42; Pascoe Pleasence et al, *Civil Justice in England and Wales* (Legal Services Commission/Ipsos MORI 2011) 34; Nigel Balmer, *English and Welsh Civil and Social Justice Panel Survey: Wave 2* (Legal Services Commission 2013) 37.

[24] Nigel Balmer, *English and Welsh Civil and Social Justice Panel Survey: Wave 2* (Legal Services Commission 2013) 9. Hazel Genn, *Paths to Justice* (Hart 1999) 23 reported that 46% of respondents reported having experienced one or more justiciable problem but the survey reference period for that study was 5 years.

than one problem at the time of responding to a legal needs survey increased from one in five to one third of people.[25]

There are also particular groups who are most likely to experience the kinds of problems that ECF applies to, including those people whose income level means that they are likely to be financially eligible for legal aid. Surveys carried out in 2001 and 2004 showed that the particular life circumstances that are more likely to give rise to certain civil legal problems include long term illness and disability, being a single parent, having a very low income, being unemployed, renting your home or living in high density housing, and being aged 25 to 44.[26] In the 2004 survey being in receipt of means tested benefits was added to that list.[27]

Research conducted in England and Wales between 2006 and 2013 included an analysis regarding people who were likely to be financially eligible for legal aid based on levels of household income.[28] This provides important context for this thesis because the data gathered highlights the civil legal needs of this group in the years immediately preceding the implementation of LASPO. Moreover, it also provides insight into the experiences of those people dealing with many of the types of problems that were removed in large numbers from the scope of the legal aid scheme by LASPO. This includes many of the problems that would fall within the most common problem clusters i.e. those concerning family law and economic

[25] Pascoe Pleasence, Nigel Balmer, Alexy Buck, *Causes of Action: Civil Law and Social Justice* (2nd ed. TSO 2006) 154. Research carried out by the MoJ post-LASPO suggests that the frequency of problems has increased within half of respondents stating that they had experienced more than one legal problem in the preceding 18 months. See Ramona Franklyn and others, *Findings from the Legal Problem and Resolution Survey, 2014-15* (MoJ 2017)15.

[26] Pascoe Pleasence and others, *Causes of Action: Civil Law and Social* Justice (TSO 2004) 106; Pascoe Pleasence, Nigel Balmer, Alexy Buck, *Causes of Action: Civil Law and Social Justice* (2nd ed. TSO 2006) 154.

[27] Pascoe Pleasence, Nigel Balmer, Alexy Buck, *Causes of Action: Civil Law and Social Justice* (2nd ed. TSO 2006) 154.

[28] An exact replica of the legal aid means test was not applied in the CSJS and CSJPS surveys. Instead a "proxy" was developed based upon the data collected on respondent's income. Between 2006 and 2009 respondents were assumed to be eligible for legal aid if they were in receipt of unemployment benefits, National Insurance credits or Income Support, or if their personal or household income was less than £15,000. See Pascoe Pleasence and others, *Civil Justice in England and Wales 2009* (Legal Services Commission 2010) 68. From 2010 onwards those on means tested benefits or with an individual annual income of less than £10,000 or a household income of less than £25,000 were presumed to meet the means test criteria for legal aid. See Nigel Balmer, *English and Welsh Civil and Social Justice Panel Survey: Wave 2* (Legal Services Commission 2013) 63. There have also been significant changes to the means test following LASPO in that entitlement to a means tested benefit no longer automatically passports an individual to automatic legal aid eligibility. The capital of those individuals is now also assessed and taken into account. The proxy applied in the surveys also did not take account of potential capital held by those respondents not on means tested benefits.

problems, which are consistently identified by the research. Where cluster problem types have not been removed from scope entirely the eligibility criteria have been tightened. For example, by the introduction of strict evidence criteria for private family law cases in which domestic violence is alleged.[29]

People with an assumed eligibility for legal aid are more likely to experience a civil legal problem.[30] They are also much more likely to experience multiple problems and more than twice as likely to report having five legal problems than people who would not qualify for legal aid.[31] The 2010 survey revealed that 39.9% of people who would qualify for legal aid experienced at least one legal problem compared with 34% of people who would not qualify for publicly funded legal assistance.[32] In the case of divorce and separation problems (including disputes regarding children) 41% of respondents had an annual income of less than £10,000, thus can be presumed to have been eligible for legal aid using the proxy developed by later researchers (compared with 33% of the survey sample as a whole). 57% of the respondents experiencing these difficulties were women.[33] Unsurprisingly, particular difficulties related to being on a low income have been found to be pervasive amongst this group. People with an assumed eligibility for legal aid are also more likely to use services where they can obtain advice in person rather than over the telephone or internet.[34] This has been interpreted as being indicative of this group's problems being 'more severe'.[35]

[29] The Civil Legal Aid (Procedure) Regulations 2012, SI 2012/3098 regulation 33. Further relaxation of the domestic violence evidence requirements is expected to be implemented in January 2018 following an announcement by the Ministry of Justice on 4 December 2017.
[30] Pascoe Pleasence et al, *Civil Justice in England and Wales* (Legal Services Commission/Ipsos MORI, 2011) 57; Nigel Balmer, *English and Welsh Civil and Social Justice Panel Survey: Wave 2* (Legal Services Commission 2013) 63.
[31] Pascoe Pleasence and others, *Civil Justice in England and Wales 2009* (Legal Services Commission 2010) 68; Pascoe Pleasence et al, *Civil Justice in England and Wales* (Legal Services Commission/Ipsos MORI, 2011) 58; Nigel Balmer, *English and Welsh Civil and Social Justice Panel Survey: Wave 2* (Legal Services Commission 2013) 64.
[32] Pascoe Pleasence et al, *Civil Justice in England and Wales* (Legal Services Commission/Ipsos MORI, 2011) 57.
[33] Hazel Genn, *Paths to Justice* (Hart 1999) 61.
[34] Pascoe Pleasence and others, *Civil Justice in England and Wales 2009* (Legal Services Commission 2010) 72; Pascoe Pleasence et al, *Civil Justice in England and Wales* (Legal Services Commission/Ipsos MORI, 2011) 60; Nigel Balmer, *English and Welsh Civil and Social Justice Survey: wave 2 report* (Legal Services Commission 2013) 67.
[35] Pascoe Pleasence et al, *Civil Justice in England and Wales* (Legal Services Commission/Ipsos MORI, 2011) 60.

Consequences of civil legal problems

The availability of legal advice and representation for the kind of problems that are most frequently experienced is essential because of the impact of such problems on people's lives and the resulting costs for other public services. Research from 2004 onwards contained a particular focus on the impact and consequences of civil legal problems.[36] Over half of problems resulted in a negative impact of some kind, with more than one third (about 40%) of problems leading to 'adverse health consequences'.[37] Of significant concern is that in a 2012 survey, the results of which were published in 2013, in more than 70% of cases involving domestic violence, relationship breakdown, divorce and care problems there were 'adverse consequences'.[38] Furthermore, access to formal advice has been found to benefit other areas of an individual's life on almost half of occasions (44.4% and 51.6% of occasions in wave 1 and 2 of the Civil and Social Justice Panel Survey respectively).[39]

When the experiences of individuals who are likely eligible for legal aid are analysed almost half of civil legal problems resulted in a deterioration in health and wellbeing (compared with just over a third of those who would not qualify for legal aid).[40] This gap was widening in the run up to LASPO, with 55.8% of legal aid-eligible survey respondents and 34.1% of non-eligible respondents reporting adverse effects on their health and wellbeing.[41] Where there is an impact on physical health it can be expected that approximately 80% of the time assistance will be sought from a health

[36] Pascoe Pleasence, Nigel Balmer, Alexy Buck, *Causes of Action: Civil Law and Social Justice* (2nd ed. TSO 2006) 60-78; Pascoe Pleasence and others, *Civil Justice in England and Wales 2009* (Legal Services Commission 2010) 37-48; Pascoe Pleasence et al, *Civil Justice in England and Wales* (Legal Services Commission/Ipsos MORI 2011) 30-36; Nigel Balmer, *English and Welsh Civil and Social Justice Survey: wave 2 report* (Legal Services Commission 2013) 33-36.

[37] Pascoe Pleasence, Nigel Balmer, Alexy Buck, *Causes of Action: Civil Law and Social Justice* (2nd ed. TSO 2006) 60; Pascoe Pleasence and others, *Civil Justice in England and Wales 2009* (Legal Services Commission 2010) 37; Nigel Balmer, *English and Welsh Civil and Social Justice Survey: wave 2 report* (Legal Services Commission 2013) 34.

[38] Nigel Balmer, *English and Welsh Civil and Social Justice Survey: wave 2 report* (Legal Services Commission, 2013) 35.

[39] Pascoe Pleasence et al, *Civil Justice in England and Wales* (Legal Services Commission/Ipsos MORI, 2011) 49; Nigel Balmer, *English and Welsh Civil and Social Justice Survey: wave 2 report* (Legal Services Commission 2013) 55.

[40] Pascoe Pleasence and others, *Civil Justice in England and Wales* (Legal Services Commission/Ipsos MORI 2011) 58.

[41] Nigel Balmer, *English and Welsh Civil and Social Justice Survey: wave 2 report* (Legal Services Commission 2013) 65.

professional and just over half of the time for stress-related ill health.[42] Individuals may also endure a loss of income, the loss of a relationship and a feeling of generally finding it difficult to carry on with day-to-day life. Aside from the impact of civil law problems on the lives of individuals there are also related costs for other public services, such as health services. The potential for such knock-on effects, both for the MoJ and wider government, has been found by the National Audit Office.[43]

The civil legal needs literature demonstrates the level of need in the areas of law that from 1 April 2013 are not ordinarily within the scope of the legal aid scheme, and for which an ECF application must now be made. It also tells us about the consequences for individuals, frequently on their health, of not taking action or of not succeeding in attempts to take action to resolve such problems.

1.4 The early evidence on ECF

When the proposals for the reform of legal aid[44] were presented to Parliament on 15 November 2010 some reassurance about the operation of the ECF scheme was given by Lord McNally, the then Minister of State for Justice, who said

> …The exceptional funding scheme will go wider than assistance for inquests, and it will indeed be available for those who may find themselves out of scope in these decisions but who have an exceptional case to make.[45]
>
> …On the exceptional cases fund, part of the consultation will be about the criteria and range of that fund…the opportunity to consult will be taken to ensure that the fund is flexible to the needs of those who really need access to justice.[46]

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[42] Pascoe Pleasence and others, *Civil Justice in England and Wales 2009* (Legal Services Commission 2010) 38.
[43] National Audit Office, *Implementing reforms to civil legal aid (*HC 784 Session 2014-15, National Audit Office 2014) paras 1.17 to 1.34. Available at <https://www.nao.org.uk/wp-content/uploads/2014/11/Implementing-reforms-to-civil-legal-aid1.pdf> Last accessed 19 April 2016.
[44] Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales* (Cm 7967, 2010).
[45] HL Deb 15 November 2010, vol 722, col 563.
[46] HL Deb 15 November 2010, vol 722, col 566.

In addition, although the Equality Impact Assessments carried out by the Government concluded that some groups with protected characteristics under the Equality Act 2010 would be disproportionately affected by the reforms, it was suggested that the ECF scheme would serve to mitigate this.[47]

Despite the reassurances given there were warnings before LASPO came into force from various quarters of the likely effect of the proposed changes including the ECF provisions which became s.10 LASPO. For example, in February 2011 Liberty responded to the MoJ's consultation on the proposals for legal aid reform warning that the exceptional funding provisions could effectively 'render the protections provided in the Convention of no practical utility.'[48] The Family Law Bar Association also warned that the ECF provisions were unlawful because they were framed too narrowly to comply with Article 6 of the ECHR.[49]

The early signs of the operation of the ECF scheme under s.10 LASPO also gave cause for concern. Statistics relating to the first three months of the scheme (April to June 2013) revealed that the number of applications received was just 233,[50] less than 15% of the number that the MoJ had expected to receive.[51] Of the 233 applications received in the first quarter only two people were successful in obtaining funding.[52] That represented a grant rate of less than 1%. Furthermore, out of the 231 applications that were refused only 37 people asked the LAA to look at their decision again using the internal review process.[53] At the time the Public Law Project concluded that the scheme was 'beset with operational failings....' and that it

[47] Ministry of Justice, *Reform of Legal Aid in England and Wales: Equality Impact Assessment (EIA)* (June 2011) paras 78 and 82.
[48] Liberty, 'Liberty's response to the Ministry of Justice Proposals for the Reform of Legal Aid' (February 2011) 10. Available at <https://www.liberty-human-rights.org.uk/sites/default/files/response-to-ministry-of-justice-consultation-on-legal-aid.pdf> Last accessed 18 January 2017.
[49] Stephen Cobb, 'Legal aid reform: its impact on family law' (2013) 35 Journal of Social Welfare and Family Law 3, 14.
[50] These figures were given to Public Law Project by the LAA at a meeting on 1 July 2013. See Martha Spurrier, 'Exceptional Funding: a fig leaf, not a safeguard' (Public Law Project, 8 July 2013) 1. <http://www.publiclawproject.org.uk/data/resources/10/exceptional_funding_blog.pdf> Last accessed 3 February 2017.
[51] Ministry of Justice, *Legal Aid Reform: Process for obtaining excluded cases funding* (March 2012). It was estimated that 6500 ECF applications would be received in the first year of the scheme.
[52] These figures were given to Public Law Project by the LAA at a meeting on 1 July 2013. See Martha Spurrier, 'Exceptional Funding: a fig leaf, not a safeguard' (Public Law Project, 8 July 2013) 1.
[53] ibid.

is a '...bar to vulnerable people with strong cases accessing legal aid...the needy are simply not getting through.'[54]

Just after LASPO came into force proposals to further restrict the scope of civil legal aid were put forward by the Government.[55] In particular these later proposals resulted in the withdrawal of legal aid from many aspects of prison law and from judicial reviews for all work done before permission to take a case forward is granted by the court.[56] This was significant for two reasons. Firstly, if prison law was to be removed from scope even greater reliance would be placed on the ECF scheme for a particularly vulnerable group. Secondly, if judicial review was to become more difficult the importance of the LAA's system of internal review for challenging refusals of ECF would be elevated. This is because if a refusal of funding was maintained on review the primary route of challenge after that would be by way of judicial review. It would therefore be essential that the internal review mechanism provided an effective means of overturning incorrect initial decisions if access to judicial review was to become more restricted.

The research questions

ECF is designed as the basic means of protection for the most fundamental of rights as enshrined in the ECHR. The number of people who would potentially be reliant upon the scheme under LASPO to secure those rights was increased significantly compared to the previous scheme under the AJA 1999. For this reason, and against the background of alarm at how the scheme was operating in its early days, the researcher identified that there was an urgent and essential need to investigate the lawfulness of the scheme. This gave rise to the central research question: to what

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[54] ibid 2.

[55] Ministry of Justice, *Transforming Legal Aid: Delivering a More Credible and Efficient System* (Consultation Paper CP14/2013, 2013) <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid/supporting_documents/transforminglegalaid.pdf> Last accessed 3.2.17. To be read in conjunction with a number of corrections made to the consultation paper on 10 April 2013 in Ministry of Justice, *Transforming Legal Aid: Delivering a More Credible and Efficient System consultation amendments* (2013) <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid/user_uploads/transforming-legal-aid-consultation-changes.pdf> Last accessed 3 February 2017.

[56] The restriction on payment for work done in judicial review cases was introduced via The Civil Legal Aid (Remuneration) (Amendment) Regulations 2015, SI 2015/898. The scope changes to legal aid for prison law cases were introduced by The Criminal Legal Aid (General) (Amendment) Regulations 2013, SI 2013/2790. Those regulations were later ruled to be unlawful in part. See *R (Howard League for Penal Reform and The Prisoners' Advice Service) v The Lord Chancellor* [2017] EWCA Civ 244.

extent can the UK rely upon the ECF scheme under s.10 LASPO in order to discharge its obligations to provide civil legal aid under the ECHR? In answering that question it is necessary to consider three emerging sub-issues: (i) what do the obligations/rights under the ECHR and EU law require? (ii) is the ECF scheme, as drawn, meeting those obligations in theory? and (iii) has the scheme been implemented in a manner which meets the requirements identified?

1.5 Conclusion

The contraction of legal aid provision since 1 April 2013 has created a situation in which hundreds of thousands of people are only able to access legal assistance through the ECF scheme under s.10 LASPO. It is therefore critical that the scheme achieves its purpose. The question of whether the ECF scheme is lawful, and is operating lawfully, therefore demands urgent attention and is the question which this thesis seeks to answer.

1.6 Overview of thesis structure

Chapter 2 begins by situating legal aid generally, and ECF in particular, in the access to justice and administrative justice literature. This necessitates some consideration of ideas and concerns about the upholding of the rule of law, justice and the achievement of equality of arms, all of which are seen as underpinning principles of the civil justice system in England and Wales. The chapter then moves on to organisational and administrative issues in relation to legal aid. Lastly, a number of approaches that could have been taken to this study are considered.

Chapter 3 describes and evaluates the research design, methods of data collection and data analysis. Ethical considerations, as well as the influence of the researcher's biography, are also discussed.

In chapter 4 a black letter law analysis of the ECF scheme is conducted. This considers the statutory basis for ECF and the supplementary guidance issued by the Lord Chancellor, as well as the practical operation of the scheme. The evaluation of the scheme itself is preceded by an exploration of the requirements of the ECHR. The requirements of Article 6(1) of the Convention, this being the right to

a fair trial and of effective access to court, are discussed in the context of legal aid provision. The chapter then moves on to ask whether the ECF scheme as drawn is meeting its stated purpose of ensuring that legal aid is available in circumstances where otherwise there would be a breach, or a risk of a breach, of an individual's Convention or EU law rights.

In chapter 5 a novel argument is advanced for the recognition of a duty of early intervention, including a grant of ECF in welfare benefits cases where a sanction has been applied. It is contended that ECF must be made available so as to prevent violations of Article 3 ECHR which absolutely prohibits torture and inhuman and degrading treatment.

In chapter 6 the findings from the empirical part of the project are presented. A number of key issues in the operation of the ECF scheme and the process of making an ECF application are identified. The chapter concludes with the findings in relation to the effectiveness of the routes of challenge to refusals of ECF.

Chapter 7 then draws together all of the evidence and analysis from the legal and empirical strands of the project in relation to both operational and systemic aspects of the ECF scheme.

Finally, in chapter 8 the thesis concludes with a series of recommended reforms to the ECF scheme as well as a number of suggestions for further research.

CHAPTER 2 - ECF IN CONTEXT: ACCESS TO JUSTICE, ADMINISTRATIVE JUSTICE AND HUMAN RIGHTS

2.1 Introduction

…in England, justice is open to all - like the Ritz Hotel.[57]

This chapter provides an overview of the context in which civil legal aid policy and administration and publicly funded legal practice, including the ECF scheme, operates. It is through this landscape that an individual, having identified that they are faced with a civil legal problem, will travel: from recognition of a problem, to deciding whether to seek advice and where to look for that, and whether the help sought is, in theory, available. If it is legal help that is sought and the services in question must be paid for but the individual cannot afford to pay themselves, then the question arises as to whether public funds, in the form of legal aid, will be made available. Accordingly the focus in part one of this chapter is the literature regarding concepts of, and debates about, 'access to justice': what it is, how much of it there should be, in what form and for whom. Although this study is focussed on England and Wales, we will also draw on the experiences and scholarship of other comparable jurisdictions. This is possible because many features of the debate about civil legal aid in England and Wales are common to other countries such as the USA, Australia and Canada.

Thereafter, if an individual arrives at the point at which an application for legal aid should be made, particularly ECF for present purposes, then a new phase in the journey commences. This is defined by whether the individual can find a legal adviser to make the ECF application for him or her, and if not then whether s/he makes an application directly to the Legal Aid Agency (LAA) themselves. Once an application is made the individual, and their legal adviser if they have one, then become concerned with the LAA's approach to decision making, the values and organisational structures underpinning that, and if funding is refused at first, how the refusal may be challenged. During this phase, after an application for ECF is made, it is the literature on administrative justice that is engaged and this is the focus for part two of this chapter.

[57] Widely attributed to Sir James Mathew 1830-1908.

The necessity of there being support in place to ensure that all persons can avail themselves of the rights and protections offered by law, regardless of their means or social status, echoes throughout the literature. Often this call may be limited to protection for citizens,[58] but it will be argued that a human rights paradigm is to be preferred for a variety of practical, philosophical and political reasons which are examined in the third and final part of this chapter.

Part One

2.2 Access to Justice: its meaning and purpose

The phrase 'access to justice' is often used but less frequently defined. For example, Article 47 of the EU Charter of Fundamental Rights states that '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'[59] but what is meant by 'access to justice' is not set out anywhere in the Charter. Difficulties in defining precisely what is meant by 'access to justice' have been acknowledged.[60] In practical terms, articulating and measuring what represents an adequate level of access to justice is contentious,[61] indeed some scholars would take issue with the idea that it is something for which a minimum standard could or should be established at all.[62] What is clear from the literature is that the idea of access to justice is inextricably linked to concerns about fairness, equality, the need to uphold the rule of law[63] and to tackle social exclusion.[64] In the case of civil law problems, with which we are

[58] For example, see Rt. Hon. Sir Ernest Ryder, 'The Modernisation of Access to Justice in Times of Austerity' (5th Annual Ryder Lecture, University of Bolton, 3 March 2016) <https://www.judiciary.gov.uk/wp-content/uploads/2016/03/20160303-ryder-lecture2.pdf> Last accessed 12 March 2016.
[59] The Charter of Fundamental Rights of the EU [2012] OJ C 326/391, Article 47.
[60] Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' [1978] 27 Buff. L. Rev. 181, 182.
[61] Deborah L. Rhode, *Access to Justice* (OUP 2004) 20.
[62] For example, Tom Cornford, 'The Meaning of Access to Justice' in Ellie Palmer and others (eds.), *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart 2016) 35.
[63] Asher Flynn and Jacqueline Hodgson, 'Access to Justice and Legal Aid Cuts: A Mismatch of Concepts in the Contemporary Australian and British Legal Landscapes' in Asher Flynn and Jacqueline Hodgson (eds.), *Access to Justice & Legal Aid* (Hart 2017) 6; Ross Cranston, *How Law Works* (OUP 1993) 2.
[64] See for example, Morag McDermont, Samuel Kirwan and Adam Sales, 'Poverty, social exclusion and the denial of rights to a fair hearing: a case study of employment disputes' [2016] Journal of Poverty and Social Justice Vol. 24 No. 1 21; Paul Mason and others, *Access to Justice: a review of*

concerned, the delivery of 'access to justice' is especially important because the nature of the problems are such that they are features of everyday life for a significant section of the population.[65] Accordingly, work on 'access to justice' is often motivated by a wish to ensure that the rights conferred on people can actually be exercised and protected.[66] As Lord Neuberger has put it

> …access to justice is a practical, not a hypothetical, requirement…It verges on the hypocritical for governments to bestow rights on citizens while doing very little to ensure that those rights are enforceable.[67]

A central theme of the access to justice debate is the affordability of legal advice. Whilst advice and representation funded by legal aid is not the only means of ensuring that individuals can make practical use of their rights, it is a crucial means of doing so. Both for that reason, and because it is an aspect of legal aid that is the focus of this thesis, civil legal aid is necessarily prominent in the discussion here. As with access to justice in general, there is considerable debate about what the values at the heart of a civil legal aid scheme should be as well as questions as to its proper purpose. In the American context it has been said that legal aid policy is often ill thought through (uninformed) and 'unresponsive to crucial values'[68] and in the UK it has been accepted that the changes to civil legal aid brought about by LASPO were informed principally by the need to make financial savings rather than consideration of any evidence as to the purpose of civil legal aid or the impact of the changes being proposed.[69] Consequently, our aim in this part is to examine the meaning of 'access to justice' and to consider what effective access to justice might look like in general and in relation to civil legal aid in particular.

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existing evidence of the experiences of minority groups based on ethnicity, identity and sexuality (Ministry of Justice Research Series 7/09, Ministry of Justice 2009). Available at <http://webarchive.nationalarchives.gov.uk/20110201134413/http://www.justice.gov.uk/publications/docs/access-justice-minority-groups-ii.pdf> accessed 3 March 2017.

[65] Pascoe Pleasence and others, *Causes of Action: Civil Law and Social Justice* (TSO 2004).

[66] Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' [1978] 27 Buff. L. Rev. 181,182; Mary Jane Mossman, 'Toward a Comprehensive Legal Aid Program in Canada: Exploring the Issues' [1993] 4 Windsor Review of Legal and Social Issues 1, 20; Marc Galanter, 'Access to Justice in a World of Expanding Social Capability' [2010] 37 Fordham Urban Law Journal 115, 124.

[67] Lord Neuberger, 'Access to Justice' (Australian Bar Association Biennial Conference, London, 3 July 2017) para 8. <https://www.supremecourt.uk/docs/speech-170703.pdf> Last accessed 5 July 2017.

[68] Deborah L. Rhode, *Access to Justice* (OUP 2004) 104.

[69] Public Accounts Committee, *Implementing reforms to civil legal aid* (HC 2014-15, HC 808).

Academics and governments have proposed a number of principles which may underpin civil justice systems in order to ensure 'enough' access to justice from the perspective of procedure and more substantive elements. It has been conceived of as a sliding scale, going from 'thin' (procedural) access to justice at one end of the spectrum to 'thick' (substantive) access to justice at the other end.[70] Availability of a relevant means for resolving disputes is considered to be on the 'thin' side, with access to law and legal entitlements at the 'thick' end.[71] Mostly, systems which sit somewhere in the middle of the continuum are regarded as sufficient. A less common view is that a legal system that promotes 'access to justice' is one which is equally accessible to all and secondly it is a system in which outcomes are both individually and socially just.[72] A particularly principled view is articulated by Cornford who, whilst acknowledging that it is never likely to be realised, promotes the idea that any inequality in the ability to make use of legal rights at all should not be tolerated. Instead he proposes that there are limits placed on the legal assistance available to those of greater means so as to reduce the gap between rich and poor.[73] The more typical view is demonstrated by Rhode who suggests a set of principles that are aimed at ensuring that access is adequate rather than aiming at equal access for everyone. She describes a minimum standard for all but accepts that there may be wide variety in access above that. The possibility of an enforceable statutory right to a minimum standard of access to justice is one of the key recommendations of the Bach Commission on Access to Justice in the UK.[74] Of particular interest, given the stated purpose of the ECF scheme, Curran and Noone have explored the potential of turning existing human rights standards into benchmarks for determining what access to justice requires and measuring the reality against those.[75]

It has been suggested that this should be a social priority and that legal systems should create as many opportunities as possible for individuals to resolve problems themselves without needing a lawyer, although for those individuals who do need a

[70] Rosemary Hunter and others, 'Access to What? LASPO and Mediation' in Asher Flynn and Jacqueline Hodgson (eds.), *Access to Justice and Legal Aid Cuts* (Hart 2017) 241.
[71] ibid.
[72] For example, Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' [1978] 27 Buff. L. Rev. 181, 182.
[73] Tom Cornford, 'The Meaning of Access to Justice' in Ellie Palmer and others (eds), *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart 2016) 36-39.
[74] Bach Commission on Access to Justice, 'The Right to Justice' (Fabian Society September 2017).
[75] Liz Curran and Mary Anne Noone, 'Access to justice: a new approach using human rights standards' [2008] 15 International Journal of the Legal Profession 195.

lawyer it is argued that 'competent assistance' should be available.[76] An important reason for maintaining the availability of representation is that 'the possibility of legal representation is crucial to creating a credible deterrent to exploitation'.[77] This could be exploitation of individuals by the state or by private entities. For example, in England and Wales employers may be tempted not to pay the minimum wage as they know that there is no legal aid available for employment law advice unless discrimination is alleged or if the employee meets the ECF criteria.

Consequently, Rhode's strategy for improving access to justice in the USA would include reducing the need for legal information and assistance; reducing the cost and increasing the effectiveness of legal procedures and services. She would also seek to find ways of enabling individuals to find affordable sources of relevant legal help and pertinent means of resolving their disputes.[78] A further example is provided by the Australian Strategic Framework for Access to Justice published in 2009,[79] which sets out a number of features that it claims should be present if there is adequate access to justice. These are accessibility, appropriateness, equity, efficiency, and effectiveness.[80] In expanding upon these basic ideas the strategy emphasises that access to justice should not be reliant upon being able to afford to pay for a lawyer, rather it should include simplification of the justice system and achieving good outcomes.[81] The emphasis though is very much on the resolution of disputes outside of the court system thus, in theory, avoiding the need for the involvement of lawyers. However, this does not take account of the need for and impact of active assistance from legal advisers in achieving positive outcomes to legal problems.

Conceived in these ways access to justice is concerned with narrow legal outcomes and any progress made towards social goals, such as increasing equality, is merely a by-product. It has been argued that access to justice measures with the purpose of achieving legal aims may support social objectives but they are not specifically designed to achieve them. Currie has put it like this: 'The primary objective of civil legal aid is the protection of rights and of entitlements and benefits provided under

[76] Deborah L. Rhode, *Access to Justice* (OUP 2004) 20.
[77] ibid 116.
[78] ibid 81.
[79] Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Australian Government Attorney-General's Department 2009).
[80] ibid 62-63.
[81] ibid 64.

the law. Legal aid is primarily a legal programme that assures access to justice, in the first instance…'[82] A contrasting view is that such 'unconcern with social justice' is problematic because the law then takes on a passive social role which allows persisting social inequalities to go unchallenged.[83] However, it has also been posited that there cannot be social justice without effective access to legal justice.[84]

In some quarters access to justice is viewed as a 'neutral goal' quite distinct from calls for law reform or tackling social problems.[85] The restrictions that have been placed on legal aid programmes can be argued to have rendered it so, having removed the capability of lawyers to take on certain kinds of cases, especially for unpopular groups or those seen as 'undeserving', which might create political or social change. For the political right 'Restrictions on the activities and budgets of legal aid programs is a way of accomplishing indirectly what opponents have been unable to do directly: curtail rights and social services benefiting the ostensibly 'underserving' poor.'[86] Currie suggests that part of the controversy over funding for civil legal aid, in Canada at least, is because of the emphasis on the achievement of social objectives, rather than characterising legal aid as a 'legal programme'.[87] In other words, legal aid may be better placed politically by being viewed as a means of access to 'legal justice' rather than a means of achieving social justice. Whilst work towards social goals such as the advancement of equality may be viewed as problematic in 'access to justice' terms, concerns about equality of arms are less controversial and it is this which is considered in the next section.

2.2.1 Equality of arms

Equality of arms is a pervasive theme in considerations of the meaning of 'access to justice'. It is most obviously an issue where one party is represented and another is not although there can also be inequality between parties who have legal

[82] Ab Currie 'Down the wrong road – federal funding for civil legal aid in Canada' [2006] 13 International Journal of the Legal Profession 99, 113.
[83] Hilary Sommerlad, 'Some Reflections on the Relationship between Citizenship, Access to Justice, and the Reform of Legal Aid' [2004] 31 Journal of Law and Society 345, 347.
[84] Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' [1978] 27 Buff. L. Rev. 181, 182.
[85] Deborah L. Rhode, *Access to Justice* (OUP 2004) 63.
[86] ibid 109.
[87] Ab Currie, 'Down the wrong road – federal funding for civil legal aid in Canada' [2006] 13 International Journal of the Legal Profession 99, 107.

representation. An example of this might be found in residential possession proceedings. In this arena some large landlords may employ in-house legal expertise or permanently retain solicitors to deal with possession cases. By contrast, a tenant could be represented by a duty advocate who may have had just a few minutes in which to take their instructions before representing them at a hearing. It is this focus on the availability, or not, of legal representation which often characterises discussion of equality of arms. This is for good reason. Access to legal representation has repeatedly been found to positively impact on case outcomes. Research suggests that litigants with legal representation achieve better outcomes than those without.[88] One example is of unrepresented litigants in American family and housing courts who fared less well than those with lawyers even though the same issues were raised. [89] Another example from Australia found that of a sample of women who were refused legal aid, the factor most commonly associated with positive outcomes was paying for legal assistance.[90]

As well as access to representation, equality of arms arguments are often advanced in favour of steps that might be taken by judges on a case-by-case basis and on a wider systemic platform. It is a primary purpose of the civil courts in England and Wales to address issues of justice and equality. An explicit procedural and case management link is made in the procedure rules set down for managing both civil and family cases between dealing with cases 'justly' and securing that as far as possible 'parties are on an equal footing'.[91] How, and to what extent, can this be achieved? In some quarters it is argued that only absolute equality of arms will suffice[92] whilst for others the idea of completely equal access to justice is an unrealistic idea which cannot be achieved and the policy objective should be one of 'adequate access'.[93] Civil and family courts in England and Wales do not have powers to grant legal aid so that unrepresented litigants may secure legal

[88] Marc Galanter, 'Why the Haves Comes Out Ahead: Speculations on the Limits of Legal Change' [1974] 9 Law and Society Review 95, 114.
[89] Deborah L. Rhode, *Access to Justice* (OUP 2004) 14.
[90] Rosemary Hunter and Tracey De Simone, 'Women, Legal Aid and Social Inclusion' (2009) 44 Australian Journal of Social Issues 379, 391.
[91] Civil Procedure Rules, rule 1.1 (2) (a) available on line at <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part01#1.1> Last accessed 3 July 2017; Family Procedure Rules, 1.1 (2) (c) available on line at <http://www.justice.gov.uk/courts/procedure-rules/family/parts/part_01> Last accessed 3 July 2017.
[92] For example, Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' [1978] 27 Buff. L. Rev. 181, 182.
[93] See Deborah L. Rhode, *Access to Justice* (OUP 2004) 20; Richard Moorhead and Pascoe Pleasence 'Access to Justice after Universalism: Introduction' [2003] 30 Journal of Law and Society 1.

assistance. Care must also be taken by judges in an adversarial system, such as that in England and Wales, not to give any advantage, or appear to give any advantage, to one party over another.[94] For these reasons, aside from making appropriate use of the relevant procedural rules, the ability of individual judges to impact on what may sometimes be stark inequalities between the parties in front of them is limited. Steps that judges take can include helping an unrepresented party with their questioning of a witness or changing the structure of a hearing so as to benefit an unrepresented party.[95] Examples of the difficulties faced by judges in trying to level out an uneven playing field when there are one or more unrepresented litigants before them are highlighted in research carried out by McLean and Eekelaar.[96] Even before LASPO was effected they reported that in 40% of 50 family hearings observed for their research a '…lack of effective representation for at least one party was an issue for the judge hearing the case.'[97] An example of how judges' efforts to address the difficulties of unrepresented litigants can become problematic is provided by Case 3 in McLean and Eekelaar's research

> The DJ tried to enable both parties to speak and to keep them calm and focussed on the needs of the child, but without success. Each parent became more agitated whenever the judge appeared to be speaking for the other, no agreement was reached and the judge adjourned the matter for a month to give the parties further opportunity to reflect and reach a compromise.[98]

Access to justice research has sought to identify the types of support that could be provided to litigants in person where they are faced with a represented opponent.[99] One example of such assistance is provided by the manuals developed and published by the judiciary and the Bar Council in the UK, which are aimed at

[94] Chris Bevan, 'Self-represented litigants: the overlooked and unintended consequence of legal aid reform' [2013] 35 Journal of Social Welfare and Family Law 43, 50.
[95] ibid.
[96] Mavis McLean and John Eekelaar, 'Legal representation in family matters and the reform of legal aid: a research note on current practice' [2012] 24 Child and Family Law Quarterly 223.
[97] ibid 227.
[98] ibid 228.
[99] See, for example, Richard Zorza, 'An Overview of Self Represented Litigation Innovation: Its impact, and an Approach for the Future: An Invitation to Dialogue' [2009] Family Law Quarterly 519.

supporting litigants in person involved in civil and family cases.[100] However, such self-help tools may not be suitable for every litigant in person or for every type of legal problem. As Genn has observed

> …information alone is not helpful for all types of people or for all types of problem…Members of the public with low levels of competence in terms of education, income, confidence, verbal skill, and emotional fortitude are likely to need some help in resolving justiciable problems no matter what the importance of the problem and no matter how intransigent or accommodating the opposition, although this need is likely to be greater where the problem is serious and the opponent is particularly intransigent.[101]

More recently, Barlow has provided insights into the experiences of people seeking advice via the internet in the context of family law disputes. Her research shows that the amount of online sources can be overwhelming, jumbled, and in the absence of being able to know which sources were reputable they are not a replacement for expert legal advice.[102] Beyond the provision of information the Personal Support Unit (PSU), a charity, provides practical support for litigants in person. The PSU utilises court-based volunteers to provide support, but not legal advice, to people facing the prospect of a court appearance without a legal representative.[103]

As well as seeking to support people to cope with the civil justice system as it is, there may be calls to radically simplify the process of bringing and defending claims.[104] This could include steps such as making changes to evidential requirements, removing the use of legal jargon in favour of plain English wherever possible, ensuring that only information which is essential for the progress of a case is requested in court forms and minimising the number of steps parties have to take before a decision is obtained. The appropriateness of changes to procedural or

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[100] HHJ Edward Bailey and others, 'A Handbook for Litigants in Person' (2013). Available at <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/A_Handbook_for_Litigants_in_Person.pdf> Last accessed 5 July 2017; The Bar Council, 'A Guide to Representing Yourself in Court' (2013). Available at <http://www.barcouncil.org.uk/media/203109/srl_guide_final_for_online_use.pdf> Last accessed 5 July 2017.

[101] Hazel Genn, *Paths to Justice* (Hart 1999) 256.

[102] Anne Barlow, 'Rising to the post-LASPO challenge: How should mediation respond? [2017] 39 Journal of Social Welfare and Family Law 203, 214.

[103] See the Personal Support Unit website at <https://www.thepsu.org/> Last accessed 5 July 2017.

[104] For example, Richard Zorza, 'Some Frist Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation' (2013) 61(3) Drake Law Review 845.

evidential rules can be context dependent. For example, in defamation cases where freedom of expression is at issue it has been suggested that a reduced evidential burden could be instituted. This, it is said, would reduce the likelihood that legal aid would be required, reduce complexity[105] and decrease the likelihood that a trial would be regarded as 'unfair' in circumstances where the parties have radically different resources with which to prepare their case.

The provision of legal aid, enabling an individual to be professionally advised and represented, is one of the most powerful and important ways in which an inequality of arms can be addressed. Indeed it is one of the aims of publicly funded legal services to secure formal legal equality.[106] It is therefore unsurprising that the limiting of resources by way of capped budgets for legal aid and the use of increasingly stringent eligibility criteria in order to 'target' limited resources has been described as 'an overt challenge to universal equality before the law'.[107] The capacity of legal aid to address concerns about unequal access to justice for those who cannot afford to fund legal representation themselves is therefore becoming more and more limited. Even when legal aid is granted it may not be a complete solution to inequalities between parties. This is because a grant of legal aid may have conditions attached to it which preclude a particular step from being taken and which set a maximum amount that may be spent on the case. Whilst permission can be sought from the LAA to vary or extend such limitations, permission may not always be forthcoming. A common example of this would be where expert evidence is necessary for the court to make a decision in a case but the LAA will not permit the necessary expenditure.[108] In some cases such restrictions may place lawyers in positions where they are unable to fulfil their ethical obligation to act in the best interests of their client.[109] An example of this post LASPO is that funding for housing possession claims based on rent arrears does not cover advice on Housing Benefit

[105] Dimitris Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge 2012) 184.
[106] R, White, *Report to the Lord Chancellor: The Unmet Need for Legal Services* (LCO, 1976) p2-3 cited in Pascoe Pleasence, Nigel Balmer, Alexy Buck, *Causes of Action: Civil Law and Social Justice* (2nd ed. TSO 2006) 3.
[107] Richard Moorhead and Pascoe Pleasence, 'Access to Justice after Universalism: Introduction' [2003] 30 Journal of Law and Society 1, 2.
[108] For example *Re AB (A Child: temporary leave to remove from jurisdiction: expert evidence)* [2014] EWFC 2758 [42-70]; *Re R (Children: temporary leave to remove from jurisdiction)* [2014] EWHC 643 (Fam); Action Against Medical Accidents, 'Legal aid and experts' fees' <https://www.avma.org.uk/policy-campaigns/access-to-justice/legal-aid-and-experts-fees/> Last accessed 30 December 2017.
[109] Deborah L Rhode, *Access to Justice* (OUP 2004) 113.

issues which are often central to the problem, and crucial to resolve, if a tenant is to keep their home.

In this section we have seen that equality of arms is a central theme in access to justice considerations. Disparities between the ability of parties to effectively participate in proceedings may be addressed at case level by the intervention of individual judges or the provision of legal aid. At a systemic level arguments may be advanced for the simplification of the litigation process. No single approach provides a complete solution to equalities concerns, and is unlikely to do so, unless demands for absolute equality of access to representation are acceded to. We now turn to consider the role that access to justice may have in addressing problems of social exclusion.

2.2.2 Social exclusion

Access to justice has been conceived of as a key way in which to combat social exclusion.[110] Despite this initiatives such as the Troubled Families programme in England, a flagship policy launched in December 2011 aimed at supporting the most socially excluded families,[111] do not address the legal needs of such families.[112] Historically, the UK Social Exclusion Unit also adopted a narrow definition of social exclusion that made no reference to rights and participation in decision making. Similarly, in Australia, work to increase social inclusion did not encompass any legal perspectives. Consequently, in both the UK and Australia, the failure to make any connection between efforts to combat social exclusion with the ability for people to actually make use of the legal system means that a cycle in which persisting legal problems feed further social exclusion goes uninterrupted.[113]

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[110] Pascoe Pleasence, Nigel Balmer and A Buck, *Causes of Action: Civil Law and Social Justice* (2nd ed. TSO 2006) 155.

[111] Department for Communities and Local Government, *Understanding Troubled Families* (HMSO 2014) 7. A Troubled Family was originally defined as a family within which three of the following are present: (1) there is involvement in youth crime or anti-social behaviour (2) there are children who are excluded from school or who are regularly truanting (3) there is an adult on out of work benefits (4) the family is costing the public sector large sums of money in responding to their problems. The definition was changed and expanded to six possible criteria (two of which had to be met) in August 2014.

[112] Department for Communities and Local Government, *Understanding Troubled Families* (HMSO 2014).

[113] Rosemary Hunter and Tracey De Simone, 'Women, Legal Aid and Social Inclusion' (2009) 44 Australian Journal of Social Issues 379, 380.

Social exclusion can also be experienced by particular groups in a specific cultural context. For example in the case of evidence given to courts in the hearing of Australian native title cases, despite significant amendment of procedures and rules of evidence on the basis of cultural sensitivity, evidence from indigenous women is often ignored or given little weight.[114]

2.2.3 Upholding the rule of law

Access to justice, as a means of ensuring that legal rights can be exercised or that others meet their legal obligations, is an essential component of the rule of law.[115] This principle, specifically in relation to access to the courts, has been emphatically reaffirmed in a recent judgment of the Supreme Court.[116] For the rule of law to be served there must be a real, as opposed to theoretical, possibility of access to a court for the resolution of disputes. If such access is unaffordable to many people then the rule of law is not upheld. Consequently any barriers to access to justice, such as court fees and the legal aid means test, must be proportionate and serve a legitimate aim. The legal aid means test has come under scrutiny when, save for the willingness of the legal profession to work for free, it has resulted in individuals being unrepresented in incredibly complex and important cases.[117] The rule of law includes the principle that the law should be accessible, and the possibility of advice from a lawyer is key to this.[118] For people who cannot afford to pay for legal advice those possibilities are much diminished since the passage of LASPO. For example, Citizens' Advice Bureaux are restricting services due to reductions in and restrictions on funding,[119] and by November 2015 eleven Law Centres had

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[114] Louise Anderson, 'The Law and the Desert: Alternative Methods of Delivering Justice' [2003] 30 Journal of Law and Society 120, 132.

[115] Pascoe Pleasence and others, *Civil and Social Justice Panel Survey: Wave 1 report* (Ipsos MORI/Legal Services Commission, 2011) p.i; Lord Neuberger, 'Justice in an Age of Austerity' (JUSTICE - Tom Sargant Memorial Lecture, London, 15 October 2013) para 44. Available at <https://www.supremecourt.uk/docs/speech-131015.pdf> Last accessed 3 March 2017.

[116] *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 [66].

[117] For example, *Great Ormond Street Hospital v (1) Constance Yates (2) Christopher Gard (3) Charlie Gard (by his Guardian)* [2017] EWHC 1909 Fam [17]; Eleanor Sheerin 'Charlie Gard: Why weren't family allowed legal aid, asks judge' (*The Justice Gap*, undated) <http://thejusticegap.com/2017/04/14880/> Accessed 30 December 2017.

[118] Tom Bingham, *The Rule of Law* (Penguin 2011) 39.

[119] Jennifer Sigafoos and Debra Morris 'The Impact of Legal Aid Cuts on Advice-Giving Charities in Liverpool: First Results' (University of Liverpool 2013). <https://www.liverpool.ac.uk/media/livacuk/law/cplu/Impact,of,Legal,Aid,Cuts,on,Advice,Charities,in,Liverpool.pdf> Last accessed 19 February 2016; James Organ and Jennifer Sigafoos, 'What if There

closed.[120] In some areas of England and Wales the possibility of obtaining publicly funded legal advice for some areas of law now barely exists. For example, in Shropshire and Suffolk there is no provision at all for housing advice funded by legal aid.[121] In the field of family law a small survey carried out by Rights of Women in 2014 revealed that women had to travel between 5 and 15 miles to seek advice on 32.9% of occasions and more than 15 miles in 13.2% of instances[122] Concerns have also been expressed on this issue by the National Audit Office and the House of Commons Justice Committee.[123] Before LASPO this was rarely a problem.[124] The shrinking possibility of access to advice is of grave concern, particularly at a time of increasing legal complexity in many areas of law, including housing and welfare benefits.

2.3 Access to justice and legal aid

Notwithstanding the troubling landscape of legal aid provision in England and Wales, for those who cannot afford to pay for legal advice and representation themselves the provision of legal aid remains a key mechanism in securing access to justice.[125] As Hunter and De Simone have put it

> The capacity to invoke formal justice mechanisms to protect and enforce rights and address legal problems generally requires legal representation, and for those unable to afford their own representation (which is likely to be

is Nowhere to Get Advice?' in Asher Flynn and Jacqueline Hodgson (eds.), *Access to Justice and Legal Aid* (Hart 2017).

[120] Law Centres Network, 'Picking Up the Pieces LCN Annual Review 2014-15' 2. <https://issuu.com/lawcentresnetwork/docs/lcn_annual_review_2014-15> Last accessed 1 August 2017.

[121] Carolina Gasparoli, 'Legal aid deserts in England and Wales' (The Law Society November 2016). Available at < http://www.lawsociety.org.uk/policy-campaigns/campaigns/access-to-justice/end-legal-aid-deserts/> Last accessed 18 January 2018.

[122] Welsh Women's Aid, Rights of Women and Women's Aid, 'Evidencing domestic violence: a year on' (March 2014) para 4.3. <http://rightsofwomen.org.uk/wp-content/uploads/2014/10/Evidencing-DV-a-year-on-2014.pdf> Last accessed 12 March 2016.

[123] Justice Committee, *Impact of the changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012* (HC 2014-15, HC 311) paras 83-89.

[124] Pleasence et al, *Causes of Action: Civil Law and Social Justice* (TSO 2004) 110; Hazel Genn, *Paths to Justice* (Hart 1999) 90.

[125] See Rosemary Hunter, 'Access to justice after LASPO' [2014] Fam Law 640 which addresses the position of private family law litigants in particular; Ab Currie, 'Down the wrong road – federal funding for civil legal aid in Canada' [2006] 13 International Journal of the Legal Profession 99.

> a characteristic of socially excluded groups), this requires the availability of either free legal assistance or legal aid.[126]

However, in the UK[127] there has been a trend over the last 30 years or so to reduce and cap the available budget for civil legal aid and exclude many kinds of case and person from eligibility for assistance. There is a general acceptance that cost is an appropriate driver of policy in this area. Indeed those contending that there should be equal access to justice have been criticised because such an approach does not deal with the problem of there being finite resources and how legal aid expenditure may have to be prioritised alongside other 'welfare' programmes but that is not a view held by everyone. For example, in the 5th annual Ryder Lecture on 3 March 2016 the Rt. Hon Sir Ernest Ryder, Senior President of Tribunals in England and Wales, expressed a more values-driven principled view observing that 'What is right, is right; what is fair, is fair; and what is just, is just. Justice has no second class: even in an age of austerity.'[128]

It is common for eligibility criteria to be set and applied to individuals applying for legal aid. With some limited exceptions, such as care proceedings,[129] inquests[130] and for survivors of the Grenfell Tower tragedy,[131] these are applied strictly and inflexibly in England and Wales. The criteria usually concern an individual's financial resources and how likely they are to succeed in achieving the outcome they want in

[126] Rosemary Hunter and Tracey De Simone, 'Women, Legal Aid and Social Inclusion' (2009) 44 Australian Journal of Social Issues 379, 381.
[127] AJA 1999; LASPO 2012; The restriction on payment for work done in judicial review cases was introduced via The Civil Legal Aid (Remuneration) (Amendment) Regulations 2015, SI 2015/898. The scope changes to legal aid for prison law cases were introduced by The Criminal Legal Aid (General) (Amendment) Regulations 2013, SI 2013/2790. Those regulations were later ruled to be unlawful in part. See *R (Howard League for Penal Reform and The Prisoners' Advice Service) v The Lord Chancellor* [2017] EWCA Civ 244.
[128] Rt. Hon. Sir Ernest Ryder, 'The Modernisation of Access to Justice in Times of Austerity' (5th Annual Ryder Lecture, University of Bolton, 3 March 2016). <https://www.judiciary.gov.uk/wp-content/uploads/2016/03/20160303-ryder-lecture2.pdf> Last accessed 12 March 2016. Also see *In the matter of the Mental Capacity Act 2005 Re JM and others* [2016] EWCOP 15 paras 19-22.
[129] The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2012, SI 2013/480 regulation 5.
[130] Lord Chancellor's Exceptional Funding Guidance (Inquests) para 36. Available at <https://www.gov.uk/government/publications/legal-aid-exceptional-case-funding-form-and-guidance> Accessed 30 December 2017.
[131] The Civil Legal Aid (Financial Resources and Payment for Services) (Amendment) Regulations 2017, SI 2017/745.

the case. These are referred to as means[132] and merits tests. It is generally accepted that this is lawful and often goes without further scrutiny or challenge. An exception to this is the work of Hunter and De Simone in Queensland, Australia. They explored the way in which means and merits tests were applied across different kinds of case and across discrete groups of women. Their research showed that 'legal aid eligibility requirements…did not operate uniformly, but had an adverse impact on particular kinds of cases, as well as on some target groups.'[133] They found that older women were particularly disadvantaged by the application of the means test. Similarly those women with an 'intellectual disability' had difficulties in setting out their case so as to demonstrate that it met the merits criteria (even with help).

> …because the guidelines and merit test were clearly open to interpretation, they could be used flexibly to deal with budgetary fluctuations, or what was colloquially known as 'turning the tap on and off…the result of this practice was the creation of systemic inconsistences and inequities in grants decision making between offices and over time.*[134]*

The same study also found that in cases where individuals had made multiple applications for legal aid and were granted access to successive 'small parcels' of legal representation over time this did not result in a complete resolution of the individual's problems.*[135]*

In response to Hunter and De Simone's research Legal Aid Queensland adopted a more flexible approach to the means testing of applications for legal aid in relation to older women and women who came from non-English speaking backgrounds.[136] New criteria were set in which allowance was made for 'special circumstances' and allowed for a decision to be made by a senior member of staff outside of the

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[132] Canada refers to eligibility for civil legal aid being 'needs tested' rather than means tested but it is still a financial assessment. See Ab Currie, 'Down the wrong road – federal funding for civil legal aid in Canada' [2006] 13 International Journal of the Legal Profession 99, 104.

[133] Rosemary Hunter and Tracey De Simone, 'Women, Legal Aid and Social Inclusion' (2009) 44 Australian Journal of Social Issues 379, 386.

[134] Rosemary Hunter and Tracey De Simone, 'Women, Legal Aid and Social Inclusion' (2009) 44 Australian Journal of Social Issues 379, 386 and 389.

[135] ibid 392.

[136] Legal Aid Queensland, 'Means test: special circumstances guidelines'. <http://www.legalaid.qld.gov.au/Find-legal-information/Factsheets-and-guides/Factsheets/Can-I-get-legal-aid > Last accessed 19 January 2018.

standard means test rules.[137] There is evidence that the strict application of the criteria used in England and Wales to decide whether or not legal aid should be granted also disadvantages particular groups but the possibility for some flexibility in the application of the means and merits tests is yet to be explored.[138] Government is, however, coming under some pressure to make such adjustments.[139]

Beyond determining whether legal aid should be granted in individual cases it has been argued that the poorest individuals should remain the focus of a targeted legal aid scheme because they experience higher levels of legal need. Furthermore, as a result of being on the financial margins this group are 'less able to withstand a denial of rights or benefits'.[140] To that extent people on the very lowest incomes may be viewed as having distinct needs.

> The financial vulnerability, emotional impact, and other consequences that can flow from many kinds of justiciable problem have implications for the type of advice and assistance that is needed when members of the public seek help to deal with problems.[141]

This group is also less likely to have the education, skills and self-confidence to resolve problems effectively.[142] Pleasence et al also highlight that some groups are likely to need advice in order to take appropriate action to resolve a problem including those with language issues, people with poor verbal skills and those with serious, complicated and long standing problems.[143]

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[137] Rosemary Hunter and Tracey De Simone, 'Women, Legal Aid and Social Inclusion' (2009) 44 Australian Journal of Social Issues 379, 394. Also see <http://www.legalaid.qld.gov.au/Find-legal-information/Publications/Factsheets/Means-test-special-circumstances-guidelines> Last accessed 5 July 2017.

[138] The only indication of a flexible approach to means testing is the adoption of a 'sliding scale' for assessing the capital resources for applicants who are aged over 60 as provided for by Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013, SI 2013/480 reg 41. Although outside the scope of this thesis it should also be noted that in inquest cases there is a discretion to disregard the means test and to waive the requirement for contributions towards legally aided costs. See Lord Chancellor's Exceptional Funding Guidance (Inquests) para 36 and 37. Available at <https://www.gov.uk/government/publications/legal-aid-exceptional-case-funding-form-and-guidance> Last accessed 30 December 2017.

[139] For example, see *In the matter of the Mental Capacity Act 2005 Re JM and others* [2016] EWCOP 15.

[140] Deborah L. Rhode, *Access to Justice* (OUP 2004) 103.

[141] Hazel Genn, *Paths to Justice* (Hart 1999) 36.

[142] ibid 260.

[143] Pascoe Pleasence et al, *Causes of Action: Civil Law and Social Justice* (TSO 2004) 109.

It is suggested that legal aid administrating bodies should take strategic action in conjunction with organisations who support relevant groups i.e. work with women experiencing domestic violence 'to ensure adequate coverage…and the strategic deployment of legal aid funds'.[144] In the UK the Legal Services Commission (set up to replace the Legal Aid Board following the Access to Justice Act 1999) had a role which went beyond the simple administration of the legal aid budget. Upon the Commission's creation Hazel Genn wrote that

> The Commission has a broad responsibility to set priorities for the funding of services in light of assessments of the need for services of different types, in relation to different areas or communities in England and Wales, and in relation to different categories of case.[145]

Its role was also strategic in that its remit also included a preventative role, the provision of general information on law and the legal system and work on public legal education.[146] The Legal Services Commission was independent of the Ministry of Justice (MoJ). By contrast the Legal Aid Agency is a non-executive agency of the MoJ and does not have an information and education brief.

From the political left legal aid has been criticised for not addressing the structural causes of poverty or adequately addressing racial inequality.[147] It treats symptoms rather than addressing the root of a problem. An alternative view is that this is expecting too much of legal aid, that it is beyond its limits to tackle economic, social or political inequalities.[148] This would not be accepted by all. For example, Pleasence et al have argued that recognition that the value of publicly funded legal services extends beyond purely legal outcomes is crucial in order to harness investment from across government, saying that

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[144] Rosemary Hunter and Tracey De Simone, 'Women, Legal Aid and Social Inclusion' (2009) 44 Australian Journal of Social Issues 379, 391.
[145] Hazel Genn, *Paths to Justice* (Hart 1999) 3.
[146] Access to Justice Act 1999, s4; Hazel Genn, *Paths to Justice* (Hart 1999) 4.
[147] Deborah L. Rhode, *Access to Justice* (OUP 2004) 110; Hilary Sommerlad, 'Some Reflections on the Relationship between Citizenship, Access to Justice, and the Reform of Legal Aid' (2004) 31 Journal of Law and Society 345, 348.
[148] Richard Moorhead and Pascoe Pleasence, 'Access to Justice after Universalism: Introduction' [2003] 30 Journal of Law and Society 1.

> The relationship between justiciable problems and ill health and disability requires that their identification, prevention and amelioration and resolution should be regarded as both public health and civil justice policy objectives.[149]

It has been estimated that as a result of the additional costs of knock on effects from the removal of legal aid from many aspects of family and social welfare law the LASPO reforms will only make approximately 40% of the expected savings.[150] Not only are additional costs likely to be incurred in other parts of the Ministry of Justice but also in the health service e.g. by people seeking treatment for a health problems related to their legal problem.[151]

There is also a view that when it comes to meeting an individual's needs for adequate housing, sufficient income, health care or other social rights legal aid provision is not important.[152] This view seems to rely upon the notion that the state will always provide what it is obliged to provide or will increase or improve provision without any pressure, for example, through legal action. It may be that a homeless person would prefer to have a roof over their head than legal aid per se, as suggested by Goriely and Paterson, '…most homeless families would much prefer a house than an appearance before the Divisional Court.'[153] However, that observation misses the crucial point that when that roof is not forthcoming the homeless person will welcome legal aid to find out their rights so that they may enforce them if that is appropriate. This is particularly the case in times of economic hardship when the state may be wishing to minimise expenditure. The practice of gatekeeping[154] in the sphere of homelessness is an example of cash strapped local authorities seeking to avoid meeting their obligations to homeless individuals.[155]

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[149] Pascoe Pleasence and others, *Causes of Action: Civil Law and Social Justice* (TSO 2004) 115.
[150] Graham Cookson, 'Analysing the economic justification for the reforms to social welfare and family law legal aid' [2013] 35 Journal of Social Welfare and Family Law 21.
[151] ibid 26 and 29.
[152] Tamara Goriely and Alan Paterson, 'Introduction: Resourcing Civil Justice' in Alan Paterson and Tamara Goriely (eds.), *A Reader on Resourcing Civil Justice* (Oxford University Press 1996) 7. For a contrary view see Jeff King, *Judging Social Rights* (Cambridge University Press 2012) 75.
[153] Tamara Goriely and Alan Paterson, 'Introduction: Resourcing Civil Justice' in Alan Paterson and Tamara Goriely (eds.), *A Reader on Resourcing Civil Justice* (Oxford University Press 1996) 11.
[154] Gatekeeping is an unlawful practice through which Local Authorities refuse to accept, or discourage, an individual from making an application for statutory homelessness assistance. See Sarah Dobie, Ben Saunders and Ligia Teixeira, *Turned Away The treatment of single homeless people by local authority homelessness services in England* (Crisis October 2014) 12. An example can also be found in a study of homelessness services by Simon Halliday: see Simon Halliday, *Judicial Review and Compliance with Administrative Law* (Hart 2004) 26.
[155] Sarah Dobie, Ben Saunders and Ligia Teixeira, *Turned Away The treatment of single homeless people by local authority homelessness services in England* (Crisis October 2014) 12.

In that context legal aid may be seen as 'an intermediate procedural right',[156] an important means of accessing a primary claim e.g. for accommodation to be provided or for there to be a fair hearing. In other words, legal aid is the means to an end, not the end in itself, the ultimate goal being to access the Convention right in question. This is not only to bring or defend a claim that one is already aware of but also to be advised as to whether one has a claim or defence at all. After all there is no point in having a right to accommodation if the individual is not aware that the right exists. Likewise, even if s/he has the requisite knowledge s/he may not have the capacities to bring the claim without assistance and again, using the example of a homelessness case, may be unable to have a fair hearing when faced with an inequality of arms against a represented local authority. Consequently, legal aid may be crucial where Convention rights are in play and this is precisely why the ECF scheme exists. Indeed, some scholars are also exploring the arguments for making legal aid in non-criminal cases a human right in itself.[157]

2.4 Effective access to justice

This is about practical participation in the civil justice system in the real world, not what is theoretically possible. It is an aspect of access to justice to be able to effectively participate in legal and related (pre-legal) procedures in which important decisions may be taken affecting an individual. What is needed to ensure effective access is dependent upon the characteristics of the individual and minimum procedural safeguards may be set. For example, whilst general information and advice may be sufficient to enable a well-educated person to take appropriate action to address a problem, for someone with an intellectual disability much more intensive support i.e. full legal representation may be needed. One size does not fit all. With this in mind there are a variety of alternatives (or perhaps additions) to legal aid that have been proposed as offering effective access. These include, for example, free or reduced cost legal services, support to enable individuals to deal with matters themselves and making changes to legal procedures in order to reduce the need for professional legal support. However, there is evidence to suggest that such proposals should be treated with a note of caution. In the Paths to Justice

[156] Dimitris Xenos, *The Positive Obligations of the State under the European Convention* (Routledge 2012) 182.
[157] For example, Simon Rice, 'Reasoning a Human Right to Legal Aid' in Asher Flynn and Jacqueline Hodgson (eds.), *Access to Justice and Legal Aid* (Hart 2017).

study less than 50% of people who had tried to sort out a legal problem on their own were able to reach an agreed solution to the problem with the other party or parties.[158] Furthermore, people were more likely to resolve a problem when active assistance was given by a solicitor or other legal adviser. Genn reported that

> Members of the public were found to be more likely to achieve a resolution of their case when they received advice from a solicitor or from a non-solicitor adviser who provided assistance such as negotiating with the other side…as compared with respondents who received no advice, or who received advice from non-solicitor advisers who did not provide active assistance.[159]
>
> Several respondents explained the futility of being told to write letters or make telephone calls when they felt that they lacked the necessary confidence, vocabulary, and basic knowledge about rights and remedies.[160]

Post-LASPO there is evidence to suggest that in the family law arena the almost wholesale absence of legal aid, and as a consequence an absence of access to legal support, has led to a situation where people are pushed to take action that is not necessarily right for them or the kind of problem they have. For example, if mediation is not appropriate and there is no legal aid available for anything else people either go to mediation regardless of whether their case is suitable for mediation, or the issues are simply not addressed or individuals go to court without legal support.[161]

Often, the emotional impact of justiciable problems is not acknowledged. This can have a negative impact on an ordinarily confident and competent individual's ability to deal with a matter.[162] This is reflected in part of the test applied for eligibility for ECF which asks whether the applicant is so emotionally involved that they lack the objectivity to be able to effectively advocate for themselves.[163]

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[158] Hazel Genn *Paths to Justice* (Hart 1999) 74.
[159] ibid 97.
[160] ibid 99.
[161] Anne Barlow and others, 'Mapping Paths to Family Justice Briefing Paper and Report on Key Findings' (University of Exeter 2014) 33.
[162] Hazel Genn *Paths to Justice* (Hart 1999) 100.
[163] Lord Chancellor's Exceptional Funding Guidance (Non-Inquests) 9.

Part Two

2.5 Administrative Justice

Assuming that an individual has identified a civil law problem for which an ECF application is needed, and is able to find a solicitor to make the application on their behalf or can make the application directly, they will begin a journey of interaction with the Legal Aid Agency (LAA). That interaction will be defined by the process of making the application, the LAA's approach to decision making and the quality of the initial decision reached. If the initial decision is to refuse ECF the focus then becomes the availability and nature of the mechanisms available for redress and challenge, if indeed the individual takes up any of those opportunities. The making and determination of an application for ECF is therefore specifically concerned with access to administrative justice. It is here, in particular, that this study is situated. Whilst there has been some debate about whether administrative justice should concern itself with the scrutiny of initial decision making,[164] in addition to challenges to first decisions such as reviews and appeals, it is argued that it does and should because

> …it is at this level that most people have any contact with the organisations that affect their lives. So, if we have any concern to improve the interactions between citizens and the state then we are likely to have most impact on the largest number by focusing on the initial, or 'front-line', decision making.[165]

This is commonly accepted by modern administrative justice scholars.[166]
It is particularly important to place initial ECF decision making under the administrative justice microscope because of the scheme's status as a gateway to the protection of fundamental rights, the reported difficulties with the scheme and the number of people who potentially need to access ECF. So few applications are

[164] Michael Harris and Martin Partington (eds.) *Administrative Justice in the 21st Century* (Hart 1999) 2.
[165] Roy Sainsbury, 'Administrative justice, discretion and the 'welfare to work' project' (2008) 30 Journal of Social Welfare & Family Law 323.
[166] Michael Harris and Martin Partington (ed), *Administrative Justice in the 21st Century* (Hart 1999) 2; Roy Sainsbury, 'Administrative justice, discretion and the 'welfare to work' project' (2008) 30 Journal of Social Welfare & Family Law 323; Tom Mullen, 'A Holistic Approach to Administrative Justice?' in Michael Adler (ed), *Administrative Justice in Context* (Hart 2010) 383.

granted that it is said that potential applicants may be put off from applying for ECF at all. Similarly, applicants may be deterred from challenging an initial adverse decision if they get that far. The subject matter of the cases to which ECF applies and the potential consequences for individuals, and possibly their families, of not being able to bring or defend a case due to a lack of legal advice or representation (legal aid), means that it is essential to include the whole of the decision making process undertaken by the state. Having said this, the question has been raised as to whether, in reality, substantive obligations can be protected in any system if an inadequate budget has been allocated to a given scheme.[167] In this sense law (rights) and policy (administration) may be in conflict.[168]

2.6 Models of administrative justice

There are a variety of systems and processes that could potentially be utilised to administer any particular scheme. Each process or system is likely to prioritise different objectives and values. Mashaw has sought to explain the different approaches to public administration (which in his research concerned disability benefit in the USA) through the development of three models: 'Bureaucratic Rationality', 'Professional Treatment' and 'Moral Judgment'.[169]

As in Mashaw's study of the American disability benefit system features of more than one model of administrative justice can be seen in the administration of legal aid. However, it is the Bureaucratic Rationality model that appears dominant. This model prioritises administrative values, individual tasks and the process of decision making and aims to ensure that decisions are sound and that the process is carried out at the lowest possible cost.[170] The LAA's latest annual report reflects this. For example, the LAA's number one strategic objective is to 'Improve casework to reduce cost, enhance control and give better customer service'.[171] Its number one achievement in 2016/17 was that 97% of bills submitted by legal aid providers were paid within one month.[172] There is a specific target to make decisions on all but the

[167] Jerry L. Mashaw, *Bureaucratic Justice* (Yale University Press 1983) 6.
[168] ibid 1; Terence G. Ison, '"Administrative Justice": Is it Such a Good Idea?' in Michael Harris and Martin Partington (eds), *Administrative Justice in the 21st Century* (Hart 1999) 31.
[169] Jerry L. Mashaw, *Bureaucratic Justice* (Yale University Press 1983) 25.
[170] ibid 26.
[171] Legal Aid Agency, *Legal Aid Agency Annual Report and Accounts 2016-17* (HC276, HMSO 2017) 1.
[172] ibid 4.

most difficult cases within two weeks[173] and it is reported that in 98% of applications for civil legal aid (which it is assumed includes ECF) in 2016/17 eligibility was determined within 20 working days[174] (which is the standard target for ECF applications).[175]

Elements of the Professional Treatment model are also evident but to a much lesser extent. In this model the emphasis is on the provision of a tailored service to each individual client within available resources. It is argued that justice is served by '…having the appropriate professional judgment applied to one's particular situation in the context of a service relationship'.[176] It might be said that this is evident in the ECF scheme through the bringing to bear of a professional legal judgment in each case in order to determine whether funding should be granted. Many of the members of the ECF team have legal qualifications and are solicitors or barristers and further advice is available from a Central Legal Team. Thus, professional legal knowledge is harnessed with a view to ensuring, as far as possible, that if an individual applicant meets the criteria for receiving ECF it is granted. The LAA aims to 'Ensure defensible and independent decision making'[177] so that the service may be regarded as 'reliable'.[178]

2.7 Interaction with the Legal Aid Agency

Initial decisions

Concern has been expressed about the quality of ECF decision making by the Legal Aid Agency.[179] This criticism has been directed at the application process, the LAA's approach to the information required to support an application, as well as the

[173] ibid 11.
[174] ibid 12.
[175] Legal Aid Agency, 'Exceptional Cases Funding – Provider Pack' (Legal Aid Agency July 2016) 4. Available at <https://www.gov.uk/government/publications/legal-aid-exceptional-case-funding-form-and-guidance> Last accessed 7 January 2018.
[176] Jerry L. Mashaw, *Bureaucratic Justice* (Yale University Press 1983) 29.
[177] Legal Aid Agency, *Legal Aid Agency Annual Report and Accounts 2016-17* (HC276, HMSO 2017) 11.
[178] ibid 25.
[179] Low Commission, 'Tackling the Advice Deficit' (Legal Action Group January 2014) 18-19; Bach Commission on Access to Justice, 'The Right to Justice' (Fabian Society September 2017) 33; Helen Connolly, 'Cut Off From Justice' (The Children's Society June 2015) 59; Amnesty International, *Cuts That Hurt* (Amnesty International UK 2016) 23-27; *The Director of Legal Aid Casework & Anor v IS* [2016] EWCA Civ 464 [20, 33, 52].

decisions themselves. Indeed, it has been suggested that the system is, in itself, unfair, although ultimately this argument was not upheld by the Court of Appeal.[180] Notwithstanding that, the question arises as to whether the LAA's decision making in ECF cases can be said to be 'administratively just'. In order for the ECF system to be considered 'just' its procedures, and the decisions that are made, must ensure that everyone who is eligible for publicly funded advice or representation receives it.[181]

It is also contended that initial decision making should be undertaken with the same keen attention as an appeal.[182] In the context of the ECF scheme the reasoning behind such an argument can be illustrated as follows. Applications may be rejected if they are incomplete but there are no published criteria which make clear when applications will be rejected on that basis. The corollary of this is that it is also unclear when further information should be requested before any determination is made. If information is identified at the stage of a review or appeal as being instrumental in reaching a decision then the same need for that additional material will have existed at the point when the application was looked at for the first time. Ison frames this issue in terms of the 'more sophisticated processing'[183] that is required than simply looking at an initial set of documents and rejecting the application out of hand solely based on what is in front of the decision maker. ECF is arguably a system which requires there to be some 'procedural sophistication' because of the complexity of ECF applications (the ECF team comes under the umbrella of the Exceptional and Complex Cases Team at the LAA) and what is often at stake in the applicant's substantive underlying case.

Discretion

The availability of some discretion in the decision making process is an important feature of administrative justice although it is not without challenges. Discretion has been defined as 'the power…to make a choice among possible courses of action'.[184]

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[180] *IS v The Director of Legal Aid Casework & Anor* [2015] EWHC 1965 (Admin); *The Director of Legal Aid Casework &Anor v IS* [2016] EWCA Civ 464. See discussion in chapter 4 at 4.5.
[181] Michael Adler, 'Understanding and Analysing Administrative Justice' in Michael Adler (ed), *Administrative Justice in Context* (Hart 2010) 129.
[182] Terence G. Ison, '"Administrative Justice": Is it Such a Good Idea?' in Michael Harris and Martin Partington (eds), *Administrative Justice in the 21st Century* (Hart 1999) 22.
[183] ibid.
[184] Kenneth Culp Davis, *Discretionary Justice* (University of Illinois Press 1971) 4.

Decision making based on discretion requires the weighing up of a range of factors, which may rely upon the evaluation of evidence, which will ultimately be a subjective assessment.[185] The decision maker may also have some 'task discretion' which permits them to elect whether to undertake particular tasks or not at various stages of the decision making process. This might include deciding whether or not to request further information, considering whether it is necessary to verify information and how to do that, what steps to take in order to address gaps in an application, inconsistencies in the information supplied and how the criteria for a successful application should be applied.[186] If the set criteria or procedures do not enable a decision to be arrived at without doubt as to its accuracy or correctness then decision makers will utilise tests from outside of the set criteria.[187] At this point, as Sainsbury has put it 'Decision making effectively enters a black box that is difficult for outside observers, including the recipients of decisions, to penetrate.'[188] It is therefore important that documents such as the Lord Chancellor's Guidance on the ECF scheme are sufficiently clear and detailed so as to avoid this.

If initial decisions are made by the most junior, inexperienced staff this stage in the process may become overly formulaic and it will only be when the matter proceeds to an internal review that there will be an active exercise of discretion.[189] Where a scheme necessitates the making of an evaluative judgment and the exercise of discretion it may be argued that there is a need to sift cases so that those where a more formulaic approach will suffice (obvious and straightforward cases) can be directed to more junior and inexperienced decision makers with the more finely balanced cases requiring a more refined, nuanced assessment being siphoned off to the more senior and experienced decision makers.[190] As will be seen in chapters six and seven the discretion available to ECF caseworkers involves the interpretation of concepts such as 'complexity', 'obvious unfairness' and whether the applicant is able to 'represent themselves effectively'.[191] Harlow and Rawlings have

[185] Michael Harris, 'New Procedures' in Michael Harris and Martin Partington (eds), *Administrative Justice in the 21st Century* (Hart 1999) 158.
[186] L Taylor and J Kelly, 'Professionals, discretion and public sector reform in the UK: re-visiting Lipsky' [2006] 19 International Journal of Public Sector Management 629, 631.
[187] Michael Lipsky, *Street-Level Bureaucracy* (Updated edition, Russell Sage Foundation 2010) 222.
[188] Roy Sainsbury, 'Administrative justice, discretion and the 'welfare to work' project' [2008] 30 Journal of Social Welfare and Family Law 323, 328.
[189] Terence G. Ison, '"Administrative Justice": Is it Such a Good Idea?' in Michael Harris and Martin Partington (ed), *Administrative Justice in the 21st Century* (Hart 1999) 23.
[190] ibid 24.
[191] Lord Chancellor's Exceptional Funding Guidance (Non-Inquests) 5.

described this as 'judgement discretion'[192] as these tests are contained within the rules to be applied to determining whether to grant ECF. There is also some 'task discretion' such as deciding whether to reject an application for being incomplete or request further information. Through such decisions ECF caseworkers 'can become very powerful, their decisions not only affecting the lives of thousands of citizens but also shaping the outcomes of policy'.[193] Lipsky has described decision makers in such positions as 'street-level bureaucrats'.[194] As will become apparent in chapters six and seven discretion in its different forms features heavily in some of the themes identified about the ECF scheme.

2.8 Challenging adverse decisions

Internal review

When an application for ECF is refused the applicant can request an internal review of the decision by the LAA. This is an example of 'mandatory reconsideration' (MR). MR is typically found in the social security arena in which the organisation making the initial decision must take another look at a case before it can be considered externally. In the case of ECF the first opportunity for external scrutiny is by way of judicial review after an internal review has been completed.

Internal review may be considered to be 'informal' if it is not a mandatory requirement before an independent external review can be sought, but 'formal' where it is a required stepping stone to external review.[195] Consequently, within the ECF scheme the internal review would be characterised as a formal review and may be seen as a first stage appeal.[196] Internal review may therefore be characterised as a means of redress or adjudication rather than part of routine administrative decision making through which an earlier erroneous decision may be corrected. This is significant because as an adjudicative procedure it has been argued that

[192] Carol Harlow and Richard Rawlings, *Law and Administration* (3rd edn, Cambridge University Press 2009) 209.
[193] Roy Sainsbury, 'Administrative justice, discretion and the 'welfare to work' project' [2008] 30 Journal of Social Welfare and Family Law, 323, 328.
[194] Michael Lipsky, *Street-Level Bureaucracy* (Updated edition, Russell Sage Foundation 2010) 3.
[195] Michael Harris, 'The Place of Formal and Informal Review in the Administrative Justice System' in Michael Harris and Martin Partington (eds), *Administrative Justice in the 21st Century* (Hart 1999) 42-43.
[196] For a contrary view see ibid 46.

internal review would therefore fall to be judged by standards comparable to those by which the decision making of courts and tribunals is assessed. The legitimacy of internal review may therefore depend upon its independence and impartiality, the extent to which applicants are involved in the process, how quickly decisions are taken, the cost of the process and the quality of decisions taken.[197]

A key objection to mandatory internal review is therefore that it delays the possibility of external scrutiny and may ultimately deter people from pursuing an appeal, or in the case of ECF, a judicial review, having had two decisions go against them already.[198] There is an important difference between mandatory reconsideration in the context of social security and in the ECF scheme. In the social security field there is an automatic right of appeal to the First Tier Tribunal after a failed review. In contrast permission must be obtained to move for judicial review if a refusal of ECF is maintained in an internal review.

An oft-repeated defence of the use of internal review or appeal after a negative initial decision is that any injustice will be addressed, however, this is only true to the extent that people take advantage of the opportunity for challenge.[199] The take-up of reviews is an important question for administrative justice generally but particularly in the context of ECF. This is because failure to request an internal review of an initial refusal or abandoning the process before it is complete means that the individual is then precluded from seeking judicial review of their case. It may also lead to the abandonment of the underlying substantive case for which funding was sought.

Previous studies have found that in general the take-up of internal review is low. There is a 'radical drop-off'[200] between the number of people who receive an adverse decision on an initial application and the number who go on to request a review of that decision. There are likely to be a number of factors that affect whether an individual decides to seek an internal review. These may include a lack of

[197] Roy Sainsbury, 'Internal Reviews and the Weakening of Social Security Claimants' Rights of Appeal' in Genevra Richardson and Hazel Genn, *Administrative Law and Government Action* (Clarendon 1994) 287-288.
[198] Michael Harris, 'The Place of Formal and Informal Review in the Administrative Justice System' in Michael Harris and Martin Partington (eds), *Administrative Justice in the 21st Century* (Hart 1999) 47.
[199] Terence G. Ison, '"Administrative Justice": Is it Such a Good Idea?' in Michael Harris and Martin Partington (eds), *Administrative Justice in the 21st Century* (Hart 1999) 23.
[200] David Cowan and others, 'Reconsidering mandatory reconsideration' (2017) Apr Public Law 215, 221.

information about the possibility of review, ignoring information received, or reading it and not understanding it.[201] Difficulties of understanding may also arise if English is not the applicant's first language, especially where information about the review process is only provided in English.[202] There may also be doubts as to the independence of the review process, it being undertaken by the same team or organisation that made the initial decision.[203] This may particularly be the case if a review is undertaken by the same person that made the original decision.[204]

Features of the individual's previous experience of the system in question or wider welfare provision can also be influential in their decision as to whether or not to pursue a review. In addition 'applicant fatigue'[205] can also result from the individual's particular circumstances, which in the case of ECF, may relate to the facts of their substantive case. Where the proceedings or legal problem for which funding is sought is connected to experiences of violence or trauma the need to rehearse those experiences for the purpose of challenging an initial negative decision may simply be too difficult. This highlights the importance of having access to the assistance of, for example, a legal adviser in order to make an ECF application and legal representation more generally in such circumstances.[206] 'Applicant fatigue' can also be exacerbated by matters taking longer than expected or complicated processes.[207] The applicant may therefore conclude that it would be preferable to put up with their existing situation than put themselves through the review process. This may lead to an applicant finding their own solution to the problem, albeit that that may not be a satisfactory solution.[208] Similarly, it may also be the case that the need for representation, in the case of ECF applications, has passed because a time limit had to be complied with before funding could be obtained.[209]

The potential for legal representation to overcome some of the barriers to the take-up of internal review is interesting. In the area of homelessness reviews the

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[201] David Cowan and Simon Halliday, *The Appeal of Internal Review* (Hart 2003) 112-114.
[202] ibid 117.
[203] ibid 118.
[204] Michael Harris, 'The Place of Formal and Informal Review in the Administrative Justice System' in Michael Harris and Martin Partington (eds), *Administrative Justice in the 21st Century* (Hart 1999) 51.
[205] David Cowan and Simon Halliday, *The Appeal of Internal Review* (Hart 2003) 139.
[206] ibid.
[207] ibid 140.
[208] ibid 146.
[209] This was a finding in the study of homelessness reviews by Cowan and Halliday i.e. the need for accommodation had passed. See David Cowan and Simon Halliday, *The Appeal of Internal Review* (Hart 2003) 145.

frequency with which applicants are represented has steadily increased over time, with almost three times as many applicants being represented in 2014 compared with 2003.[210] Research has also shown that legal representation increases the likelihood of being successful in challenging a negative initial decision.[211] Consequently it has been argued that '…internal review has now become both a specialised and adversarial enterprise'.[212] One might therefore expect that as the majority of applicants for ECF have the assistance of a legal adviser,[213] both the rate of review would be higher than in welfare systems generally, but also that many of the barriers to using the review process would be ameliorated.

Judicial review

Previous research suggests that the impact of judicial review on decision making and service provision by government bodies may be limited and varies according to context.[214] In part this may be because just one in ten judicial review challenges ultimately ends with a judgment by the court.[215] The majority of cases are either settled before permission is granted to proceed with a judicial review or between the granting of permission and a final hearing. When there is no determination by a court, there is a risk that the organisation in question will be left to carry on just the same as they were.[216] However, that is not to say that challenges which conclude by way of settlement at an earlier stage do not result in any positive impact on public bodies at all. Indeed, even if there is a court judgment in a particular case it may not have any 'bite', judicial review having been described as 'short of coercive muscle'.[217]

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[210] David Cowan and others, 'Reconsidering mandatory reconsideration' (2017) Apr Public Law 215, 223.
[211] David Cowan and Simon Halliday, *The Appeal of Internal Review* (Hart 2003) 177.
[212] ibid 194.
[213] See section 6.4.1.
[214] Jerry L. Mashaw, *Bureaucratic Justice* (Yale University Press 1983) 11; Simon Halliday, *Judicial Review and Compliance with Administrative Law* (Hart 2004); Lucinda Platt, Maurice Sunkin and Kerman Calvo, 'Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales' (2010) 20 Journal of Public Administration Research and Theory i243.
[215] Lucinda Platt, Maurice Sunkin and Kerman Calvo, 'Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales' (2010) 20 Journal of Public Administration Research and Theory i243; i244.
[216] Terence G. Ison, '"Administrative Justice": Is it Such a Good Idea?' in Michael Harris and Martin Partington (eds), *Administrative Justice in the 21st Century* (Hart 1999) 25.
[217] Lucinda Platt, Maurice Sunkin and Kerman Calvo, 'Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales' (2010) 20 Journal of Public Administration Research and Theory i243; i244.

If internal review is not to be characterised as a first appeal for ECF refusals then this means that judicial review is the 'first appeal' for applicants. However, judicial review is only available on limited public law grounds and a claim cannot proceed without the permission of the court. Combined with the limited impact judicial review challenges are likely to have, the extent of the role that can be played by judicial review in providing effective oversight of the ECF scheme and the degree of influence on the day-to-day practices of the ECF team must be in question.

Part 3

In chapter four a black letter legal analysis of the Exceptional Case Funding scheme is undertaken, the starting point for which are the obligations to provide legal aid arising from the European Convention on Human Rights. In this final part of chapter two the reasoning for the use of human rights as the mode of analysis in chapter four is articulated. Why use human rights rather than the rights associated with citizenship?

2.9 Human rights or citizenship?

The concept of citizenship contains a bundle of rights: civil, political and social.[218] It is the civil aspect of citizenship which includes rights such as access to justice and access to court. There is a clear overlap here between rights associated with citizenship and human rights, and therefore between the rights extended to citizens and non-citizens.[219] Consequently there is also an overlap between the action that may be required by the state in order to fulfil human rights and to fully realise equal citizenship.[220] There are, however, a number of practical, philosophical and political reasons for preferring the lens of human rights over citizenship for the purposes of evaluating the ECF scheme.

An analysis of the ECF scheme through the lens of citizenship would be inadequate because ECF, with its explicit connection to human rights, extends beyond 'citizens'

[218] Thomas Humphrey Marshall and Tom Bottomore, *Citizenship and Social Class* (Pluto 1992) 8.
[219] Catherine Simpson Bucker, 'The Limits of Political Citizenship' (2009) 46 Society 423, 427.
[220] Eilionor Flynn, 'Making human rights meaningful for people with disabilities: advocacy, access to justice and equality before the law' (2013) 17 The International Journal of Human Rights 491, 495.

to all persons within the English and Welsh jurisdiction. One of the limitations of citizenship, both generally and in the specific context of the ECF scheme, is that the rights conferred on citizens are connected to membership of a specific class, this being citizen members of a particular state. However, the physical boundaries of a state do not automatically tell us anything of the nature and extent of the rights of each and every person within its borders. This is because at any one time there may be significant numbers of non-citizens residing there. Residence may be seen as giving rise to an 'intermediate status' between rights accrued from citizenship status and human rights, this being rights contingent upon residence criteria.[221] Residence can be used as a test for conferring some or all the rights of citizens without granting citizenship status per se.

Any person within a jurisdiction, whether a resident, a citizen or having some other status, is subject to the laws of the land, may still have legal needs, and require support to meet them. This very observation was made by the High Court in considering an unsuccessful attempt to use residence criteria as a basis for eligibility for legal aid in England and Wales saying that 'What a non-resident Claimant seeks, just as much as a resident, is judicial protection…his [her] underlying legal rights and underlying need for help are the same whether he [/she] is resident or not'.[222]

As set out in section 1.3 it is people whose income is low enough to satisfy the legal aid means test who are more likely to experience civil legal problems. They are also more likely to experience multiple problems that fall within the family and economic clusters, including employment, welfare benefits, relationship breakdown, divorce and related issues, all of which now fall within the ECF scheme. Individuals experiencing such problems may or may not be citizens but their need for legal advice will be just the same. The capacity to exclude non-citizens if adopting a citizenship lens is therefore problematic because it would likely exclude from consideration the rights of many people who would potentially be applying for ECF. The universality of human rights is therefore a crucial consideration, as opposed to the more limited concept of citizenship.[223]

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[221] Paulina Tambakaki, *Human Rights, Or Citizenship* (Birkbeck Law Press 2010) 22.

[222] *Public Law Project v Secretary of State for Justice* [2014] EWHC 2365 (Admin) 76.

[223] Despite the universality of human rights in theory it may be argued that in some settings groups who would be excluded from citizenship rights are, in practice, also excluded from human rights. For example, see Tehila Sagy, 'Do Human Rights Transcend Citizenship? Lessons from the Buduburam Refugee Camp' (2014) 23(2) Social and Legal Studies 215.

The human rights of individuals may be viewed as a special class of rights elevated above all others, distinct from political and ordinary legal rights, which 'trump' policies or laws which may be advantageous to people generally.[224] An example of this is the ill-fated residence test for legal aid, referred to above, which was never going to apply to applicants for ECF.[225] At the root of the special status of human rights is respect for human dignity,[226] the corollary of which is that laws and policies proposed by political communities such as governments must demonstrate equal concern and respect for all people. It has been argued that respect is also rooted in the idea of justice, the consequence of this being that the rights of unpopular groups cannot be done away with simply because it may better suit the majority.[227] If governments do not at least try to respect the dignity of those in their power the alternative is a rejection of the responsibility to respect human dignity. Trying but not succeeding 'is the difference between mistake and contempt.'[228] It is by reducing the content of all individual human rights to this core principle of respect for human dignity that any relativism necessitated by varying economic conditions, political contexts and cultures in relation to the content of specific rights can be overcome. This is because the basic understanding that dignity requires equal concern for the fate of all is not relative.

The ECF scheme is a key part of the new legal aid scheme ushered in by LASPO from 1 April 2013 onwards. The purpose of ECF is to ensure that legal aid is granted to the extent required by the European Convention on Human Rights. It is designed to 'catch' those people to whom the state is obliged to provide legal aid despite their problems being ordinarily out of scope, whether they are citizens or not. It therefore follows that the ECF scheme should be examined from a human rights perspective.

[224] Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 332.
[225] *R (on the application of The Public Law Project) (Appellant) v Lord Chancellor (Respondent)* UKSC 2015/0255.
[226] Michael J. Sandel, *Justice* (Penguin 2010) 105.
[227] John Rawls, *A Theory of Justice* (Revised Edition, Oxford University Press 1999) 513.
[228] Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 335.

2.10 Conclusion

Legal aid policy and provision sits at the centre of the literature regarding concepts of, and debates about, 'access to justice': what it is, how much of it there should be, in what form and for whom. It has been argued that legal aid provision should be viewed through the lens of universal human rights rather than citizenship status.

Exceptional Case Funding is one aspect of the legal aid scheme in England and Wales. If an individual arrives at the point at which an application for ECF should be made their experience of doing so is likely to be defined, to a large extent, by whether s/he can find a legal adviser to make the ECF application on their behalf. If not, then s/he would have to make an application directly to the LAA themselves. Once an application is made the individual, and their legal adviser if they have one, then become concerned with the LAA's approach to decision making, the values and organisational structures underpinning that, and if funding is refused at first, how the refusal may be challenged. During this phase, after an application for ECF is made, it is the literature on administrative justice that can provide useful context.

The journey from identifying a civil legal need all the way through to making an application for ECF and awaiting its outcome engages with the literatures on access to justice and administrative justice but that is not the whole picture. This study sits at the intersection of the administrative and the legal. In order for the ECF scheme to be administratively just it must comply with the law. In the case of the ECF scheme this means ensuring that legal aid is granted in the circumstances prescribed by s.10 LASPO and that the scheme is operated fairly. In the next chapter the methodology adopted in order to investigate those issues, and answer the research question, is described and discussed.

CHAPTER 3 - RESEARCH DESIGN: HOW TO ANSWER THE RESEARCH QUESTION

3.1 Introduction

This chapter is devoted to a discussion of the methodology and design of this research project. In giving an account of the study there is common ground as to the matters that a researcher must consider and address. These include offering a justification for the ways in which data were collected or created, explaining how the sample was selected, and the reasoning for the particular methods of data analysis adopted. Ethical considerations and any impact of the researcher's biography must also be considered.[229] With this in mind the remainder of this chapter is structured as follows. Section 3.2 sets out the theoretical underpinnings of the research design. In section 3.3 the rationale for the research methods chosen and selection of the sample is discussed. Methods of data collection, the type of data collected and the practical and theoretical implications of those choices are discussed in section 3.4. In section 3.5 the ways in which the data collected were analysed and interpreted and the consequences of adopting those techniques are explored. Ethical considerations are addressed in section 3.6. Finally, the chapter moves on in 3.7 to reflect upon the position of the researcher and the influence of her biography in the context of the research.

3.2 Research Design

Whilst overall LASPO is an example of a legal instrument used to give specific effect to policy, that being to substantially reduce the legal aid budget, this research was not an exercise in policy evaluation. It is, in essence, a socio-legal study of the operation of s.10 LASPO and whether the ECF scheme established following its enactment is fulfilling its stated legal purpose. Put at its simplest it is an exploration of this piece of law as it is in both 'the books' and 'in action'.[230] However, precisely

[229] Virginia Braun and Victoria Clarke, *Successful Qualitative Research* (Sage 2013) 32; Alan Bryman, *Social Research Methods* (5th ed, OUP 2016) chapter 1 ; Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Kane and Herbert M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 932.
[230] Roscoe Pound, 'Law in Books and Law in Action' (1910) 44 Am.L.Rev. 12.

what is meant by the socio-legal approach or method is debated and the difficulty in setting out a complete definition is widely acknowledged.[231] Lacey put it this way

> …socio-legal scholarship locates legal practices within the context of the other social practices which constitute their immediate environment. Thus it comprehends a complex of administrative, commercial, economic, medical, psychiatric and other disciplinary practices, wherever they impinge upon or interact with law.[232]

Whilst socio-legal work is often comprised of empirical research, that is not always the case. Other approaches may be taken within the socio-legal tradition either on their own or in combination with empirical work. In the instant research a combined approach was taken and in that way it can ultimately be considered as a mixed analysis. The advantage of taking this approach is captured very well in this extract from a 1975 lecture given by Twining in which some of the disadvantages of carrying out purely doctrinal legal research are highlighted.

> …typically it takes as its starting point and its main focus of attention rules of law, without systematic or regular reference to the context of problems they are supposed to resolve, the purposes they were intended to serve or the effects they in fact have…[233]

Accordingly it was necessary to first analyse what s.10 LASPO requires. This analysis can be found in chapters 4 and 5 and was an essential precursor to the empirical work that was undertaken. In asking whether the UK Government can rely upon the ECF scheme to fulfil its legal obligations under the European Convention on Human Rights and EU law to provide civil legal aid two sub-issues arise. As identified in chapter 4 they are (1) what do those obligations require? and (2) is the ECF scheme, as drawn and operated, meeting those? In seeking to answer these questions and in order to illuminate the black letter law analysis in chapters 4 and 5

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[231] Fiona Cownie and Anthony Bradney, 'Socio-legal studies' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 35.

[232] Nicola Lacey, 'Normative Reconstruction in Socio-Legal Theory' (1996) 5 (2) Social and Legal Studies 131, 132.

[233] William Twining (1976) Taylor Lectures 1975 Academic Law and Legal Development, Lagos: University of Lagos Faculty of Law, 20 cited in Terry Hutchinson, 'Doctrinal research: researching the jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 16.

a qualitative design[234] was adopted, underpinned by a constructionist epistemology.[235] A constructionist standpoint takes the view that there is no objectively discoverable absolute truth but that meaning is constructed and that '…different people may construct meaning in different ways, even in relation to the same phenomenon.'[236] A constructionist epistemology frequently informs qualitative studies, as was the case here, because the qualitative framework or paradigm recognises that there is more than one version of reality. The crucial thing is to place knowledge in context, whether that be social or political and so on. This may be done, for example, by considering the qualitative data obtained from an interview both on its own merit but also in the wider social or political context of the interview.[237] In the case of this study the data is placed in its administrative context. The way in which the data were collected is discussed in the next section.

3.3 Data collection

The qualitative strand of the empirical inquiry involved reviewing a sample of 20 ECF applications which were provided to the researcher by four solicitors. Twelve applications were in the immigration category, four were welfare benefits cases and two were public law matters. Data were also obtained from the judgments in the *Gudanaviciene* and *IS* cases, as well as the Scott Schedule[238] from the *IS* case, and evidence submitted to the Bach Commission on Access to Justice[239] that was either publicly available or supplied to the researcher by the Bach Commission. After the majority of the documents had been reviewed (excluding evidence submitted to the Bach Commission as that came later) a series of nine in depth semi-structured interviews were carried out. Interviews were carried out with six legal practitioners (five qualified solicitors and one paralegal) who had made applications for ECF. Three of those lawyers had also provided ECF applications for review by the researcher. Interviews with five of the lawyers were carried out in person at their

[234] Virginia Braun and Victoria Clarke, *Successful Qualitative Research* (Sage 2013) 6.
[235] Michael Crotty, *The Foundations of Social Research* (Sage 1998) 8.
[236] ibid.
[237] Virginia Braun and Victoria Clarke, *Successful Qualitative Research* (Sage 2013) 6.
[238] A Scott Schedule is a summary, in table form, of the evidence submitted by the Claimant in a case along with the Defendants' response to each item or issue.
[239] The Bach Commission on Access to Justice has produced two reports: The Bach Commission on Access to Justice, 'The crisis in the justice system in England and Wales' (Fabian Society November 2016; The Bach Commission on Access to Justice, 'The Right to Justice' (Fabian Society September 2017).

offices, across three English cities, or an agreed neutral venue. One interview with a lawyer was conducted over the telephone. Interviews were carried out with three members of staff, of different levels of seniority and experience, from the Legal Aid Agency's (LAA) ECF team who were charged with determining whether ECF should be granted or not. Two of the LAA participants were qualified solicitors and the third did not have any legal qualifications. Interviews with staff at the LAA were carried out at their office in London. All of the interviews except two were recorded and then transcribed. In the case of the telephone interview and one interview in which the participant did not wish to be recorded, detailed contemporaneous notes were taken and sent to the participant to confirm their accuracy.[240]

Document review

The ECF applications reviewed included, as far as possible, the application forms (substantive application form e.g. CIV APP1 or CIV APP3), means form and ECF form,[241] any additional documentary evidence submitted in support of the application; correspondence between solicitor or client and the Legal Aid Agency; and the Legal Aid Agency's determination letter. In cases where ECF was initially refused the request for review, representations in support of the request and the decision on review and any judicial review pre action correspondence were also considered. The ECF application documents reflect what happens, as far as possible, from the point of application to the point of final decision. They tell us about the treatment of the application by the LAA ECF team and the further responses by applicants' lawyers. As Bryman puts it '…documents themselves are often implicated in chains of action that are a potential focus of attention in their own right….'[242]

In the ECF application process there are usually three actors: the applicant; the legal practitioner who makes the application on the client's behalf (if the applicant has found someone to make the application) and the decision maker at the Legal

[240] Neither of the participants whose interviews were not recorded responded to the request to confirm the accuracy of the notes taken and so that is assumed.
[241] A copy of the ECF application form (CIV ECF1) in use at the commencement of the scheme in April 2013 can be found in Appendix A. The latest version (version 5) in use as at June 2018 can be found here <https://www.gov.uk/government/publications/legal-aid-exceptional-case-funding-form-and-guidance> Accessed 17 June 2018. This reflects the changes to the form made following the judgment in *IS (by the Official Solicitor as Litigation Friend) v The Director of Legal Aid Casework and the Lord Chancellor* [2015] EWHC 1965 (Admin).
[242] Alan Bryman, *Social Research Methods* (5th edn, Oxford University Press 2016) 546.

Aid Agency. All three actors operate in the context of the law and policy guidance, which may arguably be perceived as a fourth actor. By reviewing the documents forming the application and consequent decision the researcher is able to hear from all of the actors in the process to some extent. The use of ECF application documents is also beneficial because they contain data already in existence which have not been produced specifically for the purpose of the research.[243] They are 'non-reactive'. This negates the risk that accompanies data obtained from interviews because of the possibility of a 'reactive effect', in that the data is created for the purpose of the research.[244]

Four criteria have been suggested as a means of evaluating the quality of documentary material for research purposes. These are: authenticity; credibility, representativeness and meaning.[245] These criteria are not intended as a linear checklist but rather they are proposed to assist the researcher in making a holistic assessment of the quality of the material that is available to them. In order to assess credibility Scott asks 'Is the evidence free from error and distortion?' although it might also be argued that distortion or bias within a document may be of value because it can reveal something important.[246] In the case of the documents reviewed for the purpose of this study one could take the view that the ECF application documents, whether prepared by a lawyer on behalf of their client or by the LAA in response to an application, contain an implicit bias in favour of the client and LAA respectively. The same could be said of the Scott Schedule from the *IS* case which contains a summary of the witness evidence of the claimant and the defendants' evidence in response. However, particularly as they contain 'non-reactive' data, the ECF documents and the Scott Schedule tell us something about each's approach to their part in the application process and their interpretation of the relevant law and Guidance. The documents are therefore an authentic and credible representation of each standpoint.

[243] ibid.
[244] Reactive effect is the 'response of research participants to the fact that they know they are being studied. Reactivity is deemed to result in untypical behaviour.' Alan Bryman, *Social Research Methods* (5th edn, Oxford University Press 2016) 695.
[245] John Scott, *A Matter of Record* (Polity Press 1990) 6.
[246] For example, John Abraham, 'Bias in science in science and medical knowledge: the Opren controversy' (1994) 28 (3) Sociology 717.

Semi structured interviews

A semi-structured interview

> ….typically refers to a context in which the interviewer has a series of questions that are in the general form of an interview guide but is able to vary the sequence of questions. The questions are frequently somewhat more general in their frame of reference than the questions typically found in a structured interview schedule. Also, the interviewer usually has some latitude to ask further questions in response to what are seen as significant replies.[247]

Accordingly, interview schedules or guides were prepared in advance of each interview.[248] In the case of legal adviser participants the schedule for each interviewee always included the same open questions designed to elicit detailed information about their experience of the ECF scheme that was as wide-ranging as possible. Prompt questions were also prepared in advance for use with the three interviewees who had also provided ECF applications for review and were based on the applications seen. These prompts were used where an interviewee did not naturally talk about the issues of interest that had been identified from the application documents. A particular strength of these follow-up interviews was that they offered the opportunity to go behind the information contained in the ECF documents which presented an already 'filtered' version of the world, the client's position having been communicated to the solicitor and interpreted by them into the form set out in an ECF application.

A separate interview schedule was prepared for use with the participants from the LAA. Again the questions covered broad areas of interest and the same questions were used in all three interviews with LAA staff, with some additional questions asked of the most senior participant. Areas explored included the participant's role in the ECF team, their professional background and experience; team procedures for dealing with ECF applications once received; how case determinations were supervised; and how the quality of the applications received could be improved. Themes identified from the applications seen before the interviews were conducted

[247] Alan Bryman, *Social Research Methods* (5th edn, Oxford University Press 2016) 201.
[248] A copy of the interview schedules for practitioners and LAA staff can be found at Appendix B.

were also explored, such as the factors that were likely to lead to a finding that proceedings were 'complex'. Access to the ECF decision makers was secured after discussion with a senior figure within the Legal Aid Agency. Thereafter contact was made with the researcher by a senior person within the ECF team who selected and secured the participation of two other more junior members of the team. The reasoning behind the selection of the two more junior staff made available for interview is not known. It is therefore possible that they were chosen because they were viewed as most likely to give a 'favourable' account of how the LAA deals with ECF applications. Whilst that may be the case, the interviews with decision makers at the Legal Aid Agency provided an opportunity to go beyond the reasoning in the written determinations seen in each ECF application reviewed and summarised in the *IS* Scott Schedule, and to find out more about the context in which decisions were made. For reasons of confidentiality it was not possible to discuss any individual case or specific decision in the interviews with LAA staff.

3.4 The sample

Sampling has been defined as 'the selection of people, places or activities suitable for study'.[249] In selecting the sample for the instant research the researcher was concerned to ensure that the documents reviewed and people interviewed were drawn from a range of categories that would give a rounded view of the ECF scheme from the perspective of those applying for ECF, those making decisions as to whether to grant ECF and across the various categories of law (excluding inquests) that fall within the scope of the EFC scheme. This has been described as 'stratified sampling'.[250]The pool of potential participants who could contribute to the document review was a small one due to the low number of applications for ECF that had been made.[251] Furthermore, the numbers of applications in categories of law other than immigration and family were very low indeed. Similarly the ECF team at the LAA is a small team.

[249] Raymond M. Lee, *Doing Research on Sensitive Topics* (Sage 1993) 60 cited in Fiona Devine and Sue Heath, *Sociological Research Methods in Context* (Macmillan 1999) 10.
[250] Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Kane and Herbert M. Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 934.
[251] This is a further reason for making clear the distinction between first applications and those determinations made after a review is requested. If the combined figures for numbers of applications are taken at face value this makes the potential pool of participants appear larger than it is.

Solicitor participants who supplied documents and/or were interviewed were targeted after being identified via the legal press and social media as having made applications for ECF. Members of the researcher's own professional network were also approached. Contact was made with local and national Law Societies to ask individual solicitors who had submitted applications on behalf of clients to come forward. Requests for participants were also made on Twitter to target organisations such as Resolution, Legal Action Group and legal practices that had publicised making ECF applications. There was also an element of 'snowballing'[252] in that once a potential participant was identified and contacted, in some instances they put the researcher in touch with another potential participant. The research was also publicised through Rights of Women.[253] Rights of Women is a voluntary organisation who offer telephone advice in immigration and family law to women utilising their network of around 40 volunteer legal practitioners (solicitors and barristers)[254] as well as their own legal staff in the operation of these advice lines.

It was unavoidable that the majority of applications reviewed were those that had been refused, at least initially, as a result of the low number of successful ECF applications overall. Solicitor participants were therefore much more likely to be negative about their experiences of the scheme and as a consequence the interviews with solicitors were unlikely to yield information that makes a positive case for demonstrating that ECF applications were being dealt with well. However, balance was provided by the document review and the interviews with Legal Aid Agency staff. The passage of time, particularly in the immigration category, also served to provide balance because of a significant increase in successful applications in that area.[255]

A substantial proportion, 12 out of 20, of the applications provided were in the immigration law category. This was to be expected as immigration law is the most common subject matter of the ECF applications that have been made. As family law

[252] Alan Bryman, *Social Research Methods* (5th edn, Oxford University Press 2016) 415.
[253] Further information on Rights of Women can be found on their website <http://rightsofwomen.org.uk/> Last accessed 24 October 2016.
[254] Rights of Women, 'Celebrating 40 Years of Helping Women Through the Law' (2015). <http://rightsofwomen.org.uk/wp-content/uploads/2015/07/ROW-anniversary-timeline-final.pdf> Last accessed 18 January 2018.
[255] The timing of the applications reviewed was also important because in the *IS* case the Court of Appeal observed that much of the evidence before them may have related to applications made before the decision in *Gudanaviciene*.

is the second biggest category of law in which ECF applications have been made it was anticipated that the applications made available for the study would reflect this. However, there were some difficulties in securing participation by family law practitioners. This was despite sustained targeted efforts to recruit participants working in the field of family law. This included pursuing contacts suggested by a senior member of the judiciary in the Family Court. Information about the study was circulated by the Law Society of England and Wales via their family and children law committees. Rights of Women circulated details amongst their network of volunteer practitioners. Cold calling of a number of family law practices was undertaken which resulted in three practitioners promising participation. Unfortunately that did not materialise. Consequently the data on how family law applications for ECF are treated were taken from the *IS* Scott Schedule, the evidence submitted to the Bach Commission and the interviews.

One of the methodology limitations is that it is not possible, within the confines of a small study such as this, to know whether the sample seen is representative of ECF applications in general. However, one of the strengths of the ECF application documents is that 18 of the 20 applications post-date the decision in *Gudanaviciene* which significantly changed the overarching test to be applied in deciding whether to grant ECF or not. This overcomes, to some extent, the limitation of some of the data in the Scott Schedule where no indication of the date of ECF application is given and where the decision in *Gudanaviciene* might have led to a different outcome in an application.

3.5 Use of data collected by the Legal Aid Agency

A small amount of quantitative work was undertaken using the official statistics and underlying data published by, or otherwise available from, the Legal Aid Agency. This was done with a view to verifying or providing further insight into some of the themes identified through the qualitative strand of inquiry and the legal analysis in chapters 4 and 5. The LAA numerical data were used in particular to examine whether one of the issues raised in the *IS* litigation, this being that the level of applications rejected on the basis that the applications were incomplete, was as significant as claimed and to explore how well the internal review process for ECF was used.

It was initially hoped that the LAA's own data would provide some insight into who was making ECF applications (i.e. the demographic characteristics of the population of ECF applicants) and enable a comparison to be undertaken between ECF applications post-LASPO and applications made in the relevant areas of law before LASPO was implemented. A Freedom of Information Act request was submitted to the Ministry of Justice on 23 April 2014 asking for a breakdown of ECF applicants by gender, ethnicity, age, disability, postcode and income. Disclosure of the existence of potentially relevant documents was also requested e.g. internal guidance to staff, policy and procedure documents in relation to ECF applications and staff training materials. This request was refused on 16 May 2014 on the grounds that it would be too costly to provide the information requested. A revised request was sent to the Ministry of Justice in July 2014 asking for an estimate of the number of hours it would take to manually extract the requested data from the relevant case files. At the same time the researcher indicated that she was willing to attend at the Agency's offices to carry out the necessary work herself and expressing a willingness to sign a confidentiality agreement in relation to this. Both requests were refused by the LAA but it was then indicated that since April 2014 the ECF team had been recording the gender, age, disability and ethnicity of applicants.[256] Data covering those areas were provided for the period April to December 2014 but this information was patchy and incomplete. There were several reasons for this. A summary of the data on ethnicity was provided in the form of aggregated totals which revealed that in a significant proportion of cases ethnicity had not been recorded. In addition a CSV file was provided which contained data by age bandings, disability (yes, no or unknown) and gender. In both data sets the LAA adopted a rule that if there were fewer than five cases within a particular grouping no volumes were provided. This was done in order to minimise the risk of any individual being identified. In the case of both the ethnicity and disability data there were significant numbers of cases in which the information was unknown. In addition the data on disability did not go beyond whether a person reported that they were disabled or not. Consequently the researcher decided that the available data would not provide a reliable or detailed enough picture of who is making ECF applications and did not pursue this line of inquiry any further.

[256] Letter from Ministry of Justice to author (7 April 2015).

3.6 Ethical considerations

This study was given ethical approval by the University of Liverpool in December 2014.[257] A number of ethical considerations were identified prior to approval being granted. These were principally addressed within the information sheets provided to potential participants.[258] Aside from issues of consent,[259] confidentiality and data security the main concern was to minimise any distress caused to individual applicants by discussing the potentially upsetting circumstances[260] that had led to their making an application for ECF. The majority of applicants whose documents were reviewed were people whose applications had been rejected either at the point of first consideration or on internal review by the Legal Aid Agency. Depending upon whether the applicant had found an alternative means of securing assistance or the problem which led the applicant to seek advice had resolved itself, the circumstances which led to their seeking advice and making an application for ECF were therefore likely to be persisting. In such cases going over their situation and the fact that their application was refused would have been potentially distressing for the applicant. An example of this is where an applicant does not have and has not been able to obtain contact with a child or is separated from a family member as a result of immigration difficulties.

There were also some practical considerations in relation to the direct participation of ECF applicants in the research. It was anticipated that practitioners may not be able to establish contact with applicants who were no longer being represented due to an earlier refusal of funding. Moreover, whilst hearing directly from applicants for ECF would have provided a valuable perspective it was not essential in order to answer the particular research questions settled upon (see section 1.2). It was therefore decided that only legal practitioners involved in making ECF applications would be interviewed, unless an individual applicant expressly asked to be interviewed. Information about sources of support was also included in the information sheet provided to all participants. The primary consequence of this decision was that the applicant's voice is not heard directly in the empirical inquiry.

[257] A copy of the ethics approval letter can be found in Appendix C.
[258] Copies of the participant information sheet for practitioners and applicants can be found in Appendix D.
[259] A sample consent form can be found at Appendix E.
[260] For example, many of the immigration applications that were reviewed were refugee family reunion cases. The applicants had endured very difficult experiences prior to coming to the UK as well as separation from their family members.

An information sheet about the research was provided to solicitors to send on to their clients. In order to address potential concerns about any perceived pressure on applicants to participate it was explained in the information sheet that participants could withdraw from the research at any time without having to give a reason for doing so. Potential participants were also presented with a set of options in the information sheet. They could either not participate at all, they could give permission for their documents to be reviewed or they could make their documents available to the researcher and request that they be interviewed. It was made clear that in the first instance it would be assumed that if the researcher wished to carry out a follow up interview after reviewing the applicant's documents that this would be with the applicant's legal adviser. During the course of the research no individual applicants asked to be interviewed.

It was made clear in the information sheet for participants that the role of the researcher was not to give legal advice. This was for a number of reasons. Firstly it was necessary to manage the expectations of applicant participants so that they understood that taking part in this research was not a means of obtaining a second opinion on the merits of their application. Secondly it was felt that this would allay any worries that solicitor participants might have had regarding potential criticism of the quality of applications submitted to the Legal Aid Agency. Thirdly, this part of the information sheet was a helpful reminder to the researcher that she was looking at the documents as a researcher and not as a solicitor. Consequently it was not the researcher's role to identify whether an applicant might benefit from re-submission of an application or may have grounds for bringing a claim for judicial review of an adverse decision by the Legal Aid Agency. This dealt with the researcher's initial worry about how to deal with such a scenario in the event that an ECF applicant requested a second opinion on their position. Ultimately this issue did not actually materialise in the course of the research.

Wherever it was practically possible to do so solicitor participants made efforts to obtain express consent from their clients to the use of their documents in the research. If contact with applicants could not be established for them to give their explicit consent to release of documents e.g. because they had moved or changed telephone number, solicitors were asked to provide redacted versions of the application documents retained. This required someone from within the solicitor's

firm to manually anonymise the documents in order to exclude any identifying information from them.

3.7 Data analysis

A thematic analysis of the qualitative data was carried out. Thematic analysis is defined as '…a method for identifying, analysing and reporting patterns (themes) within data.'[261] It is a flexible method of analysis which has the advantage of not being tied to a particular theoretical or epistemological standpoint or discipline. Nonetheless it is important to make clear the researcher's underlying perspective as has been set out above. In identifying themes in the data the researcher is highlighting '…something important about the data in relation to the research question…' which '…represents some level of *patterned* response or meaning within the data set.'[262]

The next question that arises is 'what is a theme?' It is acknowledged that 'Themes come in all shapes and sizes. Some themes are broad and sweeping constructs that link many different kinds of expressions. Other themes are more focussed and link very specific kinds of expressions.'[263] Identification of themes is essentially a matter of researcher judgment.[264] A theme may be identified based on the number of times it appears across the whole data set (repetition is regarded as a specific technique for identifying themes) or the space given to it in the instances when it does arise which may only be within one item of data e.g. it may appear within just one interview. Braun and Clarke suggest that '…Ideally, there will be a number of instances of the theme across the data set, but more instances do not *necessarily* mean the theme itself is more crucial.'[265] The important thing is to be uniform in how prevalence is assessed and explicit about the process.

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[261] Virginia Braun and Victoria Clarke, 'Using thematic analysis in psychology' (2006) 3 Qualitative Research in Psychology 77, 79.
[262] ibid 82.
[263] Gery W. Ryan and H. Russell Bernard, 'Techniques to Identify Themes' (2003) 15 Field Methods 85, 87.
[264] Virginia Braun and Victoria Clarke, 'Using thematic analysis in psychology' (2006) 3 Qualitative Research in Psychology 77, 82; Gery W. Ryan and H. Russell Bernard, 'Techniques to Identify Themes' (2003) 15 Field Methods 85, 89.
[265] Virginia Braun and Victoria Clarke, 'Using thematic analysis in psychology' (2006) 3 Qualitative Research in Psychology 77, 82.

The starting point for analysis was a thematic review of ECF application documents and the *IS* Scott Schedule. In turn this informed the quantitative strand of inquiry and the interview schedules. Key issues from the legal analysis in chapter 4 and 5 provided an initial framework or checklist. In particular the researcher wished to analyse how the Lord Chancellor's Guidance and the overarching test derived from the *Gudanaviciene* case was applied in each application and how the factors were weighed by decision makers. Common areas of dispute between solicitors and the LAA in the case of refused applications were also identified. The researcher also looked for any examples of a positive case for a grant of ECF being made relying upon any articles of the ECHR other than articles 6 and 8, these being the only articles explicitly considered in the Lord Chancellor's Guidance. Lastly, documents were checked for any evidence pertaining to systemic issues such as those highlighted in the *IS* litigation e.g. arbitrariness of decision-making. The interview transcripts, contemporaneous notes of the interviews not recorded and the *IS* Scott Schedule were hand coded and emerging themes identified using the same checklist as for the document review. Particular attention was paid to areas where interview data supported and developed the themes from the initial analysis of the application documents and where there were discrepancies between interview data and the other sources.

The underlying data collected by the Legal Aid Agency that was made available in a CSV table alongside their regular statistical bulletins was analysed using Excel. When the analysis was initially undertaken 3 complete years of data on ECF covering the period 1 April 2013 to 31 March 2016 was available. This was later updated to include data up to 31 March 2017. It should be noted that in the Legal Aid Agency's published statistics their count of the number of applications includes decisions taken following a request for a review of an earlier refusal. This is not strictly accurate as a decision on review is a second look at an application that had been submitted once already. Therefore, in the analysis of that data for present purposes a distinction was made between first applications and decisions taken on a review and they are treated quite separately. This is not the approach taken by the LAA in their published statistical bulletins. The analysis of this numerical data focussed on exploring the extent to which initial refusals actually progressed to a review and the outcomes on review. The outcomes across the different categories of law and between requests for review made by solicitors and direct client applicants were compared. This was an essential part of the analysis because of the importance attached to the review process.

3.8 Reflexivity

The subject matter of this study is inescapably political. The researcher is also a legal aid solicitor, who continued in practice until October 2016, with her own prior views of the programme of changes to the provision of legal aid. There is a school of thought which takes the view that discussion of a researcher's biography and values and the impact it may have on the research process is inappropriate in academic writing.[266] There is also an opposing argument which says that for reasons of transparency and credibility it is essential to include such a discussion. Reflexive accounts of the research process as set against the findings and analysis of the research have been described as the 'unofficial' and 'official' versions of research but more frequently are now seen as stories that are 'two sides of the same coin'.[267] Not only that but in the qualitative paradigm the researcher's own views and politics are regarded as a strength rather than something which the researcher should seek to erase from her work.[268] Indeed, some researchers would go so far as to say that it is an ethical obligation to publicly acknowledge the researcher's particular standpoint and the effect of this on their research.[269] That is the position adopted by the researcher.

At the very beginning of the study the researcher identified that there was a risk that she might be selective about the data used and give greater priority to the accounts of one group over another or be biased in how the results were interpreted. For example, the accounts of legal practitioners who had applied for ECF might be unconsciously preferred over Legal Aid Agency decision makers. As Devine and Heath put it '…Identifying with a powerless group can lead to a simplistic polarisation between 'goodies' and 'baddies', when in reality all groups may deserve some sympathy, albeit for different reasons.'[270] Further, as one of the groups of participants in this research were legal aid lawyers the researcher was an 'insider' of that group. This can be a particular risk if the participant is someone known to the

[266] Sarah Nouwen, '*As You Set out for Ithaka*': Practical, Epistemological, Ethical, and Existential Questions about Socio-Legal Empirical Research in Conflict (2014) 27 Leiden Journal of International Law 227, 233.
[267] ibid 227.
[268] Virginia Braun and Victoria Clarke, *Successful Qualitative Research* (Sage 2013) 6.
[269] For example, Karen Norum, 'Black (w)Holes: A Researcher's Place in Her Research' (2000) 23 (3) Qualitative Sociology 319, 336.
[270] Fiona Devine and Sue Heath, *Sociological Research Methods in Context* (Macmillan 1999) 7.

researcher[271] although this issue did not materialise in the context of the instant research project. Even with previously unknown interviewees, if the researcher finds that they like a participant this can lead to their preferring the account given by that individual over another participant.[272] It was therefore important to guard against the views of the researcher and the views of those participants merging into one.

Likewise, if those participating in the research as interviewees include individuals to whom the researcher might be deferential this could also affect the questions asked, how they are asked and the kinds of information the researcher seeks to elicit. For example, Higate describes how as a military veteran himself he found himself asking less probing questions when interviewing senior officers from the armed forces.[273] There was a risk that a similar effect could occur in this research when interviewing decision makers from the Legal Aid Agency, as those figures to a certain extent were still people that the researcher would defer to. This was because in her continuing role as a practitioner the Legal Aid Agency remained an organisation with whom the researcher wished to remain on good terms and there was a possibility that she may come across these participants in that sphere in the future. Indeed, the possibility of such future contact was acknowledged by one of the LAA interviewees. By being aware of the possibility of deference to the LAA participants the researcher was able to guard against it. Against that background it was interesting that by contrast in discussions held with the LAA prior to access being granted there seemed to be a fear that the researcher would be hostile to the interviewees.

Objectivity is a commonly cited goal for research and claims are often made that data and findings are 'objective'. However, from a qualitative and reflexive standpoint this may be viewed ultimately as an impossibility.[274] This is because through a process of reflection the research is positioned in the social and political

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[271] Joan Smith, 'Reflections on using life history to investigate women teachers' aspirations and career decisions' (2012) 12(4) Qualitative Research 486, 487; Matthew Reisz, 'Research ethics: when friends become work' *Times Higher Education* (28 August 2014) <https://www.timeshighereducation.com/news/research-ethics-when-friends-become-work/2015400.article> Last accessed 15 July 2017.

[272] Joan Smith, 'Reflections on using life history to investigate women teachers' aspirations and career decisions' (2012) 12(4) Qualitative Research 486, 490.

[273] Paul Higate and Ailsa Cameron, 'Reflexivity and Researching the Military' (2006) 32(2) Armed Forces and Society 219, 227.

[274] Karen Lumsden, 'You are what you research': researcher partisanship and the sociology of the 'underdog' (2012) 13(1) Qualitative Research 3, 5.

context that the researcher brings to it. As Bryman has put it '…knowledge from a reflexive position is always a reflection of a researcher's location in time and social space…'[275] By being aware of the potential issues in advance of actually carrying out the document reviews and interviews the researcher was able to actively manage these issues when carrying out the empirical work. This was done through regular consultations with the researcher's supervisors who provided an objective sounding board and a valuable space for reflection. Summaries of the issues and themes arising from the document review and interviews were prepared and formed the basis of supervisory discussions. These were a valuable tool in ensuring that the conclusions reached did not extend beyond the data.

Given the researcher's biography and the politicised subject matter of the research it was essential to take a reflexive approach, at least to the extent possible given the limited passage of time. This was valuable to the researcher and it is hoped will also be of use to the reader in their assessment of the findings of this research because they are able to 'see the window that frames the researcher's view'.[276] If objectivity is not truly possible it may be argued that this leads to the findings of the research being viewed as 'situated and partial'.[277] Alternatively, by acknowledging the researcher's role in her research it can be said that there is improved clarity and transparency. It is this researcher's view that the reflexive approach is essential for good research governance and is indeed an ethical obligation of the researcher. Accordingly it is not claimed that this project has been a wholly objective enterprise cleansed of any stain of researcher influence. Rather, to put it in the words of Higate and Cameron she will '…argue for transparency, honesty and openness' and has aimed 'to produce knowledge that might be considered trustworthy and dependable'.[278] Ultimately, the focus must remain on the empirical work carried out and the knowledge and understanding gained from that.

[275] Alan Bryman, *Social Research Methods* (5th ed, OUP 2016) 388.
[276] Sarah Nouwen, '*As You Set out for Ithaka*': Practical, Epistemological, Ethical, and Existential Questions about Socio-Legal Empirical Research in Conflict (2014) 27 Leiden Journal of International Law 227, 234.
[277] Karen Lumsden, 'You are what you research': researcher partisanship and the sociology of the 'underdog' (2012) 13(1) Qualitative Research 3, 4.
[278] Paul Higate and Ailsa Cameron, 'Reflexivity and Researching the Military' (2006) 32(2) Armed Forces and Society 219, 223.

3.9 Conclusion

This research is a mixed socio-legal analysis of the operation of the ECF scheme created by s.10 LASPO. Sited at the intersection of the legal and the administrative, the study seeks to establish what is required of the ECF scheme established by s.10 LASPO and whether, as drawn and operated, the scheme is fulfilling those requirements. A black letter legal analysis of the scheme is presented in chapters 4 and 5. The empirical inquiry, given ethical approval by the University of Liverpool, focussed on the operation of the scheme and utilised a qualitative design underpinned by a constructionist epistemology. A desk based review of 20 ECF applications, the judgments in the *Gudanaviciene* and *IS* cases, the Scott Schedule summarising the evidence submitted to the High Court in *IS* as well as evidence pertaining to the ECF scheme submitted to the Bach Commission, was undertaken. Semi structured interviews were carried out with six legal practitioners and three decision makers from the ECF team at the LAA. A thematic analysis of the data was carried out in order to identify themes and to a limited extent published statistics relating to the first four years of the scheme were also analysed in order to provide a 'check' on two aspects of the qualitative data. The researcher's biography has been acknowledged. Consequently, it is not claimed that the findings of the study represent an objective truth unaffected by the researcher's own views, rather that the findings are trustworthy and dependable. The findings of the empirical inquiry are set out in chapter 6, but it is to the black letter legal analysis of the ECF scheme that we now turn in chapters 4 and 5.

CHAPTER 4 – ECF: WHAT DOES THE LAW REQUIRE?

4.1 Introduction

This chapter offers an analysis of the relevant provisions from LASPO (primarily s.10), related secondary legislation and the Lord Chancellor's Funding Guidance (Non-Inquests)[279] ('the Guidance'), as well as the process of applying for ECF. This is with a view to understanding the extent to which ECF is meeting its stated purpose of ensuring that legal aid is available to individuals where without it there would be a breach of the individual's rights under the European Convention on Human Rights ("ECHR") or enforceable EU law rights, the latter being considered only briefly as EU law does not significantly extend rights to legal aid beyond the Convention.[280] In considering whether the scheme is fulfilling its explicitly stated purpose,[281] the questions that immediately arise are (i) what do those obligations/rights require and (ii) is the ECF scheme, as drawn, meeting those? and (iii) are there other requirements of the Convention beyond those explicitly stated in the legislation and Guidance? In seeking to formulate answers to these questions, some key issues are explored.

Starting in section 4.2 the requirements of Article 6(1) ECHR are discussed, in particular the obligation to ensure that applicants have effective access to Court (section 4.2.1). Consideration is given to how the scheme is operating in practice and how the legislation and the Guidance is applied. In section 4.3 particular attention is paid to the limitations which may be placed on the right of access to Court through the application of merits and means tests for legal aid eligibility. The discussion in these sections draws on the jurisprudence of the European Court of Human Rights as well as a number of domestic private family law cases which have come before the courts since the implementation of LASPO. Following on from this, in section 4.4, the use of Article 6 to exclude some case types from ECF eligibility, on the basis that they do not involve a determination of civil rights and obligations, is explored, with the focus here turning to welfare benefits cases. In section 4.5 the inherent fairness of the ECF is considered. The focus of the chapter then moves on in section 4.6 to briefly explore the possibility of eligibility for ECF on the basis of

[279] Lord Chancellor's Funding Guidance (Non-Inquests).
[280] *Gudanaviciene and others v Director of Legal Aid Casework and the Lord Chancellor* [2014] EWCA Civ 1622 [58].
[281] LASPO 2012, s 10(3).

enforceable EU law rights. In particular this section considers the scope and application of Article 47 of the EU Charter of Fundamental Rights as it applies to ECF, and the extent to which EU law may go beyond the requirements of the ECHR.

4.2 The relationship between Article 6(1) ECHR, practical and effective access to courts and legal aid.

It is worth starting by setting out the full wording of the Article:

> …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…

In summary, Article 6(1) guarantees the right to a fair trial. In civil cases, to which the first limb of the Article refers, there is no unqualified right to legal aid as there is in criminal proceedings.[282] The right to legal aid in civil cases has developed through the jurisprudence of the European Court of Human Rights on the obligations arising from Article 6(1). In civil cases, for Article 6(1) protection to be available to the individual a case must involve a 'determination of civil rights and obligations'.

It has been recognised that a key component of the Article 6(1) ECHR right to a fair trial is to have a right of access to a court.[283] The concept of 'access to court' was considered and further developed in the case of *Airey v Ireland*,[284] which concluded that it is not just access to court that is required in order to comply with Article 6(1), but *effective* access. Factors relevant to this identified by the European Court of Human Rights in *Airey* include: considerations of whether the individual is able to present their case 'properly and satisfactorily', and whether the degree of emotional involvement in the case results in the individual being unable to present their case with the necessary objectivity required by oral advocacy in a hearing.[285] Giving effect to this right can require some positive action on the part of the state, such as

[282] *Airey v Ireland* (1980) 2 EHRR 305 [26].
[283] *Golder v United Kingdom* (1975) 1 EHRR 524.
[284] *Airey v Ireland* (1980) 2 EHRR 305.
[285] ibid [24] and [26].

the provision of legal aid. [286] The fact that there is no rule preventing a person from appearing in court without legal representation is not sufficient to meet the requirement of 'effective access'. Physical access alone is not sufficient; it is the quality of what the individual is able to do on their own behalf that counts. As the European Court of Human Rights expressed in its judgment in *Airey* '…The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective…This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial…'[287] Whilst the *Airey* case concerned proceedings that Mrs Airey wished to initiate in the domestic Irish courts, these principles apply equally to an individual defending a claim.[288]

The factors identified in *Airey* as relevant to an effective access to court were further developed in the case of *Steel and Morris v UK*,[289] to include the importance of the issues at stake, the complexity of the case (law, procedure and facts) and the capacity of the applicant to effectively present their case. Moreover there must be equality of arms, which is considered to be present where the parties have '…a reasonable opportunity to present his or her case under conditions that do not place them at a substantial disadvantage…'[290] in relation to their opponents. Consideration must also be given to whether the proceedings overall were both substantively fair and had the appearance of being fair. The case of *P, C and* S further established that simply because a litigant in person manages to get through a case unrepresented 'in the teeth of all the difficulties' it does not mean that it was fair for them to do so.[291] All of these principles have recently been re-stated and helpfully summarised by the Court of Appeal.[292] It is principally the criteria from *Steel and Morris* that are explicitly included in the Guidance as matters which caseworkers must consider when deciding whether an applicant qualifies for ECF.[293] However, the overall threshold set in the first version of the Guidance stated that in order for Article 6(1) to require a grant of ECF, the caseworker must be satisfied that without legal aid the applicant would find it 'practically impossible' to

[286] ibid 25.
[287] ibid 24.
[288] *McVicar v UK* (2002) 35 EHRR 22.
[289] *Steel and Morris v UK* (2005) 41 EHRR 403.
[290] ibid [62].
[291] *P, C and S v UK* (2002) 35 EHRR 1075 [91].
[292] *Gudanaviciene and others v The Director of Legal Aid Casework and the Lord Chancellor* [2014] EWCA Civ 1622 [46].
[293] Lord Chancellor's Funding Guidance (Non-Inquests) 3 -11.

bring the proceedings or that a lack of legal aid would result in 'obvious unfairness'. The language adopted in the Guidance is drawn from the case of *X v UK*,[294] which, even before LASPO was in force, had been identified as problematic,[295] and following implementation has been found to be unlawful.[296] This is not the language used in *Airey* and it set the threshold for establishing a requirement for legal aid under Art 6(1) at a much higher level. In December 2014 the Court of Appeal concluded that the Guidance as drawn '…impermissibly sends a clear signal to caseworkers and the Director that the refusal of legal aid will amount to a breach only in rare and extreme cases…'.[297] In response to this the Guidance was eventually amended in June 2015.[298]

The way in which the Court of Appeal arrived at that conclusion is different to earlier analyses.[299] Whilst it was found that the original Guidance had distilled from the case law the relevant principles for assessing whether legal aid was required,[300] the way in which the principles were framed in the Guidance was deemed misleading as to the requirements of Article 6(1). In particular, the references to a grant of legal aid only being required in 'certain very limited circumstances' and adding to the tests of practical impossibility and obvious unfairness the words 'This is a very high threshold' served to distort the assessment of the factors to be weighed up in each case as set out above.[301] The Court felt that although the phrase 'practical impossibility' lifted from *X v UK* did not appear in any of the other cases, the use of the phrase 'obvious unfairness' from *X v UK* was an adequate reflection of the line of cases decided by the European Court of Human Rights on this issue.[302] *X v UK* was not seen as inconsistent with the other cases and although it referred to a grant of legal aid only being required in 'exceptional circumstances' the Court held that

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[294] *X v UK* (1984) 6 EHRR 136.
[295] Jo Miles, Legal Aid, Article 6 and "Exceptional Funding" under the Legal Aid etc Bill 2011 (2011) Fam Law 1003;Jo Miles, Legal Aid and "Exceptional Funding": A Postcript (2011)Fam Law 1268.
[296] *Gudanaviciene and others v Director of Legal Aid Casework and the Lord Chancellor* [2014] EWHC 1840 (Admin); *Gudanaviciene and others v Director of Legal Aid Casework and the Lord Chancellor* [2014] EWCA Civ 1622.
[297] *Gudanaviciene and others v Director of Legal Aid Casework and the Lord Chancellor* [2014] EWCA Civ 1622 [181].
[298] The Guidance was amended again in November 2015 following the judgment in *IS (by the Official Solicitor as Litigation Friend) v The Director of Legal Aid Casework and The Lord Chancellor* [2015] EWHC 1965 (Admin).
[299] *Gudanaviciene and others v Director of Legal Aid Casework and the Lord Chancellor* [2014] EWHC 1840 (Admin).
[300] *Gudanaviciene and others v Director of Legal Aid Casework and the Lord Chancellor* [2014] EWCA Civ 1622 [45].
[301] ibid [44].
[302] ibid [42].

this did not support the Lord Chancellor's view, clearly communicated through the Guidance, that ECF will only be required in rare cases.[303] The word 'exceptional' is to some extent a red herring in the context of ECF as it says nothing about the frequency with which a grant of ECF will be required.

4.3 Limits on the right of access to court

It is generally accepted that the setting of some criteria for determining eligibility for legal aid is lawful but this proposition is worthy of greater scrutiny. Eligibility is commonly, but not always, decided by the application of a financial means test and merits criteria which seek to exclude those cases in which the applicant is not sufficiently likely to succeed in achieving their desired outcome.[304] In the language of the legal aid scheme in England and Wales this is referred to as the 'ordinary merits' test. Beyond that, other criteria can be set which serve as additional ways of sifting out what may be regarded as unmeritorious cases. Examples of this are the additional specific criteria which must be met for ECF to be granted (the 'ECF merits' test)[305] and the evidence requirements for private family law cases in which there are allegations of domestic violence.[306] As those examples demonstrate, the drawing of the boundaries of a legal aid scheme more generally can also result in the placing of limitations on the right of access to court. In this section the operation of the eligibility criteria, the thresholds for eligibility and their cumulative impact on the right of access to court are discussed.

[303] ibid [45] and [56].

[304] There are different merits tests for legal aid depending upon the subject matter of the case and the type of funding applied for. If an application is made for full representation (Licensed Work) a prospects of success test will apply but the application for funding will also need to demonstrate that there is no other means of funding the proceedings, that no one else could bring the proceedings instead of the client and that, in all the circumstances of the case, representation is needed. ECF applications for Legal Help, the most common form of Controlled Work, is not subject to a prospects of success test. When granting Legal Help practitioners must satisfy themselves that there is 'sufficient benefit' to the client to justify the cost of assistance, a much lower threshold.

[305] The 'ECF merits test' is at LASPO 2012, s 10(3).

[306] Civil Legal Aid (Procedure) Regulations 2012, SI 2012/3098, reg 33. Relaxation of the domestic violence evidence requirements is expected to be implemented in January 2018 following an announcement by the Ministry of Justice on 4 December 2017.

4.3.1 The application of the 'ordinary merits' criteria in ECF cases

Applicants for ECF must meet financial eligibility criteria, satisfy a merits test ('ordinary merits') and demonstrate that the specific test for ECF ('ECF merits') is met. In this section the features which must be present for ordinary merits criteria to be lawful are explored. Previously decided cases of the European Court of Human Rights provide a series of principles or tests that the ordinary merits tests applied to the ECF scheme must meet if it is to be Article 6 compliant. Whilst the means by which states ensure effective access to court in civil cases fall within their margin of appreciation, the limitations placed upon legal aid, such as the means and merits tests, must pursue a legitimate aim and be proportionate to what the state is trying to achieve. Furthermore, whatever legal aid scheme is implemented by the state it must be operated with 'diligence' and applicants must not be subjected to 'arbitrariness'. Crucially, for there to be sufficient protection from arbitrariness there must be adequate rights of appeal against adverse decisions. Attention must also be paid to who is making decisions, both initially and on appeals against refusals of legal aid. These matters are explored in the context of the ECF scheme below.

Arbitrariness: who is deciding whether legal aid should be granted or not?

There are a number of factors held to offer adequate protection from arbitrary decision making by legal aid gatekeepers. Such factors include there being a suitable system of appeal in place and that the decision makers are an appropriately constituted group qualified to make decisions as to whether legal aid should be granted or not.[307] Of particular importance is the presence of judicial oversight of decision making.[308] How does the Legal Aid Agency (LAA), and the ECF team in particular, fare when judged by these criteria?

The LAA, unlike its predecessor the Legal Services Commission, is a government agency within the Ministry of Justice and is led by a Chief Executive who is also the Director of Legal Aid Casework, a position which reports directly to the Lord Chancellor. This has caused concern about the LAA's independence.[309] Since the

[307] *Del Sol v France* (2002) 35 EHRR 38; *Eckardt v Germany* (2007) 54 EHRR 52.
[308] ibid.
[309] Catherine Baksi, 'Roger Smith: legal aid reforms 'unsustainable'' *The Law Society Gazette* (9 February 2012); Roger Smith, 'Constitutional monstrosity' *The Law Society Gazette* (19 September 2016); Alan Paterson, 'Establishing an Independent Legal Aid Authority in Hong Kong: Lessons from

LAA's creation the Chief Executive and Director of Legal Aid Casework posts have been held jointly by a single individual. Since April 2016 Shaun McNally OBE has occupied these posts. Prior to his appointment Mr McNally was the Director of Case Management at the LAA and before that he held several senior posts in the courts and tribunals service.[310] The previous incumbent, Matthew Coats, was also not legally qualified, his background being primarily in health service management.[311]

Much can be gleaned about the ECF team, in particular from the Director of Legal Aid Casework's annual reports. The composition of the ECF team includes non-legally qualified caseworkers and public lawyers, although the ratio of one to the other is not known.[312] The Director of Legal Aid Casework's 2013/14 Annual Report simply states that there is a higher concentration of lawyers, described as being 'experienced public lawyers', within the ECF team and the wider 'High Costs Cases' grouping.[313] This group deals with 'the most expensive and complex cases'.[314] Decisions on individual cases are made by caseworkers within the ECF team. It is telling that, although the lawyers are there to 'support effective merits decision making'[315] it is explicitly stated that it is only in cases where caseworkers intend to actually grant an application for ECF that decisions must be checked and specific approval sought from the Principal Legal Advisor and the Director of High Costs Cases.[316]

From April 2015 a procedure was adopted by the LAA in relation to 'high profile cases', for both in-scope legal aid and the ECF scheme, which requires

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Overseas Jurisdictions' (2013) para 2.8. <https://www.strath.ac.uk/staff/patersonalanprof/> Last accessed 20 August 2017.

[310] See <https://www.gov.uk/government/people/shaun-mcnally> Last accessed 22 August 2017.

[311] See <https://www.gov.uk/government/people/matthew-coats> Last accessed 5 May 2017.

[312] Legal Aid Agency, *Director of Legal Aid Casework Annual Report 2013/14* (Legal Aid Agency 2014) 4.

[313] Prior to November 2016 the ECF team, along with the High Cost Civil Team was part of the High Cost Cases group. From 1 November 2016 this grouping was re-named the Exceptional and Complex Cases Team which also encompasses the National Immigration and Asylum Team. See Legal Aid Agency, *Director of Legal Aid Casework Annual Report 2016/17* (Legal Aid Agency 2017) 6.

[314] Legal Aid Agency, *Director of Legal Aid Casework Annual Report 2014/15* (Legal Aid Agency 2015) 5; Legal Aid Agency, *Director of Legal Aid Casework Annual Report 2015/16* (Legal Aid Agency 2016) 7.

[315] Legal Aid Agency, *Director of Legal Aid Casework Annual Report 2013/14* (Legal Aid Agency 2014) 4; Legal Aid Agency, *Director of Legal Aid Casework Annual Report 2014/15* (Legal Aid Agency 2015) 5; Legal Aid Agency, *Director of Legal Aid Casework Annual Report 2015/16* (Legal Aid Agency 2016) 7.

[316] Legal Aid Agency, *Director of Legal Aid Casework Annual Report 2013/14* (Legal Aid Agency 2014) 4; Legal Aid Agency, *Director of Legal Aid Casework Annual Report 2014/15* (Legal Aid Agency 2015) 5.

caseworkers to refer relevant cases on to more senior colleagues. In such cases final determinations, whether to grant or refuse funding, must be approved by the Deputy Director.[317] Cases are considered to be high profile if they are going to the Court of Appeal or Supreme Court; if they are likely to change the interpretation of current law or government policy; or if there will be an impact on spending, either at LAA level or on public expenditure more widely. High profile cases also include those where there is a serious reputational risk to the LAA, such as a case attracting public sympathy where the LAA is minded to refuse legal aid or where the grant of funding would be controversial. In addition, any case where it is accepted that there is a wider public benefit or that the proportionality test regarding benefit to others is met, and either has been significant in a decision to grant funding, is categorised as high profile. The high profile cases procedure reflects a key priority, that of budgetary control, of the legal aid reforms embodied by LASPO. It also gives a clear signal that any case 'out of the ordinary' is singled out for its exceptionality. This is also demonstrated by the specific senior oversight of decisions to grant ECF alluded to in the first two annual reports of the Director of Legal Aid Casework.

No decision on whether to grant or refuse funding is permitted in high profile cases until legal advice from a 'Funding Team', comprised of lawyers with expertise on the legal aid scheme itself, as opposed to the categories of law that may be funded, has been obtained and the Head of High Cost Cases has confirmed the Funding Team's recommendation. Lawyers in the Funding Team are part of the Government Legal Department but are 'co-located' with the Legal Aid Agency. If agreement cannot be reached between the Head of High Cost Cases and the Funding Team, cases are referred to the Attorney General/Solicitor General. This is deeply troubling for the independence of LAA decision making for two reasons. Firstly, it is lawyers from the Government Legal Department who advise whether to grant or refuse funding in high profile cases (although it is said that when carrying out functions of the Director of Legal Aid Casework they 'act solely for the LAA'). Secondly, disagreements as to whether funding should be granted or not are resolved by the binding decision of a

[317] Legal Aid Agency, *Director of Legal Aid Casework Annual Report 2015/16* (Legal Aid Agency 2016) 7; Legal Aid Agency, *Director of Legal Aid Casework Annual Report 2016/17* (Legal Aid Agency 2017) 7; Legal Aid Agency, 'Standard operating procedure for reporting and referral of High Profile Cases in Civil Case Management', version 2 August 2015 at <http://lapg.co.uk/wp-content/uploads/2013/09/FOIA_LAA_26_Feb_16.pdf> Last accessed 30 August 2017.

member of the government, the Attorney General or Solicitor General, whose primary objective is to give legal advice to the government.[318]

The inclusion of the ECF team within the High Costs Cases directorate is interesting because applications for ECF are not always high costs cases, which are defined as being those cases where the total costs are likely to be more than £25,000.[319] Applications for ECF may be for both Controlled Work and Licensed Work. Legal Help, the main form of Controlled Work, covers advice and assistance in the early stages of a case but not formal representation and advocacy in proceedings, for which a fixed fee is usually paid. By way of example, the fixed fee for Legal Help in a housing case is £157, in immigration cases it is £234 and for a welfare benefits case it is £150[320] or £208,[321] depending upon when the provider's legal aid contract started. If the work required on a Legal Help case amounts to more than three times the fixed fee when calculated using the hourly rates prescribed for that work, then the amount paid to the provider will be calculated based on the actual work done.[322] Licensed Work (including Family Help (Higher)) does permit representation in proceedings and for this providers are routinely paid an hourly rate for the work done.[323] The positioning of the ECF process within the High Costs Cases team, known as the Exceptional and Complex Cases Team from 1 November 2016,[324] is therefore another signal to caseworkers of the 'exceptional' nature of those applications even though in many instances the value of EFC cases may be as little as 0.8% of the high costs case threshold.

Diligence

The requirement of 'diligence' in the operation of a legal aid scheme is established in the cases of *Staroszczyyk v Poland*[325]; *Sialkowska v Poland*[326] and *Tabor v*

[318] Legal Aid Agency, *Director of Legal Aid Casework Annual Report 2016/17* (Legal Aid Agency 2017) 7.
[319] The definition of a high costs case can be found at <https://www.gov.uk/guidance/legal-aid-high-cost-cases> Last accessed 23 August 2017.
[320] Civil Legal Aid (Remuneration) Regulations 2013, SI 2013/422 Schedule 1, Part 1 Table 1.
[321] ibid Schedule 1, Part 1 Table 7.
[322] ibid Schedule 1, Part 2.
[323] ibid Schedule 1, Part 3.
[324] Legal Aid Agency, *Annual Report of the Director of Legal Aid Casework 2016-17* (2017, Legal Aid Agency) 6. The Exceptional and Complex Cases Team is constituted of the High Cost Civil Team, the ECF team and the National Immigration and Asylum Team.
[325] *Staroszczyk v Poland* [2007] ECHR 272 [129].
[326] *Sialkowska v Poland* [2007] ECHR 223 [107].

Poland.[327] The Oxford English Dictionary defines diligence as 'showing care and effort in a task or duty'. A review of the cases reveals that there is some overlap with the concept of 'arbitrariness' in that assessing whether an appropriate level of diligence has been shown also requires some examination of who is making the decision and the adequacy of the reasons for a refusal of legal aid provided to the applicant. Other relevant factors include the length of time taken for a decision to be reached and the impact of any delay on the applicant. In the case of the ECF scheme, the absence of any procedure for dealing with emergency applications is a feature of the scheme which suggests that it is not operated with the requisite diligence. As a feature of the system itself this tends to suggest that the ECF scheme contains elements which are inherently unfair. This is discussed in more detail in section 4.5.

4.3.2 The 'ordinary merits' test: undermining the purpose of ECF?

The restriction of eligibility for legal aid through the application of a merits test sets a bar beneath which cases are excluded from being funded. This will be referred to here as the 'ordinary merits' criteria. The ECF applicant has to overcome two merits test hurdles. The first hurdle is the ordinary merits test (which would also be applied if the case remained in scope for legal aid).[328] For Licensed Work, usually cases where full representation is to be funded, this is principally an assessment of the likelihood that the individual will secure the outcome they want and whether the likely costs of the case are proportionate when weighed against the likely benefits to be obtained.[329] The second hurdle is the merits test for ECF itself as set out in s.10 LASPO and expanded upon in the Lord Chancellor's Guidance: that ECF must be granted only if a failure to do so would result in a breach, or risk of a breach, of the applicant's rights under the ECHR or another enforceable EU law right.

The stricter the ordinary merits criteria are and the less able an applicant is to represent themselves, the more important it is that there is the opportunity for an appeal to an independent body against a refusal of legal aid. Whether a legal aid scheme such as ECF is lawful requires a weighing up of these three factors. The way in which the balancing exercise between them is to be undertaken is

[327] *Tabor v Poland* [2006] ECHR 654 [43].
[328] Civil Legal Aid (Merits Criteria) Regulations 2013, SI 104/2013.
[329] ibid regs 4, 5 and 8; Civil Legal Aid (Merits Criteria). (Amendment) Regulations 2014, SI 131/2014.

demonstrated in a number of cases decided by the European Court of Human Rights.

In the case of *Del Sol*, a French case, the merits test in question was whether there was 'an arguable ground of appeal'. This is quite a low threshold. The test was designed to weed out appeals where the arguments presented 'were incapable of constituting a valid ground of appeal',[330] in other words appeals that are totally without merit. In the language of the UK scheme this would perhaps equate to cases assessed as having poor prospects (poor prospects are currently deemed to be 45% or less but between 27 July 2015 and 21 July 2016 it was below 20%). In the French system decisions about legal aid are taken by a legal aid office based in the Court of Cassation which is constituted of judges, lawyers, civil servants and members of the public.[331] Appeals against initial refusals of legal aid could be made to the President of the Court of Cassation.[332] In addition, the refusal of legal aid did not prevent Mrs Del Sol from putting her case to the court herself both at first instance and on appeal.[333] Thus, Mrs Del Sol's access to court was not of the 'empty' variety envisaged by Law LJ when 'his [an applicant's] engagement with the court stops at its refusal of legal aid'.[334] This contrasts with the position of individuals who lack capacity who without a litigation friend cannot bring or defend proceedings at all.

In the case of *Aerts,*[335] there was no right of appeal against a refusal of legal aid to an independent (judicial) body and representation was compulsory in the action Mr Aerts wished to bring. Mr Aerts sought 'determination of a much-disputed issue'[336] which in the UK scheme would probably place his case in the category of borderline prospects of success. The Legal Aid Board had placed itself in the position of the Court of Cassation when determining the merits of Mr Aerts's appeal against a refusal of legal aid 'by refusing the application on the ground that the appeal did not at that time appear to be well-founded...'[337] Such an assessment does not take into account the value and impact of representation, as well as the more limited

[330] *Del Sol v France* (2002) 35 EHRR 38 [15].
[331] ibid [17].
[332] ibid.
[333] ibid [26].
[334] *The Director of Legal Aid Casework and the Lord Chancellor v IS (a protected party, by his litigation friend the Official Solicitor)* [2016] EWCA Civ 464 [64].
[335] *Aerts v Belgium* (1998) 29 EHRR 50.
[336] ibid [57].
[337] ibid [60].

evidence that is often available early on in a case. As a consequence the European Court of Human Rights held that 'the very essence' of Mr Aerts's right of effective access to court had been violated. *Del Sol* can be distinguished from the decision in *Aerts* not only because the merits threshold beneath which cases were excluded from legal aid was much lower, with only cases deemed to be 'manifestly bound to fail' where 'no arguable ground of appeal could be made out' being refused legal aid but also because in *Del Sol* there was the possibility of an appeal to an independent judicial person (the President of the Court of Cassation).[338]

How does the ECF scheme compare?

Since LASPO has been in force the ordinary merits criteria concerning 'prospects of success' have changed three times, principally in response to their consideration in the context of the ECF by domestic courts in the *IS* line of litigation.[339] The table below sets out the key changes to the ordinary merits criteria since the passage of LASPO.

[338] *Del Sol v France* (2002) 35 EHRR 38 [17] and [18].
[339] *IS (by the Official Solicitor as Litigation Friend) v The Director of Legal Aid Casework and the Lord Chancellor* [2015] EWHC 1965 (Admin); *The Director of Legal Aid Casework and the Lord Chancellor v IS (a protected party, by his litigation friend the Official Solicitor)* [2016] EWCA Civ 464.

Table 1: Changes to the ordinary merits criteria after LASPO (applicable to both in scope legal aid and ECF)

Relevant period	Form of merits test applied
27.1.14 to 26.7.15[340]	Applicants had to demonstrate that they had at least a 50% chance of succeeding in their case. (Prior to this cases with 'borderline'[341] prospects had been funded).
27.7.15 to 21.7.16[342]	Merits test widened to include the possibility of funding cases where prospects of success were between 20% and 50% if the ECF criteria were also met i.e. there was an obligation to provide legal aid because without it there would be a breach, or risk of a breach, of the applicant's Convention or EU law rights.
22.7.16 to present[343]	Merits test made more restricted once again. A new category of marginal prospects of success was created, this being 45% to 50% chances of success. Cases assessed as having poor prospects (anything less than a 45% chance of succeeding) are not be funded at all regardless of whether the ECF criteria are met. The only scope for flexibility is in immigration and public law matters. In those categories of law cases that are assessed as having borderline or marginal prospects can be funded if the case is of wider public interest, of overwhelming importance to the applicant, or the ECF criteria are met.

[340] Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2014, SI 2014/131. This removed the possibility of immigration and many family law cases with borderline prospects of success from being funded at all.

[341] A case with borderline prospects is one in which it is not possible to assess the likelihood of success due to 'disputed law, fact or expert evidence'. See Civil Legal Aid (Merits Criteria) Regulations 2013, SI 2013/104 reg 5(1)(d).

[342] Civil Legal Aid (Merits Criteria) (Amendment) (No.2) Regulations 2015, SI 2015/1571. These regulations were passed following the judgment in *IS v The Director of Legal Aid Casework & Anor* [2015] EWHC 1965 (Admin).

[343] Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2016, SI 2016/781. These regulations were passed following the judgment in *The Director of Legal Aid Casework & Anor v IS* [2016] EWCA Civ 464.

Between 27 January 2014 and 27 July 2015 an applicant for ECF was required, at the outset, to demonstrate that their case had prospects of success of at least 50%.[344] This was a much more difficult test to satisfy than that in *Del Sol*, with cases that may be 'arguable' (and so would satisfy a *Del Sol* test) excluded from any further consideration. This likened the ordinary merits test during that period more towards that in question in *Aerts*. This was the case until 26 July 2015. Thereafter, between 27 July 2015 and 22 July 2016 if the ECF criteria were satisfied, this could affect how the ordinary merits were assessed as during that period the protection of ECHR and EU law rights to legal aid were prioritised over the ordinary merits test.

However, as shown in the table above, since 22 July 2016 the status of the s.10 criteria have been relegated once more. It is only in the immigration and public law categories that cases considered to have marginal (45-50%) or borderline prospects of success can be funded if one of three conditions are present. The conditions are if the case is also considered to have a wider public interest beyond the individual applicant for legal aid, it is of overwhelming importance to the applicant or where the ECF criteria are met. To operate such a narrow category of cases in which Convention and EU law rights may be prioritised seems arbitrary and practically very difficult to operate. In reality it is very difficult to pinpoint the likelihood of a case succeeding with such accuracy. Other categories in the scheme are much wider. For example, cases with good prospects are those with between a 60% and 80% chance of a positive outcome.[345]

As well as the parameters of the merits tests in themselves, it is also important to consider the way in which they are applied. Useful insights are revealed about the operation of the merits tests in ECF cases by a number of post-LASPO reported cases, as well as the findings of the empirical component of this research which are reported in chapter 6. The reported cases discussed below show that in the private family law arena the boundaries of the in scope scheme are somewhat problematic. In cases where there are allegations of child abuse and/or domestic violence the alleged perpetrator is automatically excluded from the in scope scheme and can only obtain legal aid through ECF. Respondents in child abduction cases are at a similar disadvantage compared with the applicants in those cases who are

[344] Civil Legal Aid (Merits Criteria) (Amendment) (No.2) Regulations 2015, SI 2015/1571. In force from 27 July 2015.
[345] Civil Legal Aid (Merits Criteria) Regulations 2013, SI 2013/104 regulation 5(1)(b).

automatically entitled to legal aid regardless of both means and merits.[346] This immediately puts these parties (mostly men in the reported cases), against whom nothing may have yet been proven, at a disadvantage. This is because they must get over the hurdle of both the ECF and ordinary merits tests.[347] Examples of this are provided by the position of the fathers in the cases of *CD v ED*,[348] *Re B*,[349] *Re C*[350] and *Q v Q*,[351] and more unusually, the mother in the case of *Re H*.[352] Between them these cases highlight how the protection of an individual's Convention rights may vary depending upon the stringency of and priority given to the ordinary merits criteria.

Q v Q is particularly illustrative of some of the issues that can arise when the ordinary merits criteria is given precedence over the protection of Convention rights. This case tends to suggest that the ECF scheme cannot fairly deal with 'the full run of cases'[353] which go through the system. It is worth noting, in a little detail, the facts of the *Q v Q* case. It concerned a father's application for contact with his son. The father was a convicted sex offender and did not speak English. As the proceedings had started pre-LASPO he originally had the benefit of legal aid but following the receipt of expert reports this was terminated between April and August 2013 on merits grounds, the Legal Aid Agency having decided that the prospects of the father securing any contact with his son were poor. Consequently, in about August 2014 Mr Q applied for ECF, with the assistance of the Public Law Project. His application was refused, that decision was upheld on review and a claim for judicial review was issued. The Court had expressed the view that in order for the Article 6 and 8 rights of the mother, father and their son to be protected the father needed to be represented. This was because the expert evidence before the Court addressing the risk that the father posed to his son needed to be tested. The Court identified that there were questions which could properly be put to the experts in cross-

[346] For example, see *Kinderis v Kineriene* [2013] EWHC 4139 (Fam); K v K No.2 [2014] EWHC 693 (Fam).
[347] It may also be argued that those whose cases remain in scope due to allegations of domestic violence or abuse also have two hurdles to overcome because of the specific evidence requirements which must be met in addition to the ordinary merits test. This is discussed in section 4.3.4.
[348] *CD v ED* [2014] EWFC B153 (Fam).
[349] *D v K and B (a child, by her guardian)* [2014] EWHC 700 (Fam); *Q v Q; Re B (A Child); Re C (A Child)* [2014] EWFC 31.
[350] *Q v Q; Re B (A Child); Re C (A Child)* [2014] EWFC 31.
[351] Q v Q [2014] EWFC 7; *Q v Q; Re B (A Child); Re C (A Child)* [2014] EWFC 31; Q v Q (No 3) [2016] EWFC 5.
[352] *Re H* [2014] EWFC B127.
[353] *The Lord Chancellor v Detention Action* [2015] EWCA Civ 840 [27].

examination that had the potential to undermine the experts' evidence and could lead to the Court forming the view that contact in some form would be appropriate. Without the evidence being tested the likelihood was that no contact would be permitted.[354] What was certain was that whatever decision was made this would characterise the nature of the relationship (or lack of relationship) that the son would have with his father for many years to come.

ECF was eventually granted to Mr Q on 27 July 2015, in all likelihood because of the changes in the ordinary merits test which took effect on that date.[355] What the *Q v Q* case shows is that the bald application of prospects of success tests without explicit consideration of a party's rights under the ECHR and without consideration of the impact and specific purpose of representation is inadequate.[356] The case also exposes how substantial delays can occur in private family law cases which would never be accepted in public law children cases, where there is a statutory target of 26 weeks for the resolution of care proceedings.[357] It is also an example of how the distinction between public and private law proceedings can be unhelpful when considering cases from the perspective of the children involved in them.[358] Mr Q's application for contact with his son was first issued in July 2010 and did not conclude until January 2016. This was in no small part due to the difficulties that he had experienced in securing funding for legal advice and representation.[359] Without the changes to the ordinary merits test that took effect on 27 July 2015, it is likely that Mr Q would have been left unrepresented unless an alternative means of funding or pro bono representation could be secured.

The conclusion must therefore be that the form of the ordinary merits test in force between 27 July 2015 and 21 July 2016 struck the right balance between the protection of Convention rights and prospects of success criteria. The alternative would be to accept that an individual in Mr Q's position should not be granted funding and that the protection of his and his son's Convention rights were not sufficiently important for the state to do so. That cannot be right. Nonetheless, in *IS*

[354] *Q v Q* [2014] EWFC 7 [9] and [10].
[355] A more flexible merits test in response to *IS (by the Official Solicitor as Litigation Friend) v The Director of Legal Aid Casework and the Lord Chancellor* [2015] EWHC 1965 (Admin) was introduced on 27 July 2015.
[356] This was one of the criticisms of the operation of the merits test made by Collins J. ibid [96].
[357] Children and Families Act 2014, s 14(2).
[358] Coram Children's Legal Centre, 'Rights without remedies: legal aid and access to justice for children' (February 2018) 8.
[359] *Q v Q (No 3)* [2016] EWFC 5 [45].

the merits criteria in force before 27 July 2015 were ultimately found to be lawful. In doing so the Court of Appeal did away with the requirement for the more flexible merits criteria introduced on 27 July 2015, which had ultimately enabled Mr Q to obtain ECF. The Court's reasoning was flawed for the following reasons.

In considering the line of authority from the European Court of Human Rights on the permissible ways in which Article 6(1) rights of access to court may be limited through the application of merits tests, the Court of Appeal decided that the legality of the ECF scheme was not contingent upon an applicant's ability to appeal to an independent (judicial) person if legal aid was refused. Instead it was held that the most important feature was that any merits test is 'reasoned and proportionate' and that it enables there to be 'a reasoned sensitivity to each case'.[360] This view was arrived at after considering the cases of *Aerts* and *Del Sol* in particular. The evaluation of those cases was rather simplistic and led to a somewhat unfortunate outcome.

The merits criteria under consideration when the *IS* case first came before the courts provided that in the two main areas funded by ECF, immigration and many family law cases, legal aid would be refused in cases which were deemed to have borderline prospects or less. This is very much akin to the merits test applied in *Aerts*. In addition, some ECF applicants cannot conduct proceedings without a litigation friend. This applies to children under the age of 18, unless a court orders otherwise,[361] and adults who lack legal capacity.[362] Professional litigation friends such as the Official Solicitor will require that their costs be met in order to act as litigation friend. Similarly, a non-professional litigation friend may require representation in proceedings and the costs of such representation must also somehow be met. The risk of having to pay the costs of the applicant's opponent must also be considered. If the applicant cannot afford to pay for representation one of very few ways of doing so is via legal aid. Again, this is akin to the position in cases such as *Aerts* and *Del Sol* in which representation was compulsory.

[360] ibid [64].

[361] Civil Procedure Rule 21.2(3) provides that the court may make an order permitting a child to conduct proceedings without a litigation friend.

[362] Mental Capacity Act 2005, s.2(1) provides that 'a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or disturbance in the functioning of, the mind or brain.' Such persons are defined as protected parties by Civil Procedure Rule 21.1 and are required to have a litigation friend in accordance with Civil Procedure Rule 21.2(1).

However, unlike in *Del Sol*, if ECF is refused there is no possibility of an independent review of the refusal of legal aid. This is because, for ECF applicants, LASPO and regulations made pursuant to it only provide for a right of internal review by the LAA.[363] Following an internal review, the only route of challenge would be by way of a claim for judicial review.[364] Of course, in order to bring a claim for judicial review the applicant is very likely to require legal aid. Applicants can therefore find themselves in a position of applying for legal aid to bring a claim for judicial review of the LAA's refusal of ECF.[365] Moreover, determinations of the merits of a proposed judicial review in such circumstances give rise to a conflict of interest.[366] If legal aid in connection with a judicial review is refused then, in the first instance, the applicant has a right to an internal review. If the internal review upholds the decision to refuse funding for the judicial review then a right of appeal arises. There are two potential mechanisms for such appeals. They are either considered by an independent adjudicator (a practitioner appointed by the LAA) or via a Special Control Review Panel. These panels are constituted of two or three specialist practitioners drawn from a pool retained by the LAA for these purposes. In the case of judicial reviews challenging refusals of ECF such appeals will fall mostly to be considered by Special Control Review Panels because at the heart of the case is a dispute as to whether the applicant's Convention rights have been breached by the refusal of ECF.[367]

If legal aid is granted so that an applicant is able to pursue a judicial review of a decision to refuse ECF, this only permits review on limited public law grounds and permission to bring a judicial review must be obtained. Unlike in *Del* Sol there is no judicial 'full merits review' available to an ECF applicant as of right. Essentially, the LAA is the gatekeeper of ECF and is the only and final means of a full review of the

[363] Civil Legal Aid (Procedure) Regulations 2012, SI 2012/3098 regulation 66(3).
[364] ibid and 69.
[365] See John Halford and Francesca Allen, 'Physician, heal thyself: securing funding from the LAA to challenge its own exceptional funding refusals' (Public Law Project's Judicial Review: Trends and Forecasts conference, London, 22 October 2014). Available at <http://www.publiclawproject.org.uk/data/resources/194/JH_FA_physician_heal_thyself.pdf> Accessed 5 September 2017.
[366] Concern about the independence of decision making on applications for legal aid in judicial review cases was expressed before the passage of LASPO. See Joint Committee on Human Rights, *Legislative Scrutiny: Legal Aid, Sentencing and Punishment of Offenders Bill* (2010-12, HL 237, HC 1717) 5.
[367] Civil Legal Aid (Procedure) Regulations 2012, SI 2012/3098 regulations 54(3) (e) (ii) and 58(3).

merits of an application for ECF.[368] Despite the Court of Appeal's finding that the current arrangements are not unreasonable, it arguably remains the case that the opportunities for challenge and oversight of the ECF scheme are insufficient to act as a corrective to poor decision making as is necessary for the ECF scheme to be considered inherently fair.[369]

Against this background it was the position of individuals lacking capacity which the High Court had specifically identified in *IS* as the reason that the ordinary merits criteria were too rigid and therefore unreasonable. However, on appeal, this was overturned, without any specific consideration of the position of applicants without capacity. Indeed, no reasoned consideration was given to the position of such applicants for ECF whose position is very much on all fours with that of *Aerts,* rather than the case of *Del Sol.* The problems of the ordinary merits criteria in the context of the ECF scheme do not, however, end there. Difficulties in representing oneself are not limited to children and those who specifically lack legal capacity. It does not take into account circumstances such as those of the mother in *Re H*[370] who had 'capacity to litigate but only with the assistance of a solicitor'. She was described as having hearing, speech and intellectual difficulties and was unable to read or write.[371] Whilst such an individual may, in principle, bring a case without representation the reality of doing so would also result in the 'very essence of the right' being impaired as would have been the case in *Re H* if pro bono assistance had not been available.

Notwithstanding these difficulties, when *IS* came before the Court of Appeal Laws LJ reasoned that judicial involvement in ECF decision making was not 'a definitive touchstone' but rather it was crucial that the legal aid system was of sufficient quality that it was able to respond to individual cases with 'a reasoned sensitivity', concluding that the ECF scheme could indeed do so.[372] The court equated the application of different merits criteria to different sorts of cases within the legal aid scheme in general (a theoretical sensitivity) with the ability of the ECF scheme to

[368] The importance of access to a full merits review by an independent tribunal is discussed in the context of the social security 'mandatory reconsideration' procedure and rights of appeal to the First Tier Tribunal in *R (CJ) and SG v SSWP (ESA)* [2017] UKUT 0324 (AAC).
[369] *R (on the application of the Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481.
[370] *Re H* [2014] EWFC B127 [5].
[371] ibid.
[372] *The Director of Legal Aid Casework and The Lord Chancellor v IS (By the Official Solicitor as Litigation Friend)* [2016] EWCA Civ 464 [64].

respond with 'a reasoned sensitivity' to an actual individual case before it. In permitting the original merits criteria to stand the Court of Appeal has defeated the purpose of the ECF scheme. The ECF applicant now has the worst of all worlds: a relatively high cut off for funding (below 45% prospects of success), with no right to an independent full merits review, and there is no discretion for the LAA to dis-apply the merits criteria to their individual case. For applicants without capacity (like *IS*) or very limited legal capability (as in the case of *Re H*) the consequence of this is that there is no means of protection of their Convention rights at all if the current merits criteria are not satisfied. Following *Aerts* this means that the ordinary merits criteria in their current form do not afford applicants for ECF sufficient protection from arbitrariness as required by Article 6 (1).

4.3.3 Limits on the right of access to court: ECF and the means test

With some limited exceptions, legal aid including ECF, is also subject to means testing.[373] This means that individuals whose income and/or capital are above the limits set by the LAA can be excluded from eligibility for legal aid regardless of the strength of their case and/or any breach of Convention rights that may occur if legal aid is not granted. The current disposable income limit is £733 per month. In addition there is an overall gross income limit of £2657 per month for families with up to 4 children (an extra £222 per month can be added on for a 5th child and each additional child thereafter). There is also a capital limit of £3000 for immigration cases and £8000 for all other civil cases.[374] Calculation of an applicant's income and capital is made by reference to a set of allowances and deductions that may be subtracted from gross income or capital to reflect rent, mortgage payments, an allowance for each dependant, income tax and national insurance and so on.[375] The difficulties that the means test can create in cases where the ECF merits criteria are clearly made out, could not be better illustrated than by the cases of *D (A Child)*[376]

[373] Those cases in which the individual's financial resources are not taken into account in determining whether legal aid should be granted are set out in the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013, SI 2013/480 regulation 5(1).
[374] Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013, SI 2013/480.
[375] The LAA publishes the deductions and allowances that may be used when calculating financial eligibility for legal aid on a 'Key Card'. The latest Key Card can be found here <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/528095/eligibility-keycard.pdf> Last accessed 17 September 2017.
[376] *In the Matter of D (A Child)* [2014] EWFC 39; *In the Matter of D (A Child) (No.2)* [2015] EWFC 2.

and *Re K and H.*[377] The case of *D* in particular demonstrates the inconsistent treatment of Convention rights in the current legal aid scheme in general, as this concerned an application for 'in scope' legal aid but the ECF criteria would have been met if they had applied. Such situations, where applicants for legal aid have been denied funding, whether ECF or in scope legal aid, have been described as the 'LASPO gap'.[378]

In the case of *D (A Child)* a mother and father who were facing the possibility of their young child being permanently placed outside of their family were refused legal aid on the basis of their means. In May 2014 the father's disposable income was £34.64 in excess of the LAA threshold, and in June 2014 this had increased to £73.94.[379] Both parents had learning difficulties. In the mother's case she was described as 'being on the borderline of a mild learning disability' and the father had an even more significant impairment, having an IQ of about 50. The father was deemed to lack litigation capacity and therefore could not participate in the proceedings without a litigation friend, who in his case was the Official Solicitor. It took from 20 March 2014 to 1 December 2014 for the parents to eventually obtain legal aid. There had previously been care proceedings at the conclusion of which the Local Authority obtained a care order with the plan being for the child to be placed with his parents. Following concerns about the placement the local authority obtained an order permitting them to remove the child from the parents and place him in foster care, where he remained throughout the course of the proceedings and at the point where both judgments were given. The Court was therefore faced with a situation in which the parents were not eligible for legal aid on financial grounds, could not afford to pay privately for legal representation and where '…it is unthinkable that they should have to face the local authority's application without proper representation…'[380] Due to the parents' disabilities they were unable to represent themselves in the proceedings in which their rights, and those of their son, under Article 6 and 8 ECHR were clearly engaged. Not only that but the rights of the child in such a case are severely impacted and the cases are time sensitive. As observed by the Coram Children's Legal Centre '…much of the impact of LASPO

[377] *Re K and H (Children: unrepresented father: cross-examination of child)* [2015] EWFC 1.
[378] Mr Justice Cobb 'To no one will we sell, to no one will we deny or delay right or justice' (Liverpool Law School Annual Public Lecture, Liverpool, 13 May 2015).
[379] *In the Matter of D (A Child)* [2014] EWFC 39 [18].
[380] ibid [3].

on children is felt in cases involving children, rather than the cases involving child claimants.'[381]

Although D's parents were facing the permanent removal of their child, and their Article 8 and Article 6 rights were engaged, their application for legal aid was subject to means and merits tests because the particular applications did not fall within the definition of a Special Children Act 1989 case.[382] Cases within that category include care proceedings under s.31 Children Act 1989 but not the applications in the present case, unless they are brought at the same time as care proceedings. The result of this is that the parents were not entitled to legal aid because the means test applied by the LAA deemed that the father had disposable income in excess of the threshold when means were assessed in May and again in June 2014.

In *Re K and H*,[383] private law children proceedings, the mother was represented and the father was a litigant in person (although at an earlier stage in the proceedings he had been represented). Before the proceedings had come to be managed by HHJ Bellamy interim residence orders were made in favour of the mother and the father's contact with the children was limited to supervised contact at a contact centre. The issue at the core of the case was an allegation by one of the mother's older daughters (Y) that the father had sexually abused her. The father had been arrested and interviewed by the Police but no charges were brought. He denied the allegation at the time of his arrest and continued to do so. The court had decided that Y should give oral evidence at a finding of fact hearing. The father understandably wished for the evidence of Y to be tested in the proceedings but he did not wish to cross-examine Y himself and indeed there are guidelines prohibiting

[381] Coram Children's Legal Centre, 'Rights without remedies: legal aid and access to justice for children' (February 2018) 4.

[382] A special Children Act 1989 case is defined at Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013, SI 2013/480 Regulation5(2) and at Civil Legal Aid (Merits Criteria) Regulations 2013, SI 2013/104. An amendment to Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 is anticipated to enable parents facing applications for placement orders to qualify for non-means tested legal aid. However, amending regulations have not yet been laid before Parliament. See written statement by Edward Timpson MP Minister for Vulnerable Children and Families), on 28 February 2017 HCWS506 here: <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statements/?page=1&max=20&questiontype=AllQuestions&house=commons&member=1605> Last accessed 28 April 2017. Details of the amendment proposed by the Family Rights Group can be seen here: <https://www.frg.org.uk/images/Policy_Papers/161129_Jt_Alliance_Briefing_CSW_Bill.pdf> Last accessed 26 April 2017.

[383] *Re K and H (Children: unrepresented father: cross-examination of child)* [2015] EWFC 1.

the cross-examination of a child witness in family cases by a party against whom the allegation has been made.[384] This is not an isolated occurrence, a comparable issue having arisen in the case of *Q v Q; Re B (A child) and Re C (A Child)*.[385]

The father in *Re K and H* did not qualify for ECF on financial grounds as he had a disposable income of approximately £960 per month, which is above the threshold set by the LAA. Having reviewed the father's financial position the Court first hearing the matter was satisfied that the father could not afford to pay for legal representation.[386] It was observed that 'there are likely to be many people in this country with disposable incomes of more than £733 per month who are genuinely unable to fund the cost of legal representation'.[387] The Lord Chancellor was an intervenor in the case and his position on this issue was that if the father had income in excess of £733 he could afford representation and was simply electing not to pay for it.[388] The challenge of how to enable Y to be cross-examined when the father did not qualify for legal aid and could not afford to pay for representation therefore had to be addressed. The court concluded that it had the power to and was duty bound to order that HMCTS should pay for the father to be represented, limited to the cross-examination of Y at a finding of fact hearing, and that this should also include the necessary preparation. The argument put forward on behalf of the Lord Chancellor (who on this occasion had accepted an invitation to intervene in the case) was that the court did not have the power to do this and that such an order would be *ultra vires* because it was outside of the scheme set out in LASPO, which was a composite and complete reflection of the will of Parliament as to how litigants could qualify for publicly funded legal representation. This argument was rejected in its entirety by the Court on the basis that HMCTS already paid for aspects of representation for litigants (whether in person or represented in some instances) by virtue of the fact that HMCTS paid for and arranged the attendance of interpreters at hearings, prepared hearing bundles when cases involved litigants in person and arranged for intermediaries to support parties where this was required due to communication difficulties. This was all done in order to ensure that hearings were fair and that each party's Article 6 and 8 rights were respected. To do otherwise would put the Court in breach of s.6 Human Rights Act 1998.

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[384] *Re K and H (Children)* [2015] EWFC 1 [10-12].
[385] *Q v Q; Re B (a Child); Re C (a Child)* [2014] EWFC 31.
[386] *Re K and H (Children)* [2015] EWFC 1 [20].
[387] ibid [23].
[388] ibid [22].

The consideration of alternatives to legal aid in *Re K and H* as a means of ensuring that a fair hearing is afforded to all of the parties is in the spirit of *Airey,*[389] although *Airey* is not expressly considered in the judgment. *Airey* is clear that in order to ensure that Convention rights are 'practical and effective' in civil cases, legal aid is not the only option and states must give consideration to whatever steps are necessary, including the allocation of resources, to ensure that Convention rights are respected. There is a positive duty to do so. When *Re K and H*[390] later came before the Court of Appeal it was found that the lower court had erred in ordering that funding should be provided by HMCTS on the basis that there was no power to make such an order. However, the Court of Appeal did not shy away from the possibility that the resulting funding vacuum could give rise to a breach of an individual's Convention rights. Accordingly, an invitation was issued to the Government to bring forward legislation to plug this particular 'LASPO gap'.[391] No proposals have yet been forthcoming and thus the gap persists. Rather belatedly the Government has recognised the urgent need to address the problem having agreed to carry out a review with the purpose of finding a means via which alleged victims of domestic abuse can be protected from cross-examination by unrepresented alleged perpetrators.[392]

A further example of this type of inconsistency is the case of Charlie Gard, whose parents opposed applications made by an NHS trust to withdraw life support and begin a palliative care regime. An order was also sought to prevent Charlie from being taken abroad for experimental treatment which was unlikely to, but may have, extended or improved his quality of life. Legal aid was not available to the parents on means grounds, despite the importance and gravity of the outcome in which theirs and Charlie's Convention rights were engaged, including Article 2, Article 3, Article 8 and Article 6. They were represented pro bono.[393] As in the case of *D* the matter for which funding was sought remained in scope and therefore the LAA were not required to explicitly consider the parents' Convention rights. As in *D* had there been a requirement to consider the s.10 LASPO criteria they clearly would have been met. It is difficult to conceive of a case in which what is at stake is more

[389] *Airey v Ireland* (1979) 2 EHRR 305.
[390] *Re K and H (Children)* [2015] EWCA Civ 543.
[391] ibid [62].
[392] HC Deb 9 January 2017, vol 619, col 25.
[393] *Great Ormond Street Hospital v (1) Connie Yates (2) Christopher Gard (3) Charlie Gard (by his Guardian)* [2017] EWHC 1909 (Fam).

important or where it would be more obvious that the applicants were so emotionally involved as to lack the objectivity required of an advocate.

Beyond the impact of means testing on Article 6(1) rights of effective access to court in ECF cases, these cases also highlight how within the legal aid scheme more widely Convention rights may be 'trumped' by financial considerations even in the gravest of cases. If the LAA did have to explicitly consider the ECF criteria in cases such as *D* and *Charlie Gard* it would make no difference to their eligibility for legal aid because of the operation of the means test. The case must be made for Convention rights to be prioritised both in ECF cases and in the legal aid scheme more generally so that protection of fundamental rights is consistent throughout. It is also time to review the means test to more realistically reflect the affordability of legal advice and representation. The approach taken to the affordability of Employment Tribunal fees in a recent Supreme Court case may offer some assistance in doing so.[394] In that case minimum income standards developed by the Joseph Rowntree Foundation were utilised in order to calculate the financial impact of paying the fees to begin a claim and have the claim heard in the Employment Tribunal in a series of hypothetical cases.[395] The Supreme Court posed the question 'whether the sacrifice of ordinary and reasonable expenditure can properly be the price of access to one's rights.'[396] The question was answered thus

> The question whether fees prevent access to justice must be decided according to the likely impact of the fees on behaviour in the real world. Fees must therefore be affordable not in a theoretical sense, but in the sense that they can reasonably be afforded. Where households on low to middle incomes can only afford fees by sacrificing the ordinary and reasonable expenditure required to maintain what would generally be regarded as an acceptable standard of living, the fees cannot be regarded as affordable.[397]

The Supreme Court was also clear that the lawfulness of limitations imposed on the right of access to court must be assessed by reference to their effect 'in the real world'.[398] The current legal aid means test should now undergo its own 'real world'

[394] *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 [50-55].
[395] Donald Hirsch, *Minimum Income Standards for the UK in 2013* (Joseph Rowntree Foundation 2013).
[396] *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 [55].
[397] ibid [93].
[398] ibid [109].

review. This must be with a view to remedying the problems highlighted by *D*, *Re K and H* and *Charlie Gard* so that the protection of Convention rights is not compromised by the broken link between the legal aid means test and the actual affordability of paying for advice and representation which those cases highlight.

4.3.4 Private family law cases where there are allegations of domestic violence

Prior to the implementation of LASPO and the creation of the current ECF scheme, there had been some attempt to analyse, particularly in relation to private family law matters, the circumstances in which Article 6(1) of the Convention might require a grant of ECF.[399] Many of the points made can, however, be extended beyond that class of cases. One observation was that in *Airey v Ireland* the various factors considered by the European Court of Human Rights in determining whether Mrs Airey could 'properly and satisfactorily' represent herself in the proceedings were '…neither prioritised, weighted, nor expressed to be exhaustive…'[400] The leading post-LASPO cases support the proposition that no 'ordering' of the relevant factors, in assessing whether access to court is effective, is required. In *Gudanaviciene* the Court of Appeal rejected a complaint that certain factors had been given too much weight by the High Court in the earlier related judicial review.[401] The Court of Appeal also supported the view that the factors identified from the ECHR cases were not exhaustive and are not the totality of the matters to be considered by caseworkers when considering an application for ECF. The Court of Appeal summarised what it regarded as the correct approach as follows

> …the critical question is whether an unrepresented litigant is able to present his case effectively and without obvious unfairness. The answer to this question requires a consideration of all the circumstances of the case, including the factors which are identified at paras 19 to 25 of the Guidance. These factors must be carefully weighed. Thus the greater the complexity of the procedural rules and/or the substantive legal issues, the more important what is at stake and the less able the applicant may be to cope with the

[399] Jo Miles, Legal Aid, Article 6 and "Exceptional Funding" under the Legal Aid etc Bill (2011) Fam Law 1003; Jo Miles, Legal Aid and "Exceptional Funding": A Postcript (2011) Fam Law 1268.
[400] Jo Miles, 'Legal Aid, Article 6 and 'Exceptional Funding' under the Legal Aid etc Bill 2011' September [2011] Fam Law 1004.
[401] *Gudanaviciene and others v Director of Legal Aid Casework and the Lord Chancellor* [2014] EWCA Civ 1622 [91].

> stress, demands and complexity of the proceedings, the more likely it is that Article 6(1) will require the provision of legal services (subject always to any reasonable means and merits test). The cases demonstrate that Article 6(1) does not require civil legal aid in most or even many cases. It all depends on the circumstances…[402]

This suggests that an individual factor can assume greater importance, the more relevant it is in any individual's case. The individual's position must, however, be looked at in the round, with regard to all of the relevant factors and in the context of all of the circumstances.[403] The test is therefore a combination of objective and subjective elements and goes further perhaps than *Airey* may have initially suggested. For example, it has been highlighted that in *Airey* '…although Mrs Airey alleged a history of domestic violence, and Mr Airey had once been convicted for assaulting his wife, that factor was not mentioned at all by the Court as a factor in deciding that legal aid was required…'[404] It is surely beyond question that such a history would affect the extent to which an applicant is able to represent themselves with the required degree of objectivity. Yet, experience of domestic violence appears to be ignored in the context of ECF.

Parties in private family law cases where there are allegations of domestic violence can qualify for 'ordinary' legal aid if certain evidence of the abuse can be provided. This only applies to the party making the allegation as opposed to the alleged perpetrator. The types of evidence that will be accepted by the LAA are limited and are set out in regulations made pursuant to s.11(1)(b) LASPO.[405] The evidence that an applicant must provide in order to qualify for 'ordinary' legal aid in such cases must be dated within the previous five years of the date the application for legal aid is made and must be one of the following: (1) a relevant unspent conviction[406] for a

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[402] ibid [56].
[403] The careful weighing of the factors required by *Gudanaviciene* in deciding whether or not ECF should be granted is also relevant to considerations of whether the system overall is fair. Systemic fairness requires a flexibility in decision making. This is discussed further in section 4.5.
[404] Jo Miles, 'Legal Aid, Article 6 and 'Exceptional Funding' under the Legal Aid etc Bill 2011' (2011) Family Law 1003, 1004.
[405] Civil Legal Aid (Procedure) Regulations 2012, SI 2012/3098 regulation 33 as amended by Civil Legal Aid (Procedure) (Amendment) Regulations 2014, SI 2014/814; Civil and Criminal Legal Aid (Procedure) (Amendment) Regulations 2015, SI 2015/1416 and Civil Legal Aid (Procedure) (Amendment) Regulations 2016, SI 2016/516.
[406] Guidance on the Rehabilitation of Offenders Act 1974 <https://www.gov.uk/government/publications/new-guidance-on-the-rehabilitation-of-offenders-act-1974> Last accessed 18 January 2018.

domestic violence offence[407] or a spent conviction provided that it is within the 5 year time limit; (2) a relevant Police caution or a court order binding over the alleged perpetrator in connection with a domestic violence offence; (3) evidence of on-going criminal proceedings for a domestic violence offence or that the alleged perpetrator is on police bail; (4) a relevant protective injunction; Domestic Violence Protection Notice, or Domestic Violence Protection Order (5) an undertaking (provided the applicant for legal aid did not give a cross-undertaking); (6) a letter from any member of a MARAC (Multi Agency Risk Assessment Conference) confirming that the client was referred to MARAC as a victim of domestic violence and that a protective plan has been put in place to protect the client; (7) a finding of fact of domestic violence from a UK court; (8) a letter or report from a health professional who has examined the client, or who has access to the applicant's medical records, confirming that at the time of examination the client had injuries consistent with domestic violence; or confirming that a referral was made to a domestic violence support service (a letter or report from the service to whom the referral was made would also be acceptable); (9) a letter from Social Services with a copy of an assessment which confirms that the client is or is at risk of being a victim of domestic violence; (10) a letter or report from a domestic violence support organisation confirming that the client had been admitted to a refuge and the dates s/he arrived and left. If the applicant had sought a refuge space but none had been available a letter confirming the date this occurred is also sufficient or (11) any evidence which satisfies the LAA that the applicant is or is at risk of domestic violence in the form of financial abuse.

Whilst still very prescriptive the current evidence requirements are less strict and more wide-ranging than when the regulations were first made. Litigation has resulted in additional forms of evidence being permitted, the age of evidence being extended from two to five years and specific provision being made for financial abuse.[408] Despite this the list of acceptable evidence may still lead to a situation where some applicants apply for ECF solely because they cannot comply with the strict evidential requirements to obtain 'ordinary' legal aid. At the most fundamental level the evidence requirements are likely to remain an insurmountable barrier for

[407] Civil Legal Aid (Procedure) Regulations 2012, SI 2012/3098 regulation 33(3) as amended by Civil Legal Aid (Procedure) (Amendment) Regulations 2014, SI 2014/814.
[408] *R (on the application of Rights of Women) v The Lord Chancellor and Secretary of State for Justice* [2015] EWHC 35 (Admin); *R (on the application of Rights of Women) v The Lord Chancellor and Secretary of State for Justice* [2016] EWCA Civ 91.

many victims because they rely upon a victim having disclosed the abuse to a relevant person or service.[409] In addition the capacity to represent oneself effectively, with the objectivity of an advocate and without being affected by one's emotional involvement is not only impaired if one happens to have one of the stipulated pieces of evidence and the difficulties which experience of domestic abuse may present may be felt for more than five years.[410]

More particularly there may be applicants in relation to whom relevant findings of fact have been made in courts outside the UK, where for example an applicant has come to the UK to escape violence. In addition, in an 'evidence checklist' document published to assist legal aid providers in making sure that they have the relevant evidence from clients before submitting an application to the LAA it states that any evidence supplied by email from a registered medical professional must include that person's GMC or NMC registration number.[411] This means that if evidence is submitted, although dated within the requisite time period, from a medical professional outside the UK and contains the relevant country's equivalent registration details it will not be accepted by the LAA. However, the statutory regulations do not require the attesting medical professional to be based in the UK.[412] It is therefore arguable that the evidential requirements are or are being implemented in such a way as to be discriminatory to women (who most frequently experience domestic violence)[413] and to non-UK nationals.

4.3.5 The combined impact of the legal aid scheme boundaries, means and merits tests

On the face of it s.10 LASPO puts fundamental rights at the front and centre of the decision making process for ECF applications. However, the actual priority afforded to an individual's Convention rights can be diluted by the application of the ordinary

[409] Shazia Choudhry and Jonathan Herring, 'A human right to legal aid? – The implications of changes to the legal aid scheme for victims of domestic abuse' [2017] 39 Journal of Social Welfare and Family Law 152, 161.
[410] ibid 163.
[411] Legal Aid Agency, 'The Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 – Evidence Requirements for Private Family Law Matters' (Legal Aid Agency 2016) 17.
[412] Civil Legal Aid (Procedure) Regulations 2012, SI 2012/3098 regulation 33(3).
[413] Office for National Statistics, 'Domestic abuse in England and Wales: year ending March 2017 (ONS 23 November 2017) 3; Office for National Statistics, 'Domestic abuse in England and Wales: year ending March 2016 (ONS 8 December 2016) 3.

merits and means tests. The LAA has applied the means and both merits tests in different orders at different times during the life of the post-LASPO scheme. Consequently in some cases applications will have been refused on the basis of ordinary merits (prospects of success), and the ECF merits (whether there was an obligation to provide legal aid because without it there would be a breach, or risk of a breach, of the applicant's Convention or EU law rights) not even considered, even though the protection of Convention rights is the primary purpose of the scheme. As discussed above the ordinary merits criteria, as currently drawn, are not lawful as they are too inflexible and operate an unreasonable cut off by only funding cases if prospects of success are more than 50%, with a very narrow opportunity for flexibility in immigration and public law cases which may be funded if prospects of success are between 45% and 50% and the ECF criteria are met. The ordinary merits test presents particular problems for children, adults without legal capacity and those with limited legal capability for whom there is not sufficient protection from arbitrariness. In England and Wales, where the ordinary merits threshold is a relatively high one, the importance of independent oversight of refusals of ECF is elevated, especially for those applicants who lack capacity or have very limited capability. The current system is not able to strike a balance between the ordinary merits criteria, the capabilities of the individual applicant and the possibility of independent 'full merits' review of refusals of ECF. The ECF scheme is therefore unable to offer sufficient protection from arbitrariness.

Furthermore, there is an urgent need to carry out a 'real world' review of the operation of the current means test. The operation of the both the ordinary merits and means tests in the context of the ECF scheme call into question the proportionality and legitimacy of the extent to which they impair the protection of the right to effective access to court. Add to this the doubts regarding the independence of the LAA, the makeup of its staff and a skewed decision making process and there is a deeply troubling picture.

There is inconsistent treatment of cases where fundamental rights are engaged within the post-LASPO legal aid scheme more broadly. There are those cases for which legal aid is only available via ECF, in place to guard against breaches of fundamental rights in the absence of ordinary legal aid. Despite the importance of ensuring the protection of these rights, means and merits tests are still applied. There are cases which are in scope for 'ordinary' legal aid under Schedule 1, Part 1 LASPO and to which means and merits test also always apply. Examples of these

kinds of cases include cases where an individual's home is at risk (Article 8 ECHR will often be engaged in these cases and Article 6 is always relevant) or where an individual is homeless and is seeking to challenge some aspect of how a Local Authority has dealt with an application for homelessness assistance. In these cases, which remain 'in scope' for legal aid, no explicit consideration of Convention rights is required by the LAA at all.

Then there are what may be referred to as 'special cases', which are those that are exempted from consideration of the financial position of the individual where the means test (and sometimes the merits test) is entirely dis-applied. These 'special cases' are treated in this way because of the harsh and severe nature of the potential outcomes of those cases such as the permanent removal of a child from their family, loss of liberty by way of detention on mental health grounds or restriction of liberty on the basis of suspicion of terrorist activity. It is notable that in these kinds of cases it is some arm of the state that is bringing the action against an individual. (Although some of the cases that remain in scope for ordinary legal aid under Schedule 1, Part 1 LASPO also include some actions by the state against individuals). The rationale and rationality of the division between the special and ordinary cases has rightly been questioned.[414] There does not appear to be any objective rationale for this state of affairs.

If the protection of Convention rights is truly a priority then the ordinary means and merits tests should not apply in any case where the specific ECF merits criteria are satisfied. Arguably the ECF merits test should be the first and most important point of reference for LAA decision makers.[415] Indeed, there should be explicit consideration of the protection of Convention rights across the whole of the legal aid scheme. As things stand there appears to be a certain amount of disparity between the stated priorities and objectives of the post-LASPO scheme and its operation in

[414] *In the Matter of D (A Child)* [2014] EWFC 39 [25]; *A Father v SBC and ors* [2014] EWFC 6 [51].
[415] The Government has announced that it intends to amend the legal aid scheme so that parents faced with placement order applications where their child may be adopted can qualify for non-means and non-merits tested legal aid. See written statement by Edward Timpson MP (Minister for Vulnerable Children and Families), on 28 February 2017 HCWS506 here: <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statements/?page=1&max=20&questiontype=AllQuestions&house=commons&member=1605> Last accessed 28 April 2017. No amending regulations have yet been laid before Parliament. Details of the amendment proposed by the Family Rights Group can be seen here: <https://www.frg.org.uk/images/Policy_Papers/161129_Jt_Alliance_Briefing_CSW_Bill.pdf> Last accessed 26 April 2017.

practice. It is declared that the protection of the basic rights contained within the ECHR and making legal advice and representation available for vulnerable groups is a priority, and yet the conditions placed upon the provision of that assistance mean that significant hurdles are being placed in the way of those objectives being fulfilled.

4.4 Welfare benefits and Article 6(1)

S.9(1)(a) LASPO provides that legal aid will be made available to fund the civil legal services described in Part 1 of Schedule 1 to the Act. Part 1 of Schedule 1 sets out at paragraph 8(1) that appeals on a point of law to the Upper Tribunal, Court of Appeal or Supreme Court are expressly within the scope of the kinds of cases that may still attract legal aid. The case must relate to a benefit, allowance, payment, credit or pension that is given pursuant to a defined list of statutes, which are set out at paragraph 8(3) of this part of Schedule 1.[416] Consequently, individuals requiring advice or representation in relation to welfare benefits at any stage up to appeals in the First Tier Tribunal are no longer eligible for legal aid unless their Convention or other enforceable EU law rights are engaged. The approach to be taken by LAA caseworkers to applications to ECF is set out in the Guidance.[417]

On the subject of welfare benefits the Guidance is, at best, opaque and confusing. The first pointer to caseworkers is that where cases involve an individual's claim to '"a discretionary benefit, rather than a legal right" to services or benefits in kind' such cases do not fall within the ambit of civil rights and obligations and therefore cannot lead to a grant of ECF. Whilst this is legally correct no examples are given of what it might mean in practice. It would be helpful to have drawn out from the authorities relied upon in the Guidance[418] that this category of cases, those involving

[416] The relevant statutes cover the following benefits: Incapacity Benefit; Maternity Allowance; Widow's Benefit; bereavement benefits; retirement pensions; Jobseeker's Allowance (income based and contribution based); State Pension Credit; Working and Child Tax Credits; Employment and Support Allowance (income related and contribution based); Disability Living Allowance; Universal Credit and Personal Independence Payments. Income Support and Child Benefit are not specifically covered by these statutes but it is assumed that provision for those comes within the category of 'any other enactment regarding social security'.

[417] Lord Chancellor's Exceptional Funding Guidance (Non-Inquests), paras 16 and 61-63 in version 1; paras 17 and 63-65 in versions 2 and 3 refer specifically to welfare benefits cases.

[418] *Tomlinson and others (FC) v Birmingham City Council* [2010] UKSC 8; *R (A) (FC) v London Borough of Croydon* [2009] UKSC 8. In the Croydon case whilst there was helpful discussion of the meaning of a civil right no determination was actually made of the issue.

'a discretionary benefit, rather than a legal right', includes those concerning the right of a child to actual accommodation (as opposed to payment for accommodation) under s.20 Children Act 1989 and the right to be provided with actual accommodation (again not payment for accommodation) as a homeless applicant under s.193(2) Housing Act 1996. This would make it clear to caseworkers that what is being addressed here is not cash welfare benefits such as those under the various social security enactments referred to above. However, the first real indication of this is in the Annex to the Guidance[419] where it is stated that 'The sections below give an indication, to caseworkers, of the sorts of considerations that may be particularly relevant in certain types of case' but reminds caseworkers that they must also refer back to the overarching question 'whether the withholding of legal aid would mean the applicant will be unable to present his or her case effectively or lead to obvious unfairness in proceedings…'[420] In a footnote to that paragraph it states that

> The considerations referred to in the individual types of case are not an exhaustive list and are not necessarily determinative. Each case needs to be carefully considered on its individual facts. The types of cases listed are not intended to refer to categories of law in legal aid contract Category Definitions but are simply descriptive categories of kinds of case.[421]

Until one reads this small footnote in the Annex to the Guidance one could be forgiven for thinking that the use of the term 'welfare benefits' has the same meaning ascribed to it in other LAA documentation but it does not. The content of the Guidance is therefore entirely irrelevant to applications for ECF in welfare benefits cases, as that term is understood by legal aid providers, and one would assume, LAA caseworkers.[422]

[419] Lord Chancellor's Exceptional Funding Guidance (Non-Inquests) paras 40 in version 1; para 41 in versions 2 and 3.
[420] Before the Guidance was amended to incorporate the judgment of the Court of Appeal in *Gudanaviciene* the overarching question read 'whether the withholding of legal aid would make the assertion of the claim practically impossible or lead to an obvious unfairness in proceedings…'.
[421] Lord Chancellor's Exceptional Funding Guidance (Non-Inquests) 16.
[422] It may be that training materials provided to ECF caseworkers make things clearer, however, the LAA has declined to disclose this material.

In both of the authorities cited in the Guidance it is accepted, as it is more widely,[423] that the European Court of Human Rights cases of *Feldbrugge*,[424] *Salesi*[425] and *Tsfayo*[426] are authorities for the principle that Article 6(1) applies to disputes about welfare benefits. The *Feldbrugge* case relates to contributory schemes, *Salesi* to non-contributory benefits and *Tsfayo* to claims for Housing Benefit. It is accepted that those cases concern a determination of civil rights and obligations necessary for triggering the protection of Article 6(1). In the domestic authorities relied upon by the Lord Chancellor in the Guidance on ECF in welfare benefits cases, those being *R (A) (FC) v London Borough of Croydon*[427] and *Tomlinson and others (FC) v Birmingham City Council*,[428] the cases of *Feldbrugge*, *Salesi* and *Tsfayo* are specifically acknowledged in the leading judgments given by Lady Hale (as she then was) and Lord Hope respectively. What the authorities relied upon in the Guidance do is distinguish between cash benefits and welfare services or benefits in kind. This is on the basis that the latter welfare services and benefits in kind involve a discretion on the part of the state as to whether eligibility criteria are satisfied and if so, how a need for accommodation should be met.

In 2015 the European Court of Human Rights re-visited the question of whether cases concerning welfare services or benefits in kind involve a determination of a 'civil right' in the case of *Fazia Ali v UK*. They concluded on that occasion that it did.[429] Although the UK Supreme Court has declined to follow this particular decision this does not affect the continuing distinction between welfare benefits (whether contributory or non-contributory schemes) and entitlements to welfare services and benefits in kind.[430] The Guidance should be revised in order to make the position clear. This would not only be useful for prospective applicants and their lawyers but it would also be likely to lead to a better quality of decision making if positive examples of where Article 6(1) does apply in welfare benefits cases were given. This can clearly be done through drawing on *Salesi*, *Feldbrugge* and *Tsfayo*.

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[423] For example, Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White, and Ovey The European Convention on Human Rights* (7th edn, OUP 2017) 281-282.
[424] *Feldbrugge v the Netherlands* [1986] 8 EHRR 425.
[425] *Salesi v Italy* [1993] 26 EHRR 187.
[426] *Tsfayo v UK* (2006) 48 EHRR 457.
[427] *R (A) (FC) v London Borough of Croydon* [2009] UKSC 8.
[428] *Tomlinson and others (FC) v Birmingham City Council* [2010] UKSC 8.
[429] *Fazia Ali v the UK* [2015] ECHR 924.
[430] See *Poshteh v Royal Borough of Kensington and Chelsea* [2017] EWCA Civ 711.

The Guidance as currently drafted is likely to push caseworkers towards denying ECF on the basis that welfare benefits are not within the ambit of civil rights and obligations. The available statistical evidence from the Ministry of Justice seems to support this and the numbers are stark. In 2012/13, the year directly before the implementation of LASPO, 88,378 welfare benefits cases were funded by legal aid. (This was down from 110,745 in 2011/12, and 121,128 in 2010/11).[431] After LASPO this fell to almost negligible levels as shown in the table below.

Table 2: numbers of welfare benefits cases funded by legal aid (Legal Help and civil representation post-LASPO)[432]

Year	Number of cases funded (Legal Help and Civil Representation)	Welfare benefits ECF cases granted
2013/14	145	0 (of 8 applications)
2014/15	485	2 (of 9 applications)
2015/16	260	2 (of 7 applications)
2016/17	454	8 (of 20 applications)

Whilst the numbers of welfare benefits cases funded by legal aid was already diminishing before LASPO was implemented, the near cessation of publicly funded legal advice on welfare benefit entitlement is due to LASPO. The tens of thousands of people who no longer qualify for legal aid as a matter of course because their case has not yet (or never will) become an appeal on a point of law to the Upper Tribunal have been excluded from the possibility of advice unless they qualify for ECF. Only 12 applications for ECF have been granted, out of just 44 applications submitted, according to the published statistics covering the operation of the scheme between 1 April 2013 and 31 March 2017. Given the widely-recognised complexity of much of the law concerning welfare benefit entitlements and the numbers of people claiming benefit with low educational attainment, mental ill health

[431] Legal Aid Agency, 'Legal Aid Statistics in England and Wales 2013-14' (Ministry of Justice June 2014) 22. Available at <https://www.gov.uk/government/statistics/legal-aid-statistics-april-2013-to-march-2014> Last accessed 13 January 2018.
[432] All statistics published by the Ministry of Justice at <https://www.gov.uk/government/collections/legal-aid-statistics> Last accessed 26 April 2017.

or learning disabilities it is impossible to accept that the current rate of applications for ECF, and indeed the proportion being granted, reflect anywhere near the level of need and actual eligibility for ECF.

One of the difficulties of the Guidance in general is that it does not give any positive indication of the kinds of cases in which it would be accepted that ECF must be granted. Not only that but it does not contemplate that Convention rights other than Articles 6 and 8 can give rise to an obligation to provide legal aid. In chapter 5, the case is made for a grant of ECF in cases where Article 3, the prohibition on inhuman and degrading treatment, may be engaged.

4.5 Is the ECF scheme structurally fair?

It is a requirement of any system of public administration, including ECF, that it is operated fairly. Given the overlap between fairness requirements and ECHR considerations some aspects of the scheme relevant to fairness, such as the operation of the merits test and the independence and constitution of the LAA, have already been discussed (see sections 4.3.1 and 4.3.2). In this section a number of wider issues concerning the fairness of the ECF scheme are discussed: the specific context in which the ECF scheme operates; whether any particular groups or case types are put at a procedural disadvantage, and the nature and extent of evidence that is required to support a finding of systemic unfairness. Both context and procedural disadvantage were not specifically considered in *IS*. For that reason, in addition to the reasons set out in 4.3.1 and 4.3.2, it is contended that the decision in *IS* was flawed because it also did not take into account a number of relevant considerations.

A number of principles have been identified which must be applied in order to evaluate the fairness of a system. A fair system must be able to accommodate 'the full run of cases' with which it might be presented. There must be flexibility so that systems can react in order to ensure fairness. Particular groups of people or types of case should not be put at a procedural disadvantage. Moreover, there must be a minimum standard of fairness and this is context-dependent. Whether the system

meets that standard and is therefore lawful, is a question for the courts.[433] Whilst the Lord Chancellor is responsible for legal aid policy and its funding, where the fairness of a system is in question 'only a modest margin of appreciation is left to the Lord Chancellor'.[434] Systemic or inherent unfairness will not be found unless the evidence passes a high threshold and relates not just to problems in individual cases but to difficulties ingrained in the system itself. The test of 'inherent unfairness' requires an answer to the question, does the ECF scheme provide applicants with a fair opportunity to obtain legal aid?[435]

Context

The 'context' of a system affects the minimum standard of fairness required. Whilst it is accepted that there will always be a risk of unfairness in any system it should be kept to an 'irreducible minimum'.[436] In the first instance government can be guided by 'political and other imperatives' but what is not permissible is to prioritise convenience or expediency over fairness. In the *Refugee Legal Centre* case it was the fast track procedure for determining asylum claims at Harmondsworth Immigration Removal Centre which was at issue. In order to ensure systemic fairness the Court recommended that a 'flexibility policy' be adopted so that it would be clearly seen by all parties what the irreducible minimum would mean in relation to the different kinds of cases to be dealt with by the system in question. This would provide clarity as to when an extended timetable for determining applications would need to be adopted outside of the three day fast track procedure. Thus fairness can only truly be evaluated by considering all who depend upon it, especially those who may find it the most difficult to navigate. This is what 'looking at the full run of cases' requires. Although in *IS* some thought was given to the experiences of (potential) applicants who lack capacity (adults and children) and those applying for ECF without the assistance of a lawyer this was not approached with the same focus and rigour that can be seen in the *Howard League* case.[437]

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[433] *The Lord Chancellor v Detention Action* [2015] EWCA Civ 840 [27]; *R (Howard League for Penal Reform and the Prisoners' Advice Service) v The Lord Chancellor* [2017] EWCA Civ 244 [50].
[434] *R (Howard League for Penal Reform and the Prisoners' Advice Service) v The Lord Chancellor* [2017] EWCA Civ 244 [92].
[435] *R (on the application of Tabbakh) v Staffordshire and West Midlands Probation Trust and another* [2014] EWCA Civ 827; *R (on the application of the Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481; *The Director of Legal Aid Casework and the Lord Chancellor v IS (a protected party, by his litigation friend the Official Solicitor)* [2016] EWCA Civ 464.
[436] *R (on the application of the Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481 [8].
[437] *R (Howard League for Penal Reform and the Prisoners' Advice Service) v The Lord Chancellor* [2017] EWCA Civ 244.

As well as consideration of the particular vulnerable groups who may use a system there are other factors that must be considered in determining what the minimum standard of fairness may require. Those factors include the nature of the function under consideration, the statutory or other framework under which decision makers operate, the circumstances in which s/he is entitled to act, the range of decisions open to the decision maker, the interest of the person affected, and the seriousness of the consequences for the individual.[438] The ECF scheme must therefore be of a standard commensurate with the importance of the protection of Convention rights, especially the right to a fair trial, rights of access to court[439] and ensuring effective participation in decisions affecting Convention rights.

The adequacy of other available support or safeguards

Where there are difficulties within a system that may amount to unfairness the court is required to assess whether any other support or safeguards are available and whether they are adequate to mitigate any unfairness.[440] In *IS* a degree of comfort was taken from the protection afforded to direct applicants for ECF by the existence of a telephone service provided by the ECF team which prospective applicants could ring for advice.[441] However, since 13 February 2017 the ECF team do not provide this directly and prospective applicants are required to telephone the general legal aid customer service number.[442] Any 'expert' knowledge which the ECF team possessed regarding the application process is therefore no longer accessible to members of the public or legal aid providers. In *IS* there was also no recognition of the shrinking pool of alternative sources of legal assistance due to the reduction in non-legal aid funding since the ECF scheme began[443] and legal

[438] ibid [39].
[439] *Airey v Ireland* (1980) 2 EHRR 305; *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)* [2017] UKSC 51.
[440] *R (Howard League for Penal Reform and the Prisoners' Advice Service) v The Lord Chancellor* [2017] EWCA Civ 244 [32] and [52]; *The Lord Chancellor v Detention Action* [2015] EWCA Civ 840 [45].
[441] *IS (by the Official Solicitor as Litigation Friend) v The Director of Legal Aid Casework and the Lord Chancellor* [2015] EWHC 1965 (Admin) [46].
[442] The Legal Aid Agency announced on 8 February 2017 that contact arrangements for ECF applicants would be changing. See <https://www.gov.uk/government/news/civil-news-contacting-the-exceptional-and-complex-cases-team> Last accessed 1 June 2017.
[443] James Organ and Jennifer Sigafoos, 'What if There is Nowhere to Get Advice?' in Asher Flynn and Jacqueline Hodgson (eds.), *Access to Justice and Legal Aid* (Hart 2017).

practitioners have a limited capacity for offering pro bono assistance.[444] The possibility of payment by HMCTS for advice and representation in some circumstances has been proscribed by the Court of Appeal[445] and there are also constraints on the assistance that judges can offer.[446] Consequently, the alternatives available to a potential applicant for ECF are very limited and would not be sufficient to take the place of a properly functioning ECF system.

Procedural disadvantage

Systems must have the capacity to operate with some flexibility so as to ensure fairness. However, there are several aspects of the ECF scheme which are very rigid (including the operation of the merits criteria as discussed in sections 4.3.1 and 4.3.2) and serve to place some applicants at a distinct disadvantage. The first example of this is the absence of any emergency procedure for obtaining a grant of ECF. When the ECF scheme was first considered by the High Court the LAA's only commitment was to process ECF applications within 20 working days.[447] Shortly thereafter a system was implemented in which it was agreed that urgent applications would be dealt with within 5 working days.[448] It is concerning though that there is no published criteria for what will be considered urgent by the LAA. By comparison emergency applications for 'in scope' legal aid are determined within 48 hours. Legal aid contracts also delegate some functions in relation to 'in scope' applications so that legal aid providers can themselves grant emergency funding in many cases.[449] If delegated authority is not available to a legal aid provider then it is possible to submit an emergency application to the LAA in form CIVAPP6.[450] This is a much less onerous form than a standard application for legal aid which implies

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[444] This was recognised by Collins J in *IS (by the Official Solicitor as Litigation Friend) v The Director of Legal Aid Casework and the Lord Chancellor* [2015] EWHC 1965 (Admin) [32] and [59].
[445] *Re K and H (Children)* [2015] EWCA Civ 543.
[446] *IS (by the Official Solicitor as Litigation Friend) v The Director of Legal Aid Casework and the Lord Chancellor* [2015] EWHC 1965 (Admin) [71].
[447] ibid [77].
[448] Legal Aid Agency, 'Exceptional Cases Funding – Provider Pack' (Legal Aid Agency July 2016) 4. <https://www.gov.uk/government/publications/legal-aid-exceptional-case-funding-form-and-guidance> Last accessed 7 January 2018.
[449] Emergency representation is defined in the Civil Legal Aid (Procedure) Regulations 2012, SI 2012/3098, reg 2 as 'legal representation (not Controlled Work) or Family Help (Higher) provided following a determination on an urgent application'. However, for the purposes of discussion here any funding that can be granted immediately by a legal aid provider under a delegated function is included as for practical purposes this can be provided in an emergency.
[450] Form CIVAPP6 can be found here: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/539963/civapp6-version-14-july-2016.pdf> Accessed 6 September 2017.

that in an emergency the LAA accepts that less information and supporting evidence is likely to be available. Furthermore, in making such adjustments for emergency 'in scope' cases there is also an implicit recognition that any delay might lead to real injustice, hardship or cause irreparable damage to an applicant's case. It is also open to the LAA to agree to accept emergency applications a variety of methods such as fax, email or telephone.[451]

Given the potential impact of the absence of an emergency procedure for ECF cases on an applicant's rights and interests, this is a clear procedural disadvantage of the scheme. There is no objective reason for the current distinction between emergency 'in scope' and emergency ECF applications. It is therefore imperative that provision is made for emergency ECF applications which give equal protection to that afforded to 'in scope' applicants.

The high evidence threshold

The way in which evidence is evaluated by the courts in order to decide whether the high threshold is met is worthy of scrutiny. On the one hand a finding of unfairness may be reached, not based on extensive data, but by hearing about 'a number of cases suggestive of unfairness'.[452] Acceptance of such evidence recognises the limitations on the kinds of information that can sometimes be supplied within the confines of judicial review timescales.[453] On the other hand, as in *IS*, courts may require 'facts and figures' about a system and take the view that anything else is anecdotal and 'partial at best.'[454] The evidence before the courts in *IS* was voluminous and for the most part was not disputed.[455] Notwithstanding that concern was expressed by the Court of Appeal in *IS* because it was not clear how much of the Claimant's evidence related to determinations made before the *Gudanaviciene* case was decided.[456] This was felt to be significant because of a 'modest' improvement post-*Gudanviciene* in the proportion of applications being granted, to 13%. Briggs LJ, dissenting, expressed concern about placing such importance on

[451] Civil Legal Aid (Procedure) Regulations 2012, SI 2012/3098, regulation 51(1).
[452] *R (on the application of TN (Vietnam) and US (Pakistan) v Secretary of State for the Home Department and the Lord Chancellor* [2017] EWHC 59 (Admin) [31].
[453] *R (Howard League for Penal Reform and the Prisoners' Advice Service) v The Lord Chancellor* [2017] EWCA Civ 244 [53].
[454] *The Director of Legal Aid Casework and the Lord Chancellor v IS (a protected party, by his litigation friend the Official Solicitor)* [2016] EWCA Civ 464 [55].
[455] ibid [74].
[456] ibid [49].

the slightly improved grant rate because the number of applications had not increased at the same time, saying that

> It is notorious that…those lawyers who offer to work pro bono for deserving clients are insufficient to meet anything approaching the demand for their services, so that there must be (however difficult to quantify) a substantial class of deserving applicants who can neither obtain ECF on their own, nor obtain the legal assistance necessary for them to do so.[457]

The Court of Appeal was cautious about the evidence in this regard as they had no way of knowing what the right level of applications and grants should be[458] although some attempts had been made to assess this pre-LASPO.[459] What may have been more useful, as part of the exercise of looking at 'the full run of cases that go through the system' would have been to consider the ECF scheme from the perspective of the different categories of law that it covers. Had the Court of Appeal done so it would have been apparent that the number of applications for and grants of ECF is highly variable depending upon the underlying subject matter of individual cases (see 6.4.1 for further discussion of this). For example, the impact of *Gudanaviciene* on the number and grant rate of ECF immigration cases contrasts sharply with the persistently low number of applications and grants of ECF in areas such as welfare benefits.[460]

In answering the question posed at the beginning of this section 'does the ECF scheme provide applicants with a fair opportunity to obtain legal aid?' the answer must be that at present the ECF scheme remains in an unsatisfactory, and arguably unfair, state.

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[457] ibid [84].
[458] ibid [54].
[459] Justice Committee, *Impact of the changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012* (HC 2014-15, HC 311) para 33; Jo Miles, Nigel J Balmer and Marisol Smith, 'When exceptional is the rule: mental health, family problems and the reform of legal aid in England and Wales' (2012) 24 Child & Fam. L. Q. 320.
[460] Henry Brooke, 'Three Years of Exceptional Case Funding in Non-Inquest Cases' (*Musings, Memories and Miscellanea*, 13 August 2016) <https://sirhenrybrooke.me/2016/08/13/three-years-of-exceptional-case-funding-in-non-inquest-cases/> Last accessed 17 May 2017.

4.6 The European Union Charter of Fundamental Rights: what rights to legal aid does this provide?

So far this chapter has focussed on the ECF scheme in the context of the UK's obligations under the ECHR and its overall fairness. Accordingly in this section the potential offered by the EU Charter of Fundamental Rights as a basis upon which legal aid may be required is evaluated. Article 47 of the EU Charter of Fundamental Rights (the Charter) provides that

> 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. [461]

The Charter is clear that its Articles only apply to Member States 'when they are implementing EU law'.[462] The Charter also draws a direct relationship between the rights it provides for and the provisions of the ECHR.[463] In particular the 'meaning and scope'[464] of rights contained in the Charter are to be the same as the corresponding rights in the ECHR. So, in the case of Article 47 with which we are concerned here, it should be taken to be the equivalent of Articles 6 and 13 ECHR which its subject matter mirrors. However, provision is made for the possibility that EU law (which includes the Charter itself) may provide fundamental rights protections which go beyond the ECHR.[465]

The Charter is a legally binding instrument on the UK. Article 47 is therefore a potentially enforceable EU law right to legal aid. On that basis a grant of ECF may be required if an applicant's case involves 'the implementation of EU law' and the

[461] The Charter of Fundamental Rights of the EU [2012] OJ C 326/391, Article 47.
[462] ibid Art 51(1).
[463] ibid Arts 52(3) and 53.
[464] ibid Art 52(3).
[465] ibid Art 52(3).

subject matter is not ordinarily in scope for legal aid.[466] As noted by Meyler and Woodhouse, the distinction for Article 6 ECHR purposes between civil law rights and obligations and those characterised as rights arising from public law is not relevant to potential rights to legal aid under the Charter if EU law is being implemented.[467] This means that, for example, cases concerning the right of EU citizens and their family members to move between and live in Member States may require a grant of ECF.[468]

The possibility of a right to ECF arising from Article 47 specifically is examined in Part B of the Lord Chancellor's Guidance on ECF.[469] The Guidance recognises the relationship between the Charter and the ECHR and acknowledges that Article 47 goes beyond the scope of Article 6 ECHR to the extent that it is not limited to cases concerning a determination of civil rights and obligations. However, what it does not do is give any examples of the likely areas in which the subject matter of an applicant's case comes within the class of rights 'guaranteed by or otherwise falling within the scope of EU law'.[470] The practical guidance to caseworkers considering such an application for ECF is therefore very limited. They are firstly to consider whether the case concerns civil rights and obligations. If a case does not relate to civil rights and obligations then an assessment of whether it relates to rights under EU law is required, followed by the substantive Article 6 test (excepting the civil rights and obligations requirement). Consequently the Guidance states that Article 47 only falls to be considered 'in those extremely limited circumstances' where the subject matter of a case is outside of Article 6. Clearly the Guidance anticipates that this will be a very rare occurrence.

[466] LASPO 2012, s.10(3)(a)(ii).
[467] Frances Meyler and Sarah Woodhouse, 'Changing the immigration rules and withdrawing the 'currency' of legal aid: the impact of LASPO 2012 on migrants and their families' [2013] 35 Journal of Social Welfare and Family Law 55, 62.
[468] Provided for by Directive 2004/38/EC of European Parliament and of the Council of 29 April 2004 on the right of citizens to the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.
[469] Lord Chancellor's Exceptional Funding Guidance (non-Inquests) paras 30 to 34 in the first version of the Guidance published April 2013; paras 31 to 35 of the second version of the Guidance published on 9 June 2015 and paras 31 to 35 of version 3 of the Guidance published on 12 November 2015. The text is exactly the same between the three versions of the Guidance.
[470] Lord Chancellor's Exceptional Funding Guidance (non-Inquests) version 1 April 2013 para 32 and 34; version 2 June 2015 para 33 and 35; version 3 November 2015 paras 33 and 35.

It is clear that Article 47 cannot be taken to be any less generous than Article 6 ECHR[471], but when might it be more generous? One possibility may be to consider the following part of Article 47: '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 to read these in conjunction with Article 52(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.[472]

The possibility offered by such a reading has been explicitly identified by the House of Commons European Scrutiny Committee although not explored in any great detail.[473] In addition, in *Gudanaviciene* in the High Court left open the possibility for Article 47 to be more generous than Article 6.

> It is, I think, apparent that Article 47(3) does not set a standard which is lower than that applicable to Article 6, However, provided that the effectiveness and fairness criteria are properly applied, it does not necessarily set a higher standard.[474].

The court arrived at this view on the basis that the interpretation of Article 6 in *X v UK* was not correct and on that basis Article 47 does not go beyond Article 6. When *Gudanaviciene* was later before the Court of Appeal in October 2014 the Master of the Rolls, the Right Hon Lord Dyson, concluded that 'We doubt whether there is any material difference between Article 47(3) of the Charter and Article 6(1) of the

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[471] *Gudanaviciene and others v Director of Legal Aid Casework and the Lord Chancellor* [2014] EWHC 1840 (Admin) [39] and Article 52(3) EU CFR.
[472] The Charter of Fundamental Rights of the EU [2012] OJ C 326/391, Article 52(3).
[473] European Scrutiny Committee, *The application of the EU Charter of Fundamental Rights in the UK: a state of confusion* (HC 2013-14, HC 979).para 163; Ministry of Justice, *Government response to the House of Commons European Scrutiny Committee Report 43rd Report, 2013-14, HC979, The application of the EU Charter of Fundamental Rights in the UK: a state of confusion July 2014* (Cm8915, 2014) 13-14.
[474] *Gudanaviciene and others v Director of Legal Aid Casework and the Lord Chancellor* [2014] EWHC 1840 (Admin) [39].

Convention for present purposes.'[475] although his reasoning was different.[476] The possibility of Article 47 to secure ECF for applicants has so far been only superficially explored. This is because the courts have not yet needed to go beyond the Convention rights of applicants in the cases that have come before them.

What this suggests is that there may very well be circumstances in which Article 47 can be construed as requiring more than Article 6 when it comes to deciding whether the provision of legal aid is required in non-criminal cases. It has not been ruled out, albeit for different reasons.

None of the cases referred to above reflect the confusion that there has apparently been as to the extent of the applicability of the Charter in the UK at all. An authoritative, clear view of the applicability and scope of the Charter, and Article 47 in particular, is needed urgently given that Brexit is imminent. . The Government's European Union (Withdrawal) Bill[477] proposes that domestic laws giving effect to EU law will be remain in place and that EU laws that have direct effect in the UK will become domestic legislation. An exception to this is the Charter which will not form part of 'retained EU law'.[478] This means that any additional rights conferred by the Charter which go beyond the ECHR will be lost. The principles of EU law contained in the Charter e.g. proportionality may be referred to as interpretive aids to retained EU law but will not be directly applicable in themselves after Brexit.[479] The understanding of these principles will be as they had been interpreted by the CJEU up to the date of the UK's exit from the EU.[480]

In addition enforcement of retained EU law will be more limited than pre-Brexit because free-standing claims based on EU law and the principles that underpin it will not be available in order to challenge domestic legislation or administrative

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[475] *Gudanaviciene and others v Director of Legal Aid Casework and the Lord Chancellor* [2014] EWCA Civ 1622 [58].

[476] The applicability and scope of Article 47 was considered in *R (on the application of Lindsay Sandiford) v The Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 168 (Admin); [2013] EWCA Civ 581; [2014] UKSC 44. However, those cases are concerned with criminal proceedings outside of the territorial jurisdiction of the EU and are therefore of very limited assistance for our purposes here.

[477] European Union (Withdrawal) Bill (2017-19) HC Bill 5.

[478] HM Government, 'Charter of Fundamental Rights of the EU Right by Right Analysis' 5 December 2017 4. <https://www.gov.uk/government/publications/information-about-the-withdrawal-bill> Accessed 8 June 2018.

[479] ibid 10.

[480] ibid.

action. Individuals will have to rely upon judicial review, claims under the Equality Act 2010 or Human Rights Act 1998.[481] If the Bill is passed excluding the Charter from retained EU law then cases that could have proceeded relying upon Charter rights may not be able to do so after Brexit. Potential remedies may be much more limited such as a declaration of incompatibility rather than anything substantive e.g. damages. Consequently rights protection will become much weaker. The problem has been clearly articulated thus.

> The current drafting of the Bill is a recipe for legal uncertainty and hence for litigation to establish the parameters of rights protection following Brexit which would be unnecessary if relevant parts of the Charter were retained. Given the well-documented restrictions on availability of legal aid and other obstacles to the pursuit of legal claims, this uncertainty is itself bound to compromise human rights protection.[482]

Given that the ECF scheme explicitly operates, in part, based upon rights to legal aid arising from EU law it would have been helpful, and aided certainty, if some work had been undertaken and published by the Government on the impact of Brexit on rights in this area.[483]

As things stand applicants for ECF are likely to face a double layer of difficulties post-Brexit. Not only will their EU law-based rights to legal aid be uncertain but so may the strength of their underlying case. Of particular concern is how the ordinary merits test will operate after Brexit (see section 4.3.2). Given the uncertainties about the status of Charter rights outlined above it might reasonably be assumed that many claims underpinned by what previously would have been Charter rights may be regarded as having 'borderline' prospects of success in that the relevant law is uncertain and therefore likely to be disputed. Except in immigration and public law cases, where there is some flexibility, all other cases with borderline or less than 50% prospects of success will not be funded if the ordinary merits criteria remain as they are.

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[481] Jason Coppel QC, Opinion January 2018 para 22. Available at <https://equalityhumanrights.com/en/what-are-human-rights/how-are-your-rights-protected/what-charter-fundamental-rights-european-union-0> Accessed 8 June 2018.
[482] Jason Coppel QC, Opinion January 2018 para 8(6).
[483] See HM Government, 'Charter of Fundamental Rights of the EU Right by Right Analysis' 5 December 2017 68 and 69. <https://www.gov.uk/government/publications/information-about-the-withdrawal-bill> Accessed 8 June 2018.

4.7 Conclusion

Article 6(1) requires that individuals have effective access to court so that legal rights are 'practical and effective'. Giving effect to Article 6(1) can oblige the state to make legal aid available to an individual in circumstances where without it s/he would be unable to present their case 'properly and satisfactorily', and there would be 'obvious unfairness'. Whilst limitations can be placed upon Article 6(1) rights to legal aid through the application of eligibility criteria this must be proportionate and in pursuit of a legitimate aim. Eligibility for legal aid in England and Wales is determined through the operation of a financial means test and merits criteria which aim to sift out claims that are not sufficiently likely to succeed and/or those cases in which the costs of advice and representation outweigh the benefits to be obtained (referred to as the ordinary merits criteria). For ECF applicants there is also the additional hurdle of meeting the specific ECF criteria contained in s.10 LASPO and expanded upon in the Lord Chancellor's Guidance.

The more restrictive the ordinary merits criteria and the less able the individual is to proceed without representation, the more important it is that there is recourse to an independent appeals mechanism if ECF is refused. Applicants for ECF are faced with a relatively high threshold below which funding will not be granted (below 45% prospects of success), with no right to appeal to an independent body for a 'full merits' review. There is also no discretion to dis-apply the merits criteria in individual ECF cases. For applicants without capacity (like *IS*) or very limited legal capability (as in the case of *Re H*) the consequence is that there is no means of protection of their Convention rights at all if the current merits criteria are not satisfied. Following *Aerts* this means that the ordinary merits criteria in their existing form do not afford applicants for ECF sufficient protection from arbitrariness. The means test used to determine financial eligibility urgently needs to be reviewed. There is currently a vast gap between those who qualify for legal aid and individuals who can, in reality, afford to pay for legal advice and representation. An invitation to the Government from the Court of Appeal in *Re K and H* to address this issue has received no response and thus the gap persists.

The operation of the both the ordinary merits and means tests in the context of the ECF scheme casts doubt upon the proportionality and legitimacy of the extent to which they impair the protection of the right to effective access to court. Furthermore, as EU law rights to legal aid are no less generous than rights under

the Convention problems it must follow that given the concerns identified in relation to Article 6(1), the scheme cannot be sufficient to meet the obligations to provide legal aid flowing from the EU Charter of Fundamental Rights either.

Cases such as *Q v Q* tend to suggest that the ECF scheme is not able to fairly deal with all of the cases with which it might be presented. The absence of a procedure for dealing with emergency ECF applications and the lack of judicial oversight of ECF refusals (particularly to applicants who lack capacity or have limited capability) demonstrate an inflexibility in the scheme which gives weight to persisting concerns that the scheme is inherently unfair. The possibility of judicial review of refusals of ECF is not sufficient to cure earlier defective decisions because it is not available as of right and challenges may only be brought on limited public law grounds. In a climate in which the availability of alternative sources of advice and representation is minimal there are inadequate safeguards outside of the ECF scheme to remedy any unfairness within it.

Whether by design or by mistake it is clear that the authors and administrators of the ECF scheme have taken an unduly restrictive approach to the Article 6 rights of potential applicants for legal aid. Despite the stated purpose of the scheme, there is a sense of drawing back from the ECHR even before the Government's widely reported intention to withdraw from it.[484] However, the European Court of Human Rights has made it clear that 'the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6 para.1 (art.6-1) of the Convention restrictively'.[485] The Guidance issued to caseworkers does not contain any positive examples of when ECF will be granted. In relation to welfare benefits cases and rights to ECF under Article 6(1) the Guidance is, at best, opaque and misleading. Much greater clarity is required as to how the Guidance applies in welfare benefits cases, as that term is widely understood by legal aid

[484] BBC, 'Conservatives 'could plan to change human rights law' (4 March 2013). <http://www.bbc.co.uk/news/uk-politics-21651004> Last accessed 13 January 2018; Alan Travis, 'Conservatives promise to scrap Human Rights Act after next election' *The Guardian* (30 September 2013) <http://www.theguardian.com/law/2013/sep/30/conservitives-scrap-human-rights-act> Last accessed 1 May 2015; BBC, 'European human rights rulings 'to be curbed' by Tories' (3 October 2014) <http://www.bbc.co.uk/news/uk-politics-29466113> Last accessed 1 May 2015; The Conservative Party, 'Protecting Human Rights in the UK The Conservatives' Proposals for Changing Britain's Human Rights Laws' (2014) 8. <https://www.conservatives.com/~/media/files/downloadable%20Files/human_rights.pdf> Last accessed 13 January 2018.

[485] *Moreira de Azevedo v Portugal* [1990] ECHR 26 [66].

providers and potential applicants. Outside of Articles 6 and 8 the Guidance does not anticipate a grant of funding on the basis of any other Convention rights. In the next chapter it is argued that ECF must also be made available in some welfare benefits cases on the basis of Article 3, the prohibition on inhuman and degrading treatment. It is to that which we now turn.

CHAPTER 5 – WELFARE BENEFITS AND SANCTIONS: ARTICLE 3 DUTIES TO GRANT ECF?

5.1 Introduction

In this chapter the case is made for consideration of Article 3 as grounds for a grant of ECF. Article 3 ECHR states that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' It is widely accepted that Article 3 ECHR can supply a basis upon which individuals can challenge conditions of extreme poverty and destitution, in circumstances where the state is responsible for the conditions in which an individual finds themselves.[486] In particular, it has been argued that benefit sanctions can result in, or risk leading to, consequences that amount to inhuman and degrading treatment which would reach the threshold to engage the protection of Article 3.[487] Indeed the Government was warned of this possibility by the Joint Committee on Human Rights as long ago as 2011.[488] The threshold at which Article 3 protection will be engaged is discussed by analogy with particular reference to the case of *Limbuela* in section 5.4. Whilst the courts, both in the UK and Europe, remain reluctant to interfere with domestic welfare policy per se,[489] the concern of this thesis is to challenge the unlawful effect (inhuman and degrading treatment) of a lawful policy (benefit sanctions) rather than to argue for the striking down of the policy in its entirety. Although that would be another way to approach the problem it lies outside the scope of this thesis.

Earlier authors exploring the potential of sanctions to trigger the protection of Article 3 have been somewhat cautious and posited that the number of people who may fall into the category of inhuman and degrading treatment was likely to be small.

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[486] Colm O'Cinneide, 'A modest proposal: destitution, state responsibility and the European Convention on Human Rights' (2008) 5 European Human Rights Law Review 583; Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008) 236; Ellie Palmer, 'Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights' (2009) 2 Erasmus Law Review 397.

[487] Lutz Oette, 'Austerity and the Limits of Policy-Induced Suffering: What Role for the Prohibition of Torture and Other Ill-Treatment?' (2015) 15 Human Rights Law Review 4 669; Mark Simpson, '"Designed to reduce people…to complete destitution": human dignity in the active welfare state' (2015) 1 European Human Rights Law Review 66.

[488] Joint Committee on Human Rights, *Legislative Scrutiny: Welfare Reform Bill* (2010-12, HL 233, HC 1704) paras 1.37 -1.45.

[489] *R (on the application of SG and others (previously JS and others)) v Secretary of State for Work and Pensions* [2015] UKSC 16 [93-96]; *R (on the application of HC) v Secretary of State for Work and Pensions and others* [2017] UKSC 73 [32].

However, as will be seen in section 5.5, evidence has continued to mount of experiences of destitution as a result of welfare conditionality leading to sanctions. Previously decided cases, both from the European Court of Human Rights and in the domestic courts, have established that Article 3 contains obligations on the state both to refrain from conduct towards an individual which may amount to inhuman and degrading treatment but also to take action to intervene in such cases with a view to preventing, or at least mitigating, the results of such prohibited conduct. Such obligations are most often described as negative or positive but may also be framed in terms of a requirement to respect, protect and fulfil human rights.[490] It is contended in section 5.6 that however the content of the obligation is described, it amounts to a duty of early intervention in order to prevent or mitigate a violation of Article 3, and this provides a basis for a grant of ECF.

In section 5.7 the case is made for the recognition of an implied procedural protection in Article 3, as has been the case in relation to a number of other Convention rights. If such a procedural duty is established this can require the state to provide ECF in order to ensure that an individual can effectively participate in relevant decision making processes. Those with the potential to affect the Article 3 rights of an individual include the initial decision about whether or not a sanction is to be applied, determination of applications for hardship payments, and mandatory reconsideration of sanctions and hardship decisions. Each of these stages arguably attracts the procedural protection claimed and ECF should therefore be granted in such cases.

As set out in section 5.2 the number of people now receiving legal aid for advice and representation in welfare benefits matters is risibly small. Given that, the frequency with which sanctions are applied (see 5.3), new strategies for securing legal aid provision are urgently required.

5.2 Welfare benefits and legal aid

The number of people qualifying for legal aid for welfare benefits advice since the passage of LASPO is tiny. For example, in the year 2016/17 the LAA granted just 8

[490] Ellie Palmer, 'Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights' (2009) 2 Erasmus Law Review 397, 403; Jeff King, *Judging Social Rights* (Cambridge University Press 2012) 35.

applications for ECF, funding for two judicial reviews and 454 in scope applications (Legal Help and legal aid certificates combined).[491] This compares with the funding of 88,378 welfare benefits cases in the year immediately preceding LASPO (2012/13).[492] As well as the very small number of cases being funded by legal aid, the importance of the possibility of a grant of ECF on Article 3 grounds is reinforced by the numbers and duration of sanctions being applied and the mounting evidence of their impact. This is the subject of the next section.

5.3 The frequency of sanctions

When an individual does not meet the conditions attached to the receipt of a benefit their payments can be suspended for a defined period of time. Conditions can include a requirement to apply for a specified number of jobs each week or attendance on courses designed to prepare an individual for work. Failure to comply with such conditions can result in the cessation of benefit. This is known as a 'sanction'. Since 2012 there has been an increasing use of such 'conditionality' in relation to benefits for sick and disabled people and many claimants have been transferred from higher rate benefits with no conditions attached (Incapacity Benefit and Disability Living Allowance) to benefits that offer lower rates of income and to which there are conditions attached (Employment and Support Allowance (ESA), Jobseekers Allowance (JSA), and Universal Credit (UC)). Data on the frequency of sanctions has been available for some time in relation to JSA and (ESA). For that reason the focus is on those benefits. A small amount of data has recently been released by the Department for Work and Pensions (DWP) on UC sanctions and so this is dealt with briefly at the end of this section.

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[491] Legal Aid Agency, 'Legal aid statistics in England and Wales April to June 2016' (Ministry of Justice 29 September 2016); Legal Aid Agency, 'Legal aid statistics in England and Wales July to September 2016' (Ministry of Justice 15 December 2016); Legal Aid Agency, 'Legal aid statistics in England and Wales October to December 2016' (Ministry of Justice 30 March 2017); Legal Aid Agency, 'Legal aid statistics in England and Wales January to March 2017' (Ministry of Justice 29 June 2017). All available at <https://www.gov.uk/government/collections/legal-aid-statistics> Last accessed 10 December 2017.

[492] Legal Aid Agency, 'Legal Aid Statistics in England and Wales 2013-14' (Ministry of Justice 24 June 2014). Available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/366575/legal-aid-statistics-2013-14.pdf> Last accessed 10 December 2017.

Sanctions and Job Seekers Allowance claimants

Sanctions applied to claims for JSA remain in place for various periods of time depending on whether a lower, intermediate or higher sanction has been applied. For a first non-compliance a sanction of four weeks is applied. For a second failure benefit is suspended for 13 weeks. The maximum sanction period is the higher sanction which can be up to 156 weeks (3 years). The length of time for which benefit is not paid increases with the number of failures to comply with a mandatory requirement. In the higher category the first failure attracts a sanction period of 13 weeks. If a second failure occurs within 52 weeks of the first then the sanction period will be 26 weeks. If a third failure occurs within 52 weeks of the second then the sanction period will be the maximum of 156 weeks.

Between January 2012 and March 2017 the DWP applied sanctions to JSA claimants on more than two and a half million occasions.[493] The number of times a sanction was applied in each year in that period is as set out in table 3 below:

Table 3 – number of sanctions applied to JSA claimants between January 2012 and March 2017[494]

Year	**Number of sanctions applied to JSA claimants**
2012	806,979
2013	899,229
2014	594,641[495]
2015	268,809
2016	128,154
2017 (Jan to Mar only)	21,781
TOTAL	2,719,593

[493] Department for Work and Pensions, *Benefit Sanctions Statistics* (Department for Work and Pensions 15 November 2017). Statistics and data table 1.1.
[494] ibid.
[495] It is possible that the explanation for the rapidly decreasing number of sanctions of JSA claimants is due to the migration of JSA claimants on to the new Universal Credit. This process started in 2013 and is on-going. Some limited Universal Credit sanctions data is now available in Department for Work and Pensions, *Benefit Sanctions Statistics* (Department for Work and Pensions 15 November 2017). Statistics and data table 3.1.

A lower sanction was applied on 1,199,883 occasions between 22 October 2012 and 31 March 2017. Of those just over 25% (309,150) related to a person who was disabled and just over 6% (72,716) affected claimants who were single parents. In the intermediate category there were 686,452 sanctions of which almost 29% (196,664) affected disabled people and just over 6% (42,184) related to single parents. Higher level sanctions were applied 179,165 times and of those almost 20% (34,253) affected disabled people and nearly 3% (5,326) concerned lone parents. By far the biggest age group affected by sanctions are 18 to 24 year olds. They made up just over 43% (516,082) of the lower sanction category; almost 36% (246,212) of the intermediate group and just over 36% (65,186) of the higher sanctions decisions. Broadly speaking JSA sanctions are applied twice as often to men as to women.

Sanctions and Employment and Support Allowance claimants

The numbers of sanctions applied to ESA claimants between January 2012 and March 2017 is set out in table 4 below.

Table 4 – number of sanctions applied to ESA claimants between January 2012 and March 2017[496]

Year	**Number of sanctions applied to ESA claimants**
2012	12,710
2013	22,560
2014	34,692
2015	16,939
2016	12,550
2017 (Jan to March only)	3,292

For people who claim ESA and are in the Work Related Activity Group[497] there is only a lower category of sanctions. Sanctions are triggered by a failure to attend,

[496] Department for Work and Pensions, *Benefit Sanctions Statistics* (Department for Work and Pensions 15 November 2017). Statistics and data table 2.1.

[497] The Work Related Activity Group is for individuals who are assessed by the DWP as being able to work in the future and who have the capacity to prepare for work by undertaking 'work-related activities' straight away. Claimants in the ESA Support Group cannot be sanctioned at all.

failure to participate in a mandatory interview or failure to undertake a work related activity. The sanction will be 100% of the prescribed ESA amount until the person 're-engages' and once the person has re-engaged a fixed period sanction applies, the length of which depends upon whether it is a first, second or third failure. For a first failure the fixed period sanction is one week, for a second failure it is two weeks (if within 52 weeks of the previous one) and four weeks for a third failure, again if it is within 52 weeks of the previous failure.

Sanctions and Universal Credit claimants

The DWP published some data on UC sanctions for the first time in November 2017. This shows that between August 2015 and March 2017 sanctions were applied to UC claimants on 340,300 occasions. The length of sanctions were four weeks and under in 75,200 cases; between five and 13 weeks in 60,400 cases; from 14 to 26 weeks in 11,000 cases and more than 27 weeks in 2,700 cases.[498]

Challenging sanctions decisions

Since October 2013, benefit claimants who wish to challenge a decision by the DWP, including a decision to apply a sanction, must ask for an internal review of the decision by the DWP before they are able to bring an appeal in the First Tier Tribunal (FTT). This is called 'mandatory reconsideration' (MR). The request for MR must usually be made within one month of the decision to be reviewed but there is no time limit within which the DWP must complete the review.[499] So, there is an opportunity at the mandatory reconsideration stage (or before) for the state to 'step in' before the threshold for Article 3 is reached. It is not clear from the Guidance whether the LAA accepts that mandatory reconsideration is a 'dispute' or 'contestation' for the purposes of Article 6. The Guidance states that

> In cases relating to non-discretionary benefits, Article 6 will only be engaged at the point where there is a determination of a dispute or *'contestation'* in

[498] Department for Work and Pensions, *Benefit Sanctions Statistics* (Department for Work and Pensions 15 November 2017). Statistics and data table 3.1.

[499] The Upper Tribunal has recently determined that refusal to consider a late request for mandatory reconsideration does not prevent the claimant from bringing an appeal in the First Tier Tribunal. See *R (CJ) and SG v SSWP (ESA)* [2017] UKUT 0324 (AAC).

relation to the welfare benefit. It will not therefore arise prior to that point, for example at the point of an application being made for these benefits.[500]

Certainly if an appeal is lodged with the FTT this is a 'dispute' for Article 6 purposes. Nonetheless, MR is arguably a 'dispute' because the fact of requesting a review indicates that there is disagreement, a dispute, about the decision being challenged. If it was accepted that Article 6 does not apply at the MR stage, there is the possibility of obligations under Article 3 arising during the mandatory reconsideration period (or before), and between the decision on the MR and when any appeal at the FTT is determined. This is especially important because benefit is not paid whilst MR is pending.

5.4 When is the protection of Article 3 triggered?

In this section the question of when a withdrawal of benefits might amount to 'inhuman or degrading treatment' so that the obligation to provide ECF arises is addressed. The case of *Limbuela*,[501] in particular, offers a strong factual analogy and some guidance that may assist in answering this question. Although *Limbuela* was not concerned with a benefits claimant, the circumstances of the respondents in the appeal were arguably comparable. Mr Limbuela was an asylum seeker whose support (accommodation and subsistence payments) was withdrawn on the basis that he had not made his claim for asylum as soon as reasonably practicable after he arrived in the UK. He was therefore street homeless and destitute.

There are two stages to consider in examining whether Article 3 is engaged. The first concerns the meaning of the word 'treatment' and the second is the threshold that has to be reached for treatment to be considered to be 'inhuman and degrading'.

The meaning of 'inhuman and degrading treatment''

The position of a destitute asylum seeker, such as Mr Limbuela, who does not ordinarily qualify for support on the basis of having made a late claim for asylum and

[500] Lord Chancellor's Exceptional Funding Guidance (Non-Inquests) para 64.
[501] *R v SSHD ex parte Limbuela and others* [2005] UKHL 66.

the individual whose benefits have been stopped by way of a sanction are arguably comparable. This is because both groups have been set apart for different treatment as a result of conditionality of some kind i.e. making a claim for asylum as soon as practicable or compliance with targets for applying for a certain number of jobs, attendance at interviews or other appointments. The decision to withdraw support (whether asylum support or mainstream benefits) are in the same way 'treatment' by the state in that it is the deliberate action of the state (whether refusal of asylum support or applying a benefits sanction) which results in an individual being deprived of '…shelter, food or the most basic necessities of life…"[502] The key issue 'is whether the state is properly to be regarded as responsible for the conduct that is prohibited by the Article…'[503] Whilst under ordinary circumstances such treatment may be permitted, if it results in an individual deteriorating into a condition that is 'inhuman and degrading' that is the tipping point, past which such treatment is unlawful.

Before moving on it is important to deal with an argument that has been advanced against sanctions being considered as 'treatment'.[504] In response to concerns raised in relation to Universal Credit (UC) before it was introduced the Coalition Government took the view that Article 3 could not be engaged by the application of a sanction because a UC claimant had the option to work and thus avoid destitution. The Government suggested that the possibility of work therefore broke the requisite link between sanctions and the results of their application. To put it another way the argument is that sanctions may not amount to treatment by the state as it is the conduct of the claimant in not complying with a relevant condition that has resulted in the sanction.[505]

There are several strong rebuttals to such a view. Firstly, failure to comply with benefit conditions does not mean that sanctions are not to be considered as 'treatment'. For the state not to be responsible for the consequences of a sanction a number of conditions would need to be met. As Oette noted these include (1) bona fide work opportunities would need to be available so that the individual's income was not solely derived from the state. (2) The conditionality requirements associated

[502] *R v SSHD ex parte Limbuela and others* [2005] UKHL 66 [7].
[503] ibid [53].
[504] Joint Committee on Human Rights, *Legislative Scrutiny: Welfare Reform Bill* (2010-12, HL 233, HC 1704) para 1.41.
[505] Mark Simpson, '"Designed to reduce people…to complete destitution": human dignity in the active welfare state' (2015) 1 European Human Rights Law Review 66, 72.

with a particular entitlement would have to be reasonable for a specific claimant and (3) the process by which sanctions are applied must be administered fairly and efficiently both in general terms and in every individual case.[506] The provision of work opportunities would, however, be irrelevant in the case of claimants of ESA who are deemed not fit for work as they are not expected to seek work thus this argument is not available in relation to that group. As an interference with income already being received a sanction may be regarded as an interference with a proprietary right protected by Article 1 of the First Protocol.[507] Consequently a sanction represents positive action i.e. treatment by the state.[508] Lastly, in *Limbuela* it was accepted that the withdrawal of asylum support constituted treatment even though the withdrawal only occurred because of Mr Limbuela's failure to make his asylum claim quickly enough. The point has also been made that the behaviour of an individual does not result in the dis-application of Convention rights to that person.[509] It is therefore possible to be quite unequivocal in asserting that 'Targeted austerity measures, that is, those that negatively affect entitlements or have direct, adverse consequences undoubtedly constitute 'treatment'.[510] We can now move on to consider when treatment might result in a condition that can be regarded as 'inhuman and degrading'.

There is a distinction to be drawn between destitution and 'inhuman and degrading treatment'. Simple destitution would not cross the threshold but if a person's condition/circumstances go beyond 'mere destitution' then it can do so. *Limbuela* makes it clear that withdrawal of asylum support in itself does not amount to inhuman or degrading treatment '…but it will do once the margin is crossed between destitution…and the condition that results from inhuman and degrading treatment...'[511] The second question posed is whether '…if nothing is done to avoid it, the condition of the asylum-seeker is likely to reach the required minimum level of severity…'[512] The duty in Article 3 arises

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[506] Lutz Oette, 'Austerity and the Limits of Policy-Induced Suffering: What Role for the Prohibition of Torture and Other Ill-Treatment?' (2015) 15 Human Rights Law Review 4 669, 690.
[507] European Convention on Human Rights, Article 1 of the First Protocol.
[508] Mark Simpson, '"Designed to reduce people…to complete destitution": human dignity in the active welfare state' (2015) 1 European Human Rights Law Review 66, 72.
[509] Colin Warbrick, 'The European Convention on Human Rights and the Prevention of Terrorism' [1983] 32 ICLQ 82, 107.
[510] Lutz Oette, 'Austerity and the Limits of Policy-Induced Suffering: What Role for the Prohibition of Torture and Other Ill-Treatment?' (2015) 15 Human Rights Law Review 4 669, 684.
[511] *R v SSHD ex parte Limbuela and others* [2005] UKHL 66 [57].
[512] ibid.

> …when it appears on a fair and objective assessment of all relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the basic necessities of life. [513]

There are a number of factors that may be relevant to making that assessment. These include gender, age, health, the extent to which all avenues of assistance have been explored, the time spent and to be spent without any means of support, exposure to the elements from rough sleeping (including health and safety concerns), the effect of having no access to toilet/washing facilities and the resulting humiliation or sense of despair.[514] It is not possible to set out a single test to be applied in all cases.[515] The suffering caused by an existing illness which is, or could be, made worse by the loss of income and other consequences arising from a sanction can also trigger the protection of Article 3.[516] This is particularly relevant for those claimants with an existing illness or disability, given that around 20% of sanctions that are applied affect disabled claimants. There is also evidence to suggest that for ESA claimants, particularly those experiencing mental ill-health, sanctions made health problems worse.[517]

Benefit sanctions are applied for a fixed and finite period (in contrast to the position of a destitute asylum seeker) of between 1 week and 3 years. Despite the finite nature of the withdrawal of benefits it is not difficult to see that suffering privation, with no, or no sustainable or acceptable, alternative sources of support, and where the individual cannot support themselves, either because they cannot find work or cannot work due to illness or disability, could develop beyond destitution and into the realms of inhuman and degrading treatment. If the absence of support is for such a length of time that it results in 'growing despair and a loss of self respect'[518] then this can result in the individual's condition amounting to 'inhuman and degrading treatment'.

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[513] ibid [8].
[514] ibid.
[515] ibid [9].
[516] *Pretty v UK* [2002] 35 EHRR 1 [52].
[517] Work and Pensions Committee, *Benefit sanctions policy beyond the Oakley Review* (HC 2014-15, HC 814) written evidence of Dr Kayleigh Garthwaite and Professor Clare Bambra (SAN0011).
[518] *R v SSHD ex parte Limbuela and others* [2005] UKHL 66 [71].

What does it mean to be destitute?

Destitution has been defined in a number of different ways. For example, s. 95(3) Immigration and Asylum Act 1999 provides that for the purposes of the application of that act

> (3) For the purposes of this section, a person is destitute if –
>
> (a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met); or
>
> (b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs

Within the regulations later laid down there was no definition of what 'essential living needs' means, only what it does not mean.[519] The Oxford English Dictionary states that to be destitute is to be '…very poor and without a home or other things necessary for life…' Most useful, is a very practical working definition of what it means to be destitute that has been developed, in conjunction with members of the public, by the Joseph Rowntree Foundation.[520] They propose that

> …People are destitute if they, or their children, have lacked two or more of these six essentials over the past month, because they cannot afford them:
>
> Shelter (have slept rough for one or more nights)
> Food (have had fewer than 2 meals a day for more than 2 days)
> Heating their home (haven't been able to do this for 5 or more days)
> Lighting their home (haven't been able to do this for 5 or more days)
> Clothing and footwear (appropriate for weather)
> Basic toiletries (soap, shampoo, toothpaste, toothbrush)

[519] The Asylum Support Regulations 2000, SI 2000/704 Regulation 9.
[520] Suzanne Fitzpatrick and others, 'Destitution in the UK' (Joseph Rowntree Foundation April 2016) 2.

> People are also destitute, even if they have not as yet gone without these essentials, if their income is so low that they are unable to purchase these essentials for themselves…[521]

This definition is reflective of modern social standards in the UK as defined by members of the public who were consulted in developing it. The use of such a definition as a starting point for evaluating whether Article 3 is engaged is in the spirit of the notion that the Convention is a living instrument, to be interpreted in accordance with social norms as they develop. The English Supreme Court has recently displayed a willingness to take such an approach by using similar material in the form of a minimum income standard when determining the affordability of Employment Tribunal fees.[522]

One need not look very far to find many examples of experiences which not only meet the Joseph Rowntree Foundation's definition of destitution but go beyond it into the realms of what can properly be considered 'inhuman and degrading' and thus crossing, or being at risk of crossing, the threshold for Article 3 protection. It is the evidence of such experiences that is the focus of section 5.5.

5.5 Mounting evidence of destitution in the UK

Since Lutz Oette was writing in 2015 evidence of destitution in the UK has continued to mount. Doubt may now be cast upon the assertion that only small numbers of people may attract Article 3 protection after being sanctioned.

Experiences of destitution and beyond

Recent research on experiences of welfare reform has identified that people frequently report 'going without'[523] and that parents often prioritise their children's needs, whilst going hungry themselves.[524] Sanctions can also result in attempts to

[521] Suzanne Fitzpatrick and others, 'Destitution in the UK: an interim report' (Joseph Rowntree Foundation 2015) 35, Box 2.
[522] *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 [50-55].
[523] Ruth Patrick, 'Wither Social Citizenship? Lived Experiences of Citizenship In/Exclusion for Recipients of Out-of-Work Benefits' (2017) 16:2 Social Policy & Society 293, 296.
[524] ibid 297.

survive by turning to crime including shoplifting,[525] selling drugs[526] or prostitution.[527] As well as adopting these practical strategies in order to deal with the effects of a sanction it is evident that there are also significant emotional impacts. Research has described 'the downward spiral' of the mental health of sanctioned benefit claimants as a result of the 'grinding daily reality' of struggling to cope.[528] It has also been found that people experience anxiety and depression, feel angry, have low mood, feel powerless and that they are being punished unfairly.[529] The particular experience of having to beg for food can lead to feelings of degradation and an associated loss of confidence.[530] Then there are the humiliations of not having enough money for washing powder to wash clothes[531] or being too worried about the cost to have a bath.[532] For some claimants such feelings may be against a background of existing 'vulnerabilities and marginalisation' which can include mental illness, homelessness, domestic violence, parenting issues, and difficult home environments.[533] Indeed there is evidence to suggest that the most disadvantaged claimants are more likely to be sanctioned.[534]

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[525] ibid; Sarah Johnsen, Beth Watts and Suzanne Fitzpatrick, 'Welfare Conditionality: Sanctions, Support and Behavioural Change First Wave Findings: Homelessness' (May 2016) 8 <http://www.welfareconditionality.ac.uk/wp-content/uploads/2016/05/WelCond-findings-homelessness-May16.pdf> Last accessed 18 January 2018.

[526] Sarah Johnsen, Beth Watts and Suzanne Fitzpatrick, 'Welfare Conditionality: Sanctions, Support and Behavioural Change First Wave Findings: Homelessness' (May 2016) 8 <http://www.welfareconditionality.ac.uk/wp-content/uploads/2016/05/WelCond-findings-homelessness-May16.pdf> Last accessed 18 January 2018.

[527] Peter Dwyer and others, 'Welfare Conditionality: Sanctions, Support and Behavioural Change First Wave Findings: Disability and conditionality' (May 2016) 9 <http://www.welfareconditionality.ac.uk/wp-content/uploads/2016/05/WelCond-findings-disability-May16.pdf> Last accessed 15 January 2018.

[528] Ruth Patrick, 'Wither Social Citizenship? Lives Experiences of Citizenship In/Exclusion for Recipients of Out-of-Work Benefits' (2017) 16:2 Social Policy & Society 293, 297; Sarah Johnsen, 'Welfare Conditionality: Sanctions, Support and Behavioural Change First Wave Findings: Lone Parents' (May 2016) 6 <http://www.welfareconditionality.ac.uk/wp-content/uploads/2016/05/WelCond-findings-lone-parents-May16.pdf> Last accessed 22 April 2017.

[529] Sharon Wright and Alasdair B R Stewart, 'Welfare Conditionality: Sanctions, Support and Behavioural Change First Wave Findings: Jobseekers' (May 2016) 5 <http://www.welfareconditionality.ac.uk/wp-content/uploads/2016/05/WelCond-findings-jobseekers-May16.pdf> Last accessed 18 January 2018.

[530] ibid 6.

[531] ibid 5.

[532] ibid 4.

[533] Peter Dwyer and Janis Bright, 'Welfare Conditionality: Sanctions, Support and Behavioural Change First Wave Findings: Overview Report' (May 2016) 2. <http://www.welfareconditionality.ac.uk/wp-content/uploads/2016/05/WelCond-findings-Overview-May16.pdf> Last accessed 19 April 2017.

[534] Julia Griggs and Martin Evans, 'A review of benefit sanctions' (Joseph Rowntree Foundation 2010) 2. <https://www.jrf.org.uk/report/review-benefit-sanctions> Last accessed 18 January 2018.

A specific link has been identified between the increasing application of sanctions by the DWP and the burgeoning demand for food aid, in that those areas which have the highest numbers of sanctions also have the highest food bank usage.[535] This is within a context where even before a sanction is applied people on low incomes and/or state benefits struggle to eat properly for health.[536] In evidence to the Commons Justice Committee Islington Law Centre

> …reported that two people had collapsed in its offices because of a lack of food. They had received benefit sanctions and had not contested them. In one case, a man had not eaten for six days; in another, a woman was unable to feed herself and her three young children.[537]

This clearly demonstrates the level of hunger that can result from sanctions.

Organisations providing services for homeless people also report the 'profoundly negative impact' sanctions have on homeless people.[538] Common experiences include having to resort to stealing food or other essentials, not having the support of having friends or family to offer a safety net and anxiety caused by having your only source of income stopped. They also routinely suffer the consequent impact on existing mental health conditions. However, since July 2014 homeless people who can show that they are in a 'domestic crisis' and are taking reasonable steps to find accommodation can be released from any work-related conditions that are normally attached to their entitlement to benefit. There is not any evidence as yet on the extent to which this has made a practical difference to homeless benefit claimants.[539] Incidences of street homelessness have, however, more than doubled since 2010 with a count/estimate in autumn 2016 indicating that 4134 people were street homeless. Exploratory research carried out on behalf of Crisis reported that, of a sample of 213 homeless people that had been sanctioned in the previous 12 months, just over a fifth of the group had become homeless as a consequence of

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[535] Rachel Loopstra and others, 'Austerity, sanctions and the rise of food banks in the UK' [2015] BMJ 2015;350: h1775.
[536] Kayleigh Garthwaite, Peter J. Collins, Clare Bambra, 'Food for thought: An ethnographic study of negotiating ill health and food insecurity in a UK foodbank' (2015) 132 Social Science & Medicine 38, 43.
[537] HL Deb 10 December 2015, vol 767, col 1691.
[538] Homeless Watch, 'A High Cost to Pay' (Homeless Link, September 2013) 20. <https://www.homeless.org.uk/sites/default/files/site-attachments/A%20High%20Cost%20to%20Pay%20Sept%2013.pdf> Last accessed 2 January2018.
[539] National Audit Office, *Homelessness* (HC 308 session 2017-19, National Audit Office 2017) 4.

being sanctioned. 16% of the sample said that they had had to sleep rough because of a sanction.[540] When life is so precarious the impacts of a sanction are likely to be magnified and the likelihood of slipping into a condition that could be considered to be inhuman and degrading is increased for a growing number of people.

Research by Loopstra et al found an explicit link between the rate of benefit sanctions and levels of food bank usage. The highest rates of food bank usage was found in those areas with the highest numbers of sanctions. The researchers combined data from the Trussell Trust on food bank operations with budget and socio economic data from 375 Local Authorities covering the period from 2006/07 to 2013/14. The Trussell Trust was operating in just 29 local authority areas in 2009/10 but by 2013/14 there were Trussell Trust food banks operating in 251 local authorities.[541] Data collected by the Trussell Trust shows that the numbers of emergency food parcels needed by food bank users has increased drastically since 2012/13. In 2012/13 just 346,992 parcels were given out (pertaining to 126,889 children and 220,103 adults). Need has continued to increase year on year and by 2016/17 provision was made via 1,109,309 food parcels with 415,866 of those being for children.[542] Each voucher is exchanged for an amount of food that is designed to last the recipient for three days. Whilst the Trussell Trust do not account for all food aid provided in the UK (Fareshare and Food Cycle are the other two main providers) the data collected by the Trussell Trust is the most reliable.[543]. It is, however, estimated that in 2013/14, between these three organisations 20,247,042 meals were provided to people who would have otherwise gone without.[544] At the same time it is reported that cases of malnutrition being seen in English hospitals has been increasing sharply for a number of years.[545]

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[540] Elaine Batty and others, *Homeless people's experience of welfare conditionality and benefit sanctions* (Crisis 2015) 45.
[541] Rachel Loopstra and others, 'Austerity, sanctions and the rise of food banks in the UK' [2015] BMJ 350: h1775.
[542] All statistics on Trussell Trust food bank usage from 2012/13 onwards can be found at <https://www.trusselltrust.org/news-and-blog/latest-stats/end-year-stats/> Last accessed 28 April 2017.
[543] Rachel Loopstra and others, 'Austerity, sanctions and the rise of food banks in the UK' [2015] BMJ 350: h1775.
[544] Niall Cooper, Sarah Purcell, Ruth Jackson, *Below the Breadline The Relentless Rise of Food Poverty in Britain* (Church Action on Poverty/Oxfam/the Trussell Trust June 2014) 6.
[545] Nicola Fifield, Shocking rise in Brits being admitted to hospital because they are MALNOURISHED *Mirror* (22 October 2016) <http://www.mirror.co.uk/news/uk-news/shocking-rise-brits-being-admitted-9106672#ICID=sharebar_twitter> Last accessed 2 January 2018; Charlie Cooper and Kunal Dutta, Malnutrition cases in English hospitals almost double in five years *The Independent* (17 November 2013) <http://www.independent.co.uk/life-style/health-and-families/health-

As well as assistance from food banks when people are sanctioned, individuals may also be able to obtain assistance from local authority discretionary welfare funds (these replaced the national Social Fund which offered Crisis Loans and Social Fund Loans). The assistance offered varies between each local authority area and they are administered differently in each of the four UK countries. What is common between them is that they offer mainly 'in kind' rather than cash assistance. There is very little evidence about how these local discretionary funds are being distributed and whether they are used in such a way as to tackle destitution. Local welfare schemes in England have, however, been the focus of a recent study by the Centre for Responsible Credit. The findings of their research are disturbing in that 26 local authorities have closed their schemes completely. A further 41 authorities have reduced scheme budgets by more than 60% and of those 11 authorities have imposed funding cuts of more than 80%. The latter schemes are therefore said to be 'on the brink of collapse'.[546] Access to support which may prevent deterioration into an 'inhuman and degrading' condition has significantly diminished, in England at least. There are also indications that the capacity of families to provide support is shrinking[547] and that 'resilience is close to saturation'.[548]

In 2015 Simpson wrote that 'Given the existence of food banks, hardship payments to sanctioned claimants otherwise unable to meet basic needs and the fact that housing benefit is not subject to sanction, the number of cases in which such needs cannot be met might be expected to be small.'[549] He concluded that the potential pool of claimants who could rely on Article 3 would be those who had not been granted hardship payments, and without family or charitable support. Simpson's view was arguably optimistic for a number of reasons. Firstly, the support offered by food banks is subject to limitations. Typically, individuals are limited to three or four vouchers in a six or 12 month period. The precise number varies across

news/malnutrition-cases-in-english-hospitals-almost-double-in-five-years-8945631.html> Last accessed 2 January 2018.

[546] Damon Gibbons, 'The Decline of Local Welfare Schemes in England: why a new approach is needed' (Centre for Responsible Credit, September 2017) 18.

[547] Real Life Reform, Real Life Reform Report 3' (Real Life Reform, March 2014) 25. <http://www.connecthousing.org.uk/Documents/Home/RealLifeReformReport3.pdf> Last accessed 18 January 2018.

[548] Real Life Reform, 'Real Life Reform Report 2' (Real Life Reform, December 2013) 26. <https://democratic.lincoln.gov.uk/documents/s5590/Real_Life_Reform_Report_2_Dec_2013%20supplied%20by%20Alex%20Ray.pdf> Last accessed 18 January 2018.

[549] Mark Simpson, '"Designed to reduce people…to complete destitution": human dignity in the active welfare state' (2015) 1 European Human Rights Law Review 66, 72.

locations.[550] The Trussell Trust estimates that in the region of 15% of its service users need more than three food vouchers in a year. On average it is estimated that individuals using foodbanks need an average of two vouchers per year.[551] This leaves open the question of what people do after they can no longer access the foodbanks. Attached to such food insecurity is likely to be profound uncertainty and anxiety.

In addition, awareness of the possibility of hardship payments is extremely low.[552] Furthermore, most people do not know how to appeal against a sanction,[553] the corollary of which must be that there is an unacceptable likelihood that people do not make use of their right to challenge a sanction before the deadline for doing so, or at any time thereafter.[554] There is a two week waiting period before hardship payments can be claimed for JSA claimants unless they are deemed to be 'vulnerable' and such payments are not available as of right. Even in cases where hardship payments are granted there is likely to be a cumulative impact of living on such a small amount of money over, in the cases of longer sanctions in particular, many months or years.

Although Housing Benefit (HB) is not subject to sanctions it is often interrupted when a primary benefit such as JSA or ESA stops.[555] If HB does end, even if only for a relatively short period, this can lead to a risk of homelessness. For assured and assured shorthold tenants, which includes most private sector and Housing Association tenants, after eight weeks or two months arrears have accrued their Landlord will have mandatory grounds upon which to seek possession.[556] If a tenant was already in rent arrears before HB stopped it may take less than eight weeks for

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[550] Kayleigh Garthwaite, Peter J. Collins, Clare Bambra, 'Food for thought: An ethnographic study of negotiating ill health and food insecurity in a UK foodbank' (2015) 132 Social Science & Medicine 38, 40.

[551] This data is collected by the Trussell Trust and published on their website here: <https://www.trusselltrust.org/news-and-blog/latest-stats/end-year-stats/> Last accessed 28 April 2017.

[552] Matthew Oakley, *Independent Review of the operation of Jobseeker's Allowance sanctions validated by the Jobseeker's Act 2013* (HMSO 2014) 9.

[553] ibid 33.

[554] Lutz Oette, 'Austerity and the Limits of Policy-Induced Suffering: What Role for the Prohibition of Torture and Other Ill-Treatment?' (2015) 15 Human Rights Law Review 4 669, 677.

[555] David Webster, 'Independent review of Jobseeker's Allowance (JSA) sanctions for claimants failing to take part in back to work schemes' 10 January 2014 (revised 13 January 2014) para 37. Available at <http://www.cpag.org.uk/sites/default/files/uploads/CPAG-David-Webster-submission-Oakley-review-Jan-14_0.pdf> Last accessed 10 December 2017.

[556] Housing Act 1988, s.8.

the mandatory ground for possession to apply. Some Landlords may not even wait for eight weeks arrears to build up preferring instead to serve a s.21 notice at the first sign of problems. In such cases provided procedural requirements are complied with Landlords do not need to prove rent arrears.[557]

The picture which this evidence paints is that the impact of benefit sanctions may quite routinely result in circumstances in which the criteria for 'destitution' developed by the Joseph Rowntree Foundation would be met. Accounts of going without food and not being able to pay for heating and hot water are common. There is also emerging tentative evidence that sanctions can cause homelessness, including rough sleeping. Unsurprisingly, a deterioration in physical and mental health is often reported by those who have been sanctioned. Coping strategies in the aftermath of benefits being withdrawn might include shoplifting or other crime in order to obtain money or food. Use of food banks is increasing whilst access to other local welfare support, in England at least, is diminishing. Thus the potential for an individual who has been sanctioned to go beyond 'mere destitution' into a condition that can be described as 'inhuman and degrading', and triggering the protection of Article 3, is clearly present. Having established that the risk of Article 3 violations is present in benefit sanctions cases the remainder of the chapter sets out the action that is required as a result.

5.6 Article 3, sanctions and ECF: a duty of early intervention?

Obligations under Article 3 do not exist solely at the level of individual cases, where the state is required to refrain from conduct which may bring about inhuman and degrading treatment (the negative obligation). There is also a 'positive' aspect to the Article which requires action on a systemic level in order to try and prevent violations of the Article from occurring in the first place. This positive obligation has been recognised by reading Article 3 in conjunction with Article 1 ECHR which provides that states '…shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention' of which Article 3 is one. The basis on which positive obligations have been implied into Convention rights 'has been to ensure that the relevant rights are 'practical and effective' in their

[557] Housing Act 1988, s.21.

exercise.'[558] Such obligations can require states to take action in order to guarantee that the Article 3 rights of individuals are not infringed.[559] The context in which a breach may occur must also be taken into account when determining what is required of the state. As Palmer has put it

> …the implication of affirmative duties has been consistent with the recognition that threats to *all* human rights require a range of protective and preventative measures that take into account the context in which the violation occurs, the seriousness of the threat and the immediacy of the action necessary to fulfil or facilitate the protection of the right.[560]

In this section the elements of the positive component of Article 3 are set out after which consideration is given to what action might be required in the context of benefit sanctions and ECF.

The duty to protect individuals includes protection from ill-treatment by both private individuals and state agents.[561] The case of *E v UK*[562] is an illustration of this. In *E v UK* the state knew that the children at the centre of the case had been sexually abused and did not prevent further abuse from occurring, after the perpetrator had been convicted. Writing about the case Hofstotter states that the European Court of Human Rights is 'unambiguous in requiring the states parties to do more than merely refrain from interfering with the rights enshrined in the Convention'.[563] There is a duty upon states to take reasonable steps to protect from a violation of Article 3. Crucial to this conclusion in *E v UK* was the lack of 'investigation, communication and co-operation by the relevant authorities'.[564]

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[558] Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004) 221.
[559] Bernhard Hofstotter, 'European Court of Human Rights: Positive obligations in E. and others v United Kingdom' (2004) 2 (3) Int'l J Const L 525, 527; *E v UK* (2003) 36 EHRR 31 [88].
[560] Ellie Palmer, 'Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights' (2009) 2 Erasmus Law Review 397, 404.
[561] Alastair Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004) 44.
[562] *E v UK* (2003) 36 EHRR 31.
[563] Bernhard Hofstotter, 'European Court of Human Rights: Positive obligations in E. and others v United Kingdom' (2004) 2 (3) Int'l J Const L 525, 526.
[564] *E v UK* (2003) 36 EHRR 31 [100].

For the positive duty to be triggered there must be knowledge on the part of the state as to the risks, taking into account not only what the state or its agents actually knew but what it ought to have known.[565] Where the state's agents are the source of a potential act of interference, such as Jobcentre staff in cases of sanctions, the requisite knowledge of the need for 'human rights protection' can 'reasonably be implied'.[566] Given the evidence set out in section 5.5 the Government knows or ought to know of the risk of a breach of Article 3 as a result of sanctions (an objective risk). Moreover, intervention in accordance with the positive duty found in Article 3, before a sanction is applied, would provide the opportunity to find out about the particular circumstances of an individual claimant (the subjective risk). Knowledge of a potential breach can also come from a specific complaint from an affected individual or if another person has been in a similar situation previously.[567] For example, an individual who is warned that s/he is about to be sanctioned could point to what happened to them on a previous occasion when benefit was withdrawn. What is required by the state in such circumstances is summarised by Mowbray like this 'the Article 3 duty obliges states to take 'reasonable steps' to prevent vulnerable persons from being subject to ill-treatment where the domestic authorities 'had or ought to have knowledge' of that maltreatment.'[568] The state's response for Article 3 purposes is to be evaluated in terms of general policy and the specific individual.[569] Steps will be regarded as reasonable provided that they are not 'impossible' and they do not place a 'disproportionate burden' on the state. The margin of appreciation will be narrow where the right in question is essential to an individual's ability to make use of 'intimate or key rights'. Article 3, as one of the most important Convention rights must surely fall into this category, thus a narrow margin of appreciation will be available to the state in determining what steps are required to prevent or avoid a breach, or mitigate impact if the Article is violated.[570]

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[565] ibid [92].

[566] Dimitris Zenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge 2013) 76.

[567] ibid 81.

[568] Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*(Hart 2004) 45.

[569] Lutz Oette, 'Austerity and the Limits of Policy-Induced Suffering: What Role for the Prohibition of Torture and Other Ill-Treatment?' (2015) 15 Human Rights Law Review 4 669, 688.

[570] Ellie Palmer, 'Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights' (2009) 2 Erasmus Law Review 397, 417.

Overall, a state's positive Article 3 duty will be engaged, giving rise to the possibility that a failure to act would breach the Article, if the following criteria are satisfied:

i. Is the applicant in a particularly serious situation? It is suggested that this means an inability to cater for basic needs: food, hygiene and a place to live.

ii Is the applicant in need of special protection due to being particularly underprivileged or vulnerable?

iii Is the applicant wholly dependent on state support and faced with official indifference in a situation of 'serious deprivation'?

iv Has the state taken the requisite action? The onus should not be on the applicant.

v Could the authorities have substantially alleviated suffering by acting promptly?

vi. Did the authorities have due regard to the applicant's vulnerabilities?[571]

It is instructive at this point to consider how this might apply in a specific case. One of the most striking and well-publicised examples of when the Article 3 threshold may have been reached in a sanctions case is provided by the case of David Clapson.[572] Mr Clapson, aged 59, died on 20 July 2013 as a result of fatal diabetic ketoacidosis which is caused by a severe lack of insulin. His JSA had stopped in early July 2013 after he received a four week sanction for missing one or two

[571] Synthesis of *MSS v Belgium and Greece* (2011) 53 EHRR 2 [253-264] taken from Lutz Oette, 'Austerity and the Limits of Policy-Induced Suffering: What Role for the Prohibition of Torture and Other Ill-Treatment?' (2015) 15 Human Rights Law Review 4 669, 684-685.

[572] Work and Pensions Committee, *Benefit sanctions policy beyond the Oakley Review* (HC 2014-15, HC 814) written evidence of Gill Thompson (SAN0047); Frances Ryan, David Clapson's awful death was the result of grotesque government policies *The Guardian* (9 September 2014) <http://www.theguardian.com/commentisfree/2014/sep/09/david-clapson-benefit-sanctions-death-government-policies> Last accessed 23 April 2015; Amelia Gentleman, No one should die penniless and alone: the victims of Britain's harsh welfare sanctions *The Guardian* (3 August 2014) <http://www.theguardian.com/society/2014/aug/03/victims-britains-harsh-welfare-sanctions> Last accessed 18 January 2018.

appointments in May 2013. After his JSA stopped it appears that Mr Clapson had no money for food or for electricity. Consequently he could not refrigerate his insulin, as he had no electricity to run the refrigerator. He had a prepayment electricity meter for which he could not afford to buy credit after it ran out. At the time of his death Mr Clapson had 5p credit on his mobile phone and as at 8 July he had just £3.44 in his bank account. In his flat when he died there were six teabags, a tin of soup and a can of out of date sardines. At the time Mr Clapson was sanctioned mandatory reconsideration was not yet in place, but it was after benefits advice was, for the most part, taken out of scope for legal aid. Whilst Mr Clapson may have qualified for hardship payments, these are generally not payable until 15 days after a sanction has been applied for JSA claimants. The DWP states that in Mr Clapson's case, they told him on the telephone that he could apply for hardship payments and sent a letter confirming this on 15 July 2013 with details of how to apply. Unfortunately this letter and another dated 3 July 2013 were found unopened in Mr Clapson's flat after he died.[573]

If Mr Clapson's circumstances, as far as they can be known from the above account, are considered according to the series of six questions above, it can be seen that the state had an obligation to intervene in Mr Clapson's case for the following reasons. Firstly, he was in a very serious situation. Although he had a roof over his head Mr Clapson could not provide for basic needs such as food and the conditions required to store essential medication. He was vulnerable as a result of being diabetic, which it is said the DWP was aware of. Despite this Mr Clapson was not permitted to apply for hardship payments for two weeks. This may amount to 'official indifference'. JSA was Mr Clapson's sole source of income which rendered him entirely dependent upon the state. No regard was had to Mr Clapson's health needs and thus no action was taken. Had hardship payments been provided immediately Mr Clapson may not have died. Had ECF been immediately provided Mr Clapson could have obtained independent advice in order to challenge the sanction and receive assistance with an application for immediate hardship payments.

The steps required of the state by virtue of Article 3 in the context of benefit sanctions involve systems and provision which for the most part already exist. What

[573] Work and Pensions Committee, *Benefit sanctions policy beyond the Oakley Review* (HC 2014-15, HC 814) written evidence of Gill Thompson (SAN0047).

is required in the first instance is a proactive system of making inquiries of individual claimants (and to review information held about them) as to their circumstances before benefit stops. When a sanction is being contemplated individuals should be warned of this and have speedy access to independent advice. By doing so there is a 'real prospect of altering the outcome.'[574] In the case of ECF the opportunity for independent advice is likely to affect the outcome by increasing the number of reconsiderations and appeals. It would also be likely to improve the prospects of a successful reconsideration or appeal against the decision to apply a sanction. Questioning of individual claimants could be expected to identify vulnerable claimants so that hardship payments can be made available without delay. Furthermore, if the claimant's circumstances and/or explanation of their apparent failure to comply with a condition of receiving benefit is accepted a sanction would not be applied and thus the need for reconsideration or an appeal is avoided.

Close questioning by Jobcentre staff and the possibility of delegated functions for legal aid providers to grant ECF Legal Help could both form part of a package of 'procedural structures through which the critical element of knowledge can be established'.[575] It is arguable that in this context the cumbersome procedure of applying for ECF Legal Help to the LAA should be dispensed with. The very low numbers of applications for ECF in welfare benefits cases may be seen to reflect the burdensome nature of the process. Furthermore, bearing in mind the low value of the fixed fees for welfare benefits work under Legal Help (£150[576] or £208[577] depending upon when the provider's legal aid contract started) it would be proportionate to enable providers to grant funding directly. This is particularly the case where the individual has no other source of income at all.

5.7 Article 3: an implied right to procedural protection

There are several Convention rights in which a duty to provide procedural protection has been implied in the absence of any explicit wording in the Articles themselves. Article 8 (the right to private and family life, home and correspondence); Article 2

[574] *E v UK* (2003) 36 EHRR 31 [99].
[575] Dimitris Zenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge 2013) 110.
[576] Civil Legal Aid (Remuneration) Regulations 2013, SI 2013/422 Schedule 1, Part 1 Table 1.
[577] ibid Schedule 1, Part 1 Table 7.

(the right to life) and Article 1 of the First Protocol (which confers a right to protection of possessions) are all in this category. Each of these Articles is a qualified right and if the rights contained in the Convention were to be arranged in a hierarchy of importance, only Article 2 (the right to life) is considered as important as Article 3, with its absolute prohibition on torture and inhuman and degrading treatment. In this section, the ways in which these procedural duties have been constructed are explored. Finally, some arguments in favour of the recognition of an implied requirement for procedural protection within Article 3 are considered.

In the case of Article 8 the protection of the Article attaches to the decision making procedure in which it is to be decided whether an interference with the right can stand or proceed, such as care proceedings. The procedure must be fair which requires that relevant information must be provided to the person whose rights are in question so that s/he can participate effectively and be sufficiently involved in the decision making process so that their interests are protected.[578] On this basis there can be an obligation to provide legal aid so that an individual can be advised and/or represented in the process as a means of guaranteeing their effective participation in a procedure in which their Article 8 rights are to be determined (although as discussed in chapter 4 at 4.3 the right to legal aid is not absolute and can be limited through the application of means and merits tests). This is recognised in the Lord Chancellor's Guidance on ECF.

In the context of Article 2 (right to life) there are some circumstances in which procedural protection and an associated right to legal aid for representation at an inquest are automatic (intentional killings by the state such as Police shootings and violent deaths or suicides in detention whether by the Police, in prison or psychiatric care).[579] There are also circumstances in which the 'procedural obligation' arises if certain conditions are met, namely where the state is alleged to have had an involvement in the death of the individual and the family's circumstances mean that legal aid is required in order to meet Article 2 obligations[580] or where representation at an inquest would result in a wider public benefit. Where a conditional right to procedural protection arises the inquest itself must satisfy a number of criteria which

[578] *P, C and S v UK* (2002) 35 EHRR 31 [119 and 120]; *W v UK* (1987) 10 EHRR 29 [62 and 64].
[579] Lord Chancellor's Exceptional Funding Guidance (Inquests) paras 11 and 12. It should also be noted that inquest cases are in a comparatively advantageous position in the context of legal aid because Legal Help for inquests has been retained as part of the 'in scope' scheme. ECF applications are therefore only required to secure funding for representation at an inquest itself.
[580] LASPO, s.10 (3).

includes a criterion that 'The next-of-kin of the deceased must be involved in the inquiry to the extent necessary to safeguard their legitimate interests.[581] This is comparable to the protection offered by Article 8 in seeking to ensure sufficient and effective participation in the relevant process. These procedural protections implied in to Article 2 are reflected in the Lord Chancellor's Exceptional Funding Guidance (Inquests).[582]

A further example is provided by the protections against a potential interference with property contained within Article 1 of the First Protocol to the Convention. Such an interference is only acceptable if it is in the public interest and complies with the law, is proportionate and is not arbitrary. In some circumstances an adversarial process must be available before proprietary interference takes place. This is particularly relevant in the context of sanctions which may be considered as an interference to a proprietary right, the benefit received being deemed 'property'.[583]

Why should Article 3 give rise to an implied right to procedural protection?

A number of authors have considered that sanctions themselves and the way in which sanctions decisions are taken contain features of arbitrariness.[584] Webster suggests that sanctions are disproportionate in themselves on the basis that the extent of sanctions greatly outweighs the 'crime' committed by failing to comply with a condition of benefit. Aspects of the decision making process that have been considered arbitrary include the fact that benefit may be stopped even whilst a sanction is being considered, before a final decision about whether it should be applied or not is taken;[585] insufficient reasons being given for a sanction, claimants not being routinely told about their appeal rights or the availability of hardship payments, and the suggestion that Jobcentre staff have sanctions targets to meet

[581] Lord Chancellor's Exceptional Funding Guidance (Inquests) 4, para 19.
[582] Lord Chancellor's Exceptional Funding Guidance (Inquests).
[583] *Stec and others v UK* (2005) 41 EHRR SE 18 [47-56].
[584] David Webster, 'Independent review of Jobseeker's Allowance (JSA) sanctions for claimants failing to take part in back to work schemes' 10 January 2014 (revised 13 January 2014). Available at <http://www.cpag.org.uk/sites/default/files/uploads/CPAG-David-Webster-submission-Oakley-review-Jan-14_0.pdf> Last accessed 10 December 2017; Mark Simpson, '"Designed to reduce people…to complete destitution": human dignity in the active welfare state' (2015) 1 European Human Rights Law Review 66; Lutz Oette, 'Austerity and the Limits of Policy-Induced Suffering: What Role for the Prohibition of Torture and Other Ill-Treatment?' (2015) 15 Human Rights Law Review 4 669.
[585] Mark Simpson, '"Designed to reduce people…to complete destitution": human dignity in the active welfare state' (2015) 1 European Human Rights Law Review 66, 74.

as part of their performance monitoring thus offering incentives to withdraw benefit.[586] It has also been argued that explanations for non-compliance with a benefit condition and relevant circumstances are not taken into account. Moreover, it has been found that decision makers are insensitive to vulnerabilities such as mental health and disabilities.[587] The inadequacy of measures such as a sanctions warning system without any accompanying advice provision is demonstrated by a recent trial in Scotland in which benefit claimants were given a 14 day warning that a sanction was being considered, yet only 13% of the sample responded and submitted any additional evidence during the warning period.[588]

In addition to these concerns account must be taken of the seriousness of the decision being taken. In sanctions cases decisions are potentially of the utmost gravity because the consequence may be the withdrawal of a person's sole source of income. ECF, and the access to independent advice which it provides, can therefore be seen as an important protective factor against arbitrariness and the disastrous consequences that may ensue from a withdrawal of benefit. This offers support for the argument that Article 3 can be found to contain a duty to provide procedural protection in sanctions and related decision making processes which may affect a claimant's Article 3 rights. As Article 3 is one of the most important rights contained within the ECHR 'a greater content of protection has to be prescribed'.[589] Consequently, if procedural safeguards are required for qualified Convention rights such as Article 8, then for the most important rights such as Article 3 the importance of procedural protection is elevated even further and should be recognised as providing a right to ECF.

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[586] ibid 75; Lutz Oette, 'Austerity and the Limits of Policy-Induced Suffering: What Role for the Prohibition of Torture and Other Ill-Treatment?' (2015) 15 Human Rights Law Review 4 669, 691.
[587] Lutz Oette, 'Austerity and the Limits of Policy-Induced Suffering: What Role for the Prohibition of Torture and Other Ill-Treatment?' (2015) 15 Human Rights Law Review 4 669, 691.
[588] DWP, 'JSA Sanction Early Warning Trial Evaluation – Interim Report' (December 2016) 7. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/578691/jobseekers-allowance-sanctions-early-warning-trial-evaluation-interim-report.pdf> Last accessed 10 December 2017.
[589] Dimitris Zenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge 2013) 93.

5.8 Conclusion

Article 3 has both negative and positive qualities. The negative prohibition on inhuman and degrading treatment is absolute. Consequently the issue of proportionality or the state's margin of appreciation does not arise in relation to that but a positive element to the Article has also been recognised. This can require states to intervene when there is a risk that treatment (deliberate acts) that may be prima facie lawful will cross the threshold for treatment that is considered to be 'inhuman and degrading' under Article 3 and thereby trigger the protection of the Article.[590] The action that can be required is limited to reasonable steps which do not place a disproportionate burden on the state.

The evidence set out above suggests that without early intervention, many individual benefit claimants whose benefits have been sanctioned will either reach or be at grave risk of reaching the threshold of inhuman and degrading treatment. The combination of an almost complete lack of legal aid for welfare benefits advice and the DWP's approach of 'sanctions first and ask questions later'[591] is a fundamental problem because it misses an opportunity to assess the risk of an individual claimant passing the Article 3 threshold and is a lost opportunity for intervention and prevention.

As demonstrated in this section it is possible using the reasoning in *Limbuela*, to build a strong analogous argument as to how Article 3 can be engaged in cases where benefits are withdrawn by way of a sanction for benefit claimants. In cases where inhuman and degrading treatment can be identified or there is a risk of it then this will trigger the requirement for ECF to be granted. It is also possible to find a duty to ensure that individuals can participate effectively in decision making processes which may affect their Article 3 rights. The possibility of a grant of ECF on Article 3 grounds should therefore be addressed in a separate edition of the Lord Chancellor's Guidance on ECF, as is the case for inquests. Providers should also be given delegated functions so that they can make an immediate grant of ECF themselves. In order to make ECF available in reality, as well as in theory,

[590] *R v SSHD ex parte Limbuela and others* [2005] UKHL 66 [46-48].
[591] Gillian Guy was quoted in Amelia Gentleman, 'No one should die penniless and alone': Britain's harsh welfare sanctions' *The Guardian* (3 August 2014) <http://www.theguardian.com/society/2014/aug/03/victims-britains-harsh-welfare-sanctions> Last accessed 18 January 2018.

meaningful positive relationships will need to be established between Jobcentre staff and legal aid providers of welfare benefits advice. This would properly reflect the status of Article 3 as one of the most significant protections provided for within the ECHR.[592]

[592] *Pretty v UK* [2002] 35 EHRR 1 [52].

CHAPTER 6 – EMPIRICAL FINDINGS

6.1 Introduction

In this chapter the researcher is drawing on the evidence provided by the LAA's published statistics covering the first four years of the ECF scheme,[593] evidence on ECF submitted to the Bach Commission and the judgments in the key cases during that time: *Gudanaviciene*[594] and *IS.*[595] As discussed in chapter four the *Gudanaviciene* case is highly significant because it led to a change in the overarching test for whether ECF must be granted. The result was that the test shifted from applicants having to meet a 'very high threshold' in demonstrating that without legal aid it would be 'practically impossible' to advance their case, to a test which asks, if ECF is not granted can the applicant 'present his case effectively and without obvious unfairness?' *IS* was a systemic challenge to the overall fairness and legality of the ECF scheme. As well as the judgments in the *IS* line of cases, the Scott Schedule summarising the evidence presented by the parties to the High Court in *IS* was reviewed (this was provided to the researcher by the claimant's solicitors). The evidence contained in the Scott Schedule consisted of a summary of the witness statements of 65 legal practitioners, one individual who had made a direct application for ECF and eight representatives of the Legal Aid Agency and Ministry of Justice. That evidence also drew on the details of 99 specific applications for ECF drawn principally from the family law and immigration categories. Nine of those were made by individuals directly. The evidence was arranged so that it is possible to understand the evidence of the Claimant in support of the various complaints about the scheme and the LAA's response to the same.[596]

Alongside the statistics, evidence provided to the Bach Commission, judgments and *IS* Scott Schedule, the researcher draws on evidence from a review of 20 applications for ECF (18 of which post-date the High Court judgment in *Gudanaviciene)* and nine interviews. Six of the interviews were carried out with legal

[593] All Legal Aid Agency statistics are those available as at 29 June 2017.
[594] *R (on the application of Gudanaviciene and others) v The Director of Legal Aid Casework and The Lord Chancellor* [2014] EWHC 1840 (Admin); [2014] EWCA Civ 1622.
[595] *IS (by the Official Solicitor as Litigation Friend) v The Director of Legal Aid Casework and The Lord Chancellor* [2015] EWHC 1965 (Admin); [2016] EWCA Civ 464.
[596] Each witness whose evidence is summarised in the *IS* Scott Schedule has been assigned a code in order to protect their confidentiality. Witnesses for the Claimant in the case are therefore referred to as C1 etc. and those for the Defendant as D2 etc.

practitioners, and three with members of staff from the ECF team at the Legal Aid Agency (of varying levels of seniority). Table 5 below provides a breakdown of the ECF applications reviewed by the stage which each application reached.

Table 5 – breakdown of sample of ECF applications by stage reached

Total	Initial application granted	Granted on internal review	Refused - no review requested	Review requested & refusal maintained	Judicial review threatened	Judicial review issued	Stage reached unclear
20	5	3	4	2	4	1	1

The applications were supplied by a total of four practitioners across the categories of immigration, welfare benefits and public law. The six practitioners interviewed have made in the region of 116 applications between them. One of them had also reviewed a significant number of applications for the purposes of supervision, research and litigation.

The chapter is divided into three parts. The first concerns matters external to the ECF scheme itself but which appear to be essential to making the scheme, as currently operated, work. This includes the heavy reliance upon pro bono work by lawyers and the use made of 'in scope' legal aid by providers in order to make ECF work for them or as a way of avoiding the ECF scheme altogether. As will be seen, the timing of ECF applications emerges as an important issue. Part two is concerned with the substance of the ECF scheme itself. The central theme that appears in this part is that of complexity, which arises in a number of different but related ways. It appears first of all in the weighing up of factors relevant to evaluating whether the threshold for ECF is passed, particularly in the interplay between the complexity of an applicant's substantive case and their ability to deal with the matter without legal assistance. The evidence suggests that the LAA may take an impermissible approach to this evaluation by adopting tests of equivalence and by paying no, or insufficient, attention to the impact of the experience of violence and trauma on an applicant's ability to represent themselves. This complexity, in addition to what appears to be a more robust approach to the assessment of applicant's means and the application of the ordinary merits tests,

leads us to consider the level of detail and evidence that is required in order to make a successful application for ECF. At the end of part two, the complexity of the procedure of applying for ECF is illuminated by a consideration of the understanding, knowledge and experience of practitioners and ECF staff of the areas of law pertinent to making a successful ECF application. A resistance to the expertise of others is evident in the decision making of the ECF team at the LAA.

Against the background of parts one and two, the opportunities for challenge to and oversight of the ECF scheme are considered in part three. What can be seen here is that there are two routes of challenge to a refusal of ECF. The first is through the LAA's internal review process after which, if a refusal is maintained, a claim for judicial review may be brought. What we see here is that the rate of challenge by way of internal review is low across the board. However, there are marked differences in the extent to which the process is used, and the likelihood of a successful review, between solicitors compared with unrepresented applicants and between different categories of law. Quite separate to that is the LAA's complaints procedure, escalation from which, in the absence of a satisfactory resolution, is to the Parliamentary and Health Service Ombudsman. Referral to the Ombudsman is via an applicant's MP. Here it is evident that there is disagreement about the level of complaints made. This part then finally moves to consider the role and impact that judicial review litigation has had, and may continue to have, in the development of the ECF scheme. Ultimately it is concluded that judicial review alone will not be sufficient to protect the Convention rights of potential and actual applicants for ECF.

Part 1

6.2 Matters external to the ECF scheme

In this part the wider context in which the ECF scheme operates is explored. As will be seen practitioners have found ways in which to supplement or support the ECF scheme including through pro bono work, and where possible, making use of in scope legal aid. These can be crucial to making the ECF scheme work.

6.2.1 The ECF scheme heavily relies upon pro bono work by lawyers

It is evident from the applications reviewed and practitioners interviewed, as well as from the evidence in the *IS* case, that the functioning of the ECF scheme depends heavily upon the willingness of legal advisers to carry out significant amounts of work pro bono. This remains the case post-*IS* and straddles categories of law where significant improvement in the grant rate for applications has occurred (immigration cases) and those where the number of applications and grant rate remains a concern e.g. welfare benefits.

Pro bono work is done before an application for ECF is made in order, it seems, to progress cases to a stage where the legal adviser feels that an ECF application is more likely to succeed. In such cases, even if ECF is eventually granted, the practitioner will never be paid for this work. This is distinct from work that is done at risk of non-payment, as part of the ECF application process,[597] which will only be paid for in the event that an ECF application is successful. However, solicitors may not receive payment for all of the work done 'at risk' if it is deemed excessive when costs are assessed at the end of a Licensed Work case. Non-payment for work done 'at risk' may also occur in ECF Legal Help cases if the amount of work done does not exceed three times the fixed fee amount, after which payment to the provider is made on an hourly rate as opposed to a fixed fee.[598] The Legal Aid Agency's guidance does not specifically set out what it regards as a reasonable length of time for completing the ECF application form.[599] In the case of application forms for 'in scope' legal aid 30 minutes is the standard time allowed. More may be paid for complex cases where a detailed statement is required to support the

[597] It was primarily the problem of 'at risk' work that was examined in the *IS* litigation. Whilst the point was raised that when ECF was refused this 'at risk' work became pro bono, the case did not explicitly address the issue of work done before an ECF application was granted. There was also evidence that a number of firms chose to carry out some work pro bono instead of submitting ECF applications.

[598] Legal Help is the most basic form of legal aid. It is designed to cover initial advice and assistance for which providers are mostly paid a fixed fee. If sufficient work is done which amounts, when calculated at the applicable hourly rate, to more than 3 times the fixed fee then providers can be paid for the actual work done at the relevant hourly rate. This is known as an 'escape fee'. The rates of payment for Legal Help are set out in the Civil Legal Aid (Remuneration) Regulations 2013, SI 2013/422, Schedule 1 Part 1 and Part 2.

[599] Legal Aid Agency, 'Costs Assessment Guidance: for use with the 2013, 2014 and 2015 standard civil contracts (Version 7)' (December 2015) paras 2.59 – 2.63. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/481752/legal-aid-costs-assessment-guidance-2013-2014-2015.pdf> Last accessed 1 September 2016.

application.[600] It is not just solicitors who have to accept that they may not be paid for work done on an ECF application, barristers who often supply written advice in support of an ECF application and/or review must do so too.

Solicitor S3 provided two applications for review in two related public law cases. The applications were submitted to the LAA in August and November 2014 respectively. When interviewed solicitor S3 stated that

> *We got costs so the legal aid didn't end up being very much at all and we had to fund the legal aid costs for all the ludicrous back and forth.*
>
> [Interview with S3 on 19 May 2016]

What the above quote demonstrates is that even when ECF is eventually granted there is still some work that will not be paid for. When, as in this case, an order is made requiring the unsuccessful party to pay a legally-aided winner's costs, there may be some 'legal aid only costs' that the receiving party is not entitled to claim from the paying party. Typically this would include the work done in obtaining and administering the client's public funding certificate. Payment for this element of a solicitor's bill is claimed from the LAA. When the amount to be paid is assessed[601] some aspects of the work done may not be paid for i.e. 'all the ludicrous back and forth' referred to by S3.

On the matter of the written opinions obtained from counsel to support the ECF application solicitor S3 went on to say that

> *Yes they did it on the basis that if it got backdated we'd claim, but if not we couldn't, they wouldn't have done it for free, they would have billed it and had to write it off.*
>
> [Interview with S3 on 19 May 2016]

This was a reference to the four written pieces of advice prepared by counsel to accompany applications S3/A1 (submitted in August 2014) and S3/A2 (submitted in

[600] ibid para 2.60.

[601] In legally aided cases costs are assessed by the court if the bill is over £2500, however, if the amount to be paid by a paying party is agreed between the parties without an assessment by the court it then falls to the LAA to assess the amount solicitors should be paid for the legal aid section of the bill. If costs are not agreed between the parties the whole bill will be assessed by the Court. Any work that is deemed unreasonable and/or disproportionate may not be paid for.

November 2014). In each case a written advice accompanied the initial application. After funding was refused in both cases a second written advice supported the requests for a review. In interview, both S5 and S7 also referred to the use of written advice from counsel in order to support an application for ECF, which if not granted, would be pro bono. The possibility of advice from specialist counsel is likely to play a key role for practitioners whose own specialist field may not usually require arguments to be made based on public law and human rights. This is explored further later in this chapter.

The existence of an expectation by the LAA that pro bono work be undertaken by solicitors is demonstrated in correspondence with the LAA challenging a refusal of ECF in application S1/A2. Solicitor S1 wrote in March 2015

> *We cannot assist our client to obtain documentation without funding. We would also have to apply for exceptional funding with that endeavour. We do not think it is appropriate that a refusal of exceptional funding for an immigration case appears to be based on a premise that we should work pro bono to assist with a process which should not be mandatory in any case for my client to be reunited with her child.*

Solicitor S4 provided 7 ECF applications for review. Five were immigration matters and the remaining two were in the welfare benefits category, although both welfare benefits cases had a significant immigration law element to them. In all of S4's applications pro bono work had been done. In the two earliest applications, both immigration cases, submitted in August 2014 and December 2014, funding was refused. The remaining five applications were submitted in year three of the scheme between May 2015 and March 2016, all of which were granted. Both welfare benefits cases were in this group. S4's applications therefore provide a useful insight into the operation of the scheme post *Gudanaviciene* because all of those applications post-date the High Court judgment in that case. To a large extent they also reflect the treatment of applications post *IS* as four of the applications (four out of five of those which succeeded) were submitted in the last quarter of 2015/16. What they show is that, whatever improvements there have been in the operation of the scheme, pro bono work undertaken by solicitors continues to feature heavily in applications for ECF where they succeed. Often this includes substantial work, for which funding could properly be sought. The decision to work pro bono rather than make an early application for ECF Legal Help may be explained by the LAA's

approach to such applications. In the *IS* case witness C24 reported that the LAA often concludes that the very low test of sufficient benefit to the client for ECF Legal Help applications is not met and that

> *Applicants seeking legal aid in order to investigate the merits of their claim and obtain advice often face a Catch-22, in that the LAA will conclude that there is insufficient benefit to the client unless it can be shown that the claim has merit.*
>
> [Witness C24, *IS* Scott Schedule p.55]

In the background information to the documents supplied by S4 it was evident that s/he had formed the view that pro bono work was a necessary precursor to a successful ECF application. S4 works in a not-for-profit practice and may therefore be in a different position to a solicitor in private practice where the evidence suggests that there is less capacity for, and acceptance of, doing work without legal aid funding being in place.[602] Table 6 below summarises the time spent by S4 working pro bono on each of their successful cases and the nature of the unpaid work undertaken.

[602] *IS* Scott Schedule p.13-18.

Table 6 - Pro bono work by S4 as a precursor to making an ECF application

Application Identifier	**Duration of case**	**Nature of the work carried out pro bono**
S4/A3	Not known	5 pages of detailed written analysis used to support ECF application
S4/A4	7 months (immigration aspect) 2 months (welfare benefits aspect)	Immigration aspect – application for permanent residence
S4/A5	2 months	Application for permission to appeal
S4/A6	6 months	Application to Home Office to confirm right to reside for client and 4 family members
S4/A7	5 months	Application for entry clearance

As well as the lengthy periods working pro bono shown in table 6, S4 also spent between one and three months working at risk of non-payment following the submission of an ECF application in each of the five cases in which ECF was granted. This included substantial work in order to pursue appeals, so as not to lose appeal rights, including the preparation of detailed grounds of appeal. Work done at risk of non-payment whilst waiting for an ECF application to be determined may also present another risk, this being that the undertaking of such work may be relied upon by the LAA as a reason why the client no longer requires legal aid. An example of this was provided by the evidence of witness C67 in the *IS* case in which s/he described a case in which emergency steps taken to protect a client's appeal rights whilst their application for ECF was awaiting determination had such consequences. In their witness statement C67 said

> *It was an extraordinary catch 22: my firm acted to ensure that appeal deadlines were met and the client's best interests protected whilst the application for legal aid was pending, and the LAA then relied on us having undertaken that work to say he no longer needed legal aid!*
>
> [Evidence of C67, *IS* Scott Schedule p.74]

In interview Solicitor S2 described a similar experience in which the LAA decided that a client no longer needed legal aid because s/he had successfully resolved the client's welfare benefits appeal before the ECF determination was made.

Less typically, in one instance a practitioner had taken the step of going on the court record as acting for a party, having made an application for ECF, but without funding being in place. This places obligations on the solicitor to take steps in the proceedings as directed by the court. In this particular case, a public law matter, there had been a one day interim hearing, disclosure had taken place and witness statements were being prepared, all without funding. This work is not only 'at risk' for the solicitor but also places a costs risk on the client in the proceedings. Costs were estimated at approximately £10,000 at the time of interview. Such is the importance of the case that both solicitor S5 and their client felt that it was right to take this step, which in part was also done with the purpose of trying to bring a separate case in order to obtain a 'definitive judgment' on the issues of legal aid funding in the case which are pertinent to many of that legal practice's clients.

By contrast, on occasion the availability of pro bono assistance elsewhere can be detrimental to trying to obtain funding for a case as it is seen as an alternative to funded representation. S5 described a situation where applications for ECF and judicial review had been made simultaneously for a client, both of which were refused. In the aftermath of that the client disappeared for a time and was able to obtain some pro bono assistance elsewhere. In interview S5 said

> *Eventually a Law Centre got involved, which is great, but it muddied the water from our perspective as the client then had an alternative.*
>
> [Interview with S5 on 28 June 2016]

Whilst in many other instances the availability of pro bono assistance positively contributed to an ECF application, in this case it was counterproductive. Although, of course, in the short term there was a benefit to the client.

As can be seen pro bono performs a number of roles in supporting the ECF scheme including:

i. Progressing cases to a point where an application for ECF is less likely to be viewed as speculative and therefore more likely to be granted.

ii. Bringing in public law and human rights expertise where the instructed practitioner requires such support in order to make an ECF application or to challenge a refusal.

iii. To develop a case into a piece of strategic litigation.

In many cases these forms of pro bono assistance have undoubtedly been an essential ingredient in making successful applications for ECF. Pro bono, combined with a willingness to undertake work at risk of non-payment after an application for ECF is submitted, is clearly a crucial way in which practitioners have been able to make the scheme work, but at a price. The work done at risk of non-payment includes the preparation of the application for ECF itself. In addition to pro bono work, the ECF scheme may also be supported or supplemented by in scope legal aid. It is to consideration of this which we now turn.

6.2.2 The use of 'in scope' legal aid to support the ECF application process

'In scope' legal aid may be available in some cases to support or supplement the ECF application process. One example of this is where solicitors have a public law contract and Legal Help[603] may therefore be available to cover at least some of the cost of preparing a letter before action when judicial review proceedings are contemplated to challenge a refusal of ECF. Evidence as to an applicant's capacity may be paid for by legal aid if there is a related 'in scope' element to the client's case running concurrently with the problem for which ECF is sought. This can then be used to support an application for ECF. It may also be possible to draw on work that was done when funding was ordinarily available previously. For example,

[603] Legal Help is the most basic form of legal aid through which initial advice and assistance may be given. The fixed fee payable for a public law Legal Help matter is £259.

between 13 June 2014 when the High Court decision in *Gudanaviciene* was handed down and 15 December 2014 (the date of the Court of Appeal's judgment in the case) refugee family reunion cases were in scope. Interpreters could therefore be paid for and assistance given with initial family reunion applications. Where necessary the instructions obtained and work done during the 'in scope' period could be used to support a related ECF application later on.

An example is provided by solicitor S3

> *Yes, he has quite serious alcohol problems so it was more about whether it was that affecting his capacity. Here we had a report from his doctor in the end that he can make decisions and so we were slightly fortunate that we did have the committal, so we did have grants of representation for the committal so I think the capacity was probably done more through that.*
>
> *we did end up having at least one public law legal help which we have a public law contract because it got to the point where it was JR so we again couldn't get funding for the judicial review pre-action letter so the amount of costs has been fairly high.*
>
> [Interview with S3 on 19 May 2016]

In relation to a refugee family reunion case solicitor S1 stated in correspondence to the LAA after an ECF application (S1/A2)

> *We would like to note that our client provided us with instructions previously funded by legal aid with the assistance of professional interpreters through her asylum claim…This is why we know the background to her case.*
>
> [ECF application S1/A2]

Exceptionally, one practitioner (S5) used 'in scope' legal aid as a complete alternative to making an application for ECF. The example given related to the defence of claims for possession against trespassers, which is not 'in scope' for legal aid. ECF would therefore be required in order to enable such defendants to be represented in possession proceedings. However, when interviewed, practitioner S5 explained that the preferred method of dealing with such cases was to bring a judicial review of the decision to seek possession and apply for 'in scope' legal aid to fund that. S5 reported that in such cases the response from the LAA has

consistently been to say that the possession action should be defended in the County Court rather than launching a claim for judicial review of the decision to seek possession. The availability of ECF to enable representation in the county court is treated as an alternative remedy and a basis upon which to refuse legal aid for a judicial review. When interviewed S5 said

> *There needs to be a definitive judgment on this really because if every time, or on many occasions, we go to the LAA for legal aid for a JR and it is being refused on the basis that ECF is available to defend the case in the county court, and that this is an effective alternative remedy, then it's a hopeless situation really.*
>
> [Interview with S5 on 28 June 2016]

Whilst this strategy had proved unsuccessful, S5 persisted with it in the hope that it would eventually lead to a favourable point of principle being established: that the availability of ECF for the defence of possession proceedings against trespassers is not an alternative remedy upon which legal aid for judicial review can be refused.

It can therefore be seen that in limited circumstances elements of the work or evidence required to support an application for ECF can be funded through 'in scope' legal aid. For clients where there has been a previous related case which qualified for legal aid, such as an asylum claim, the work done can be used in a later ECF application. If there are concurrent proceedings which qualify for legal aid useful evidence may be paid for, such as a capacity assessment, which can then be utilised to strengthen an ECF application. If an application for ECF is refused, the decision is maintained on review and a challenge by way of judicial review is then contemplated, providers with a public law legal aid contract are able to utilise that source of funding to pay for the preparation of a pre action protocol letter. In the latter two examples this 'supplementary' funding will be available in a very limited number of cases. By way of illustration, of 3801 legal aid providers in England and Wales only 111 have a legal aid public law contract.[604] Furthermore, as will be seen in part three, the extent to which reviews of adverse decisions are requested is low, and an even smaller sub-set of those will progress to a threat of judicial review.

[604] Legal Aid Agency, 'Directory of legal aid providers' as at 22 July 2016. Available at <https://www.gov.uk/government/publications/directory-of-legal-aid-providers> Last accessed 3 September 2016.

Part 2

6.3 The substance of the ECF scheme itself

This part is concerned with the substance of the ECF scheme itself. The principal theme that arises here is complexity and it comes in several different, but related, guises. There are concerns about the complexity of the process of applying for ECF in that significant public law and human rights expertise is required in order to prepare a sufficiently detailed application which succeeds. That same expertise is also required by LAA decision makers, if they are to properly determine applications. In deciding whether ECF must be granted complexity of law, evidence and procedure is one of the factors to be weighed up by the LAA and this is the focus of the next section.

6.3.1 The application of the ECF merits criteria: the interplay between case complexity and the ability of the applicant to represent themselves.

As noted in chapter four, there have been three versions of the Lord Chancellor's Exceptional Funding Guidance (Non-Inquests) since the scheme began, the latest of which was published on 12 November 2015. Following the *Gudanaviciene* case the 'overarching question' or threshold for a grant of ECF is 'whether the withholding of legal aid would mean that the applicant is unable to present his case effectively and without obvious unfairness.'[605] There are a number of factors that must be considered in answering that question and deciding whether ECF should be granted. Those factors are the importance of what is at stake, the complexity of the procedure, law, evidence and facts in the case, and how capable the applicant is of presenting their case effectively, having regard to the applicant's age or mental capacity. It was established by the *Gudanaviciene* case that these factors must be considered together with all the circumstances of the case. In summary

> *...the greater the complexity of the procedural rules and/or substantive legal issues, the more important what is at stake and the less able the applicant may be to cope with the stress, demands and complexity of the proceedings*

[605] Lord Chancellor's Exceptional Funding Guidance (Non-Inquests) 5.

the more likely it is that Article 6(1) will require the provision of legal services...[606]

No one factor alone is more important than any other, it is about weighing up and evaluating the relationship between each of the factors in the context of the individual's case. LAA caseworkers are invited to consider some supplementary issues in doing so including the applicant's emotional involvement in the case, and any relevant skill or experience either in the area of law in question or the factual subject matter. In practice it can be seen that the most significant area of dispute is about the complexity of a case and the relationship between that and the capability of the applicant to represent themselves. What the evidence shows is that there are difficulties in the understanding of the test itself, and in the application of the test. For example, one member of the LAA's ECF team stated when interviewed that the shift in the test from that contained in the first version of the Lord Chancellor's Guidance to the test substituted by *Gudanaviciene* had not made any difference to how s/he dealt with applications for ECF. In addition the decision makers from the LAA that were interviewed did not offer any concrete definition of what makes a case complex. They consistently expressed that it was assessed on a case by case basis but the examples given as to what might make a family law case complex were

„...long history...I don't know, conflicts, real historic conflict between parents.

Court orders show lots of complex directions needing to be complied with. That helps to, you know, when we look at exceptional, how complex is the case?

but they just, to me personally, seem more complex, and they are in the middle of proceedings so proceedings have been going on for a while.

[All from interview with LAA1 on 26 May 2016]

Another member of the ECF team [LAA3] listed the following factors that s/he would weigh up when assessing whether ECF should be granted

[606] *R (Gudanaviciene) v the Director of Legal Aid Casework and the Lord Chancellor* [2014] EWCA Civ 1622 [56].

Have they got mental health issues, are they educated, have they been here before, do they have a knowledge of this case, do they know the facts of this case, has case law been mentioned, are they aware of the case law, how will they respond?

[Interview with LAA3 on 26 May 2016]

S/he also talked about a case where the applicant was a University graduate who had already prepared his own skeleton argument and was assessed as not requiring representation.

The key difference between the features identified by the two more junior members of the LAA ECF team (LAA1 and LAA3) is that LAA1's features are very much objective factual features of a case. By contrast the factors that LAA3 said were indicative of complexity were related to the characteristics and abilities of the particular individual applying for ECF. The question arises as to whether they each look at both the subjective and objective when assessing the strength of applications. A tendency by the LAA to focus on just one or one type of indicator of complexity was highlighted by S7 who said that

I think the Legal Aid Agency often take the view that...the case is always about the facts, which ignores the fact that facts and law do just go together a lot...in particular in immigration cases what Article 8 means in practice is not straightforward...there's a lot of case law about it...factual doesn't necessarily mean straightforward. Many people's ability to marshall facts is, I mean you know, I don't know how many people, but I don't know exactly but there's a huge number of the population who don't get a C in GCSE English and you need more than that so you can deal with a case competently.

[Interview with S7 on 27 July 2016]

An example of this focus on 'the facts' was demonstrated by application S4/A2. In a request for further information dated 9 January 2015 (the application was subsequently refused) the LAA stated '...it is unclear what the complex legal issue is as it appears that this matter is one which falls on fact and evidence.'

The most senior member of the ECF team interviewed (LAA2) identified both objective and subjective features as potential indicators of complexity, saying that

They have got to weigh it with ability, plus it may be that somebody who is very incapable can't do even the simplest thing like putting their initial immigration, like IS. But obviously we are looking what the case is about, the issues in the case so we look at the key facts as presented to us and then we draw from the application the issues, whether they are procedural issues, sometimes you can get cases that are in terrible procedural tangles, whether they are factual issues, whether there are evidential disputes especially medical or expert…one of the cases that would be in the high end of litigation, you would be looking at the higher the court, if you get into legal issues, legal complexity as well so sometimes a forum, sometimes is it a legal dispute, is it an evidential dispute, does somebody need evidence?

[Interview with LAA2 on 24 May 2016]

This would seem to suggest that there may not be a full or consistent understanding of what is required when evaluating the complexity of a case amongst the ECF team caseworkers.

The difficulty in weighing up the complexity of a matter with the ability of the client to represent themselves was alluded to by S7. In describing how s/he went about trying to articulate the interplay between these two factors so as to make the case for a grant of ECF S7 said

I remember one person who...wasn't of herself extremely...unable but she did have quite a complicated case in the Upper Tribunal so...you really had to put the two together and explain, I remember sort of thinking well, if I was starting from square one without...any kind of legal training, how would I, how would I try and approach this as a relatively able, relatively educated person? And which bits of that would she have trouble with, so you'd have to think it out from square one... you have to take yourself out of your professional bubble a bit and think about it from a slightly more less informed point of view so that, that's actually not a simple task.

[Interview with S7 on 27 July 2016]

A third understanding of complexity in play is that when ECF applications are received an initial screening is carried out by a senior person in the ECF team. LAA2 said that

We screen for complexity and non-complexity so that I know whether it can go to a caseworker or a lawyer. So I see them upfront and then I will see a proportion of them, mainly complex ones at the end.

[Interview with LAA2 on 24 May 2016]

When each application is screened in this way an assessment of urgency is also carried out. No explicit link is made between those applications identified as complex for the purposes of the ECF team's own procedures and an acceptance that the case was complex from the applicant's perspective.

Lastly, in some instances the complexity of the matter can be inferred from the forum, or composition of the forum, in which the proceedings will be heard. One example of this is when a three judge panel is convened in the Upper Tribunal for welfare benefits appeals. The fact that a three judge panel, as opposed to a single judge, is to hear a case, can be indicative of the complexity of the proceedings. It is an established principle, at the direction of the Senior President of Tribunals, that if an appeal before the Upper Tribunal of the Administrative Appeals Chamber concerns 'a question of law of special difficulty or an important point of principle or practice', or if it is fitting for some other reason, then the case should be decided by a panel of three judges, rather than one judge sitting alone.[607] This suggests that some factors, if present, should be viewed as a kind of 'shorthand' for complexity.

From this we can discern four types of complexity. These being:

1. Objective features of the case itself that may be indicative of complexity e.g. the presence of a long case history or being in the middle of proceedings.

2. Features of the individual applicant (subjective features) e.g. educational attainment, mental health issues which mean that that particular applicant would view the proceedings as complex.

[607] Senior President of Tribunals, 'Composition of Tribunals in Relation to Matters that Fall to be Decided by the Administrative Appeals Chamber of the Upper Tribunal on or After 26 March 2014' Practice Statement (26 March 2014) para 3(a) <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Practice+Directions/Tribunals/admin-appeals-chamber-upper-trib-on-or-after-260314.pdf> Last accessed 10 August 2017. Cited in *JC v Secretary of State for Work and Pensions (ESA)* [2014] UKUT 352 (AAC) 63.

3. Third party assessments of complexity e.g. the LAA's initial screening of ECF cases for 'complexity' or judicial comment on the complexity of a particular area of law (such as in immigration cases) where numerous and frequent changes to the law take place.

4. Cases where there is a 'shorthand' i.e. something that is immediately indicative of complexity. This may include hearings in welfare benefits appeals before a 3 judge panel in the Upper Tribunal or an appeal to the Upper Tribunal in an immigration case.

The Lord Chancellor's Guidance poses a number of questions that caseworkers should consider in determining whether an applicant is sufficiently capable of presenting their own case.[608] An explicit link is made to the complexity of the case, alongside a number of other matters which include (1) whether the applicant has any skills or experience in the relevant area of law or the factual subject matter, and (2) the extent of the applicant's emotional involvement in the issues in the case is such that their objectivity as an advocate for their own case would be impaired. In answering these two questions in particular, the evidence suggests that the LAA takes an approach that is not envisaged or in compliance with the Guidance. In the first case of relevant skills and experience the LAA adopts what may be referred to as 'tests of equivalence'. In doing so comparisons are made between representation in the applicant's substantive case and other unrelated processes. In the latter question of emotional involvement it appears that experiences of violence or other trauma which would need to be addressed at a hearing are either given no, or insufficient, weight.

6.3.2 Tests of equivalence

There is an acceptance, or assumption, in some quarters that in order to use formal justice mechanisms to enforce or protect rights individuals will mostly need legal representation.[609] However, ECF starts off relying upon the opposite premise i.e. that an individual does not require representation to properly put forward their case unless they can prove otherwise. This presumption has resulted in tests of

[608] Lord Chancellor's Exceptional Funding Guidance (Non-Inquests) 9.
[609] Rosemary Hunter and Tracey De Simone, 'Women, Legal Aid and Social Inclusion' (2009) 44 Australian Journal of Social Issues 379, 381.

equivalence being applied by the Legal Aid Agency. This means that a judgment is made that if an applicant has done one thing, which the LAA regards as being equivalent to making an application for ECF or presenting their case to a Tribunal or Court, then it is determined that representation is not required for ECF purposes. For example

> *JLE…was initially told by the LAA that she did not need ECF because by making the application she had shown that she was able to convey her concerns effectively.*
>
> [Evidence of C25, *IS* Scott Schedule p.6]

Comparison has also been made between, for example, an application to the Home Office or Entry Clearance Officer, and applying for welfare benefits. If an applicant has successfully obtained welfare benefits then they are deemed able to deal with an application to the Home Office or appearance at a Tribunal hearing and therefore do not need legal assistance. Practitioner S1, when interviewed, stated that this kind of approach

> *…shows a real lack of understanding of the reality of people who have English as a second language or in fact can't speak English at all. I was often incredibly angered by that observation …because obviously that is completely different. And many people still struggle with that process, you know obviously with applying for benefits you have an interpreter on the telephone which the LAA doesn't understand….You can get in touch on the telephone to make the appointments which you simply don't have, as you know, to make an application yourself for a visa. There's no interpreters, all the onus is on you and if you want to provide an interpreter, you'd pay one.*
>
> [Interview with S1 on 24 May 2016]

In application S1/A3 the applicant, aged 76, spoke only a few words of English. S/he had not been educated beyond primary level. Whilst s/he had two adult sons who had been able to offer limited interpreting assistance at some previous appointments, they could not so do consistently because they lived a considerable distance from the applicant and had work commitments. However, the view taken by the LAA when refusing an application for ECF was that

> *…your client has the ability to complete the required application form to the entry clearance officer and be able to engage with the process without funding…it is indicative that she has the ability to complete application forms as she began to complete and ensure that the adoption of her de facto children are recognised by a competent authority in the DRC [Democratic Republic of the Congo]…your client provided paper evidence within her asylum interview…This is again indicative that your client is capable of gathering documentary information…she has also made a successful application for Pension Credit.*
>
> [ECF application S1/A3 refusal letter dated 17 April 2015]

By adopting this position the LAA seem to suggest that the completion of an application form, regardless of the subject matter, requires the same skills and experience.

In applications S1/A4, reliance was again placed upon the fact that the applicant had been able to claim benefits and on that basis (as well as for other reasons) was denied ECF. The same point was made in application S1/A5 in which the decision maker stated

> *I note that your client is in receipt of benefits which is indicative that he is capable of completing application forms and providing supporting documentation.*
>
> [ECF application S1/A5 review refusal letter dated 23 April 2015]

In S1/A6 refusal of ECF was justified, in part, on the basis that the applicant had been able to provide their solicitor with clear instructions and would therefore be able to present his case at the Upper Tribunal in an immigration matter.

As well as these tests of equivalence, unless an applicant has direct evidence of an inability to represent themselves, such as having attended and failed to secure the desired outcome at a previous hearing, it seems that the client must fail first and have advanced beyond a first appeal or an initial application. For example, in every single one of the five successful applications made by S4 each client had failed in trying to secure the outcome they wanted, either with assistance or on their own. In application S4/A5 ECF was sought to assist with an appeal against a refusal of ESA to a claimant whose entitlement was dependent upon the status of their father as an

individual in the UK exercising EU treaty rights. The claimant was disabled, including being non-verbal (which may have also been a factor in the eventual grant of ECF but it is not possible to know how the individual factors are weighed). In response to the question on the CIV ECF1 form which asks 'How capable is your client of representing his/her case effectively? S4 wrote

> *The Appellant herself is severely disabled and indeed non-verbal. The parents are not familiar with the law and/or regulations although they enlisted the help of a Mackenzie [sic] friend for the hearing in November 2015 they did not put the case forth on the correct basis, nor did they draw the tribunal's attention to the relevant law from the CJEU*.
>
> [ECF application S4/A5]

In two other successful applications (S4/A6 and S4/A7), both immigration cases, initial applications had already been made to the Home Office and had been refused. ECF was granted to enable the clients to be represented on bringing appeals against those decisions. It is also worth noting that in both cases the initial applications had been made with the pro bono assistance of solicitor S4.

Nowhere in the Lord Chancellor's Guidance does it invite caseworkers to make these kinds of assessments of 'equivalence'. In the Guidance a direct link is made to the complexity of the case, the applicant's level of education, and whether the applicant has skills and experience in the relevant area of law or the factual subject matter. The evidence therefore tends to suggest that the LAA is taking an impermissible approach to evaluating the ability of applicants to represent themselves by making these comparative judgments. Not only that but there appears to be a bar to a grant of ECF for early intervention, thus creating a need for the pro bono work discussed in part one of this chapter.

6.3.3 The impact of the experience of violence and or trauma on an individual's ability to represent themselves

In addition to making impermissible comparative judgments the evidence suggests that the LAA pays insufficient regard to the emotional involvement of applicants in some cases. When decisions are made that applicants are able to represent themselves there may be no acknowledgement or evaluation of the applicant's

degree of emotional involvement, despite it being explicit from the application that the individual has experienced serious violence or other trauma. For example, in ECF application S2/A2 the applicant was a woman who had fled from an abusive 40 year marriage. The LAA refused funding, not accepting that she required legal advice and representation, on the basis that she was 'highly motivated' to deal with her benefits issues. No account was taken of the fact that she would need to rehearse a traumatic history at her Tribunal hearing or that the emotional impact of this was likely to be that she did not have the objectivity required for advocacy at her appeal hearing. Application S1/A2 provides a further example of how the impact of violence and trauma is not taken into account. In this case the applicant, a woman, had been raped and detained on the grounds of her sexuality in her country of origin. Indeed this had been the basis for her acceptance as a refugee in the UK. The experience of having to rehearse this history as well as the experiences of her de facto child, who had also experienced sexual violence, at an appeal hearing would be very likely to impair the capacity of the applicant to perform as an objective advocate.

The way in which experiences of violence and trauma appear to be overlooked in evaluating the need for ECF disproportionately affects women. For example, in refugee family reunion cases, if the recent refugee and applicant for ECF is a woman it is accepted that she is more likely than a man to have experienced persecution in the form of violence including sexual violence.[610] In addition statistics on rates of domestic abuse in England and Wales show that women are more likely to be affected than men.[611]

Although it seems that the detail of an applicant's experience of violence may be overlooked, the issue of providing sufficient detail and evidence in order to succeed in an ECF application is a wider concern. This is explored in the next section.

[610] UK Visas and Immigration, 'Gender Issues in the Asylum Claim' (UKVI 29.9.10) 5. Available at <https://www.gov.uk/government/publications/gender-issue-in-the-asylum-claim-process> Last accessed 11 January 2018.
[611] Office for National Statistics, 'Domestic abuse in England and Wales: year ending March 2017 (ONS 23.11.17) 3; Office for National Statistics, 'Domestic abuse in England and Wales: year ending March 2016 (ONS 8.12.16) 3.

6.3.4 The level of detail/evidence required in ECF applications

Since the ECF scheme began in April 2013 a persistent complaint has been that the time it takes to prepare an application that is to have any chance of success is extremely onerous.[612] It is the burden of carrying out many hours of work, it is estimated to be 12.5 hours on average,[613] in the context of a real risk that solicitors will not be paid for it which is said to account for the low number of applications for ECF.[614] As shown above this may be in addition to significant pro bono work before an ECF application is even made. When an application for ECF is made the level of detail and amount of work required to succeed is considerable. Evidence presented to the High Court in the case of *IS* put it this way

> *On each occasion I made what I thought was a full and proper application giving the salient facts, and on each occasion the LAA treated the information I had provided as woefully incomplete.*
>
> [Evidence of C12, IS Scott Schedule p.3]

It appears that there is sometimes an expectation that the work for which funding is being sought will be done in order to support the application for ECF. An example is provided in the *IS* Scott Schedule where it is stated that

> *An application on behalf of a critically ill child made on 25 July 2013 in advance of an immigration appeal hearing on 7 August 2013 was responded to on 9 August 2013, asking for missing pages of the Home Office refusal letter, and refused on 14 August 2013 (7 days after the hearing) because of missing pages and a failure to identify the grounds of appeal which the applicant sought legal assistance to formulate.* [my emphasis].
>
> [Application tab 32, referred to in the *IS* Scott Schedule p.32]

[612] Martha Spurrier, 'Exceptional funding: a fig leaf not a safeguard' (Public Law Project, 8 July 2013) 1; evidence of 30 witnesses in the *IS* Scott Schedule p.22-27.
[613] Evidence of witness C24, *IS* Scott Schedule p.23.
[614] Justice Committee, *Impact of the changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012* (HC 2014-15, HC 311) para 42. This was also supported by the evidence of the Community Law Partnership and Southall Black Sisters to the Bach Commission and witnesses C34, C32, C38, C40, C11, C47 and C26 in the *IS* Scott Schedule p14-17.

In this case the application was ultimately refused for the absence of grounds of appeal. However, this is the very work i.e. the preparation of grounds of appeal, that funding was sought for.

A further example is provided by a children's rights solicitor who, in his evidence regarding cases involving the extradition of a parent, in *IS* said that

> *Throughout the process I was shocked at the amount of work I was being asked to do at risk of non-payment...My experience has made me unwilling to take on any case where an exceptional funding application is required, irrespective of the prima facie strengths of those cases under the LAA's published criteria.*
>
> [Evidence of C32, IS Scott Schedule p.14]

The evidence of a family solicitor who also gave evidence in the *IS* case supports this

> *It seems clear to me that an exceptional funding application needs to be treated like a case in itself, requiring detailed submissions and possibly even the threat of litigation.*
>
> [Evidence of C40, IS Scott Schedule p.15]

This was also echoed by S7 in interview, who said that the process of making an application

> *...required you to put in a lot of thinking about what the problems really were in the case, in a way that you would usually do once you were really engaged with a case...You'd have thought maybe you could give them the order and that would be enough but in practice what you had to do was try and spell it ...all out in such detail in order to ...give them the best chance possible in what was clearly a hostile environment… There was no way you could just say "this case is complex, see attached order, ps he doesn't speak any English".*
>
> [Interview with S7 on 27 July 2016]

Extensive documentary evidence to support an application may also be requested. This can be onerous to supply to the LAA, particularly after 1 April 2016 when

making applications electronically became compulsory.[615] This is because the size of the files that can be uploaded on to the LAA's system is limited. In one case referred to by S5 in interview the LAA had already been supplied with the pleadings, the applicant's witness statements, and a written advice from counsel. However, the LAA requested copies of all of the opponent's witness statements. This tends to suggest that the LAA is putting themselves in the position of the court, rather than making a decision on prospects of success for legal aid purposes. As will be seen later in this chapter, this is not uncommon and may amount to an unlawful application of the merits criteria.

The time-intensive nature of ECF is also reflected in the time allotted by ECF team staff to process applications. When asked how many applications s/he might deal with in an average week LAA1 said that in a week, when s/he was more or less undisturbed by other duties, s/he might deal with five or six ECF applications. This is consistent with the evidence submitted in the *IS* case in which it was said that the Director of Legal Aid Casework "allows his caseworkers up to one full day to determine the merits of an application for ECF".[616] In contrast to the time allowed for LAA caseworkers to consider an application, the length of time it should take for a solicitor to prepare an ECF application was disputed in the *IS* case. The evidence from Malcolm Bryant, Head of Complex and High Cost Cases, at the Legal Aid Agency on this point in *IS* was summarised in the Scott Schedule as follows

> *The application form requires key information to be provided. It does not require detailed submissions to be made. PLP's [Public Law Project's] applications, which tend to contain extensive legal submissions, are not typical of those received by the LAA...The form provides the opportunity for focussed representations, and does not provide the space for the lengthier representations made by PLP.*
>
> [Evidence of D1, *IS* Scott Schedule p.31]

The above quote suggests that 'extensive legal submissions' are made unnecessarily by a minority of legal aid providers, including the Public Law Project.

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[615] The LAA introduced its electronic Client and Cost Management System (CCMS) in phases but its use became compulsory for all civil work, including applications for ECF, from 1 April 2016. See <https://www.gov.uk/guidance/bringing-civil-legal-aid-processing-online> Last accessed 10 August 2017.

[616] *The Director of Legal Aid Casework and The Lord Chancellor v IS (a protected party, by his litigation friend the Official Solicitor)* [2016] EWCA Civ 464 [38].

However, the sample of applications reviewed for the purposes of this study as well as the evidence from the six legal practitioners interviewed who had made 116 applications between them, does not support this. A recent example was also provided by S7 in interview who described an application made in January 2016 which was refused all the way up to the point where judicial review proceedings were about to be issued. A number of witness statements intended for use in the impending judicial review were sent to the LAA before proceedings were actually issued, at which point ECF was then granted. In all of the successful applications reviewed, very detailed legal submissions were made, including in some cases written advice from a barrister as well as the provision of extensive documentation.

The evidence therefore tends to suggest that, on the one hand, the LAA has a generous view of the time they need to determine an application whilst on the other their view of the amount of time needed to actually prepare one is much more restrictive. There is also a disparity between the LAA's view of the level of detail and evidence required in an application and the reality of the amount of work that appears to be necessary to make a successful application.

6.3.5 Complexity of the ECF application process itself

As a consequence of the level of detail and specialist knowledge required to make a successful application providers applying for ECF frequently express the view that it is not a task that can be completed by junior and inexperienced staff. Assistance is often obtained from counsel in order to complete an application. The following examples were before the High Court in the *IS* case.

> *The forms were completed by an associate solicitor and Andrew Bagchi (now QC). I would not expect an 'average' junior solicitor to be able to complete the ECF form.*
>
> [From Case TAB – evidence of C14, *IS* Scott Schedule p.3]

> *We would not expect a junior solicitor to be able to complete it adequately without considerable supervision and/or input from counsel.*
>
> [Evidence of C15, *IS* Scott Schedule p.4]

The number of applications rejected by the LAA for being incomplete was cited in *IS* as further evidence of the difficulty of the application process. As can be seen in table 7 below less than 10% of rejected applications were returned to providers by reason of being incomplete in 2013/14. In the following three years the number of applications said to be incomplete increased roughly fourfold.

Table 7 - data on rejected ECF applications by reason and year (new applications by solicitors)

Year	% of rejected applications deemed incomplete	% of rejected applications deemed 'in scope'	Total number of rejections
2013/14	9.6% (27)	64.9% (183)	282
2014/15	45.2% (84)	42.5% (79)	186
2015/16	38.4% (81)	43.6% (92)	211
2016/17	39.8% (84)	32.7% (69)	211

On applications re-submitted for review following an initial refusal of ECF the rejection rate on the basis of the application being incomplete was one out of 19 rejects (5.3%) in 2013/14. In 2014/15 it was two out of 17 rejections (11.8%), none of the seven review applications that were rejected in 2015/16 were incomplete and in 2016/17 three out of nine review applications (33.3%) from solicitors were rejected because of incompleteness. Certainly in relation to new applications the statistics do not support the idea of a 'learning curve' for solicitors over time, as was suggested by the Court of Appeal in *IS*.[617]

Just as significant a problem appears to be the level of rejections on the basis that the matter for which funding is sought is, in fact, in scope. As shown in table 7 above, in 2013/14 almost two thirds of rejected applications were returned to providers for that reason. By 2016/17 'in scope' rejections in relation to new applications by solicitors had fallen to account for just under one third of the total number rejected. This would seem to indicate a degree of confusion about the

[617] *The Director of Legal Aid Casework and The Lord Chancellor v IS (a protected party, by his litigation friend the Official Solicitor)* [2016] EWCA Civ 464 [52] and [54].

parameters of the in scope scheme, rather than a difficulty with the process of making an ECF application.[618] Whilst the data suggests that the passage of time has led to some improvement in solicitors' knowledge of the parameters of the 'in scope' legal aid scheme and the kinds of cases for which an ECF application must be made, it remains the case that almost a third of rejections are because the matter is 'in scope'. One area in particular that is likely to have contributed to these 'in scope' rejections are those cases in which applicants were seeking legal aid for private family law cases on the basis that they had experienced domestic violence but could not meet the evidence requirements. Applications may then be made for ECF but rejected because the 'in scope' scheme provides for such cases and ECF is for cases other than those. Examples include the cases of *M* and *N* considered in the challenge to the domestic violence evidence regulations by Rights of Women.[619] The expectation that ECF would be available to individuals who could not satisfy the 'in scope' domestic violence evidence requirements was not without foundation as the Government's evidence to the United Nations CEDAW committee on 17 July 2013 had indicated that this was the case.[620] A further example of uncertainty about the parameters of the scheme is provided by ECF application S1/A7 in which a victim of trafficking wished to make an application for entry clearance so that her 16 year old daughter be permitted to join her in the UK. In the written submissions provided to the LAA in support of the application for ECF S1 wrote

> *We would submit that our client's case is within scope for legal aid, and write to ask that the LAA confirm this in writing. If the LAA does not consider the case to be within scope, then we would ask that the LAA confirm this in writing, and proceed to consider the ECF application….*
>
> [ECF application S1/A7]

[618] Although not in the specific context of the rejection rate for ECF applications, Richard Miller (Head of Legal Aid at the Law Society) raised the issue of problems in understanding of the dividing line between what is in and out of scope, particularly in housing law matters, in his oral evidence to the Bach Commission. A recording of his evidence can be found here: < https://soundcloud.com/the-fabian-society/sets/the-bach-commission-on-access> Accessed 21 August 2017.

[619] *See R (on the application of Rights of Women) v The Lord Chancellor and Secretary of State for Justice* [2016] EWCA Civ 91 [33] and *R (on the application of Rights of Women) v The Lord Chancellor and Secretary of State for Justice* [2015] EWHC 35 (Admin) [72].

[620] This was highlighted in evidence to the Bach Commission from Ben Hoare Bell LLP. The evidence was given to the CEDAW committee by Andrew Tucker from the Ministry of Justice on 17 July 2013 and can be viewed at <http://www.treatybodywebcast.org/cedaw-55-session-united-kingdom/> Accessed 22 August 2017.

The continuing improvement in the operation of the EFC scheme anticipated in *IS*[621] is unlikely to address the problem of 'in scope' rejections. Rather, a review of the statutory provisions[622] setting the boundaries of the in scope and ECF legal aid schemes may be needed as well as training and support for legal practitioners focussed on this issue.

6.3.6 A lack of and a resistance to expertise?

The complexity of the scheme is also highlighted by providers due to the level of expertise in areas outside their immediate specialist fields that is needed to make an application for ECF. Providers are quite candid about their lack of experience in the areas of law upon which the ECF merits criteria is premised i.e. the operation of the ECHR in relation to circumstances in which the state is obliged to provide legal aid to an individual. The evidence also suggests that there is a lack of relevant expertise in the ECF team at the LAA as 'Unlike applications for in-scope legal aid, ECF applications are generally dealt with by non-specialists'.[623] As well as the difficulties in applying the key test from *Gudanaviciene* already noted above there is also an issue about the extent to which ECF decision makers have sufficient understanding of the relevant areas of law and procedure in the substantive cases underlying ECF applications.

From providers themselves there are numerous examples in the case of *IS* as demonstrated by the following extracts from the Scott Schedule.

> *Although I have a great deal of experience in my own practice area, I am not familiar with the Article 6 ECHR caselaw emanating from Strasbourg.*
>
> [Evidence of C18, *IS* Scott Schedule p.4]

[621] *The Director of Legal Aid Casework and The Lord Chancellor v IS (a protected party, by his litigation friend the Official Solicitor)* [2016] EWCA Civ 464 [57].
[622] LASPO 2012, Schedule 1, Part 1.
[623] Evidence of witness D8, *IS* Scott Schedule p.59. This issue had also previously been highlighted in evidence to the House of Commons Justice Committee, who in turn recommended that the LAA review the staffing of the ECF team in order to address a lack of specialist knowledge. See Justice Committee, *Impact of the changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012* (HC 2014-15, HC 311) paras 39, 47.

I was struck at the level of detail and analysis of human rights case law in particular European case law that was seemingly required in form ECF1. The level of detail required was beyond what I would encounter on a day to day basis as a family practitioner, or in my dealings with the LAA.

[Evidence of C21, *IS* Scott Schedule p.4]

Making an application also seems to require considerable knowledge of public law and human rights case law that I, as a family law practitioner, do not have.

[Evidence of C22, *IS* Scott Schedule p.5]

In our experience, securing funding under the scheme requires extraordinary persistence, a willingness to devote considerable resources and the public law confidence and expertise to threaten the LAA with judicial review proceedings at the appropriate point.

[Evidence of C11, *IS* Scott Schedule p.16]

This was also echoed by S7 in interview who described the making of ECF applications as 'quite difficult' because they only had a basic knowledge of immigration and family law, the two main areas in which they have made applications.

There is also a lack of expertise in the ECF team at the LAA. In some cases it is clear that the decision maker simply did not have knowledge of the relevant procedures involved in the client's substantive case for which funding was sought. For example, in application S1/A6 the decision maker had not understood that when an immigration case reaches the stage of an appeal hearing in the Upper Tribunal this means that the central question to be decided is whether 'a material error in law' had been made in the earlier decision. This is not surprising. The three LAA participants were not only of varying levels of seniority but also different levels of legal experience and qualification. One participant had no legal qualifications at all, another was a solicitor early on in their career and the third was a solicitor with many years of experience. Although the ECF team has some staff with specialist experience in the areas of law that are relevant to ECF any member of staff can decide an application even if it is not within their area of expertise. In addition applications can be decided outside of the ECF team by staff in the wider unit of which the ECF team is a part. This may be the case if the ECF team is particularly

busy. In addition, any applications which are not in the three main ECF areas of family, immigration and inquests are led on by one person who, whilst they are a qualified solicitor, has limited experience in the areas of law which will be covered e.g. housing, welfare benefits, employment law and so on.

The most senior member of ECF staff interviewed [LAA2] explained

> *We are part of a wider unit…of a high costs case unit, which deals with the most complex and…high cost cases and so obviously we have lawyers in that unit too, we've got the ability to utilise other resources if we need to.*
>
> *We drew on staff that were previously Legal Aid Agency staff so they came with the experience of having dealt with the in scope scheme, I came with the experience of having dealt with the previous exceptional funding scheme, and we did recruit externally as well into categories which we thought were going to be the volume categories so immigration, family were the couple of areas which we concentrated on because they were the big areas taken out of scope.*
>
> [Interview with LAA2 on 24 May 2016]

A more junior ECF team member interviewed said that

> *We self-allocate now so we… just take the next one….we can all… consider immigration, housing, other types, so I consider… whatever is next in line.*
>
> [Interview with LAA1 on 26 May 2016]

The evidence from both legal aid providers and the LAA's ECF team demonstrates that expertise in either the area of law engaged by an applicant's substantive case, or in public law and human rights as relevant to ECF applications, alone is not sufficient for making or determining ECF applications.

In many of the ECF applications reviewed reference is made to the expert opinion of others to support the request for funding. This may be in the form of written advice from specialist counsel, research published by NGOs such as the Red Cross or judicial evaluations of a case, whether that be the complexity of an area of law in general terms or the merits of an individual case. It is not to say that such

supporting material should be accepted without question but there are a number of examples where precisely the opposite seems to occur, where the expertise of others appears to be summarily rejected.

Solicitor S3 articulated this explicitly in their interview, giving examples of cases in which the ECF team refused funding in the face of detailed submissions from experienced counsel and judicial opinion as to the merits of the cases. S/he said

> *It was refused on merits which I found completely absurd given what the Judge had said in the initial hearing, they had a solicitor saying there was merits. I think by this point there were possibly 2 barristers saying there was merit… They said no merits so we asked for a review, they upheld the decision and said no merits. We did a pre-action judicial review letter and sent it to the legal team and they said OK we will make a fresh decision. They made a fresh decision – no merits! Second review, got the decision and I think by that point we had had a couple of committal hearings and I think the last hearing we had before we put the review in…Judge…had actually said, would it help if I put in the recording…"Upon His Honour Judge Safman noting that there is merit in an application to set aside injunction"....The fact that they were saying it was totally without merit was just perverse, it was unreasonable. It was an unreasonable determination by the Legal Aid Agency in face of so much evidence to the contrary.*
>
> [Interview with S3 on 19 May 2016]

In the case of TG upon which evidence was given in *IS* it was stated that

> *the LAA was provided with an advice on the merits from counsel and detailed supporting material…The LAA's response was to request detailed further information and place the application for ECF on hold….Those requests were answered…The LAA then summarily rejected counsel's advice and concluded that the Secretary of State's position in the appeal was correct…The LAA later accepted that it had been wrong and granted ECF, 2 months after the application for ECF was made…TG's appeal succeeded.*
>
> [Evidence of C56, IS Scott Schedule p. 56]

A similar experience was recounted by S7 in interview regarding a Court of Appeal case in which

> *The Lord Justice, had said this is a tricky, delicate and balanced case but it's worth re-looking at, so it meets the second appeals test...and then we applied for legal aid and they said we don't think this is significantly complex in a way that's going to disadvantage.... And that application was refused twice and it was eventually granted but only after the Gudanaviciene case in the High Court.*
>
> [Interview with S7 on 27 July 2016]

Likewise, in the Public Law Project's evidence to the Bach Commission, reference was made to two cases, referred to as BXA and MM, in which advice was obtained from specialist practitioners (in BXA from a solicitor and in MM from counsel) which confirmed that both cases were likely to succeed. In both cases the LAA maintained that the ordinary merits criteria were not satisfied until in BXA a judicial review was threatened and in MM a claim for judicial review was actually issued.[624]

Evidence from witness C24 referred to in the *IS* Scott Schedule gave an account of the response to an application for ECF in a family law case, called KB/BA. The ordinary merits of the case had been positively evaluated by a specialist family lawyer and the judge hearing the case had commented that 'if ever there was a case that qualified [for ECF] this is it. It would be a travesty of justice if this woman were not represented'.[625] The LAA's response was to say that the judge's view was not persuasive and that in the absence of further information they regarded the merits of the case as poor. Witness D1 sought to explain the LAA's response in this case by drawing attention to the fact that the LAA's merits decision was taken by a non-specialist.[626] This would tend to suggest that what may be perceived as a more robust attitude towards the assessment of the ordinary merits test is actually a result of a lack of specialist legal knowledge in the substantive area of law engaged by a particular case.

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[624] Public Law Project, 'Evidence of the Public Law Project to the Labour Party Review of Legal Aid' 12 May 2016, available at <http://www.publiclawproject.org.uk/data/resources/225/Evidence-of-the-Public-Law-Project-to-the-Labour-Review-of-Legal-Aid.pdf> Accessed 22 August 2017.
[625] Evidence of witness C24, *IS* Scott Schedule p.59.
[626] Evidence of witness D1, *IS* Scott Schedule p.59.

There may, however, be an increasing acceptance of judicial comment. In the ECF applications submitted by solicitor S4 in the last quarter of 2015/16 reference was made to a number of judgments in which immigration judges commented upon the complexity of immigration law. In all of those cases funding was granted. Whilst it may of course be the case that other aspects of those cases were persuasive, thus minimising the importance of such third party expertise, there was no summary dismissal of the use of this expert material in those applications.

In another ECF application (S4/A2) the applicant's solicitor offered his own expertise in his response to a request for further information from the LAA. S/he wrote

> *For the avoidance of doubt I have never known (either personally or others in the field when I was working at …Solicitors or ….Law Centre from 2005 - 2013) of an entry clearance manager in a Somali family reunion appeal reversing a decision on the basis of further evidence or the grounds of appeal. The matter ultimately is whether the First tier tribunal will allow the appeal not whether the ECM would have reversed the decision.*
>
> [Application S4/A2 letter to LAA dated 14 January 2015]

The LAA's response to this was to say that

> *The ECO has not raised any of the issues you believe makes your client's appeal complex. The application was refused on the basis that adequate documentation had not been provided and nothing else…Following from this therefore, your assertion that the case is complex is speculative.*
>
> [Application S4/A2 letter from LAA dated 9 January 2015]

The issue of speculation also arose with one of the LAA staff [LAA1] interviewed who said that

> *It's really for the solicitors to set out the complexities…they don't always set out what the complexities are, or sometimes they set out complexities on issues that are speculative, like the court may order a finding of fact hearing and that will add to the complexity, yeah but… is it complex now?...So, I find sometimes they say there's complexity for things that haven't yet happened…*
>
> [Interview with LAA1 on 26 May 2016]

Indeed since 2015/16 LAA data on ECF applications has included a 'premature' category of applications to be recorded as a reason for rejection.

The summary dismissal of the expertise of actors outside of the LAA, whether that be judges, solicitors or counsel, has contributed to the perception that applications for ECF are determined, in the words of S7, in a 'hostile environment'. It is clear that providers are deterred by these kinds of responses to applications and feel that it almost does not matter what evidence is submitted in support of an application, it will be refused. This finding is also reflected by earlier research carried out on behalf of The Children's Society in which ECF was described as an 'an elusive opportunity' and a feeling of hopelessness about the application process was highlighted due to 'poor quality decision making'.[627] In such an environment the persistently low level of applications for ECF is not surprising. There are also other factors which may contribute to this sense of hopelessness about the ECF scheme such as the way in which the means and ordinary merits tests are applied in ECF cases. This is explored in the next section.

6.3.7 A more robust approach is taken to the assessment of an applicant's means and prospects of success in ECF applications

As seen in chapter four, as well as meeting the threshold for ECF ("ECF merits"), an applicant's financial means and prospects of succeeding in their substantive case (the "ordinary" merits test) also form part of the ECF decision making process. It was suggested in the *IS* Scott Schedule and by interviewees S1, S3 and S7 that the ECF team takes a more robust approach to the investigation of an applicant's finances and evaluation of the merits of the substantive case than would be the case if the matter was 'in scope'.

Solicitor S1 reported that

> *The ECF team is not always as understanding of the legal aid rules and guidance when it comes to means and I say this because I have had to argue my case on means where I can go to another team in the Legal Aid Agency and get a different decision, which I have had to do actually to*

[627] Dr. Helen Connolly, 'Cut Off From Justice' (The Children's Society June 2015) 59.

persuade the ECF team that my client is eligible…I think the ECF team can also sometimes seem to have a very more robust attitude to what you need to show them in terms of documents than what is normally required under controlled work, which is the first stage of Legal Aid, and I'm not saying that we shouldn't have stringent approaches but I do think…there should be a consistent approach across the board.

[Interview with S1 on 24 May 2016]

S7 also reported a similar experience regarding the assessment of means in an ECF application. It is difficult to account for this as the three LAA staff interviewed consistently stated that the means assessment for ECF applications is undertaken by the same specialist means team that does them for "in scope" applications. For example, the most senior member of the ECF team interviewed stated that

…so we would generally do the means assessment first…we have a Means Team which is not part of ECF any longer but we have a team of people who do the means and they will do ECF cases for us…

[Interview with LAA2 on 24 May 2016]

This would seem to indicate that at one time an applicant's means were assessed within the ECF team but that that is no longer the case. It could also be that specific instructions are given to means assessors about how to approach ECF applications or it could indicate a hardening attitude towards applicants for legal aid generally in the post-LASPO environment.

Consideration was given to whether there may be some statistical evidence to support or rebut this suggestion. A comparison between the rate at which civil representation was refused in private family law and immigration cases pre and post-LASPO was attempted. However, this was not straightforward as pre-LASPO the data collected by the Legal Services Commission (the LAA's predecessor) on civil legal aid refusals were categorised and recorded differently compared with current practice. Pre-LASPO civil legal aid refusals were divided into the following categories: (1) N/A (2) 'other grounds' (3) 'no reason recorded' (4) 'refused on evidence only' or (5) 'refused on evidence and other grounds'. Post-LASPO refusals of civil legal aid in these areas, which are now within the ECF scheme, are recorded as being on the basis of 'ECF Merits', 'Means', 'Means and ECF Merits', 'Means and Merits (both)', 'Means and Normal Merits', 'Normal and ECF Merits', 'Normal Merits'.

In 2016/17 two additional categories of refusal on financial grounds were added, these being ‘Means capital’ and ‘Means Refusal’. There is no obvious overlap between the categories except perhaps ‘evidence’ might equate to normal merits and ‘other grounds’ may include means criteria but clearly no straightforward comparison is possible.

Failure to satisfy the ordinary merits criteria was given as a reason for refusal of ECF in 550 (83.1%) cases out of a total of 662 refusals in 2013/14. In 2014/15 failure to satisfy the ordinary merits criteria was a reason for refusal of ECF in 324 (80%) out of a total of 405 refused applications. In 2015/16 refusals on ordinary merits grounds occurred in 81 (44.8%) cases out of a total of 181 refusals. In 2016/17 of 299 refusals 101 (33.8%) were on ordinary merits grounds.

The LAA’s published statistics show that in 2013/14 there were a total of 662 refusals and in 34 of those cases (5.1%) the means of the applicant were the sole reason or part of the reason for refusal. In 2014/15 the applicant’s means was a factor in 42 cases (10.4%) out of a total of 405 refusals. In 2015/16 27 refusals (14.9%) were either in full or in part based on the applicant’s means out of a total of 181 cases that were refused. In 2016/17 means-related refusals of new ECF applications occurred in 67 (22.4%) of 299 refused applications for ECF.

However, as stated above it was not possible to compare the rates of refusal on means grounds in ECF applications with in scope applications because of the different way in which ‘in scope’ refusals are recorded by the LAA. A conclusion as to any differential application of the means criteria in ECF cases cannot therefore be reached using the published statistics.

Part 3

6.4 Routes of challenge to adverse ECF decisions and oversight of the ECF scheme

There are principally two routes of challenge to adverse decisions under the ECF scheme: the first being the possibility of an internal review of the decision to refuse ECF, which if unsuccessful may then give rise to a right to bring a claim for judicial review. Internal review is the focus of section 6.4.1. The second possibility is to

make a complaint using the Legal Aid Agency's complaints procedure,[628] and this is discussed in 6.4.2. If both stages of the LAA's own procedure are exhausted without reaching a satisfactory resolution the complainant can ask their MP to refer the matter to the Parliamentary and Health Service Ombudsman ("the Ombudsman") for investigation by them. Decisions of the Ombudsman may also be amenable to judicial review. The role and impact that judicial review litigation has had in the development and operation of the ECF scheme is considered in 6.4.3 and 6.4.4 respectively.

6.4.1 Internal review

If it is to operate lawfully one of the key features of the ECF scheme must be that there is access to an effective appeals procedure for people whose applications for ECF are initially refused. As discussed in chapter four there is no right of appeal, as such, against an adverse ECF decision but there is the opportunity to request an internal review of the decision. Subsequently, the applicant may have recourse to judicial review proceedings if the refusal of funding is maintained. The Legal Aid Agency defines a request for review as the re-submission of any application that was previously refused *or rejected*.[629] Consequently the level of usage of the review process in cases where an adverse determination has actually been made may be lower than the LAA's reported figures indicate. This is because no determination is made in the case of rejected applications. They are simply sent back to the provider or direct applicant because, for example, the application is incomplete as discussed in section 6.3.5.

Table 8 below summarises the number of review requests by year for applications submitted by solicitors and table 9 contains the equivalent information in relation to applications submitted directly by individuals. Of the 888 reviews requested in total between 1 April 2013 and 31 March 2017 just 113 (12.73%) were from individuals,

[628] The Legal Aid Agency complaints procedure can be found at <https://www.gov.uk/government/organisations/legal-aid-agency/about/complaints-procedure> Last accessed 12.1.18.

[629] Legal Aid Agency, 'Legal Aid Statistics in England and Wales January to March 2016' (Ministry of Justice 30 June 2016) 36. Available at <https://www.gov.uk/government/statistics/legal-aid-statistics-quarterly-january-to-march-2016> Last accessed 12 January 2018. From July 2016 the review data published by the LAA also explicitly includes reviews relating to refusals of applications to amend previously granted ECF legal aid certificates.

so the data primarily reflects the experiences of solicitors with the review process. As can be seen, requests for an internal review of adverse decisions were made in less than one in three cases of refused or rejected applications submitted by solicitors in 2013/14. This grew to just under four in ten in 2014/15 and reduced slightly in 2015/16 to just over one in three. The review rate was lower in 2016/17 when it fell again to under 1 in 3. Until 2016/17 the likelihood of succeeding on a review was quite a bit lower for individuals than for solicitors. In 2015/16 it was in excess of three times more likely that a solicitor would succeed in a review application compared to reviews requested by individuals. However, in 2016/17, whilst solicitors were still more likely to succeed on a review, the gap had reduced so that there was just an 8% difference between the success rates of solicitors and direct applicants. Ultimately, whilst the conversion of the pool of decisions eligible for review into a grant of funding has increased since the scheme began, it remains very low with just over 11% of reviewable decisions resulting in a grant of ECF.

Table 8 - data on ECF reviews requested by solicitors by year

Year	**Total no. refused and rejected applications**	**No. of reviews requested**	**Review Rate**	**No. of successful reviews (as % of reviews requested)**	**No. of applications granted on review as % of all refused and rejected applications**
2013/14	944	279	29.6%	6 (2.2%)	0.6%
2014/15	591	228	38.6%	50 (21.9%)	8.5%
2015/16	392	140	35.7%	59 (42.1%)	15.1%
2016/17	421	128	30.4%	47 (36.72%)	11.16%

Table 9 - data on ECF reviews requested by individuals by year

Year	Total no. refused and rejected applications	No. of reviews requested	Review Rate	No. of successful reviews (as % of reviews requested)	No. of applications granted on review as % of all refused or rejected applications
2013/14	63	11	17.5%	1 (9.1%)	1.6%
2014/15	42	9	21.4%	1 (11.1%)	2.4%
2015/16	92	22	23.9%	3 (13.6%)	3.3%
2016/17	170	71	41.76%	20 (28.17%)	11.76%

The review data for applications made by individuals and solicitors mainly reflects immigration and family law cases as they made up 76.01% of all 888 reviews requested over the course of four years. The next biggest category was those classed as 'other' in which there were 111 reviews (12.5% of the total) and then housing/land law (5.97%). Since the ECF scheme was implemented there have been no review requests by direct applicants in the welfare benefits, debt/consumer/contract, inquiry/tribunal or personal injury/clinical negligence categories. Therefore the review data for direct applicants in table 9 does not tell us anything about the likelihood of succeeding on a review for direct applicants in any of those categories of law. In all of those areas solicitors have submitted review applications but the volumes are very small. Lastly, in the discrimination and education law categories there have been no review requests at all, from either solicitors or direct applicants.

There are also marked differences in the extent to which the review process is used and the prospects of a review succeeding between immigration and family law cases. Over the four years of the scheme to 31 March 2017 the statistics show that in immigration cases reviews were requested in 49.31% of refused or rejected applications. In family law cases the review rate is less than half of that, at 23.28%. There is a similar disparity in the likelihood of success on review between

immigration and family law cases. In the immigration category reviews succeeded in 32.49% of cases, but for family law the success rate on review is just 15.09%. Whilst the numbers of applicants succeeding on review have increased significantly in both categories since the inception of the ECF scheme, the rate of improvement is significantly different. Immigration reviews succeeded in just 1.3% of cases in 2013/14 but by 2016/17 this had increased to 46.5% (down slightly from 54.4% in 2015/16), thus reviews are now 35 times more likely to succeed than in the first year of the scheme. By comparison, in family law cases an applicant is 17 times more likely to succeed on a review in 2016/17, when the success rate was 34.29%, than in 2013/14 when just 2% of reviews resulted in ECF being granted.

There are a number of factors that, in combination, may explain these differences. There may be differences in understanding of the ECF scheme between family and immigration practitioners. Whilst in immigration the number of initial applications has increased year on year (from 159 applications in 2013/14 to 903 in 2016/17), the opposite is true in the family law category where volumes have fallen year on year, going from 670 in 2013/14 to 268 in 2016/17. At the same time, as the number of family applications has fallen, the proportion of unrepresented applicants applying directly for ECF has increased each year, reaching 15% of all family law applications in 2016/17. The proportion of direct applicants for ECF has fluctuated in immigration cases from 18% of applications in 2013/14, to 2.4% in 2014/15, 10% in 2015/16 and 21% in 2016/17. This suggests that the pattern of engagement with the ECF scheme is very different between the two areas. Furthermore, there is more frequent recourse to public law and human rights arguments in the ordinary course of immigration cases, separately from ECF, so that immigration practitioners may be better equipped to make ECF applications and negotiate the review process. In addition, whilst members of the ECF team can assess applications in any area of law they all have a 'lead' area and will therefore determine more applications in their specialist field. As with legal practitioners, those staff in the ECF team with an immigration specialism are likely to have more knowledge and experience that is relevant to ECF.

The chances of succeeding on a review also provide less of an incentive to use the review process in family cases. It is also worth noting that when initial applications for ECF are submitted, those in immigration cases are nearly twice as likely to be granted compared with family cases. The grant rate for immigration cases in 2016/17 was 70.87%. In the same year 36.94% were either granted or part-granted

in family cases. It may therefore be that initial grant rates may also make it more likely that immigration practitioners will request a review. Despite the low numbers of applicants who are pursuing reviews of refused and rejected applications,[630] the most senior member of the ECF team interviewed stated that

> *It is a straight forward process, certainly most direct applicants would apply for a review, pretty much all lawyers.*
>
> [Interview with LAA2 on 24 May 2016]

However, as can be seen from tables 8 and 9 above this is patently not the case.

The applications reviewed as part of this research suggest that there are two key reasons why recourse to the internal review process is low. The first is the time it would take to go through the review process and the second is the very real risk that other than in immigration cases the review will not result in funding being granted. There is also the possibility that by the time the review process is complete the client will be out of time to achieve the outcome they were hoping for or the situation will be made much more difficult than it already is. An example of the latter is where an applicant is seeking to bring a child to the UK who is nearly 18, because the process of seeking reunion with an adult child is much harder. There may also be accompanying anxieties where circumstances are particularly grave such as where the applicant's family member is in a refugee camp. In such cases the burden and risk of making ECF applications, as well as the time it takes, are significant barriers. Accordingly solicitors may not request a review of a refusal of ECF even when they believe that there would be merit in doing so. Applicants themselves may elect not to pursue a challenge to an adverse decision so as not to delay their substantive case any further. This was illustrated by S1, who said that

> *People – as you understand very well – are very stressed and…one of the reasons they often get into debt and borrow money to pay for things they can't afford is that they are just so worried about their chances slipping away of getting an application through for a loved one.*
>
> [Interview with S1 on 24 May 2016]

[630] The increase in the rate of reviews being requested by individuals came after LAA2 was interviewed.

In only one case (S4/A1) did the solicitor state that the reason for not pursuing a review of a refusal was because, with hindsight, s/he agreed with the Legal Aid Agency's assessment of the ordinary merits of the client's case for which funding had been requested, namely that the client did not have more than a 50% chance of succeeding in their application. In that instance, an immigration case, the client achieved the outcome they desired by alternative means. In the other application submitted by S4 that was initially refused s/he decided not to pursue a review of the decision because '*on the facts it is going to be difficult to overturn the decision…and in any event to overturn it in time, as the appeal is in a few days…'*

[Personal correspondence with S4 dated 19 July 2016]

As can be seen despite the impression held by one of the LAA interviewees that most refused or rejected applications result in a request for a review of the decision, this is not the case. Review rates are low across the board outside of the immigration law category. Until 2016/17 the likelihood of succeeding in getting a grant of ECF after a review was more than three times higher if the review was requested by a solicitor as opposed to an individual. Reviews may not be requested if the applicant's substantive case is time-sensitive because whilst waiting for the outcome of a review in such cases, appeal or other rights may be lost.

6.4.2 Use of the LAA complaints procedure

The evidence as to the frequency with which the Legal Aid Agency's complaints process is used to challenge adverse ECF decisions is inconsistent. In evidence given to the High Court in the *IS* case, Malcolm Bryant (Head of Complex and High Cost Cases) stated that in the year commencing 1 April 2013 the ECF team received a total of 13 formal complaints. Two were upheld, nine dismissed and two described as "inconclusive": The ECF team had received eight complaints since 1 April 2014. Four were justified, two not justified and another two remain under consideration. This differs significantly from the picture described by another senior staff member in interview who said

> *It is a Legal Aid Agency complaints procedure so it is common across the whole of the Agency so there are two tiers of complaints. A first tier level complaint which we would try to handle. Most commonly that would be used a couple of times a week, if we get complaints they can be about delay, they*

can be about people not liking the decision, so they can be a whole range of things, some are which are justified, some of which are not but we do get them all.

[Interview with LAA2 on 24 May 2016]

Another lawyer in the ECF team also reported that

We got this type of training then I think then we got training on other aspects of Legal Aid like complaints because we do have a lot of complaints and the reason being is that's one way whereby we can challenge our decisions.

[Interview with LAA3 on 26 May 2016]

Two practitioners, S2 and S4 reported having made use of the LAAs complaints procedure. One of S2's complaints had progressed to an investigation by the Ombudsman. In interview S2 said

…the complaints process, I had to get…through to a lawyer about the complaints procedure and what they said is that…they'd look at it again.

[Interview with S2 on 3 June 2016]

This did not result in the refusal of funding being overturned.

The interviews conducted with LAA staff took place in May 2016. The passage of time may therefore explain the different account of the level of complaints received by the ECF team compared with the evidence of Malcolm Bryant in the *IS* case which would have been referring to the situation as it was up to June 2015. There may also be different perceptions of what amounts to a complaint within the ECF team as compared with the understanding of more senior managers. Alternatively, perhaps nobody understands the LAA's complaints policy and how to apply it.

6.4.3 The role of judicial review in challenging adverse ECF decisions

If a decision to refuse ECF is maintained on review the applicant may go on to seek a judicial review of the LAA's decision. The opportunity to do so has been highlighted as important in 'overseeing the decision making process under the

scheme'.[631] However, it appears that matters do not always proceed straightforwardly after a refusal of funding on review. ECF application S3/A1 and S7 in interview both indicated that after a judicial review pre action protocol letter had been sent the LAA may decide to make a fresh decision or treat the protocol letter as a fresh application if it contained some additional information. In interview S7 said

> *The Legal Aid Agency often played...quite a tricky tactical game with us...you'd put in an application, it'd get refused...you put in a review request and that would be refused as well. You'd write a pre action letter and they say "Oh, actually you've raised something else in your pre action letter, we're going to treat this as a new application" or something and...so they would keep you going round and round offering further reviews with seemingly the intention of preventing you getting...a final decision that you can take to JR.*
>
> [Interview with S7 on 27 July 2016]

In *IS*[632] evidence was presented by the Public Law Project of the stage at which each of the 31 successful applications for ECF they had dealt with was granted. In 16 cases funding was granted after a judicial review pre action protocol letter had been sent. In a further seven cases proceedings were actually issued. This means that in just under three quarters of cases it was necessary to either threaten or issue a claim for judicial review. Of the 20 applications reviewed for the purposes of this study judicial review was threatened in four cases. In two cases a threat of judicial review resulted in the LAA taking a fresh look at the application which in one case led to a grant of funding (after a further review of this fresh decision) and in the other the refusal of funding was maintained. In one case proceedings were issued and settled. Given that judicial review is a measure of last resort when other avenues have failed, based on this albeit small sample, it suggests that providers must go to extraordinary lengths to succeed in obtaining a grant of ECF.[633] Alternatively it may

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[631] *The Director of Legal Aid Casework and The Lord Chancellor v IS (a protected party, by his litigation friend the Official Solicitor)* [2016] EWCA Civ 464 [51].

[632] ibid.

[633] In the Public Law Project's evidence to the Bach Commission they highlighted a case (referred to as MM) in which the applicant was erroneously advised by the LAA to bring a judicial review against a decision of a Local Authority to refuse to support him with contact with his child, rather than pursuing contact in the Family Court for which he had requested ECF. See Public Law Project, 'Evidence of the Public Law Project to the Labour Party Review of Legal Aid' (12 May 2016).

be that the Public Law Project's expertise in public law and human rights makes it more likely that refusals of ECF would be challenged. It could also be the case that the Public Law Project are more likely to take an interest in those cases that are more likely to be susceptible to judicial review.

Frustration was expressed by some interviewees at the futility of trying to utilise judicial review in some cases. For example, an attempt to use judicial review to challenge a refusal of ECF in welfare benefits cases was described by solicitor S2. S/he said

> *in respect of benefits cases, the cases get resolved and then they…run the argument that the case has been resolved, so why are you applying for funding? Then you can't challenge that decision because if you want to judicially review that decision they wouldn't award funding for that…I tried to challenge…their decision not to award funding for a judicial review but you have to apply to the Legal Aid Agency for that and they say it doesn't meet the merits criteria, and it doesn't meet the merits criteria because the case is already been resolved… they use their delay and their incompetence at dealing with the exceptional funding application to eventually not have their decisions challenged…it is a deliberate policy, I think.*
>
> [Interview with S2 on 3 June 2016]

Some applicants decide against pursuing further challenge to the refusal of funding by way of judicial review. One such example is provided by application S1/A2. This was an application for ECF to enable a new refugee to be represented on an appeal against a decision of the Entry Clearance Officer not to permit her de facto daughter to join her in the UK. Refusal of funding was maintained on the request for review and the applicant decided not to proceed with any further challenge to that as she was so worried about the impact of further delay in preparing her appeal. She therefore proceeded as best as she could with assistance from her church.

The time sensitive nature of the case underlying the ECF application means that any delay may effectively serve to defeat the primary proceedings in a client's case and a potential claim for judicial review challenging a refusal of funding.

6.4.4 The role and impact of judicial review in the evolution of the ECF scheme

In view of the profile of review rates across the different categories of law it is not surprising that the most significant challenges to the ECF scheme have come through immigration cases. Whilst, as seen in chapter four, there have been a series of high profile family law cases in which ECF has been at issue, there has not been any reported judicial review litigation itself to address the many issues highlighted by those family law cases. The possibility for challenge in the family law arena has diminished year on year as the number of new applications for ECF in this category has decreased from 670 in 2013/14, to 374 in 2014/15, 350 in 2015/16, with just 268 applications being made in 2016/17. The opposite pattern has occurred in the immigration category where in 2013/14 there were 159 initial applications for ECF, rising to 235 in 2014/15, 414 in 2015/16 and reaching 903 in 2016/17. At the same time the necessity of the possibility of challenge has decreased in the immigration arena in that year on year the proportion of initial applications granted has increased from 1.26% in 2013/14, to 14.89% in 2014/15, 68.36% in 2015/16 and 70.87% in 2016/17. Whilst in the family law category the proportion of applications granted has significantly increased since the scheme's inception, from 0.9% in 2013/14, to 8.29% in 2014/15, up again to 40.29% in 2015/16 and dropping slightly to 36.96% (including applications that were granted in part) in 2016/17. Notwithstanding this increase in the grant rate of family law applications for ECF the position is that immigration law applications are around twice as likely to be granted as those in the family law category. After that the most significant category of work in volume is classed as 'Other' which would include matters concerning, for example, some public law and employment matters except discrimination. In that category there have been 416 initial applications for ECF, 264 from practitioners and 152 from direct applicants. Of those, just 19 applications submitted by solicitors, and none of the applications from individuals, were granted. All other categories of law included within the ECF scheme have seen very small numbers over the course of the first four years.

The LAA states that judgments are taken into account immediately as they are given. The Lord Chancellor's Guidance gives specific instruction to take case law into account as it develops. This has been used as an argument to rebut challenges to adverse decisions made, for example, after the initial decision in *Gudanaviciene* but before the Lord Chancellor's Guidance was updated to reflect the content of the judgment. For example, in correspondence from the LAA regarding application

S2/A4 it was asserted that new judgments are implemented in decision making immediately and this was reflected in interview by LAA2. However, another interviewee from the LAA stated that before applying a judgment new regulations would be needed, thus indicating that the impact of new case law may not be as immediate as suggested by other sources.

Another member of the ECF team (LAA1) suggested that the litigation on ECF had resulted in more appropriate applications being submitted but that *Gudanaviciene* had not made any difference to the way in which s/he actually assessed applications for ECF. S/he said

> *In the olden days…many cases that came in weren't necessarily complex but the solicitors weren't quite sure, they were submitting applications but weren't quite sure what our response and our decisions would be and I think since the judgment against us, I think the solicitors might have more of an idea…because the cases coming through are more complex.*
>
> [Interview with LAA1 on 26 May 2016]

In response to being specifically asked what difference the change of the threshold for ECF brought about by the *Gudanaviciene* case had made LAA1 said

> *How I viewed it, how I deal with them hasn't really changed that much. I wouldn't say I was an unfair assessor before and I would say I was quite fair, I just base it on the facts that I have. I'm not granting more because of it.*
>
> *I'm not refusing more because of it either, I just, can't see much has changed for me…*
>
> [Interview with LAA1 on 26 May 2016]

Whilst the judicial review in the *Gudanaviciene* case significantly changed the overarching test to be applied to the consideration of all ECF applications it has only had any real impact in the area of immigration law. There have been no reported judicial reviews concerning ECF in family law cases. It is also deeply troubling that one of the interviewees from the LAA felt that *Gudanaviciene* had not made any practical difference to how s/he assesses applications. If judicial review is to play an effective role in the protection of rights to legal aid based on the European Convention on Human Rights, many more applications for ECF will be needed in

order to generate the possibility of challenge to the operation of the scheme in areas such as welfare benefits and housing. Until then the capacity of judicial review to protect rights in individual cases and bring about change more widely is limited.

6.5 Conclusion

The emerging picture of the operation of the ECF scheme is one in which legal aid providers and barristers must often be willing to do significant amounts of pro bono work. This work outside the scheme performs a number of functions which support the functioning and development of the ECF scheme. It may serve the purpose of progressing cases to a point where an application for ECF is less likely to be viewed as speculative and is therefore more likely to be granted. It may also provide a way of bringing in public law and human rights expertise where the instructed practitioner requires such support in order to make an ECF application or to challenge a refusal. It may also provide a means through which to develop a case into a piece of strategic litigation. Combined with a willingness to do work at risk of non-payment after an application for ECF is submitted pro bono assistance is undoubtedly an essential component in making the scheme work but at a price. In a very limited number of cases elements of the work or evidence required to support an application for ECF can be funded through 'in scope' legal aid. This may be possible where an immigration case has been preceded by an asylum claim, following which, the work done in the asylum matter can be used to support a later ECF application for the immigration case. Secondly, where there are concurrent proceedings which qualify for legal aid useful evidence may be paid for, such as a capacity assessment, which can then be used to strengthen an ECF application. Providers with a public law legal aid contract are able to utilise that source of funding to pay for the preparation of a pre action protocol letter in the case of ECF applications which escalate to a threat of judicial review after earlier adverse decisions by the LAA. These aspects of the findings demonstrate how the goodwill, charity and creativity of the legal professions is providing crucial support in making the ECF scheme work.

From within the ECF scheme itself the key theme to emerge is that of complexity. The analysis of whether the substantive case for which is ECF is sought is complex and the relationship between that and the capability of the applicant to effectively represent themselves without legal assistance is a central area of dispute. Four

types of complexity can be identified. It may manifest through aspects of the applicant's case itself such as the presence of a long case history or being in the middle of proceedings. Complexity may also be identified based upon features of the individual applicant including educational attainment or mental health issues which mean that that particular applicant would view the proceedings as complex. Third party assessments of complexity arise through the LAA's initial screening of ECF cases for 'complexity' or judicial comment on the complexity of a particular area of law (such as in immigration cases) where numerous and frequent changes to the law take place. In some cases there is a 'shorthand' i.e. something that is immediately indicative of complexity. This may include hearings in welfare benefits appeals before a three judge panel in the Upper Tribunal or an appeal to the Upper Tribunal in an immigration case.

In weighing up these manifestations of complexity with the question of whether an applicant is sufficiently capable of presenting their own case the LAA should consider a number of issues including: (1) whether the applicant has any skills or experience in the relevant area of law or the factual subject matter; and (2) whether the extent of the applicant's emotional involvement in the issues in the case is such that their objectivity as an advocate for their own case would be impaired. However, the evidence suggests that the LAA takes an impermissible approach to this exercise by applying 'tests of equivalence' and giving no, or insufficient, weight to applicant's experiences of violence or other trauma. It is very difficult for applicants to prove that they cannot represent themselves unless they have tried and failed first. There is both a human and financial cost to this. If cases are not funded at an early stage there is a cost to the legal system of matters escalating to appeals which otherwise may not have done. The human cost is felt in the distress caused to applicants and their families by the uncertainty of having cases hanging over them and the stress of trying to deal with legal problems alone.

The complexity of the ECF scheme itself is illustrated by the level of detail and evidence that appears to be required in order to make a successful ECF application. Whilst the LAA has suggested that making lengthy legal submissions is not necessary to obtain a grant of ECF the sample of applications reviewed for the purposes of this study, the interview data, and evidence from the *IS* Scott Schedule and the Bach Commission, does not support this view. In all of the successful applications reviewed very detailed legal submissions were made. Sometimes this included written advice from a barrister as well as the provision of extensive

documentation. There is an on-going disparity between the LAA's view of the level of detail and evidence required in an application and the reality of the amount of work being done in order to make a successful application. In order to make the kind of detailed and well-supported ECF application that succeeds it is not sufficient for practitioners making applications or LAA decision makers to have expertise only in the area of law engaged by an applicant's substantive case, or in public law and human rights as relevant to ECF applications. Both are required. There is an urgent need to provide development opportunities and support in order to build the necessary expertise for both practitioners and ECF decision makers.

Although lacking expertise themselves there is evidence that ECF decision makers can be dismissive of the expertise of others. This has created at the very least a perception that ECF applications are determined in something of a hostile environment. This perception is compounded by some practitioners' experiences of a more robust approach to the assessment of applicants' means and application of the ordinary merits criteria. It was not possible to find any statistical support or rebuttal for this perception due to differences between the way in which refusals and rejections of in scope legal aid applications and ECF refusals and rejections have been recorded.

When applications for ECF are refused or rejected the applicant may request an internal review by the LAA. Over the four years of the scheme so far requests for an internal review of adverse decisions have been fairly steady at around the one in three mark. In stark contrast the perception from within the LAA is that almost all solicitors, and most direct applicants, request a review of refused and rejected applications. The number of applications eventually granted after a review, as a proportion of all refused and rejected applications, has increased year on year but remains very low. The likelihood of succeeding on a review is significantly lower for individuals than for solicitors. It is also apparent that immigration cases have a much higher review rate and rate of successful reviews than any other category of law.

The alternative route to challenging an adverse decision is for applicants to use the LAA's separate complaints process. There are inconsistencies between junior members of the ECF team and those at a more senior level about the extent to which this is used by applicants for ECF. The timing of the evidence of the LAA interviews may account for this in that perhaps the position has changed over time. There may also be different perceptions of what amounts to a complaint within the

ECF team as compared with the understanding of more senior managers. Alternatively, perhaps there is a lack of clarity on the substance of the LAA's complaints policy and how it should be implemented.

Ultimately it is judicial review and the case of *Gudanaviciene* in particular that has played the greatest role in the development of the ECF scheme since it began in April 2013. *Gudanaviciene* significantly changed the overarching test to be applied to the consideration of all ECF applications but has only had real impact in the area of immigration law. There is some doubt as to the understanding of ECF decision makers about the practical difference to the assessment of applications that *Gudanaviciene* requires. If judicial review is to play an effective role in the protection of rights to legal aid based on the European Convention on Human Rights, many more applications for ECF will be needed in order to generate the possibility of challenge to the operation of the scheme outside the sphere of immigration cases. Until then the capacity of judicial review to protect rights in individual cases and bring about change more widely is limited.

CHAPTER 7 – ECF: LEGAL REQUIREMENTS IN EMPIRICAL CONTEXT

7.1 Introduction

This chapter draws together the legal analysis in chapters four and five and the findings from the author's empirical work in chapter six in order to answer the overarching research question: can the UK rely upon the ECF scheme operated pursuant to s.10 LASPO in order to discharge its obligations to provide legal aid under the European Convention on Human Rights and EU law?

The discussion centres on:

- the way in which Article 6(1) is applied in ECF decision making by the LAA including by reference to the Lord Chancellor's Guidance on the same;
- limitations upon the Article 6(1) right of access to court;
- the shifting of the burden of the state's obligations to provide legal aid;
- systemic requirements of a lawful ECF scheme;
- the potential for the use of Article 3 in welfare benefits cases; and
- obligations to provide legal aid based upon the EU Charter of Fundamental Rights.

7.2 Article 6 and the empirical evidence on ECF decision making

For ease of reference it is worth re-stating the text of Article 6(1) ECHR which provides that

> …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…

This is frequently referred to as the Article which guarantees a right to a fair trial but included within that is the specific right of effective access to Court.[634] It is this which can give rise to an obligation on the state to provide legal aid in civil cases,

[634] *Golder v UK* (1975) 1 EHRR 524.

such as those covered by the ECF scheme, although this is not an unqualified right. The state's obligation to provide legal aid in civil cases in Article 6 is amplified by the jurisprudence of the European Court of Human Rights as shown in the cases of Airey[635] and Steel and Morris[636], and from the domestic courts the key case on ECF specifically, Gudanaviciene.[637] It is this legal background which the Lord Chancellor's Guidance on Exceptional Case Funding (non-inquests) purports to reflect in its direction to the Legal Aid Agency caseworkers who determine ECF applications.[638] Crucially, access to court is about 'effective access.'[639] It is the quality of what an individual can do in representing themselves that is important and states are required to take steps to ensure that rights are 'practical and effective'. One such step may be the provision of legal aid, but it can also include other action such as the simplification of court procedures.[640]

In evaluating whether legal aid is required in civil cases for the purpose of ensuring effective access to court the Legal Aid Agency's ECF team caseworkers must decide 'whether the withholding of legal aid would mean that that applicant is unable to present his case effectively and without obvious unfairness'.[641] In order to answer that question ECF case workers must weigh up a number of factors as discussed in detail in chapter 3. Briefly, however, the exercise which Legal Aid Agency caseworkers must go through in evaluating each application for ECF is encapsulated in the test from the *Gudanaviciene* case which states

> …the greater the complexity of the procedural rules and/or substantive legal issues, the importance of what is 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…[642]

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[635] *Airey v Ireland* (1980) 2 EHRR 305.
[636] *Steel and Morris v UK* (2005) 41 EHRR 403.
[637] *Gudanaviciene and others v Director of Legal Aid Casework and the Lord Chancellor* [2014] EWHC 1840 (Admin); *Gudanaviciene and others v Director of Legal Aid Casework and the Lord Chancellor* [2014] EWCA Civ 1622.
[638] Lord Chancellor's Funding Guidance (Non-Inquests).
[639] *Airey v Ireland* (1980) 2 EHRR 305.
[640] ibid.
[641] Lord Chancellor's Funding Guidance (Non-Inquests) 5.
[642] *Gudanaviciene and others v Director of Legal Aid Casework and the Lord Chancellor* [2014] EWCA Civ 1622 [56].

In incorporating and unpacking that test the Lord Chancellor's Guidance directs caseworkers to consider a number of supplementary issues. The most salient of those are discussed below along with the empirical evidence and other commentary in relation to each.

7.2.1 The importance of the issues at stake

The Guidance states that 'caseworkers need to consider whether the consequences of the case at hand are objectively so serious as to add weight to the case for the provision of public funds.'[643] In reaching a judgment about this caseworkers are directed to ask themselves

> What are the consequences to the applicant of not bringing/not being able to defend proceedings?
> Does the case merely involve a claim for money, or does the claim relate to current (as opposed to historic) issues of life, liberty, health and bodily integrity, welfare of children or vulnerable adults, protection from violence or abuse, or physical safety?
> If the claim is financial, what sums are at stake?
> Does the claim relate to adjustments, care provision or medical equipment without which the applicant cannot live an independent life?[644]

It is evident from the applications reviewed for the purposes of this study that in refugee family reunion cases the objective seriousness of what is at stake for the individual applicant is generally accepted. However, in welfare benefits cases the position is not quite as straightforward. It is particularly illustrative to compare the treatment of application S2/A2, an application where ECF (Legal Help) was refused, with S4/A4, where ECF (full representation) was granted. In application S2/A2, submitted to the LAA in 2015, ECF was refused on the basis that the ECF merits test was not satisfied. The sum at stake was 3 months' worth of Employment and Support Allowance (ESA), with the sum continuing to rise until the conclusion of the appeal against the termination of the claim for ESA. The applicant's Housing Benefit (HB) had also been terminated when her ESA stopped and therefore rent arrears

[643] Lord Chancellor's Funding Guidance (Non-Inquests) 5 para 21.
[644] ibid 5.

had accrued, although the amount of rent arrears nor the monthly or weekly rent was known. The ESA component of the appeal was worth at least £72.40 per week.[645] The likely consequences for the applicant if the appeal failed were destitution and homelessness. In addition the applicant was a survivor of a lengthy abusive marriage. In S4/A4 a sum of £17,514.15 was being re-claimed from the applicant, also a survivor of an abusive marriage, in Child Benefit which it was contended should not have been paid. If the appeal, which concerned entitlement to Child Tax Credits, failed it was likely that a review of the applicant's other entitlements (ESA and HB) would be carried out, risking their withdrawal. As a result this applicant also faced the possibility of destitution and homelessness. In both cases enquiries were made by the LAA about the amount at stake, although in S2/A2 it was suggested that this information would have made no difference to the outcome. Both cases concerned complex areas of social security law: the rules about how capital is accounted for in assessing benefit entitlement in S2/A2 and EU law rights of residence in S4/A4. Although it is not obvious how persuasive the value of S4/A4 was when weighed with other features of the case, and despite the LAA's assertion that the amount at stake in S2/A2 was not relevant to the refusal of funding, it is the marked difference in the financial value that is the distinguishing feature of these two applications.

The use of the word 'merely' in the Guidance in relation to money claims is an example of structural bias in the ECF scheme. It is a clear negative signal to caseworkers that claims for money are of lesser importance and are therefore less worthy of being funded, the Government's view being that welfare benefit cases are 'of lower objective importance (because they are essentially about financial entitlement)'.[646] However, this view fails to make an important distinction between claims for compensation on the one hand and welfare benefit entitlement on the other, which may form the totality of a person's income and be the only thing that stands between an individual and destitution. As a result the Guidance takes no account of how a claim involving, what may objectively be regarded as a small sum of money, can be incredibly important to a person of limited means. The 'importance of what is at stake' test is an objective one ("is it objectively so serious?"). Unless

[645] The basic rate of ESA in 2014/15 was £72.40 per week. See <https://www.rightsnet.org.uk/pdfs/rightsnet_benefit_rates_poster_2014_15.pdf> Last accessed 7 September 2017.

[646] Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales* (Cm 7967, 2010) para 4.217.

there is an assessment of the importance of a financial claim to the individual applicant (thus introducing a subjective element to the test) the Guidance provides an inadequate means of judging the seriousness of a case in the particular circumstances of an individual applicant.

7.2.2 Complexity and the applicant's capacity to represent themselves

The author's empirical research shows that there are considerable tensions in the understanding, application of, and interplay between, the LAAs evaluation of two factors in the Guidance in particular: these being the complexity of the case (law, procedure and facts) and the capacity of the individual to effectively present their case. The Guidance makes a specific connection between these two factors and it is the relationship between them which provides the biggest area of dispute in ECF decision making seen in this study. The ways in which these tensions arise in practice are discussed below by reference to the Guidance.

When evaluating the complexity of an applicant's underlying case it was found that the LAA often places an emphasis on 'the facts' with much less attention being paid to law and procedure, and law's relationship to 'the facts'. Even if an applicant is able to recount the facts of their case it does not necessarily follow that they can apply the relevant law to those facts in such a way as to effectively pursue or present their case. In interview S7 suggested that educational attainment, for instance whether the applicant has at least a grade C in GCSE English, could be used as an indicator of the applicant's ability to effectively marshal the facts of their case. Educational attainment is, in fact, one of the supplementary issues highlighted in the Guidance for consideration by caseworkers[647] but there was only one instance in the author's empirical work of this being actively considered in the ECF decision making process. This was by one of the LAA participants who, in interview, noted that an applicant who was educated to degree level was deemed not to require funding. In the evidence made available to this study there were no examples of low educational attainment being identified as a reason to grant funding, aside from it being cited in general terms by practitioners to support applications for ECF. It may be that this is an example of the Guidance being

[647] Lord Chancellor's Funding Guidance (Non-Inquests) 9.

interpreted to applicants' detriment (of which many examples are discussed throughout this chapter).

When gauging the factual complexity of a case, the Guidance directs LAA caseworkers to consider whether 'the facts in the case already been explored? (for example, has the case already been through other tribunals or hearings, and have the issues been fully explored and the key point or points to be determined clearly identified?)'.[648] The question here should really be 'have the *correct* issues or points for determination been identified?' An example of where the wrong test was selected by the Home Office, and subsequently a First Tier Tribunal, is provided by S4/A4 when instead of determining whether the applicant had satisfied the criteria for permanent residence, they focussed on whether she had a right to remain as a *Zambrano*[649] carer. This had huge implications for her entitlement to benefits and recourse to public funds generally. Of course, this was highlighted by S4 in the application for ECF but it may also rely upon ECF decision makers having sufficient expertise to be able to identify whether the correct issues have been identified. This is especially important in the case of lay applicants for ECF.

As stated above, it is in relation to factual complexity that the Guidance directs LAA decision makers to look at previous hearings in an applicant's case. It is difficult to make the connection from this aspect of the Guidance to the way in which, in practice, previous hearings (or the absence of them) are weighed in decision making. An applicant's failure to achieve their desired outcome at a previous hearing is a way of overcoming the presumption that representation is not required. It is a way of proving the negative that an applicant cannot effectively represent themselves. By contrast if applicants have not already tried, and failed, to successfully represent themselves previously the suggestion that they cannot effectively represent themselves appears, very often, to be seen as speculative.

The Guidance anticipates that evidential complexity may arise in the form of expert evidence. Whilst the issue of expert evidence did not arise in any of the applications reviewed for the purposes of this study the case of *Q v Q*,[650] as discussed in chapter four, is a good example of a case where multiple experts were needed. In that case the expert evidence addressed the risk posed to a child by his father, a convicted

[648] ibid 6.
[649] Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)* [2011] ECR 1-01177.
[650] *Q v Q* [2014] EWFC 7; *Q v Q* [2014] EWFC 31; *Q v Q (No 3)* [2016] EWFC 5.

sex offender, in the context of an application for contact by the father. The availability of expert evidence was absolutely critical in order for the court to make a decision as to whether contact should be permitted. Ultimately, the court ordered that there be no contact, of any kind, between the father and his son. The proceedings had been extremely protracted, having commenced in July 2010 and a final order being made in January 2016. One of the key reasons for the delay in the proceedings being concluded were difficulties in obtaining legal aid. Pre-LASPO, funding had been in place but was withdrawn in 2014 on merits grounds. Subsequently, an application for ECF was made, refused and pursued until it was finally granted on 27 July 2015. The granting of ECF coincided with the coming into force of amended ordinary merits regulations[651] in response to the High Court judgment in *IS*.[652]

On procedural complexity the Guidance suggests that caseworkers ask themselves 'Is the case before a tribunal that possesses specialist or expert knowledge which can assist the applicant?'[653] This reflects a generous view of the tribunal system and fails to take account of the fact that proceedings before tribunals can be adversarial, whether in the immigration and asylum or social entitlement chamber.[654] It has also given rise to assumptions being made in ECF decision making that applicants do not need to know the law because the tribunal will know it and will apply it correctly to the facts of the applicant's case. This highlights a further tension between different types of complexity, in this instance between the procedural and legal complexity of the applicant's case. Examples of this are seen in the applications for ECF submitted by S2 in the welfare benefits category. In those applications S2's submissions on legal complexity were not accepted. The LAA determined that as the applicant knew the facts of their case the Tribunal would assist them in dealing with the law and it was not necessary for the applicant to be familiar with the relevant law because the Tribunal would be. On other occasions, in applications made much later in the life of the scheme than S2's, legal complexity was accepted when judgments in numerous cases in which the complexity of immigration law had

[651] Civil Legal Aid (Merits Criteria) (Amendment) (No.2) Regulations 2015, SI 2015/1571.
[652] *IS (by the Official Solicitor as Litigation Friend) v The Director of Legal Aid Casework and the Lord Chancellor* [2015] EWHC 1965 (Admin).
[653] Lord Chancellor's Funding Guidance (Non-Inquests) 6.
[654] There is considerable discussion about the nature of Tribunals and the extent to which they may be adversarial or inquisitorial in their approach. See for example, Robert Thomas, 'From "Adversarial v Inquisitorial" to "Active, Enabling and Investigative": Developments in UK Administrative Tribunals' in Jacobs, L and Baglay, S (eds), *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Ashgate 2013).

been highlighted were cited. In one case (S4/A4) the decision maker clearly had no knowledge of the substantive legal issues in the case having made a request for further information questioning what the legal basis of the applicant's challenge was. This was after the applicant's solicitor had submitted seven A4 pages of detailed submissions with the initial application and in response to the request for further information S4 wrote a further three A4 pages of detailed submissions. As it took ten A4 pages of detailed submissions to satisfy the LAA that ECF should be granted it is reasonable to assume that they were satisfied that the matter was legally complex.

When reaching a decision as to whether an applicant is able to present their case themselves reliance on intervention by judges to support applicants arises again. The Guidance directs caseworkers to bear in mind that 'Most courts and, in particular, tribunals are well used to assisting unrepresented parties in presenting or defending their cases against an opponent who has legal representation.'[655] Whilst the Guidance suggests that courts and tribunals are well placed to provide assistance to unrepresented litigants the system is not resourced to do this. Even before the LASPO reforms were in place the tribunal hearing welfare benefits appeals was described as 'under considerable strain'[656] and that has not improved. Tribunal statistics published by the Ministry of Justice in June 2017 suggest that the social security and child support tribunals are now under tremendous pressure. The number of appeals received by the tribunal has been increasing since April 2014. In the year 2016/17 appeals received were up 45% on the previous year with much of this increase in workload coming from appeals concerning ESA and Personal Independence Payment (PIP). This is particularly concerning as it is likely to be the appellants in this group who may be least likely to be able to prepare and present an appeal due to a disability. Even though the number of cases concluded increased by 21% in 2016/17 compared with the previous year, there were 96,768 cases outstanding at the end of March 2017. This was an 81% increase compared with the number of cases outstanding at the end of the previous financial year.[657] The problem with relying upon the tribunals to provide assistance to unrepresented appellants is not only a matter of resources. It is also a question of the fundamentally adversarial character of tribunals. Whilst in some areas, such as

[655] Lord Chancellor's Funding Guidance (Non-Inquests) 8 para 24.
[656] Neville Harris, *Law in a Complex State* (Hart 2013) 178.
[657] Ministry of Justice, 'Tribunals and Gender Recognition Certificates Quarterly, January to March 2017 (provisional)' p.3 available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/621515/tribunal-grc-statistics-q4-2016-2017.pdf> Last accessed 10 September 2017.

welfare benefits appeals, there is evidence to suggest that a more active inquisitorial-type approach has often been taken,[658] in others, such as asylum and immigration, the process remains very adversarial.[659] It remains the case that

> …tribunals have not wholly rejected the adversarial approach. Rather, they have applied an inquisitorial gloss to a basically adversarial process. If the process were thoroughly inquisitorial, the adjudicator would take charge of the case, decide what evidence was required and so forth. This is not how tribunals operate.[660]

Not only does the Guidance make this mistake about the nature of courts and tribunals but the capacity of social security tribunals to continue to take an active and enabling role in hearings must now be in question given its increasing load.

When stating the test for judging whether an applicant is able to represent themselves, the Guidance is weighted against a grant of ECF, placing the threshold for this factor at too high a level. It states that 'Caseworkers should consider whether the applicant would be incapable of presenting their case without the assistance of a lawyer.'[661] The use of the word 'incapable' seems to hark back to the 'practical impossibility' test from the original version of the Lord Chancellor's Guidance. The test set out following *Gudanaviciene* does not set the threshold this high. The question posed is whether the applicant can represent themselves effectively and without obvious unfairness, not whether they are incapable of representing themselves without the assistance of a legal adviser. This may cause confusion amongst caseworkers and could account for the frequency of disputes concerning the interplay of the complexity of the cases and the ability of the applicant to represent themselves.

As noted above, applications for ECF seem more likely to succeed if applicants have failed to successfully resolve their case at a previous hearing. Cases in which

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[658] Michael Adler, 'Can Tribunals Deliver Justice in the Absence of Representation?' (Legal Services Research Centre Conference, Greenwich, November 2008) 14.
[659] Robert Thomas, 'From "Adversarial v Inquisitorial" to "Active, Enabling and Investigative": Developments in UK Administrative Tribunals' in Jacobs, L and Baglay, S (eds), *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Ashgate, 2013) 64.
[660] Tom Mullen, 'A Holistic Approach to Administrative Justice' in Michael Adler (ed), *Administrative Justice in Context* (Hart 2010) 391.
[661] Lord Chancellor's Funding Guidance (Non-Inquests) 8 para 23.

there have not been any previous hearings because they are at an earlier stage, but in which the applicant is equally unable to represent themselves effectively, are therefore disadvantaged. This is one example of how the ECF system prevents applicants from obtaining legal assistance early on in their case which may serve to increase legal costs and cause additional distress and other problems for applicants. In this way the capability of individuals to represent themselves is not being properly assessed due to the operation of an albeit rebuttable presumption that representation is not required unless there is a particular type of evidence to the contrary.

Previous assistance from a lawyer, whether pro bono or funded, is relevant when weighing up whether an applicant is capable of representing themselves. The researcher's empirical work suggests that it is most likely to add to an argument against granting ECF. Certainly there are examples in this study of the LAA being suspicious about how practitioners have managed to obtain detailed instructions without funding for an interpreter, which they have been able to do when legal aid was previously in place for a client. Application S1/A2 was an example of this. Likewise in another case, highlighted in interview by S5, the availability of pro bono support was highlighted by a practitioner as working against an application for ECF because it was viewed as an alternative to funded representation. However, for the most part extensive pro bono work by practitioners works to support the ECF scheme, solicitor S4 being a key example of this. It serves to progress cases to a point where an application for ECF is less likely to be viewed as speculative and is therefore more likely to succeed. Solicitor S4 provided seven ECF applications for review. Five were immigration matters and the remaining two were in the welfare benefits category, although both welfare benefits cases had a significant immigration law element to them. In particular, S4's applications show that even after the judgments in *Gudanaviciene* and *IS* in the High Court and whatever improvements there have been in the operation of the scheme, pro bono work undertaken by solicitors continues to feature heavily in applications for ECF where they succeed. Often this includes substantial work, for which funding could properly be sought.

7.2.3 Discussion

One of the most concerning findings of this study was that one LAA participant reported that the change to the overarching test effected by *Gudanaviciene* made no difference to the way in which they approached ECF decision making. Whilst it is possible that this participant may be alone in this view, the ECF team is a small one and therefore any lack of understanding of this magnitude is likely to have a more significant impact than if the participant in question was one of a larger group. In addition because a small sub-set of the ECF team act as subject area 'leads' within the wider team if those people do not apply the correct legal test then that practice is likely to be spread amongst the junior members of their subject area sub-team. To some extent this may explain why there has not been the same increase in the proportion of applications for ECF being granted outside of the immigration law category. This is also a particular worry for direct applicants who are reliant, unless they have legal advisers in the background, upon advice from the ECF team as to how to prepare their application and what matters might be relevant. The core ECF team is also likely to be a source of guidance and support for caseworkers in the wider unit, of which the ECF team is a part, who may be called upon to determine ECF applications during busy periods.

Of course there are also other possible explanations for this. It may be that applications submitted to the LAA in areas of law other than immigration law have been less meritorious or that the criteria as expressed in the Guidance and examined in the key pieces of litigation on the ECF scheme are better suited and more easily understood in the context of immigration law cases compared with other areas of law. As noted in chapter 5 immigration law practitioners are more used to making arguments relying upon human rights and public law principles and the post-LASPO litigation on ECF has centred on immigration law cases thus enabling practitioners to more clearly see how the criteria applies in their particular field. There may be also be assumptions in operation about the kinds of cases that fit the ECF criteria which serve to place an artificial (and unlawful) limit on the types of application that are granted. Whatever the explanation for the variable grant rates between categories of law there is a clear, albeit rebuttable, presumption that funding will not be granted. This is evident from much of the language in the Guidance and that when there is scope for interpretation of the Guidance by the LAA this tends to work against the applicant.

Participants did not express a consistent or fully-developed understanding of complexity in the context of ECF applications. Only one LAA participant described the complexity of proceedings by reference to both objective and subjective factors. The remaining two LAA participants described complexity as either wholly subjective or wholly objective. Despite the clear direction in the Lord Chancellor's Guidance that complexity is to be assessed by reference to law, facts and evidence in each case, as noted in 6.2.2 above, there is often an over-emphasis by LAA staff on an applicant's familiarity with 'the facts' of their case. In this way 'the facts' appear to be viewed by the ECF team as the only or most important indicator of complexity. Consequently matters concerning the law and evidence are often overlooked. Although 'the facts' may often mean that an applicant will be required to recount a difficult history, including experiences of violence or other trauma, the empirical evidence suggests that no or inadequate account is taken of the impact of this when assessing an applicant's emotional involvement in the case and deciding whether an applicant has the capacity to represent him or herself with the objectivity required of an advocate. The role of immigration and welfare benefits tribunal judges may also be overstated in terms of their assumed assistance to applicants by way of their knowledge and application of the law to the facts. By way of contrast in the majority of ECF applications reviewed the understanding of the practitioners by whom the application was submitted was much fuller with all aspects of potential complexity being addressed in the majority of applications seen.

The LAA's decision making in ECF cases is not sufficiently sensitive to the nuances of individual cases and the process of weighing up the Article 6 factors. Accordingly it is much more difficult to secure a grant of ECF in cases where it is not immediately and absolutely obvious that funding must be granted. Special provision is made in the Guidance for children and adults lacking capacity and this supports the sense that there has to be a 'smoking gun' before funding will be granted. Further insensitivity or confusion as to what the Guidance actually requires is demonstrated by the adoption of impermissible tests of equivalence. The reference in the Lord Chancellor's Guidance to the link between the complexity of a case and the applicant's educational attainment, skills and experience in the area of law or factual subject matter relevant to their case has frequently been transformed into a more expansive 'test of equivalence'. Examples of this seen by the author in the sample of applications reviewed for this study include the view that completion of any application form requires the same skills and experience as an application for

entry clearance for an applicant's family member who is abroad.[662] Experience of negotiating formal procedures for adoption of a child in one's home country in one's own language has been viewed as rendering a non-English speaking applicant qualified to represent themselves in an immigration tribunal in English.[663]

What this shows is that in some areas the LAA takes a narrower, unduly strict, approach to the application of the overarching test and in others a more expansive view is adopted. Whenever there is room for interpretation of the Guidance it is always to the detriment of the applicant. In both cases the effect on the applicant is to make it more difficult to secure a grant of funding. The findings of the author's empirical research did not reveal any instances in which a more generous view than necessary was taken. This would therefore seem to suggest that there is a tendency towards making the process more difficult in the LAA's approach to decision making in ECF cases.

Against that background and the persistently low rates of success in securing a grant of ECF outside of the immigration law category it is understandable that when preparing an application for ECF legal practitioners mostly provide very detailed submissions in support of an application. The evidence provided by the applications reviewed suggests that the information and supporting evidence submitted to the LAA covers the most relevant and important aspects of each case. In a bid to do their absolute best for their client legal advisers often 'throw the kitchen sink' at each application. Of the applications seen there were just two welfare benefits applications, submitted quite early on in the life of the scheme, in which relatively scant supporting information was provided to the LAA. Despite the view expressed by the LAA in the *IS* case that extensive detail is not needed to make an ECF application, the sample of applications reviewed for this study tends to suggest that it is the cases where very full supporting evidence is provided that succeed. For example, in the case of S4/A4 ten A4 pages of detailed written submissions were required before funding was granted. Whilst this may not seem terribly onerous in some contexts, it is in the wider context of applications for legal aid, especially as such work is done at risk of non-payment. There is also a mismatch between the LAA's view of the work required by practitioners in making an application and the time needed for ECF caseworkers to consider and determine one, for which a whole

[662] Application S1/A5.
[663] Application S1/A3.

working day is allowed. It was accepted by the LAA in *IS* that when making an ECF application for the first time it would require 'particular thought' by practitioners but that it should get easier over time.[664] The same approach is not taken to the ECF team itself. As at the date of the evidence submitted to the High Court in *IS* (heard in July 2015) the ECF team were allowed a day to determine each application and that remained the case when the researcher's interviews with LAA staff were carried out in May 2016.

In summary the ECF scheme as operated contains a presumption that legal aid is not required unless the applicant can prove otherwise. The starting point is that the Legal Aid Agency will not make a grant of Exceptional Case Funding unless there are compelling reasons to do so. The evidence from chapter 5 suggests that applicants are more likely to succeed if they are able to prove a negative e.g. by referring to previous failed attempts to progress matter without legal assistance. Given that there is no unqualified right to civil legal aid the starting presumption that legal aid is not required unless the relevant tests are met is lawful. However, it must also be borne in mind that Article 6 (1) creates a positive obligation on the state to take action to ensure that rights are made real, including the allocation of resources (see section 7.4 below for a more detailed consideration of positive obligations). What is required is a much more proactive and positive, supportive approach to the operation of the ECF scheme. There is no legal basis for requiring the LAA to work from the opposite presumption that legal aid is needed unless there are compelling reasons not to grant it but the starting point should be a neutral one. Furthermore, positive examples of when ECF will be granted are needed in order to bring clarity to, and encourage use of, the scheme.

7.3 Limitations on Article 6 rights and the legal aid means and merits tests

As we saw in chapter 4 the ordinary merits tests apply to all applications for legal aid (with limited exceptions), including applications for Exceptional Case Funding. They have taken three principal forms since LASPO has been in force as set out in Table 1 (see section 4.3.2). Any merits criteria adopted will only be permissible if the limitations on the Article 6(1) rights of applicants they give rise to can be justified.

[664] *The Director of Legal Aid Casework and The Lord Chancellor v IS (a protected party, by his litigation friend the Official Solicitor)* [2016] EWCA Civ 464 [52].

They must pursue a legitimate aim and be proportionate. Furthermore, any merits test adopted must be implemented with diligence and decisions must not be taken arbitrarily. Of crucial importance is the availability of an adequate system for appealing against adverse decisions.

As fieldwork ended in July 2016 no qualitative data is available which may shed light on the impact of the current merits criteria, in force from 22 July 2016. However, desk-based analysis continued after that date and the LAA's published statistics suggest that the current, more restrictive, merits criteria has not had any discernible impact on the number of new ECF applications made. The numbers of both immigration and family law cases have continued on an upward trajectory, with the number of immigration applications increasing again in 2016/17. As has been the case year on year throughout the life of the scheme family applications declined in 2016/17. Whilst the proportion of applications in which failure to satisfy the ordinary merits criteria was a reason for refusal dropped dramatically from 80% of refusals in 2014/15 to 44.8% in 2015/16, perhaps because of the more flexible approach to the ordinary merits implemented from 27 July 2015, there is not a corresponding increase in 2016/17 after the criteria were tightened again. In fact, ordinary merits only played a part in 33.8% of ECF refusals in 2016/17. It is likely that the more generous criteria in force between July 2015 and July 2016 played a part in increasing the numbers of cases in which ECF funding was granted during that period. Certainly in cases such as *Q v Q* it can be no coincidence that ECF was finally granted on the very day that the merits test became more flexible so as to prioritise cases in which the ECF criteria were satisfied (whether in scope or not).

In *IS* the Court of Appeal held that the merits criteria in use before 27 July 2015 were lawful. This was because in some types of case the merits criteria are varied or dis-applied.[665] As stated in chapter 4 this decision was flawed. The principal objection to the Court's reasoning is that the way in which the merits criteria apply within the legal aid scheme overall was mistakenly treated as an opportunity for the LAA to respond flexibly in an individual case. The reinstatement of the original merits criteria in July 2016 was a retrograde step. As a result ECF applicants are faced with a rigid and relatively high threshold below which funding will not be granted (below 45% prospects of success), combined with no possibility of

[665] *The Director of Legal Aid Casework and The Lord Chancellor v IS (By the Official Solicitor as Litigation Friend)* [2016] EWCA Civ 464 [65] and [66].

independent oversight of a refusal of ECF, and no flexibility in the application of the merits criteria even where Convention rights are engaged to the extent necessary for the s.10 LASPO criteria to be met. For particularly vulnerable applicants, such as those without capacity or with very limited legal capability, and unpopular groups such as respondents in private family law cases where there are allegations of domestic violence towards a partner or abuse of a child, the result is very dire indeed: there is effectively no means of protection of their Convention rights at all if the merits criteria are not satisfied. This means that the ordinary merits criteria now in place are unlawful on two counts: (1) they do not fulfil the requirement of Article 6(1) to adequately protect these applicants from arbitrariness (following *Aerts*); and (2) the lack of any flexibility enabling the LAA to dis-apply the merits criteria in individual cases means that the ECF scheme is not able to respond to 'the full run of cases' that will go through the system, thus rendering it structurally unfair.

The same can also be said of the variable application of the legal aid means test. An example of this is public law children proceedings. Proceedings in which a local authority seeks a care order to remove a child from their birth family are neither means nor merits tested. This is because of the draconian implications for the Article 8 rights of all respondents to such proceedings, including the child. However, comparable ECF cases, such as where a child may be permanently separated from his or her family by virtue of immigration rules, are subject to both tests. The impact of a lack of legal support in such cases is that

> …people struggle to advocate effectively for their rights and as a result risk having their right to a family life violated. The reality of this means either deportation to another country, which might for example involve the separation of a parent from their child…[666]

This is likely to disproportionately affect people because of race and/or national origin. Likewise, in inquest (Article 2) cases the LAA has a discretion to waive the usual means test if the family of the deceased person could not reasonably be expected to pay for their own legal representation. There are therefore three classes of case in the context of means testing: (1) those to which the means test always applies (2) those cases which are never means tested and (3) cases in which there

[666] Coram Children's Legal Centre, 'Rights without remedies: legal aid and access to justice for children' (February 2018) 17.

is a discretion to waive the means test. Convention rights are, however, equally engaged in all of them and there is therefore no objective justification for this state of affairs.

7.4 Shifting the burden of the state's obligations to provide legal aid

In order to ensure that Convention rights are "practical and effective" in civil cases, states must give consideration to whatever steps are necessary to secure and respect Convention rights. This can include the allocation of resources in the form of legal aid, although that is not the only option and is not an obligation in every case. However, in those cases where it is required there is a positive duty to provide legal aid.

The foundation for the recognition of positive obligations under the Convention is provided by three imperatives: (1) the requirement under Article 1 of the Convention that states should *secure* rights under the Convention for every person within their jurisdiction (2) that Convention rights must be effective, not just available in theory and (3) there must be an effective remedy for conceivable breaches of Convention rights.[667] As a consequence of the Human Rights Act 1998 the positive obligations arising under the Convention are incorporated into UK law. A positive obligation has been defined as an obligation 'requiring member states to…take action.'[668] and as a '…duty upon states to undertake specific affirmative tasks…'[669] and this includes action to prevent or address breaches of Convention rights.[670] What is clear is that such obligations require the state to *do something*, the burden of action rests with the state and it is an on-going obligation. It cannot be assumed that the ECF scheme, simply by virtue of its existence, is sufficient to discharge the UK's Convention obligations. The scheme must work to meet its stated purpose of enabling Convention rights, through the provision of legal aid, to be protected. The burden of doing so lies with the state. If the state knows, or ought to know, that the

[667] Keir Starmer, *European Human Rights Law* (Legal Action Group 1999) 194.
[668] Dissenting Opinion of Judge Martens in *Gul v Switzerland* 1996-I 165 cited in Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004) 2.
[669] Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004) 2.
[670] *Ireland v* UK [1978] no. 5310/71 para 239 cited in Dimitris Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge 2012) 11.

system intended to protect Convention rights is deficient it must take action to remedy it. To take a laissez-faire approach and simply ignore or deny the existence of clearly identified gaps in the protection offered by the ECF scheme does not meet the threshold of action required to discharge the state's positive obligations under the Convention.

The evidence from the author's empirical work and cases that have come before the courts since LASPO was implemented demonstrate a lack of positive action on the part of the state and a shifting of the burden to secure Convention rights for individuals on to the legal professions. Examples of this include the frequent reliance on significant amounts of pro bono work by legal advisers in order to make the ECF scheme work. This is frequently a feature of successful ECF applications and it is clear that this is the case post-*Gudanaviciene* and across all areas of law. Pro bono assistance from specialist Counsel is frequently relied upon as a way of bringing on board public law and human rights expertise to support an application or to challenge a refusal of ECF. Less common but evidence nonetheless of how legal advisers are being creative in order to try to make the ECF scheme work for clients is the use of 'in scope' legal aid to support or avoid making an ECF application altogether. This strategy is only likely to be available in a limited way. For example, legal practitioners with a public law contract may utilise Legal Help to cover the costs of a judicial review pre action protocol letter to challenge a refusal. Similarly, if there are concurrent proceedings of different types for an individual, legal advisers may utilise medical evidence obtained in connection with a set of proceedings for which funding is in place e.g. criminal charges to support an ECF application in another type of case. Exceptionally practitioners may try to find alternative means of pursuing a client's case so as to avoid having to make an ECF application altogether.

As discussed in chapter four one of the continuing problems of the post-LASPO legal aid landscape is the difficulties faced by people who do not qualify for legal aid but cannot afford to pay for legal representation. This problem is illustrated by a number of cases that have come before the courts since April 2013. In *Re K and H*[671] the Court of Appeal identified a vacuum in the legal aid scheme which gives rise to the possibility of breach of an individual's Convention rights. The issue in *Re K and H* was that a father accused of sexual abuse was faced with the prospect of

[671] *Re K and H (Children)* [2015] EWCA Civ 543.

directly cross examining his step-daughter about his alleged behaviour. This was because he did not meet the legal aid means test and could not afford to pay for legal representation. The Government was invited to bring forward legislation[672] to plug this particular 'LASPO gap' but this has not happened and the gap persists.

A further example is provided by the case of *D (a child)*[673] in which parents faced with the permanent loss of their child, but who did not initially qualify financially for legal aid, needed legal representation due to a lack of capacity on the part of the father and significant learning disability on the part of the mother. They could not afford to pay for legal representation. For a considerable time through the proceedings they were faced with an application by a represented Local Authority and the prospect of the loss of their child. Until legal aid was finally granted these parents only had pro bono representation (albeit very competent and significant pro bono representation for which the solicitor in question was recognised).
In both cases the individual's Convention rights were clearly engaged. In *Re K and H* the father's right to a fair trial could not be secured if the evidence of his alleged sexual abuse could not be tested. He, understandably, did not wish to directly cross-examine his stepdaughter.[674] In *D* one of the parents, lacking capacity, was required by court rules to have a litigation friend. The Official Solicitor could not act as Litigation Friend without their costs being met through legal aid. Before funding was finally granted the father was faced with the prospect that his right of access to court would be entirely denied. In addition the procedural protection inherent in Article 8 required that the parents should be able to effectively participate in the process which ultimately would decide whether their child was adopted or not.

In these instances there is a clear policy of controlling eligibility for legal aid, including ECF, on the basis of an individual's financial resources. As discussed in chapter 4, the means test is not a generous one and the threshold has remained static since 2012. However, there is a clear incompatibility between this policy and the stated purpose of the ECF scheme, this being to provide legal aid in cases where Convention rights have been or are at risk of being breached. As this conflict has not been addressed it has led to what must surely be unintended consequences

[672] ibid [62].
[673] *In the Matter of D (A Child)* [2014] EWFC 39; *In the Matter of D (A Child) (No.2)* [2015] EWFC 2.
[674] The Government announced in January 2017 that it would review the closely related problem of victims of domestic violence being directly cross-examined by unrepresented alleged perpetrators in family proceedings. See HC Deb 9 January 2017, vol 619, col 25.

such as those described above. These give weight to the view that the ECF scheme as currently drawn does not meet the UK's obligations under the Convention and they must be urgently addressed. Until that happens the burden of securing the Convention rights of individuals is to some extent displaced from the state on to the legal professions who continue to try and realise the right of effective access to court (and other Convention rights) on behalf of clients. The system is precarious in that should the legal professions withdraw their goodwill and stop carrying out pro bono work we could expect to see a dramatic fall in the numbers of ECF applications made and granted.

The steps which could be taken to address this situation might include the introduction of a discretion to set aside the means test in cases where fundamental rights are engaged as is the case currently for inquest cases OR the means test could be dis-applied from all cases in which the ECF criteria are met thus making the protection of Convention rights the primary consideration in deciding whether funding should be granted. Also useful would be a review of the legal aid scheme in its entirety in order to assess the impact on Convention rights of the current scheme and thereafter to make changes to ensure consistency of treatment and resolve any incompatibilities between policy objectives.[675] Lastly, it would also be appropriate to take a fresh approach to applications for ECF made at an early stage. Applications that are made early on, in order to prevent breaches of Convention rights or minimise the risk of the same, should be welcomed. This is required particularly in view of the underlying duty of prevention contained within the state's positive obligations.

7.5 Systemic requirements of a lawful ECF scheme

The means by which states ensure effective access to Court are within their margin of appreciation.[676] Limitations on the right of effective access to Court must pursue a legitimate aim and be proportionate. The limitation on the legal aid scheme in general by way of merits testing as a way of managing a defined budget is a

[675] The Government has announced that a review of LASPO is to be carried out, however, there is no specific commitment to assessing its impact on Convention rights. See Ministry of Justice, *Legal Aid, Sentencing and Punishment of Offenders Act 2012: Post-Legislative Memorandum* (Cm9486, MoJ October 2017) 38.
[676] *Airey v Ireland* (1980) 2 EHRR 305 [26].

legitimate aim. After all, the scheme cannot be open-ended. However, the current merits criteria have tipped the balance back towards a more restrictive merits test which undermines the protection of fundamental rights for which the ECF scheme is designed. The merits criteria in their current form are not a proportionate way of managing limited public funds.

Any legal aid scheme must be operated with 'diligence'[677] and applicants must not be subjected to 'arbitrariness'.[678] There is some overlap between these two safeguards. The empirical evidence of the presence of these safeguards shows a mixed but quite negative picture. On the positive side there is some evidence that the LAA shows 'care and effort' in its treatment of ECF applications. For example, requests for further information and evidence from the LAA might be viewed as evidence of 'care and effort' on their part. Similarly, caseworkers are allotted in the region of a working day to assess and determine each application for ECF. This may be viewed as a positive illustration of the LAA wanting to give sufficient time to each application. However, ultimately actual decisions are only checked routinely if the initial decision maker intends to grant ECF, or more latterly, if the case is considered to be 'high profile'. This demonstrates a distinct structural bias to the detriment of applicants in the way that the ECF system is set up. There is a presumption that funding will not be granted and it is only when, unexpectedly, an applicant successfully rebuts that presumption that the decision is checked because a grant of funding is an unexpected outcome. This shows that the care and effort expended may sometimes be targeted to particular kinds of applications. In this case the focus is on those cases which are likely to incur a cost to the LAA by granting funding to an applicant. As this is unanticipated there is clearly a view that mostly it is not necessary to routinely review decisions. Targeted review in itself is not necessarily problematic but it is the grounds for such targeting that is questionable.

Issues concerning the independence of ECF decision makers arise on two levels: at the individual level when decisions are taken by individual LAA caseworkers and on an organisational level. The position of the LAA within the Ministry of Justice and the direct relationship between the LAA's most senior officer and the Lord Chancellor must be considered in that regard. At the individual level the empirical evidence is

[677] *Tabor v Poland* [2006] ECHR 654 [43].
[678] *Del Sol v France* (2002) 35 EHRR 38.

that there is some resistance on the part of ECF caseworkers to the expertise of others. This may be taken to suggest a lack of objectivity or independence on their part in the form of a lack of openness to the arguments presented within an application for ECF. At the organisational level the Chief Executive (also the Director of Legal Aid Casework) reports directly to the Lord Chancellor. In terms of the perception of the LAA's role as distinct from and independent from the Ministry of Justice one LAA participant stressed that the LAA are 'just implementers of Ministry of Justice policy'. The implication is that any actions of the LAA can only fall to be considered at the level of individual decisions, not as indicative of any inherent unfairness in the system. The test of 'inherent unfairness' requires an answer to the question, does the ECF scheme provide applicants with a fair opportunity to obtain legal aid?[679] If it does not then the scheme may be struck down as unlawful. This was the basis of the systemic challenge to the ECF scheme brought in the case of *IS*. If, as decided by the Court of Appeal in *IS*, the ECF scheme is lawful then a legal challenge can only be brought to individual decisions.[680]

The law accepts that there will always be a risk of unfairness in any system but this should be kept to an 'irreducible minimum'.[681] It can be recalled from section 4.5 that in the *Refugee Legal Centre* case it was the fast track procedure for determining asylum claims at Harmondsworth Immigration Removal Centre which was at issue. In that case the Court recommended that a 'flexibility policy' be put in place. The purpose of such a policy was to make clear when time limits should be extended in order to ensure that the processing of asylum claims was fair. A similar issue arises in relation to the ECF scheme. The standard timetable for ECF applications to be determined by the LAA is 20 working days, falling to five days for urgent cases.

The evidence suggests that in cases which are time sensitive, such as applications S1/A2 and S1/A4, the prospect of delay may deter applicants from challenging adverse decisions. Instead they find alternative means of support. This is because delay may defeat what they are trying to achieve e.g. a time limit for appeal may pass. The urgency procedure adopted by the LAA which requires ECF applications

[679] *R (on the application of Tabbakh) v Staffordshire and West Midlands Probation Trust and another* [2014] EWCA Civ 827; *R (on the application of the Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481; *The Director of Legal Aid Casework and the Lord Chancellor v IS (a protected party, by his litigation friend the Official Solicitor)* [2016] EWCA Civ 464.
[680] An application by *IS* for permission to appeal to the Supreme Court was refused.
[681] *R (on the application of the Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481 [8].

to be determined within five days is regarded as insufficient.[682] In part this is because an urgent application for ECF requires a full application to be submitted. Furthermore, in cases where significant action is needed immediately, such as to prevent the eviction of gypsies or travellers from an illegal encampment, eviction may have taken place by the time ECF is granted. For these reasons it is essential that emergency procedures for ECF which mirror those for 'in scope' applications, at least in spirit if not in form, are developed and implemented as there is no good reason why ECF should be treated differently in this way.[683]

The important features of the scheme for emergency funding that is available to 'in scope' applicants are that applications for Controlled Work and most forms of Licensed Work can be granted immediately by providers under a system of delegated functions.[684] If delegated authority is not available to a legal aid provider then it is possible to submit an emergency application to the LAA in form CIVAPP6.[685] This is a much shortened form compared to what would ordinarily be required. It is accepted by the LAA that in emergency cases full information, to demonstrate that the means and merits tests are satisfied, may not be available but that in certain circumstances justice requires that legal aid be granted nonetheless. This includes cases in which there is a risk to life, liberty, safety or a risk of homelessness for the applicant and/or their family. In such cases it is recognised that any delay in obtaining funding could cause substantial injustice, hardship or

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[682] The urgency procedure adopted by the LAA for ECF cases does not have a statutory underpinning whereas the emergency procedures for 'in scope' cases are specifically provided for in regulations. The ECF urgency provision can be found in Legal Aid Agency, 'Exceptional Case Funding – Provider Pack' (Legal Aid Agency July 2016) 5. Available at <https://www.gov.uk/government/publications/legal-aid-exceptional-case-funding-form-and-guidance> Last accessed 7 January 2018.

[683] Emergency representation is defined in the Civil Legal Aid (Procedure) Regulations 2012, SI 2012/3098, reg 2 as 'legal representation (not Controlled Work) or Family Help (Higher) provided following a determination on an urgent application'. However, for the purposes of discussion here any funding that can be granted immediately by a legal aid provider under a delegated function is included as for practical purposes this can be provided in an emergency.

[684] Delegation of the Director of Legal Aid Casework's powers is permitted in general terms by LASPO 2012, s 5; and Civil Legal Aid (Procedure) Regulations (2012), SI 2012/3098. Specific delegations in respect of Licensed Work are contained within the Standard Civil Contract Specification at paragraphs 5.2-5.4 and for Controlled Work at para 3.2 of the contract specification. The 2013 contract as amended in May 2016, can be found here: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/526402/2013-standard-civil-contract-specification-general-provisions-1-6-ame....pdf> Last accessed 6 September 2017.

[685] Form CIVAPP6 can be found here: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/539963/civapp6-version-14-july-2016.pdf> Accessed 6 September 2017.

lead to the prospects of progressing a case being beyond repair. Consequently, emergency funding can be granted for a period of eight weeks on limited information, without a full means assessment. Furthermore, emergency applications can be made by any method agreed by the LAA, including fax, email or telephone.[686] Whilst the ECF scheme persists in its current form, in which no specific provision is made for emergency cases, this will only serve to give weight to the claim that the system is 'inherently unfair'.

In order to guard against arbitrariness, and to counter accusations of 'inherent unfairness' in the ECF scheme there must be adequate rights of appeal against a refusal of funding.[687] This is one of the key features of a scheme if it is to be regarded as having sufficient guards against arbitrariness. In the case of ECF there is no right of appeal. Applicants can, however, request an internal review of an adverse decision by the LAA. The empirical evidence shows that the internal review process is not well used, despite LAA perceptions to the contrary. Since the implementation of LASPO only in the region of a third of refused or rejected applications have resulted in a request for a review. The definition used for a 'review' by the LAA is any application that is resubmitted after being refused or rejected. Rejected applications may be returned for being incomplete or in scope. In the case of rejected applications no decision is actually made before it is returned. Therefore the rate of 'true reviews' i.e. of earlier refusals rather than rejections may be much lower than the published statistics suggest. It is also not clear how the ECF team distinguish between an application in which they decide that it is appropriate to request further information or evidence before making a determination and an application that is rejected for being incomplete.

As well as there being adequate rights of appeal against a refusal of funding, decision makers must be an 'appropriately constituted group'.[688] The ECF team is staffed by a mixture of people with and without legal qualifications. Those with legal qualifications, and who have qualified as a solicitor or barrister, do not always have significant practice experience in the categories of law in which they are determining ECF applications. By way of contrast this would not be accepted in the context of legal aid providers. For example, immigration advice is regulated by the Office of the Immigration Services Commissioner (OISC). In order to provide immigration advice

[686] Civil Legal Aid (Procedure) Regulations 2012, SI 2012/3098, regulation 51(1).
[687] *Del Sol v France* (2002) 35 EHRR 38; *Eckardt v Germany* (2007) 54 EHRR 52.
[688] *Del Sol v France* (2002) 35 EHRR 38.

most advisers must register with the OISC.[689] The OISC registration scheme places limitations on the type and complexity of the work that may be carried out depending upon the individual adviser's competence, level one registration being the most basic, and level three the most complex. Advisers are not permitted to work at a level higher than that at which they are registered. More generally, in order to be awarded a legal aid contract organisations must be able to demonstrate that their staff can meet certain specified supervision requirements. Similarly, the Code of Conduct operated by the Solicitors Regulation Authority (SRA) by which all solicitors are bound requires that solicitors only take on cases for which they have the 'resources and skills' to carry out the client's instructions.[690] At present the ECF scheme assumes that experience is transferable in ways that it is not. Whilst this issue did not arise explicitly in the interviews with the LAA participants, it may be that practitioners are more able to say that they are lacking the necessary expertise in order to make applications. The interviews with LAA staff indicated that there may be a lack of relevant expertise within the ECF team although the LAA staff interviewed seemed to be unaware that this might be the case and certainly did not explicitly comment on this to the researcher.

For the ECF system to be fair there must be judicial oversight. In the High Court in *IS* the lack of judicial oversight of the ECF scheme was held to be capable of being unlawful. This was reversed in the Court of Appeal. However, it is notable that in the *Refugee Legal Centre* case, relied upon in *IS*, the availability of the Immigration and Asylum Tribunal as a means of rectifying mistakes in initial decision making at Harmondsworth was not sufficient as an answer to the accusation of inherent unfairness. The Court of Appeal observed that the IAT may not be able to cure earlier defects in the system if an asylum claimant, distressed and under pressure, says something in their asylum interview about which inconsistencies or omissions are later identified when the case comes to the attention of the IAT. A similar point can be made about ECF. Many people are not applying or pursuing challenges to adverse decisions because by doing so the delay may defeat their substantive case, for example, appeal rights are lost or a limitation date passes. There is also a

[689] Details of the OISC requirements can be found on the Gov.uk website here <https://www.gov.uk/government/publications/how-to-become-a-regulated-immigration-adviser/how-to-become-a-regulated-immigration-adviser#applying-for-the-correct-level> Last accessed 15 January 2018.

[690] SRA, 'Code of Conduct', outcome 1.4. Available at <*http://www.sra.org.uk/solicitors/handbook/code/part2/content.page*> Last accessed 15 January 2018.

difference between a judicial appeal mechanism to which all have access as of right after an adverse decision, as opposed to judicial review, for which permission must be obtained and which only permits challenge on limited public law grounds.

In order to bring a judicial review of an adverse ECF decision most applicants are likely to require legal aid and decisions as to whether funding to pursue a judicial review should be granted are made by the LAA. The empirical evidence suggests that there is more than a theoretical conflict of interest in this regard. For example, in interview, S7 recalled an instance in which the decision maker on a judicial review legal aid application consulted with the ECF team before deciding whether to grant funding for the judicial review to challenge the refusal of ECF. Moreover, since 22 July 2016 there have been more stringent merits criteria for public law cases, including judicial review, which may have made it more difficult to obtain funding. These factors, combined with the deterrent effect of the time it takes to go through the review process, mean that in reality there is limited judicial oversight available. The low level of success on review also puts people off from using the process. Whilst it is also possible to pursue a complaint using the LAA's complaints procedure as opposed to an internal review, if the complaint is ultimately referred to the Parliamentary and Health Service Ombudsman this too may be amenable to judicial review and the same problems are likely to arise in relation to delay and the funding of a judicial review. Consequently, the opportunities for challenge and oversight of the ECF scheme are insufficient to act as a corrective to poor decision making and operation of the scheme as suggested by the Court of Appeal in *IS*. In reality, judicial review has only brought about improvement for ECF applicants involved in immigration cases.

7.6 Use of Article 3 in relation to welfare benefits applications for ECF

The Lord Chancellor's Guidance does not explicitly consider any other grounds for a grant of ECF outside of Articles 6 and 8 ECHR. However, as discussed in chapter 5 there is a compelling case that in some welfare benefits cases there will be an obligation on the Legal Aid Agency (LAA) to grant ECF on the basis of Article 3 ECHR. This provides that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' If without legal aid there would be a breach or a risk of a breach of the Article then ECF must be granted. The case is made by

analogy with the judgment in *Limbuela*,[691] along with evidence from research on the impact of recent welfare reforms, particularly in the form of sanctions. Those to whom a sanction is applied have been singled out for different treatment as a result of welfare conditionality. The application of a sanction and the consequent withdrawal of benefits is a deliberate act of the state and therefore constitutes 'treatment' for Article 3 purposes.

It is not sufficient to attract the protection of Article 3 if an individual is simply destitute. In order to be considered 'inhuman and degrading' their treatment must result, or be likely to result in, a condition which has deteriorated to a state that goes beyond mere destitution, in which the individual is humiliated, has lost self-respect and/or has become despairing. This is judged by reference to the factors identified in *Limbuela* which include gender, age, health, the extent to which all avenues of assistance have been explored, the time spent and to be spent without any means of support, exposure to the elements from rough sleeping (including health and safety concerns) and the effect of having no access to toilet/washing facilities. Despite the finite nature of the withdrawal of benefits it is not difficult to see that suffering privation, with no, or no sustainable or acceptable alternative sources of support, and where the individual cannot support themselves, either because they cannot find work or cannot work due to illness or disability, could develop beyond destitution and into the realms of inhuman and degrading treatment.

The numbers of sanctions applied each year, the lengths of time for which benefits may be withdrawn as a result and the DWP's poor record in respect of making hardship payments create conditions in which destitution and circumstances amounting to inhuman and degrading treatment can flourish. There is burgeoning evidence that when benefits are withdrawn there is a real risk of the development of circumstances that cross the threshold for Article 3 protection. For example, in research carried out by a group of universities in the UK, interviewees who had been sanctioned reported 'the adverse and lasting impact that sanctions had on their day-to-day lives'. Experiences included visiting a food bank, relying upon friends, falling into debt including rent arears, and in one extreme example turning to prostitution to try and make ends meet.[692] There is increasing reliance on food

[691] *R v SSHD ex parte Limbuela* [2005] UKHL 66.
[692] Peter Dwyer and others, 'Welfare Conditionality: Sanctions, Support and Behavioural Change First Wave Findings: Disability and conditionality' (May 2016) 9

banks, such as those run by the Trussell Trust, at the same time that other support services are dwindling due to huge reductions in funding.[693]

The prohibition on inhuman and degrading treatment in Article 3 ECHR places both negative and positive duties on the state. The positive element can require states to intervene when there is a risk that treatment, including deliberate acts such as a sanction, may cross the threshold for 'inhuman and degrading treatment' under Article 3 and thereby trigger the protection of the Article.[694] After a sanction is applied the individual benefit claimant may ask for the decision to be reviewed, using the mandatory reconsideration procedure, internal to the DWP. This must be requested before an appeal can be considered by an independent Tribunal. There is no time limit within which a mandatory reconsideration must be dealt with and so the opportunity to rely upon Article 3 in making an ECF application is crucial to this group of people as it is likely that it would be considered that Article 6 could not provide a basis for an application until an appeal is lodged and there is clearly the requisite 'dispute' for Article 6 purposes.

It is very likely that the circumstances of many individual benefit claimants whose benefits have been sanctioned will, without intervention, either reach or be at grave risk of reaching the threshold of inhuman degrading treatment. Article 3 is therefore engaged in these cases and separate guidance from the Lord Chancellor should be developed so as to make clear when ECF should be granted on Article 3 grounds. The existing Guidance should also be amended to make the application of Article 6 to welfare benefits cases much clearer. This is just one example of an area in which the LAA could be much more explicit in setting out when a grant of ECF will be made.

Of the 20 applications for ECF reviewed by the author in the empirical component of this research there were six ECF applications in the welfare benefits category. Although none of them were made on behalf of applicants who had been sanctioned there were two applications that provided examples of where Article 3 could have been utilised. For example, in S2/A2 a woman who had fled domestic violence had

<http://www.welfareconditionality.ac.uk/wp-content/uploads/2016/05/WelCond-findings-disability-May16.pdf> Last accessed 15 January 2018.

[693] Damon Gibbons, 'The Decline of Local Welfare Schemes in England: why a new approach is needed' (Centre for Responsible Credit September 2017) 18.

[694] *R v SSHD ex parte Limbuela and others* [2005] UKHL 66 [46 – 48].

her entitlements to both ESA and Housing Benefit terminated for a period of three months. This was due to a determination that she had capital excess of £16,000 based upon the value of the former matrimonial home which the applicant had fled. She had been diagnosed with depression and prescribed medication. Her tenancy offered no security of tenure, it being an introductory tenancy.[695] If possession proceedings were issued by the applicant's landlord the County Court would be compelled to make an outright possession order unless a public law/human rights defence could be raised. This means that for a period of 3 months it is possible that the applicant had no income and no means of paying the rent, heating her home or buying food. It is not known whether hardship payments were in place or whether she had access to other support. It is therefore possible that the applicant became destitute and that her condition may have crossed the threshold of 'inhuman and degrading treatment'. This assumes that the decision to terminate both ESA and HB constitute 'treatment'. This is therefore arguably a case where the Article 3 threshold could have been reached thus triggering the positive duty on the state to intervene. In S4/A4 a woman with two children, who had left a violent relationship, was living on Working Tax Credit and Child Benefit having been advised by HMRC that she had no recourse to public funds for a period of almost a year. She could therefore not receive payments of Child Tax Credits. In correspondence with the LAA S4 wrote that '…the claimant was at risk of having her child benefit revoked also as a result of being unable to establish her right to reside and that the consequences could be disastrous…'[696] The DWP then demanded the repayment of more than £17,000 of Child Benefit. If Housing Benefit and ESA entitlement was also then reviewed and terminated this could result in loss of the family's home. If all benefits were removed then there is a real risk that the family would be destitute. The applicant suffered from depression and was in the 'support' group for ESA.[697] Again, the decision of non-entitlement to Child Tax Credit may constitute treatment and the possibility of deterioration into an "inhuman and degrading" condition is certainly there in the event that all, or nearly all, of the family's benefit entitlements come to an end.

[695] For details of introductory tenancies and the procedure for bringing such a tenancy to an end see Housing Act 1996, ss124-128.

[696] Application S4/A4. Email from S4 to LAA on 27 January 2016.

[697] Individuals who are awarded Employment and Support Allowance (ESA) are placed in one of two groups. The Work Related Activity Group is for people who are likely to be able to resume work at some time in the future. They are required to attend work-focussed interview and may be required to undertake other work-related activities such as training. The Support Group is for people who have no current prospect of being able to resume work and they are not required to undertake any work-related activities.

As currently drawn the ECF scheme does not even countenance the possibility of a grant of ECF on Article 3 grounds. Whilst this alone cannot be said to render the scheme unlawful it is another example of the bias in how the scheme is structured and set up. There is no positive case made in the Guidance as to when ECF is likely to be granted. Article 3 aside, even where the Guidance does address the possibility of ECF in welfare benefits cases i.e. on Article 6 grounds, the Guidance is opaque and actually quite misleading. This thesis makes the case for ECF to be made available on Article 3 grounds to individuals whose benefit entitlement is made subject to a sanction, by analogy with the case of *Limbuela*. The statistics on increasing food bank usage, evidence from research reporting on the impact of sanctions, and media reports of individual experiences of being sanctioned provide evidence that individuals are becoming destitute after a sanction has been applied. There are also examples of individuals who are at risk of deteriorating, or have deteriorated into, with the qualities of humiliation and despair that characterises the inhuman and degrading treatment which triggers the protection of Article 3.
As a result of the positive duty contained within the Article there is a duty of intervention upon the state to take action to prevent an individual's condition deteriorating beyond 'mere destitution'. Article 3 may also be seen to contain an implied duty of procedural protection in order to ensure that people can effectively participate in decision making process which may affect their Article 3 rights. This applies to determinations of hardship payment applications and requests for mandatory reconsideration of the decision to apply a sanction and/or if hardship payments are refused.

7.7 Art. 47 EUCFR

In addition to the obligations to grant legal aid under the ECHR the UK must also provide legal aid in accordance with EU law in the circumstances required by Article 47 of the EU Charter of Fundamental Rights. Article 47 provides that

> 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. [698]

The Charter applies only when Member States 'are implementing EU law'.[699] The Article 47 provisions mirror, as a minimum, Articles 6 and 13 of the ECHR but with the explicit potential to be more generous in the protection of fundamental rights than those Articles. .[700] This has been recognised by the House of Commons European Scrutiny Committee[701] and was left open by the High Court in the *Gudanaviciene* case.

As the Charter is a legally binding instrument on the UK Article 47 therefore provides a potentially enforceable right to legal aid under EU law. Consequently, if

i. an applicant meets the ordinary merits and means tests operated by the Legal Aid Agency; and
ii. their case involves 'the implementation of EU law'; and
iii. the subject matter is not ordinarily in scope for legal aid[702]

ECF must be granted.

One example of the kinds of case in which the Charter may assist is one which involves the rights of EU citizens and their families to move between and live in Member States.[703]

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[698] The Charter of Fundamental Rights of the EU [2012] OJ C 326/391, Article 47.
[699] ibid Art 51(1).
[700] ibid Art 52(3).
[701] European Scrutiny Committee, *The application of the EU Charter of Fundamental Rights in the UK: a state of confusion* (HC 2013-14, HC 979) para 163; Ministry of Justice, *Government response to the House of Commons European Scrutiny Committee Report 43rd Report, 2013-14, HC979, The application of the EU Charter of Fundamental Rights in the UK: a state of confusion July 2014* (Cm8915, 2014) 13-14.
[702] LASPO 2012, s 10 (3) (a) (ii).
[703] Provided for by Directive 2004/38/EC of European Parliament and of the Council of 29 April 2004 on the right of citizens to the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.

This potential right to ECF arising from Article 47 is examined in Part B of the Lord Chancellor's Guidance on ECF.[704] The Guidance recognises the relationship between the Charter and the ECHR and acknowledges that Article 47 goes beyond the scope of Article 6 ECHR to the extent that it is not limited to cases concerning a determination of civil rights and obligations. However, the Guidance lacks any meaningful indication of the kinds of cases in which this is likely to apply and so its practical use for LAA caseworkers, or indeed, those applying for ECF, is very limited.[705]

The possibility of Article 47 to secure ECF for applicants has so far been only superficially explored. This is because the domestic courts have not yet needed to go beyond the Convention rights of applicants that have come before them. The ambit of Article 47 has, however, been explicitly considered by the Court of Justice of the European Union but this was with a view to deciding whether legal persons i.e. companies could have rights to legal aid pursuant to Article 47 in the German context.[706] None of the cases referred to above reflect the confusion that there has apparently been as to the extent of the applicability of the Charter in the UK at all.

The limited reliance upon and use of Article 47 predicted by the Lord Chancellor's Guidance on ECF is reflected in the finding of the author's empirical work. Of the 20 ECF applications reviewed Article 47 was highlighted as a specific basis for a grant of ECF in 5 cases. In addition there were 3 cases in which Article 47 arguably applied but which did not specifically highlight this. The most obvious explanation as to why that was the case is because when the CIV ECF1 form was updated in order to simplify it after the High Court hearing in *IS* the space for setting out the legal basis for a grant of ECF, whether by reference to the ECHR or enforceable EU law rights was merged into one single box. Whereas in the original version of the CIV ECF1 there was a specific box within which reliance on EU law as a basis for the application had to be set out. In two cases Article 47 was highlighted as being relevant but the applications did not say how or why the Article applied, rather they

[704] Lord Chancellor's Exceptional Funding Guidance (non-Inquests) paras 30-34 in the first version of the Guidance published April 2013; paras 31-35 of the second version of the Guidance published on 9 June 2015 and paras 31-35 of version 3 of the Guidance published on 12 November 2015. The text is exactly the same between the three versions of the Guidance.
[705] Lord Chancellor's Exceptional Funding Guidance (non-Inquests) version 1 April 2013 para 32 and 34; version 2 June 2015 para 33 and 35; version 3 November 2015 paras 33 and 35.
[706] Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* [2010] ECR I-13849.

just set out the wording of the Article but did not seek to apply it. In one of those cases it was the author's view that Article 47 did not apply.

In one application the Article was actively in dispute (S1/A1). This was a refugee family reunion case in which the applicant was seeking to bring his wife to join him in the UK. The dispute as to the applicability of Article 47 arose because the applicant's wife was not in the UK or in any other Member State when the application was made. In two cases where Article 47 arguably applied the applications were refused on ordinary merits grounds and so the LAA did not move on to consider the role Article 47 rights played in the case and ultimately in the decision on whether to grant ECF or not.

The conclusion that must therefore be drawn is that Article 47 of the Charter has been of little consequence in the development and clarification of the ECF scheme in the courts and in the making of applications. Ultimately, if the ECF scheme is not fulfilling the obligations contained within Article 6(1) ECHR then it cannot meet the requirements of Article 47 EUCFR which is arguably more generous than the ECHR. If, as proposed in the EU (Withdrawal) Bill the EUCFR is not translated into domestic law the resulting uncertainty will be doubly problematic for some ECF applicants. Both EU law-based rights to legal aid and the law underpinning some substantive cases for which ECF is sought are likely to concern law that is hotly disputed. Assuming that such cases would be determined as having 'borderline' prospects of success they will not be funded unless they concern public or immigration law. The protection of basic rights are therefore likely to be much diminished post-Brexit. Revised Guidance to caseworkers will need to be in place in readiness for Brexit.

7.8 Conclusion

It is evident that the LAA's approach to weighing the various factors set out in the Guidance in order to arrive at a reasoned decision in each ECF application is variable. Whilst in the refugee family reunion cases seen for the purposes of this study the seriousness of what is at stake for the applicant was readily accepted, in other types of case that is not so. Where, objectively, relatively small amounts of money are at stake albeit with potentially devastating consequences for the applicant, the seriousness of such cases is not routinely acknowledged. This is

because the Guidance contains an objective test directing caseworkers to enquire about the sums at stake but gives no direction as to the individual consequences of, for example, being refused benefits. There is what may be described as a negative signal or structural bias in the scheme against a grant of funding in “money cases”.

There are considerable tensions in the understanding, application of, and interplay between, the LAAs evaluation of two factors in particular. These being the complexity of the case (law, procedure and facts) and the capacity of the individual to effectively present their case. In the ECF applications reviewed the weighing up of these two factors was frequently at the root of refusals of ECF. Underpinning this is an approach to decision making which lacks the sensitivity to properly weigh the factors in the Guidance in more nuanced cases where there is no ‘smoking gun’ such as a lack of capacity. Whatever the explanation for the highly variable grant rates between categories of law there is a clear, albeit rebuttable, presumption that funding will not be granted. This is evident from much of the language in the Guidance and that when there is scope for interpretation of the Guidance by the LAA this tends to work against the applicant. The overall assessment must be that the Article 6(1) obligations are not being met and if that is the case then the requirements of the more generous Article 47 of the EU Charter cannot be either.

The evidence suggests that applicants are more likely to succeed if they are able to prove a negative e.g. by referring to previous failed attempts to progress matter without legal assistance. Given that there is no unqualified right to civil legal aid the starting presumption that legal aid is not required unless the relevant tests are met is lawful. However, Article 6 (1) creates a positive obligation on the state to take action to ensure that rights are made real, including the allocation of resources, as was discussed earlier in this chapter. There are also inherent positive obligations in the other Convention rights discussed, these being Article 8 and Article 3. Consequently what is needed is a much more proactive approach to the operation of the ECF scheme. The Guidance does not currently countenance a grant of funding on any basis other than Articles 6 and 8 yet as shown above there is a compelling case the in welfare benefits cases Article 3 may frequently be engaged and a preventative duty can be constructed.

Despite some positive steps towards meeting the state’s obligations under the Convention following the *Gudanaviciene* and *IS* litigation there remain multiple ‘LASPO gaps’ between the policy objectives underlying the LASPO scheme in

general and ECF in particular. This is especially the case for individuals whose Convention rights are clearly engaged but who are on the margins of the current legal aid means test, a state of affairs that has been far too readily accepted. Other unintended consequences include parties being left without representation which leads to circumstances in which they are faced with the prospect of directly cross-examining former partners or children of the family whom it is alleged they have abused.

There is an inconsistent and irrational treatment of Convention rights and an incompatibility between policy objectives. This has arguably come about partly because of the overriding priority given to financial considerations as per the stated aims of the LASPO reforms and partly because no proper consideration appears to have been given to the principles that might or should be at the heart of the scheme. This presents a serious problem of multiple gaps between principle, stated policy and practice.

To some extent the state has shifted the burden of realising the right of effective access to court (and other Convention rights) on to the legal profession. Bearing in mind the proactive duties placed on the state and the gaps identified in the arrangements for ECF it is evident that the scheme is only working to the extent that it is due to the goodwill of the legal professions, who have shown some willingness and determination to make the scheme work for their clients. This is not sustainable. Even in the immigration law category where the proportion of applications being granted in 2016/17 was in excess of 70%, the number of applications remains low at 903 for the year. In family law, the grant rate is only just over half of what it is for immigration and there were just 268 applications in 2016/17. At best, the ECF scheme has evolved into ‘an exceptional funding scheme for immigration cases’. Urgent steps are needed in order to get it working for everyone else.

CHAPTER 8 - CONCLUSION

8.1 Research questions and method

This thesis posed the question 'can the UK rely upon the Exceptional Funding Scheme under s.10 LASPO in order to discharge its obligations to provide civil legal aid under the European Convention on Human Rights (ECHR) and EU law?' In unpacking this question there are three sub-questions: (a) what do the obligations under the ECHR and EU law require? (b) does the ECF scheme, as drawn, meet those obligations in theory? and (c) has the scheme been implemented in a manner which meets the requirements identified? A black letter legal analysis and an empirical qualitative study of the ECF scheme was undertaken. This consisted of a desk-based review of a variety of documentary sources including: a sample of 20 applications for ECF; statistics published by the LAA; the judgments in the key cases concerning ECF since its inception,[707] the Scott Schedule summarising the evidence presented by the parties to the High Court in the *IS*,[708] case along with all of the evidence on ECF submitted to the Bach Commission on Access to Justice. The evidence contained in the *IS* Scott Schedule was derived from the witness statements of 65 legal practitioners, one individual who had made a direct application for ECF and eight representatives of the Legal Aid Agency and Ministry of Justice and pertained to 99 specific applications for ECF. Following the desk-based review semi-structured interviews were carried out with six legal practitioners and three decision makers from the Legal Aid Agency's ECF team.

8.2 Findings

In order for the ECF scheme to be lawful it must, as required by Article 6 ECHR, provide effective access to court and a fair hearing. There are a number of factors that must be taken into account when determining whether funding should be granted or not. These include the importance of what is at stake, the complexity of the law, evidence or procedure in the case and the applicant's ability to represent

[707] *R (on the application of Gudanaviciene and others) v The Director of Legal Aid Casework and The Lord Chancellor* [2014] EWHC 1840 (Admin); [2014] EWCA Civ 1622; *IS (by the Official Solicitor as Litigation Friend) v The Director of Legal Aid Casework and The Lord Chancellor* [2015] EWHC 1965 (Admin); [2016] EWCA Civ 464

[708] *IS (by the Official Solicitor as Litigation Friend) v The Director of Legal Aid Casework and The Lord Chancellor* [2015] EWHC 1965 (Admin).

him or herself effectively. Article 8 ECHR requires consideration of the same matters in order to ensure that the procedural protection guaranteed by the Article is provided. The scheme must therefore also ensure that applicants can properly participate in decision making processes in which decisions affecting Article 8 rights are taken. It is also contended that in some welfare benefits the protection of Article 3 is engaged and that this will give rise to duties of intervention and procedural protection requiring a grant of ECF. Limitations on effective access to court are permissible in the form of means and merits tests, which control eligibility for ECF, provided that such limitations are proportionate, a necessary means of achieving a legitimate aim and are operated with diligence and without arbitrariness. Crucially, there must be a proper and effective means of challenging refusals of ECF. The scheme itself must be inherently fair.

It might appear at first glance that the legislation (s.10 LASPO) and the Lord Chancellor's Guidance meet the requirements for protecting Convention rights. For example, the Guidance makes reference to the primary factors distilled from both the domestic and European human rights jurisprudence that are relevant to deciding whether legal aid must be granted or not on Article 6 and 8 grounds. However, there are a number of ways in which the Guidance, in particular, is problematic. Even after the *Gudanaviciene* judgments the language of the Guidance was amended only minimally. Consequently, within the Guidance language remains which serves to give negative signals to decision makers and operates in such a way as to increase the threshold that an applicant has to reach in order for funding to be granted. One example of this is the invitation to caseworkers to consider whether an applicant for ECF is 'incapable of presenting their case without the assistance of a lawyer'[709] when the actual test is whether an applicant can present their case 'effectively and without obvious unfairness'.[710] There is an overriding presumption within the ECF scheme that representation is not required unless there is particular persuasive evidence to the contrary. This is illustrated by the difficulties which applicants may face if they have not tried and failed to achieve a positive outcome at an earlier hearing or have clear evidence that they lack legal capacity. The language of the Guidance and the LAA's interpretation of it are both indicative of this. A grant of funding is not expected, which is one explanation for the fact that

[709] Lord Chancellor's Funding Guidance (Non-Inquests) 8, para 23.
[710] *Gudanaviciene and others v Director of Legal Aid Casework and the Lord Chancellor* [2014] EWCA Civ 1622 [56].

decisions are only checked routinely when ECF is to be granted.[711] In this way there is a distinct structural bias to the detriment of applicants in the way the system is set up.

The Guidance does not countenance the possibility of ECF being granted on any grounds other than Articles 6 and 8 ECHR. However, s.10 says that 'services are to be available' if an exceptional case determination is made under s.10 (3) LASPO. S.10 (3) requires that legal services are to be made available if a refusal of funding would amount to a breach of the individual's Convention or EU law rights or there is a risk of such a breach. It does not only cover Article 6 and 8 rights as the Guidance would seem to suggest. To that extent the Guidance does not meet the requirements of the ECF scheme's statutory underpinning. This is another example of structural bias within the scheme and may render the Guidance unlawful. Although a counterbalance to this is that the ECF application form does give applicants an opportunity to say if other Convention rights are engaged.

The emerging picture of the operation of the ECF scheme is one in which legal aid providers and barristers must often be willing to do significant amounts of pro bono work. This performs three main functions: (1) progressing cases to a point where an application for ECF is less likely to be viewed as speculative and therefore more likely to be granted; (2) bringing in public law and human rights expertise where needed; and (3) developing a case into a piece of strategic litigation. In this way the state has shifted the burden of realising the right of effective access to court (and other Convention rights) on to the legal profession. Bearing in mind the proactive duties placed on the state and the gaps identified in the arrangements for ECF it is evident that the scheme is only working to the extent that it is due to the goodwill of the legal professions who have shown some willingness and determination to make the scheme work for their clients.

The ECF scheme is itself complex. This is illustrated by the level of detail and evidence that appears to be required in order to make a successful ECF application. A degree of expertise is required to provide this. It is not enough for practitioners making applications or LAA decision makers to have expertise only in the area of law engaged by an applicant's substantive case, or in public law and human rights

[711] Legal Aid Agency, *Director of Legal Aid Casework Annual Report 2014/15* (Legal Aid Agency 2015) 5. This is separate to the procedure adopted for any case (ECF or in scope) that is deemed to be 'high profile'.

as relevant to ECF applications. There is an urgent need to provide development opportunities and support in order to build the necessary expertise for both practitioners and ECF decision makers alike. At the same time as lacking expertise themselves there is evidence that ECF decision makers can be dismissive of the expertise of others. This has created, at the very least, a perception that ECF applications are determined in something of a hostile environment and perhaps indicates a rejection of the value of professional judgment that is prioritised in Mashaw's Professional Treatment model. This perception is compounded when, as has been reported, a more robust approach to the application of the ordinary merits tests is taken by the LAA. In doing so the LAA risks being seen as putting themselves in the place of the court or tribunal that will make a decision in the applicant's substantive case. However, that is not their function and is an impermissible approach to merits testing.

One aspect of the tension arising from the interplay of the complexity of cases and an applicant's ability to represent him or herself is the different understandings of what may be representative of an individual's capability.[712] None of the ECF decision makers who participated in this research had a full understanding of the different forms that complexity might take in relation to the proceedings or the applicant themselves. Apart from in obvious cases, such as where it is clear the applicant lacks capacity, the LAA operates a negative burden of proof. It seems that unless an applicant can prove that they need assistance by having failed to represent themselves earlier on in a case, they are assumed to be able to do so. This operates to prevent early intervention and preventative work. Furthermore, the misguided suggestion in the Guidance that courts and tribunals can be relied upon to provide support and expertise, thus negating the need for representation, serves to increase the threshold of personal legal capability when weighing up whether ECF should be granted, in a way that does not accord with how the courts and tribunals really operate.

There is a low rate of usage of the internal review process for challenging refusals of ECF, and succeeding on a review is unlikely and has remained so year on year.

[712] 'Capacity' has a specific legal meaning under Mental Capacity Act 2005 s. 2 (1) which provides that '…a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain'. Capability is used in its ordinary meaning to denote a person's abilities to effectively advance a case or represent themselves at a court or tribunal hearing.

Until 2016/17 direct applicants without a lawyer were 3 times less likely to succeed than in a review application made by a solicitor. Direct applicants were also much less likely to request a review in the first place. In the first three years of the life of the ECF scheme requests for reviews by direct applicants were made in just over one in five of all eligible cases, although this doubled in 2016/17. Comparatively, the take-up of internal review is higher in the context of ECF than in other arenas such as social security and homelessness. Given that most applicants for ECF are assisted by a lawyer, compared for example with just 25% of homeless applicants in one study, this is not surprising. However, it might be expected that with a professional adviser leading on the process for most ECF applicants the rate of reviews would be much greater than one in three, which has been the average review rate for applications submitted by lawyers over the first four years of the scheme. Despite this the LAA perception is that most people who can request a review, do so.

One way in which this study challenges earlier analyses of the use of internal review mechanisms is the finding that there is a significant disparity in the proportion of cases in which reviews are requested, as well as review success rates, between different categories of law.[713] In particular this is the case when comparing the two most common areas of law with which ECF applications are concerned: immigration law and family law. Earlier research does not assist in explaining why there might be such different patterns of review use and success within a single system.

The role and potential impact of judicial review is a common theme between this study and previous research. This research found that the role of judicial review in improving the quality of ECF decision making was limited. This is partly for reasons of cost and partly because it is not available as of right following a refusal of ECF. Moreover, the basis upon which a claim for judicial review can be made is limited to narrow public law grounds. Consequently, it is insufficient to act as a corrective to the many deficiencies in the scheme. Judicial review has only really had an impact in immigration cases following the case of *Gudanaviciene*.

The LAA's approach to weighing the various factors set out in the Guidance in order to arrive at a reasoned decision in each ECF application is variable. There is a need to interpret a variety of concepts from the law and Guidance such as 'complexity',

[713] See section 6.4.1.

'obvious unfairness' or whether the applicant is able to 'represent themselves effectively' in deciding whether to grant ECF. Thus, in making an ECF determination there is an 'embedded discretion' available to caseworkers as identified by Harlow and Rawlings. Where there is this scope for interpretation of the Guidance this tends to operate against the applicant. The proper exercise of 'embedded discretion' relies upon each decision maker having a proper understanding of the tests they are to apply in reaching a decision. In that context the findings of this study give cause for concern due to the inconsistent understandings of complexity amongst LAA caseworkers. Most worrying though was the report by one interviewee from the LAA who stated that the change in the overarching test for whether ECF must be granted from the case of *Gudanaviciene* had made no difference to their approach to decision making.

There are considerable tensions in the understanding, application of, and interplay between, the LAA's evaluation of two factors in particular, these being the complexity of the case (law, procedure and facts) and the capability of the individual to effectively present their case. In the ECF applications reviewed the weighing up of these two factors was frequently at the root of refusals of ECF. Underpinning this is an approach to decision making which lacks the sensitivity to properly weigh the factors in the Guidance in more nuanced cases where there is no 'smoking gun' such as a lack of capacity. One explanation for this might be the presence of political pressure to control costs which Mashaw has suggested can lead to refusals if it is not obvious that the applicant qualifies. It is then left to the applicant to challenge an adverse decision. Whatever the explanation for the highly variable grant rates between categories of law there is a clear, albeit rebuttable, presumption that funding will not be granted. This is evident from much of the language in the Guidance and that when there is scope for interpretation of the Guidance by the LAA this tends to work against the applicant. The overall assessment must therefore be that the Article 6(1) obligations upon the UK state are not being met and if that is the case then the requirements of the arguably more generous Article 47 of the EU Charter cannot be either.

Article 6(1) creates a positive obligation on the state to take action to ensure that rights are made real, which can include the allocation of resources. There are also inherent positive obligations in the other Convention rights discussed, these being Article 8 and Article 3. Consequently what is needed is a much more proactive approach to the operation of the ECF scheme. Despite some positive steps towards

meeting the state's obligations under the Convention following the *Gudanaviciene* and *IS* litigation there remain multiple 'LASPO gaps' between the policy objectives underlying the LASPO scheme in general and ECF in particular. This is especially the case for individuals whose Convention rights are clearly engaged but who are on the margins of the current legal aid means test or who fall below the high bar set by the 'prospects of success' merits criteria.

The ordinary merits test implemented between 27 July 2015 and 21 July 2016 struck the right balance between the protection of Convention rights and the exclusion of unmeritorious cases. As a result of the regression to a more restrictive, and it is argued unlawful, ordinary merits test since 22 July 2016 the prospects of success bar is set much higher thus allowing the exclusion of many more cases from the possibility of publicly funded legal representation regardless of whether the ECF criteria are met. The importance of taking steps to address the lack of an 'any grounds' appeal, as of right, to an independent (judicial) person when ECF is refused is elevated as a result. This is particularly the case for those applicants who cannot bring or defend litigation at all without legal representation (children and adults without legal capacity) or who have very limited capability.

The priority given to the protection of Convention rights is inconsistent within the post-LASPO legal aid scheme more widely. This has arguably come about partly because of the overriding priority given to financial considerations as per the stated aims of the LASPO reforms. The prioritisation of financial and administrative concerns suggest that Mashaw's Bureaucratic Rationality model is dominant in the ECF scheme and this can be seen in the absence of an emergency procedure or any delegated functions for providers making ECF applications. No proper consideration appears to have been given to the principles that might or should be at the heart of the scheme. This presents a serious problem of multiple gaps between principle, stated policy and practice.

8.3 Implications

The findings of this study will be of considerable interest to legal professional bodies and advocacy groups such as the Public Law Project, Law Society and Legal Aid Practitioners Group because of continuing concerns about the post-LASPO legal aid landscape generally and the operation of the ECF scheme in particular. For

example, the conclusions reached in this research on the duty to intervene and provide procedural protection in welfare benefits sanctions cases, where there is a risk of the individual deteriorating into a condition that can be described as inhuman and degrading, lends support to and extends the Law Society's recent campaign to reinstate what they refer to as 'Early Legal Advice'.[714]

The research may also be of interest to organisations such as Citizens Advice Bureaux and Law Centres who continue to provide welfare benefits advice, along with pro bono partners such as University Law Clinics, who may see potential for a strategic project designed to identify cases in which applications for ECF on Article 3 grounds should be made. This might give rise to the opportunity for bringing a test case in the event that such applications are routinely rejected by the LAA.

This thesis may also be a timely contribution to the review of LASPO currently being undertaken by the Government, the results of which are due for publication in the summer of 2018.[715] More widely, those within the Ministry of Justice and Legal Aid Agency who are responsible for the implementation of the ECF scheme or who are accountable for the performance of the ECF team, may be interested in the challenges for and deficiencies in ECF decision making identified through this research, so that they may take steps towards addressing those issues. Chapter 5 in particular may be used as a blueprint for the development of specific guidance on the circumstances in which ECF must be granted in welfare benefits cases in which Article 3 ECHR is engaged.

The research will also speak to individuals and groups interested in or working in the field of administrative justice, legal aid policy or human rights. Located at the intersection of these three areas this project seeks to advance a case for renewed consideration of how Convention rights can be consistently protected and prioritised in the context of legal aid policy and its administration. The Bach Commission recently called for a new right to justice with a 'set of guiding principles' underpinning such a right.[716] This research may provide a starting point for thinking about how Convention rights could be applied in that context.

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[714] The Law Society's press release launching their campaign on 27 November 2017 can be seen here <http://www.lawsociety.org.uk/news/press-releases/restoring-state-funding-for-early-legal-advice-could-save-cash/> Last accessed 9 December 2017.

[715] Ministry of Justice, *Legal Aid, Sentencing and Punishment of Offenders Act 2012: Post-Legislative Memorandum* (Cm9486, MoJ October 2017) 38.

[716] Bach Commission on Access to Justice, 'The Right to Justice' (Fabian Society September 2017) 7.

8.4 Recommendations for reform

Based on the findings of this research the following recommendations for reform are made:

1. An emergency procedure for ECF applicants should be introduced so that providers can exercise delegated functions and/or the CIVAPP6 procedure can be used. There is no objectively justifiable reason why emergencies cannot be properly catered for within the ECF scheme as they are for 'in scope' legal aid.

2. In order that Convention rights can be consistently protected and prioritised across the legal aid scheme, the ECF criteria should be the first stage of assessing all applications for legal aid, whether 'in scope' or ECF.

3. When the ECF criteria are met the means test capital and income limits should be disregarded and there should be a discretion to waive contributions to legal aid.

4. There should be flexibility in the system so that the ordinary merits tests can be dis-applied in cases where the ECF merits criteria are met.

5. A right to a 'full merits review' by an independent (judicial) person should be introduced for all applicants who are refused ECF. This could overcome the limitations identified in relation to the current arrangements for internal review and the limited grounds on which judicial review may be sought thereafter.

6. The Lord Chancellor's Guidance should be amended in order to provide a more detailed, positive and transparent guide as to when ECF is likely to be granted. All of the negative signals in the Guidance should be removed.

7. In order to give effect to the Article 3 duties of intervention and procedural protection all benefit claimants facing the loss of their income due to the application of a sanction should be assessed before benefit is suspended. If there is a risk that the threshold for 'inhuman and degrading treatment' will be reached as a result of the sanction then there should be an automatic

right to ECF (Legal Help). Providers must be given delegated functions to grant ECF themselves in such circumstances. The application of the sanction should also be postponed for a period of 28 days to enable independent advice to be obtained. For these changes to be truly effective it will require the development of positive relationships between the LAA, providers and Jobcentre staff.

8. Given the quite different considerations relevant to deciding whether an ECF application should be granted on Article 3 grounds separate guidance should be prepared and published by the Lord Chancellor. This should reflect the dual duties contained with Article 3: the duty to intervene and the duty of procedural protection.

9. The distinction for legal aid purposes between victims and alleged perpetrators for the purpose of 'in scope' legal aid in domestic violence and child abuse cases should end.

10. An effective programme of training and development opportunities for ECF decision makers, legal aid providers and other organisations working with relevant groups[717] should be developed so as to encourage applications, develop expertise and build confidence in the scheme.

8.5 Further research

This thesis has provided new insights into the ECF decision making process, particularly in relation to understandings of complexity and individual legal capability, and how they are weighed together to reach a judgment as to whether there is an obligation to provide ECF. Building on that, and the existing scholarship which seeks to measure complexity and legal capability, further research should seek to articulate a process for a more nuanced and/or more transparent

[717] Some charities, such as Rights of Women, who are not legal aid providers have set up ECF projects to assist individuals in making an ECF application with a view to referring the individual to a solicitor if ECF is granted. Details of the Rights of Women project can be seen here: <http://rightsofwomen.org.uk/wp-content/uploads/2014/09/ECF-project_info-sheet.pdf> Last accessed 9 December 2017. Another example is the Eaves Poppy Legal ECF project, details of which can be found here: <http://www.eavesforwomen.org.uk/about-eaves/our-projects/exceptional-case-funding/> Last accessed 9 December 2017.

assessment. Comparison could be made between ECF applications in which funding was granted and those which were refused in order to identify features or combinations of features in relation to complexity and personal legal capability that correctly lead to each outcome. This may go some way in addressing the difficulties, identified in this research, of dealing with the majority of ECF applications which are not 'smoking gun' cases.

The study has also highlighted the impact that common limitations on Article 6 rights of effective access to court, in the form of means and merits tests, have on the protection of Convention rights. Cases such as *D* and *Q v Q*, in which legal aid was refused based on means and merits respectively, are illustrative of how Convention rights can be cast aside by the application of hard rules. Further research should be undertaken, focused on the legal aid scheme overall, in order to establish a rational and consistent scheme for the protection of Convention rights. In relation to the legal aid means test the approach taken to the affordability of Employment Tribunal fees by the Supreme Court[718] may provide a starting point for thinking about how the legal aid means test could be updated in order to properly reflect the reality of being able to afford to pay for legal advice and representation.

Unless there is a real shift, political debate about legal aid is likely to continue to be characterised by financial considerations above all else. However, a recent judgment by Lord Reed provides a powerful reminder as to why that should not be the case

> *The constitutional right of access to the courts is inherent in the rule of law.*[719]
>
> *At the heart of the concept of the rule of law is the idea that society is governed by law…Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced….In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be*

[718] *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51.
[719] *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 [66].

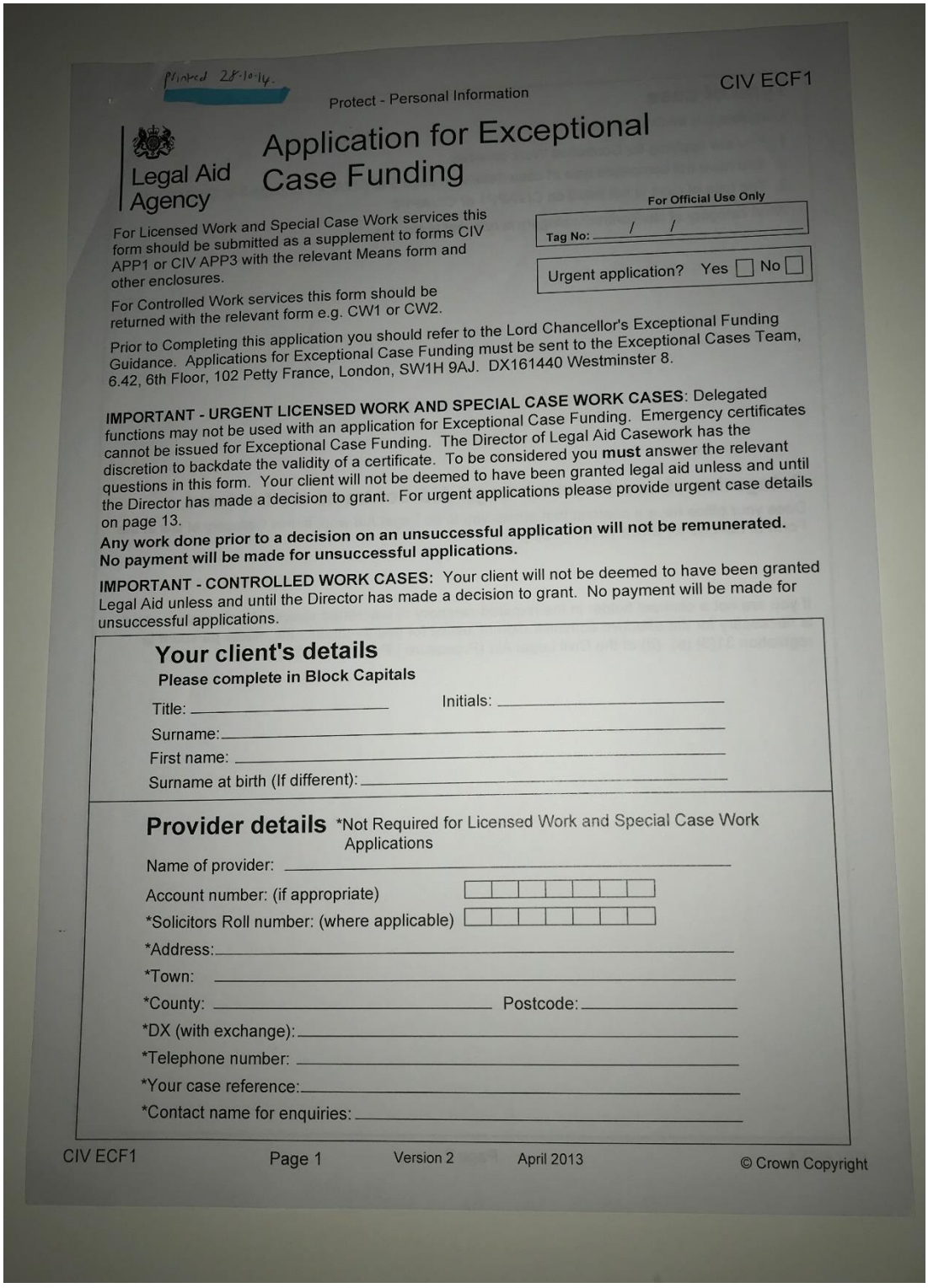
rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade.[720]

[720] *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 [68].

APPENDICES

Appendix A - Sample ECF application form version 2 April 2013

Contains public sector information licensed under the Open Government Licence v3.0.



Printed 28.10.14.

Protect - Personal Information

CIV ECF1

Legal Aid Agency

Application for Exceptional Case Funding

For Licensed Work and Special Case Work services this form should be submitted as a supplement to forms CIV APP1 or CIV APP3 with the relevant Means form and other enclosures.

For Controlled Work services this form should be returned with the relevant form e.g. CW1 or CW2.

For Official Use Only

Tag No: / /

Urgent application? Yes ☐ No ☐

Prior to Completing this application you should refer to the Lord Chancellor's Exceptional Funding Guidance. Applications for Exceptional Case Funding must be sent to the Exceptional Cases Team, 6.42, 6th Floor, 102 Petty France, London, SW1H 9AJ. DX161440 Westminster 8.

IMPORTANT - URGENT LICENSED WORK AND SPECIAL CASE WORK CASES: Delegated functions may not be used with an application for Exceptional Case Funding. Emergency certificates cannot be issued for Exceptional Case Funding. The Director of Legal Aid Casework has the discretion to backdate the validity of a certificate. To be considered you **must** answer the relevant questions in this form. Your client will not be deemed to have been granted legal aid unless and until the Director has made a decision to grant. For urgent applications please provide urgent case details on page 13.

Any work done prior to a decision on an unsuccessful application will not be remunerated. No payment will be made for unsuccessful applications.

IMPORTANT - CONTROLLED WORK CASES: Your client will not be deemed to have been granted Legal Aid unless and until the Director has made a decision to grant. No payment will be made for unsuccessful applications.

Your client's details

Please complete in Block Capitals

Title: _____ Initials: _____

Surname: _____

First name: _____

Surname at birth (If different): _____

Provider details

*Not Required for Licensed Work and Special Case Work Applications

Name of provider: _____

Account number: (if appropriate) ☐☐☐☐☐☐☐

*Solicitors Roll number: (where applicable) ☐☐☐☐☐☐☐

*Address: _____

*Town: _____

*County: _____ Postcode: _____

*DX (with exchange): _____

*Telephone number: _____

*Your case reference: _____

*Contact name for enquiries: _____

CIV ECF1 Page 1 Version 2 April 2013 © Crown Copyright

Type of case

Complete this section if either:

1. You are applying for Controlled Work services.
2. You have not completed type of case details on page 5 of CIVAPP1 or page 3 of CIVAPP3 or
3. The type of case is not listed on CIVAPP1 or CIVAPP3.

What category of law/contract category is relevant to the case?

Categories of Law for which Legal Aid Contracts are tendered.

Does your office have a contract that allows you to do Legal Aid work in this Category of law at the Form of Service for which you are applying?

If you are not a contract holder in the required category of law stated above, please explain why it is necessary for the effective administration of justice for you to conduct the matter pursuant to regulation 31(5) (a) -(d) of the Civil Legal Aid (Procedure) Regulations 2012:

▸ If your application is for inquest proceedings complete section F, for all other proceedings complete sections A-E as appropriate.

Section A - Generic Information

1. How important are the issues at stake for the client?

Section A - Generic Information continued

2. How complex are the procedures, the area of law or the evidence in question?
   - You should discuss factual, procedural and legal complexity.
   - Please specify the court, tribunal or other forum in which the case will be heard (e.g. First Tier Tribunal, County Court, High Court).

Section A - Generic Information continued

3. How capable is the client of presenting their case effectively?

- Please consider the client's education or relevant skills/experience; any relevant disabilities; the client's capacity, including whether a litigation friend may be able to conduct proceedings on the client's behalf.

Section A - Generic Information continued

4. Please specify any additional information that is relevant to the question of whether exceptional case funding should be made available.

Exceptional Cases Criteria.

- Please provide the following information in order for the Director of Legal Aid to consider whether Exceptional Case Funding should be provided under section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('the Act').

Section B - Right to Legal Aid under Article 6 ECHR.

1. Does the case involve a determination of the applicant's civil rights and obligations? ☐ Yes ☐ No
   If yes, please provide reasons below providing references to any supporting case law if appropriate.

2. Would the failure to provide legal aid be a breach of the client's rights under Article 6(1) ECHR? ☐ Yes ☐ No
   If yes, please provide reasons below providing references to any supporting case law if appropriate.

Section C - Other ECHR Rights

Would the failure to provide legal aid be a breach of any other Convention rights (within the meaning of the Human Rights Act 1998)? ☐ Yes ☐ No

If yes, please provide reasons below providing references to any supporting case law if appropriate.

Section D - Enforceable EU Rights to Legal Services.

Would the failure to provide legal aid be a breach of the client's enforceable EU rights to legal services? (For example, under Article 47 of the EU Charter of Fundamental Rights). ☐ Yes ☐ No

If yes, please provide reasons below providing references to any supporting case law if appropriate.

Section E - Extent of services to be provided.

What level of services is the client applying for?

Licensed work ☐ Special case work services ☐ Controlled work services ☐

Please provide reasons why these services are the minimum services required to meet the obligation under ECHR or EU law.

Section F - Inquests.

Part A - Article 2 ECHR inquest.

1. Set out the names and relationship to the deceased of the family members of the deceased:

2. Do you consider that there is there an arguable breach of the Government's substantive obligation under Article 2 ECHR to protect life? ☐ Yes ☐ No. Go to Part B on page 11.

   Has the Coroner made a determination that the inquest will be a 'Middleton' inquest? ☐ Yes ☐ No

   Please describe why you consider there is an arguable breach of the substantive obligation.

Section F - Inquests (continued)

Part A - Article 2 ECHR inquest

3. If you consider there has been an arguable beach of the substantive obligation, is funded representation for the family of the deceased required to discharge the procedural obligation? ☐ Yes ☐ No

i) Please describe why funding is required with particular reference to the factors set out in the Lord Chancellor's Guidance on Inquests, namely:

- the nature and seriousness of the allegations against the state;
- the particular circumstances of the family; and
- whether previous investigations have taken place and whether the family have been involved in such investigations.

ii) If investigations are in progress please tell us the status of the investigations and when you expect the outcomes to be known.

- If the views of the Coroner concerning the necessity of representation are known, please attach any relevant correspondence.
- Please submit copies of all available reports concerning the death.

4. Please specify any additional information that is relevant to the question of whether exceptional case funding should be made available under Article 2 ECHR.

Section F - Inquests (continued)

Part B - Significant Wider Public Interest Inquest

1. Do you consider that there is significant wider public interest in providing Licensed Work and Special Case Work services for the inquest? ☐ Yes ☐ No. Go to page 12.

   Describe the issue or issues in the case that have the potential to produce real benefit for members of the public other than the client and family.

2. Please identify which group or section of the public may benefit from raising these issues and the approximate number of people affected.

Part B - Significant Wider Public Interest Inquest (continued)

3. Please describe the nature of the potential benefit.

4. Please demonstrate that representation is necessary to obtain the benefits that may arise.

Inquests (Licensed Work and Special Case Work Services Only)

Are you making a request for the Director of Legal Aid to consider making an exceptional grant of funding even though your client would not normally meet the financial criteria to qualify for Legal Aid? ☐ Yes ☐ No

If yes, please give your reasons:

Urgent Case Details (Licensed Work and Special Case Work Services Only)

Complete this section if you wish this case to be treated as urgent. We will use this section to prioritise exceptional case funding applications.

1. Is there an imminent date for:

a) an injunction or other emergency proceedings? ☐ Yes ☐ No

If yes, enter date of hearing ___/___/___

b) a hearing in existing proceedings? ☐ Yes ☐ No

If yes, enter date of hearing ___/___/___

c) a limitation period that is about to expire? ☐ Yes ☐ No

If yes, enter date of hearing ___/___/___

2. Would a delay cause risk to the life, liberty, or physical safety of the client or his or her family, or the roof over their heads? ☐ Yes ☐ No

Please give details:

3. Will a delay cause a significant miscarriage of justice, or unreasonable hardship to the client, or irretrievable problems in handling the case? ☐ Yes ☐ No

Please give details:

Privacy notice - access to personal data

Personal data relates to a living individual who can be identified from that data. The processing of personal data is governed by the Data Protection Act 1998 (DPA), under which the Ministry of Justice (MoJ) is registered as a data controller. The Legal Aid Agency is an executive agency within the MoJ. The Legal Aid Agency processes personal data in order to provide legal aid services.

The MoJ complies with its obligations under the DPA by keeping the personal data we hold up to date; storing and destroying it securely; by not collecting or retaining excessive amounts of data; protecting personal data from loss, misuse, unauthorised access and disclosure; and ensuring that appropriate technical measures are in place to protect the personal data we process in line with Her Majesty's Government standards.

You have the right to request details about the personal information we hold about you; and subsequently request that we correct any personal information if it is found to be inaccurate or out of date.

In order to fulfil its functions the MoJ may share personal data with other organisations. These organisations include other government departments, local authorities and private or voluntary sector organisations engaged to deliver services. Personal data is only shared outside the MoJ when the law allows.

To request a copy of your personal information please refer to the MoJ website for further details on how you may do this.

Declaration to be signed by the applicant

To the best of my information, knowledge or belief, all the information I have given is true and I have not withheld any relevant information.

My solicitor has explained that if I am assessed as eligible for funding with a condition that I make a contribution towards the cost of my case I will be required to make payment of the contribution within 14 days or there is a risk that the certificate will be revoked.

I understand that if I give false information or withhold any relevant information the services provided to me may be cancelled at which point I will become liable to pay all the costs that have been incurred and I may be prosecuted. If I fail to accept the offer of funding and make the required payment of contribution I will become liable to pay all the costs that have been incurred.

Signed: _____ Date: __/__/____

This declaration must be signed by the applicant

Certification

I certify that:

- I have explained to the client their obligations and the meaning of their declaration.
- I have provided as accurately as possible all the information requested on this form.
- I am able to act in this matter under the competence standards set out in my firm's Legal Aid contract; and my firm is currently trading and no Law Society intervention or other sanction prohibits me from acting in this matter. (Applies to Controlled Work services Only).
- I have taken all reasonable steps to ensure my client has completed the Financial Eligibility questions on the accompanying Controlled Work Form fully and accurately. I have applied the Financial Eligibility regulations to the information supplied by my client and assessed my client as being eligible for Legal Aid in this matter (Applies to Controlled Work services Only).

Signed: _____ Date: __/__/____

authorised litigator

Name: _____

Appendix B - Sample interview schedule for practitioners

Interview schedule for S3 – interview on 19 May 2016 at 3.30pm

Introduce study. Get S3 to sign consent form.

General matters

HOW DID YOU FIND THE PROCESS OF MAKING YOUR ECF APPLICATIONS?

PROMPT: For example, are there any observations that you'd like to make about the LAA'S decision making processes in ECF cases?

DO YOU THINK THAT THE ECF SCHEME ADEQUATELY PROTECTS CONVENTION RIGHTS?

PROMPT: For example, in your cases Article 6 ECHR was clearly engaged but it never got to the point of that being considered because the "ECF merits" of an application is not looked at until after means and the ordinary merits tests are deemed satisfied. So do you have any thoughts on how the application of means and merits tests could be adapted or improved in ECF cases?

PROMPT: Do you think that there are any changes to ECF that could/should be made for those that do have capacity but still have significant mental health problems, such as Mr ***** and Mr *****?

PROMPT: This could be to either the procedure of making an application or the extent to which mental ill health is taken into account when making a decision on an application.

WHAT WERE THE BARRIERS IN APPLYING FOR ECF FOR YOUR CIENTS? AND, FOR YOU?

PROMPT: For example, can you say a little bit about what happened during the time it took to get a grant of funding (between 2 and 3 months in both cases) both in terms of the impact on Mr *****/Mr ***** personally, on the proceedings and you/your firm?

PROMPT: My understanding is that post-IS the LAA has implemented an urgency procedure for ECF applications whereby if they agree that an application is urgent they will determine it within 5 days. It's not clear whether this also applies to requests for review of an adverse decision. Do you have any thoughts on that?

HAVE YOU TURNED ANY CLIENTS AWAY WHO YOU THOUGHT WOULD HAVE BEEN ELIGIBLE FOR ECF BUT FOR THE FACT THAT THEY DIDN'T QUALIFY ON MEANS? IF YES, TELL ME A BIT ABOUT THE CIRCUMSTANCES OF THOSE CLIENTS.

ARE THERE ANY OTHER CLIENTS FOR WHOM ECF APPLICATIONS COULD HAVE BEEN MADE BUT WHO WEREN'T TAKEN ON AS CLIENTS FOR NON-MEANS REASONS? IF YES, WHY WAS THAT? WHEN WAS THAT? [SO CAN PINPOINT WHERE PROBLEMS LIE ON THE TIMELINE OF THE KEY CASES AND REVISED PROCEDURES/APPLICATION FORM].

HAVE YOU APPLIED FOR ECF IN ANY CASES SINCE MR ***** AND MR *****? IF NO, WOULD YOU? IF YES, CAN YOU TELL ME WHEN YOU MADE THOSE APPLICATIONS AND SAY SOMETHING ABOUT EACH OF THEM?

PROMPT: How did those your later experiences of applying for ECF compare with the process in Mr ***** and Mr ***** cases?

<u>Questions arising from specific ECF applications provided by S3</u>

I see in both Mr ***** and Mr ***** applications that you were considering a referral to the Public Law Project on the basis that their applications for ECF were not being dealt with quickly enough. Did you do that in either case?

If so, what was the hoped for outcome of the referral(s)?

How did Mr ***** and Mr ***** mental ill health affect each of them?

I saw that there was a suggestion at one point that Mr ***** may not have capacity (para 24 of Counsel's Advice) – can you tell me more about that and how the issue was resolved?

From the applications that I've looked at it seems that reasons are not given by LAA when ECF is granted following an earlier refusal. What do you think it was it that persuaded the LAA to grant funding in each of your cases in the end?

FINISHING UP

IS THERE ANYTHING THAT YOU'D LIKE TO ADD ABOUT HOW THE PROCESS OF APPLYING FOR ECF OR THE SCHEME ITSELF COULD BE IMPROVED?

Do you have any colleagues who have made applications for ECF? What has been their experience? Can I speak to them and have a look at their applications whilst I'm here?

Sample interview schedule for LAA staff

Interview schedule for LAA2 – interview on 24 May 2016 at 11am

Introduce study. Get consent form signed.

Q's I'd like to ask are to find out a bit about you and the ECF team more widely, the procedures that you operate, some themes arising from applications and the context that the ECF team operates in.

Questions re LAA2 as an individual and the ECF team

Ask for details of ECF team size and structure – ask for structure chart (redacted if necessary)

What is your specific role within the ECF team and how does that fit in the context of LAA more generally?

What is your professional background and experience? Can you give an overview of the backgrounds/experience of the ECF team overall?

How many ECF applications would you estimate that you have looked at personally?

Questions about ECF team procedures

CAN YOU DESCRIBE THE PROCESS OF WHAT HAPPENS TO AN ECF APPLICATION WHEN IT IS RECEIVED BY THE TEAM?

PROMPT: I understand that the ECF team operates a triage system. Can you describe how that works?

DOES THE ESCALATION FOR DECISION-MAKING ON ECF APPLICATIONS I.E. FROM DECISION ON INITIAL APPLICATION TO DECISION ON REVIEW, DIFFER TO REPORTING LINES FOR SUPERVISION AND PERFORMANCE REVIEW?

CAN YOU TELL ME ABOUT THE MECHANISMS THAT ARE IN PLACE WITHIN THE TEAM TO MONITOR THE QUALITY OF DECISION MAKING ON ECF APPLICATIONS?

WHEN ECF IS GRANTED FOLLOWING EARLIER ADVERSE DECISION(S) ARE THERE ANY COMMON FACTORS OR THEMES IN THOSE CASES, IN TERMS OF WHAT IT IS THAT PERSUADES YOU TO OVERTURN THE REFUSAL? PLEASE GIVE EXAMPLES.

HOW ARE DISAGREEMENTS WITHIN THE TEAM, ABOUT WHETHER ECF SHOULD BE GRANTED OR NOT, RESOLVED? HOW FREQUENT ARE SUCH DISAGREEMENTS?

TURNING TO THE QUALITY OF APPLICATIONS, IN YOUR EXPERIENCE HOW COULD PRACTITIONERS IMPROVE THE APPLICATIONS THAT THEY SUBMIT?

HOW IS THE OUTCOME OF SIGNIFICANT LITIGATION PROMULGATED WITHIN THE TEAM? E.G. WHAT WILL BE HAPPEN FOLLOWING THE JUDGMENT ON THE APPEAL IN "IS" THAT CAME OUT LAST FRIDAY?

After the High Court decision in IS several changes were made to the scheme (how merits assessed, introduction of urgency procedure and new form). Although the Crt of Appeal allowed the appeal against that it is clear from the judgment that there are many ways in which the scheme still requires improvement as part of what Laws J referred to as a "learning curve". What further improvements/changes are planned, if any, at this time?

DO YOU RECEIVE MANY PRE-APPLICATION ENQUIRIES / REQUESTS FOR SUPPORT? IF NO, IS SUCH SUPPORT AVAILABLE?

<u>Questions re understanding/interpretation of factors relevant to ECF applications</u>

CAN YOU DESCRIBE THE TEAM'S APPROACH TO EVALUATING THE MERITS OF AN ECF APPLICATION? HOW HAS IT CHANGED SINCE THE INCEPTION OF THE SCHEME?

ONE OF THE MOST DISPUTED ISSUES FROM THE APPLICATIONS I HAVE LOOKED AT SEEMS TO BE AROUND WHETHER A CASE IS COMPLEX OR NOT. CAN YOU GIVE ME SOME EXAMPLES OF CASES WHICH YOU WOULD REGARD AS COMPLEX AND SOME THAT YOU WOULDN'T?

PROMPT: Are there certain features that you look for in cases to identify complexity? For example, a private family law in the county court is not complex unless a, b or c is present.

Questions about the context in which ECF team operates

ASIDE FROM THE LORD CHANCELLOR'S GUIDANCE THAT IS PUBLISHED DO YOU HAVE ACCESS TO ANY OTHER GUIDANCE TO SUPPORT DECISIONS? DO YOU FEEL THAT THE GUIDANCE YOU HAVE ALLOWS YOU TO INTERROGATE THE APPLICATIONS IN THE WAY THAT YOU WISH TO BE ABLE TO AND THAT IS NEEDED?

HOW WOULD YOU DESCRIBE THE PARAMETERS WITHIN WHICH THE ECF TEAM, AND MORE WIDELY THE LAA, OPERATE?

DID YOU WORK AT THE LEGAL SERVICES COMMISSION PRE-LASPO? IF YES, HOW WOULD YOU SAY THAT THE OPERATING CONTEXT/PARAMETERS HAVE CHANGED AND WHAT HAS BEEN THE IMPACT OF THAT?

DO YOU FEEL THAT YOUR RESOURCES SUFFICIENT?

Appendix C – Copy ethics approval letter

Date 03/12/14

Dear Michelle Waite

I am pleased to inform you that the SLSJ Ethics Committee has approved your application for ethical approval. Details of the approval can be found below.

Ref: SLSJPHD14-1501
PI: Debra Morris
Title: Exceptional Case Funding under Legal Aid
School: School of Law & Social Justice
Department: Sociology & Social Policy
Date of initial review: 25/09/14
Date of Approval: 03/12/14

This approval applies for the duration of the research. If it is proposed to extend the duration of the study as specified in the application form, the SLSJ Ethics Committee should be notified. If it is proposed to make an amendment to the research, you should notify the SLSJ Ethics Committee by following the Notice of Amendment procedure outlined at http://www.liv.ac.uk/researchethics/application/forms_and_templates/ . If the named PI / Supervisor leaves the employment of the University during the course of this approval, the approval will lapse. Therefore please contact the RGO at ethics@liverpool.ac.uk in order to notify them of a change in PI / Supervisor.

Yours sincerely,

Ms. Louise Hardwick
Chair of SLSJ Ethics Committee
Eleanor Rathbone Building
Bedford Street South
LIVERPOOL
L69 7ZA

Tel: 0151 794 2795
Email: lsjethic@liverpool.ac.uk

Appendix D - Information sheet for practitioners

PARTICIPANT INFORMATION SHEET FOR LEGAL ADVISERS

This information sheet explains why you have been asked to take part in our research.

Title of study: Exceptional Case Funding under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"): fit for purpose?

The study is about the exceptional funding scheme implemented by the Legal Aid Agency on 1 April 2013. The central question we are aiming to answer is whether the UK Government can rely upon the scheme in order to fulfil the obligations to provide legal aid arising from the European Convention on Human Rights (Articles 6 and 8 in particular) and Article 47 of the Charter of Fundamental Rights of the EU? We also want to find out how the scheme is working in practical terms and who has/has not been making applications.

1. **Who is organising the study?**

This study is being conducted by Michelle Waite, a postgraduate researcher at the University of Liverpool. Michelle is supervised by Dr. Jennifer Sigafoos and Professor Debra Morris. The research is funded by the Hodgson Trust and has been reviewed by the University of Liverpool Ethics Committee.

2. **Do I have to take part?**

No, participation is entirely voluntary.

3. **What will happen if I take part?**

If you decide to take part you will be asked to forward an information sheet (different to this one) to your clients on whose behalf you have made applications for exceptional funding. This is with a view to your client (or former client) giving permission for their application and related documents to be reviewed by Michelle Waite. If your client agrees that their documents can be viewed we would ask you to send us (ideally scanned copies by email) the following: ECF application (i.e. CIV APP1/3 and CIV ECF1) and means forms; any supporting evidence provided to the LAA with the forms; all correspondence with the Legal Aid Agency (especially the decision letter concerning the application) and any other documents relevant to the application and its outcome. Ideally you would send these documents to us within 2 weeks of your client giving their consent to you doing so.

You may also be asked to take part in an interview with Michelle Waite and this is likely to last between 30 minutes and one hour. We anticipate that interviews will take place either at your place of work or by Skype within 4 weeks of our seeing

your client's documents. The interview would be audio recorded and transcribed thereafter. However you do not have to agree to be interviewed if you prefer not to, even if your clients agree to their documents being made available for the research.

4. What happens if I don't want to carry on with the study?

You can withdraw from the study at any time without giving a reason. However information you have provided may still be included in the research findings when they are reported unless you asked to withdraw from the study before your information is anonymised.

5. Confidentiality

All findings from this study will be kept confidential. This means that your name and any identifying information that may result in your identity being revealed will not be used. Notes referring to your client's papers, interview recordings and transcripts will be stored securely on a password protected computer and destroyed two years after completion of the study. You will be identified as an Adviser and allocated a number e.g. "Adviser 1 said that…" Only Michelle Waite and her supervisors will have access to your information. The exception to this is information concerning a disclosure of abuse or suspected abuse of a vulnerable person where the researcher is obliged to take further action.

6. Expenses/Payments

If photocopies of documents are required then there may be a small budget available in order to pay reasonable photocopying charges. Unfortunately we do not have funding to cover expenses or to pay you for your time.

7. What if I am unhappy or there is a problem?

If you are unhappy or if there is a problem, please do tell us. You may contact Michelle Waite on 0151 794 5697 or by email at michelle.waite@liverpool.ac.uk or Professor Debra Morris on 0151 794 2825 or by email at Debra.Morris@liverpool.ac.uk and we will try to help. If you remain unhappy or have a complaint which you feel you cannot come to us with then you should contact the Research Governance Officer at ethics@liv.ac.uk. When contacting the Research Governance Officer, please provide details of the name or description of the study (so that it can be identified), the researcher(s) involved, and the details of the complaint you wish to make.

8. Taking part

If you have read the above information and are happy to take part please contact Michelle Waite by email to register your interest. You will have the opportunity to go through this information again and ask further questions on the day of any interview at which time you will be asked to sign a consent form. (If your interview is to take place by Skype we will ask you to sign the form and either scan and email this to us or send it by post).

We do not expect that there will be any risks or benefits to you personally as a result of taking part in the study.

9. What will happen to the results of the study?

Findings from all interviews and the information gleaned from the documents will be used in a PhD thesis and may be used in publications arising from this study such as conference presentations, academic journal articles and reports to the Hodgson Trust who have funded the study. If you wish to receive details of the research findings we can let you know where you can access them on line at the relevant time. You (or the organisation you work for) will not be identifiable from the results unless you have consented to being so.

Thank you for taking the time to read this information. If you wish to find out more about the study please contact Michelle Waite on 0151 794 5697 or by email at michelle.waite@liverpool.ac.uk.

PARTICIPANT INFORMATION SHEET FOR CLIENTS

This information sheet explains why you have been asked to take part in our research.

Title of study: Exceptional Case Funding under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"): fit for purpose?

The study is about the exceptional funding scheme implemented by the Legal Aid Agency on 1 April 2013. We are investigating whether the scheme is legal and how it is working. We are also trying to find out about the types of people who have applied for exceptional funding.

1. **Who is organising the study?**

This study is being conducted by Michelle Waite, a postgraduate researcher at the University of Liverpool. Michelle is supervised by Dr. Jennifer Sigafoos and Professor Debra Morris. The research is funded by the Hodgson Trust and has been reviewed by the University of Liverpool Ethics Committee.

2. **Who is being asked to take part?**

We would like three different groups to take part in the study. They are:

- people like you who have made applications for exceptional case funding;
- legal advisers e.g. solicitors who have assisted clients in making applications for exceptional case funding; and
- staff who make decisions about Exceptional Case Funding at the Legal Aid Agency.

3. **Do I have to take part?**

No, participation is entirely voluntary.

4. **What will happen if I take part?**

If you decide to take part you will be asked to allow your legal adviser to make your application for exceptional funding and associated documents available to us. Before the researcher looks at these documents you will be asked to sign a consent form.

We will also interview legal advisers to find out more about some applications and this may include the legal adviser who assisted you. If your application is selected for more detailed study and you would like to participate in an interview yourself please let us know. If you do take part in an interview it would last between 30 minutes and one hour.

5. What happens if I don't want to carry on with the study?

You can withdraw from the study at any time without giving a reason. However information you have provided may still be included in the research findings unless you asked to withdraw from the study before your information was anonymised.

6. What will happen after my documents have been reviewed and my legal adviser and/or I have been interviewed?

All interviews will be audio recorded and the recordings transcribed and anonymised by the researcher. Findings from all interviews and the information gleaned from your documents will be used in a PhD thesis and may be used in publications arising from this study such as conference presentations, academic journal articles and reports to the Hodgson Trust.

7. Confidentiality

All findings from this study will be kept confidential. This means that your name and any information that may result in your identity being revealed will not be used. Notes referring to your papers; any interview recordings and transcripts will be stored securely on a password protected computer and destroyed two years after completion of the study. You will be identified as a Client and allocated a number e.g. "Client 1 said that…" Only Michelle Waite and her supervisors, Dr. Jennifer Sigafoos and Professor Debra Morris, will have access to your information.

8. Expenses/Payments

Unfortunately we do not have any funding to pay for expenses such as travel to an interview or to pay you for your time.

9. What if I am unhappy or there is a problem?

If you are unhappy or if there is a problem please tell us. You may contact Michelle Waite on 0151 794 5697 or by email at michelle.waite@liverpool.ac.uk or Professor Debra Morris on 0151 794 2825 or by email at Debra.Morris@liverpool.ac.uk and we will try to help. If you remain unhappy or have a complaint which you feel you cannot come to us with then you should contact the Research Governance Officer at ethics@liv.ac.uk . When contacting the Research Governance Officer, please provide details of the name or description of the study, the researcher(s) involved, and the details of the complaint you wish to make.

10. Taking part

If you are happy to take part please contact Michelle Waite by telephone or email to register your interest. It is hoped that arrangements could be made to view your papers within around two weeks of you telling us that you are happy for us to look at them. If you wish to be interviewed we would aim to arrange your interview within about 4 weeks of reviewing your documents. It is intended that your interview would take place either by Skype or at your legal adviser's office at a mutually convenient time. On the day of any interview you will have the opportunity to go through this information again and ask further questions after which time you will be asked to sign a consent form. (If your interview is to take place by Skype we will ask you to sign the form and either scan and email this to us or send it by post).

There will not be any personal benefits to you as a result of taking part in this study. Allowing the researcher to look at your application documents or taking part in an

interview is not an opportunity for further legal advice or a second opinion on your case. However we hope that the research findings will provide new insights into the exceptional funding scheme.

11. What will happen to the results of the study?

We have set out what we will do with the information you provide within the answers to questions 6 and 7 above. In addition if you wish to receive details of the research findings we can let you know where you can access them on line at the relevant time.

Thank you for taking the time to read this information. If you wish to find out more about the study please contact Michelle Waite on 0151 794 5697 or by email at michelle.waite@liverpool.ac.uk.

Appendix E- Sample consent form

Committee on Research Ethics

PARTICIPANT CONSENT FORM

Title of Research Project:	Exceptional Case Funding under s.10 Legal Aid, Sentencing and Punishment of Offenders Act 2012: fit for purpose?
Researcher(s):	Michelle Waite

Please initial box

1. I confirm that I have read and have understood the information sheet dated September 2014 for the above study. I have had the opportunity to consider the information, ask questions and have had these answered satisfactorily. ☐

2. I understand that my participation is voluntary and that I am free to withdraw at any time without giving any reason, without my rights being affected. In addition, should I not wish to answer any particular question or questions, I am free to decline. ☐

3. I understand that, under the Data Protection Act, I can at any time ask for access to the information I provide. I understand and agree that once I submit my data it will become anonymised and I will therefore no longer be able to withdraw my data. ☐

I agree to take part in the above study.

Participant Name	Date	Signature
Name of Person taking consent	Date	Signature
Researcher	Date	Signature

Principal Investigator:

Name	Debra Morris
Work Address	University of Liverpool
Work Telephone	0151 794 2825
Work Email	Debra.Morris@liverpool.ac.uk

Student Researcher:

Name	Michelle Waite
Work Address	University of Liverpool
Work Telephone	
Work Email	michelle.waite@liverpool.ac.uk

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