



Getting legal aid to challenge discrimination in welfare benefits cases

Matt Ahluwalia – Public Law Project



Funding for discrimination claims

- Discrimination claims will normally require legal assistance
- Clients bringing such claims are unlikely to be able to pay privately or to enter into a CFA
- Funding available from EHRC where cases have potential for wider strategic impact
- Legal Support Project



Legal aid

- Discrimination claims are in scope of legal aid under paragraph 43 of Part 1 Schedule 1 LASPO.
- Legal aid must in the first instance normally be accessed via the 'Civil Legal Advice' telephone helpline: the 'Gateway'.
- The LAA announced on 5th February 2018 that it is cancelling the procurement process for the Civil Legal Advice contracts in education and discrimination, which were due to start in September 2018.



Reviews and reports of the CLA Gateway

- MOJ [research findings](#):
 - Overarching research summary
 - Findings from interviews with users
 - Findings from interviews with service providers
 - Secondary analysis of management information
- [MOJ report](#): Civil Legal Advice mandatory gateway review (December 2014)
- [Public Law Project report](#) - Keys to the Gateway: An Independent Review of the Mandatory CLA Gateway (March 2015)
- [Bach Report](#) on The Right to Justice (September 2017)



Problem area – merits criteria

- If work beyond the pre-action stage is required, it will be necessary for the specialist provider to apply to the Legal Aid Agency for ‘full representation’
- The merits criteria which must be met for full representation are set out in regulations 41, 42 and 43 of the Civil Legal Aid (Merits Criteria) Regulations 2013.



Regulation 42

42. Cost benefit criteria for determinations for full representation

(1) The cost benefit criteria are as follows.

(2) If the case is primarily a claim for damages or other sum of money and is not of significant wider public interest—

(a) if the prospects of success of the case are very good, the Director must be satisfied that the likely damages exceed likely costs;

(b) if the prospects of success of the case are good, the Director must be satisfied that the likely damages exceed likely costs by a ratio of two to one; or

(c) if the prospects of success of the case are moderate, the Director must be satisfied that the likely damages exceed likely costs by a ratio of four to one.

(3) If the case is—

(a) not primarily a claim for damages or other sum of money; and

(b) not of significant wider public interest,

the Director must be satisfied that the reasonable private paying individual test is met.

(4) If the case is of significant wider public interest, the Director must be satisfied that the proportionality test is met.

Reasonable privately paying individual



- Where a case is not primarily a claim for damages the **‘reasonable private paying individual’** test applies:
 - Does the potential benefit to be gained justify the likely costs, such that a reasonable private paying individual would be prepared to start or continue the proceedings having regard to the prospects of success and all the other circumstances of the case?
- Where a case is of significant wider public interest, the **‘proportionality’** test applies.



Exceptional Case Funding

- Section 10 of LASPO provides for an ‘exceptional case funding’ scheme for civil matters whereby legal aid will be provided if failing to do so would risk a breach of human rights or EU law.
- Applicants must also meet the usual merits and means (i.e. financial eligibility) criteria in order to make an application.



Overview of ECF

ECF is potentially available where:

- The person has a civil (i.e. not criminal) legal problem that is not already in scope,
- Means/financial criteria are met,
- Merits criteria are met, AND
- If funding is not granted, there will be a breach of
 - a. Convention rights OR
 - b. EU law rights to legal services.



Factors to consider

- *Gudanaviciene and Others v Director of Legal Aid Casework and Anor* [2014] EWCA Civ 1622
- The critical question under Article 6(1) ECHR is whether an unrepresented litigant is able to present his case effectively and without obvious unfairness
- Three-way balancing exercise:
 - Importance of issue to client
 - Complexity of proceedings
 - Ability of the client to represent themselves without legal assistance



When to apply?

- Advocacy in the Upper Tribunal
- First-Tier Tribunal proceedings
- Mandatory reconsiderations
- To investigate merits – ‘ECF for ECF’



Resources on ECF

- [PLP's guide](#) on how to get ECF in welfare benefits cases
- [PLP's guide](#) on how to make ECF applications without legal assistance
- [Lord Chancellor's Guidance](#) on ECF