

ILPA information sheet

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Shauna Gillan ILPA Legal Officer 020-7490 1553 shauna.gillan@ilpa.org.uk

Immigration Law Practitioners' Association www.ilpa.org.uk 020-7251 8383 (t) 020-7251 8384 (f)

Legal Aid 19: Litigation Update

July 2014

Two important High Court judgments have been recently handed down with potentially significant impact on legal aid provision in the UK. This Information Sheet summarises the key findings contained in those judgments.

(1) Exceptional Case Funding

Judgment was handed down last month in a case called *Gudanaviciene & Ors v Director of Legal Aid Casework & Anor* [2014] EWHC 1840 (Admin) (13 June 2014). This was a challenge to the Government's refusal to grant legal aid under its 'exceptional funding' scheme, set up under the Legal Aid, Sentencing and Punishment of Offenders Act 2012. This Act removed the majority of immigration work from the scope of legal aid provision. To avoid breaching the UK's obligations under European Law and under the European Convention on Human Rights, the Act made provision for "exceptional funding" to be granted in cases where human rights are at risk of being violated. However in practice, this funding has proved extremely difficult to secure.

The Court's Ruling: The Court held that the refusal of legal aid to each of the six claimants in the case was unlawful on their individual facts. It also held that the guidance being used by the Legal Aid Agency to make decisions on applications for exceptional case funding was unlawful. Lastly, the Court held that refugee family reunion cases were *in scope* of legal aid under the 2012 Act (a family reunion case is one where a recognised refugee applies for permission to have their family members reunite with them in the UK).

Likely Impact: The Court's finding that refugee family reunion cases are within the scope of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is a very significant result, as the Legal Aid Agency had previously been treating all of these cases as out of scope. Funding will now be available for these cases (subject to the usual tests of financial means and merit). Although the Government is appealing the judgment, the Legal Aid Agency has clarified that any cases funded in the period after this judgment will not be at risk of having to repay the legal aid granted, in the event that the Government wins its appeal.

The Court's ruling that the refusal of exceptional funding to all six cases before it was unlawful is likely to have the effect that more exceptional funding applications are granted in future (to date, only about 1% of exceptional funding applications in immigration cases have been granted). The Legal Aid Agency will also need to rewrite its internal guidance.

(2) The 'Residence Test'

In our previous Information Sheet: [Legal Aid 18 – the Residence Test](#) we outlined the Government's plans to introduce a 'Residence Test' for legal aid. This was due for introduction in August 2014. The test would have denied legal aid to anyone who could not prove lawful residence in the UK at the date of their application for legal aid (and also that they had been lawfully resident for at least 12 months at some point in the past). A charity called the Public Law Project brought a legal challenge to the test and [judgment](#) was delivered this month. The case is called *Public Law Project v The Secretary of State for Justice the Office of the Children's Commissioner* [2014] EWHC 2365 (Admin).

The Court's Ruling: The Court held that the Government's plans to introduce a residence test for legal aid were unlawful, describing them as: "*Unauthorised, discriminatory and impossible to justify*". It held that the Lord Chancellor had exceeded his powers, that is, that he had not been given the power by Parliament under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to impose such a test. It also held that the test would unlawfully discriminate against 'foreigners' without justification.

Likely impact: the Court's ruling came shortly after the House of Commons voted by a small majority to approve the residence test. The Regulations containing the test were due to be considered by the House of Lords, but have been withdrawn by the Government because of this judgment (which the Government is appealing). Thus the test will not be introduced in August as planned; whether or not it will be introduced in future will depend on the outcome of the litigation on appeal. More information about the test and its impact on access to justice is available from a joint briefing by a coalition of charities and non-governmental organisations (including ILPA), available [here](#).

Overall, both judgments were important victories for those campaigning to save legal aid in the face of successive cuts by government. Further information about legal aid campaigns can be obtained from the following organisations:

- Justice Alliance <http://justiceallianceuk.wordpress.com/>
- The Low Commission www.lowcommission.org.uk/Can-you-help
- Illegal <http://illegal.org.uk/>
- Justice Gap <http://thejusticegap.com/>
- LAG [Legal Action News and Blog covering the "Transforming Legal Aid" consultation](#)
- Save Legal Aid: www.savelegalaid.co.uk/
- Young Legal Aid Lawyers: www.younglegalaidlawyers.org/

ILPA's full series of Information Sheets on Legal Aid is available from our website [here](#).