

information sheet

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Legal Aid 19: Exceptional Funding policy ruled unlawful

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The Government's legal aid regime was found to be operating unlawfully by the Courts in the case of *Gudanaviciene v The Director of Legal Aid Casework* [2014] EWCA Civ 1622. This Information Sheet provides some background to the judgment, and discusses what it means in practice. The judgment has important implications for anyone who is unable to get legal aid at present but whose human rights might be breached if they are not provided with it. The judgment also affects legal aid in family reunion cases; this is explained further below. The judgment is currently under appeal to the Supreme Court.

Background

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 made sweeping cuts to the provision of legal aid. The cuts included removing legal aid from the majority of immigration cases, with only asylum and certain human rights cases being left untouched (Articles 2 and 3 of the European Convention on Human Rights – the right to life and right to freedom from torture or inhuman and degrading treatment). At the time the Government argued that the reductions in legal aid would not offend against the State's human rights obligations because they had left a 'safety net'. This is a catch-all exception clause: a person has the possibility of securing "exceptional case funding" if they can show that there is a risk that their human rights or EU law right to legal assistance would be breached. The accompanying guidance made clear that the threshold for showing such a risk was very high, so that only rare cases should succeed in being granted funding on this basis. See further ILPA's Information Sheet: [Legal Aid 15: Exceptional Case Funding](#).

What was the legal challenge?

Six different people who had been refused legal aid for their immigration cases brought a joint case challenging the operation of the legal aid exceptional funding scheme. Each claimant was in a position of great difficulty in presenting their case. In each case, there was no entitlement to legal aid and the individuals had to rely on the 'safety net' of exceptional

funding. They applied for legal aid on this basis, and in each case the Legal Aid Agency refused to grant exceptional case funding.

The case of I.S.

One of the claimants, I.S., was a blind Nigerian national with profound cognitive impairment. He could not give instructions to solicitors himself and had to be acted for by the Official Solicitor. This claimant was refused legal aid to help regularise his immigration status and thereby get him the access he required to health services and community support.

The Court decided that the guidance the Legal Aid Agency was applying was unlawful because it wrongly stated that the threshold for funding was very high - and that legal aid was required only in rare and extreme cases. The judges held that the system was unfair, stating:

“...it is a fundamental principle that anyone in the UK is subject to its laws and is entitled to their protection. Thus there must be a fair and effective hearing available and the Guidance, as the facts of some of the cases I have dealt with show, produces unfairness.”

Impact on Family Reunion cases

The Court of Appeal held that family reunion cases are not within the general scope of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (overturning the High Court on this point). These cases, as with everything else out of scope, can only be funded if the Legal Aid Agency are persuaded to grant exceptional case funding.

What happens now?

The Legal Aid Agency will have to reissue its guidance in light of the Court’s findings. It is to be expected that grants of exceptional case funding will increase, as the threshold will have to be lowered.

Further test cases on legal aid are due in June, when the High Court will consider the operation of the exceptional funding scheme more generally, and whether systemic failings of the scheme are denying individuals access to funding. The case is being brought by the Public Law Project (PLP).

Further Information

PLP have published a helpful guide to applying for exceptional funding, available online here: <http://www.publiclawproject.org.uk/exceptional-funding-project>

ILPA’s full list of Information Sheets spanning legal aid changes over the past few years, including the changes brought in under the 2012 Act, is available from our website [here](#).