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## LORD CHANCELLOR'S EXCEPTIONAL FUNDING GUIDANCE (NON-INQUESTS)

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<b>Produced by:</b>	Civil and Family Legal Aid Policy Team
<b>Contact details:</b>	Civil.legalaidpolicy@justice.gov.uk

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## 1. Background and Introduction

1.1 This guidance is issued by the Lord Chancellor to the Director of Legal Aid Casework under section 4(3) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('the Act'). The Director must have regard to this guidance in determining whether civil legal services are to be made available under section 10(2) and (3) of the Act.<sup>1</sup> As, in practice, applications will be considered by caseworkers on the Director's behalf, this guidance is addressed to caseworkers.

1.2 This guidance sets out some of the factors that caseworkers should take into account in deciding exceptional funding applications under section 10(2) and (3) of the Act. It is not intended to be an exhaustive account of those factors. In particular, it is not intended to replace the need for consideration of representations in individual cases and any applicable case law. Applications should be considered on a case by case basis.

## 2. Exceptional Case Determinations

2.1. Sections 10(2) and (3) of the Act can be viewed here:  
<http://www.legislation.gov.uk/ukpga/2012/10/section/10>.

2.2. An exceptional case determination is a determination made under section 10(3)(a) or 10(3)(b) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('the Act').

### *Section 10(3)(a)*

2.3. Section 10(3)(a) allows civil legal services other than those described in Part 1 of Schedule 1 to the Act to be made available where it is necessary to do so because the failure to provide such funding would be a breach of:

- (i) the individual's Convention rights (within the meaning of the Human Rights Act 1998), or;
- (ii) any rights of the individual to the provision of legal services that are retained enforceable EU rights.

2.4. In considering whether it is **necessary** to make civil legal services available, caseworkers should ask themselves whether a failure to do so would be a breach of Convention rights or retained enforceable EU rights by reference to the principles identified in this Guidance and in any relevant case law.<sup>2</sup>

### *Section 10(3)(b)*

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<sup>1</sup> This guidance does not, however, cover determinations under section 10 of the Act in relation to representation at inquests. Specific guidance in relation to inquests has been published separately.

- 2.5. Section 10(3)(b) provides a discretion to make an exceptional case determination where it is considered “appropriate” to do so having regard to any risk that failure to do so would be a breach of Convention rights or retained enforceable EU rights.
- 2.6. The purpose of section 10(3) of the Act is to enable ECHR and retained EU law rights to be secured in the context of a civil legal aid scheme that has refocused limited resources on the highest priority cases. Caseworkers should approach section 10(3)(b) with this firmly in mind. It would not usually be appropriate to fund simply because a risk (however small) exists of a breach of the relevant rights. The greater the risk of a breach, the more likely that it will be appropriate to make a determination. However, the seriousness of the risk is only one of the factors that may be taken into account in deciding whether it is appropriate to make a determination. Regard should be had to all the circumstances of the case.<sup>2</sup>

#### *Means and merits criteria*

- 2.7. All exceptional funding applications are also subject to the legal aid means and merits criteria (section 10(2)(b) and 10(4)(c)). Therefore, in order for an exceptional case to be funded under section 10, the applicant must also qualify for legal aid under the financial eligibility criteria set out in regulations made under section 21 and the merits criteria set out in regulations made under section 11. The merits criteria include, for example, an assessment of the availability of alternative funding.

### **3A. The right to legal aid under the ECHR**

- 3.1. Whereas Article 6(3)(c) ECHR provides a specific right to legal assistance in the context of criminal proceedings, the Convention contains no such specific right in relation to civil proceedings. However, the ECtHR has recognised that there are circumstances in which the failure of the State to provide civil legal aid may amount to breach of an individual’s rights under the European Convention on Human Rights.
- 3.2. Caseworkers will need to consider, in particular, whether it is necessary to grant funding in order to avoid a breach of an applicant’s rights under Article 6(1) ECHR.

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<sup>2</sup> R (Gudaviciene) v Director of Legal Aid Casework [2014] EWCA Civ 1622 at §31-32

**Application for funding under Article 6 of ECHR: questions for caseworkers to consider.**

1. Does the case involve the determination of civil rights or obligations

• **If yes, go to Q2.**

• **If no, funding should not be granted under Article 6.**

2. Will withholding of legal aid mean the applicant will be unable to present his or her case effectively, or lead to an obvious unfairness in the proceedings? (see the factors at paragraphs 3.12-3.17) **If yes, go to Q3.**

▪ **If no, funding should not be granted under Article 6.**

3. What are the minimum services required to meet the legal obligation to provide legal aid?

### **Article 6(1) ECHR**

3.3. Article 6(1) ECHR states 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 [...]”*

3.4. Article 6(1) guarantees the right to a fair hearing and the right of access to the court for the purposes of the determination of a person’s civil rights and obligations. In certain circumstances, legal aid may be required in order to guarantee the effective right of access to a court in civil proceedings, or to prevent obvious unfairness. The Court of Appeal has confirmed that Article 6(1) does not require that funding be granted in “most or even many cases”<sup>3</sup>, but caseworkers should not approach the applications for ECF with any preconception about the proportion of applications that are likely to succeed. Whether the Convention requires funding in any given case depends on a holistic assessment in each case.

#### *Civil rights and obligations*

3.5. An obligation to provide legal aid under Article 6(1) ECHR can only arise where the case involves a determination of a person’s civil rights or obligations.

3.6. In deciding whether the case involves the determination of civil rights or obligations, caseworkers must consider the nature of the proceedings in question.

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<sup>3</sup> Ibid at §56.

- 3.7. Most claims in the civil courts (e.g. breach of contract, statutory claims, tort, family proceedings) will involve the determination of civil rights and obligations.
- 3.8. Some proceedings have been held not to involve the determination of civil rights and obligations, for example:
- tax disputes;<sup>4</sup>
  - immigration proceedings relating to the determination of an individual's entry, stay, residence or deportation;<sup>5</sup>
  - cases concerning 'discretionary' welfare benefits, i.e. where 'the award of services or benefits in kind is not an individual right of which the applicant can consider himself the holder, but is dependent upon a series of evaluative judgments by the provider as to whether the statutory criteria are satisfied and how the need for it ought to be met'.<sup>6</sup>
- 3.9. Caseworkers should always consider whether the proceedings in question actually involve the determination of any of the substantive issues in a case. It will also be relevant to consider whether the question at issue in the set of proceedings under consideration will be directly decisive, or will substantially influence or affect other proceedings which determine civil rights and obligations. Caseworkers should note that a tenuous connection or remote consequences with those other proceedings will not suffice (for example, internal school disciplinary hearings have been found not to engage Article 6(1) because they do not have sufficient influence or effect on proceedings before the Independent Safeguarding Authority).<sup>7</sup>

*Will there be a breach of Article 6(1)?*

- 3.10. Assuming that the proceedings in question involve the determination of a civil right or obligation, caseworkers should then go on to consider whether the failure to provide legal aid would be a breach of the applicant's rights under Article 6(1) ECHR.

**The overarching question to consider is whether the withholding of legal aid would mean that the applicant is unable to present his case effectively and without obvious unfairness.**

<sup>4</sup> Jussila v Finland (2007) 45 EHRR 39.

<sup>5</sup> Maaouia v France (2001) 33 EHRR 42; Eskelinen v Finland (2007) 45 EHRR 43.

<sup>6</sup> Tomlinson v Birmingham City Council [2010] UKSC 8.

<sup>7</sup> R (G) v The Governors of X School [2011] UKSC 30, [2012] 1 AC 167.

3.11. The following factors should be taken into account. No one of these factors is necessarily determinative and each case needs to be assessed on its particular facts and in the light of representations made by applicants. However, the factors must be carefully weighed – for example, 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 stress, demands and complexity of the proceedings, the more likely it is that Article 6(1) will require the provision of legal services.<sup>8</sup>

**(a) How important are the issues at stake?**

3.12. Caseworkers should consider the importance or seriousness of what is at stake in the proceedings. Applicants will often naturally feel that their case is an important one. However, 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.

For example:

- 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 are the sums at stake?
- Does the claim relate to adjustments, care provision or medical equipment without which the applicant cannot live an independent life?

**(b) How complex are the procedures, the area of law or the evidence in question?**

3.13. Caseworkers should consider whether the proceedings in question involve unusually complex issues of fact, procedure or law.

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<sup>8</sup> Gudaviciene (above) at §56.

For example:

### **Factual complexity**

- *Does the case turn on issues of fact that lie within the applicant's own knowledge?*
- *Will there be a significant number of witnesses or a large volume of evidence?*
- *To what extent have 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?).*
- *Will expert evidence (e.g. complex medical evidence) have to be obtained and tested in cross-examination? If so, will multiple experts be required? How relevant is the expert evidence to the case itself? Has the court given permission for expert evidence to be submitted under the relevant rules, for example FPR 25.4(1)?*

### **Procedural complexity**

- *How complex is the procedure in the forum where the case takes place? How clear and straightforward are the relevant rules of procedure?*
- *Is the case before a court or higher court? If so, are the rules of procedure in that court nonetheless clear and unambiguous?*
- *Is the case before a tribunal that possesses specialist or expert knowledge which can assist the applicant?*

### **Legal complexity**

- *Does the case in question involve any particularly complex issues of law?*

### **(c) How capable is the applicant of presenting their case effectively?**

3.14. Caseworkers should consider whether the applicant would be incapable of presenting their case without the assistance of a lawyer. When considering this factor, caseworkers will need to bear in mind their assessment of case complexity, as this may affect the weight that needs to be given to some of the matters listed below.

3.15. In doing so, caseworkers should bear in mind that:

- there is no requirement to provide legal aid to ensure total equality of arms between an applicant and opponent, so long as each side is afforded a reasonable opportunity to present their case under conditions that don't place them at a substantial disadvantage compared to the opponent;<sup>9</sup>
- 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.

For example:

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<sup>9</sup> De Haes and Gijssels v Belgium (1998) 25 EHRR 1.

- *How complex is the case? (see above)*
- *Has the individual received prior assistance from a lawyer? (Although such assistance should not be treated as an absolute bar; it will depend on the particular circumstances of the case, the nature and extent of the assistance afforded)*
- *How long is the case likely to last?*
- *What is the applicant's level of education?*
- *Is the degree of emotional involvement that the applicant is likely to have in the issues in the case incompatible with the degree of objectivity expected of advocates in court?*
- *Does the applicant have any relevant skills or experience (either in the area of law or the factual subject matter)?*
- *Will the case be heard in a tribunal or other venue that is well used to dealing with litigants in person?*
- *Is there a Mackenzie friend who could be granted permission to speak on behalf of a party to proceedings?*
- *Does the applicant have English as a first language? If not, what is the applicant's level of skill in English? Will the court or tribunal be able to assist with interpretation and/or the translation of documents? Could family or friends who do not have an interest in the case provide interpretation/translation?*
- *Does the applicant have any special caring responsibilities which may present a genuine barrier to the presentation of the case?*
- *Does the applicant or their carers/dependents have any relevant disabilities? Would the absence of legal representation put a disabled person at a disadvantage vis-à-vis their opponent?*

3.16. In the case of a child applicant, the following questions may be relevant:

## **Child applicants**

- *What role, if any, is CAFCASS playing in this case?*
- *Where a litigation friend has been appointed by the court, or is acting under a certificate of suitability under rule 21.4(3) of the Civil Procedure Rules:*
  - *How capable is the litigation friend of presenting the case on the applicant's behalf?*
- *Where a litigation friend is not acting for the child:*
  - *How likely is it that a suitable litigation friend will be available? (Having regard to the factual situation of the applicant and any relevant Court Rules and Practice Directions including those in the Family Procedure Rules (FPR) and the Civil Procedure Rules (CPR), especially FPR Part 16 and CPR Part 21.)*
  - *Will the Official Solicitor be acting for the child? Caseworkers should note that the Official Solicitor is a litigation friend of last resort, and will usually not act unless private funding or legal aid is in place.*
- *Where no litigation friend is available or likely to be available, and the child would otherwise have to present the case themselves:*
  - *How old is the child?*
  - *Does the child have sufficient maturity or intelligence to understand the nature and implications of the proceedings?*
  - *Would the child be permitted to conduct proceedings without a litigation friend? Caseworkers should have regard to Part 21 of the Civil Procedure Rules, Part 15 of the Family Procedure Rules, or any other relevant rule governing the circumstances in which a child may conduct proceedings without a litigation friend. If a litigation friend is likely to be required, and no litigation friend other than the Official Solicitor is available, this will be an important (and potentially determinative) factor to consider in relation to this aspect of the Article 6 test.*
- *Are there any other relevant Court rules and Practice Directions that have a bearing on the child's situation?*

3.17. Where the applicant is an adult who lacks capacity within the meaning of the Mental Capacity Act 2005, the caseworker should consider the following questions:

### **Adult applicants who lack capacity**

- *Having regard to s.2(3) of the Mental Capacity Act 2005, what is the nature of the potential lack of capacity (e.g. to what does it relate? Is it temporary or permanent?)*
- *Does the applicant have the assistance of an attorney or deputy?*
- *Is the applicant a protected party within the meaning of any applicable Court rules? If so:*
  - *Will a litigation friend be acting for the applicant? How capable is the litigation friend of presenting the case on the applicant's behalf?*
  - *Will the Official Solicitor be acting for the applicant? Caseworkers should note that the Official Solicitor is a litigation friend of last resort, and will usually not act unless private funding or legal aid is in place.*
  - *If no litigation friend other than the Official Solicitor is available, this will be an important (and potentially determinative) factor to consider in relation to this aspect of the Article 6 test. Caseworkers should have regard to Part 21 of the Civil Procedure Rules, Part 15 of the Family Procedure Rules, or any other rule which requires a protected party to have a litigation friend to conduct proceedings on their behalf. If no litigation friend is available, a protected party is unable to be a party to the litigation in question.*
- *Does the subject matter of proceedings have a special relevance to an applicant who lacks capacity (for example, do the proceedings concern important matters, such as the applicant's life, health or personal safety)?*
- *Are there any other relevant Court rules and Practice Directions that have a bearing on the applicant's situation?*

### **Article 8 ECHR**

3.18. Applicants may seek to argue that the provision of legal aid is necessary in order to avoid a breach of the applicant's rights under Article 8 ECHR (right to respect for private and family life). Cases in which an applicant seeks to rely on Article 8 are likely to fall more naturally to be considered under the Article 6(1) heading,<sup>10</sup> particularly if the case is one of proceedings involving the determination of civil rights and obligations.

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<sup>10</sup> Gudaviciene (above) §74.

3.19. In the cases of *Airey v Ireland*<sup>11</sup> and *P, C and S v United Kingdom*<sup>12</sup>, the ECtHR found that the lack of an accessible legal procedure in certain types of family law proceedings did amount to a breach of the procedural obligations imposed by Article 8 ECHR. The Court of Appeal has also held that Article 8 may give rise to a right to legal assistance in relation to immigration matters which engage the substantive right to respect for private and family life conferred by Article 8.<sup>13</sup>

3.20. Where Article 8 is engaged in relation to a particular decision-making process, caseworkers should consider whether legal aid is required. This will depend on the particular facts and circumstances of each case, including (a) the importance of the issues at stake; (b) the complexity of the procedural, legal and evidential issues; and (c) the ability of the individual to represent himself or herself (or to participate in the relevant process) without legal assistance, having regard to his or her age and mental capacity.<sup>14</sup> It will also often be helpful to take account of the factors set out at paragraphs 3.12 to 3.17 above in relation to Article 6(1).<sup>15</sup>

### **Article 13 ECHR**

3.21. Caseworkers should note that Article 13 ECHR has not been incorporated into domestic law by the Human Rights Act 1998. Nor does it give rise, in any event, to a freestanding right to legal aid. Article 13 ECHR is not therefore a right in respect of which exceptional funding may be provided under section 10 of the Act.

## **3B. Retained enforceable EU rights to the provision of legal services**

3.22. An individual may argue that civil legal services should be made available by virtue of a “retained enforceable EU right”. This is a term defined in statute as “*a right (as modified from time to time) which forms part of retained EU law by virtue of section 3 or 4 of the European Union (Withdrawal) Act 2018.*” Where such an argument is made, caseworkers should take into account the representations made by the applicant, and consider carefully whether the right relied upon is one which is retained by virtue of those provisions. The following is a summary of the general approach to assist caseworkers in assessing this question.

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<sup>11</sup> (1979-80) 2 EHRR 305.

<sup>12</sup> (2002) 35 EHRR 31.

<sup>13</sup> *Gudanaviciene* (above).

<sup>14</sup> *Ibid* §72.

<sup>15</sup> *Ibid* §76.

- 3.23. Where an application is made on the basis that there is a retained enforceable EU right to legal aid, caseworkers will first need to be satisfied that the proceedings or matter for which legal aid is sought have as their purpose the determination of rights guaranteed by or otherwise falling within the scope of “retained EU law”.
- 3.24. “Retained EU law” is a term defined by statute as anything which continues to be, or forms part of, domestic law by virtue of section 2, 3, 4, 6(3) or 6(6) of the European Union Withdrawal Act (as that body of law is added to or otherwise modified from time to time). Broadly speaking, those provisions provide that (with certain exceptions) unless it has been added to or otherwise modified:
- a. EU-derived domestic legislation will continue to have effect as it did on 31 December 2020, including subordinate legislation made under the European Communities Act 1972, and domestic legislation that implemented the UK’s former obligations as a member state of the EU.
  - b. Directly applicable EU legislation which was in effect in the UK on 31 December 2020 will continue to have effect (with some exceptions) – this includes EU regulations, decisions and EU tertiary legislation. Only EU law or legislation that is directly effective or directly applicable, as well as domestic legislation implementing EU obligations, is preserved by the EUWA. Therefore, retained EU law does not include provisions of a Directive, except to the extent they are implemented in UK legislation or have direct effect (and were recognised as having this effect on or before 31 December 2020).
  - c. Other EU law rights, powers, liabilities, obligations, restrictions, remedies and procedures (such as general principles of EU law and directly effective rights in treaties or directives) will continue to apply if they were recognised and enforceable in domestic law on 31 December 2020.
- 3.25. Where a caseworker is satisfied that legal aid is being sought for the purpose of a determination of a right guaranteed by or otherwise falling within the scope of “retained EU law”, caseworkers should go on to apply the substantive Article 6(1) ECHR test described above.
- 3.26. The vast majority of matters that give rise to a right to legal aid due to a retained enforceable EU law right will also give rise to such a right under Article 6(1) ECHR. As such, a retained enforceable EU law right is only like to be of significance in those circumstances where: (i) there is no determination of civil rights and obligations within the meaning of Article 6(1) ECHR, and: (ii) the right is guaranteed by or otherwise falling within the scope of retained EU law.

3.27. The Charter of Fundamental Rights will not form part of domestic law after 31 December 2020, although section 5(5) of the European Union Withdrawal Act states that the exclusion of the Charter does not affect the retention of the underlying fundamental rights from other sources of retained EU law. This includes the principle of effective judicial protection which has been construed as having materially identical effect to Article 47 of the Charter.

**Application for funding under retained enforceable EU rights: questions for caseworkers to consider.**

1. Does the case involve the determination of civil rights or obligations?
2. Does the case involve the determination of a right guaranteed by or otherwise falling within the scope of retained EU law?
3. What are the minimum services required to meet the legal obligation to provide legal aid?

*Extent of services to be provided*

3.28. Where caseworkers conclude that legal aid is required to be provided under section 10, this should be limited to the minimum services required to meet the obligation under ECHR or to satisfy any retained enforceable EU right to legal aid. For example, it could be through providing assistance in the form of specific levels of service, or through limitations placed on funding certificates.

3.29. For example, Legal Help allows for a range of services to be provided, including the giving of oral and written advice and assistance, such as writing letters on behalf of the client, or negotiating with, for example, a local council or health authority. Legal Help can also be used to assist a client in setting out legal arguments for an appeal application (for example, to a tribunal).

3.30. Where an individual makes an application for full representation, caseworkers should therefore consider whether, in the particular circumstances of the case, it is really necessary to provide full representation or whether it would suffice to provide civil legal services in the form of Legal Help – for example, to provide advice and assistance in the preparation of a written claim in a welfare benefits tribunal.

3.31. Where an individual makes an application for Legal Help alone, caseworkers should consider particularly carefully whether the section 10(3) criteria are met. It will not be sufficient that such assistance is merely helpful for the presentation of the case. The failure to provide Legal Help will in itself not usually amount to a breach of ECHR or any retained enforceable EU right to legal aid. In particular, where the source of the obligation to provide legal aid is Article 6(1), it should be recalled that this obligation can only arise where there is a 'determination' of an individual's civil rights and obligations and caseworkers should consider whether an application for Legal Help alone does in fact relate to such a determination (see paragraph 3.9).

### **3C. Specific case types**

3.32. The Annex sets out further guidance in relation to certain specific types of case that may arise in applications for exceptional funding.

#### **Annex**

#### **Specific Case Types**

3.33. The sections below give an indication, to caseworkers, of the sorts of considerations that may be particularly relevant in certain types of case.<sup>16</sup>

3.34. In all of these specific areas however caseworkers must constantly refer back to the overarching question of whether the withholding of legal aid would mean the applicant will be unable to present his or her case effectively or lead to an obvious unfairness in proceedings.

### **4. Private Family Law**

4.1. Private family law proceedings, in particular those concerning the right of contact with and residence of the applicant's child or the division of matrimonial assets, will generally involve the determination of civil rights and obligations.

4.2. Where a case involves the determination of civil rights and obligations, caseworkers should consider whether the withholding of legal aid would mean the applicant will be unable to present his or her case effectively or lead to an obvious unfairness in proceedings, having regard to the general factors described above. The following matters may be particularly relevant:

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<sup>16</sup> 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 cases.

- Are the proceedings likely to be unusually emotive for the applicant to the extent that he or she would be unable to approach proceedings objectively? All private law proceedings are likely to be emotive for the applicant to some degree but this factor alone will not usually be sufficient to demonstrate that legal aid is required.
- In relation to the complexity of the proceedings caseworkers should take into account that large numbers of litigants in England and Wales represent themselves in family proceedings every year.
- In relation to legal and factual complexity: for example, does the case involve unusually complex questions of trust law?
- What support (other than legal representation) is the applicant likely to receive? Caseworkers should take into account that judges are used to dealing with unrepresented parties in family proceedings and the court may be supported by, for example, CAFCASS in reaching a decision.

## **5. Business Cases**

- 5.1. Private law claims involving the determination of rights or obligations under a contract will generally involve the determination of civil rights and obligations. However, non-criminal tax proceedings do not generally involve the determination of civil rights and obligations.
- 5.2. Where a case involves the determination of civil rights and obligations, caseworkers should consider whether the withholding of legal aid would mean the applicant will be unable to present his or her case effectively or lead to an obvious unfairness in proceedings, having regard to the general factors described above.

## **6. Clinical negligence**

- 6.1. Clinical negligence claims will generally involve the determination of civil rights and obligations.
- 6.2. Where a case involves the determination of civil rights and obligations, caseworkers should consider whether the withholding of legal aid would mean the applicant will be unable to present his or her case effectively or lead to an obvious unfairness in proceedings, having regard to the general factors described above. The following matters may be particularly relevant:

- In relation to the complexity of the case, how complex is the case at hand bearing in mind the complexity and volume of any medical expert evidence and any medico-legal arguments in issue in the case?
- In relation to the ability of the applicant to present their own case, how able is the applicant or litigation friend to do this:
  - bearing in mind any caring responsibilities they have due to caring for a disabled child or family member?
  - bearing in mind any disabilities or medical problems they have?
- In relation to the importance of the matter at stake, is the applicant a disabled person who is seeking to recover damages which would, in whole or in part, cover adjustments, adaptations, equipment and care?

## 7. Debt

- 7.1. Claims under a contract will generally involve the determination of civil rights and obligations.
- 7.2. A significant proportion of debt work does not involve a substantive legal dispute as to liability, but rather enforcement of admitted liabilities or management of admitted liabilities. It will only be in those circumstances where enforcement proceedings are considered to be part of the same proceedings for the purposes of Article 6(1) ECHR<sup>17</sup> that an obligation to provide legal aid may potentially arise (for example, in respect of a debtor who is faced with enforcement proceedings).
- 7.3. Where a case involves the determination of civil rights and obligations, caseworkers should consider whether the withholding of legal aid would mean the applicant will be unable to present his or her case effectively or lead to an obvious unfairness in proceedings, having regard to the general factors described above.

## 8. Education

- 8.1. Education claims involving substantive civil law remedies determined in the civil courts (such as breach of contract or tort) will generally involve determination of civil rights and obligations.
- 8.2. Proceedings before an Independent School Appeal Board in relation to the permanent exclusion of a pupil may involve the determination of civil rights and

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<sup>17</sup> See, for example, *Immobiliare Saffi v Italy*, (2000) 30 EHRR 756.

obligations, if on the particular facts the exclusion is an arguably disproportionate restriction on the right to an education under Article 2 Protocol 1 of the European Convention of Human Rights, and/or if such exclusion arguably gives rise to a right to a judicial remedy under the applicable law.

## **9. Employment**

- 9.1. Claims relating to rights under a private contract of employment will generally involve the determination of civil rights and obligations. Professional disciplinary proceedings will involve the determination of civil rights and obligations where the outcome of the proceedings will have a substantial influence or effect on the determination of the applicant's civil right to practise his or her profession.
- 9.2. Where a case involves the determination of civil rights and obligations, caseworkers should consider whether the withholding of legal aid would mean the applicant will be unable to present his or her case effectively or lead to an obvious unfairness in proceedings, having regard to the general factors described above.

## **10. Housing**

- 10.1. Claims between parties about housing issues, in contract or tort, are generally likely to involve the determination of civil rights and obligations.
- 10.2. Where a case involves the determination of civil rights and obligations, caseworkers should consider whether the withholding of legal aid would mean the applicant will be unable to present his or her case effectively or lead to an obvious unfairness in proceedings, having regard to the general factors described above.
- 10.3. In applications relating to out of scope housing disrepair claims the following matters may be particularly relevant:
  - Where the applicant is seeking to claim damages, what is the level of damages sought? Do they include damages to compensate for items of particular importance to the applicant, such as damage to important medical equipment?
  - To what extent is expert evidence necessary to resolve disputes concerning the allegations of disrepair, the medical effects of disrepair or the nature of remedial work required?

## 11. Human Rights

11.1. Claims under the Human Rights Act 1998 do not involve a determination of civil rights and obligations simply by virtue of the fact that another Convention right is involved. For example, the fact a person may be arguing in immigration proceedings that an immigration decision interferes with their right to family life does not mean that the immigration proceedings therefore involve the determination of civil rights and obligations.

## 12. Immigration

12.1. Proceedings relating to the immigration status of immigrants and decisions relating to the entry, stay and deportation of immigrants do not involve the determination of civil rights and obligations.<sup>18</sup>

12.2. However, some immigration proceedings and decision-making processes will engage the substantive right to respect for private and family life conferred by Article 8 ECHR. Caseworkers should therefore consider whether the procedural obligation imposed by Article 8 requires the provision of legal aid (see paragraphs 3.18 to 3.20 above).

12.3. When considering applications in relation to immigration proceedings and processes, caseworkers should have regard to the following matters, as relevant to any individual case: (i) there are statutory restrictions on the supply of advice and assistance (see section 84 of the Immigration and Asylum Act 1999); (ii) individuals may well have language difficulties; and (iii) the law is complex and rapidly evolving.<sup>19</sup>

## 13. Welfare Benefits (including asylum support)

13.1. Where an individual is claiming a discretionary benefit, rather than a legal right, a decision on the claim will not involve a determination of the individual's civil rights and obligations.<sup>20</sup> Accordingly, cases concerning the award of services or benefits in kind which is not an individual right of which the applicant can consider themselves the holder, but is dependent upon a series of evaluative judgments by the provider as to whether the statutory criteria are satisfied and how the need for it ought to be met, will not involve a determination of the individual's civil rights and obligations<sup>21</sup>.

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<sup>18</sup> *Maaouia v France* (2001) 33 EHRR 42; *Eskelinen v Finland* (2007) 45 EHRR 43.

<sup>19</sup> *Gudanaviciene* (above) at §72.

<sup>20</sup> *R (A) v London Borough of Croydon* [2009] UKSC 8.

<sup>21</sup> *Tomlinson v Birmingham City Council* [2010] UKSC 8.

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

13.3. Where a case involves the determination of civil rights and obligations, caseworkers should consider whether the withholding of legal aid would mean the applicant will be unable to present his or her case effectively or lead to an obvious unfairness in proceedings, having regard to the general factors described above. The following matters may be particularly relevant:

- In relation to the complexity of the case, is the case simply about satisfying entitlement rules or straightforward factual issues such as an alleged delay in making an application? On the other hand, does the case concern complex legal issues about the interaction of retained EU and domestic law or complex immigration matters?
- In relation to the importance of the issue at stake, what is the level of the benefit at stake? Does it relate to a one-off payment or an ongoing award? Does the case concern payment of benefits that will be used to pay, for example, rent arrears and may mean the difference between the applicant remaining in their home or not?
- In relation to the ability of the client to present their own case, is the client disabled, elderly or vulnerable? Does the applicant have education issues or learning difficulties?

**END**