In an important and wide-ranging judgment the Court of Appeal in *R (on the application of Gudanaviciene & Ors) v The Director of Legal Aid Casework & Ors* [2014] EWCA Civ 1622 has upheld Collins J’s finding that the Exceptional Case Funding (‘ECF’) scheme has been operated unlawfully, while allowing the appeal in two, and dismissing the appeal in the remaining three, of the test cases. Rarely can the Court of Appeal have considered such a number of important and diverse issues in one judgment. While everyone will recognise the importance of the case, at 181 densely-written paragraphs over 60 pages, it is hard to make much headway on the train home.

In the immigration context, the most important restriction brought in by LASPO was to remove article 8 (the protection of private and family life) matters from the scope of mainstream legal aid. They now require ECF if legal aid is to be granted.

This article considers the implications of the decision of the Court of Appeal for all ECF applications that raise article 8, with a focus on deport cases, but immigration advisors should be aware of the other important implications of the decision of the Court of Appeal such as inter alia for trafficking and refugee family reunion cases. The judgment also contains sections of more general interest on *Pepper v Hart* and ECHR rights where the principal applicant is outside the jurisdiction.

**Immigration Article 8 issues can require funding**

There is no doubt that this is the headline issue for most immigration lawyers, even though by the time of the Court of Appeal hearing this principle was common ground. The Lord Chancellor’s Exceptional Funding Guidance (Non-Inquests) (“the Guidance”) is issued by the Lord Chancellor to the LAA, essentially as instructions on how to operate the ECF scheme. This currently suggests the opposite:

> The Lord Chancellor does not consider that there is anything in the current case law that would put the State under a legal obligation to provide legal aid in immigration proceedings in order to meet the procedural requirements of Article 8 ECHR (Guidance at para 60)

This will now be amended. The real battleground had shifted to the question of under what circumstances must ECF be granted? As a preliminary, the following is a helpful summary of the ECtHR case law from which neither side much differed:

(i) the Convention guarantees rights that are practical and effective, not theoretical and illusory in relation to the right of access to the courts (Airey para 24, Steel and Morris para 59); (ii) the question is whether the applicant’s appearance before the court or tribunal in question without the assistance of a lawyer was effective, in the sense of whether he or she was able to...
present the case properly and satisfactorily (Airey para 24, McVicar para 48 and Steel and Morris para 59); (iii) it is relevant whether the proceedings taken as a whole were fair (McVicar para 50, P.C and S para 91); (iv) the importance of the appearance of fairness is also relevant: simply because an applicant can struggle through “in the teeth of all the difficulties” does not necessarily mean that the procedure was fair (P.C and S para 91); and (v) equality of arms must be guaranteed to the extent that each side is afforded a reasonable opportunity to present his or her case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent (Steel and Morris para 62).

This was helpfully distilled:

We accept the following summary of the relevant case-law given by Mr Drabble: It can therefore be seen that the critical question is whether an unrepresented litigant is able to present his case effectively and without obvious unfairness.

In perhaps the most significant portion of the judgment the Court held that in considering this question the fact that it is Article 8 rather than Article 6 (fair trial) rights at stake is largely irrelevant. This was directly contrary to the position of the appellant Legal Aid Agency (for convenience hereafter “the LAA”). Article 6 does not apply directly to immigration proceedings as they are not a determination of ‘civil rights’, but the Court held that,

In practice, the ECtHR’s analysis of the facts in the case-law does not seem to differ as between article 6(1) and article 8. This is not surprising. The focus of article 6(1) is to ensure a fair determination of civil rights and obligations by an independent and impartial tribunal. Article 8 does not dictate the form of the decision-making process that the state must put in place. But the focus of the procedural aspect of article 8 is to ensure the effective protection of an individual’s article 8 rights. To summarise, in determining what constitutes effective access to the tribunal (article 6(1)) and what constitutes sufficient involvement in a decision-making process (article 8), for present purposes the standards are in practice the same.

Given this approach, it is unsurprising that the Court found that the position where EC rights are at stake (which can give rise to a separate right to legal aid under art. 47(3) of the Charter of Fundamental Rights) is essentially the same as under the Convention.

The Court then gave the following guidance where article 8, immigration, and deportation issues arise:

… (i) decision-making processes by which article 8 rights are determined must be fair; (ii) fairness requires that individuals are involved in the decision-making process, viewed as a whole, to a degree that is sufficient to provide them with the requisite protection of their interests: this means that procedures for asserting or defending rights must be effectively accessible; and (iii) effective access may require the state to fund legal representation.

Whether legal aid is required 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 without legal assistance, having regard to his age and mental capacity. The following features of immigration proceedings are relevant: (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 (see, for example, per Jackson LJ in Sapkota v Secretary of State for the Home Department [2012] Imm AR 254 at para 127).

Deportation cases are of particular concern. It will often be the case that a decision to deport will engage an individual’s article 8 rights. Where this occurs, the individual will usually be able to say that the issues at stake for him are of great importance. This should not be regarded as a trump card which usually leads to the need for legal aid. It is no more than one of the relevant factors to be taken into account. The fact that this factor will almost invariably be present in deportation cases is not, however, a justification for giving it reduced weight.

While the Court declined to explicitly disavow X v UK (1984) 6 EHRR 50 (which took the most restrictive approach of the European authorities to the circumstances that demand legal aid, and which the Guidance enthusiastically took as the touchstone) it has at least been comprehensively de-fanged.

The Court did however disapprove M v Director of Legal Aid Casework [2014] EWHC 1354 (Admin), in which Couslon J had
concluded that the (in his view, lawful) purpose of the scheme was that grants of ECF would be ‘exceptional’ with the pithy words ‘Exceptionality is not a test’. [29]

Likewise, while the Court accepted that the Guidance had identified correctly the factors for consideration in ECF applications, they were clear that the interpretation in the Guidance that legal aid would only be necessary in ‘very limited circumstances’ and that there is a ‘very a high threshold’ is mistaken [44]-[45].

ECF funding and immigration appeals

The position of the LAA, as set out at paragraph 23 of the Guidance, is that legal aid is unlikely to be necessary for immigration appeals because

‘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’

The Court poured cold water on that suggestion, especially as far as deport appeals are concerned. Paragraphs 88-91 are essential reading for deport appeal ECF applications/further submissions. In brief the Court placed a welcome (and entirely realistic) stress on the need for proper preparation for an appeal, especially the identification of the key issues and the collation of evidence in advance of the hearing, to dispose of the doubtful notion that ‘assistance’ from the Tribunal on the day could suffice.

It is also important to note that, on the current state of the law, virtually any EC deport appeal that involves a realistic claim to the ‘imperative grounds’ criteria should secure funding [135]. In this respect it should be noted that the fact that Mr. Reis spoke fluent English, and had respectable GCSE qualifications (points relied upon by the LAA) did not imply that he would be able to comprehend the complex issues in this type of case.

When is it ‘appropriate’ to grant ECF?

Finally, it is well worth noting that the decisions were based on s.10(3)(a) LASPO – which requires the LAA to grant ECF where a failure to do so ‘would be’ a breach of ECHR (or EC) rights. Where does that leave the position under s.10(3)(b)? The Court had this to say:

The Director may conclude that he cannot decide whether there would be a breach of the individual’s Convention or EU rights. In that event, he is not required by section 10(3)(a) to make a determination. He must then go on to consider whether it is appropriate to make a determination under section 10(3)(b). In making that decision, he should have regard to any risk that failure to make a determination would be a breach. These words mean exactly what they say. The greater he assesses the risk to be, the more likely it is that he will consider it to be appropriate to make a determination. That is because, if the risk eventuates, there will be a breach. But the seriousness of the risk is only one of the factors that the Director may take into account in deciding whether it is appropriate to make a determination. He should have regard to all the circumstances of the case. [32]

Answers on a postcard please….

James Packer, Director, Public Law department, Duncan Lewis. James represents Mr. Reis in his judicial review of the decision to refuse him ECF for his deport appeal.
Refusal of legal aid held unlawful

In “Cases”

Good news in an HIV/AIDS case

This is another from last week’s luggage carousel - I’m still catching up. I’m afraid. In the case of JA (Ivory Coast) & Anor v Secretary of State for the Home Department [2009] EWCA Civ 1353 the Court of Appeal has allowed the appeal of a woman with HIV/AIDS (albeit only…

In “Cases”

Absence of legal aid may breach fair hearing
In “Cases”

In Procedure  Cases, Court of Appeal, Legal aid

James Packer

‘Exceptionally diligent’ and ‘Exceptional’ is what Legal 500 2013 says about James Packer. James has been recognised as a Leading Lawyer in his Field within the Chambers UK 2014 edition and has been highly recommended for his expertise by Legal 500 2013 for both his Public Law and Immigration work.

One response to Legal Aid and ‘exceptional’ case funding

Philip Thomas  22 December 2014 at 12:35 pm

Although they did say the actual case before them should be given funding, the court generally ruled Family Reunion out of scope: which is not very convenient…

Reply

Leave a comment

Enter your comment here…

Search…
The Free Movement immigration law blog is written by members of the immigration team at Garden Court Chambers in London, ranked as top tier in both Chambers and Partners and The Legal 500. The editor is Colin Yeo.

Subscribe to blog posts by email

Ebooks

Check out Colin’s ebooks on the Immigration Act 2014, Refugee law in the UK, Surinder Singh and Challenging visit visa refusals, each priced at only £9.99. Visit the shop for details and to download:
“The summer 2014 asylum update was excellent and great guide to recent protection cases.”

– Adam Pipe, No 8 Chambers

“Very clear and well structured.”

– Andrew Frost, TRP Solicitors

“Really helpful and not as ones I’ve looked at elsewhere tips on those of us who are gauging the things to ask cl balance this with keeping to the barest essentials, without bloating on facts and relevance.”

– Teerachai Sriasi

The Immigration Law Practitioners’ Association (ILPA) is a professional membership organisation for those practising in all aspects of immigration, Asylum and Nationality Law. It works to raise standards, disseminate information and to promote a just and equitable immigration, asylum and nationality law practice.

Recent

<table>
<thead>
<tr>
<th>Date</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>23 December 2014</td>
<td>Upper Tribunal: Merry Christmas Pakistani Christians! Appeals dismissed…</td>
</tr>
<tr>
<td>22 December 2014</td>
<td>Legal Aid and ‘exceptional’ case funding</td>
</tr>
<tr>
<td>19 December 2014</td>
<td>Jesus is refused asylum</td>
</tr>
<tr>
<td>17 December 2014</td>
<td>Unwanted anonymity and gagging orders</td>
</tr>
<tr>
<td>16 December 2014</td>
<td>Minister misleads on sham marriage numbers</td>
</tr>
</tbody>
</table>
On The Forum

Restriction to Apply Fresh Application vs Section 3C by Lindoven Magsino

"presence of a proxy test taker" by Manndred Adophy

Right to rent and "going the extra mile" (:: by Kitty Falls

The need to maintain integrity of the Immigration Rules outweighs s55 by Ferial Saada

FLR(O) app & Transitional Provisions – 7 years residence by Daniel Bunting

Immigration cases


Mohammed, R (on the application of) v The Secretary of State for the Home Department [2014] EWHC 4317 (Admin) (19 December 2014) 22 December 2014

BW (witness statements by advocates) [2014] UKUT 568 (IAC) (12 December 2014) 22 December 2014

Macnikowski (applicable policies) [2014] UKUT 567 (IAC) (12 December 2014) 22 December 2014

On this blog

Select Category

On other blogs

Asad Khan immigration blog
BritCits
JCWI blog
Life Without Papers
NCADC blog
Nearly Legal
Pink Tape
Strasbourg Observers
UK Constitutional Law Group
UK Human Rights Blog
UK Supreme Court Blog

Disclaimer

The information and commentary on this blog is provided free of charge for information purposes only. The information and commentary does not, and is not intended to, amount to legal advice to any person. For specific legal advice please see the 'Contact' page.

We try to make sure information is accurate at the date it is published. Immigration law changes very rapidly, though. The older the blog post on this site, the more likely it is that there have been legal developments since it was published.

Views expressed in blog posts are those of the author only, not Garden Court Chambers as a whole.
The Free Movement blog was founded by Colin Yeo in 2007. Colin continues to edit the blog and other members of the immigration team at Garden Court Chambers also contribute. More about the blog

Login

Username

Password

Remember Me

Log In

Lost Password?

Search...