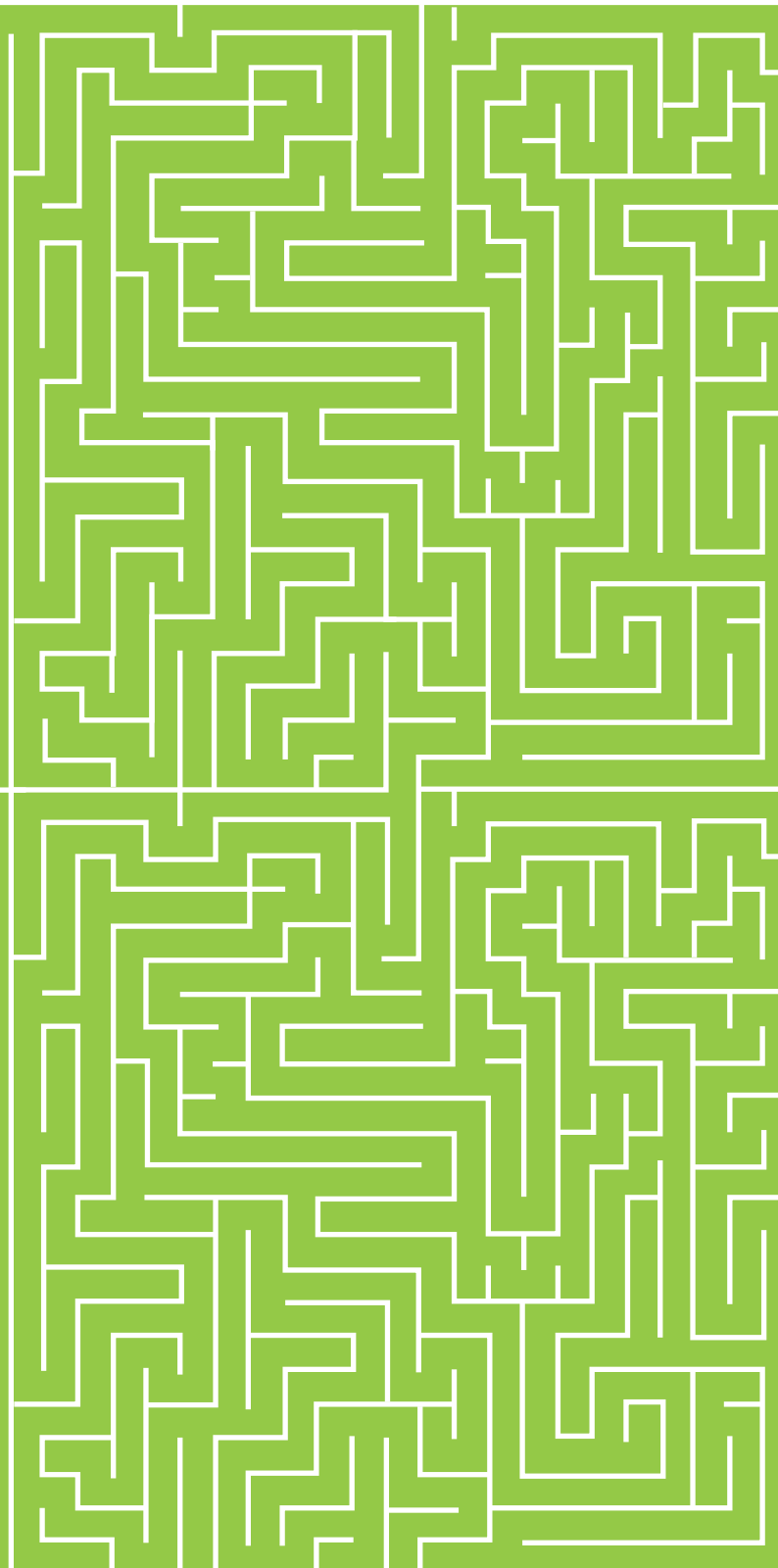


Accessible or beyond reach?

Navigating the Exceptional Case Funding Scheme without a lawyer

A policy report analysing the accessibility of the scheme for survivors of domestic and sexual violence and abuse making Exceptional Case Funding applications under Immigration and Family law.



ABOUT RIGHTS OF WOMEN

Rights of Women [established 1975] works to secure justice, equality and safety for all women. Our mission is to advise, educate and empower women by:

- ▶ Providing women with free, confidential legal advice by specialist women solicitors and barristers
- ▶ Enabling women to understand and benefit from their legal rights through accessible and timely publications and training
- ▶ Campaigning to ensure that women's voices are heard and that law and policy meets all women's needs

Our services are primarily targeted at women experiencing violence and abuse with an emphasis on reaching those who may be facing additional intersectional or structural discrimination including black, minority ethnic, refugee and asylum-seeking women (BME women) and women involved in the criminal justice system (as victims and/or offenders). By offering a range of services including specialist telephone legal advice lines, legal information and training for professionals we aim to increase women's understanding of their legal rights and improve their access to justice enabling them to live free from violence and make informed, safe, choices about their own and their families' lives.

On a daily basis we provide free specialist confidential legal advice directly to women throughout England and Wales via three telephone advice lines covering family, immigration and asylum and criminal law. We advise an average of 2000 women annually via our lines. Advice is provided by our legal staff team and 40 women volunteers, all of whom are qualified solicitors or barristers.

APPROACH TO GATHERING AND PRESENTING DATA EVIDENCE

Participants provided written authorisation of their understanding of the nature of the project: that it was for research to make policy recommendations to government. The case studies in this report are fully anonymised in accordance with best practice to prevent identification of any individual; this includes use of pseudonyms and the removal or alteration of any other personally identifiable factors.

ACKNOWLEDGEMENTS

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1. OVERVIEW OF OUR ECF PROJECT

INTRODUCTION

In this report we present data, findings and recommendations from a Rights of Women research project examining the effectiveness of the Exceptional Case Funding scheme in England and Wales. The provision for Exceptional Case Funding (ECF) came into force through section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). Through our frontline work, Rights of Women has witnessed the devastating impacts that the cuts to legal aid enacted by LASPO have had on the ability of women survivors of violence and abuse to obtain safety and justice.

LASPO dramatically reduced access to civil legal aid for individuals by removing many areas of law from the scope of legal aid funding. The ECF scheme was put in place for individual cases that fall outside the scope of legal aid, but require funding on human rights or EU rights grounds. It is therefore a critical safety net that is supposed to ensure access to justice by allowing individuals to enforce the human rights they are entitled to in law.

Applications to the ECF scheme are handled by the Legal Aid Agency (LAA), an executive agency of the Ministry of Justice. The scheme is supposed to be accessible to laypeople (non-lawyers), however, it has been widely criticised for being too complex and time-consuming for individuals, particularly those that are vulnerable¹, and is therefore failing to deliver justice to those that need it most. The Government responded to concerns about this as long ago as July 2015, stating the Legal Aid Agency “is always looking to improve the customer and provider experience and has sought feedback on the form and will consider making changes to streamline the process”². Despite this assurance, our experience of the ECF scheme, as demonstrated throughout this report, is that it is far from streamlined and is in urgent need of improvement.

ABOUT OUR PROJECT

The first stage of the project took place between April 2017 and September 2018. Throughout this period, we supported women experiencing or at risk of domestic or sexual violence or abuse (DSVA) to make ECF applications to the Legal Aid Agency within the areas of immigration and family law.

Our reasons to focus the project on ECF applications made under immigration and family law were several. The need for the project was first identified through calls to our immigration law legal advice line where we had noticed an increasing number of calls from women survivors with complex cases who faced attempting to navigate the legal system alone and unrepresented unless they obtained legal aid via the ECF scheme. We were concerned that the complexity of the scheme would make it beyond their reach and wished not only that we could assist them but also that we could scrutinise the accessibility of the ECF scheme to make policy recommendations.

1 For example, *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, Justice Committee Report, March 2015, para 47

2 *Government Response to Justice Committee’s Eighth Report of Session 2014–15: Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, July 2015, page 8

At the point that we began to plan the project in late 2016, Legal Aid Agency statistics³ showed that 53% of all ECF applications were being made under immigration law (with a 58% success rate) and 16% under family law (with a 31% success rate). The success rate for both areas was worryingly low, indicating potential systemic barriers for individuals applying for legal aid in these areas. Rights of Women has expertise in both these areas of law and understands their specific significance in providing legal redress for women survivors. In February 2016, we had been successful⁴ in bringing a judicial review (on appeal) against the Government regarding the accessibility of civil legal aid in private family law cases via the Domestic Violence legal aid gateway. Whilst in theory women survivors of domestic abuse should be able to gain family law legal aid via this gateway rather than needing to make an ECF application, we were conscious of how narrow the eligibility criteria were. Therefore, we decided that our project should provide support to women survivors making applications across both areas of law so we could monitor the effectiveness of the scheme more widely in responding to survivors of DSVAs.

The research provides a snapshot over the course of just over a year (between August 2017 and September 2018) and provides a broad set of data and observations encompassing areas including how accessible the scheme is to individuals making their own applications, particularly those that are vulnerable, and the Legal Aid Agency's handling of cases and decision-making.

Additionally, although it was not an intended focus of our research, we have included observations about the ability of the current scheme to provide real access to justice through the legal practitioners that DSVAs survivors encounter on their pathway to support. For example, we cover our experiences with external legal service providers (both legal aid and private), regarding their awareness of the scheme's availability, their understanding of when a matter is in scope and their reluctance to make ECF applications. This final point is in consideration of the well-known and documented reviews of the scheme that have concluded the lengthy process combined with a lack of payment for unsuccessful applications are a disincentive for legal practitioners to take cases on⁵.

Our data and findings across immigration and family law provide ample examples of systemic problems that illustrate how the ECF system is not fit-for-purpose. It is notable, however, that with specialist legal casework support from Rights of Women the majority of women we supported (22 out of 23) were successful in their applications for ECF. We believe this demonstrates the strength of applications when domestic or sexual violence and abuse are a factor in meriting the granting of legal aid. Furthermore, it is an indication of the dedication of our casework team in preparing these ECF applications for our women clients.

We are grateful to the Public Law Project (PLP) for providing partnership support and guidance to us throughout the course of the project. PLP have a wealth of expertise in this area including their work on two notable legal cases challenging aspects of operation of the ECF scheme⁶. Our project and this report have sought to build on the work they have done in striving to make the ECF scheme more accountable and effective in delivering access to justice for individuals.

³ See *Legal Aid Statistics: July to September 2016* Legal Aid Agency, December 2016

⁴ See the judgment for *R (Rights of Women) v Secretary of State for Justice [2016] EWCA Civ 91*

⁵ For example, *Cuts that hurt: The impact of legal aid cuts in England on access to justice*. Amnesty International, October 2016

⁶ *Gudanaviciene v Director of Legal Aid Casework [2014] EWHC 1840 (Admin)* and *I.S. v Director of Legal Aid Casework [2015] EWHC 1965 (Admin)*

2. EXECUTIVE SUMMARY OF FINDINGS

This is an abridged summary of the findings of our project. See Section 9 for further detail on each of the findings and for a range of case studies.

1 The ECF application process disadvantages people with vulnerabilities who are navigating the process alone. Women survivors of domestic or sexual violence and abuse often have complex multiple vulnerabilities.

Our project provides insight on how the complex ECF scheme can disadvantage those with multiple vulnerabilities. All of the women we assisted to make ECF applications were survivors of domestic or sexual violence and abuse and this aspect of their experience was relevant to their ECF application. We recorded a high incidence of additional vulnerabilities in the women we assisted, the main ones being having English as an additional language and mental health issues. Our project provided ample examples of the difficulties women faced when trying to fill out the application form alone. We also found that the requirement to write an account of their experiences of abuse was particularly challenging to them. All of the women we assisted clearly required a lawyer to complete the form for them. We are concerned that there has been no independent research to understand the scheme's accessibility to those with multiple vulnerabilities.

FOR MORE DETAIL REFER TO:

- ▶ *Section 5.4 Vulnerabilities of women we assisted to make an ECF application*
- ▶ *Section 9.1 Finding 1*
- ▶ *Section 9.9.1 Case studies on ability of clients to complete ECF application forms*

2 Legal aid is needed to address issues of overwhelming importance to individuals and society

All of the cases in our project engaged the women's human rights or EU rights and we were able to demonstrate in all 18 of our immigration law cases that their rights would be breached if legal aid were not made available. The cases raised issues of overwhelming importance including the welfare of children; the applicant's access to accommodation, financial support and the means of sustaining herself and any family; the applicant and any children's right to remain in the UK; the applicant and any children's physical and / or mental well being; and the protection from violence or abuse. In relation to immigration law, the ECF process is inconsistent with other parts of the same legal aid system, for example the Domestic Violence Rule.

Most of the women who sought family law legal aid did so in the context of private law children proceedings. Issues central to almost all of these cases were protecting women and children from further abuse, the welfare of children and the applicant and children's physical and / or mental well-being. These and other fundamental human rights issues are intrinsic to all child arrangements cases, and particularly in the context of domestic abuse.

FOR MORE DETAIL REFER TO:

- ▶ *Section 5.5 Importance of what is at stake for client*
- ▶ *Section 9.2 Finding 2*

3 Immigration cases engaging human rights and EU rights are inherently complex and are too complicated for an individual to present without the assistance of a lawyer

In all of our 18 immigration cases, it was beyond question that the complexity of the issues in the case were such that the applicants could not effectively represent themselves. The complexity of immigration law is roundly accepted outside of government. Yet the Government, in removing legal aid from human rights and EU rights cases, holds the view that there is nothing inherently complex about them that individuals cannot represent themselves. With more than half of all human rights and EU rights decisions being overturned at appeal, the Government's contention that immigration cases are not inherently complex does not stand up to scrutiny.

FOR MORE DETAIL REFER TO:

▶ [Section 9.3 Finding 3](#)

4 There is a lack of awareness of what is 'in scope' of legal aid

We found a 34% of all referrals to us for ECF support were ultimately unnecessary as the women being referred were eligible for legal aid due to their matter being in scope. There evidently remains a considerable degree of confusion about what is in scope of legal aid. Whilst it is unsurprising that non-legal professionals and the public may struggle with the complexity of LASPO, a critical issue is also the lack of understanding amongst legal professionals. As a result, survivors are being left without the support and protection they are entitled to and/or their pathway to adequate support or redress is being made unnecessarily onerous.

FOR MORE DETAIL REFER TO:

▶ [Section 4.3 Reasons for refusing ECF referrals](#)

▶ [Section 9.4 Finding 4](#)

5 The women we supported to make ECF applications would have had improved chances of access to justice if legal aid for early advice and assistance were available to them

Across both areas of law where we provided assistance to women to make ECF applications, we observed that access to legal aid for early advice and assistance would have been helpful in enabling them to take effective steps to resolve their legal problem. Without this, the women had invariably faced difficulties that impacted on their access to justice including protracted legal proceedings and - within immigration law cases - being exploited by unscrupulous immigration advisers for money. The negative consequences for their safety as a result are not something we can measure but are undoubtedly a hidden cost behind this picture.

FOR MORE DETAIL REFER TO:

▶ [Section 9.5 Finding 5](#)

6 A lack of awareness of the availability of exceptional case funding

There is a lack of understanding generally about the availability of exceptional case funding amongst the public, non-legal professionals and, to a lesser extent, legal professionals.

FOR MORE DETAIL REFER TO:

- ▶ [Section 9.6 Finding 6](#)

7 A lack of help to apply for exceptional case funding

We witnessed a lack of available help for women to make ECF applications, evidenced through the referrals to our project by lawyers (both those in private and legal aid practice). Legal aid providers are the most obvious party to apply for exceptional case funding for those who need it. Rights of Women is aware of very few legal aid providers who undertake exceptional case funding applications; the reasons behind this must be studied and countervailing measures put in place to address the barriers preventing legal aid providers undertaking this work. It is clear to us from our work on this project that legal aid providers are disincentivised to make applications due to the lack of a fair remuneration system for this work.

FOR MORE DETAIL REFER TO:

- ▶ [Section 4.1 Referrals to our ECF project](#)
- ▶ [Section 6.1 Preparing the ECF application – Length of time](#)
- ▶ [Section 9.7 Finding 7](#)

8 The ECF scheme is inaccessible in relation to individuals

Any claim that the scheme is accessible to individuals, based on LAA statistics on the success rate for individual applications (as opposed to provider applications), is misleading due to the high number of NGOs supporting individuals and making applications on their behalf within these statistics. The LAA does not disaggregate this data. Furthermore, individual applicants cannot seek assistance to apply for exceptional case funding from the Legal Aid Agency. There has been no LAA telephone helpline since March 2017 and the standard of the information and guidance online is poor.

FOR MORE DETAIL REFER TO:

- ▶ [Section 6.4 When applications were submitted and decided](#)
- ▶ [Section 9.8 Finding 8](#)

9 The ECF application forms are inaccessible to individuals

Many of the women we supported assisted us to analyse the accessibility of the ECF forms by attempting to fill the form out and then discussing it with us. We have produced 6 short case studies (see [9.9.1](#)) that detail how confusing the terminology on the forms is to someone without a background in law.

On average, our caseworkers spent 9 hours preparing an application for ECF. This included the drafting of a cover letter addressing why the applicant was eligible for legal aid that was, on average, between 10-11.5 pages long. We do not think it is reasonable or realistic to expect individuals to be able to present their own case in this manner and question how this process is supposed to be accessible to laypeople.

FOR MORE DETAIL REFER TO:

- ▶ Section 6.1 *Preparing the ECF application – Length of time*
- ▶ Sections 6.2-6.3 *Preparing the ECF application – Length of application*
- ▶ Section 9.9 *Finding 9*
- ▶ Section 9.9.1 *Case studies on ability of clients to complete the ECF application forms*

10 There are chronic delays in LAA decision-making

The LAA's claim to process applications within 20 working days was never met in respect of the 15 non-urgent immigration and family applications we submitted. We were met with a variation of the same reason every time we chased a delayed application – that they were 'running behind schedule', experiencing a 'backlog', dealing with a 'higher than usual number of applications'. Bearing in mind our applications were submitted from September 2017 to August 2018 it is plain that that the delays were not a one-off attributable to unforeseen spikes in applications, therefore we consider it reasonable to conclude that the delays in decision-making within the ECF team, as far as applications are concerned, are chronic. The fact that the LAA appeared to change their timescale from 20 to 25 days as of July 2018 without amendment to their published guidance raises concerns both about the impact on applicants and the transparency of LAA policy.

FOR MORE DETAIL REFER TO:

- ▶ Section 7 *Legal Aid Agency decision-making and 'customer service'*
- ▶ Section 9.10 *Finding 10*

11 The urgent case procedure is not fit for purpose

Of the 8 urgent applications we submitted, we received acknowledgment emails with a timescale for decision in only 2 cases and only one was determined within the 5 working day urgent timeframe. There appears to be no system or at least no adequate system in place to identify urgent cases as they are submitted. In one case (see Case Study 3) a grant decision was not reached until 51 days after submission; in this case the LAA first responded to the application 27 days after submission.

FOR MORE DETAIL REFER TO:

- ▶ Section 7.3 *Legal Aid Agency decision making timescale – urgent cases*
- ▶ Section 7.7-7.8 *Case studies on application handling and decision-making timescales of the Legal Aid Agency*
- ▶ Section 9.11 *Finding 11*

12 There are significant barriers to effective communication after applications are submitted

With no route to speak directly with the ECF team, the only point of access for us, individual applicants and legal aid providers is to telephone the LAA's general customer services team. The customer services team is never able to resolve a query independently; its role is to act as a 'go-between', taking information and queries from callers and passing them to the ECF team for response. We learnt through experience that it was necessary to chase the LAA to press for a decision. Inexperienced direct applicants would likely fare far worse. Direct applicants with limited or no English would find this an insurmountable barrier as the customer services team does not have access to interpreting services and is an English only point of contact.

FOR MORE DETAIL REFER TO:

- ▶ [Section 7.5 *The customer services team*](#)
- ▶ [Section 7.6 *Chasing decisions*](#)
- ▶ [Section 9.12 *Finding 12*](#)

13 No immigration applications were refused ECF

All of the 18 immigration applications we submitted for ECF were granted. While the grant rate for immigration ECF applications in 2017/18 was 70%, close analysis of the statistics reveals a mere 6% were refused on 'ECF merits' grounds i.e. for failing to meet the threshold for ECF. The economic case for operating an ECF scheme for immigration cases engaging human rights or EU rights must be proven by the Government taking into account the operational costs of processing the applications.

FOR MORE DETAIL REFER TO:

- ▶ [Section 9.13 *Finding 13*](#)

14 Individuals face challenges after ECF is granted

Individual applicants granted ECF receive a letter from the LAA that advises them to now seek a provider with a legal aid contract. Unhelpfully, the standard letter makes no suggestion how this could be achieved. We made referrals to legal aid providers for most of our clients. In most cases we had to refer to multiple providers before one accepted the case.

FOR MORE DETAIL REFER TO:

- ▶ [Section 8.3-8.6 \(data on immigration law case referrals\)](#)
- ▶ [Section 9.14 *Finding 14*](#)

3. RECOMMENDATIONS

Our recommendations to the Ministry of Justice for changes to the ECF scheme are:

- 1 ▶ Conduct independent research into the accessibility of the ECF scheme for individual applicants and commit to implementing recommendations. This research must assess the scheme's accessibility for those with multiple vulnerabilities, including, but not limited to survivors or domestic and sexual violence or abuse.
- 2 ▶ Conduct independent research into the willingness and ability of legal aid providers to make ECF applications and commit to implementing recommendations.
- 3 ▶ Improve information and guidance available to individual applicants.
- 4 ▶ Provide a helpline for individual applicants making their own ECF application and ensure interpreting services are available. If the LAA considers it to be a conflict for it to offer this service, an independent service should be commissioned.
- 5 ▶ Commit to a helpful and collaborative approach to individual applicants ensuring applications are not rejected as incomplete without assistance being provided by the LAA to remedy any deficiencies.
- 6 ▶ Remove the assessment of means and merits for individual applicants and reinstate the option of making provisional grants of ECF. Legal aid providers would adopt responsibility for the means and merits assessment as usual (whether by using delegated powers or making applications to LAA) and legal aid should be backdated to the date of the provisional grant.
- 7 ▶ Pay legal aid providers to make ECF applications at a rate commensurate with the time it takes them to prepare an application and irrespective of the outcome of the application.
- 8 ▶ Provide detailed and certain guidance in respect of urgent cases including non-exhaustive criteria for determining whether a case is urgent and the procedure.
- 9 ▶ Implement an effective triage system that: identifies urgent cases as they are received, makes a decision whether to treat them as urgent and communicates that decision to the applicant.
- 10 ▶ Reinstatement of a telephone line direct to the ECF team and improve response rates and times to queries.
- 11 ▶ Clarify and simplify the process for a legal aid provider to commence work after an individual has been granted ECF.

In addition to the above, a related recommendation that follows from our findings is:

- 12 ▶ Reinstatement of legal aid for all immigration cases involving human rights and EU rights.

4. REFERRALS

4.1 REFERRALS TO OUR ECF PROJECT

When we launched the project on 8 August 2017, we enabled external referrals by disseminating information about the project to both women’s rights and migrant rights organisations. We also accepted internal referrals from our advice lines. However, because we had a long waiting list as a result of referrals from external providers and a finite number of women we could assist due to capacity, we were unable to refer all cases that would have been eligible from our advice lines during the period.

TABLE 1: Referrals to our ECF project

	Immigration Law	Family Law	Total
Number of referrals to ECF project			
Referrals from our advice lines (internal)	11	15	26
Referrals from external organisations	38	14	52
Self-referral	0	1	1
Total number of referrals	49	30	79
Breakdown of sources of referrals from external organisation figures above			
Domestic violence professional or domestic violence/women’s organisation	20	7	27
Not-for-profit organisation (non-domestic violence specialists)	13	2	15
Statutory organisation	1	3	4
Law firm unable to cover area of law ECF application required in	2	0	2
Law firm able to cover area of law ECF application required in but with no legal aid contract	0	1	1
Law firm able to cover area of law ECF application required in with legal aid contract in that area	2	1	3
Total referrals from external organisations	38	14	52

4.2 ASSESSMENT OF REFERRALS

Of the 79 referrals to the ECF project, 23 were accepted and casework undertaken and 56 refused.

TABLE 2: Assessment of referrals	Immigration Law	Family Law	Total
Outcome of assessment of referral by ROW			
Referral accepted and casework undertaken	18	5	23
Referral refused	31	25	56
Total number of referrals	49	30	79
Breakdown of refusals above by referral source			
Referrals from our advice lines (internal)	6	12	18
Referrals from external organisations	25	12	37
Self-referral	0	1	1
Total number of refusals	31	25	56

4.3 REASONS FOR REFUSING ECF REFERRALS

Of the 56 ECF referrals we refused, the reasons for refusal (broken down in relation to the source of the referrals and area of law) are tabulated below. Reasons for refusal are listed from top to bottom according to prevalence, to highlight the most common reasons.

In terms of our criteria for refusing cases, we were clear that we would not make ECF applications on behalf of women who were already represented by a lawyer. Where this was the case, we have indicated at which point in the process a lawyer became instructed, for example either at referral stage to us or at the later stage of our initial assessment. The referrals we received where a lawyer was instructed at the time of referral were all from professionals who were either unaware that their service user was represented already or were unaware that the lawyer could assist with the legal problem in question. Where referrals had instructed a lawyer by the time of our initial assessment, this reflects those individuals' efforts to obtain alternative assistance while on our waiting list for assessment.

TABLE 3: Reasons for referral refusals - Immigration Law	Referrals from our advice lines (internal)	Referrals from external organisations	Total
Reason for referral refusal			
Legal aid lawyer already instructed by time of initial assessment	2	3	5
Matter in scope of legal aid	0	4	4
Lawyer already instructed by time of initial assessment (legal aid provider status unknown)	0	3	3
Legal aid provider already instructed at time of referral	0	3	3

Referral made by legal aid provider able to cover area of law ECF application in	0	2	2
Individual decided to leave the UK and not pursue application	0	2	2
ROW referred individual to legal aid provider who agreed to do ECF	1	0	1
No capacity to act in timeframe required	0	2	2
Private lawyer already acting at time of referral and fees already paid	0	1	1
Another organisation assisting with ECF application at time of initial assessment	0	1	1
Weak merits of underlying case	0	1	1
Individual chose to pay privately	1	0	1
No application for leave necessary	0	1	1
Financially ineligible for legal aid	0	1	1
Weak ECF merits (individual proven ability to represent self)	0	1	1
Unable to make contact with individual	1	0	1
Individual submitted her own immigration application which was pending	1	0	1
Total	6	25	31

Comment on Table 3:

We received referrals from external organisations even though their service had already instructed a legal aid provider at the time of the referral. In these cases, it was the individual and their support worker's lack of awareness about what was happening in their immigration case that prompted them to seek further support from us.

In one of the cases where a legal aid provider was already instructed at the time of the referral, the woman was paying privately for representation by them. This is despite her financial eligibility for legal aid and her representative holding a legal aid contract in immigration law.

We refused 5 referrals in total because the women, who did not have representation at the time of the referral, had secured the assistance of a legal aid provider by the time we were able to commence our assessment. This reflected both our advice to women referred to us that they should continue to exhaust all other avenues for assistance while waiting for us to assess their referral, and the approach of support workers who, conscious of the limited capacity of organisations like ours, make multiple referrals simultaneously in an effort to secure support for their service users.

TABLE 4: Reasons for referral refusals - Family law

Reason for referral refusal	Referrals from our advice lines (internal)	Referrals from external organisations	Self-referral	Total
Matter in scope of legal aid	5	9	1	15
Financially ineligible for legal aid	3	0	0	3
Unable to make contact with individual	2	0	0	2
Legal aid provider already instructed at time of referral	0	1	0	1
Referral made by legal aid provider able to cover area of law ECF application in	0	1	0	1
No capacity to act in timeframe required	0	1	0	1
Issue was not a family law matter	1	0	0	1
Individual decided not to pursue legal advice	1	0	0	1
Total	12	12	1	25

Comment on Table 4:

60% of all the refusals were on the basis that the individual was eligible for legal aid, such that an application for ECF was unnecessary. This high proportion indicates a lack of understanding regarding family law legal aid and in particular the operation of the domestic violence (DV) gateway. When refusing these referrals, we gave substantive advice either to the woman directly or the referrer on the availability of legal aid and the evidence of domestic violence that the women could obtain in order to access legal aid. It was notable that many of the women in this category were referred to us by statutory organisations that were able to provide evidence of domestic violence for the purposes of legal aid but had not done so. The women referred from our advice line were discovered to be in scope upon further enquiries being made and documents being inspected so that we were able to identify that they had evidence that met the requirements of the DV gateway.

5. NEEDS AND CHARACTERISTICS OF OUR CLIENTS

5.1 LEVEL OF LEGAL AID NEEDED

Of the 49 immigration referrals to the ECF project, 43 were for legal help and 6 were for controlled legal representation.

Of the 30 family law referrals to the ECF project, 1 was for family legal help and 29 were for family help (higher).

The data from here onwards relates to the 23 cases where the referral was accepted and casework carried out.

5.2 LEVEL OF LEGAL AID NEEDED FOR CASES ACCEPTED - IMMIGRATION LAW

Of the 18 immigration cases we accepted, 16 were for legal help - the level of legal aid required for advice and assistance with making an application to the Home Office - and 2 were for controlled legal representation – the level required to assist with immigration appeals before the Immigration and Asylum Chamber of the First-tier Tribunal and Upper Tribunal. Both of these 2 cases were in respect of appeals before the First-tier Tribunal.

This matches our general experience from our immigration advice line where the vast majority of women who contact us for assistance with their immigration problem need the lowest level of legal aid available for advice and assistance to make an application to the Home Office.

The type of service they needed is broken down in Table 5 (note: more than one type of service can be required by the same case).

TABLE 5: Level of legal aid needed for cases accepted - Immigration Law

Type of service needed for immigration cases where the referral was accepted and casework carried out	Number of women needing this type of support
Advice on the options available to resolve their legal problem	15
Help with making an application to the Home Office	16
An expert report(s)	4
Preparation of appeal	2
Representation at court or tribunal	2

5.3 LEVEL OF LEGAL AID NEEDED FOR CASES ACCEPTED – FAMILY LAW

Of the 5 family law cases we accepted, the level of service required for all was family help (higher) - the level required for case preparation and legal representation at family court hearings.

TABLE 6: Level of legal aid needed for cases accepted - Family law

Type of service needed for family cases where the referral was accepted and casework carried out	Number of women needing this type of support
Legal advice on law and procedure	5
Case management and preparation for court hearings up to but excluding a contested final hearing	5
Legal representation at court hearings up to but excluding a contesting final hearing	5

5.4 VULNERABILITIES OF WOMEN WE ASSISTED TO MAKE AN ECF APPLICATION

The eligibility criteria for Rights of Women's ECF project required all referrals to be victims of domestic or sexual violence and abuse (DSVA). For this reason, all the women we represented had this vulnerability.

Our approach to defining vulnerabilities in the context of the project was any aspect relating to the client's identity or circumstances that may place them at a potential disadvantage (individual, societal or structural) compared to someone else navigating the legal system unrepresented who did not have this vulnerability. Most often these vulnerabilities were characterised by a hardship indicating an increased 'need' of the assistance of a lawyer, for example due to factors that relate to an increased risk to their personal safety or a requirement for additional and separate specialist support. Table 7 shows the vulnerabilities we recorded in our caseload. Table 8 shows that the women we assisted often had more than one vulnerability.

TABLE 7: Vulnerabilities of women we assisted to make an ECF application

Vulnerability	Number of women with this vulnerability		
	Immigration law	Family law	Total
Victim of domestic or sexual violence and abuse	18	5	23
English not first language	13	3	16
Mental health issues	11	4	15
Homeless / insecure accommodation	7	1	8
No source of independent income	6	2	8
Needs an interpreter	4	1	5
Physical disability	2	3	5
Victim of trafficking or modern slavery	2	0	2
Caring for children with complex health needs	2	0	2
Age under 25	1	0	1
No formal education	0	1	1

Number of vulnerabilities	Number of women we assisted with this frequency of vulnerabilities		
	Immigration law	Family law	Total
2 of the above listed vulnerabilities	1	2	3
3 of the above listed vulnerabilities	9	1	10
4 of the above listed vulnerabilities	5	0	5
5 of the above listed vulnerabilities	2	0	2
6 of the above listed vulnerabilities	0	1	1
7 of the above listed vulnerabilities	1	1	2
Total	18	5	23

5.5 IMPORTANCE OF WHAT IS AT STAKE FOR CLIENTS

Of the 23 women we assisted to make applications for ECF, all needed legal aid to address issues of overwhelming importance to themselves or their children. Table 9 provides a breakdown of these issues in our caseload.

Issue	Number of women we assisted with this issue		
	Immigration law	Family law	Total
Welfare of the children	16	4	20
Access to accommodation / financial support / means of sustaining self and family	16	0	20
Right to remain in the UK	15	0	15
Physical and / or mental well being	16	5	21
Protection from violence or abuse	12	5	17
Loss of home	0	1	1

Comment on Table 9 - Immigration Law:

That welfare of children is a factor of such prevalence reflects the fact that 16 out of 18 of our immigration clients had one or more children.

All but two of our immigration clients needed help with their own immigration status. For this reason, without legal assistance to resolve their immigration problem their ability to work and / or access public funds was at stake. The two clients for whom this was not in issue

had secure status in the UK which permitted them access to public funds, but needed legal assistance to apply for their children, from whom they were separated because of domestic violence, to join them in the UK.

The vast majority of our immigration clients were experiencing considerable stress and anxiety because of their immigration problem and any consequential problems such as destitution. 16 out of 18 specifically talked to us about how their physical and / or mental well-being had been affected.

While all immigration clients were victims of domestic or sexual violence and abuse, we recorded 12 instances where protection from violence or abuse was an important issue in the case. The remaining 6 had had no contact with the perpetrator of abuse for more than one year and were able to resolve their immigration case independently without relying on the perpetrator.

Comment on Table 9 - Family Law:

4 out of 5 family clients were respondents to a child arrangement application involving one or more children. A concern these four women had in common was the risk to their children of exposure to violence if contact with the other side (the alleged perpetrator) was granted (supervised or unsupervised).

3 of the 5 family clients stated they had stress and anxiety exacerbated by the court proceedings. The highly emotive issues made it practically impossible for these women to continue to represent themselves.

While all 5 of the family clients were victims of domestic violence, none had the prescribed evidence which would have enabled them to access legal aid via the domestic violence gateway. Notably, two of these women were in receipt of a doctor's letter, however the letters were not sufficient to pass the gateway evidence test as the doctor had not confirmed domestic abuse. In both of these cases the victim's domestic abuse related to coercive control.

3 of the 5 family clients reported feeling that the abuser was able to use the family justice system as a method of furthering their control of the client.

6. APPLYING FOR EXCEPTIONAL CASE FUNDING

6.1 PREPARING THE ECF APPLICATION / LENGTH OF TIME

The amount of time it took for our caseworkers to prepare the ECF applications for submission varied between 6 hours and more than 12 hours. On average, our caseworkers spent 9 hours preparing an application for ECF.

In addition, our caseworkers spent a considerable amount of time speaking with clients to obtain the information needed to prepare the application.

6.2 PREPARING THE ECF APPLICATION / LENGTH OF APPLICATION - IMMIGRATION LAW

Our caseworker's applications for ECF included the completion of the form CIVECF1 as well as the relevant means and merits forms i.e. form CW1 (for legal help) or CW2 (for controlled legal representation). In addition, she prepared a detailed cover letter addressing why the applicant was eligible for legal aid.

The cover letters ranged from 7.5 to 15 pages long. The average cover letter was 11.5 pages long giving some indication of the detail submitted with the application.

6.3 PREPARING THE ECF APPLICATION / LENGTH OF APPLICATION - FAMILY LAW

Our caseworker's applications for ECF included the completion of CIVECF1, CIV APP3 and the relevant means form i.e. form CIVMEANS 1 (client not receiving a passported benefit) or form CIVMEANS 2 (client in receipt of passported benefits). In addition, she prepared a detailed cover letter addressing why the applicant was eligible for legal aid.

The cover letters ranged from 8 to 13 pages long. The average cover letter was 10 pages.

TABLE 10: Preparing the ECF application – Average length of time and length of application

	Average length	
	Immigration law	Family law
Time spent by our caseworker preparing each ECF application	9 hours	9 hours
Number of pages to covering letter written by our caseworker for each application	11.5 pages	10 pages

6.4 WHEN APPLICATIONS WERE SUBMITTED AND DECIDED

Of our 23 applications, the first was submitted in September 2017 and the last in August 2018. Table 11 shows the months when applications were made and decided.

TABLE 11: When applications were submitted and decided

Month & Year	Immigration law		Family law	
	Number of ECF applications made	Decision received	Number of ECF applications made	Decision received
September 2017	1	0	0	0
October 2017	1	1	0	0
November 2017	1	1	1	1
December 2017	5*	2	1	0
January 2018	1	3	0	1
February 2018	1	1	0	0
March 2018	2	2*	1	0
April 2018	1	2	0	0
May 2018	2	0	1	1
June 2018	0	3	0	0
July 2018	2	0	0	1**
August 2018	1	3	1	0
September 2018	0	0	0	1
Total	18	18	5	5

Comment on Table 11 - Immigration Law:

A total of 12 immigration ECF applications were made in the financial year 2017-18 and 6 applications in the financial year 2018-19. A total of 10 decisions granting ECF were received in the financial year 2017-18 and 8 decisions granting legal aid in the financial year 2018-19.

* One application was prepared by us and handed over to a non-profit legal aid provider to submit to the Legal Aid Agency on behalf of the client. While the legal aid provider did not draft the application, it will nevertheless be recorded by the Ministry of Justice in its published statistics on legal aid as an application made by a provider, as opposed to an application made by an individual. As a result, 11 of the 12 applications we prepared in the financial year 2017-18 and 9 out of 10 decisions granting legal aid we received in the financial year 2017-18 will be recorded as applications made by an individual in Ministry of Justice statistics.

Comment on Table 11 - Family Law:

A total of 3 family ECF applications were made in the financial year 2017-18 and 2 applications in the financial year 2018-19. A total of 2 decisions granting ECF were received in the financial year 2017-18 and 2 decisions granting ECF in financial year 2018-19.

** This application was refused on standard merits criteria. The decision-maker made no finding on whether the exceptional case criteria under section 10(3) LASPO were met.

7. LAA DECISION-MAKING & 'CUSTOMER SERVICE' OF LAA

7.1 ACKNOWLEDGMENT OF APPLICATIONS BY LAA'S ECF TEAM

Applications for ECF can be submitted to the LAA by email to contactECC@legalaid.gsi.gov.uk or by post to Exceptional Case Funding Team (ECF), Legal Aid Agency (7.38), 102 Petty France, London, SW1H 9AJ. The contact details are available on the gov.uk website.

To benefit from immediate delivery and to reduce the cost of having to send applications by recorded or special delivery, Rights of Women opted to lodge ECF applications by email in all cases.

After sending an application by email to the ContactECC email address, the sender receives an automatic reply which states:

"Thank you for contacting the Exceptional and Complex Cases team.

This email address should not be used to make an application for an emergency interim relief order to the out of hours administrative court duty judge. The email address for those applications is asylum-out-of-hours@legalaid.gsi.gov.uk

Please note that we have changed the way you contact us – please refer to the news story on gov.uk for further details: <https://www.gov.uk/government/news/civil-news-contacting-the-exceptional-and-complex-cases-team>"

The automatic email reply makes no attempt to acknowledge receipt of ECF applications.

Our experience of receiving acknowledgment emails from the ECF team with confirmation of their timescale for determining the application was inconsistent.

Of the 23 ECF applications we submitted to the LAA, we received acknowledgment emails with a timescale for decision in 9 of our applications (7 immigration applications and 2 family applications).

Of the 15 non-urgent applications we submitted, we received acknowledgment emails with a timescale for decision in 7 cases (5 immigration applications and 2 family applications).

Of the 8 urgent applications we submitted, we received acknowledgment emails with a timescale for decision in only 2 cases. These were both immigration cases, both contained an expected date of decision within the non-urgent timeframe and failed to acknowledge our request for urgency.

7.2 LEGAL AID AGENCY'S DECISION-MAKING TIMESCALE

The LAA's online guidance⁷ to individual applicants states that applications are usually processed within 20 working days and if the LAA agrees a case is urgent, they will prioritise it and make a decision within 5 working days.⁸

Of the 23 applications we submitted, we requested an urgent decision in 8 of them. We describe these below as 'urgent cases'. The remaining 15 applications for which we did not request urgency are described as 'non-urgent cases'.

⁷ <https://www.gov.uk/guidance/legal-aid-apply-for-exceptional-case-funding>

⁸ The LAA has similar guidance for legal aid provider applicants in its ECF Provider Pack dated July 2016 which states that it aims to process an ECF application within 20 working days. If a case is urgent the LAA states that if they agree that the application is urgent, they will deal with the case ahead of others and make a decision within 5 working days. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/588924/ecf-provider-pack.pdf

7.3 LEGAL AID AGENCY DECISION-MAKING TIMESCALE – URGENT CASES

Of the 8 urgent applications we submitted, only one was determined within the 5 working day urgent timeframe.

TABLE 12: Legal Aid Agency decision-making timescale – Urgent cases

Number of days LAA took to make decision (compared to the 5 day timeframe for urgent cases)	Number of cases that received decision within this timescale	
	Immigration law	Family law
5 working days	1	-
6 working days	1	-
8 working days	-	1
9 working days	1	-
10 working days	-	1
21 working days	2	-
51 working days	1	-

Comment on Table 12 - Immigration Law:

The LAA did not give an early indication of whether they agreed to treat the application as urgent in any of the 6 urgent immigration applications.

4 out of 6 of the urgent immigration applications received no acknowledgment at all after submission.

2 out of 6 of the urgent immigration applications were acknowledged by the LAA by email. However in both acknowledgment emails the LAA cited the non-urgent timeframe for decision with no mention at all that the application had been submitted requesting consideration within the urgent timeframe. In the latest of these urgent applications submitted in July 2018 the LAA cited a 25 working day decision-making period - longer than the non-urgent timeframe.

The only case in which we ever received reasons for refusing to treat the application as urgent was case study 4 (see below). In that case the LAA informed us that an application for legal help to submit an application for leave is not usually considered urgent and that their urgent consideration is usually reserved for applications with imminent hearing dates or where there is an immediate risk of deportation.

This does not match our experience. 2 out of 6 of our urgent immigration applications were decided within 5 and 6 working days respectively (Case studies 2 and 5 below). While the LAA never told us that they considered the first application as urgent, they did issue a decision within 5 working days. The LAA confirmed it would treat the second application as urgent on the 5th working day after we chased it and issued a decision on the 6th working day. We did make two urgent immigration applications, the reason for urgency being an imminent hearing date however these were decided in 51 (Case study 3) and 21 (Case study 5) working days respectively.

Comment on Table 12 - Family Law:

The LAA did not give any indication of whether they agreed to treat the application as urgent in either of our 2 urgent family applications. However, it appeared from their decision-making timescale that they did treat it as urgent.

In both of these cases we received a generic acknowledgment email from the LAA after submission but there was no acknowledgement of the request for urgency.

In one of these urgent ECF applications submitted, the reason for urgency was a hearing listed 17 working days from the date of submission. We received a decision by the LAA 10 working days after submission of the ECF application.

The second urgent ECF application was submitted 11 working days before a child arrangement hearing in the Family Court. We contacted the LAA on the 7th and 8th working days after submission. We received a decision granting legal aid 8 working days after submission.

7.4 LEGAL AID AGENCY DECISION-MAKING TIMESCALE - NON-URGENT CASES

Of the 15 non-urgent applications we submitted, none were determined within the LAA's 20 working day timeframe. Table 13 shows how many days it took to receive a decision.

TABLE 13: Legal Aid Agency decision-making timescale - Non-urgent cases

Number of days LAA took to make decision (compared to the 20 day timeframe for non-urgent cases)	Number of cases that received decision within this timescale	
	Immigration law	Family law
22 working days	1	-
23 working days	1	-
24 working days	2	-
25 working days	1	-
26 working days	1	-
27 working days	3	-
28 working days	-	1
29 working days	2	-
30 working days	-	1
36 working days	-	1
37 working days	1	-
Total number of cases	12	3

Comment on Table 13 - Immigration Law:

In 10 of the 12 non-urgent immigration cases, when we chased the decision on or after the 20th working day, we were informed by the LAA that they were running behind schedule due to a backlog of cases. The period of time during which we received this response from the LAA ran from November 2017 to June 2018. On some occasions we were told the extent of their delays at that time, for example in January 2018 and May 2018 we were told they were running 10-15 working days and 10-12 working days behind schedule respectively. On other occasions we were given a less specific response, such as in March 2018 when we were told the ECF team was 'currently dealing with unprecedented amount of immigration applications' or in June 2018 when we were told the ECF team had a 'higher than usual number of applications'.

In 1 of these 12 cases, no reason was ever given for the delay when we chased a decision.

In 1 of these 12 cases in August 2018, when we chased the decision on the 20th working day, the customer services team informed us that the LAA's target date for decision was 25 working days. When we pointed to the gov.uk website and the ECF Provider Pack which still published the 20 working day timeframe, the call handler informed us the ECF team had been very busy and so the new target of 25 working days had been set to better manage our expectations. Our call to the LAA on the 20th working day was the first occasion the LAA had informed us of the change in timeframe.

Comment on Table 13 - Family Law:

In 1 case in August 2018 the LAA acknowledged receipt of submission and confirmed they would respond within 25 working days. As is noted in our comments in the immigration law observations section above, the standard timeframe for non-urgent cases (as per the gov.uk website and the ECF provider pack at the time) was actually 20 working days, indicating a policy decision had been taken within the LAA to derogate from the published guidance without any public announcement. No reason was given for this additional 5 working days delay in comparison to their published guidance.

We spoke to the LAA on the 25th day and were informed that the timeframe for a decision on an ECF application was 10 working days for the means assessment and 20 working days for the merits assessments, making this a total of 30 working days. We emailed the LAA the same day to express our concerns about the processing time frame we had just been informed of over the phone.

We received an email from the LAA on the second day of the expiration of the 25-working day date advising us that the turnaround time on a non-urgent case was 25 working days. They further confirmed that the ECF Provider pack had not been updated to reflect this. They acknowledged that they had a slight back log and would provide a decision as soon as possible.

7.5 THE CUSTOMER SERVICES TEAM

The contact telephone number for the ECF team published on gov.uk and given to applicants in email correspondence from the ECF team is the telephone number 0300 200 2020, which is the LAA's general customer services team.

We understand that prior to our project commencing there was a dedicated telephone number for the ECF team, which would allow direct communication, however it was closed

in early 2017 since which time it has been impossible to speak directly to the ECF team. Throughout our work, our only option if we wanted to speak to the LAA was to call the customer services team.

The customer services team acted as a 'go between' with the ECF team. Whenever we called them to enquire about the progress of an ECF application, the customer services team had three options to resolve our query:

1. Pass on information from their spreadsheet which contained a limited amount of information about ECF applications (see further details below in 'chasing decisions').
2. Call the ECF team on our behalf to enquire about the progress of an application.
3. When they could not reach the ECF team by telephone, send an internal message to the ECF team asking them to contact us about the progress of an application. We were never consistently advised whether there was a time period within which we could expect a response. Some call handlers gave no time limit, some said 2 days, others said 5 days.

Generally, our experience with the customer service team was of call handlers following the above practice with little difficulty, however we also experienced some more unhelpful services:

- ▶ One call handler told us they could not access the ECF spreadsheet as they had not been in post long enough and only senior call handlers were permitted access.
- ▶ We were told on at least two occasions by different call handlers that they cannot share information with us without our client present for data protection reasons. While we had sent signed authority with our applications it would appear the customer services team did not have access to it.
- ▶ Occasionally we received incorrect information. For example one call handler informed us the 20 working day service standard did not apply to ECF cases. In relation to another case, a call handler informed us that the standard timeframe for a review decision was 20 working days. In that same case, on another call to the customer services team, a call handler informed us that the timeframe for a review was 26 working days.

On most occasions when we contacted the customer service team we spent a period of time on hold waiting for an available call handler. Our experience of waiting time was often around 10 minutes for calls to be answered.

7.6 CHASING DECISIONS

Our caseworkers routinely chased the LAA for a decision after the standard or urgent timeframe had passed without a decision having been received.

The only mechanism to contact the LAA to chase decisions was either to call the customer services team on 0300 200 2020 or to email the ECF team using the contactECC@legalaid.gsi.gov.uk email address. From our experience, our emails to the Contact ECC inbox were never answered until a call had been separately logged with the customer services team and so our primary means of communication was usually to call the customer services team.

We soon learned through experience that the customer services team does not have access to all the LAA's data on ECF applications.

Customer service team call handlers told us that they cannot view all the information available to LAA staff in the ECF team because the teams use different systems. The customer service team call handlers can only access a basic spreadsheet from which they are able to view a limited amount of information. This information appears to be limited to whether the application has been received, what the target date for completion is, whether the application has been through initial means testing and whether a decision has been made. For any further information the customer services team need to contact the ECF team internally, which they would commonly attempt to do in order to seek a resolution to our query. The customer service team commonly found it difficult to reach the ECF team by telephone and in the majority of cases their calls were not answered. When unable to reach the ECF team the call handler told us the only resolution they could offer us was to send an internal message to the ECF team asking them to contact us directly with an update on progress of the case.

Our experience of the response by the ECF team to these internal messages from the customer services team was mixed.

Comment on chasing decisions - Immigration Law:

Of the 12 non-urgent immigration applications we submitted, 8 were chased via the customer services team who sent internal messages to the ECF team asking them to respond directly to us. In 4 of these 8 cases we never received any reply from the ECF team until the decision was issued (3-5 days after chasing). In the other 4 cases we did receive responses from the ECF team informing us of delays in their decision-making.

Our experience of emailing the ECF team directly without first going through the customer services team had less success. We attempted this in 2 of the 12 non-urgent immigration cases. We received no reply to our emails sent to the ContactECC inbox in either case and had no contact from the ECF team until the decisions were issued (2-3 working days later).

In 2 of the 12 non-urgent applications we submitted, the customer services team was able to explain the delay to us directly, in both cases by getting through to the ECF team themselves during our call.



CASE STUDIES ON APPLICATION HANDLING & DECISION-MAKING TIMESCALES OF THE LAA

7.7 IMMIGRATION LAW CASE STUDIES

CASE STUDY 1

September - October 2017, urgent application

The applicant needed legal aid to apply for her 3 year old daughter, from whom she had been separated because of domestic abuse, to join her in the UK. She requested urgency because she was concerned about the welfare of her child in the care of a family member in her country of origin. She cited known instances of physical abuse of her daughter.

The LAA did not acknowledge the request for urgency nor confirm whether it was accepted or not.

After 10 working days, we contacted the LAA to chase a decision and were informed by the LAA's customer services team that they could find no record of the application having been received. The LAA call handler was unable to reach the ECF team by telephone and instead resolved our query by emailing the ECF team to ask them to contact us directly to confirm receipt of the application and when a decision would be received.

16 working days after submitting the application and a week after chasing the LAA, we had still received no response. We called the LAA customer services team again and were again informed that they could not locate any record of the application. Again, the LAA call handler's resolution of our query was to email the ECF team to ask them to contact us directly.

21 working days after submitting the application and after two attempts to chase, we had still not received any decision. We emailed the LAA's ECF team on the email address contactECC@legalaid.gsi.gov.uk requesting an urgent decision. We doubled our efforts by also calling the LAA customer services team who in turn emailed the ECF team on our behalf to raise our request for an urgent decision.

That same day we received a call from a caseworker in the ECF team informing us that they had allocated the application to a caseworker for consideration that day and they hoped to issue a decision within two days. She made no comment on our request for urgency and informed us that the 20 working day timeframe is usually met but that this was a busy period.

We received a decision that same day, 21 working days after the urgent application was submitted.

CASE STUDY 2

December 2017, urgent application

The applicant's visa was due to expire within 32 working days of the date of the ECF application. If the LAA made a decision within their urgent timeframe of 5 working days the applicant would have 27 working days to find a legal aid provider with capacity to take her case and prepare the application for submission to the Home Office.

In requesting urgency we cited the delays in finding a legal aid provider with capacity to take the case after legal aid was granted, especially in the context of a region with only three legal aid providers operating, and also the steps a legal aid provider would need to take to prepare the case which could not be properly completed in a matter of days. We argued that without urgent consideration, the grant of ECF would be too late to instruct a legal aid provider to properly prepare an application for leave.

On the same day of submission, we received an email from the LAA acknowledging the application and informing us that we could expect to receive a decision within 20 working days. The LAA did not mention our request for urgency.

Three days later we wrote to the LAA ECF team by email asking it to acknowledge our request for urgency and make a decision within 5 working days. We received no reply to our email.

The LAA granted ECF on the 5th working day after submission, within the urgent timeframe.

CASE STUDY 3

December 2017 – March 2018, urgent application)

The applicant sought legal aid to represent her at an appeal which was to take place 33 working days from the date the ECF application was submitted. She also had Tribunal directions to comply with – to lodge evidence 31 working days from then and to complete and file a reply notice 22 working days from then. Without urgent consideration, the grant of exceptional case funding would have been made too late to allow her to properly prepare her appeal.

Unlike the other applications for exceptional case funding, Rights of Women did not submit this on behalf of the individual. The applicant was able to secure an offer of assistance from a non-profit legal aid provider in her area 35 working days before her appeal hearing. As we had already prepared most of her ECF application and the legal aid provider did not have capacity to work on it we agreed to finalise

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the application and send it to the legal aid provider for submission which they did.

The non-profit legal aid provider received confirmation of the grant of ECF 51 working days after this urgent application was submitted and more than 3 weeks after the hearing had taken place. Despite not knowing whether it would receive funding for its work, the non-profit legal aid provider had nevertheless acted for the applicant at her appeal. The ECF team first responded to the application 27 working days after it was submitted to request further financial information. The applicant provided further financial information the following working day.

The ECF team then again requested further financial information, now 30 working days after submission and several days before the applicant's appeal hearing. The applicant supplied additional financial information after her appeal hearing, then 37 working days after submission.

The grant of legal aid was finally confirmed 51 working days after the application had been submitted. As the grant of ECF was backdated it could be relied upon to fund the appeal.

The non-profit legal aid provider told Rights of Women that they had worked at their own financial risk on this case i.e. with no guarantee of being paid, because of the imminence of the applicant's appeal hearing. They told us that, had ECF not been granted, their work would have been unfunded 'pro bono' work which was not sustainable for their organisation.

CASE STUDY 4

January - February 2018, urgent application

The applicant needed legal aid to make an application to remain in the UK based on her own and her daughter's private life in the UK. The applicant was undocumented and had been reporting to the Home Office for five years. Immigration Enforcement had recently been taking steps toward the removal of the applicant and her daughter. The applicant had informed Immigration Enforcement about her plans to make an application for leave once she had secured legal aid and they had responded by giving her a two week deadline in which to make an application to the Home Office failing which they would continue enforcement action. The applicant's next reporting event was in less than two weeks. It was highly likely that the applicant and her daughter were at risk of removal and they needed to make an urgent application to the Home Office.

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We argued that ECF was required urgently because of the multiple and time-consuming steps that were required before she could apply to the Home Office. Once ECF were granted, the applicant would need to find a legal aid provider with capacity to take on her urgent case. Once instructed the steps a legal aid representative needed to undertake before being able to submit an immigration application are multiple and cannot be completed properly in days.

We submitted the application for ECF clearly marking it as urgent however received no acknowledgment email from the LAA.

On the 4th working day after submission we wrote again to the LAA by email asking for confirmation whether they had agreed to treat the application as urgent and make a decision with 5 working days. We received no reply to this email.

On the 6th working day after submission when no decision had been received, we wrote again to the LAA asking for a response by the close of business the following day. When no response was received by the deadline, we referred the case to the Public Law Project to judicially review the unreasonable delay.

On the 8th working day after submission, the Public Law Project sent a letter before action to the LAA asking for a decision by midday the following day failing which judicial review proceedings would be issued.

The following day, the 9th working day after submission, we received a letter from the LAA granting legal aid. In its letter granting ECF, the LAA stated that the "application has not been considered as urgent as an application for Legal Help to assist in submitting an application for Leave to Remain is not something that would usually be considered on an urgent basis. Urgent immigration cases are usually reserved for applications with imminent hearing dates or where there is an immediate risk of deportation."

CASE STUDY 5

July - August 2018, urgent application

The applicant sought legal aid to represent her at an appeal which was listed for hearing 41 working days from the date the ECF application was submitted. She had Tribunal directions to lodge her appeal bundle as soon as it was available. If an urgent decision were received granting ECF, the applicant would have 36 working days in which to find a legal aid provider able to take on her case and prepare all the evidence needed in her complex human rights appeal which included obtaining expert evidence. In requesting urgent consideration, we cited our recent experience of delays in finding a legal aid provider

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with capacity to take on a new case – in another case we had sent referrals to 8 different providers and waited 22 working days before finding a provider able to assist. We argued that without urgent consideration, the grant of exceptional case funding would have been made too late to allow the applicant to properly prepare her appeal.

The day after submitting the urgent ECF application, the ECF team sent an acknowledgment email confirming we could expect a decision within 25 working days. The ECF team's email did not mention our request for urgency nor explain why their expected date of decision fell outside both their urgent and standard decision-making timeframes which are 5 and 20 working days respectively. We immediately replied asking the LAA to confirm whether they agreed to treat the application as urgent. We received no reply.

3 working days after submitting the application we called the LAA customer services team. The customer services team were unable to reach the ECF team by telephone and instead sent an email to the ECF team on our behalf. We received an email from the ECF team on that day noting the applicant's hearing date and confirming it would process the application within 25 working days, which they considered to be 'well before the date of the court hearing'. On their timescale a decision would have been reached 16 working days before the appeal hearing date.

We considered this delay to be unreasonable and feared that the applicant would not have sufficient time to properly prepare her appeal. We referred the case to the Public Law Project for advice on challenging this delay. The Public Law Project wrote to the LAA 15 working days after the ECF application had been submitted, stressing the urgency in the case and requesting a decision urgently and within 20 working days at the latest. When the LAA did not reply to the Public Law Project's letter, PLP called the customer services team on the 20th working day to chase a decision.

The LAA wrote to us on the 21st working day after submission granting legal aid. This left the applicant with only 20 working days before the appeal.

Rights of Women assisted the applicant to secure a legal aid provider to take the case; however they were not able to offer the client an initial appointment until a date 11 working days before the appeal hearing. The legal aid provider did not have sufficient time to properly prepare the appeal and was forced to seek an adjournment of the hearing date which has now been postponed by a further 6 months.

By the time of the re-scheduled hearing in 2019, it will be 3 years and 5 months since her application for leave to the Home Office.

CASE STUDY 6

August 2018, urgent application

The applicant needed legal aid to make an application to change her immigration status following the breakdown of her relationship because of domestic violence. The urgency in the case stemmed from her need for safe accommodation and financial assistance for herself and her children in order to flee the perpetrator of abuse. She was unable to access any mainstream welfare benefits or housing assistance while she had no recourse to public funds as a condition of her then leave. The applicant was destitute, facing eviction within a month and experiencing continuing abuse from her ex-partner who continued to attend her home. Although she had been advised by the police to move out and seek help from the council, the council had rejected her homelessness application on account of her immigration status.

When we submitted the urgent application for ECF we did not receive any email from the LAA acknowledging its receipt. After 2 working days we wrote to the ECF team by email asking for confirmation on whether they agreed to treat the application as urgent. We received no reply to our email.

On the 5th working day after submission we called the customer services team to chase a decision. The call handler we spoke with was unable to find any record of our application on the spreadsheet he had access to – he explained that it was because the spreadsheet only recorded applications made 10 days or more ago therefore it could not show any details of applications made in the meantime. The call handler called the ECF team and following their discussion asked us to explain the reasons for urgency – we repeated the reasons for urgency as set out in our application cover letter and in the email we sent with the application. The call handler informed us that the ECF team would contact us directly.

Later that day we received an email from the LAA confirming they were treating the application as urgent and they would aim to make a decision within the following days.

The following day, the 6th working day after submission, we received a letter from the LAA granting ECF.

7.8 FAMILY LAW CASE STUDIES

CASE STUDY 7

November 2017, urgent application

The applicant needed legal aid to be represented as the respondent at a child arrangement hearing in late November in the Family Court. The applicant in the family case was her ex-partner and father of her child. The applicant was a survivor of emotional and psychological abuse perpetrated by her ex-partner.

The ECF application was submitted 17 working days before the hearing and urgent consideration was requested. The LAA did not acknowledge the application and did not inform us whether they would treat the application as urgent.

Five working days after the application was submitted we contacted the ECF team by email repeating the urgency in the case and requesting a decision that day. We received no reply.

The next day, 6 working days after submitting the application, we sent a further email to the ECF team reiterating our request for an urgent decision based on the imminent hearing. We also attempted to contact the LAA by telephone but were unable to get through due to a problem with the LAA's telephone lines. The LAA responded to our email on the same day requesting a case reference number. The email stated that they had been unable to locate the client within their CCMS system. CCMS is the system used by legal aid providers to submit applications for funding, it cannot be used by individual applicants for ECF. We responded on the same day, stating that we did not have a reference number as we had not received any correspondence from the LAA. We also explained that we were not a legal aid provider and that we were assisting the client to make the ECF application.

We further provided the applicant's name, address, date of birth and national insurance number, and the date and time of the submitted application. No response to this email was received.

We called the LAA's customer services team 7 working days after submission of the ECF application to enquire about the status of the application. We were informed that there was no one in the ECF team to speak to us. We left our contact details requesting an update from the ECF team as a matter of urgency.

On the same day a caseworker from the ECF team emailed us requesting the name of the client and the "ECF tracker reference". We responded that same day stating again that we had not received any reference and providing the client's details. The ECF team responded requesting that we forward the original email we had sent submitting the application. We were unable to do this immediately as the staff member who had sent the email was out of the office, however we were able to confirm the exact time that the email had been sent.

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The ECF team finally responded stating that the application had been identified, and asking "is there any urgency of the application? E.g. Hearing date. If not, then we aim to make a decision by 1 December 2017."

We responded to confirm it was urgent, stating again that there was an imminent hearing and requesting a decision by close of business on the same day. The ECF team then informed us that the application had been marked as urgent and that a caseworker would be allocated "in due course". The email also stated that they could not guarantee when a decision would be made.

When no response was received by the end of the day, we referred the case to the Public Law Project to judicially review the unreasonable delay.

On the 8th working day after submission, the Public Law Project sent a letter before action to the LAA asking for a decision by 5pm of the same day failing which judicial review proceedings would be issued.

The ECF team contacted us that day requesting further documents. They acknowledged the imminent hearing and requested further information within three working days to enable them to decide on the application. We responded to the LAA on the same day forwarding the additional requested documents.

The LAA acknowledged receipt of the information the following day, 9 working days after submission, and confirmed a decision would be made as soon as possible and by 5pm the next day.

10 working days after submission of the urgent application, we received a letter from the LAA granting exceptional case funding.

No reasons were ever given for the delay.

CASE STUDY 8

December 2017 - urgent application

The applicant needed legal aid to be represented as the respondent at a child arrangement hearing in the Family Court in early January 2018. The applicant in the family case was her ex-partner and the father of her child. The applicant was a survivor of emotional and psychological abuse perpetrated by the ex-partner.

We submitted the ECF application by email in late December 2017 requesting urgent consideration within 5 working days – at the time of application it was 11 working days before the hearing.

The LAA did not acknowledge the application and did not inform us whether they would treat the application as urgent or give any time frame for consideration.

7 working days after submitting the application when we had received no decision we contacted the LAA customer services team by telephone. We were informed that the ECF team were aware of our application and that the LAA would make it a priority; however they could not give a definite date of response.

On the 8th working day after submission, we called the LAA customer services team again to chase a decision. We were put on hold for about fifteen minutes as the customer services call handler attempted to contact the ECF team. The call handler was unable to get hold of anyone on the ECF team and so took our details informing us that we would receive a call back from the ECF team.

We received an email from the ECF team on the same day requesting further information for the LAA's means assessment form that we had enclosed with our submission documents. We forwarded the requested documents to the LAA straight away.

Later that day the LAA granted exceptional case funding - 8 working days after submission of the ECF application. No reason was ever given for the delay.

CASE STUDY 9

July – August 2018, non-urgent application; review application

This was a non-urgent case where the LAA refused to grant ECF based on the merits of the application. We pursued the LAA's review process, which states in the LAA's ECF Provider Pack (dated July 2016) that the applicant may apply for a review "within 14 days of a refusal" and that they aim to process the application for review and notify the applicant of the outcome within 10 working days of receipt.

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We submitted the review application 9 working days after the refusal (within the stated 14 day deadline).

14 working days after the application for review was made, we had no decision so we contacted the LAA. The call handler informed us that the decision timescale for an ECF application was 20 working days. We informed the call handler that it was a review application and that this timeframe was incorrect. We provided our client's name and the LAA's reference number. They placed us on hold, whilst attempting to reach the ECF team, then returned to advise us they were unable to reach them.

20 working days after submitting our application for review, we had still not received an outcome and chased the LAA again. The call handler informed us, contrary to the previous information provided, that the timescale for a decision on a review was "26 days" and we should expect to hear by 29 August 2018.

We contacted the LAA for the third time, 27 working days after the application for review and insisted that we needed a decision that day.

We received an email from the LAA on the same day of our third telephone chase up providing an apology, but giving no reason, for the delay. They further stated that our client's review had been allocated for consideration and that they hoped to make a final determination by 'the beginning of next week, if not sooner'.

We received the LAA's decision to our client's review application that same day, 27 working days after the review application was submitted and 17 working days after their standard decision-making timeframe.

8. ECF APPLICATION OUTCOMES AND POST-GRANT WORK

8.1 APPLICATION OUTCOMES

- ▶ 22 out of the 23 applications submitted were granted ECF.
- ▶ All 18 of the immigration applications we submitted were granted ECF.
- ▶ 4 out of 5 of the family applications we submitted were granted ECF.

The one family application refused ECF was refused on standard merits criteria. The decision-maker made no finding on whether the exceptional case criteria under section 10(3) LASPO were met.

8.2 REFERRALS TO LEGAL AID PROVIDERS - IMMIGRATION LAW

Of the 18 immigration cases, we assisted the clients to secure a legal aid provider by making referrals in 15 cases.

The reasons why we did not participate in the search for legal aid providers in 3 cases were as follows:

- ▶ One client had secured the offer of assistance from a non-profit legal aid provider before we had submitted the ECF application.
- ▶ One client had secured the offer of assistance from a legal aid provider subject to her being granted ECF. Once ECF was granted we were able to refer the case directly to the legal aid provider who had previously accepted subject to funding.
- ▶ One client's support worker had secured the offer of assistance from a legal aid provider subject to ECF being granted and so we referred directly to that provider once funding was granted.

8.3 NUMBER OF REFERRALS MADE BEFORE SECURING REPRESENTATION: IMMIGRATION LAW

Of the 15 cases in which we assisted the clients to find a legal aid provider following the grant of legal aid, we were able to secure representation in all cases after considerable time and effort was spent in making referrals and chasing responses.

Table 14 shows how in most cases it was necessary to make referrals to multiple providers in order to secure representation.

TABLE 14: Number of referrals made before securing representation – Immigration law

Number of referrals made before securing representation	Number of cases this applies to
One legal aid provider	2
Two legal aid providers	2
Three legal aid providers	4

Four legal aid providers	3
Five legal aid providers	3
Eight legal aid providers	1

8.4 LENGTH OF TIME BEFORE SECURING REPRESENTATION - IMMIGRATION LAW

The length of time it took to secure an offer from legal aid providers to accept the case varied. Table 15 shows that some providers responded immediately to our referrals, and in other cases there was a longer wait.

TABLE 15: Length of time before securing representation – Immigration law

Length of time before securing representation	Number of cases this applies to
Within a week (0-5 working days)	8
Within 2 weeks (6-10 working days)	1
Within 3 weeks (11-15 working days)	5
Within 5 weeks (21-25 working days)	1

Comment on Table 15

The above figures relate to the length of time between our referral and the offer to take a case from a legal aid provider. The figures do not represent the length of time until the client was offered a first appointment with the legal aid provider who accepted the case.

8.5 LENGTH OF TIME BETWEEN REFERRAL ACCEPTANCE AND INITIAL APPOINTMENT - IMMIGRATION LAW

The majority of cases had an initial appointment with their legal aid provider within 2 weeks of their having accepted the referral. However, there were instances of considerable delays between providers accepting the referral and offering the client an initial appointment.

The timeframes for legal aid providers accepting referrals and the initial appointment with the client are shown in Table 16.

TABLE 16: Length of time between referral acceptance and initial appointment – Immigration law

Length of time between referral acceptance and initial appointment	Number of cases this applies to
Within 2 weeks (0-10 working days)	9
Within 4 weeks (11-20 working days)	4
Over 4 weeks (21 working days plus)	2*

- * Both clients who had to wait more than 4 weeks for an initial appointment had to wait a considerable time – one waited 50 working days (10 weeks) and the other 54 working days (over 10 weeks). In both cases this was attributed to the legal aid provider being busy. In both cases our resources were invested in chasing the legal aid providers who had already accepted the referrals to progress the matter.

8.6 RESPONSE FROM LEGAL AID PROVIDERS TO REFERRALS – Immigration law

Of the 53 referrals we made to legal aid providers relating to 15 of our cases the responses we received are shown in Table 17.

TABLE 17: Response from legal aid providers to referrals – Immigration law

Response from legal aid provider to referral	Number of cases this applies to
Rejecting referral - no capacity	19
Accepting referral	22*
No reply	9
Rejecting referral - merits of underlying immigration application	2**
ROW withdrew referral after another provider accepted	1

- * In 7 of these acceptances, the legal aid provider accepted the referral after the case had been picked up by another provider. In the remaining 15, the legal aid provider was instructed in the case.

- ** Both merits rejections related to the same case which was subsequently accepted by another provider.

8.7 REFERRALS TO LEGAL AID PROVIDERS – Family law

Of the 4 family cases successfully granted ECF, we assisted 3 of the clients to secure a legal aid provider by making referrals. One client found a legal aid provider without our assistance.

We were able to secure representation in all 3 of the cases in which we assisted the clients to find legal aid providers following the grant of legal aid.

8.8 NUMBER OF REFERRALS MADE BEFORE SECURING REPRESENTATION – Family law

In 2 cases it was necessary to make referrals to two providers to secure representation.

TABLE 18: Number of referrals made before securing representation – Family law

Number of referrals made before securing representation	Number of cases this applies to
One legal aid provider	1
Two legal aid providers	2

8.9 LENGTH OF TIME BEFORE SECURING REPRESENTATION – Family law

The length of time it took to secure an offer of legal representation after referrals are shown in Table 19.

TABLE 19: Length of time before securing representation – Family law

Length of time before securing representation	Number of cases this applies to
Within a week (0-5 working days)	3

Comment on Table 19

All 3 of the family legal aid providers who accepted the referrals did so on the same day we referred the case.

8.10 RESPONSE FROM LEGAL AID PROVIDERS TO REFERRALS – Family law

We made 5 referrals to legal aid providers relating to 3 of our cases, and the responses we received are shown in Table 20.

TABLE 20: Response from legal aid providers to referrals – Family law

Response from legal aid provider to referral	Number of cases this applies to
Rejecting referral – due to insufficient time to re-apply for legal aid before hearing	1
Accepting referral	3
No reply	1

Case study 10 (see overleaf) shows the impact of the delay of the Legal Aid Agency's decision-making on the ability of the legal aid provider to act for the client.

CASE STUDY 10

January 2018, urgent application Impact of delay of Legal Aid Agency decision-making on legal aid referral

The client needed legal aid to be represented at a child arrangement hearing. An urgent ECF application was submitted 11 working days before the hearing. The LAA granted ECF 8 working days later leaving the client only 3 working days before the hearing to find a legal aid representative. It was imperative that the client and her representative had ample time to prepare for the hearing as there remained outstanding court directions to be complied with.

The LAA's letter granting ECF for 'Family Help Higher' stated that it was on condition that the client located a firm of solicitors with a family legal aid contract to deal with the matter for her; that they submit an application through CCMS, and that the client's financial eligibility be re-verified by the LAA.

The grant of ECF was received by us after 5pm on a Wednesday and the client's hearing was on the following Monday. On Thursday morning we referred the matter to a family law legal aid provider who initially accepted the case subject to being able to find a barrister able to attend the hearing on Monday.

However later that day, after they had received a copy of the grant letter, the legal aid provider wrote to us refusing the referral stating that after further consideration they were unable to take the case on due to the financial risk of instructing a barrister for Monday's hearing when there was no guarantee that the legal aid certificate would be granted when they re-applied for it as instructed by the LAA.

The legal aid provider had concluded that our client's legal aid contribution might come back higher than expected on the re-examination and the client might be unable to afford to pay it resulting in the legal aid certificate not being granted. They also explained that as the hearing was on Monday they would not have the time to make the legal aid application on CCMS and receive a response from the LAA ahead of Monday's hearing. We were able to find her another legal aid provider so she was represented at the hearing.

Had the LAA issued their initial decision within their 5 working time timeframe for urgent cases as we had requested, this legal aid firm might have had enough time to re-apply for legal aid in accordance with the LAA's instructions before the hearing.

9. FINDINGS & ANALYSIS

FINDINGS AND ANALYSIS OVERVIEW

This section covers the full set of findings for the project and presents relevant case studies to support the findings. A summary of these findings can be found in the Executive Summary.

Due to having a larger evidence base of immigration law ECF cases compared to family law ECF cases, we were able to draw more findings from this side of the project, which is reflected here. We are mindful that both the smaller evidence base of family law ECF applications and the changes to the Domestic Violence legal aid gateway eligibility criteria in January 2018 inhibit us from developing a more conclusive analysis of issues relevant to family law, but where possible we have discussed patterns that are indicative of wider issues.

9.1 FINDING 1:

The ECF application process disadvantages people with vulnerabilities who are navigating the process alone. Women survivors of domestic or sexual violence and abuse often have complex multiple vulnerabilities.

Our work with women under this project has underlined how difficult the ECF application process is to navigate for someone who has multiple vulnerabilities. All of the women in our caseload were survivors of domestic or sexual violence and abuse; this was part of the eligibility criteria for our service. Unsurprisingly for this group of women, there was also a high incidence of additional vulnerabilities. All of the women had one or more additional vulnerabilities.

Our approach to defining vulnerabilities in the context of the project was any aspect relating to the client's identity or circumstances that might place them at a potential disadvantage (individual, societal or structural) compared to someone else navigating the legal system unrepresented who did not have this vulnerability. Most often these vulnerabilities were characterised by a hardship indicating an increased 'need' for the assistance of a lawyer, for example due to factors that relate to an increased risk to their personal safety or a requirement for additional and separate specialist support.

In relation to the women we assisted to make applications under immigration law, the most common additional vulnerabilities were having English as an additional language, mental health issues, homeless / insecure accommodation and no source of independent income. Language barriers, mental health problems and destitution are, in our experience, issues affecting the overwhelming majority of migrants with insecure immigration status.

In relation to the women we assisted to make applications under family law, the most common additional vulnerabilities were having English as an additional language, mental health issues and physical disability.

We observed that even when we were able to provide help with the ECF process, it was apparent that it was challenging for the survivor when she heard how long the process took. We observed this created worry and appeared to have a deterrent effect on her proceeding.

The case studies in [section 9.9.1](#) provide ample example of the difficulties women faced when trying to fill out the application form. The process is complex and demands that the individual has a high level of written English. It is clearly likely to disadvantage those who

face language barriers such as not having English as a first language. We also noted that when faced with having to write an account of the abuse they had experienced they often avoided describing it completely.

Considering the relatively small size and limitations of our project and the boundaries of our expertise as legal specialists, we are unable to draw definitive findings or analysis about the accessibility of the ECF scheme for those with multiple vulnerabilities. However, our observations below are indicative of multiple vulnerabilities requiring far greater consideration by agencies in the justice system to ensure accessibility to individuals and enable an anti-discriminatory approach.

- ▶ Evidentially, the process requires an objective presentation of the facts, which can be extremely hard for a survivor who, quite naturally, is emotionally connected to her own personal experiences. It is unreasonable to expect that a survivor will be able to assess the impact on herself of trauma and talk about it in an objective manner to convince the LAA.
- ▶ The various effects of having experienced abuse, such as trauma, PTSD, mental health issues (such as anxiety and depression) are potential significant barriers to women being able to represent themselves effectively yet, conversely, indicate that they are in the strongest need of legally aided representation.
- ▶ We are concerned that the LAA appears to have given no thought to whether the ECF process may increase the risk of retraumatisation to the survivor. The ECF application questions effectively force survivors to revisit the abuse outside of a 'safe environment' through the process of having to recount what has happened again. When someone is at a point of crisis, for example having suffered abuse and being at risk of deportation or destitution, it can be difficult for them to engage with any support services, for example counselling. To ask a person who is not yet even able or ready to engage with therapeutic processes to write an account of their abuse can be near impossible for them and also dangerous.
- ▶ We are concerned that the ECF application process, by disadvantaging women survivors in this way from the start instead of acting as a safety net, may effectively be an additional barrier to women either leaving abusive relationships or taking important steps to break the pattern of abuse. For example, we know through our frequent contact with women survivors with insecure immigration status that regularising their status allows independence and brings with it an opportunity to sever their link with their abuser.

9.2 FINDING 2:

Legal aid is needed to address issues of overwhelming importance to individuals and society

Exceptional case funding is only available where it is established that a failure to provide legal aid risks a breach of an individual's human rights or enforceable EU rights.⁹

⁹ Section 10, Legal Aid, Sentencing and Punishment of Offenders Act 2012

Comment on Finding 2 - Immigration law

All of the cases in our project engaged the women's human rights or EU rights and we were able to demonstrate in all 18 of our immigration law cases that their rights would be breached if legal aid were not made available. In addition to each case engaging the applicant's human rights or EU rights, the cases raised issues of overwhelming importance including the welfare of children; the applicant's access to accommodation, financial support and the means of sustaining herself and any family; the applicant and any children's right to remain in the UK; the applicant and any children's physical and / or mental well-being; and the protection from violence or abuse.

The significant barriers the ECF scheme currently poses to unrepresented applicants indicate a serious failing in the legal aid system's ability to offer parity in terms of fair and equal access to justice for all survivors of abuse across the same system.

The ECF process is inconsistent with other parts of the same legal aid system. For example, it is notable that in making legal aid available for applications for indefinite leave to remain, albeit within narrow circumstances¹⁰, via the Domestic Violence Rule, the Government cited the "real risk that without legal aid spouses will stay trapped in abusive relationships for fear of jeopardising their immigration status. The trauma that they may have suffered will often make it very difficult to cope with that type of application..."¹¹ We agree with this analysis but contend the ECF application is equally difficult.

Comment on Finding 2 - Family law

Most of the women that were referred to the ECF project were seeking legal aid for private children law cases. The effect of domestic abuse and the stress of proceedings on these women caused a great deal of anxiety and stress leading to mental ill health.

Issues around the protection of women and children from domestic and sexual violence and safe child contact arrangements always raise human rights arguments for all involved in proceedings. The effect of facing proceedings unrepresented, in a justice system that is woefully ineffective at protecting victims from domestic abuse, can result in breaches of a victim's right to a fair trial.

9.3 FINDING 3:

Immigration cases engaging human rights and EU rights are inherently complex

In the first quarter of 2018, 59% of all human rights appeals and 52% of all EU rights appeals in the First-tier Tribunal (Immigration and Asylum Chamber) were granted. This tells us that Home Office officials, who receive training on immigration law, have not made the correct decision in the majority of human rights and EU rights cases they determine. Yet the Government, in removing legal aid from human rights and EU rights cases, holds the view that there is nothing inherently complex about them that individuals cannot represent

¹⁰ Paragraph 28 of Part 1 of Schedule 1 LASPO makes legal aid available to individuals applying for indefinite leave to remain in the UK on the grounds that they were given limited leave as the partner of another person present and settled in the UK and that relationship has broken down permanently as a result of domestic violence

¹¹ <https://hansard.parliament.uk/Commons/2011-10-31/debates/1110315000002/LegalAidSentencingAndPunishmentOfOffendersBill#contribution-11103114000043>

themselves. The Government's view appears untenable in light of this data on the level of error in Home Office decision-making.

The complexity of these cases does not challenge only Home Office decision-makers. Home Office policy makers have themselves demonstrated time and again that their approach to human rights claims is incompatible with the Human Rights Act 1998. It was only last year that the Supreme Court in the case of *MM (Lebanon) and others v Secretary of State for the Home Department [2017] UKSC 10* declared the Home Office's own approach to evaluating family life claims outside the rules under Article 8 ECHR was unlawful. Additionally the Supreme Court declared that the immigration rules and guidance had failed to take proper account of the Home Office's duty under section 55 Borders Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children when making decisions that affect them.

The complexity of immigration law is roundly accepted outside of government. The Law Commission's 13th Programme of Law Reform includes a project addressing the simplification of the immigration rules. Following extensive consultation, the Law Commission has described the problem it now seeks to address as follows:

"Hundreds of thousands of decisions are made annually under the Immigration Rules. Decisions which can be life changing for those seeking entry or leave to remain in the UK and their families.

But the Rules are widely criticised for being long, complex, and difficult to use. On 1 May 2017, the Rules totalled 1096 pages in length and their drafting is poor.

Many provisions are duplicated, cross references are often incomplete and some parts are incomprehensible." ¹²

Judges have added their voice to the chorus of criticism. Sir Ernest Ryder, the Senior President of Tribunals, described the complexity of immigration law when giving evidence to the Constitution Committee of the House of Lords in December 2016:

"We have had eight immigration Acts in 12 years, three EU directives and approximately—my apologies for being approximate—30 statutory instruments. The Immigration Rules themselves have been amended 97 times over the same period, which is approximately eight times a year, and are four times larger, and in a smaller typeface, than they were 10 years ago.

The Immigration Rules no longer contain all or indeed most of the policy that is to be implemented, which is of course their primary purpose. The policy is separately provided in—if I may say so—rather dense and unconsolidated guidance that one can access through the Home Office website, but that generally does not show you the previously existing guidance on the same topic, or how the guidance has changed. If you are an unwitting litigant whose first language is not English and you have no recourse to public funding, because this is an immigration case, not an asylum case, your chances of accessing any of that material and putting it together in a coherent way are negligible."

In all of our 18 immigration cases, it was beyond question that the complexity of the issues in the case alone was such that the applicants could not effectively represent themselves.

¹² <https://www.lawcom.gov.uk/project/simplifying-the-immigration-rules/>

9.4 FINDING 4:

There is a lack of awareness of what is 'in scope' of legal aid

Comment on Finding 4 – Immigration law

More than one in ten of all the referrals we received from external organisations seeking immigration ECF for their service users were assessed by us not to require ECF because the matter was in scope of legal aid.

There evidently remains a considerable degree of confusion about what is in scope of legal aid. While the complexity of LASPO and the lack of accessible information for non-legal professionals and the public certainly play a large role in this confusion, a critical issue is also the lack of understanding amongst legal professionals and particularly legal aid providers.

Case study 11 shows an example of where a legal aid provider appeared to assess a matter to be out of scope.

CASE STUDY 11

A lack of awareness of what is 'in scope' of legal aid – Immigration law

We received a referral to our ECF project from a professional in a domestic violence charity. The professional had already sought immigration advice from a legal aid provider before making the referral to Rights of Women. Following a consultation with the client, the legal aid provider advised her that she could make an application for indefinite leave as a victim of domestic violence but that she would have to pay privately. As the client was plainly financially eligible for legal aid, we can only infer from their response that the legal aid provider assessed the matter to be out of scope.

As the client was unable to pay for legal representation, the referrer sought a further opinion from a non-profit immigration charity that recommended a referral to our ECF project.

After taking instructions from the client and reviewing relevant documents it became apparent to our caseworker that the client had entered the UK with leave (albeit outside the rules) as the wife of a British citizen and that their relationship had broken down as a result of domestic violence. This made her eligible to apply for indefinite leave as a victim of domestic violence, an application which was in scope of legal aid under paragraph 28, Schedule 1 of LASPO.

Alongside rejecting the referral and signposting to legal aid providers, we gave immigration advice to the client and her support worker which included detailed guidance on the relevant parts of LASPO and why the matter was in scope so that they could challenge any further rejections by legal aid providers.

Comment on Finding 4 – Family Law

Nine out of twelve of the referrals we received from external organisations seeking family ECF for their service users were assessed by us not to require ECF because the woman was able to obtain evidence to satisfy the domestic violence gateway eligibility criteria.

We found that two teams within the same local authority and a Housing Association had made ECF referrals. This showed their lack of awareness of the DV gateway process. These agencies were in fact all capable of providing the DV gateway evidence at the time of referral.

It is notable that 5 out of 12 referrals for ECF through our advice line resulted in refusal. We had screened all callers in relation to DV gateway evidence before the initial internal referral but in these cases the women either hadn't known they had already the correct piece of evidence or had not known it could be obtained. It took a fair amount of work for our ECF caseworker to assist the women in these cases. To us this highlights the difficulty that individuals may have in relation to understanding the gateway and how this can be resolved through thorough consultation with a legal professional.

Overall, 15 out of 25 cases we refused were due to the matter being in scope (due to DV gateway eligibility). This suggests that individual women can struggle to understand legal aid eligibility and this situation can be compounded by professionals not understanding that they can provide the necessary evidence, especially as women perceive professionals as 'gatekeepers' to legal aid and will trust their judgement. As a result, survivors are being left without the support and protection they are entitled to.

We found that most of the women had experienced emotional and psychological abuse (in relation to coercive and controlling behaviour). This type of abuse was rarely reported and so the production of the DV gateway evidence was too difficult to obtain. This left the survivors of domestic violence frustrated which made them sometimes give up trying to secure the evidence.

CASE STUDY 12

A lack of awareness of what is in scope of legal aid – Family law

We received a family law referral from a local authority who at the time of referral were providing subsistence and temporary accommodation to the client and her child. Prior to referral the client had been assessed by the local authority as being a victim of domestic abuse and was also receiving support from a domestic abuse support organisation.

The local authority was trying to assist the client to obtain a child arrangement and prohibited steps order against the perpetrator of domestic violence as the welfare of the child was at risk.

The local authority was unaware that they could have provided the DV gateway evidence. We advised the local authority that it was able to provide a letter that would be accepted as evidence of domestic violence for the purposes of accessing legal aid.

After the local authority produced this letter, the client was successfully referred to a legal aid provider who then applied for legal aid on her behalf to obtain the orders sought.

9.5 FINDING 5:

The women we supported to make ECF applications would have had improved chances of access to justice if legal aid for early advice and assistance were available to them.

Across both areas of law where we provided assistance to women to make ECF applications, we observed that access to legal aid for early advice and assistance would have been helpful in enabling them to take effective steps to resolve their legal problem. Without this, the women had invariably faced difficulties that impacted on their access to justice including protracted legal proceedings and - within immigration law cases - being exploited by unscrupulous immigration advisers for money. The negative consequences for their safety as a result are not something we can measure but are undoubtedly a hidden cost behind this picture.

Comment on Finding 5 - Immigration law

88% of our immigration referrals and 89% of our immigration casework was in relation to the level of legal aid known as 'legal help'. This is the level of service which provides for legal advice and assistance and, in an immigration case, would cover the making of an application to the Home Office.

Without access to legal aid for early advice and assistance we have seen that our clients' problems become protracted and more complex as they seek to represent themselves despite being ill equipped to do so. [Case study 13. Mary](#) illustrates the difficulties many face without access to early advice and assistance.

In view of the Home Office's high error rate, as can be seen from the statistics above relating to success rates on appeal, early advice and assistance in immigration cases is unfortunately no guarantee of a successful outcome at first instance. Early advice and assistance must be followed by representation in appeal proceedings where there is merit to pursue an appeal against refusal.

We have also observed with concern amongst our client group the exploitation of vulnerable migrants who are victims of unscrupulous immigration advisers providing a poor service or people providing an unregulated and therefore unlawful immigration service.¹³ [Case study 14. Lucilla](#) is an example of this type of exploitation.

CASE STUDY - Mary

Mary is an undocumented woman who was subjected to domestic abuse by her ex-partner and is now the sole carer of two children under the age of 4 who were born in the UK. One of Mary's children has a health condition that their doctor warns would put the child's life at risk on return to Mary's country of origin.

The Home Office wrote to Mary in 2015 asking her to explain the reasons why she and her children should not be removed from the

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¹³ It is a criminal offence under section 91 of the Immigration and Asylum Act 1999 to provide immigration advice or services unless qualified to do so under section 84 of the same Act. For non-legally qualified persons this generally requires registration with the Office of the Immigration Services Commissioner.

UK. Mary sought legal assistance at that time but was informed that legal aid was not available to her and she could not afford to pay for private representation. As she was unable to secure legal assistance, Mary responded to the Home Office herself with help from a friend. The Home Office refused Mary's claim which they found to be 'clearly unfounded' leading to her being denied a right to appeal in the UK.

Mary was being accommodated and financially supported by her Local Authority's Children's Social Services. In 2016, the Local Authority began to exert pressure on her to make a further application to the Home Office. She again sought legal assistance and was again informed that there was no legal aid available in her case. Mary eventually received free advice from an OISC registered migrant rights charity. The charity was unable to offer casework support at the time because of their limited resources but advised Mary about the availability of ECF and referred her to another charitable project where she could get assistance to apply for ECF.

At the time, Mary was under intense pressure from Social Services to submit her immigration application by a certain date failing which they would cease support and accommodation. Fearing homelessness and destitution and unable to wait to get seen by the project offering support with making an ECF application, she was forced to lodge her own immigration application in 2017 without legal assistance. Mary's application was rejected by the Home Office as a repeat claim against which there was no right of appeal.

Mary took her refusal letter to a migrant rights charity where she received one-off advice from an immigration solicitor about making an application for leave to remain on the basis of Article 8 of the European Convention on Human Rights, explaining that she would require the assistance of representative to prepare the application. The charity referred Mary to our ECF project.

CASE STUDY 14 - Lucilla

Three years before we secured ECF for Lucilla, she had paid £200 to an individual operating out of a London shopping centre who held themselves out as an immigration adviser and submitted an immigration application on Lucilla's behalf.

At the time Lucilla paid the adviser she believed her to be a qualified immigration adviser; however after the application was submitted she was told by another client at the shopping centre premises that the adviser was an interpreter and not legally qualified.

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The application was refused by the Home Office, which was little surprise to us because it was totally without merit.

From the information available, Rights of Women has concluded that it is likely that Lucilla was a victim of crime in this instance because the 'immigration adviser' appears not to be regulated to give immigration advice or services in contravention of section 84 of the Immigration and Asylum Act 1999.

After the Home Office refusal, Lucilla sought assistance from another immigration adviser. She was not informed about the availability of ECF and was instead quoted private fees which she could not afford leaving her unable to pursue her immigration matter at that time.

When Lucilla fled domestic violence with her two children she started to receive support from a domestic violence professional who sought to assist her with her immigration problem. The domestic violence professional arranged for Lucilla to have a consultation with a legal aid provider who informed her in 2017 that she could apply for leave to remain on human rights grounds. The legal aid provider told Lucilla that legal aid was not available, and she would have to pay privately for their assistance. Lucilla was destitute and could not afford legal representation.

Lucilla's support worker then contacted a migrant rights charity who recommended she refer Lucilla to us for help with an ECF application. We submitted an ECF application for Lucilla which was granted in 2018 allowing her to make an application to stay in the UK on family / private life grounds.

Had Lucilla secured legal aid years ago when she first sought immigration advice, she would very likely have resolved her immigration status long ago. In the meantime, she was trapped in an abusive relationship where her immigration status was used by the perpetrator as a weapon of control and, since receiving help to flee, she has been dependent on support from social services because her insecure immigration status does not allow her to work or access mainstream benefits.

Comment on Finding 5 - Family Law

Legally aided early advice and assistance in family law cases would have been useful for the women we supported, particularly had it included help to obtain DV gateway evidence. As discussed under Finding 4, there appears to be a lack of awareness of what is in scope and how the DV gateway operates which ultimately results in survivors missing out on their entitlements. If this could be included under legal help, along with providing legal advice and assistance, then more survivors would be able to access the legal aid that they are eligible for.

9.6 FINDING 6:

A lack of awareness of the availability of exceptional case funding

There is a lack of understanding generally about the availability of exceptional case funding amongst the public, non-legal professionals and, to a lesser extent, legal professionals.

The overwhelming majority of our advice line callers across both our family and immigration law services are unaware of the availability of exceptional case funding, and this is the case notwithstanding their previous contact with non-legal professionals, for example social workers or domestic violence support workers, as well as other legal professionals. We can only conclude that this lack of awareness of the availability of ECF has contributed to the low number of applicants for exceptional case funding.

Comment on Finding 6 – Immigration law

It is common for callers to our immigration advice line to have had contact with immigration advisers before seeking advice from us. Their experience is of being informed that legal aid is not available for their case and / or receiving quotes of private fees. Generally, callers will hear about the availability of exceptional case funding for the first time when we advise them on it.

Those referred to our ECF project had similar experiences. Despite having contact with immigration lawyers their common experience is of being informed that legal aid is not available for their case and / or receiving quotes of private fees. Such responses from immigration lawyers have included those who are legal aid providers.

9.7 FINDING 7:

A lack of help to apply for exceptional case funding

Comment on Finding 7 – Immigration law

Legal aid providers are the most obvious party to apply for exceptional case funding for those who need it. They are ideally equipped because they receive queries from those who need legal aid to solve their immigration problem, are qualified to apply the relevant means and merits tests for legal aid and are qualified to identify the human rights / EU rights issues in the case as well as the complexities in the case. Despite this, the number of new ECF applications by providers in 2017/2018 was only 2190 across all categories of law¹⁴. While the figure is certainly an increase since the implementation of LASPO, it remains considerably lower than expected.

Rights of Women is aware of very few legal aid providers who undertake exceptional case funding applications. Indeed, as referrals to our ECF project demonstrate, legal aid providers were in some instances referring cases to us to complete the exceptional case funding on their behalf. One legal aid provider who referred to us informed us that their firm does not do exceptional case funding applications. Another provider we spoke to about ECF applications during the project informed us that they would only apply for exceptional case funding at appeal stage.

The MOJ does not publish data on the number of legal aid providers who apply for exceptional case funding and the proportion of their legal aid work this represents. This data must be

¹⁴ <https://www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2018>

analysed and if, as is expected, it reveals a low number of providers undertaking exceptional case funding applications, the reasons behind this must be studied and countervailing measures put in place to address the barriers preventing legal aid providers undertaking this work.

Without wishing to pre-empt this important study, our experience in the legal sector tells us that in an environment in which legal aid providers are already expected to undertake a huge amount of work either unpaid or at shamefully low rates of pay there is simply no room within the fragile business model of a legal aid practice to do more unpaid work (such as applying for ECF) in order to bring in more legal aid work at such a low rate of payment (e.g. the immigration non-asylum legal help standard fee is £234). Applying for ECF is entirely unpaid if the application is refused. If ECF is granted and it is backdated by the LAA, time spent on the ECF application can be charged; however the LAA's Costs Assessment Guidance will not fill legal aid providers with confidence that all the work they do in relation to an ECF application will be reimbursed. The 'Costs Assessment Guidance: for use with the 2018 Standard Civil Contracts' states at paragraph 2.60:

"A claim may be made for completion of application forms for Controlled Legal Representation in Immigration cases and for licensed work certificates (in the latter case, time will be claimed under the certificate itself following a delegated, telephone or faxed application grant of legal aid, otherwise under legal help; see further Part C, section 10.15). **The basic time standard for such forms is 30 minutes, but more may be payable in complex cases, particularly if a substantial statement of case is required** and where the application is for emergency legal aid or is to report a grant of emergency legal aid by delegated functions."

Unfortunately, this guidance does not explicitly refer to completing ECF applications; however one might hope that an ECF application would be recognised by the LAA as being a 'complex case' requiring a 'substantial statement of case'. Even if this were accepted, the promise is to pay more than 30 minutes, not as long as it takes to do the work. As our above data shows, our caseworker spent an average of 9 hours preparing an ECF application. We think it unlikely the LAA would pay providers for the actual time it took them to prepare an ECF application so that, as in so many other areas, this again would be an area where they are expected to absorb unpaid work.

One way in which legal aid providers have sought to address the problem they face by the economically unreasonable premise of the ECF scheme is to charge for their work in completing ECF applications. While there can be no criticism of legal aid providers who offer this service for a fee as long as they subsequently refund clients if the ECF application is successful, it reveals an inherent and wholly unreasonable premise in the Government's ECF scheme. There is a provision within the legal aid contracts with providers that states:

"You may charge privately for civil legal services which are not described in Part 1 of Schedule 1 to the Act (including for making an application for a determination under section 10 of the Act). If the case later becomes an Exceptional Case you may not charge privately for any work which becomes payable under Legal Aid pursuant to a determination under section 10 of the Act. For the avoidance of doubt, where you have already received payment from the Client for work which has become payable under Legal Aid pursuant to a determination under section 10 of the Act, you must refund such payment to the Client."¹⁵

¹⁵ paragraph 1.38 of the 2018 Standard Civil Contract Specification, paragraph 1.37 of the 2013 Standard Civil Contract Specification & paragraph 1.50 of the 2010 Standard Civil Contract Specification.

When the Government introduced the ECF scheme, it envisaged legal aid providers charging clients to access legal aid through the ECF scheme. In so doing, government recognised that it is not economically viable for providers to undertake this work at their own financial risk. However, these clients are financially eligible for legal aid and thus accepted by government to have insufficient resources to pay for legal assistance. Despite this, government policy effectively requires those who want to apply for ECF to pay the cost of doing so in the first instance, and bear the full cost of doing so if they are refused legal aid.

Comment on Finding 7 – Family law

Despite the amendments to DV gateway evidential requirements in January 2018, there still exists a failure to acknowledge that not all survivors of domestic violence will be in receipt of any of the DV gateway evidence. The LAA's statutory guidance to the evidence requirements¹⁶ does not signpost readers (for example DV survivors or legal aid providers) to the availability of exceptional case funding as an alternative if the DV gateway requirements cannot be met. This omission may have contributed to the lack of awareness of the availability of exceptional case funding.

9.8 FINDING 8:

The ECF scheme is inaccessible in relation to individuals

Legal aid providers are not meeting the demand for making exceptional case funding applications. This leaves individuals with the options of making their own application for exceptional case funding, finding a third party to help them apply or not applying for legal aid at all.

Wherever there is a crisis left behind by government cuts, there is a space in which civil society and others seek to work in the interests of vulnerable people. This has been true of the access to justice crisis left behind by LASPO. One response from charities, universities and pro bono lawyers has been the creation of projects that assist individuals to apply for exceptional case funding. Rights of Women's ECF project ran for one year doing just this from August 2017 – September 2018. Coram Children's Legal Centre has been offering this service for longer. The Public Law Project currently has a list of seven organisations on its website offering assistance with exceptional case funding applications¹⁷. There are additionally various clinics of university law students offering assistance e.g. City, University of London.

While these services can be enormously beneficial as evidenced by our high success rate in obtaining ECF for our clients, this is little surprise when the service is provided by legally trained professionals investing the resources needed to prepare comprehensive ECF applications. These free to use services however are unable to meet demand, illustrated by the number of referrals from Coram Children's Legal Centre we received notwithstanding its own internal expertise. Moreover, these services are not sustainable, as illustrated by the temporary duration of our own ECF project.

¹⁶ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672143/evidence-requirements-private-family-law-matters-guidance-version-8.pdf

¹⁷ <https://publiclawproject.org.uk/what-we-do/current-projects-and-activities/legal-aid/exceptional-funding-project/database-of-organisations-supporting-ecf-applications/>

While there is a procedure for individuals to apply for ECF without a legal aid provider or other assistance, the number of individual applicants is low. Ministry of Justice statistics¹⁸ indicate that in 2017/18 there were 438 applications for ECF across all categories of law by individuals, compared with 2190 applications made by legal aid providers. This equates to around 17% of all ECF applications in 2017/18 made by individuals.

More significantly, the MOJ statistics for 2017/18 tell us that of 254 individual applications determined in the immigration category, 170 were granted – a success rate of nearly 67%. The same statistics tell us that of 1248 provider applications determined in the immigration category, 884 were granted – a success rate of nearly 71%. On first sight, this would suggest that applications made by individuals were nearly as likely to succeed as applications by providers. On closer consideration, we know this not to be the case.

Any claim that these figures are indicative of the accessibility of the scheme to individuals would be grossly misleading. The figures on individual applicants fail to distinguish applications made by individuals and those made by third party organisations who do not hold legal aid contracts but make applications on behalf of their service users e.g. Rights of Women and Coram Children’s Legal Centre.

The applications we undertook on behalf of our service users under this project are recorded as ‘individual’ applications by the Ministry of Justice. Of the 170 individual applications granted ECF in the immigration category in 2017/18, 9 were applications prepared by Rights of Women and 23 were applications prepared by Coram Children’s Legal Centre. These two organisations alone prepared and submitted 19% of the successful applications made by individuals in 2017/18. We believe the proportion of applications recorded as ‘individual applications’ and yet submitted by professionals on behalf of individuals is significantly higher.

We regularly advise callers to our advice line about the availability of exceptional case funding and how to apply. While we have repeat callers to our service who call back asking for further assistance, we have never had a repeat caller informing us they are or have applied for exceptional case funding alone. We fear the number of individual applicants and their chance of success is likely very low.

The Ministry of Justice must disaggregate the data it publishes on individual applications to distinguish applications made by individuals and those made by third parties on their behalf. Only then will the data speak to the accessibility of the scheme to individuals.

Individual applicants cannot seek assistance to apply for exceptional case funding from the Legal Aid Agency. During the case of *The Director of Legal Aid Casework and the Lord Chancellor v IS [2016] EWCA Civ 464*, the Court of Appeal overturned the finding of the court below that the ECF scheme was inherently or systematically unfair. During the case the Government argued that its website and a telephone helpline operated by LAA caseworkers or lawyers provided material assistance to individual applicants. In making its findings the Court of Appeal declared the website and helpline to be ‘of significant material assistance to applicants’¹⁹. However there is now no telephone helpline available to applicants. PLP reports that this service was closed down in March 2017²⁰.

18 <https://www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2018>

19 paragraph 55 *The Director of Legal Aid Casework and the Lord Chancellor v IS [2016] EWCA Civ 464*

20 <https://publiclawproject.org.uk/wp-content/uploads/2018/05/Exceptional-Case-Funding-Briefing.pdf>

When Rights of Women closed down its ECF project in September 2018 we sought to obtain information about the availability of assistance from the LAA so that we could suitably signpost service users in future. We called the LAA customer services team (the only remaining point of contact for ECF enquiries) to find out about the material assistance it offered to individual applicants. The LAA call handler, after consulting with a senior colleague, informed us that the customer service team cannot offer any assistance to individuals who wish to apply for exceptional case funding. The reason given by the call handler was that it would be a conflict of interest if they were to provide assistance when the LAA is also the decision-maker. Instead, we were informed that when the customer service team receives a query from an individual seeking assistance with an exceptional case funding application, they would signpost to information available on their website and to the Citizens Advice Bureau for any additional help.

9.9 FINDING 9:

The ECF application forms are inaccessible to individuals

The gov.uk website contains information about applying for ECF. It tells the public that “[the] forms are designed to help you provide the right information in your legal aid application, but you don’t have to use them. You must sign your application, whatever format you have made it in.” There appears therefore to be no requirement for the form of an application other than a mandatory signature. It is concerning to see that in 2017/18, 45 out of 254 determinations of individual applications in the immigration category were rejected by the LAA as ‘incomplete’²¹. This is more than 1 in 6 of all applications made by individuals in the immigration category and suggests that either these 45 applicants did not sign the written application they sent to the LAA or the LAA is operating additional mandatory criteria which are not available publicly. The Ministry of Justice must analyse the basis on which these applications are being rejected and report on its findings.

Research by the Public Law Project found that in practice all applicants are expected to complete the LAA’s applications forms and if they do not, they are asked to complete them before their application is considered²². The application forms an individual would need to complete to apply for exceptional case funding to make an immigration application are the CIV ECF1 form and CW1 form or, if the matter were a Tribunal appeal (before September 2018) a CW2 form²³. For representation in family law proceedings, the relevant forms are the CIV ECF1 and the CIV APP3 as well as either CIV MEANS1 or CIV MEANS2.

While the LAA made changes to the CIV ECF1 form following legal action, it is wholly unrealistic to suggest the application form is accessible to lay persons generally let alone applicants with English language barriers. The form uses technical language which requires knowledge of legal aid law, policies and practices. For example the technical language of ‘provider’, ‘controlled work’, ‘contract category’, ‘legal help’ are terms that assume knowledge whereas in reality they are terms most lawyers who have never undertaken legal aid work would not recognise.

21 <https://www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2018>

22 <https://publiclawproject.org.uk/wp-content/uploads/2018/05/Exceptional-Case-Funding-Briefing.pdf>

23 Under the 2018 Standard Civil Contract, from September 2018 an application to the Immigration and Asylum Chamber of the Upper Tribunal became licensed work. From September 2018 applications for ECF by individuals in relation to appeals to the Upper Tribunal will require completion of forms CIV ECF1, CIV APP1 and CIV MEANS1 or CIV MEANS2.

Comment on Finding 9 - Immigration law

As part of our project, Rights of Women asked our ECF clients to attempt to complete the legal aid forms relevant to their case without our assistance first to the best of their ability. We made it clear this was neither mandatory nor a condition for gaining our support. The responses we received immediately demonstrated the inaccessibility of the legal aid forms to individuals:

9.9.1 Case studies on ability of clients to complete ECF application forms

CASE STUDY 15 - Fola

Fola was only able to complete the applicant details on page 1 of the CIV ECF1 form and the equal opportunities monitoring section and client details section on page 1 of the CW1 form.

Fola was homeless with no capital or income at the time of applying making her financial eligibility for legal aid straightforward from the point of view of a professional with relevant expertise.

CASE STUDY 16 - Stacey

Stacey attempted to complete the CIV ECF1 and CW2 forms for her immigration appeal. On returning them to us completed to the best of her ability, she said: 'most of them are a bit complicated, that I didn't know how to fill them'.

The only section of the CIV ECF1 form she was able to complete was the applicant details section on page 1. Similarly on the CW2 form she was able to complete the equal opportunities monitoring section and client details sections on page 1. Stacey completed the provider details on page 2 of the form by entering the name and contact details of Rights of Women. Her mistake in completing this section of the form illustrates her lack of understanding of what the question was asking likely due to the language of 'provider' on the form.

When it came to signing the declarations on the completed legal aid forms, Stacey mistakenly signed the litigator's certification on the CIV ECF1 form, again illustrating the barrier that technical, legalistic language has on a layperson's ability to complete the form correctly.

CASE STUDY 17 - Beatriz

Beatriz's English language ability was limited. When looking at the CIV ECF1 form unassisted she was only able to complete parts of the 'applicant details' section on page 1. She could identify that page 1 was asking for her personal details; however there were several errors in her understanding of the questions on page 1. She misunderstood the question 'title' and understood this to have a connection with a document due to a similar word in her first language. She was not able to identify that the 'provider detail' section did not relate to her. When attempting to read and understand the question on page 3 of the form 'what legal work do you think you / your provider will need to do in order to make this application?', she made the fundamental mistake of recognising the word 'work' in the sentence and drawing incorrect conclusions from that – she thought the question required her to show she had a job in order to apply for legal aid.

CASE STUDY 18 - NGOZI

When Ngozi attempted to complete the CIV ECF1 form the only sections she was able to understand and complete were:

- The urgent application query on page 1.
- The 'applicant details' section on page 1
- The applicant declaration.

She completed the following sections of the CW1 form:

- tick to confirm it is an ECF application on page 1
- equal opportunities monitoring on page 1
- client details on page 1
- Financial eligibility: type of case on page 3
- Client's certification
- Evidence checklist on the last page

Ngozi told us that she was unable to complete the rest of the forms because she did not understand them.

Further she made several mistakes on the CW1 form including specifying the type of case as 'family'. Hers was an immigration application under Article 8 ECHR involving her family members. The correct answer to this question was 'immigration'. When signing the declaration, she ticked the box 'I have already received legal help or family help (lower) from a solicitor or contracted provider on this matter'. While Ngozi had received legal aid in the past it was not on the same matter and so this too was a mistake.

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Ngozi had no capital and was in receipt of income support. Her financial eligibility for legal aid was simple from the point of view of a professional with relevant expertise as was completion of the financial eligibility sections of the CW1 form, nevertheless Ngozi herself was unable to understand and complete the financial eligibility section of the form.

CASE STUDY 19 - GLORIA

Gloria's English language ability was limited. Rights of Women required the use of an interpreter in order to obtain the information to draft her application.

When looking at the CIV ECF1 form unassisted she was able to understand most of the 'applicant details' section on page 1; however she did not understand the question asking for her initials and needed the interpreter to assist. She could not understand question 1 on page 4 which reads 'please provide us with brief details about the case if they are not already in the other forms / documents that you are supplying.' She was able to understand the general gist of question 2 on page 4 however did not understand the word 'issues' in the question 'how important are the issues in the case for you / your client.' She could not understand the meaning of question 3 on page 4 at all, the question being 'how complex are the proceedings, the area of law and the facts / evidence in the case?'. She pointed in particular to the words 'complex' and 'proceedings' and her lack of understanding of these words.

CASE STUDY 20 - LINA

Lina has extremely limited English language skills. Rights of Women needed an interpreter to prepare her application for exceptional case funding. Lina was unable to read and understand the CIV ECF1 form without the assistance of Rights of Women explaining it to her through an interpreter. When looking at the form unassisted she was only able to understand parts of the 'applicant details' section on page 1.

The ECF scheme operates in such a way that individual applicants must provide sufficient information and evidence to prove that the failure to provide legal aid would be a breach of their human rights or enforceable EU rights (i.e. the criteria for ECF) and also provide information and evidence to prove they are financially eligible for legal aid and their case

meets the relevant 'merits' criteria. There is no way for individual applicants to know what the relevant 'merits' criteria in their case are. While there is an online civil legal aid calculator to calculate financial eligibility it does not assist inexperienced individual applicants as its language, style and accompanying guidance replicate that of the forms and guidance written for legal aid providers.

Assessing financial eligibility for legal aid can be complex and ensuring evidence of means is obtained in a form acceptable to the LAA is a task that requires knowledge of LAA guidance and practice.

Individual applicants for ECF should not be burdened with the responsibility of proving the means and merits criteria are met. The LAA should issue provisional grants of ECF that are subject to the means and merits criteria being met²⁴. The task of proving means and merits can then fall to the legal aid provider who accepts the case. These are tasks the legal aid provider will be undertaking in the rest of its legal aid caseload in any event.

9.10 FINDING 10:

There are chronic delays in LAA decision-making

The LAA's claim to process applications within 20 working days was never met in respect of the 15 non-urgent immigration and family applications we submitted. We were met with a variation of the same reason every time we chased a delayed application – that they were 'running behind schedule', experiencing a 'backlog', dealing with a 'higher than usual number of applications'. Bearing in mind our applications were submitted from September 2017 to August 2018 it is plain that that the delays were not a one-off attributable to unforeseen spikes in applications, so we consider it reasonable to conclude that the delays in decision-making within the ECF team, as far as applications are concerned, are chronic. An injection of resources is likely the only solution to this situation.

Instead, we are disturbed to see that following applications made in July and August 2018 the LAA informed us that they aimed to make a decision within 25 working days. There has been no consequential amendment to their published guidance to individuals on gov.uk or to providers in the ECF provider pack. This appears to be an, as yet, unpublished change in policy which will leave applicants waiting even longer for an ECF determination.

9.11 FINDING 11:

The urgent case procedure is not fit for purpose

The urgent case procedure is beset with uncertainty and lacks transparency.

There is no guidance for individual applicants as to when the LAA might treat an application as urgent, they are simply told by the LAA: "If we agree a case is urgent, we will prioritise it and make a decision within 5 working days. You can tell us the case is urgent on the ECF1 form."²⁵ Providers are given a hint as to the circumstances in which the LAA may treat the application as urgent, but this offers very little in the way of certainty:

²⁴ Provisional grants of ECF subject to means and merits were in the past issued, however the LAA stopped this practice before our project commenced.

²⁵ <https://www.gov.uk/guidance/legal-aid-apply-for-exceptional-case-funding>

“If you wish the application to be treated as urgent you should complete page 6 of the CIV ECF1 to provide us with details as to the urgency of the case, for example an imminent date for a hearing or the imminent expiry of a limitation date or reasons why delay would cause risk of harm or prejudice to the client’s case. We will consider the information that you have provided including information as to how the urgent situation has arisen and why exceptional funding is needed to deal with the emergency situation and if we agree, then we will deal with your case ahead of nonurgent applications and within 5 working days. We aim to determine all cases within 20 working days from the date of receipt of the fully completed application.

However we cannot guarantee that the application will be determined before a hearing day or before specified urgent work is needed. We can provide information if you call our ECF telephone enquiry line about the likely timeframe for completion of a pending application. On receipt of an application we will notify you of the date for the 20 day timeframe.”²⁶

The analysis of our urgent cases in [section 7.3](#) demonstrates that we have been unable to discern any patterns in the LAA’s approach to urgent applications. For example, two of our urgent applications related to cases with appeal hearing dates 33 working days and 41 working days from the date of the application. To our surprise, the LAA refused to accept either was urgent. In one of those cases, the LAA told us that their decision within 25 working days of the application would be made ‘well before the date of the court hearing’. The LAA’s assertion that 16 working days is long enough for anyone to find a legal aid provider with capacity to take her case and then for that legal aid provider to prepare the appeal is unreasonable. In reality the client in question was only able to find a legal aid provider who then had no choice but to seek an adjournment to the appeal.

There appears to be no system or at least no adequate system in place to identify urgent cases as they are submitted. We marked our applications as urgent in every way possible – on the CIV ECF1 form itself, on the cover letter accompanying it, and in the email we sent lodging the application. Yet despite this, we were never told by the LAA whether they agreed the application was an urgent one and would be determined within 5 working days. Instead in some cases we received an acknowledgment email referring to a decision being made within the non-urgent timeframe which led us to believe that the LAA had made a decision that the application was not urgent. While this seemed a reasonable conclusion to draw from those emails, it transpired not to be the case because in at least one instance after receiving an email informing us a decision would be made within 20 working days, we received the decision on the 5th working day.

In one urgent case (see [section 7.7, Case study 6](#)) it was our chasing of a decision on the 5th working day that prompted the LAA to consider the application and confirm it would be treated as an urgent case. Whatever system the LAA has in place to identify and prioritise urgent cases clearly failed in this instance.

Not only does the LAA routinely fail to inform applicants whether it will treat the application as urgent, it also gives out misleading information when it does accept applications are urgent and has an unreliable system for early identification of urgent cases.

While we have experienced considerable difficulties with the urgent case procedure in representing individual applicants, there is an additional issue affecting only legal aid

²⁶ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/588924/ecf-provider-pack.pdf

provider applicants that merits highlighting. That is the LAA's suggestion that providers can work at their own financial risk while waiting for a decision from the LAA. We are aware of this practice through our professional networks with legal aid providers and our own Case study 3 (see [section 7.7](#)) illustrates this. The LAA's expectation of the goodwill of legal aid providers who feel compelled to perform work they have no guarantee of being paid for in order to protect the best interests of their clients and comply with their obligations to the court is placing an unacceptable burden onto providers.

9.12 FINDING 12:

There are significant barriers to effective communication after applications are submitted

With no route to speak directly with the ECF team, the only point of access for us, individual applicants and legal aid providers is to telephone the LAA's general customer services team. The customer services team is never able to resolve a query independently and its role is to act as a 'go-between', taking information and queries from callers and passing them to the ECF team for response. The ECF team rarely answers its phone when the customer services team call it and therefore queries are rarely answered in real time. Instead the ECF team receive messages from the customer service team about the nature of the caller's query and their contact details for a response. The caller is not given any guarantee that they will receive a response and indeed half of all our queries made this way were not responded to.

While email correspondence can be sent directly to the ECF team on their 'contactECC' email address, our experience was that attempts to raise queries exclusively by email after an application were ignored. We only ever had successful communication by email with the ECF team after a call was logged with the customer services team.

Over the course of the project, we gained knowledge which enabled us to develop a pragmatic strategy for approaching communication with the LAA including diarising dates to chase, calling the customer services team and noting details of any timeframes or commitments made during the conversation, diarising dates to chase again in the absence of a response to our query, making further calls and 'doubling up' with emails if necessary. It goes without saying that this chasing used our caseworker's time and that it would be entirely unpaid work for legal aid providers in the same situation.

Inexperienced direct applicants would likely fare far worse. Direct applicants with limited or no English would find this an insurmountable barrier as the customer services team does not have access to interpreting services and is an English only point of contact.

9.13 FINDING 13:

No immigration applications were refused ECF

All of the 18 immigration applications we submitted for ECF were granted.

The Ministry of Justice statistics for 2017/18²⁷ confirm that of 254 individual applications determined in the immigration category, 170 were granted and of 1246 provider applications determined in the immigration category, 884 were granted. Combined, this represents a grant rate of 70%.

²⁷ <https://www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2018>

While the grant rate for immigration ECF applications was 70% last year, it does not follow that 30% of the applications failed to meet the threshold for ECF. The remaining 30% of determinations is made up of refusals on a variety of grounds including 'means' (i.e. financial eligibility) and 'merits' (i.e. the standard merits criteria that applies to all legal aid) as well as rejections on grounds including the application being 'incomplete' or the matter being 'in scope' of legal aid already. In fact, close analysis of the statistics reveals that only 91 out of the 1500 immigration determinations made by the ECF team in 2017/18 were refused on 'ECF merits' grounds i.e. for failing to meet the threshold for ECF. This is a mere 6% of determinations made by the team.

With only 6% of all immigration applications failing to meet the threshold for ECF last year, the economic case for operating an ECF scheme for immigration cases engaging human rights or EU rights must be proven by the Government taking into account the operational costs of processing the applications.

It would be wholly disproportionate to continue to treat immigration cases involving human rights and EU rights as out of scope of legal aid if the administrative cost of processing these applications outweighs the benefit of refusing 6% of cases.

9.14 FINDING 14:

Individuals face challenges after ECF is granted

Individual applicants granted ECF receive a letter from the LAA. The letter tells individuals that they now need to find a 'Provider with an Immigration / Family Legal Aid Contract' to deal with their case. Unhelpfully, the standard letter makes no suggestion about how this could be achieved. One obvious improvement to this standard letter would be for the LAA to give information about the legal aid provider search engine available on the gov.uk website. Our experience is that this search engine is often out of date; for example when we contacted a firm in Yorkshire listed on gov.uk as having an immigration legal aid contract the firm informed us they had not done legal aid work for two years.

We made referrals to legal aid providers for most of our clients. In most cases we had to refer to multiple providers before one accepted the case. 1 in 6 of our immigration referrals received no response at all. More than 1 in 3 of our immigration referrals were rejected on 'capacity' grounds i.e. the legal aid provider told us they were too busy to take the case on. In 2 out of the 3 family cases we assisted with referral, it was necessary to refer to two providers before one accepted the case.

The LAA's standard ECF grant letter in immigration cases goes on to tell individual applicants that once a legal aid provider is found, the provider should 'complete and sign/date the CW1 form, complete and sign/date the CIVECF1 form, then send a copy of these forms to the Exceptional Case Funding Team, together with a copy of this determination letter. The Provider should notify us that they are acting in the matter so that we can update our records with their details.' We understood this to be an administrative matter of completing specific 'provider' sections of the original forms and returning them to the LAA so that work could commence immediately. Unfortunately, our understanding is far from that of legal aid providers, some of whom believe they are required to complete the same CIVECF1 form and means / merits forms all over again and await another decision before they can commence work on the case, while others complete the 'provider' sections of the original forms and await another decision before commencing work. The LAA has not helped providers by

issuing rather unclear guidance in its ECF Provider Pack:

“If you are instructed to apply for funding in circumstances where the client has made a direct application a fully completed application, including the relevant provider details and certifications, must be submitted as described in section 5. Any letter to a Direct Applicant from the ECF Team should be supplied with the application. It will be particularly important to describe any change of circumstances or new facts and to identify any additional documents that are being provided with the application. If the client has a letter confirming that exceptional case funding is granted subject to location of a provider it is important to note that exceptional case funding may be withdrawn where the information on the application submitted by the provider is materially different as to the facts, merits, likely benefit or likely costs.”

This apparent requirement on individual applicants to apply twice is onerous, causes further unnecessary delays in the commencement of the case and acts as a deterrent to legal aid providers already overwhelmed by LAA administrative burdens.

