Changes to civil legal aid
Practical Guidance for the Bar

The Bar Council
Changes to civil legal aid: Practical guidance for the Bar

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Acknowledgments
This guide has been written by the Remuneration Committee’s Civil (Public) Panel. The Bar Council welcomes any comments or suggestions to improve future revisions of this guidance, and any errors and omissions should be drawn to the attention to the Bar Council’s Remuneration Team (Remuneration@BarCouncil.org.uk).

The Civil (Public) Panel comprises Jan Luba QC (Chair), Sarah-Jane Bennett (Executive), Kerry Bretherton, John Friel, Fay Gillott, Henrietta Hill, Michael Horne, Jason Housden, Catrin Lewis, Judith Maxwell, David Renton, John Walsh and Martin Westgate QC. The Panel is grateful to Tim Samuel for his contribution.

Address
Remuneration and Policy
Bar Council
289-293 High Holborn
London WC1V 7HZ

Document Exchange No
DX LDE 240

Telephone Number
020 7242 0082

Fax Number
020 7611 1352

Email
Remuneration@BarCouncil.org.uk

Website
www.BarCouncil.org.uk
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Overview

Summary
1. This Guidance is directed to barristers undertaking civil legal aid work after 1 April 2013 in all categories of civil cases other than family cases.

2. The Guidance is intended to help explain how civil legal aid work has been changed by the legal aid reforms introduced by the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (LASPO) and the secondary legislation made under it. This material has been prepared by a team of practising barristers and clerks who comprise the Bar Council’s Civil (Public) Panel. It will be regularly revised and updated. The Bar Council welcomes any comments or suggestions to inform future revisions of the Guidance.¹

3. This Guidance cannot, and does not, seek to cover all dimensions of the changes which have taken place. It focuses only on one specific issue – the remaining scope of civil legal aid – with the intention of helping a barrister determine whether a case can be brought within one of the new prescribed categories where civil legal aid remains available or within the new exceptional funding criteria. This Guidance provides an overview of the scope of civil legal aid now available in each of the following categories of law:

   - Actions against the police
   - Clinical negligence
   - Community care
   - Debt
   - Education
   - Employment
   - Housing
   - Immigration and asylum
   - Inquests
   - Mental health
   - Personal injury
   - Public law and judicial review, and
   - Welfare benefits.

4. Readers interested in pursuing other dimensions of the legal aid reforms are directed to guidance available from the following sources:

   - *The Lord Chancellor’s Guidance on Civil Legal Aid* (February 2013) Ministry of Justice

¹ Any comments should be sent to Remuneration@BarCouncil.org.uk
• Legal Aid Reforms: Frequently Asked Questions (July 2012) Ministry of Justice

• Out of scope, out of mind: Who really loses from legal aid reform (March 2012) Citizens Advice Bureau Service, and


5. This Guidance does not address alternative methods of funding civil cases whether by private payment, conditional fee agreements, damages-based agreements or otherwise. Barristers seeking guidance on those funding methods should consult the Bar Council’s Guidance for Barristers and Clerks Relating to Privately Funded Civil Litigation.

6. This Guidance is best read electronically and care should be taken that the most up to date version is accessed. This is to ensure that hyperlinks in the Guidance lead to the correct sources.

Keeping up to date

7. The Bar Council and the Legal Aid Agency (LAA) have agreed that there should be regular opportunities for the exchange of information between the Bar and legal aid officials about the operation of the legal aid reforms, including the matters covered in this Guidance. Individual barristers can get involved in this process by:

• attending the meetings held in London and on Circuit where barristers can meet and discuss issues directly with legal aid officials. These are known as Bar Reference Group meetings.  

• raising issues of concern about the general administration of civil legal aid for the Bar Council to canvass at its regular liaison meetings with senior legal aid officials.  

8. Regular updates on aspects of the material covered in this Guidance are available free of charge from three sources to which all civil legal aid practitioners should consider subscribing:

• Remuneration Update (issued by the Bar Council)

• Advocates’ Bulletin (issued by the Legal Aid Agency)

• Latest News and Updates (issued by the Legal Aid Agency)

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2 The most up to date version of this document is available on the Bar Council website

3 The agency that replaced the Legal Services Commission on 1 April 2013

4 Further information is available on the Ministry of Justice website

5 Such issues should be notified by email to Sarah-Jane Bennett at the Bar Council: SJbennett@BarCouncil.org.uk
9. The LAA have also published online training modules covering the impact of the legal aid reforms.

10. Barristers regularly undertaking civil legal aid casework may benefit from membership of the Legal Aid Practitioners Group (LAPG).
Legal Aid, Sentencing and Punishment of Offenders Act 2012

The headline changes

11. In April 2013 civil legal aid underwent its biggest shake-up in a generation. The driving force for change was the Government policy to reduce public spending.

12. The changes were first outlined in a consultation paper issued in 2010. There were some 5,000 representations received in the consultation process but the Government’s response to the consultation, published in 2011, advised that it would press forward with the reforms largely as originally proposed. LASPO was the subsequent legislative vehicle for the central reforms. It completed the Parliamentary process and received Royal Assent on 1 May 2012. Since then the detail of the changes has been supplied in a series of statutory instruments.

13. The ‘headline’ changes include:

- **Abolition of the Legal Services Commission.** The LSC was abolished on 1 April 2013. Decision-making on legal aid is now the role of a Director of Legal Aid Casework and administration of applications, claims and payments is now handled by the Legal Aid Agency (LAA) based within the Ministry of Justice. All policy responsibility is taken directly by the Lord Chancellor and other ministers in the Ministry of Justice.

- **Reduced scope of civil legal aid.** Before 1 April 2013 the assumption was that civil legal aid was available to help on almost all aspects of English law, with narrowly prescribed exceptions. Since 1 April 2013 the situation has been completely reversed – civil legal aid is now only available for prescribed topics and types of legal work, subject to a narrow override for exceptional funding in other cases.

- **Reduced access to civil legal aid through means-testing.** There has long been an element of means-testing to determine who qualifies for legal aid. From 1 April 2013 the means-test has been tightened so that fewer individuals qualify for legal aid.

- **Tightened merits testing.** Before 1 April 2013, LSC officials decided legal aid applications by applying criteria in the Funding Code and Guidance. Since 1 April 2013 the basis on which civil legal aid will be made available has been circumscribed by statutory instrument.

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8 *Civil Legal Aid (Merits Criteria) Regulations 2013 SI No. 104*
• **Shift away from face-to-face access.** Government is increasingly keen that publicly-funded legal services should be accessed otherwise than through the traditional ‘high street solicitor’ route. From 1 April 2013 there is a greater emphasis on call-centre provision under which legal advice is sought and provided by telephone, email and online from the service called Civil Legal Advice (CLA). Those call-handlers giving advice are not usually solicitors but the intention is that their work be supervised by solicitors.\(^9\) For some subject areas it will only be possible to access legal aid by first passing through a ‘gateway’ of telephone advice services.\(^10\)

• **Reduced remuneration for undertaking legal aid work.** The cuts in rates of pay for solicitors, barristers and experts handling civil legal aid work were implemented early in the process of legal aid reform and apply to all work done in legal aid cases where legal aid applications were made after 3 October 2011.\(^11\) Rates of pay were, in effect, cut by 10 percent. Indeed, given the method of setting the rates to which the cut for the Bar was applied, many barristers’ fees suffered a greater than 10 percent cut. Similar cuts were made to remuneration in Family cases with effect from February 2012. From 1 April 2013, the rates of payment to solicitors, barristers and experts in civil legal aid cases have been prescribed by new regulations.\(^12\)

• **Changes in the supplier-base.** Most front line suppliers of civil legal aid services were given notice ending their contracts with the LSC from 31 March 2013. Following a tendering-exercise, new contracts with the LAA were issued with effect from 1 April 2013.\(^13\) Other suppliers continue to work under the terms of the 2010 contract, which was subject to variation in order to bring it into line with LASPO and to provide as much consistency with the 2013 contract as possible.\(^14\) Some previous suppliers have left the market. Many new providers have contracts to supply services in subject areas in respect of which they have not previously practised. Because some subject areas were exposed to over-bidding, the number of cases offered to successful bidders may have been so limited as to make contracts non-viable. But, as before, there are legal aid ‘deserts’ in which no local provider of specialist legal services is available to take on particular types

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\(^9\) The announcement of the successful bidders to provide the telephone advice services from 1 April 2013 was made in November 2012. Further information is available on the [Ministry of Justice website](https://www.ministryofjustice.gov.uk).\(^10\) See further information on the [Ministry of Justice website](https://www.ministryofjustice.gov.uk).\(^11\) See [Summary of the changes to be implemented on October 3rd 2011](https://www.ministryofjustice.gov.uk) (Legal Services Commission). The rates of payment in effect from 3 October 2011 were implemented by [The Community Legal Service (Funding) (Amendment No.2) Order 2011 SI No. 2066, Schedule 1](https://www.ministryofjustice.gov.uk).\(^12\) [Civil Legal Aid (Remuneration) Regulations 2013 SI No. 422](https://www.ministryofjustice.gov.uk).\(^13\) See [Summary of tender outcomes](https://www.ministryofjustice.gov.uk).\(^14\) The amended contract documents are available on the [Ministry of Justice website](https://www.ministryofjustice.gov.uk).
of legal aid cases. The Bar Council understands that no contracts have been issued to barrister-led bidders.

- **Changes to civil legal aid procedures.** The rules about how legal aid applications are made, processed and determined and the various forms in which civil legal aid can be provided are detailed in a new statutory instrument.\(^\text{15}\) They are no longer the subject of procedural guides produced by the legal aid authorities.

- **Changes in the Civil Procedure Rules.** The availability of civil legal aid has also been affected by the changes introduced to the management of civil cases by amendments to the Civil Procedure Rules which came into effect on 1 April 2013.\(^\text{16}\) Most obviously, the doubling of the upper limit of the small claims track from £5,000 to £10,000 has meant that civil legal aid effectively ceased to be available in respect of the taking or defending of most claims for sums between £5,000 and £10,000.

- **Changes to forms and in technology.** All the forms used to apply for legal aid or be paid for the provision of civil legal aid services were changed on 1 April 2013.\(^\text{17}\) All claims submitted on the old forms after that date will be rejected. Later in 2013 the LAA will implement a new online computer system through which it will deal with applications for civil legal aid, with most other civil legal aid transactions, and with claims for payment presented by barristers and solicitors. All barristers doing civil legal aid work will need to register for participation in the new computerised system when it is rolled-out nationally.

- **Changes to costs protection.** As with the old legal aid arrangements, the new scheme provides some measure of costs protection for circumstances in which a legally aided client loses their case. The details are given in a new set of regulations.\(^\text{18}\) These also set out the circumstances in which the Lord Chancellor can be ordered to meet the costs of the successful party.

- **Supplementary Legal Aid Scheme.** It had been envisaged that a new Supplementary Legal Aid Scheme might be introduced alongside the mainstream legal aid reforms. That proposal has not been taken forward, at least for the time being.\(^\text{19}\)

\(^{15}\) Civil Legal Aid (Procedure) Regulations 2012 SI No. 3098
\(^{16}\) Civil Procedure (Amendment) Rules 2013 SI No. 262
\(^{17}\) The new forms are available on the Ministry of Justice website
\(^{18}\) Civil Legal Aid (Costs) Regulations 2013
\(^{19}\) This was confirmed on the Ministry of Justice website
**Arrangements for payment of barristers.** Under the new civil legal aid scheme there is no contract between the LAA and any barrister for the payment by the LAA of a barrister’s fees. Nor does counsel have any statutory entitlement to be paid for his or her services by the LAA. The scheme for payment of barristers in civil legal aid cases is intended to ‘work’ by the LAA requiring its contracted suppliers to themselves pay professionals whom they engage in legal aid cases, including barristers and experts, and by the LAA agreeing, under those contracts, that in some cases it will pay barristers directly. It is therefore for each barrister to make their own agreement with a legal aid supplier, such as a solicitor, as to the terms on which they will accept a brief or instructions to undertake civil legal aid work. The old default Terms of Work between barristers and solicitors ceased to apply on 31 January 2013 and as a result any liability on the solicitor to pay (or arrange for the LAA to pay) in a civil legal aid case will only be enforceable if the barrister enters into a contract with the supplier (whether on the Standard Terms in Annex T of the Code of Conduct, or some variant of them, or on bespoke terms). The Bar Council’s Fee Collection Service remains available to assist counsel if a solicitor will not pay (or will not arrange for a barrister to be paid by the LAA) in a civil legal aid case.20

**Very High Cost Civil Cases.** As with the pre-reform arrangements, civil legal aid cases likely to incur costs of over £25,000 for the assisted client will be treated as ‘high cost’ cases and subject to special measures. In each such case, the solicitor will enter into an individual contract with the LAA specifically designed to manage high cost cases. Since 1 April 2013 the form of the contract has changed but not its essential structure which requires prior LAA approval of each ‘stage’ of the case and imposes a reduced (risk rate) payment from the LAA if the case does not result in full costs recovery at *inter partes* rates. For counsel, the risk rates are at the same rates which have been frozen since 2000.21 A barrister instructed by a solicitor holding a high cost contract does not become a party to the contract and has no statutory or contractual right to payment from the LAA. Although the LAA issued guidance on 1 April 2013 for barristers instructed in high cost cases, the guidance was not drafted jointly with, or approved by, the Bar Council.

**How the Act works**

14. This part of this Guidance offers an outline of how LASPO ‘works’ and how barristers can identify what is within, and what is now outside, the scope of civil legal aid.

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20 Further information on the Fees Collection Service is available on the [Bar Council website](http://www.barcouncil.org.uk).
21 £70 per hour for a junior, £90 per hour for a QC.
15. “Civil legal aid” is once again the term covering non-crime legal aid services. It is defined as constituting the “civil legal services” required to be made available under sections 9 or 10 of LASPO or under paragraph 3 of Schedule 3 of the Act.22

16. Civil legal aid services are services providing advice and assistance both as to the application of the law and legal proceedings. The term also covers providing advice and assistance to prevent or resolve legal disputes and for enforcing decisions in legal proceedings or other decisions resolving legal disputes.23

17. Sections 9 and 10 of LASPO deal respectively with first “General cases” and then “Exceptional cases”.

**General cases**

18. General cases are now those cases in which the subject is brought within the scope of the civil legal aid scheme because it is listed in Part 1 of Schedule 1 of LASPO and the Director of Legal Aid Casework (through LAA officials) has determined that the individual qualifies for civil legal aid services. Exceptional cases are those limited number of cases where civil legal aid remains available notwithstanding that they would not otherwise qualify as general cases.

19. The starting point in most cases will be to determine whether or not the case is of a type which falls within scope (i.e. is specified in Schedule 1 Part 1). The Schedule works by identifying a particular subject, describing which services within that subject are covered, and then applying a series of definitions, conditions and exclusions. The amount of cross-referencing within the Schedule produces a snakes-and-ladders type exercise to determine whether a particular sub-class of case is in or out of scope. The function of the detailed chapters in this Guidance is to break the back of that exercise so that barristers can more readily discern what is in or out of scope.

20. The fundamental concept is that if a case does not fall within the parameters of Schedule 1, Part 1, and cannot be treated as an exceptional case, it is out of scope. The net effect is that, according to the Ministry of Justice,24 the following matters are now outside the scope of civil legal aid:

- asylum support (except where accommodation is claimed)
- consumer and general contract
- Criminal Injuries Compensation Authority cases
- debt, except where there is an immediate risk to the home

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22 LASPO s 1(2)(a)
23 LASPO s 8
24 Further information is available on the Ministry of Justice website
• employment cases
• education cases, except for cases of Special Educational Needs
• housing matters, except those where the home is at immediate risk (excluding those who are “squatting”), homelessness assistance, housing disrepair cases that pose a serious risk to life or health and anti-social behaviour cases in the County Court
• immigration cases (non-detention)
• appeals to the Upper Tribunal from the General Regulatory Chamber of the First-tier Tribunal
• cash forfeiture actions under the Proceeds of Crime Act 2002
• legal advice in relation to a change of name
• actions relating to contentious probate or land law
• court actions concerning personal data
• actions under section 14 of the Trusts of Land and Appointment of Trustees Act 1996
• legal advice on will-making for those over 70; disabled people; the parent of a disabled person; the parent of a minor who is living with the client, but not with the other parent, and the client wishes to appoint a guardian for the minor in a will
• private family law (other than cases where criteria are met regarding domestic violence or child abuse)
• tort and other general claims, and
• welfare benefits, except for appeals on a point of law in the Upper Tribunal (but not advocacy in the Upper Tribunal), and onward appeals to the Court of Appeal and Supreme Court.

21. The Lord Chancellor has power to alter, amend and add to Schedule 1 Part 1 and has already exercised that power. This means that the Schedule must always be read in an updated or revised form in the light of the exercise of those powers.

22. Even if a case is within scope, the qualifying criteria for civil legal aid remain governed by tests of means and merits. The means test is established by section 21, as again detailed in regulations. The merits test is framed by the general criteria in section 11 of LASPO which have subsequently been fleshed out in detailed regulations.

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25 See, for example, Civil Legal Aid (Preliminary Proceedings) Regulations 2013 SI No. 265. See also The Legal Aid, Sentencing and Punishment of Offenders 2012 (Amendment of Schedule 1) Order 2013.
26 See LASPO s 11
27 Civil Legal Aid (Merits Criteria) Regulations 2013 SI No. 104
23. The way in which the merits criteria are drawn means that it is not sufficient for a case to be within the scope of Schedule 1 Part 1. It must also meet the criteria set out in the regulations for the funding of such a case.\textsuperscript{28} Again, the detail is in the respective subject-related chapters of this Guidance.

**Exceptional cases**

24. As indicated above, failure to bring a case within the parameters of Schedule 1 Part 1 is not necessarily fatal to legal aid entitlement. Two classes of exceptional case are provided for under section 10.

25. The first and more limited class applies to inquests and that class is dealt with in the **Inquests** chapter of this Guidance.

26. The second and broader class is set out in section 10(2)-10(3) of LASPO in these terms:

\begin{quote}
(2) *This subsection is satisfied where the Director—*

(a) *has made an exceptional case determination in relation to the individual and the services,* and

(b) *has determined that the individual qualifies for the services in accordance with this Part,*

(and has not withdrawn either determination).
\end{quote}

\begin{quote}
(3) *For the purposes of subsection (2), an exceptional case determination is a determination—*

(a) *that it is necessary to make the services available to the individual under this Part because failure to do so would be a breach of—*

(i) *the individual’s Convention rights (within the meaning of the Human Rights Act 1998), or*

(ii) *any rights of the individual to the provision of legal services that are enforceable EU rights,* or

(b) *that it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach.*
\end{quote}

27. How particular cases in specific subject areas can satisfy that test – and be brought back into scope – is considered in the subject-specific chapters of this Guidance. The Lord Chancellor

\textsuperscript{28} Including amending regulations such as *Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2013.*
has issued specific guidance to LAA officials on the operation of this category of ‘non-inquest’ exceptional funding.29

28. Although every effort has been made to describe the provisions of LASPO accurately in this Guidance there can be no substitute for the legislation itself. This Guidance can usefully be read with:

- The Act itself
- The Explanatory Memorandum

Regulations and official guidance
29. As the numerous references in the text and footnotes to this Guidance indicate, there are many regulations and orders published in exercise of the powers to make delegated legislation given in LASPO.30 Where possible this guidance provides hyperlinks to them.

30. The Lord Chancellor has published various pieces of official guidance, including:31

- The Lord Chancellor’s Guidance on Civil Legal Aid (February 2013) Ministry of Justice
- The Lord Chancellor’s Guidance on Exceptional Funding (Non-Inquests) (February 2013) Ministry of Justice, and

31. This guidance has been written by civil servants in the Ministry of Justice. Its content was not the subject of any prior consultation with the Bar or with any other external body. It cannot substitute the wording of the Act or the Regulations and the legal accuracy of the guidance that it gives cannot necessarily be assured. By way of illustration only, the Guidance on Exceptional Funding (Non-Inquests) states that whether or not there is a McKenzie friend (MF) who could be granted permission to speak on behalf of a party to proceedings is something a caseworker should consider when determining how capable an applicant for exceptional funding is of presenting their case effectively.32 Compare and contrast this with the Master of the Rolls Practice Guidance 2010 on the role of MFs:33

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29 Lord Chancellor’s Exceptional Funding Guidance (Non-Inquests)
30 The Bar Council has created a Statutory Instrument Tracker that provides information about the SIs laid under LASPO.
31 Civil legal aid funding guidance is available on the Ministry of Justice website
32 See Lord Chancellor’s Exceptional Funding Guidance (Non-Inquests), page 9
33 Practice Guidance – McKenzie Friends (Civil and Family Courts), paragraph 19
Courts should be slow to grant any application from a litigant for a right of audience or a right to conduct litigation to any lay person, including a MF.

32. Those interested in identifying the precise intended consequences of particular aspects of the new regime will find the detail set out in a host of impact assessments and equality impact assessments,\(^{34}\) including assessments dealing specifically with the changes to scope.\(^{35}\)

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\(^{34}\) Reform of Legal Aid in England and Wales: Equality Impact Assessment

\(^{35}\) See the Impact Assessment specifically dealing with changes to scope and the Equality Impact Assessment specifically concerned with changes to scope
Actions against the police

Category definition and scope

LASPO Schedule 1, Part 1

33. The LASPO categories of most relevance to Actions Against the Police (AAP) are those set out in Schedule 1, Part 1, paragraphs 21 and 22. Paragraphs 3 and 39 will also assist in some cases.

34. Paragraph 21 covers cases involving “abuse by a public authority of its position or powers”. However, Schedule 1, Part 1, paragraph 21(4) goes on to provide that

For the purposes of this paragraph, an act or omission by a public authority does not constitute an abuse of its position or powers unless the act or omission –

(a) is deliberate or dishonest, and
(b) results in harm to a person or property that was reasonably foreseeable.

35. Paragraph 22 covers claims in tort or claims for damages (other than claims in tort) in respect of a “significant breach of Convention rights” by a public authority.36

36. Paragraphs 21(5) and 22(4) provide that for the purposes of paragraphs 21 and 22 “public authority” has the same meaning as in the Human Rights Act 1998, section 6:

(3)[…] “public authority” includes—

(a) a court or tribunal, and
(b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

[…]

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

37. Paragraph 3 brings within scope cases involving the physical or mental abuse of children or vulnerable adults, and paragraph 39 covers assistance to the victims of certain sexual offences.

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36 Further information on the meaning of “significant breach” is provided by the Lord Chancellor’s Guidance Under Section 4 of Legal Aid, Sentencing and Punishment of Offenders Act 2012, paragraphs 11.1-11.3.
Regulations

38. Chapter 3 of the Civil Legal Aid (Merits Criteria) Regulations 2013 sets out specific merits criteria provisions for claims against public authorities.37

39. Regulation 57 provides that where a claim is made for investigative representation in relation to a matter described in paragraphs 21 and 22, the “minimum damages” criteria set out in regulations 40(1)(c),38 and (2),39 only apply to the extent that the case (a) is part of a multi-party action, and (b) does not relate to (i) the abuse of a child or a vulnerable adult; or (ii) a contravention of the Equality Act 2010 or of a previous discrimination enactment.

40. Regulation 58 provides that where a claim is made for full representation in relation to such cases the applicable criteria are those set out in regulation 39,41 and regulation 58(2) and (3). The latter provide that funding will be granted if the proportionality test is met and the prospects of success are either:42 (a) very good, good or moderate; or (b) borderline, and (i) the case is of significant wider public interest; (ii) the case is one with overwhelming importance to the individual; or (iii) the substance of the case relates to a breach of Convention rights.

41. Regulation 59 sets out the criteria for full representation in relation to multi-party claims against public authorities: multi-party action damages criterion.

42. Under Regulation 20 of the Civil Legal Aid (Procedure) Regulations 2012,43 discrimination cases that fall within the AAP contract category are exempt from the “gateway” provisions.

37 Civil Legal Aid (Merits Criteria) Regulations 2013 SI No. 104
38 Which provides that “if the individual’s claim is primarily a claim for damages or other sum of money in which the likely damages do not exceed £5,000, the case must be of significant wider public interest”.
39 Which provides that “[f]or the purposes of paragraph (1)(c), if the claim forms part of a multi-party action only the lead claim within that action is capable of being a case of significant wider public interest”.
40 Civil Legal Aid (Merits Criteria) Regulations 2013 SI No. 104, regulation 57(2)
41 Standard criteria for determinations for legal representation
42 Civil Legal Aid (Merits Criteria) Regulations 2013 SI No. 104, regulation 58(3)
43 SI No. 3098
43. The Lord Chancellor’s Guidance,\textsuperscript{44} at parts 4-5 and 7, provides further guidance on the merits and costs benefit tests. These parts of the guidance should be examined closely by AAP practitioners given the different merits and costs benefit tests that apply to claims under paragraphs 21 and 22.

**Standard Civil Contract 2010 (as amended)**

44. The Standard Civil Contract 2010 (between the then Legal Services Commission and contracted legal aid providers) previously included, within its “Actions Against the Police, etc” category, reference to claims arising out of the deliberate/dishonest torts such as assault, wrongful arrest and malicious prosecution but also claims arising from “...other abuse of authority or neglect of duty against any body or person, public or private, with power to detain, imprison or prosecute”.

45. The amended category definitions that apply from 1 April 2013\textsuperscript{45} make clear that funding is now only available for cases within Schedule 1, Part 1, paragraphs 3, 21, 22 and 39 of LASPO.

46. The amended category definition refers to claims only being within scope if they relate to claims against public or private authorities with “....the power to prosecute, detain, or imprison”. This limitation on the definition of public authority is not to be found in LASPO (which would prevail over the guidance) but this category would nevertheless appear to embrace the main types of authorities against which claims of this nature are brought (namely the police, prisons, immigration authorities and private bodies carrying out these functions).

47. The amended category definition also provides that claims for damages for clinical negligence (including claims funded via exceptional funding) are included only if the clinical negligence forms part of a claim which includes another cause of action against a body or person with power to detain or imprison.

48. The amended contract category definition also makes clear that exceptional funding under section 10 of LASPO can be made available for applications to the Home Office under the *Criminal Justice Act 1988*, section 133 or the *ex gratia* scheme for compensation for wrongful conviction and claims under the Criminal Injuries Compensation Authority Scheme, including any applications to the First-Tier Tribunal arising out of such a matter. It also makes clear that claims for damages in respect of alleged professional negligence in the conduct of a matter included in the category are covered.

\textsuperscript{44} Lord Chancellor’s Guidance Under Section 4 of Legal Aid, Sentencing and Punishment of Offenders Act 2012

\textsuperscript{45} Standard Civil Contract 2010, Amended Category Definitions, paragraphs 31-33
Types of cases covered in practice

49. It is likely that most AAP cases will fall to be considered under LASPO Schedule 1, Part 1, paragraphs 21 and 22.

50. The reference in paragraphs 21(5) and 22(4) to the Human Rights Act 1998 definition of a public authority makes clear that where a private body is carrying out public functions it will be regarded as a public authority for these purposes. This is welcome given the increasing privatisation of public functions. It means that, for example, actions against those running private prisons or court escort services will continue to be within scope.

51. The main limitation on the scope of paragraph 21 claims is the provision in paragraph 21(4) confining claims under this category to those which arise from “deliberate or dishonest” acts or omissions of public authorities and which result in “reasonably foreseeable harm to a person or property”.

52. It is likely that the first limb of this definition will cause most difficulty, because it is hard to envisage many deliberate or dishonest acts by public authorities that do not also result in reasonably foreseeable harm to a person or property.

53. However, the limitation of claims to those arising from deliberate or dishonest acts means that the following sorts of cases are now likely to fall out of scope:

- claims of loss of liberty arising from the negligence of the police and/or immigration authorities
- claims in respect of arrests pursuant to defective warrants, and
- cases where, due to negligence of the detaining authorities, a prisoner has been in a position to assault another prisoner due to negligence by the supervising officers.

54. The main limitation on the scope of paragraph 22 is the requirement that a claim only falls within it if it involves a “significant” breach of Convention rights by a public authority. Guidance on the meaning of “significant breach” is provided by the Lord Chancellor’s Guidance on Civil Legal Aid, at paragraphs 11.1-11.3 (which replaces the previous Funding Code guidance on the meaning and effect of “Significant Human Rights Issue”). The new Guidance indicates that:

- This category is “intended to focus legal aid on the most serious cases”
- The word “significant” should be given its natural meaning, and

46 Lord Chancellor’s Guidance Under Section 4 of Legal Aid, Sentencing and Punishment of Offenders Act 2012
• Factors which might be relevant in considering whether there has been a significant breach of a Convention right by a public authority include whether the breach was deliberate, and whether the individual has suffered a significant disadvantage taking account of both his or her subjective perceptions and what is objectively at stake in a particular case.

55. It is unsurprising that the Guidance seeks to focus funding for human rights cases on the most serious claims. In the police context, this provision is perhaps most likely to be of use in civil claims involving breaches of the rights set out in Articles 2, 3, 5, 8, 9, 10 and 14 of the European Convention on Human Rights (ECHR).

56. There has been widespread publicity recently over the issue of sexual offences committed by police officers and the victims of those offences may be assisted by LASPO Schedule 1, Part 1, paragraphs 3 and 39 (although many of those cases would also fall under paragraphs 21 and/or 22).

57. As indicated above, the amended contract category definition makes clear that exceptional funding under section 10 of LASPO can be made available for applications to the Home Office under the Criminal Justice Act 1988, section 133 or the ex gratia scheme for compensation for wrongful conviction and claims under the Criminal Injuries Compensation Authority Scheme. However, claims for exceptional funding in these cases and any other AAP claims which fall outside the general AAP funding provisions (such as those relating to negligence by the police or other authorities which do not on their facts fall within LASPO paragraphs 3, 21, 22 or 39) will need to meet the criteria for exceptional funding.

58. The Lord Chancellor’s Guidance on Exceptional Funding (Non-Inquests) makes clear that the overarching question to be considered in determining such applications is whether the withholding of legal aid would make the assertion of the claim practically impossible or lead to an obvious unfairness in proceedings. Claims for compensation for miscarriages of justice are notoriously difficult, and such cases should have reasonable prospects of obtaining exceptional funding, as should complex claims relating to negligence by the police or other authorities. Particularly complicated Criminal Injuries Compensation Authority claims may well also meet the exceptional funding threshold.

59. The provisions of regulation 57 disapplying the “minimum damages” criteria to certain cases are welcome and should mean that even discrimination claims against public authorities that are worth less than £5,000 are brought within scope.47

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47 See Civil Legal Aid (Merits Criteria) Regulations 2013 SI No. 104, regulation 57
Clinical negligence

Category definition and scope

LASPO Schedule 1, Part 1
60. Clinical negligence is defined for the purposes of LASPO by paragraph 23(5) of Part 1 of Schedule 1 as “breach of a duty of care or trespass to the person committed in the course of the provision of clinical or medical services (including dental or nursing services)”.  

61. LASPO removed all claims for damages for clinical negligence from the scope of civil legal aid, with one exception: clinical negligence during pregnancy, child birth, or the postnatal period (eight weeks), which causes a child to suffer severe disability due to a neurological injury.  

62. The conditions which must be met are set out in LASPO Schedule 1, Part 1, paragraph 23. They are that:  

- clinical negligence caused “a neurological injury” to the individual (V)\(^48\) and, as a result of the neurological injury, V is “severely disabled”\(^49\)

- the clinical negligence occurred
  - “while V was in his or her mother’s womb”, or
  - “during or after V’s birth”; and
    - if V was born before the beginning of the 37th week of pregnancy, the period of eight weeks beginning with the first day of what would have been that week; or
    - if V was born during or after the 37th week of pregnancy, the period of eight weeks beginning with the day of V’s birth.\(^50\)

63. Paragraph 23(5) provides that “disabled” means “physical or mentally disabled” and defines “birth” as “the moment when an individual first has a life separate from his or her mother” and references to an individual being born are interpreted accordingly.

\(^{48}\) The individual is defined as ‘V’ throughout LASPO Schedule 1, Part 1, paragraph 23  
\(^{49}\) LASPO Schedule 1, Part 1, paragraph 23(1)  
\(^{50}\) LASPO Schedule 1, Part 1, paragraph 23(2)
64. The services under the certificate of public funding must be provided to V, or where V has died, to his or her “personal representatives”, defined as being:  

(a) a person responsible for administering the individual’s estate under the law of England and Wales, Scotland or Northern Ireland, or  

(b) a person who, under the law of another country or territory, has functions equivalent to those of administering the individual’s estate.

65. Other clinical negligence claims can still secure civil legal aid if the LAA makes an “exceptional case determination” under section 10(2) of LASPO.

66. Section 10(2) applies where it is “necessary to make the services available to the individual under this Part because failure to do so would be a breach of...the individual’s Convention rights (within the meaning of the Human Rights Act 1998)”, or where “…it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach”.

Regulations

67. The same merits and financial eligibility criteria apply to clinical negligence claims which fall within the scope of civil legal aid as apply to a general case under paragraph 23 of Part 1 of Schedule 1 of LASPO and to those where an exceptional funding application is made under section 10(2) of LASPO.

68. There is no longer a specific category for clinical negligence claims in the relevant merits criteria. Instead, clinical negligence claims are subject to the general merits criteria before legal representation (investigative or full representation) can be granted or continue.

69. Essentially, for investigative representation to be granted,

- the prospects of success must be “unclear” and substantial investigative work required before the prospects can be determined to be “poor”, “moderate”, “good” or “very good”, and
- there must be reasonable grounds for believing that once the investigative work is performed, the criteria for full representation will be met.

70. To qualify for full representation both the “cost benefit” criteria in regulation 42 and the “merits” criteria in regulation 43 must be met.

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51 LASPO Schedule 1, Part 1, paragraph 23(5)  
52 LASPO s 10(3)  
53 Civil Legal Aid (Merits Criteria) Regulations 2013 SI No. 104, regulations 40-43
71. In terms of “merits”, the prospects of success must not be “poor” or “borderline” but must be at least “moderate” (50 percent or more, but less than 60 percent) or greater.

72. The “cost benefit” criteria, which relate to likely damages versus likely costs, are in the form of a sliding scale, depending upon whether the merits of the claim are moderate, good or very good.\(^{54}\) In short, likely damages must exceed likely costs by the following ratios:

- moderate prospects of success – 4:1
- good prospects of success – 2:1, and
- very good prospects of success – 1:1.

73. The definitions of “likely damages” and “likely costs” in regulations 9 and 10 respectively bear careful examination. “Likely damages” means the amount of damages that the individual is likely to receive if “substantially successful” at trial or other final hearing. “Likely costs” means the total costs to final settlement or judgment calculated on legal aid rather than \emph{inter partes} rates. The prospects of the claim settling before trial are explicitly to be taken into account in assessing “likely damages”. Because there may be legitimate debate over when an individual case may compromise, the application of the “cost benefit” criteria may not be straightforward.

74. Because of the costs involved in claims involving serious disabilities caused by neurological injury, it is almost certain that every clinical negligence claim which falls within the scope of LASPO will be treated as “Special Case Work” within the meaning of Part 6 of the \textit{Civil Legal Aid (Procedure) Regulations 2012}.\(^{55}\) A fully costed case plan is likely to be required,\(^{56}\) which will include details of the tasks to be undertaken by counsel.

\textbf{Standard Civil Contract 2010 (as amended)}

75. The amended category definition of the Standard Civil Contract 2010 (between the then Legal Services Commission\(^{57}\) and contracted legal aid providers) refers to the provisions of LASPO Schedule 1, Part 1, paragraph 23.\(^{58}\) The Contract also refers to grants of exceptional funding including:\(^{59}\)

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\(^{54}\) \textit{Civil Legal Aid (Merits Criteria) Regulations 2013 SI No. 104}. The definitions of likely damages and likely costs are set out in regulations 9 and 10 respectively.

\(^{55}\) SI No. 3098

\(^{56}\) \textit{Civil Legal Aid (Procedure) Regulations 2012 SI No. 3098}, regulation 55

\(^{57}\) Now the Legal Aid Agency (LAA)

\(^{58}\) See \textit{Standard Civil Contract 2010, Amended Category Definitions}, paragraphs 24-25

\(^{59}\) See \textit{Standard Civil Contract 2010, Amended Category Definitions}, paragraph 25
all proceedings in relation to a claim for damages or a complaint to a relevant professional body in respect of an alleged breach of duty of care or trespass to the person committed in the course of the provision of clinical or medical services (including dental or nursing services); or a claim for damages in respect of alleged professional negligence in the conduct of such a claim.

Types of cases covered in practice

Claims within Scope

76. **Identity of the negligent healthcare professionals.** Paragraph 23 of Part 1 of Schedule 1 does not limit the healthcare professionals whose negligence could give rise to a claim. So long as the other criteria are met, clinical negligence claims could be brought as a result of negligence not only of doctors, nurses, or dentists, but midwives, physiotherapists, healthcare visitors or any other healthcare professional.

77. **Neurological injury not confined to the brain.** The definition of neurological injury is not confined to injury of the brain. It could encompass injury to other parts of the nervous system, although such a case may not qualify under the criteria which relate to the severity of the injury or the timing of the negligence. The definition in paragraph 23 is probably wide enough to cover claimants suffering from severe Erbs' palsy caused during delivery.

78. **Requirement for there to be negligence in the course of treatment of a patient.** For a prospective claim to fall within the scope of civil legal aid under paragraph 23, the neurological injury must be caused by clinical negligence. This will exclude claims where the occurrence of the injury is incidental to the claimant’s presence in a hospital or other location where healthcare services are provided. For instance, a serious neurological injury caused by a slip or trip on the premises will not fall within this category. The qualifying injury must be caused by a negligent act or omission in the treatment of a patient.

79. **Common scenarios.** There are countless scenarios in which healthcare professionals can injure, or fail to prevent injury to, a child in utero or in the first eight weeks of life so as to cause a serious neurological injury. The most common of these is likely to be obstetric negligence where mismanagement of a mother’s labour leads to deprivation of oxygen for the foetus, resulting in hypoxic ischaemic brain injury. Alternatively, negligence by paediatricians or neonatologists where a newborn infant is not resuscitated adequately in the immediate aftermath of birth, or where serious illness is not recognised on attendance to hospital. Another common species of claim will relate to General Practitioners who fail to refer to hospital infants who are suffering serious illness, such as meningitis or septicaemia.

80. **Exclusion of claims based on pre-conception negligence.** Claims where the clinical negligence occurs before conception will not be eligible for legal aid under this paragraph. For
example, in cases where drugs administered to the mother before conception cause malformation of the brain, or other serious neurological abnormality, the child would not be eligible for legal aid.

81. **Latent injury.** The drafting of paragraph 23 makes it clear that it is the time of the negligence not the injury which is relevant. Consequently, even if the injury did not declare itself until much later – as may be the case with neurological injury causing only cognitive disabilities – the claim would still fall within scope so long as the first act of negligence occurred within the qualifying timeframe.

82. **Treatment of third parties.** Paragraph 23 is sufficiently wide to encompass clinical negligence in the treatment of a patient other than the child (V). For example, the following situation would potentially remain within the scope of civil legal aid: administration of a drug to treat a medical condition in V’s mother during her pregnancy, the direct effects of which cause a serious neurological injury to V in utero, preventing V’s mother’s ability to deliver V without such an injury.

83. **Legal aid available for all parts of the proceedings.** Subject to the criteria in paragraph 23 of Part 1 of Schedule 1 of LASPO, civil legal aid will be available for advocacy services in all courts in which clinical negligence claims are heard, from the County Court to the Supreme Court.60

**Exceptional Funding**

84. Exceptional case determinations are made by the LAA applying the guidance in the *Lord Chancellor’s Exceptional Funding Guidance (Non-Inquests)*. The guidance recognises that the overarching question to be asked is “will withholding of legal aid make assertion of the claim practically impossible or lead to an obvious unfairness in the proceedings?”61 Guidance which is specific to clinical negligence cases is found at paragraphs 46 and 47. The following factors may be particularly relevant:

- In relation to the importance of the matter at stake, whether the applicant is a disabled person who is seeking to recover damages which would in whole or in part cover adjustments, adaptations, equipment, or care

- In relation to the complexity of the case, how complex the case is bearing in mind the complexity and volume of any medical expert evidence and any medico-legal arguments in the case, and

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60 See *LASPO* Schedule 1, Part 3 (Advocacy: exclusion and exceptions)
61 See *Lord Chancellor’s Exceptional Funding Guidance (Non-Inquests)*, page 3
• In relation to the ability of the applicant to present their own case, how able he/she is to do so bearing in mind any disabilities, medical problems, or caring responsibilities they have for others.

85. If alternative funding is available, a claim will not qualify for civil legal aid under the exceptional funding scheme. Because the same means criteria apply to legal aid under the exceptional funding scheme as to general cases, the claimants who potentially would qualify are unlikely to have the means to litigate using their own private funding. In the main, the scheme will only benefit those claimants of qualifying means who do not have any form of before-the-event (BTE) insurance and are unable to secure a conditional fee agreement (CFA). All clinical negligence claims require medical expert evidence on breach of duty, causation and quantum. Because of their complexity, lay people are usually ill-equipped to present these claims effectively. The type of clinical negligence claim that is most likely to succeed in an application for exceptional funding is a claim of moderate to high value where the claimant has failed to find a solicitor to accept it as a CFA because its merits appear to be moderate rather than good.
Community care

Category definition and scope

LASPO Schedule 1, Part 1

87. Community Care was one of the areas of civil legal aid least affected by the April 2013 changes. Under LASPO Schedule 1, Part 1, paragraph 6(3), funding available for “community care” includes services which a relevant person (namely a local authority Primary Care Trust or Local Health Board) may provide or arrange to be provided under the following provisions:

a) Part 3 of the National Assistance Act 1948 (local authority support for children and families)

b) section 47 of the 1948 Act (removal to suitable premises of persons in need of care and attention);

c) section 48 of the 1948 Act (temporary protection for property of persons admitted to hospital);

d) section 45 of the Health Services and Public Health Act 1968 (arrangements for promoting welfare of old people);

e) section 117 of the Mental Health Act 1983 (after-care);

f) section 17 of the Children Act 1989 (“the 1989 Act”) (provision of services for children in need);

g) section 20 of the 1989 Act (provision of accommodation for children);

h) sections 22A, 22B, 22C and 23 of the 1989 Act (accommodation and maintenance for children in care and looked after children);

i) sections 23B and 23C of the 1989 Act (local authority functions in respect of relevant children);

j) sections 24, 24A and 24B of the 1989 Act (provision of services for persons qualifying for advice and assistance);

k) section 2 of the Carers and Disabled Children Act 2000 (services for carers);

l) section 254 of, and Schedule 20 to, the National Health Service Act 2006 (functions of local social service authorities); and

m) section 192 of, and Schedule 15 to, the National Health Service (Wales) Act 2006 (functions of local social service authorities).

Standard Civil Contract 2010 (as amended)

88. The amended category definition of the Standard Civil Contract 2010 (between the then Legal Services Commission and contracted legal aid providers) states that civil legal aid for community care “includes legal services provided in relation to community care assessments, service provision decisions, and issues around the delivery of services”. It does not include,
however, “any matter falling within the Welfare Benefits Category or Clinical Negligence Category and proceedings before the First-Tier Tribunal (Mental Health)”.  

89. The category definition also specifies that Community Care work covers advocacy in proceedings to the extent set out at paragraph 4 of Part 3 of Schedule 1 to LASPO, regarding a person’s capacity, their best interests (welfare and/or medical treatment) and deprivation of liberty issues.

90. LASPO Schedule 1, Part 3, paragraph 4 provides that civil legal aid covers:

Advocacy in proceedings in the Court of Protection to the extent that they concern —

a) a person’s right to life,
b) a person’s liberty or physical safety,
c) a person’s medical treatment (within the meaning of the Mental Health Act 1983),
d) a person’s capacity to marry, to enter into a civil partnership or to enter into sexual relations, or
e) a person’s right to family life.

91. If there is a grant of exceptional funding, the Community Care category will also cover advocacy for matters arising under the Mental Capacity Act 2005 which are not listed at paragraph 4 of Part 3 of Schedule 1 in LASPO.  

Types of cases covered in practice

92. In practice, the overwhelming majority of Community Care cases will be applications for judicial review arising out of alleged breach of statutory duty by the local authority or Primary Care Trust in any of the above examples. The most common types of case will tend to be those in which accommodation is sought under the National Assistance Act 1948 or Children Act 1989.

93. For further information about the circumstances in which funding for judicial review is available, please see the chapter of this Guidance on Public Law and Judicial Review.

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62 See Standard Civil Contract 2010, Amended Category Definitions, paragraphs 28-30
63 See Standard Civil Contract 2010, Amended Category Definitions, paragraph 30
Debt

Category definition and scope

LASPO Schedule 1, Part 1
94. LASPO Schedule 1, Part 1, has effectively removed debt work from the scope of legal aid. A residual category of housing-related debt is within scope and, under paragraph 33, can cover civil legal services relating to:

- court orders for sale of an individual’s home
- court orders for the possession of an individual’s home following failure to make mortgage payments, and
- bankruptcy orders under Part 9 of the Insolvency Act 1986 where the estate includes the individual’s home and where the petition for bankruptcy was not presented by the individual.

Standard Civil Contract 2013
95. No contracts to provide freestanding debt work have been available since 1 April 2013. The Standard Civil Contract 2013 reiterates the provisions of LASPO Schedule 1, Part 1 to define what work is covered by the new Housing and Debt contracts. Only legal help, however, is available for work that is in scope, and because Debt is a subject area covered by the ‘Gateway’ arrangements, such help must be sought first through the Civil Legal Advice online and telephone service.

96. The category definition of Debt clarifies that possession of an individual’s home arising out of any matter other than failure to make mortgage payments, falls within the Housing category. To undertake such Housing work, a provider must hold a Housing contract as the categories of work are exclusive.

97. To the extent that any relevant grant of exceptional funding is made in the Debt category, the grant can include legal help and all proceedings:

(a) For the payment of monies due or the enforcement of orders in such proceedings (excluding any matter which falls within the Housing category); and

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64 Standard Civil Contract 2013, Category Definitions
65 Further information is available on the Ministry of Justice website
66 Standard Civil Contract 2013, Category Definitions, paragraph 19
(b) Arising out of personal insolvency, including bankruptcy, administration, Debt Relief representation or IVA proceedings, but excluding representation in proceedings against parties in default of a fine or other order in criminal proceedings in the magistrates’ court who are at risk of imprisonment.

Types of cases covered in practice

98. The thrust of the April 2013 legal aid reforms was to exclude most debt cases from scope, leaving only a small residual category where enforcement of the debt puts a home in jeopardy (usually where a lender seeks to enforce a secure loan).

99. The Lord Chancellor’s Guidance on Exceptional Funding (Non-Inquests) does canvass the possibility that some other debt cases might be brought back into scope, but only where legal aid is essential to avoid obvious unfairness in proceedings where the party is faced with enforcement action in respect of a debt.

67 See Lord Chancellor’s Exceptional Funding Guidance (Non-Inquests), paragraphs 48-50
Education

Category definition and scope

LASPO Schedule 1, Part 1

100. LASPO Schedule 1, Part 1, Paragraph 2 defines civil legal services for “Special Educational Needs” as:

(1) Civil legal services provided in relation to—

a) matters arising under Part 4 of the Education Act 1996 (special educational needs);

b) assessments relating to learning difficulties under sections 139A and 140 of the Learning and Skills Act 2000.

101. Education cases also fall within the judicial review civil legal services definition in Schedule 1, Part 1, paragraph 19, and within the Equality Act 2010 civil legal service definition in Schedule 1, Part 1, paragraph 43.

Standard Civil Contract 2013

102. The Standard Civil Contract 2013 category of Education (Special Educational Needs) is defined as:

1. Legal Help and all proceedings in relation to:

a) matters arising under Part 4 of the Education Act 1996 (Special Educational Needs) (under paragraph 2(1)(a) of Part 1 of Schedule 1 to the Act as set out above);

b) assessments relating to learning difficulties under sections 139A and 140 of the Learning and Skills Act 2000 (under paragraph 2(1)(b) of Part 1 of Schedule 1 to the Act); and

c) any other matter within the scope of Part 1 of Schedule 1 to the Act where the primary problem or issue relates to the provision of, or failure to provide, education or funding for education.

2. For the avoidance of doubt, the following are included in the category:

a) Legal Help and all proceedings in relation to a contravention of Part 6 of the Equality Act 2010 (Education); and

b) Legal Help and all proceedings in relation to a contravention of a previous discrimination enactment as far as the matter concerns the provision or funding of education.

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68 Standard Civil Contract 2013, Category Definitions
3. **Proceedings in relation to judicial review of an enactment, decision, act or omission as far as this concerns the provision or funding of education.** To the extent that exceptional funding is granted (in accordance with section 10 of the Act) this category includes Legal Help and proceedings in relation to any matter where the primary problem or issue relates to the provision of or failure to provide education or funding for education.

103. This is a significant departure from the previous Education category under the Standard Civil Contract 2010, where Education was defined as:

1. **Legal Help in relation to matters where the primary problem or issue relates to the provision of or failure to provide education or funding for education, including special educational needs.** This would include such issues or problems relating to admissions, exclusions or Disability Discrimination Act claims.

2. **Any proceedings before a court concerning the above issues.** This excludes claims for damages falling within the Personal Injury, though claims for damages arising out of a failure to provide adequate education or assessment for education are included.

**Types of cases covered in practice**

104. Schedule 1, Part 3 of LASPO makes it clear that Special Educational Needs civil legal services do not include advocacy at the First-Tier stage. Save in complex cases or on points of law, cases at this stage are normally dealt with by solicitors.

105. However, advocacy is funded in proceedings in the Upper Tribunal under the **Tribunals, Courts and Enforcement Act 2007** from decisions made by the First-Tier Tribunal or the Special Educational Needs Tribunal for Wales (SENTW) in proceedings under the following:

   a) **Part 4 (special educational needs) of the Education Act 1996 (“EA 1996”), or**

   b) **The Equality Act 2010 (“the Equality Act”)**

106. This means legal help and legal representation are available for appeals to the First Tier Tribunal against the contents of a Statement of Special Educational Needs (“a Statement”) under EA 1996, section 326. They will also be available for appeals to the Upper Tribunal from the First-Tier Tribunal or SENTW on a challenge to special needs decisions, which include:

   - A reasons appeal in relation to waking day curriculum issues and links to social care

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69 See section 11 – appeals on a point of law

70 LASPO Schedule 1, Part 3, paragraph 17
• An appeal on section 316 EA 1996 regarding integrated education
• An appeal on education otherwise and home education under section 319 EA 1996
• An appeal to the Upper Tribunal on post-16 provision, and
• An appeal on practice and procedure in the First-Tier Tribunal.

107. Appeals to the Upper Tribunal from the First-Tier Tribunal or SENTW on a discrimination claim under the Equality Act 2010 (legal representation and advocacy funding is available) are included. Examples of this include:

• the application of the Equality Act 2010 Disability Regulations on excluded conditions
• a school’s failure to make reasonable adjustments, and
• direct discrimination.

108. There is cover for legal representation and advocacy in judicial reviews.71 Examples of education-related judicial reviews include challenges to:

• a Local Authority’s decision not to provide transport for an eligible child pursuant to Section 508B EA 1996. Legal representation and funding for advocacy is available
• a Local Authority’s failure to comply with Section 324 EA 1996 and make the provision specified in a Statement
• a Local Authority’s failure to implement the First-Tier Tribunal’s decision
• decisions regarding religious education to include human rights issues
• a Local Authority’s failure to comply with Section 19 EA 1996 and provide lawful and adequate out of school provision for those out of school for medical, exclusion, or other reasons, and
• decisions regarding post-19 continued education in complex cases including where there are links to social care. Here the issues will plainly overlap with work covered by Community Care.

109. Education cases that are no longer covered by civil legal aid include:

• bullying and other educational negligence cases72

71 See LASPO Schedule 1, Part 3, paragraph 3 which provides for funding for advocacy in proceedings in the High Court. See further the relevant chapter of this Guidance on Public Law and Judicial Review.
• schools exclusions and admissions cases, save where there is an Equality Act 2010 appeal to the Upper Tribunal or where a judicial review arises following an ultimate determination in those cases, and

• breach of contract in education cases.

72 LASPO Schedule 1, Part 2, paragraph 2 excludes civil legal services provided in relation to a claim in tort in respect of negligence.
Employment

Category definition and scope
110. LASPO defines employment law as “an enactment or rule of law relating to employment, including in particular an enactment or rule of law conferring powers or imposing duties on employers, conferring rights on employees or otherwise regulating the relations between employers and employees”.73

111. Since April 2013, there has been no civil legal aid available for employment law cases except for cases which involve a contravention of the Equality Act 2010 or the legislation which preceded it (“discrimination claims”) or cases in connection with the exploitation of an individual who is a victim of trafficking in human beings (“trafficking claims”).74

Types of cases covered in practice
112. Prior to April 2013, the most common type of advocacy funded under legal aid was bringing or defending appeals to the Employment Appeal Tribunal, Court of Appeal or Supreme Court. Since April 2013, advocacy for these types of cases has continued to attract legal aid where the underlying claim is a discrimination claim.75 Advocacy in trafficking appeals before the Court of Appeal or the Supreme Court is also eligible for legal aid.76 Schedule 1, Part 3 of LASPO excludes advocacy in the Employment Tribunal.

113. Prior to April 2013, legal help (i.e. legal aid amounting to assistance short of advocacy) was available in employment cases. While legal help would not cover advocacy, it was possible for barristers to be compensated via “disbursements” for drafting in particular cases, for example settling particulars of claim or schedules of loss. Since April 2013, legal help has only remained available for discrimination claims77 and trafficking claims.78

114. Employment practitioners may be able to make use of exceptional funding, which is available where failing to provide legal aid “would result in a breach of the individual’s rights to legal aid under the Human Rights Act 1998 or European Union law”.79

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73 LASPO Schedule 1, Part 1, paragraph 32(8)
74 LASPO Schedule 1, Part 1, paragraphs 32 and 43; Part 3, paragraph 20. The Government has also proposed to extend the current RTA Portal Scheme to cover Employers’ Liability claims up to £25,000. Further information is available on the Ministry of Justice website.
75 LASPO Schedule 1, Part 3, paragraphs 1, 2 and 20
76 LASPO Schedule 1 Part 3, paragraphs 1 and 2
77 LASPO Schedule 1 Part 1, paragraph 43
78 LASPO Schedule 1, Part 1, paragraph 32
79 LASPO s 10(2)-10(3) sets out the statutory requirements
115. The *Lord Chancellor’s Guidance on Civil Legal Aid* provides that an application for exceptional funding in the Employment Tribunal in a discrimination claim will be assessed under the “general merits” criteria for legal representation.\(^{80}\) This is explained in the *Civil Legal Aid (Merits Criteria) Regulations 2013* as follows:\(^{81}\)

\[\text{a)} \text{ if the prospects of success of the case are very good, the Director must be satisfied that the likely damages exceed likely costs;}
\[\text{b)} \text{ if the prospects of success of the case are good, the Director must be satisfied that the likely damages exceed likely costs by a ratio of two to one; or}
\[\text{c)} \text{ if the prospects of success of the case are moderate, the Director must be satisfied that the likely damages exceed likely costs by a ratio of four to one.} \]

116. The *Lord Chancellor’s Exceptional Funding Guidance (Non-Inquests)* provides that such funding may be made available in claims relating to a private contract of employment. The Guidance invites caseworkers to consider “whether the withholding of legal aid would make the assertion of the claim practically impossible or lead to an obvious unfairness in proceedings”.\(^{82}\)

117. In *Steel and Morris v The United Kingdom*,\(^{83}\) the European Court of Human Rights (ECtHR) found significant unfairness where the Claimant was a large multinational and the case was an exceptionally lengthy non-employment (libel) hearing and the Defendants were refused legal aid. Generally, the lengthiest and most complex Employment Tribunal cases are direct discrimination, harassment or equal pay claims, which, depending on the circumstances, may require exceptional funding for advocacy in the Employment Tribunal. At appeal stage they are eligible for funding under the provision for funding of discrimination claims.

118. It is possible to imagine cases raising the Claimant’s capacity to represent themselves (for example, a claim brought by a disabled person for “ordinary” unfair dismissal, where the facts of the dismissal were unusually complex) or cases of particular legal difficulty (for example, raising statutory interpretation under human rights or European law) which might come within this test.

119. Significantly, the Exceptional Funding Guidance envisages that exceptional funding might be appropriate not merely in Employment Tribunal proceedings and appeals from the

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\(^{80}\) *Lord Chancellor’s Guidance Under Section 4 of Legal Aid, Sentencing and Punishment of Offenders Act 2012*, paragraph 7.10

\(^{81}\) *SI No. 104*, regulation 42(2)

\(^{82}\) See *Lord Chancellor’s Exceptional Funding Guidance (Non-Inquests)*, paragraphs 53-54

\(^{83}\) [2005] ECHR 103, 18 BHRC 545
Tribunal but also potentially in professional disciplinary proceedings where the proceedings will have a substantial effect on the applicant’s civil right to practice his or her profession.84

84 See Lord Chancellor’s Exceptional Funding Guidance (Non-Inquests), paragraphs 53-54
Housing

Category definition and scope

LASPO Schedule 1, Part 1

120. Schedule 1, Part 1, paragraphs 33-36 of LASPO describe housing law matters as including:

- Loss of home
- Homelessness
- Risk to health or safety in rented home
- Anti-social behaviour
- Protection from harassment
- Immigration: accommodation for asylum seekers etc.
- Judicial review (but only arising out of matters that are already covered in this category), and
- Exceptional funding cases.

Regulations

121. The Civil Legal Aid (Merits Criteria) Regulations 2013 implements specific merits criteria that have to be met for certain types of housing work in addition to the general merits test. These include:

- For full representation in relation to a claim for a court order for possession of an individual’s home. The Director must be satisfied the individual has a defence; the prospects of success are very good, good, moderate or borderline; and the proportionality test is met.

- For full representation in relation to other housing matters to which specific merits criteria apply (this covers eviction, risk to health or safety in a rented home and harassment, by a landlord or other person, that interferes with the individual’s enjoyment of their home). The Director must be satisfied that the proportionality test is met; the landlord or other person responsible for the matter complained of has been notified of the complaint (an exception is where this is impracticable) and been given a reasonable opportunity to resolve the matter.

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85 See Civil Legal Aid (Merits Criteria) Regulations 2013 SI No. 104, regulations 61-63
86 Civil Legal Aid (Merits Criteria) Regulations 2013 SI No. 104, regulation 61
87 Civil Legal Aid (Merits Criteria) Regulations 2013 SI No. 104, regulation 62
• **For investigative representation in unlawful eviction cases.** Where the claim is primarily for damages and the damages do not exceed £1,000 the case must be of significant wider public interest.\(^88\) Where the claim is part of a multi-party action only the lead claim in the action is capable of being of significant wider interest.\(^89\)

**Standard Civil Contract 2013**

122. Housing is now a stand-alone category of legal aid.\(^90\) Mortgage repossession cases fall within the Debt contract and are not covered by the Housing contract.

123. The Standard Civil Contract 2013 covers legal help and proceedings in housing law areas specified under LASPO. Where exceptional funding is granted, the contract category definition makes it clear that housing work also includes:\(^91\)

> any matters which concern the possession, status, terms of occupation, repair, improvement, eviction from, quiet enjoyment of, or payment of rent or other charges for premises (including vehicles and sites they occupy) which are occupied as a residence, including the rights of leaseholders under the terms of their lease or under any statutory provision (including enfranchisement). Cases including allocation, transfers and the provision of sites for occupation are also included.

**Types of cases covered in practice**

124. Advocacy for housing work that remains in scope is covered for proceedings in all courts from the County Court to the Supreme Court

**Loss of home**

125. Loss of home includes possession and eviction proceedings in respect of an individual’s home.\(^92\) Home can include house, caravan, houseboat or other vehicle that is an individual’s only or main residence.\(^93\) This includes applications under the *Trusts of Land and Appointment of Trustees Act 1996* by the trustee of a bankrupt’s estate and proceedings in relation to bankruptcy or a statutory demand where the individual’s estate includes their home. Cases of unlawful eviction and planning eviction are also covered. Cases under the *Matrimonial Causes Act 1973* and under the *Civil Partnership Act 2004* are excluded.

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\(^{88}\) *Civil Legal Aid (Merits Criteria) Regulations 2013* SI No. 104, regulation 63(2)

\(^{89}\) *Civil Legal Aid (Merits Criteria) Regulations 2013* SI No. 104, regulation 63(3)

\(^{90}\) Housing and debt were previously joined in the Standard Civil Contract 2010

\(^{91}\) *Standard Civil Contract 2013, Category Definitions*

\(^{92}\) LASPO Schedule 1, Part 1, paragraph 33

\(^{93}\) LASPO Schedule 1, Part 1, paragraph 33(9)
126. Instances of loss of home include claims in tort for assault, battery and false imprisonment, as well as trespass to goods and land. Damage to property and breach of statutory duty are covered where they relate to counterclaims in proceedings for court orders for possession or sale, or where there has been an unlawful eviction.94

**Homelessness**

127. Legal services for homeless persons or persons threatened with homelessness extend to work under Part 6 (allocation) and 7 (homelessness) of the *Housing Act 1996*.95 The terms “homeless” and “threatened with homelessness” have the same meaning as section 175 of the *Housing Act 1996*.

**Risk to health or safety in a rented home**

128. Civil legal aid will be available for housing disrepair claims brought to reduce or remove a risk to the health or safety of an individual or family member as a result of deficiency in a home that is rented or leased.96 The deficiency can be caused by the construction of the building or absence of maintenance and repair. Harm includes temporary harm and health includes mental health.97

129. The *Lord Chancellor’s Guidance on Civil Legal Aid* sets out those matters to which the Director must have regard when determining whether legal aid should be made available to an individual in regard to housing disrepair.98 The *Civil Legal Aid (Merits) Regulations 2013* provide specific merits criteria for legal representation in disrepair cases.

130. Where there is a credible allegation of disrepair, within the LASPO definition, civil legal services are available from an early stage to fund expert reports. In appropriate cases this will mean not only a report on the state of the property and causation but also medical reports. Joint experts should be instructed in keeping with the Pre-Action Protocol save where an urgent injunction is needed. If after reports are obtained the Director is not satisfied that the case is one of serious risk then funding will cease.

131. The Lord Chancellor’s Guidance also sets out factors that the Director may take into account.99 It is made clear that the Director must take into account all relevant factors and the

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94 LASPO Schedule 1, Part 1, paragraph 33(6)
95 LASPO Schedule 1, Part 1, paragraph 34
96 LASPO Schedule 1, Part 1, paragraph 35
97 LASPO Schedule 1, Part 1, paragraph 35
98 See Lord Chancellor’s Guidance Under Section 4 of Legal Aid, Sentencing and Punishment of Offenders Act 2012, Part 12
99 Lord Chancellor’s Guidance Under Section 4 of Legal Aid, Sentencing and Punishment of Offenders Act 2012, paragraphs 12.9-12.11
examples given are not an exhaustive list. Some factors may make the issue clear cut such as where there are gas leaks or dangerous electrical installations. In less clear cut cases there are a number of factors that need to be taken into account. These will include whether there has already been harm to the applicant or a member of the family. Consideration should be given to whether the applicant or those in the applicant’s family are members of a high risk or vulnerable group. It will also be relevant if the local authority has identified hazards under the Housing Health and Safety Rating System.

**Anti-social behaviour and protection from harassment**

132. Legal aid is available to individuals where an order has been sought or made in the County Court under the *Crime and Disorder Act 1998* and under the *Housing Act 1996* for anti-social behavior.  

133. Civil legal aid is also available for work in relation to injunctions under section 3 or section 3A of the *Protection from Harassment Act 1997* and the variation or discharge of restraining orders under section 5 or section 5A of the same Act.

**Immigration: accommodation for asylum seekers etc.**

134. Individuals can seek legal aid for claims in respect of the Secretary of State’s powers to provide accommodation for asylum seekers under the *Immigration and Asylum Act 1999* and to provide support for destitute asylum seekers under the *Nationality, Immigration and Asylum Act 2002*.

135. Civil legal services are only available for proceedings challenging these specific powers. Any claims for any injury or damage suffered as a consequence of the Secretary of State failing to exercise these powers or an improper exercise of the powers are excluded.

**Judicial Review and Public Law**

136. Challenges by way of judicial review or counterclaim to acts, omissions or decisions of public bodies will be covered by the category in which the main challenge proceeds. Judicial review challenges of housing matters within the housing contract are included in that contract. This includes, in the housing context, challenges under the *Human Rights Act 1998*.

137. To qualify for legal services for judicial review, an individual must show the judicial review has a potential to produce a benefit for themselves or their family or the environment.

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100 LASPO Schedule 1, Part 1, paragraph 36. 
101 LASPO Schedule 1, Part 1, paragraph 37. 
102 LASPO Schedule 1, Part 1, paragraph 31. 
103 See LASPO Schedule 1, Part 2. 
104 LASPO Schedule 1, Part 1, paragraph 19.
This cuts out challenges brought for the benefit of the public but without benefit to the individual seeking the judicial review.
Immigration and asylum

Category definition and scope

LASPO Schedule 1, Part 1

138. LASPO constitutes a significant change in legal aid funding for immigration and asylum work. Most non-asylum immigration work is out of scope, including children’s cases. Legal aid is only available in the following circumstances:

- asylum cases
- immigration cases involving applications for leave to enter or remain made by a victim of trafficking and applications for indefinite leave to remain under the domestic violence rule
- cases relating to immigration detention, including bail applications and matters/conditions relating to temporary admission and release on restrictions
- habeus corpus
- asylum support where accommodation is sought under sections 4 and 95 of the Immigration and Asylum Act 1999, and
- proceedings before the Special Immigration Appeals Commission.

139. All other immigration applications are out of scope. Significantly, this includes applications on the basis of Article 8 of the European Convention on Human Rights (ECHR), or otherwise on grounds of long residence.

Regulations

140. The Civil Legal Aid (Merits Criteria) Regulations 2013 provide specific merits tests that must be passed to qualify for full representation in immigration cases. An individual will qualify for full representation in any area of immigration work covered by LASPO if:

- the reasonable private paying individual test is met (if the case is not of significant wider public interest) or if the case is of significant wider public interest, or

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105 LASPO, Schedule 1, Part 1, paragraph 30(1)
106 LASPO, Schedule 1, Part 1, paragraph 28, 32(1)
107 LASPO, Schedule 1, Part 1, paragraph 25-27
108 LASPO, Schedule 1, Part 1, paragraph 20
109 LASPO, Schedule 1, Part 1, paragraph 31
110 LASPO, Schedule 1, Part 1, paragraph 24
111 Right to respect for private and family life
112 See Civil Legal Aid (Merits Criteria) Regulations 2013 SI No. 104, regulation 60
the proportionality test is met and the prospects of success are very good, good or moderate.

141. If the prospects of success are borderline or unclear, the case must be of significant wider public interest, of overwhelming importance to the individual, or the substance of the case must relate to a breach of Convention rights.113

Types of cases covered in practice

Asylum cases
142. Asylum cases are covered where they involve rights to enter and remain in the United Kingdom arising from:

- The Refugee Convention
- Articles 2 and 3 ECHR
- The Temporary Protection Directive,114 and
- The Qualification Directive.115

143. Asylum support cases are covered where accommodation is sought under sections 4 and 95 of the Immigration and Asylum Act 1999. However, as previously, legal aid will not be available for representation before the First-tier Tribunal (Asylum Support).

Immigration cases
144. Immigration cases are only covered where they:

- Involve applications for leave to enter or remain made by a victim of trafficking, where there has been a conclusive determination under the Trafficking Convention, or there are reasonable grounds to believe that the person is a victim of trafficking and there has not yet been a conclusive determination that they are not.116

- Involve applications for indefinite leave to remain under the domestic violence rule. This only includes people with leave under the immigration rules as partners/spouses who have suffered domestic violence, not children or other family members who have suffered domestic violence.117

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113 Civil Legal Aid (Merits Criteria) Regulations 2013 SI No. 104, regulation 60
116 LASPO, Schedule 1, Part 1, paragraph 32(1)
117 LASPO, Schedule 1, Part 1, paragraph 28
• Involve applications and for EU residence permits on the grounds of a retained right of residence arising from domestic violence under regulation 10(5) of the Immigration (European Economic Area) Regulations 2006.\textsuperscript{118}

• Relate to immigration detention. This includes bail applications and matters/conditions relating to temporary admission and release on restrictions. There is no legal aid for the detainee’s substantive immigration application.\textsuperscript{119}

Judicial review
145. Judicial review remains in scope,\textsuperscript{120} but in immigration cases it is restricted by specific exclusions preventing the provision of civil legal services where judicial review is sought:

• in relation to an issue in respect of which an appeal or judicial review of the same or substantially the same issue was resolved adversely to the applicant/appellant, less than one year previously,\textsuperscript{121} and

• for removal directions given not more than one year after a decision was made to remove the individual or any appeal against such a decision was determined.\textsuperscript{122}

146. These specific exclusions do not apply to judicial review of a negative decision in relation to an asylum application where there is no right of appeal to the First-tier Tribunal against the decision,\textsuperscript{123} or to judicial review of a certificate under section 94 or 96 of the Nationality, Immigration and Asylum Act 2002 (NIAA 2002).\textsuperscript{124}

147. Surprisingly, ‘asylum application’ is defined by reference to the EU Procedures Directive, which limits the meaning of ‘asylum application’ to claims under the Refugee Convention.\textsuperscript{125}

Exceptional cases
148. Section 10 of LASPO allows for “exceptional case determinations” to provide funding for cases which do not fall within Part 1 of Schedule 1 where it is necessary to provide civil legal services to avoid a breach of an individual’s Convention rights or enforceable EU rights, and it

\textsuperscript{118} LASPO, Schedule 1, Part 1, paragraph 29
\textsuperscript{119} LASPO, Schedule 1, Part 1, paragraph 25-27
\textsuperscript{120} LASPO, Schedule 1, Part 1, paragraph 19. See further the relevant chapter of this Guidance on Public Law and Judicial Review.
\textsuperscript{121} LASPO, Schedule 1, Part 1, paragraph 19(5)
\textsuperscript{122} LASPO, Schedule 1, Part 1, paragraph 19(6)
\textsuperscript{123} This will mainly be refusals of further representations under paragraph 353 of the Immigration Rules.
\textsuperscript{124} See LASPO, Schedule 1, Part 1, paragraph 19(7).
\textsuperscript{125} This excludes claims based on Article 2 or 3 ECHR, or humanitarian protection claims under the Qualification Directive.
is appropriate to do so, having regard to the risk that a failure to provide civil legal services would be such a breach.

149. The government’s view has been that immigration cases will not qualify for this funding, on the basis of established European case law that the right to a fair trial under Article 6(1) of the ECHR does not cover immigration cases. 126 The Lord Chancellor’s Guidance states as follows:127

59. Proceedings relating to the immigration status of immigrants and decisions relating to the entry, stay and deportation of immigrants do not involve the determination of civil rights and obligations.

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

126 Maaouia v France 39652/98[2000] ECHR 455
127 Lord Chancellor’s Exceptional Funding Guidance (Non-Inquests), paragraphs 59-60
Inquests

Category definition and scope

LASPO Schedule 1, Part 1

150. Inquests are covered by LASPO, Schedule 1, Part 1, section 41(1), where the inquest involves “a member of the individual’s family”.

151. However under the Civil Legal Aid (Merits Criteria) Regulations 2013, regulation 30, legal help is the only form of civil legal services which is appropriate in relation to any matter described in paragraph 41.

152. Advocacy for inquests will therefore still fall to be considered as “exceptional” funding. Section 10 of LASPO provides that exceptional funding will be granted where the criteria in either section 10(2) or section 10(4) are met.

153. Section 10(2) applies where it is “necessary to make the services available to the individual under this Part because failure to do so would be a breach of...the individual’s Convention rights (within the meaning of the Human Rights Act 1998)”, or where “...it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach”.128

154. Section 10(4) applies where a “wider public interest determination” has been made. This is a “determination that, in the particular circumstances of the case, the provision of advocacy under this Part for the individual for the purposes of the inquest is likely to produce significant benefits for a class of person, other than the individual and the members of the individual’s family”.

155. Under section 41(2) and section 10(6) for these purposes an individual is a member of another individual’s family if:

- they are relatives (whether of the full blood or half blood or by marriage or civil partnership)
- they are cohabitants (as defined in Part 4 of the Family Law Act 1996), or
- one has parental responsibility for the other.

156. The Civil Legal Aid (Procedure) Regulations 2012, regulations 66-69 set out the procedure for applying for exceptional funding.

128 LASPO s 10(3)
Standard Civil Contract 2010 (as amended)

157. The amended category definitions to apply from April 2013 state at paragraphs 17 and 18 that legal help or exceptional funding in relation to an inquest will fall into the category which relates to the underlying subject matter of the inquest. For example, legal help for an inquest where the client died in prison will be funded in the Actions Against the Police etc Category. Where an inquest does not fall within one of the categories, it will be included in the Miscellaneous Category.  

Types of cases covered in practice

158. The Lord Chancellor’s Exceptional Funding Guidance (Inquests) sets out some of the factors that caseworkers should take into account in deciding exceptional funding applications in relation to inquests. It is not intended to be an exhaustive account of those factors, nor to replace the need for consideration of representations in individual cases and new case law that arises. The Guidance stresses that applications should be considered on a case by case basis.

159. The Guidance reiterates that there are two grounds on which exceptional funding can be made available for inquests: (i) where the failure to provide such assistance would lead to a family member’s rights under Article 2 ECHR being breached; and (ii) if an inquest raises wider public interest issues within the LASPO definition.

160. In respect of the Article 2 ground, caseworkers need to be satisfied that (i) there is an arguable breach of the State’s substantive obligation under Article 2, and (ii) funded representation is required to discharge the procedural obligation.

161. As to (i), the Guidance provides that:

- It is likely that there will be an arguable breach of the substantive obligation where State agents have killed the individual: for example, a police shooting. It is also likely that an arguable breach of the substantive obligation will occur where the individual has died in State custody other than from natural causes: for example, killings or suicides in prison

- It is unlikely that there will be an arguable breach of the substantive obligation where there is no State involvement in the death, for example, the fatal shooting of one private individual by another private individual (where the authorities had no forewarning or

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129 Standard Civil Contract 2010, Amended Category Definitions
130 The investigative obligation derived from the right to life
131 Lord Chancellor’s Exceptional Funding Guidance (Inquests), paragraph 12
other knowledge prior to the death). Another example is a death (in State detention) through natural causes.\textsuperscript{132}

- There may be an arguable breach of the substantive obligation where it is alleged that the State has played some role in the death, including a failure to take reasonable steps to prevent the death,\textsuperscript{133} and

- In the context of allegations against hospital authorities, there will not be a breach of the substantive obligation where a case involves only allegations of ordinary medical negligence as opposed to where the allegations of negligence are of a systemic nature.\textsuperscript{134}

162. As to (ii), the Guidance states that, all the individual facts and circumstances of the case must be taken into account by caseworkers, including:\textsuperscript{135}

- The nature and seriousness of the allegations against State agents (with particular regard being given to allegations based on evidence of gross negligence or systemic failures, for example, closely related multiple and avoidable deaths from the same cause within the same institution; criminal conduct; and attempts to conceal information or otherwise interfere with an investigation into the circumstances surrounding the death)

- The previous investigations into the death and whether the family has been involved in such investigations, and

- The particular circumstances of the family (such as whether the applicant is suffering from severe mental health problems, potentially arising from the circumstances of the death, or has a learning disability).

163. In respect of the “wider public interest” ground, the Guidance provides that:\textsuperscript{136}

- A “wider public interest determination” is a determination that, in the particular circumstances of the case, the provision of advocacy for the individual for the purposes of the inquest is likely to produce significant benefits for a class of person, other than the applicant and members of the applicant’s family

- In the context of an inquest, the most likely wider public benefits are the identification of dangerous practices, systematic failings or other findings that identify significant risks to the life, health or safety of other persons

\textsuperscript{132} Lord Chancellor’s Exceptional Funding Guidance (Inquests), paragraph 13
\textsuperscript{133} Lord Chancellor’s Exceptional Funding Guidance (Inquests), paragraph 14
\textsuperscript{134} Lord Chancellor’s Exceptional Funding Guidance (Inquests), paragraph 15
\textsuperscript{135} See Lord Chancellor’s Exceptional Funding Guidance (Inquests), paragraphs 20-24
\textsuperscript{136} Lord Chancellor’s Exceptional Funding Guidance (Inquests), paragraphs 27-36
• Whether the wider public interest is “significant” will depend on a number of factors: what the benefits are; whether the benefits are more or less tangible; whether they will definitely flow to other persons or whether this is just a possibility; and the numbers of people who will benefit (it will be unusual for significant wider public interest to apply to something that benefits fewer than around 100 people, for example)

• It is not sufficient that there is significant wider public interest in the inquest itself. There must be significant wider public interest in the client being represented at the inquest for the case to qualify for a wider public interest determination. This means that an applicant must be able to demonstrate that representation is necessary to obtain any benefits that may arise, not just that the inquest itself may provide benefits, and

• In deciding whether to make a wider public interest determination, caseworkers should consider the nature of any allegations of systemic failings, and whether there are likely to be improvements to systems as a result of the inquest.

164. The Guidance also makes provision for the waiver of the financial eligibility limits137 relating to inquests if, in all the circumstances, it would not be reasonable to expect the family to bear the full costs of legal assistance at the inquest. Whether this is reasonable will depend in particular on the history of the case and the nature of the allegations to be raised against State agents, the applicant’s assessed disposable income and capital, other financial resources of the family, and the estimated costs of providing representation. Provision is also made for the waiver of contributions in whole or part, which again is determined on the basis of the applicant’s disposable income and disposable capital in the usual way ignoring upper eligibility limits.

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137 See Lord Chancellor’s Exceptional Funding Guidance (Inquests), paragraphs 37-38
Mental health

Category definition and scope

LASPO Schedule 1, Part 1

165. LASPO Schedule 1, Part 1, paragraph 5(1), defines mental health work as covering three areas of work where matters arise under:

- the Mental Health Act 1983
- paragraph 5(2) of the Schedule to the Repatriation of Prisoners Act 1984, and
- the Mental Capacity Act 2005.

166. There are, however, specific exclusions and the following matters are not covered:\textsuperscript{138}

- the creation of lasting powers of attorney under the Mental Capacity Act 2005, and
- the making of advance decisions under the Mental Capacity Act 2005.

167. These exclusions, though, do not exclude services provided in relation to determinations and declarations by a court under the Mental Capacity Act 2005 as to the validity, meaning, effect or applicability of a lasting power of attorney that has been created, or an advance decision that has been made:\textsuperscript{139}

168. In relation to Court of Protection Proceedings, (which fall under the Mental Capacity Act 2005), advocacy work is only available to the extent that the relevant proceedings concern:\textsuperscript{140}

- a person’s right to life
- a person’s liberty or physical safety
- a person’s medical treatment (within the meaning of the Mental Health Act 1983)
- a person’s capacity to marry, to enter into a civil partnership or to enter into sexual relations, and
- a person’s right to family life.

Regulations

169. Civil Legal Aid (Merits Criteria) Regulations 2013 provide further information about the type of legal aid that can be provided for Mental Health work.

\textsuperscript{138} LASPO Schedule 1, Part 1, paragraph 5(3).
\textsuperscript{139} LASPO Schedule 1, Part 1, paragraph 5(4).
\textsuperscript{140} LASPO Schedule 1, Part 3, paragraph 4.
170. Regulation 21 states that **investigative representation** will not be awarded for Mental Health work where it relates to proceedings before the First-tier Tribunal or the Mental Health Review Tribunal for Wales.

171. Regulations 51 and 52 stipulate criteria that must be taken into account when considering determinations for **full representation** in relation to mental health proceedings and mental capacity proceedings.

**Standard Civil Contract 2010 (as amended)**

172. Mental Health work is covered by the Standard Civil Contract 2010 (as amended). The amended category definition notes that the Mental Health category covers legal help and proceedings under LASPO Schedule 1, Part 1, paragraph 5.

173. The definition also clarifies that where there is a grant of exceptional funding, the Mental Health category also includes advocacy for matters arising under the **Mental Capacity Act 2005** in addition to those listed in LASPO.\(^1\)

**Types of cases covered in practice**

174. In practice, funding will be available for medical treatment cases, cases concerning a right to life and cases concerning capacity to marry, enter into a civil partnership or sexual relations.

175. Cases involving liberty will continue to be covered and so will those concerning a person’s right to family life. This will mean that there will be funding in cases where there is a deprivation of liberty,\(^2\) and in cases where an incapacitated adult is being removed from their family or where contact with their family is restricted.

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\(^1\) See [LASPO](#) Schedule 1, Part 3, paragraph 4.

\(^2\) How far this will go will depend upon a decision of the Supreme Court which is due to consider the scope of a deprivation of liberty in residential care homes in the Autumn of 2013.
Personal injury

Category definition and scope

LASPO Schedule 1, Part 1

176. There is no separate category for, or definition of, claims involving personal injury in LASPO. Claims for damages arising out of personal injury or death can arise in numerous contexts and as a result of a number of different legal wrongs.

177. Regardless of their basis, the default position is that claims for damages arising out of personal injury or death are excluded from the scope of civil legal aid by paragraphs 1-3 and 8 of Part 2 of Schedule 1 of LASPO.\textsuperscript{143}

178. There are a limited number of exceptions to this general position. Part 1 of Schedule 1 sets out a number of categories of claim which remain within the scope of civil legal aid which can involve a claim for damages for personal injury. Those categories are summarised in the paragraphs that follow, but require careful reading.

179. The category of abuse of a child or vulnerable adult relates to claims arising out of the abuse of an individual that took place at a time when they were a child or vulnerable adult.\textsuperscript{144} Clinical negligence claims are excluded from this category.

180. Civil legal aid is available in relation to abuse by a public authority of its position or powers.\textsuperscript{145} Again, clinical negligence claims are excluded from this category.

181. Civil legal aid is also available in relation to a claim in tort in respect of an act or omission by public authority that “involves” a “significant breach of Convention Rights” by the authority.\textsuperscript{146} Clinical negligence claims are once again expressly excluded from this category of work.\textsuperscript{147}

\textsuperscript{143} See the Ministry of Justice website for further information about changes to civil litigation affecting personal injury claims.

\textsuperscript{144} LASPO Schedule 1, Part 1, paragraph 3

\textsuperscript{145} LASPO Schedule 1, Part 1, paragraph 21

\textsuperscript{146} LASPO Schedule 1, Part 1, paragraph 22. Further information about the meaning of “significant breach” is provided by the Lord Chancellor’s Guidance Under Section 4 of Legal Aid, Sentencing and Punishment of Offenders Act 2012, paragraphs 11.1-11.3.

\textsuperscript{147} LASPO Schedule 1, Part 1, paragraph 22(3)
182. Civil legal aid is available for specific clinical negligence claims where an infant is left severely disabled.\textsuperscript{148} This category is considered in fuller detail in the chapter of this Guidance on Clinical Negligence.

183. A claim for damages by a victim of conduct amounting to a sexual offence under a provision of the Sexual Offences Act 2003 or section 1 of the Protection of Children Act 1978, or their personal representative, will fall within the scope of civil legal aid, regardless of whether there have been criminal proceedings in relation to their conduct, or the outcome of any such proceedings.\textsuperscript{149}

184. Even if it does not fall within any of the general cases listed above, a claim for damages for personal injury can still secure civil legal aid if the LAA makes an “exceptional case determination” under section 10(2) of LASPO.

185. Section 10(2) applies where it is “necessary to make the services available to the individual under this Part because failure to do so would be a breach of...the individual’s Convention rights (within the meaning of the Human Rights Act 1998)", or where “…it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach”.\textsuperscript{150}

Regulations
186. If a claim is eligible for civil legal aid under any of these categories, legal aid is available for advocacy services in all courts in which such claims are heard, from the County Court through to the Supreme Court.\textsuperscript{151}

187. Claims under any of these categories which fall within the scope of civil legal aid, or obtain it via an exceptional case determination, still need to satisfy relevant financial eligibility and means criteria before civil legal services will be available for legal representation (either investigative or full representation). The merits criteria are contained in the \textit{Civil Legal Aid (Merits Criteria) Regulations 2013}.

188. For claims involving the abuse of a child or vulnerable adult\textsuperscript{152} or sexual offences\textsuperscript{153} the ‘merits’ criteria and ‘cost benefit’ criteria apply.\textsuperscript{154} Essentially, for \textit{investigative representation},

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{148} \textsuperscript{LASPO} Schedule 1, Part 1, paragraph 23
\item \textsuperscript{149} \textsuperscript{LASPO} Schedule 1, Part 1, paragraph 39
\item \textsuperscript{150} \textsuperscript{LASPO} s 10(3)
\item \textsuperscript{151} \textsuperscript{LASPO}, Schedule 1, Part 3
\item \textsuperscript{152} \textsuperscript{LASPO}, Schedule 1, Part 1, paragraph 3
\item \textsuperscript{153} \textsuperscript{LASPO}, Schedule 1, Part 1, paragraph 39
\item \textsuperscript{154} See Part 4, and in particular regulations 39-43, of \textit{Civil Legal Aid (Merits Criteria) Regulations 2013 SI No. 104}
\end{itemize}
\end{footnotesize}
this requires the prospects of success to be unclear and substantial investigative work to be required before the prospects can be determined, but there to be reasonable grounds for believing that once the investigative work is performed, the criteria for full representation will be met, and that (unless the claim is of wider public interest) the likely damages will exceed £5,000.

189. To qualify for **full representation** both the ‘cost benefit’ criteria in regulation 42 and the ‘merits’ criteria in regulation 43 must be met. The prospects of success must be at least moderate (50 percent or more) to satisfy the merits criteria. The cost benefit criteria, which relate to likely damages versus likely costs, are in the form of a sliding scale, depending upon whether the merits of the claim are moderate, good or very good. The definitions of likely damages and likely costs are set out in regulations 9 and 10 respectively. In short, likely damages must exceed likely costs by the following ratios:

- moderate prospects of success – 4:1
- good prospects of success – 2:1, and
- very good prospects of success – 1:1.

190. In the case of the abuse of position or powers,\(^{155}\) or the breach of Convention Rights,\(^{156}\) by a public authority, the criteria in the *Civil Legal Aid (Merits Criteria) Regulations 2013* are less exacting.\(^{157}\)

191. The minimum £5,000 limit on the likely damages, which would otherwise preclude a case being eligible for **investigative representation**, does not operate where the claim is part of a multi-party action or there was abuse of a child or vulnerable adult.

192. For **full representation**, the “merits” criteria is in effect modified so that the prospects of success must be at least “moderate”, or if they are not “moderate”, the prospects can be “borderline”\(^{158}\) if the case is one of significant wider public interest, of overwhelming importance to the individual, or relates to a breach of Convention Rights.

193. Similarly, the “cost benefit” criterion does not apply. Instead, the “proportionality test” in regulation 8 must be satisfied. The proportionality test is met if the likely benefits of the

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155 [LASPO](#), Schedule 1, Part 1, paragraph 21
156 [LASPO](#), Schedule 1, Part 1, paragraph 22
157 See Part 6, and in particular regulations 57-58, of *Civil Legal Aid (Merits Criteria) Regulations 2013 SI No. 104*
158 Meaning below 50 percent but not “poor”, which means that the individual is unlikely to obtain a successful outcome.
proceedings to the individual and others justify the likely costs, having regard to the prospects of success and all the other circumstances of the case.

Types of cases covered in practice

Abuse of child or vulnerable adult and Sexual Offences

194. Claims involving abuse of children or vulnerable adults arise in a variety of guises, usually as trespass to the person where the abuse may take the form of violence, a sexual assault, or rape. There is a clear overlap with the category of sexual offences. The defendants to such claims may be family members, schools, religious orders, care homes, local authorities, prisons, the police, or similar bodies. Claims can also lie in negligence for neglect, or for failing to detect, prevent, or act upon the abuse. Claimants in such cases are entitled to damages for personal injuries arising out of the physical and psychiatric effects of their experiences.

Abuse of position or powers by a public authority

195. Deliberate or dishonest abuse of position or powers by a public authority so as to cause personal injury to a claimant might arise in a number of contexts. One may be in the use of police or other regulatory powers, where a dishonest or deliberate detention could include the use of force which causes the claimant to suffer physical and/or psychiatric injury. Another area where personal injury can occur in the exercise of statutory powers by a public authority is in the context of the detention and restraint of psychiatric patients. However, it is very unlikely that such claims will fall within this category because of the breadth of the definition of clinical negligence in paragraph 21(5) of Part 1 of Schedule 1, which should exclude such claims from this category.

Breach of Convention rights by public authority

196. A claim in tort against a public authority which involved a “significant breach” of one of the Convention Rights will most frequently occur where the operational obligation in Article 2 of the European Convention on Human Rights is engaged because of the presence of a real and immediate risk of suicide or death on the part of an individual, yet negligence allows the death to occur. In such circumstances, damages for personal injury would be included in the claim on behalf of the estate under the Law Reform (Miscellaneous Provisions) Act 1934. A relative may suffer a psychiatric injury (“nervous shock”) as a result of witnessing the immediate aftermath of the death.

159 Further information on the meaning of “significant breach” is provided by the Lord Chancellor’s Guidance Under Section 4 of Legal Aid, Sentencing and Punishment of Offenders Act 2012, paragraphs 11.1-11.3

160 Right to life
197. Paragraph 22 of Part 1 of Schedule 1 of LASPO does not restrict civil legal aid services to the direct victim of the significant breach of the Convention Rights. It is therefore likely that a nervous shock claim could be brought as a result of witnessing the aftermath of a significant breach of Article 2.

198. Although this factual matrix is most likely to occur in the context of mental health patients informally or compulsorily admitted to a hospital for assessment and treatment, such claims are likely to be excluded because they fall within the definition of clinical negligence which is excluded from this category by paragraph 22(3) of Part 1 of Schedule 1. The same exclusion does not apply to other public authorities, such as the police or the prison service. Claims in tort involving serious breaches of Articles 3, and Article 8, which encompasses bodily integrity could also give rise to an eligible claim under this category.

199. By necessity, whether a claim involves a “significant breach” of Convention Rights will be highly fact-sensitive.

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161 Prohibition of torture
162 Right to respect for private and family life
163 Further information on the meaning of “significant breach” is provided by the Lord Chancellor’s Guidance Under Section 4 of Legal Aid, Sentencing and Punishment of Offenders Act 2012, paragraphs 11.1-11.3
Public law and judicial review

Category definition and scope

LASPO Schedule 1, Part 1

200. Under LASPO Schedule 1, Part 1, legal aid is available for “civil legal services provided in relation to judicial review of an enactment, decision, act or omission”. Legal aid is also available for habeas corpus proceedings.

201. Paragraph 18 of Part 2 of Schedule 1 excludes judicial review from services for which legal aid is available except as provided under Schedule 1. This is to ensure that judicial review can only be funded via paragraph 19 of Part 1 of Schedule 1 and not under other paragraphs. The effect is that the limitations contained in that paragraph apply to all judicial review claims, whatever their subject matter.

Regulations

202. Full representation will only be granted where the requirements of Civil Legal Aid (Merits Criteria) Regulations 2013 are met, i.e.:

- there has been a letter before claim and reasonable time to respond (except where this is impracticable)
- the proportionality test is met, meaning “the likely benefits of the proceedings to the individual and others justify the likely costs having regard to the prospects of success and all the other circumstances of the case”, and
- the prospects of success are 50 percent or above, or they are borderline and the case is either of significant wider public interest, of overwhelming importance to the individual or “the substance of the case relates to a breach of Convention Rights”.

203. A case is of significant wider public interest:

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164 LASPO, Schedule 1, Part 1, paragraph 19
165 LASPO, Schedule 1, Part 1, paragraph 20
166 Inserted by the Legal Aid Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order
167 See the explanatory memorandum to the Legal Aid Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order
168 Regulation 60
169 See Civil Legal Aid (Merits Criteria) Regulations 2013 SI No. 104, regulation 8
170 Civil Legal Aid (Merits Criteria) Regulations 2013 SI No. 104, regulation 6
if the Director is satisfied that the case is an appropriate case to realise real benefits to the public at large, other than those which normally flow from cases of the type in question; and benefits for an identifiable class of individuals, other than the individual to whom civil legal services may be provided or members of that individual’s family.

204. Note that if the application is for investigatory representation then the proposed defendant must still be notified of the potential claim before legal aid is granted. This need not be a full pre-action protocol letter and is expected to be most relevant in cases of failure to act (such as failure to carry out an assessment) where mere notice of the claim may prompt action.171

Standard Civil Contract 2010 (as amended) and Standard Civil Contract 2013

205. Public law contracts have not been terminated and continue on the 2010 terms (as amended). The public law category covers:172

34. Legal Help and related proceedings concerning:

   a. The human rights of the client or a dependant of the client other than matters which fall within the definition of another category.

   b. Public law challenges to the acts, omissions or decision of public bodies, including challenges by way of judicial review or habeas corpus.

35. To the extent that any relevant grant of exceptional funding is made (in accordance with section 10 of the Act) this category also include Legal Help and all proceedings concerning data protection and freedom of information issues.

206. This is narrower than the original category definition in the 2010 contract which covered civil liberties more generally, proceedings under section 222 of the Local Government Act 1972 and freedom of information.

207. The 2010 (as amended) and 2013 contracts both refer to the relationship between this and other categories in the following terms:173

   Public law challenges to the acts, omissions or decision of public bodies (including under the Human Rights Act 1998), in particular challenges by way of judicial review...and habeas corpus are covered by the Category in which the principal matter or proceedings appear or by the

172 Standard Civil Contract 2010, Amended Category Definitions
173 See Standard Civil Contract 2013, Category Definitions and Standard Civil Contract 2010, Amended Category Definitions
Category which relates to the underlying substance of the case (as referenced by the widest Category Definition incorporating excluded work). They are also covered by the Public Law Category.

208. Paragraph 2.28 of the Standard Civil Contract 2013 specification provides that:\footnote{Standard Civil Contract 2013}{174}

*All Categories of Work are exclusive under this Contract. You must have Schedule Authorisation in a Category to undertake work in that Category unless it is Miscellaneous Work.*

209. The effect is that:

- If a judicial review claim arises out of a matter that is in scope in some other category then the solicitor bringing the claim must either have a contract in that category or a public law contract. So, the holder of a community care contract can bring a judicial review claim to challenge an assessment under section 21 of the *National Assistance Act 1948* and a housing contract holder can bring a claim for judicial review to challenge a refusal to accept a homelessness claim.

- If a judicial review claim arises out of a matter that is not within one of the other contract categories then the solicitor must have a public law contract to bring the claim. The important point to note is that the contract categories do not necessarily overlap with the ordinary meaning of the category heading. So, for example, housing does not include non-homeless allocation decisions. A judicial review claim in such a case would have to be brought under a public law contract and not a housing contract.

**Types of cases covered in practice**

**Courts and Tribunals covered**

210. LASPO Schedule 1, Part 1, paragraph 19(10) defines judicial review as including “any procedure” in which a court or body in Schedule 3 “is required by an enactment to make a decision applying the principles that are applied by the court on an application for judicial review”.

211. Various statutes make such provision but the main effect seems to be to include judicial review in the Upper Tribunal under section 15 of the *Tribunals Courts and Enforcement Act 2007*. It is doubtful whether this includes collateral challenges before other statutory Tribunals.\footnote{For example, a challenge to the validity of Housing Benefit Regulations in the First Tier Tribunal.}{175} Where a statute allows for an appeal on a point of law (for example homelessness appeals\footnote{However, homelessness cases are treated as public law cases for the purposes of the application of the Merits Criteria Regulations.}{176})

\footnotetext[174]{Standard Civil Contract 2013}  
\footnotetext[175]{For example, a challenge to the validity of Housing Benefit Regulations in the First Tier Tribunal.}  
\footnotetext[176]{However, homelessness cases are treated as public law cases for the purposes of the application of the Merits Criteria Regulations.}
then that normally includes the same grounds as are available on a judicial review but that does not seem to be what is intended here. Otherwise funding would now be available for all appeals on a point of law.

212. Paragraphs 1, 18 and 19 of Schedule 3 include legal aid for advocacy services in the Upper Tribunal exercising its judicial review powers.

213. Proceedings will cease to qualify as judicial review if the court orders that they should continue as if brought by ordinary action. The claim will then have to qualify for funding under a different category.

**Personal benefit mandatory**

214. LASPO provides that a judicial review claim must “have the potential to produce a benefit for the individual, a member of the individual’s family, or the environment”. Benefit is not defined but this is intended to exclude a pure “public interest” challenge.

215. If proceedings become academic for the individual after legally aided services have been provided then the exclusion does not apply. So, for example, if the individual claimant in a community care claim receives the relief they are seeking then legal aid can continue to allow the claim to proceed for the purpose of pursuing costs or on wider public interest grounds.

**Alternative proceedings**

216. Under the *Civil Legal Aid (Merits Criteria) Regulations 2013*, the case must meet the standard criteria under regulation 39. In particular:

> the individual has exhausted all reasonable alternatives to bringing proceedings including any complaints system, ombudsman scheme or other form of alternative dispute resolution.

217. In addition, the claim must meet the criteria in regulation 53, meaning the claim must appear to be susceptible to challenge and that:

> there are no alternative proceedings before a court or tribunal which are available to challenge the act, omission or other matter, except where the Director considers that such proceedings would not be effective in providing the remedy that the individual requires.

218. This applies only to alternatives before a court or tribunal, but where such a remedy exists then it must be used first unless it would be ineffective. For example, the alternative

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177 See Civil Procedure Rules Part 54.20  
178 LASPO Schedule 1, Part 1, paragraph 19(3)  
179 Regulation 53(b) as substituted by the *Civil Legal Aid (Merits Criteria) Amendment Regulations 2013*.  
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procedure might not be mandatory if the case is urgent and the tribunal cannot grant interim relief.  

**Subject-based limitations**

219. As a general rule legal aid for judicial review is not limited to particular subject areas, although contract holders who do not hold public law contracts (see above) will be limited in the kinds of case they can take on. This means that judicial review claims can still be brought in respect of issues that would otherwise be excluded. For example:

- It is still possible to include a claim for damages for most non-defamation torts in a judicial review application where that arises out of the claim. This will include a restitutionary claim provided that it is not based on trust law. The circumstances in which such claims can be made are governed by section 31(4) of the *Senior Courts Act 1981*.

- It is still possible to bring a judicial review for claims in relation to welfare benefits, including those excluded from legal aid generally by paragraph 15 of Part 2 of Schedule 1. However, in most cases a judicial review claim will not be possible because there will be an alternative remedy.

220. There are, however, various exclusions. Some general exclusions in LASPO, Schedule 1, Part 2 apply to judicial review claims:

- defamation and malicious falsehood
- in relation to conveyancing
- in relation to the making of wills
- in relation to matters of trust law
- company or partnership law
- civil legal services provided to an individual in relation to matters arising out of or in connection with the establishment, carrying on, termination or transfer of their business, and
- changing an individual’s name.

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180 See further Lord Chancellor’s *Guidance Under Section 4 of Legal Aid, Sentencing and Punishment of Offenders Act 2012*, paragraph 7.37

181 *LASPO*, Schedule 1, Part 2, paragraph 7

182 *LASPO*, Schedule 1, Part 2, paragraph 9

183 *LASPO*, Schedule 1, Part 2, paragraph 10

184 *LASPO*, Schedule 1, Part 2, paragraph 11

185 *LASPO*, Schedule 1, Part 2, paragraph 13

186 *LASPO*, Schedule 1, Part 2, paragraph 14

187 *LASPO*, Schedule 1, Part 2, paragraph 17
221. If the subject matter of the claim falls within any of the above then it will not qualify for legal aid including for judicial review, although in principle the Director could make an exceptional case determination under section 10 of LASPO.  

222. In relation to immigration claims, LASPO Schedule 1, Part 1, paragraph 19(5) creates a general rule that legal aid is not available for judicial review in respect of an immigration issue where substantially the same “issue” has been determined against the claimant within the preceding year on an application for judicial review or an appeal to a court of tribunal. Paragraph 19(6) provides that legal aid is not available to challenge removal directions given not more than a year after the making of the relevant decision to remove or the conclusion of any appeal against that decision.

223. The one year rule does not apply to asylum applications where there is no right of appeal, to certificates under the Nationality Immigration and Asylum Act 2002 sections 94 and 96, or of removal directions in prescribed circumstances. At the time of writing no such circumstances had been prescribed.

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188 The Lord Chancellor’s Guidance expressly gives a judicial review claim arising out of a business as an example of a case where a determination might be made. An example might be where statutory powers have been used to close down a business that is the claimant’s sole source of income and where a challenge requires extensive expert evidence. See Lord Chancellor’s Guidance Under Section 4 of Legal Aid, Sentencing and Punishment of Offenders Act 2012, paragraph 7.10

189 LASPO, Schedule 1, Part 2, paragraph 19(7)

190 LASPO, Schedule 1, Part 2, paragraph 19(7)

191 LASPO, Schedule 1, Part 2, paragraph 19(8)
Welfare benefits

Category definition and scope

LASPO Schedule 1, Part 1

224. Paragraph 15 of Part 2 of Schedule 1 of LASPO excludes civil legal services in relation to a benefit, allowance, payment, credit or pension under any enactment relating to social security as well as tax credits, pension credit and vaccine damage payments.

225. The exception to this is under paragraph 8 of Schedule 1, Part 1 which allows for civil legal services to be provided on a point of law in the Upper Tribunal, the Court of Appeal or Supreme Court in relation to a benefit, allowance, credit or pension under enactments relating to social security, tax credits and pension credits.

Regulations

226. The effect of regulation 2 of the Civil Legal Aid (Preliminary Proceedings) Regulations 2013 is that requests to the First Tier Tribunal for permission to appeal are not eligible for legal aid.

Types of cases covered in practice

227. The LAA is currently in the process of tendering welfare benefit contracts for the limited work available and is expecting to have only a few providers.

228. Advocacy is not funded at the Upper Tribunal, unless the Tribunal is exercising its judicial review functions or it is an exceptional case under section 10 of LASPO and Part 8 of the Civil Legal Aid (Procedure) Regulations 2012.

229. An exceptional case is one where the failure to provide legal aid would be a breach of the individual’s convention right or the rights of the individual to the provision of legal services that are enforceable EU rights.

230. Right to reside and other determinations to do with the free movement of people may raise issues of enforceable EU rights. Further, where decisions on entitlement to benefits do not involve the decision makers in exercising their discretion, a claim for exceptional funding could be made under Article 6 of the European Convention on Human Rights.

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192 SI No. 265, available at
193 Requests are a requirement under Rule 38 of the The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008
194 Further information is available on the Ministry of Justice website
195 SI No. 3098
231. However the Lord Chancellor’s Exceptional Funding Guidance (Non-Inquests) makes clear that in determining whether Article 6 would be breached what has to be shown is that the failure to fund means that bringing the case would be “practically impossible or lead to an obvious unfairness in proceedings”.\textsuperscript{196} The factors that may be particularly relevant considered include:

- the complexity of the matter
- the importance of the matter, and
- the inability of the claimant to argue their case, for example, because of vulnerability or disability.

\textsuperscript{196} Lord Chancellor’s Exceptional Funding Guidance (Non-Inquests), paragraphs 63
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