

GUIDANCE ON EXCEPTIONAL FUNDING

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1 Scope of this guidance

1.1 This guidance is issued by the Director of Legal Aid Casework. It sets out how the Legal Services Agency (“the Agency”) will deal with applications for Exceptional Funding under Article 12A of the Access to Justice (Northern Ireland) Order 2003 (“the 2003 Order”). This guidance applies to applications made from July 2019, coinciding with the Agency’s new online application system and the issuing of the Agency’s general Decision Making Guidance on Civil Representation. This guidance is concerned with the special features of the Exceptional Funding regime and will cross refer where appropriate to the general Decision Making Guidance to avoid duplication. All current guidance is available on the ‘Legal aid legislation and guidance’ page of the Department of Justice’s website.

1.2 This guidance replaces all previous guidance on Exceptional Funding, issued by the Legal Services Commission (the predecessor of the Agency) on 22 October 2008. A new and in some respects simplified statutory framework for Exceptional Funding was established in April 2015 when the Agency came into being. This guidance reflects that new framework and the new online procedures for making applications but otherwise does not seek to make substantive changes to the previous approach of the Agency to Exceptional Funding applications.

1.3 In this guidance “Exceptional Funding” means funding applied for or provided under Article 12A of the 2003 Order. Other terms used in this guidance have the same definitions as those given in the general Decision Making Guidance.

2 The nature of Exceptional Funding

2.1 Legal aid schemes have traditionally been strictly defined by statutory rules governing their scope and funding criteria. A system of exceptional funding arose in England and Wales in the late 1990s (using certain general provisions of the Legal Aid Act 1988) as a way of giving ministers the power to grant legal aid in certain high profile exceptional cases not covered by the usual scheme. The intention was that one-off grants of exceptional funding would be discretionary, based on public interest rather than legal entitlement, and would be for ministers to decide upon in individual cases.

2.2 As exceptional funding became more established, case law under the European Convention on Human Rights clarified the extent of a state’s obligation to fund representation at inquests and in civil proceedings (see the guidance on Articles 2 and 6 below). Increasingly, decisions became based on determinations of legal entitlement.

2.3 In Northern Ireland the Legal Aid and Coroners’ Courts Act (Northern Ireland) 2014 redefined the exceptional funding regime. Decisions in individual cases were to be determined by the Director of Legal Aid Casework, not by ministers, and would be governed by specific statutory tests. In this way, Exceptional Funding should no longer be seen as sitting wholly outside the main legal aid scheme; it is in fact a part of the scheme for civil legal services, albeit with its own specific criteria and procedures. Exceptional Funding is no longer exceptional in its nature.

3 Statutory Framework

3.1 Article 12A of the 2003 Order provides as follows:

“Exceptional funding

12A—(1) The Department is to fund the provision of any of the services specified in Schedule 2 to an individual if paragraph (2) or (4) is satisfied.

(2) This paragraph is satisfied if the Director—

(a) has determined that the individual satisfies the requirements of regulations under Article 13 in relation to the services, and

(b) has made an exceptional case determination in relation to the individual and the services, (and has not withdrawn either determination).

(3) An exceptional case determination is a determination—

(a) that it is necessary to make the services available to the individual under this Order 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.

(4) This paragraph is satisfied if—

(a) the services consist of representation in proceedings at an inquest under the Coroners Act (Northern Ireland) 1959 into the death of a member of the individual's family,

(b) the Director has made a wider public interest determination in relation to the individual and the inquest, and

(c) the Director has determined that the individual satisfies the requirements of regulations under Article 13 in relation to the services,

(and neither determination has been withdrawn).

(5) A wider public interest determination is a determination that, in the particular circumstances of the case, the provision of representation 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.

(6) For the purposes of this Article an individual is a member of another individual's family if—

(a) they are relatives (whether of the full blood or half blood or by marriage or civil partnership),

(b) they are cohabitees (as defined in Article 3(1) of the Family Homes and Domestic Violence (Northern Ireland) Order 1998), or

(c) one has parental responsibility for the other.

(7) Articles 14 to 20 do not apply to civil legal services funded under this Article unless they are applied (with or without modification) by an exceptional case determination or a wider public interest determination.”

3.2 This Article sits within the provisions for ‘Civil Legal Services’.¹ One consequence of this is that it is not permitted to grant Exceptional Funding for services within the definition of Criminal Defence Services.²

3.3 There are some important features which distinguish the regime under Article 12A from earlier rules and guidance on exceptional funding:

- Exceptional Funding is framed (in Article 12A(1)) by reference to services otherwise excluded under Schedule 2 of the Order (which defines the normal scope of civil legal services) – this means that Exceptional Funding has **no role in relation to in-scope services**,³ nor does it provide any general mechanism to disapply the normal means and merits criteria (but see guidance on merits criteria below)
- Article 12A is concerned only with applications relating to **individual cases**; there is no power in the Article to authorise the funding of descriptions or classes of case,⁴ the only mechanism to bring categories of case back into scope is to amend Schedule 2 is via regulations⁵
- For non inquest cases a grant of Exceptional Funding can only be based on the client’s Convention or EU rights; previous grounds such as “**significant wider public interest**” or “**overwhelming importance to the applicant**” no longer apply;⁶ however “wider public interest” remains a relevant consideration for inquest proceedings
- The Article specifies the legal grounds on which Exceptional Funding can be granted – there is **no residual discretion** for the Agency to grant anything not falling within the prescribed grounds

3.4 Like all other Civil Legal Services, the procedures for Exceptional Funding are governed by the General Regulations. Exceptional Funding cases are controlled by legal aid certificates in a similar way to Civil Representation. Part 2 of the General Regulations contains provisions common to all forms of Civil Legal Services, including Exceptional Funding. Part 2 includes rules on issuing, amending, discharging and revoking certificates, on the use of counsel and on the general power to review decisions. Guidance on all these topics is contained in the general Decision Making Guidance⁷ and the separate guidance on Authority for Counsel. Part 6 of the General Regulations contains the procedural rules specific to Exceptional Funding – guidance on procedural issues is at section 6 of this guidance below.

3.5 It is clear from Article 12A that there are two distinct grounds on which Exceptional Funding can be granted:

¹ As defined in article 10 of the 2003 Order

² Article 10(1) and see the Decision Making Guidance, Part A, sections 1 and 2

³ Compare the wider power (including non excluded proceedings) under Article 10A of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 and see the Lord Chancellor’s Guidance dated 15th December 2005, paragraphs 32 to 36

⁴ Compare paragraphs 15 to 20 of the 2005 guidance relating to “generic authorisations”

⁵ 2003 Order, Article 12(6)

⁶ See paragraph 30 of the 2005 guidance

⁷ See Part A of the guidance: section 7 covers Certificates; section 9 Withdrawal of Funding and section 10 the Right of Review

- Under 12A(2) based upon Convention or enforceable EU rights – this provision is of general application;
- Under 12A(4) on the basis of “wider public interest” – this provision is restricted to inquest proceedings (see section 5 of this guidance below)

3.6 Because Convention rights have a very distinct relevance to inquests compared to other proceedings, it is convenient to consider guidance on funding representation at inquests separately from representation in any other proceedings.

4 Representation at Inquests

4.1 Exceptional Funding for representation at an inquest is therefore available in two categories of case;

- on the basis of ECHR or enforceable EU rights or
- on the basis of wider public interest (discussed in section 5 below)

The Article 2 Test

4.2 The relevant ECHR provision is Article 2: the ‘right to life’ provision. There are no other Convention or EU rights which could arguably create an obligation to provide legal aid at an inquest. Article 2 imposes two kinds of obligation on a state. First there are **substantive** state obligations not to take life without justification, to take reasonable steps to avoid putting lives at risk, and to establish a framework of laws, systems, precautions, and means of enforcement which will, to the greatest extent reasonably practicable, protect life.

4.3 In addition, Article 2 imposes a **procedural** obligation on the State to carry out an effective investigation into certain deaths. This obligation arises where there are circumstances that give ground for suspicion that the State may have breached its substantive Article 2 obligations. It follows that the procedural obligation is only likely to arise for inquests where there is some degree of state involvement in the events leading to the death. The following are examples of situations where the procedural obligation clearly arises:

- all intentional killings by state agents (e.g. a police shooting);⁸
- all violent deaths and suicides of persons detained in police or prison custody or during the course of arrest or search;⁹ and
- all violent deaths and suicides of persons detained in mental hospitals¹⁰

4.4 By contrast, the following situations are less likely to trigger the procedural obligation, although each case must be considered on its facts:

- death in an NHS hospital, even where it is alleged that individual acts of clinical negligence by health professionals contributed to the death;¹¹ however the obligation might be triggered if the allegation is of gross negligence or serious systemic failure, as in the case of

⁸ See for example McCann v UK 21 EHRR 97; Jordan v UK (2003) 37 EHRR 2

⁹ Salman v Turkey (2000) 34 EHRR 425; R (L) v Secretary of State for Justice [2009] 1 AC 588

¹⁰ R (Smith) v Oxfordshire Assistant Deputy Coroner [2010] UKSC 29 at 210

¹¹ R (Humberstone) v Legal Services Commission [2011] 1 WLR 1460

*Khan*¹² (where a child was accidentally poisoned by a massive overdose of medication and there was evidence of an attempted cover-up by the hospital)

- suicide of a *voluntary* mental patient, although again this will depend on the nature of the allegations¹³
- death from natural causes in a prison, police station or mental hospital
- violent deaths caused by private individuals or accidents where there does not appear to be significant state involvement or responsibility

4.5 The nature and seriousness of the allegations against the state or its agents is therefore crucial to the question of whether the procedural obligation arises. The Agency will objectively evaluate the allegations set out in the application, taking care to ensure that allegations of individual negligence are not dressed up as systemic failures.¹⁴

4.6 Where it arises, the nature of the procedural obligation to carry out an effective investigation were summarised in the *Jordan* case.¹⁵ *Jordan* arose from the shooting of an unarmed man by police in Belfast in 1992. An effective investigation:

- Must be on the initiative of the State, and it must be independent;
- Must be capable of leading to a determination of whether any force used was justified, and to the identification and punishment of those responsible for the death;
- Must be prompt and proceed with reasonable expedition;
- Must be open to public scrutiny to a degree sufficient to ensure accountability; and
- The next-of-kin of the deceased must be involved in the inquiry to the extent necessary to safeguard their legitimate interests.

4.7 Inquest proceedings before a coroner are the normal means by which deaths are investigated in Northern Ireland, although civil or criminal proceedings or enquiries may also have a role. In cases where the procedural obligation in Article 2 is triggered the traditional narrow remit of inquest proceedings may be extended to cover the above issues – an enhanced inquest of this sort is sometimes referred to as a *Middleton* inquest.¹⁶

4.8 If the Agency is not satisfied that an inquest concerns an arguable breach of the substantive Article 2 obligation, triggering the procedural requirement of an effective investigation, an application for exceptional funding for representation at the inquest is likely to be refused (unless justified on separate public interest grounds as discussed below). Any decision by the coroner on whether or not to hold a *Middleton* style inquest will be highly material to the Agency's decision, although not binding on the Agency.

4.9 If the Agency is satisfied that the procedural obligation has arisen, it does not follow automatically that legal aid must be granted to the family of the deceased. The test is whether

¹² R (*Khan*) v Secretary of State for Health [2003] EWCA Civ 1129

¹³ See R (*Letts*) v Lord Chancellor [2015] EWHC 402 (Admin) at 92, see also 101

¹⁴ As recognised in the *Humberstone* judgement [2011] 1 WLR 1460 at paragraph 46

¹⁵ (2003) 37 EHRR 2

¹⁶ After R (*Middleton*) v HM Coroner for Western Somerset [2004] 2 AC 182

separate legal representation for the next of kin is needed in order to ensure that they are involved in the inquest to the extent necessary to safeguard their legitimate interests.

4.10 In most cases the coroner can conduct an effective investigation, with the family's participation, without the family of the deceased needing to be legally represented.¹⁷ This is likely to be the case for inquests where the facts surrounding the death are unlikely to be substantially in dispute.¹⁸ It must be remembered that inquests are inquisitorial not adversarial proceedings: the function of legal aid is solely to assist the coroner in making the investigation fair and effective. For this reason, the fact that public bodies may be legally represented at the inquest, or at what level, is not likely to be a significant consideration for the Agency. The principle considerations for the Agency are as follows:

- The nature and seriousness of the allegations which are likely to be raised at the inquest, relating to public authorities or other agencies of the state (see next paragraph);
- Whether other forms of investigation have taken place, or are likely to take place, and whether the family have been, or are likely to be, involved in such investigations: this may include investigations by public bodies such as Ombudsmen,¹⁹ NHS Trusts or the Historical Enquiries team;
- The ability of the family to participate in the inquest without legal representation: this will depend on the particular circumstances and capabilities of the family and the extent to which they might be assisted prior to the inquest under the Advice and Assistance scheme
- Applicable means and merits criteria discussed below;
- Any views expressed by the coroner relating to the above factors; there is however no expectation that the opinion of the coroner should be sought prior to making the application for Exceptional Funding and any views expressed are of course material but not binding upon the Agency.

4.11 By definition a Middleton inquest is likely to raise some allegations against public bodies or agents of the state, so it is the nature and seriousness of these which is most relevant to the decision on whether legal aid is required. Examples of aggravating factors which may support the application include the following:

- evidence of gross negligence or systemic failures, for example, closely related multiple and avoidable deaths from the same cause within the same institution;
- evidence of criminal conduct by a public authority or state agent;
- attempts to conceal information or otherwise interfere with an investigation into the circumstances surrounding the death.

4.12 If the Agency concludes that Article 2 requires the deceased's family to be represented, Exceptional Funding will be granted. However Article 12A(3)(b) also allows a grant where this is appropriate in light of the risk that Convention Rights might otherwise be breached. This gives the Agency some discretion in cases where there are strong arguments in favour of the application but the arguments both ways are finely balanced.

¹⁷ Khan above at paragraph 74 – emphasising that the circumstances of that case were exceptional

¹⁸ See Tobias Main v Minster for Legal Aid [2007] EWCA Civ 1147 at paragraph 50

¹⁹ See Decision Making Guidance, Part B, section 6 paragraphs 6.62 to 6.64

4.13 Legal aid in Article 2 inquests will be used to provide representation for the family of the deceased. The Article 2 caselaw does not set out a definition of “next of kin” or “family” but the Agency will use as a starting point the wide definition of “family” contained in Article 12A(7) of the 2003 Order.²⁰ Applications for Exceptional Funding on Article 2 grounds by applicants who are not members of the deceased’s family will be refused.

4.14 The Agency do not expect to receive requests for Exceptional Funding from more than one family member of the deceased. However, where the application clearly establishes that circumstances are such that an assisted family member cannot represent the interests of the Applicant then the Agency will consider the position, on a case by case basis.

Wider Public Interest

4.14 As an alternative to Article 2, exceptional funding may be granted for representation at an inquest if the Agency make a determination that, “in the particular circumstances of the case, the provision of representation 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”²¹

4.15 It will be unusual for an inquest to satisfy this test, especially if the inquest does not already satisfy the Article 2 test for an enhanced investigation. Inquests do not establish civil or criminal liability or lay down binding precedents in the same way as civil litigation. The Agency will however carefully consider any arguments put forward in the application. It must be shown that public benefits would flow from the provision of representation for the applicant, not just from the subject matter of the inquest itself. If an inquest concerns a death in circumstances where the findings or recommendations of the coroner may help to prevent future deaths, funding may be justified on this ground.

Merits Criteria

4.16 Article 12A(7) of the 2003 Order provides that Articles 14 to 20 of the Order do not apply to Exceptional Funding applications unless the Agency chooses to apply them as part of a determination made under that Article. The normal merits criteria for civil funding arise under Article 14. The effect of these provisions is that the Agency has a discretion whether or not to apply merits criteria to exceptional funding applications.

4.17 The Agency will apply merits criteria to inquest cases only where to do so would be consistent with the nature of the proceedings and the Convention rights which form the basis of the application. For most purposes the tests of Article 2 engagement or public interest take the place of the normal merits criteria applicable to civil litigation. In practice the relevance of such merits criteria to inquest proceedings is as follows:

- Prospects of success – no prospect of success criterion will be applied in inquest cases; the purpose of funding is to assist with the investigation, not to achieve a specific outcome;

²⁰ The definition technically only applies to public interest cases as the term “family” is not used in 12A(2), but the test of family connection is if anything more important in Article 2 cases

²¹ 2003 Order, Article 12A (5) above – “family” is defined at 12A(6)

- Cost benefit – value for money and cost benefit is always a relevant consideration; however, in cases where representation is required to satisfy the Article 2 procedural requirement, exceptional funding will not be refused solely on cost benefit grounds. The issue of cost benefit and proportionality will be highly relevant to public interest cases and to determinations of the appropriate level of representation to fund at the inquest²²
- Over representation – the number and identity of other parties represented at the inquest may be taken into account in deciding whether it is necessary for the applicant to be separately represented; the Agency will take a practical approach to looking at the different interests involved, remembering that the proceedings are inquisitorial
- Alternative Funding – Exceptional Funding applications may be refused where there are alternative sources of funding available to the applicant²³
- Alternative types of legal aid – as stated above, Exceptional Funding may be refused if the interests of the family can be adequately protected under the Advice and Assistance scheme

Financial Eligibility

4.18 Exceptional Funding to be represented at an inquest, whether on Article 2 or public interest grounds, is in principle means tested.²⁴ However the Financial Regulations²⁵ give the Agency a wide power to disapply eligibility limits and waive contributions in inquest cases. This is expressed in the following terms:

“8 (1) Where an application is made for a relevant determination, the Director may, if the Director considers it equitable to do so, do one or both of the following—
 (a) disapply the eligibility limits in regulation 6 in respect of the application; and
 (b) waive all or part of any contribution payable under Part 3.
 (2) In considering whether to disapply the eligibility limits under paragraph (1), the Director must have regard in particular to any applicable rights under Article 2 of the Human Rights Convention.”

4.19 In considering whether to exercise this waiver, the Agency will consider whether it would be reasonable to expect the family of the deceased to bear the full costs of representation. Whether this is reasonable will depend on the history of the case, the nature of the allegations to be raised, the applicant’s disposable income and capital, the other financial resources of the family and the estimated cost of providing representation. Since the resources of the family as a whole are a relevant consideration, no advantage will be gained from making the application in the name of the family member with least resources. If a contribution is appropriate it will be based upon what the family can reasonably afford, which may be a combination of any assessed income contribution together with a proportion of whatever capital contribution would normally be due under the regulations.

²² See further guidance on cost benefit in the Decision Making Guidance, Part B, paragraphs 6.4 to 6.13

²³ See Decision Making Guidance, Part B, paragraphs 6.37 to 6.43

²⁴ Both grounds are subject to Article 13 of the 2003 Order – see paragraphs 12A(2)(a) and (4)(c) above

²⁵ Civil Legal Services (Financial) Regulations (Northern Ireland) 2015, regulation 8 – the power to waive contributions is repeated in regulation 50(3) of the General Regulations

4.20 It is recognised that the role of legal aid in Article 2 inquest cases is to help the coroner to fulfil the state's enhanced investigative obligations; it would therefore not always be appropriate to expect the applicant to make the same contribution that would be due if the applicant were pursuing civil proceedings for their own benefit. If Article 2 applies and the family cannot reasonably afford the full cost of representation, the Agency is unlikely to refuse the application on means grounds, although a contribution may be appropriate. If different family members have conflicting views and objectives in relation to the inquest, the Agency will take these into account but will bear in mind that the proceedings are inquisitorial; separate representation for different family members would not be reasonable and is not required under the Article 2 test.

4.21 As a starting point, the Agency will usually expect to see financial information from the following family members in inquest cases:

- if the deceased was a child, financial information from the parent or parents;
- if the deceased was an adult, financial information from his or her partner;
- if the deceased was an adult who did not have a partner, financial information concerning his or her parents, children and siblings;
- if none of the above apply, other family members may be considered. The Agency may be contacted in advance for advice in such situations

4.22 If funding is applied for under public interest rather than Article 2 grounds, the Agency is less likely to waive eligibility limits or contributions. The significance of the issues and degree of public benefit will be taken into account in deciding whether such a waiver is appropriate.

Scope of funding and preparatory work

4.23 Advice and assistance is available for families involved in inquest proceedings. This may include the provision of advice about the procedures and issues before the coroner and assistance in drafting any submissions or correspondence the family wishes to put to the coroner. It is only advocacy before the coroner which is excluded.

4.24 If Exceptional Funding is granted, such funding will cover all legal services provided by solicitor or counsel. Once such a grant is made, no further claims may be made under the Advice and Assistance scheme relating to the inquest.

Statutory Charge

4.25 The statutory charge arises under Article 17(7) of the 2003 Order; it is therefore one of the provisions which will apply to Exceptional Funding only where the Agency so determines.²⁶ The Agency will usually specify that the statutory charge provisions do apply to funding for inquest proceedings.

4.26 Damages are not awarded and property cannot be recovered or preserved in inquest proceedings themselves. However, recovery may well take place in civil proceedings (or negotiations in lieu of civil proceedings) relating to the death; in those circumstances the legal costs of being represented at the inquest are likely to form part of the charge against any compensation

²⁶ Article 12A(7) of the Order

agreed or awarded. Article 17(7)(b) provides that when civil legal services are funded, the charge attaches to:

“...any property....which is recovered or preserved..in connection with that matter...”

4.27 Clients must be advised of the possible application of the charge when exceptional funding is applied for in relation to an inquest. In any negotiations concerning compensation (however described) arising out a death which was the subject matter of a funded inquest, the costs of attending the inquest should be part of the claim put forward on behalf of the client.

4.28 To ensure that the statutory charge and relevant merits criteria can be applied where it is appropriate to do so, grants of Exceptional Funding relating to inquests will usually include a provision that Articles 14 to 20 of the 2003 Order *do* apply to the grant, save for Article 14(2A)(a) (the legal merits / prospects of success test).

Remuneration

4.29 Remuneration rates for representation at an inquest covered by Exceptional Funding are now prescribed by statute. Schedule 5 of the Civil Legal Services (Remuneration) Order (Northern Ireland) 2015 set out the following hourly rates:

Table 1 Solicitor's fees

Work Type	Rate
Preparation	£79.50 per hour
Hearing (including any preliminary hearings)	£63.38 per hour
Travelling Time	£24.75 per hour
Mileage	35.7p per mile

Table 2 Counsel's fees

Work Type	Junior Counsel	Senior Counsel
Preparation	£87.38 per hour	£179.25 per hour
Hearing (including any preliminary hearings)	£149.25 per hour	£386.25 per hour
Refresher fees (full day)	£236.50	£400
Travelling Time	£12 per hour	£12 per hour
Mileage	35.7p per mile	35.7p per mile

4.30 All travelling time and mileage rates are payable on an actual basis.

5 Non Inquest Proceedings

5.1 For all types of case other than inquest proceedings, the only ground on which exceptional funding may be granted is under Article 12A(2) (as set out above). This requires that the Agency must be satisfied that it is appropriate to grant legal aid, having regard to the risk that failure to do so would be a breach of either an ECHR convention right or an enforceable EU right. Although there

are some enforceable EU rights relating to legal aid,²⁷ these are unlikely in practice to require a grant in circumstances where a grant would not be made under the normal Civil Representation scheme. The key question is therefore whether refusal might be breach of ECHR rights, of which Article 6 of ECHR is the most relevant. The guidance below could equally be seen as an application of Article 13 of ECHR which is the right to an effective remedy where convention rights are violated.

5.2 It must be remembered that Exceptional Funding is only a mechanism to escape the scope rules contained in Schedule 2 of the 2003 Order.²⁸ There is no mechanism to escape the normal means or merits criteria for cases which are within the normal scope of the scheme. Applications for Exceptional Funding must therefore relate to proceedings outside the Schedule 2 scope rules.²⁹ Scope exclusions may relate either to the subject matter of the case (matters listed in paragraphs 1³⁰ and 4 of Schedule 2) or the venue of the proceedings (courts or tribunals not listed in paragraph 2 of the Schedule).

5.3 Currently, the only significant subject matter exclusions in Schedule 2 are defamation proceedings and certain admitted debt proceedings. It is however inconceivable that proceedings relating to an admitted debt could satisfy the Article 6 test described below. Therefore for practical purposes non inquest applications for Exceptional Funding are likely to relate to either:

- Exceptionally complex proceedings for defamation, or
- Exceptionally complex proceedings before a tribunal which is outside the normal scope of legal aid

The Article 6 Test

5.4 Article 6 of ECHR is often described as the “right to a fair hearing”. The Article contains a range of specific rights for persons facing criminal charges and a right to representation in criminal proceedings where this is in the interests of justice.³¹ The Article however contains no specific right to representation in civil proceedings. Any right to civil legal aid arises from the general wording of Article 6(1):

“In determination of his civil rights and obligations....everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

5.5 Before the Agency can grant an application for Exceptional Funding, it must be satisfied that:

- The application relates to proceedings in which the client’s civil rights are to be determined; and
- It would not be possible for the client to have a fair hearing in the absence of legal aid

²⁷ See European Union Council Directive 2002/8/EC on access to justice in cross border disputes

²⁸ This comes from the wording of Article 12A(1) – the disapplication of other Articles under 12A(7) only arises where a determination has been made under the main provisions of the Article

²⁹ See the guidance on those rules in Part A section 2 of the Decision Making Guidance

³⁰ Paragraph 1 lists exclusions to the provision of advice and assistance; although in theory an exceptional funding application could relate to excluded advice services, there is no prospect of such an application passing the relevant tests (for example there is no ECHR right to conveyancing services)

³¹ Article 6(3)

5.6 Whilst civil proceedings before a court usually do determine civil rights, funding cannot be granted under Article 6 for public enquiries (or indeed inquests) because these do not determine rights. Whether proceedings before a **tribunal** determine civil rights depends on the nature of the jurisdiction in question. Case law has established that the following types of proceeding do not involve the determination of a civil right:

- Where the issue is entitlement to a discretionary welfare benefit: this applies where the benefit cannot be claimed as a straightforward legal entitlement, but is “dependent upon a series of evaluative judgments by the provider as to whether the statutory criteria are satisfied and how the need for it ought to be met”³²
- Immigration proceedings relating to the determination of an individual’s entry, stay, residence or deportation³³ (such proceedings are in any event unlikely to be out of scope in Northern Ireland)
- Tax disputes³⁴

5.7 If an exceptional funding application relates to tribunal proceedings for which there is no clear case law as to the application of Article 6, the Agency will need to consider the merits of the arguments put forward in the application and decide whether it is appropriate to grant in light of any risk that Article 6 might otherwise be breached.³⁵

5.8 Once the Agency is satisfied that the client’s civil rights and obligations are engaged, it is necessary to decide in all the circumstances of the case whether the requirement of a fair hearing necessitates the grant of legal aid. Legal aid is of course just one mechanism to satisfy the fair hearing requirement – alternatives include making sure that the court or tribunal proceedings are genuinely accessible to parties without legal representation. The principles were first established in the *Airey* case³⁶, which related to proceedings in the Republic of Ireland in which Mrs Airey was seeking judicial separation from her violent husband. Given the nature of the issues and the court procedures applicable at the times, proceeding without legal representation would not give her effective access to justice. Numerous other cases have developed the test, especially in the field of defamation proceedings.³⁷ The test was summarised in the *Steel and Morris* (the “McLibel” case) as follows:

“The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend *inter alia* upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively”³⁸

³² *Tomlinson v Birmingham City Council* [2010] UKSC 8

³³ *Maaouia v France* (2001) 33 EHRR 42; *Eskelinen v Finland* (2007) 45 EHRR 43

³⁴ *Jussila v Finland* (2007) 45 EHRR 39

³⁵ Applying the discretion given to it under Article 12A(3)(b) of the 2003 Order

³⁶ *Airey v Ireland* (1979) 2 EHRR 305

³⁷ See for example *McVicar*, no. 46311/99, *ECHR* 2002 §§ 48 and 50; *P., C. and S. v. the United Kingdom*, no. 56547/00, § 91, *ECHR* 2002-VI; and *Munro v. the United Kingdom*, no. 10594/83

³⁸ *Case of Steel and Morris v the United Kingdom (Application no. 68416/01)* 15 February 2005, at paragraph 61

5.9 Because courts and tribunals in Northern Ireland are well used to dealing with unrepresented parties and ensuring that their cases are resolved fairly, legal aid will only be required in very exceptional cases. As summarised in the *Jarrett* case:

“Only in exceptional circumstances, namely where the withholding of legal aid would make the assertion of a civil claim practically impossible, or where it would lead to an obvious unfairness of the proceedings, can such a right be invoked by virtue of Art. 6(1) of the Convention”³⁹

5.10 Determinations under this test are very fact specific. Applications for Exceptional Funding must address in detail both the nature of the proceedings and the capacity of the client to represent him or herself effectively. Note also that:

- The fact that the opponent is represented or has significant resources does not necessarily make the proceedings unfair – courts and tribunals are well used to protecting the interests of the unrepresented party in such circumstances
- If the client has language difficulties, this will be a relevant consideration but is not sufficient in itself to justify legal representation

Applicable rules and criteria

5.11 Exceptional Funding is means tested and subject to the usual financial eligibility criteria.⁴⁰ The Agency has no discretion to waive eligibility limits for non inquest Exceptional Funding. Although a power does exist to waive financial contributions⁴¹ the Agency is unlikely to do so in a non inquest case as it would not be appropriate for the funding of out of scope proceedings to be available on more favourable terms than those available for in scope funding.

5.12 The Agency does in principle have some discretion over merits criteria and the other conditions normally applicable to civil funding.⁴² The Agency will only consider doing so if there are any such rules which are incompatible with Convention Rights. The courts have however held that even civil merits criteria which are far stricter than those applicable in this jurisdiction are compatible with such rights.⁴³

5.13 It follows that every grant of Exceptional Funding relating to non inquest proceedings is likely to include a determination that Article 14 to 20 of the 2003 Order apply in full to all funded services. All the usual rules relating to merits criteria, costs and the statutory charge will be applicable to Exceptional Funding applications. It would in any event be illogical to apply more generous merits criteria to cases normally excluded from the scheme than to those which were within scope. Non inquest Exceptional Funding applications must satisfy all the merits criteria

³⁹ R (Jarrett) v Legal Services Commission [2001] EWHC Admin 289

⁴⁰ Article 12A(2)(a) of the 2003 Order

⁴¹ General Regulations, regulation 50(3)

⁴² As discussed for inquests, this arises by virtue of Article 12A(7) of the 2003 Order which provides that Articles 14 to 20 of the Order are only applicable where this is so directed

⁴³ See Director of Legal Aid Casework & Anor v IS [2016] EWCA Civ 464 (20 May 2016) and the further guidance on human rights considerations in section 4 of Part B of the Decision Making Guidance

applicable to in-scope Civil Representation. The criteria will be interpreted in accordance with Part B of the Decision Making Guidance.

Remuneration

5.14 There are no prescribed rates applicable to non inquest Exceptional Funding. The Agency therefore has a discretion as to the rates to apply and will take into account the nature of the proceedings and the gravity of the issues at stake. The Agency may have regard to any prescribed rates or fees applicable to in-scope services or inquests.

6 Procedures

6.1 From April 2019, applications for Exceptional Funding must be made under the new online application process, in a similar way to applications for Civil Representation. Exceptional Funding applications must carefully address the relevant issues set out in this guidance (including the additional financial information which may be required from family members in inquest cases as set out at paragraph 4.21 above).

6.2 Because of the nature of the tests to be applied, more detailed information and submissions are usually required for Exceptional Funding than for other forms of funding. The Agency will also expect all applications to include a detailed breakdown of the likely duration and expected costs of the case, and to be notified of any change which affects these estimations.

6.3 Exceptional Funding is administered under certificates. It is governed by the common provisions of the General Regulations and certain specific provisions set out in Part 6 of those regulations. However in most respects the legal procedural framework for Exceptional Funding is the same as for Civil Representation – regard should therefore be had to Part A of the Decision Making Guidance. The following should be noted:

- The Agency has some discretion over the date that the Exceptional Funding certificate takes effect;⁴⁴ however, now that Exceptional Funding decisions are made by the Agency without requiring referral to ministers, there is unlikely to be any necessity to back-date such certificates; the discretion as to date will be exercised only where there has been delay on the part of the Agency or in exceptional circumstances
- As explained above, the Agency's discretion to waive contributions is likely to be restricted to inquest cases⁴⁵
- As for other types of civil funding, authority is needed before counsel can be instructed in Exceptional Funding cases;⁴⁶ as set out in the Agency's Guidance on Authority for Counsel, the expected or appropriate level of representation in all Exceptional Funding cases is "solicitor and junior counsel"
- The requirement to obtain a prior authority in Exceptional Funding cases is more limited than for other types of funding and is required only for: obtaining or tendering expert

⁴⁴ General Regulations, regulation 51(2)

⁴⁵ Ibid, regulation 50(3) and see paragraphs 4.17 to 19 and 5.11 of this guidance

⁴⁶ Ibid, regulation 11 (applicable to all civil legal services)

evidence or the opinion of a person other than an expert; or acts which are unusual in nature or which involve unusually large expenditure⁴⁷

- The Agency will provide reasons for all Exceptional Funding decisions, both those where a positive determination is made⁴⁸ and where the application is refused⁴⁹
- Although a refusal of Exceptional Funding may be reviewed by the Agency,⁵⁰ there is no right of appeal to the Appeals Panel against any Exceptional Funding decision or determination⁵¹

⁴⁷ Ibid, regulation 49(7)

⁴⁸ Ibid, regulation 51(1)

⁴⁹ Ibid, regulation 52(1)

⁵⁰ Ibid, regulation 14 and see section 10 of Part A of the Decision Making Guidance

⁵¹ Civil Legal Services (Appeal) Regulations (Northern Ireland) 2015, Schedule, paragraphs 6 to 10