

IN THE MATTER OF THE ACCESS TO JUSTICE BILL

AND

IN THE MATTER OF THE *JUSTICE* PARLIAMENTARY SCRUTINY

PROJECT

AND

IN THE MATTER OF A HUMAN RIGHTS AUDIT

JOINT OPINION

1. We are asked to advise on the compatibility of the Access to Justice Bill (“the Bill”) with the Human Rights Act 1998 (“HRA”) and the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950¹ (“the Convention”) in particular and international human rights law in general. This Joint Opinion forms the second stage of the analysis of this Bill in the context of the Parliamentary Scrutiny project conducted by *JUSTICE*. The First Stage of this project consisted of the “Human Rights Initial Assessment Report”, prepared by *JUSTICE*, which considered if the Bill as a whole and/or any provision in particular touches on Convention rights guaranteed by the HRA. We have been

supplied with a copy of this Initial Assessment Report and this Joint Opinion will broadly follow the structure of that Report, namely a chapter by chapter analysis of the provisions of the Bill. Unlike the Initial Assessment Report, the Joint Opinion will concentrate on the compatibility of the Bill, on its face, with the requirements of the Convention and the HRA and not attempt to predict possible HRA issues arising in the context of its implementation at a later date. Furthermore, this Joint Opinion will concentrate very heavily on the assessment of Part I of the Bill, which raises the most immediate human rights issues and only briefly comment upon one or two aspects arising under Part III.

2. This Joint Opinion is based upon the Bill as amended on Report in the House of Lords read together with a marshalled list of amendments moved on Third Reading, as provided by those instructing us.

The Legal Services Commission (“the Commission”)

3. **Clause 1**, which was introduced by Lord Lloyd of Berwick at Report Stage (following the withdrawal of a similar amendment at Committee stage), sets out the principles that are to apply to Part I of the Bill (“The Legal Services Commission”). These reflect quite properly the requirements, in relation to “legal aid” (in its widest sense), imposed by the HRA (and the Convention). Clause 1(2)(a) provides that:

¹ As amended by Protocol No 11 and incorporated into domestic law by the HRA

“persons have access to legal services and the machinery of justice which they would otherwise be unable to obtain on account of their means;”

4. This reflects the requirements inherent both in Article 6(1) and 6(3)(c) of the Convention that, in order to guarantee access to court and a fair trial, legal aid may be required. In the context of criminal proceedings, the Convention itself, in Article 6(3)(c) requires that

“Everyone charged with a criminal offence has the following minimum rights:

...

- (c) to defend himself in person or through legal assistance of his own choosing or, **if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.**” (emphasis added)

5. In the context of disputes concerning “civil rights and obligations”, the European Court of Human Rights (“the Court”) has repeatedly held that, even though Article 6 does not require the provision of legal aid for all cases, under certain circumstances, the Convention does require the provision of legal aid to those who cannot afford to pay for representation themselves in relation to such disputes. In Airey v. Ireland, the Court stated that:

“Article 6(1) may sometimes compel the State to provide the assistance of a lawyer when such assistance proves indispensable for an effective access to a court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, **or by reason of the complexity of the procedure or of the case.**”²

² 2 EHRR 305 at para. 26, emphasis added; see also App No 10871/84 Winer v UK (1986) 48 D&R 154

Failure in such circumstances to provide legal aid, will either be tantamount to denying the individual access to court or at least interfere with his right to equality of arms (as required under Article 6(1)).

In the case of Airey, the Court came to this conclusion despite the Irish government's protestations that Article 6(1) could not be taken to impose a positive obligation on the Member State to provide such legal aid, in particular in light of the financial impact such an obligation would have on the State. This was rejected by the Court on the basis that:

“... the Convention must be interpreted in the light of present-day conditions and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals”³

Where the Airey test requires the provision of legal aid, in principle, budgetary considerations cannot justify the failure to provide such legal aid.

6. Clause 1(2)(b) provides that:

“such access is not impaired on account of disability (within the meaning of the Disability Discrimination Act 1995) or the place in England and Wales where any legal services are brought;”

This is somewhat more restrictive than the original proposed amendment⁴, which provided:

“that such access be enjoyed without discrimination on any ground;”

7. The reason given for this change in ambit by the Lord Chancellor at Committee stage⁵ was:

“I cannot accept that access to legal services should be enjoyed without any discrimination if that were to preclude, for example, distinctions based on the comparative strength of cases. But of course I can readily accept the principle that access should be enjoyed without discrimination on, for example, grounds of race, gender or disability.”

8. Though it is obviously desirable that some of the existing anti-discrimination legislation be extended in its application to the provision of legal services, the amendment as adopted fails to reflect either the full anti-discrimination requirements laid down by domestic law (as currently in force) or those laid down by the HRA. Unlike the Lord Chancellor’s statement in the House, the current version of clause 1(2)(b) even fails to extend the application of all domestic non-discrimination legislation to this field by missing out reference to discrimination on grounds of sex (Sex Discrimination Act 1975) and race (Race Relations Act 1976).
9. Applying the standards laid down by the Convention and the HRA the original amendment proposed by Lord Lloyd of Berwick was the only version of this clause that truly reflected the requirements of non-discrimination imposed by those

³ *ibid* para. 26

⁴ House of Lords, *Hansard*, 19 January 1999, col. 475

⁵ House of Lords, *Hansard*, 19 January 1999, col. 484

instruments. Under Article 14 of the Convention *inter alia* the rights guaranteed by Article 6 of the Convention:

“... shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

This provision effectively prohibits “discrimination on any ground”, as the long list of grounds given therein is by way of example only (“such as”) and the last ground listed (“other status”) is open ended.

10. Under the HRA, the Legal Services Commission will be under an obligation not “to act in a way which is incompatible with a Convention right”⁶, such as the right to non-discrimination under Article 14. The limitation in clause 1(2)(b) to discrimination on grounds of disability at the very least introduces an unwelcome and unnecessary element of uncertainty into the relationship between that provision and section 6(1) and (2) of the HRA (read in conjunction with Article 14): the question is: is clause 1(2)(b) meant to provide something over and above what is provided by Article 14 or does it merely restate, in relation to disability, the obligations under Article 14?

11. At this point it is important to note that the concerns of the Lord Chancellor in respect of the effect of the originally proposed clause 1(2)(b) on the merits test do

⁶ HRA, section 6(1)

not accord with the requirements of the Convention or the jurisprudence of the Court. In criminal cases, Article 6(3)(c) makes the obligation to provide legal aid expressly subject to the requirement that “the interests of justice” require such legal assistance. There may therefore be some room, though, in light of the nature of the likely sanctions arising out of criminal trials, very limited, for a merits test. In Benham v United Kingdom⁷, the Court was faced with the question “whether the interests of justice required that B be provided with free legal representation”⁸ (in the context of a hearing for committal to prison for non-payment of Community charge). The Court held that:

“In answering this question, regard must be had to the severity of the penalty at stake and the complexity of the case.

The Court agrees with the Commission that where deprivation of liberty is at stake, the interests of justice in principle call for legal representation. In this case, B faced a maximum term of three months’ imprisonment.

Furthermore, the law which the magistrates had to apply was not straightforward.”⁹

Any restriction on the merits test in this context, however, arises not out of the application of a requirement of non-discrimination but out of the nature of the proceedings themselves: the individual seeking assistance is generally not the person who initiated the proceedings; quite frequently, s/he has no choice but to defend the proceedings, and the penalties imposed as a result of criminal proceedings are frequently of such severity that Article 6(3)(c) alone will require that legal assistance be provided.

⁷ (1996) 22 EHRR 293

12. In the context of civil proceedings, the Court has always made clear that the requirement for the provision of legal aid is much less strict than that under Article 6(3)(c)¹⁰. However, though the Commission has repeatedly held that the refusal of legal aid because there was no “reasonable prospect of success” does “not normally constitute a denial of access to court unless it could be shown that the decision of the administrative authority was arbitrary.”¹¹, the Court, in its recent judgment in Aerts v Belgium¹² held that:

“It was not for the Legal Aid Board to assess the proposed appeal’s prospect of success; it is for the Court of Cassation to determine the issue”.¹³

On that basis the Court, unanimously found a violation of Article 6(1), in the context of civil proceedings before the Cour de Cassation, in which legal representation was compulsory. The Convention does not, therefore, allow for a merits test carried out by the Legal Services Commission to completely deny the applicant access to the court in question (through compulsory legal representation). In relation to the second Airey test (i.e. complexity of the issues or the procedure), the Commission’s approach, however, appears to remain valid as the individual can have the prospects of success assessed by a court (in person), at least in

⁸ *ibid.* para. 60

⁹ *ibid.* paras. 60 to 62

¹⁰ see Application No. 9444/81 v United Kingdom (1984) 6 EHRR 136: “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”

¹¹ Appl. No. 8158/78 X v United Kingdom (1980) 21 D&R 95

¹² judgment of 30 July 1998

¹³ *ibid.* para. 60

proceedings for judicial review. This is also the approach currently taken by domestic law, where the courts have held that the merits test to be applied by the Legal Aid Board is identical to that of the High Court judge on an application for leave to move for judicial review¹⁴. Once leave to move for judicial review has been granted, the merits test for legal aid purposes should be fulfilled.

13. However, as with a merits test in the context of criminal law, the limitations on the permissibility of a merits test arises not out of the operation of the non-discrimination requirement but out of the operation of Article 6 itself. The conclusion that any such merits test would not be undermined by the application of Article 14 is further strengthened by the fact that Article 14, just as any other non-discrimination provision, bases itself on a comparison between analogous situations; as the benefit sought here is legal assistance in the presentation of one's case, in order to be analogous the merits between the chosen comparators would have to be equivalent.

14. By contrast to its limitation to discrimination on grounds of disability, the current clause 1(2)(b)'s inclusion of discrimination on "account of ... the place in England and Wales where any legal services are sought" provides a welcome clarification and effectively adds another express ground to the list of grounds set out in Article

¹⁴ R v The Legal Aid Board ex parte Hughes (1992) 24 HLR 698

14; place of residence can clearly constitute a basis for discrimination contrary to Article 14: Darby v Sweden¹⁵.

15. Clause 1(2)(c) merely seeks to reiterate some of the other requirements of Article 6(1) of the Convention, namely “a fair ... hearing within a reasonable time”.

Community Legal Service

16. Clause 7(6) together with Schedule 2 to the Bill provide a list of “services” which the Commission “may not fund” as part of the Community Legal Service. The list in Schedule 2 excludes from funding *inter alia* the bringing or defending of

- a) proceedings for negligence (other than clinical negligence) where the damage is to property or the person;
- b) proceedings relating to a company or partnership;
- c) proceedings relating to a trust or alleged trust (other than a trust arising from joint ownership or occupation of domestic premises)

as well as

- d) representation before any court or tribunal, **except**
 - i) the ordinary courts,
 - ii) the Employment Appeal Tribunal; and

¹⁵ (1991) 13 EHRR 774

iii) the Mental Health Review Tribunal

17. In relation to such services, the Lord Chancellor “may” direct the Commission to fund such services under specified circumstances or “may” authorise the Commission to fund such services in specified circumstances or, if requested by the Commission, in an individual case (clause 7(8)). This “scheme” reflects to a large extent that currently in operation under the Legal Aid Act 1988. The concerns expressed below are, therefore, concerns which apply equally to the Legal Aid Act 1988 and some of which have led to litigation against the Legal Aid Board and/or the Lord Chancellor or at least to the threat of such litigation. In R v Lord Chancellor's Department and the Legal Aid Board ex parte Bourke (CO/4203/97) the Applicant complained that the refusal to provide her with legal aid for sexual harassment proceedings in the industrial tribunal was contrary to her right to an effective remedy and a fair hearing under EC law and the Convention. The case was dismissed without a finding on this argument because the applicant had, in the course of the Solicitor General's argument before the Divisional Court, received confirmation that her representation would be funded by the Equal Opportunities Commission. The Lord Chief Justice (who heard the case together with Mr Justice Cresswell), in a short judgment¹⁶ dismissing the case, recorded that the case raised a potentially important question which may have required a reference to the European Court of Justice.

¹⁶ judgment of 20 May 1998, unreported

18. In addition to preventing funding for disputes in areas of the law, which in domestic law terms rank amongst the most complex (e.g. negligence, trusts etc.) the Schedule contains two major omissions which, applying the test laid down in Airey, may well bring the Commission, in its operation of the Community Legal Service, into conflict with the requirement for legal assistance under Article 6(1) of the Convention; the omissions are:

- a) tribunals, such as *inter alia* employment tribunals, social security appeal tribunals and social security commissioners, immigration adjudicators and the immigration appeal tribunal (see e.g. ex parte Bourke); and
- b) the European Court of Justice, on an order for reference from any one of those listed in paragraph (a) above; these are excluded from funding on the basis that the hearing before the ECJ constitutes an integral part of the domestic proceedings and therefore are not entitled to separate funding.

19. One aspect of these concerns was discussed during the Committee stage of the House of Lords¹⁷, namely the failure to make allowance for representation before tribunals. As Lord Goodhart stated, when moving amendment no. 100:

“The rejection of a case before any of those tribunals may be devastating to the claimant. It may lead to a loss of livelihood, it may lead to extreme personal hardship, and in an asylum case it may lead to an applicant being returned to a country where he or she will suffer a grave risk to their life.”¹⁸

¹⁷ see House of Lords, *Hansard*, 21 January 1999, col. 713 to 724

¹⁸ *ibid.* col. 713

Lord Archer of Sandwell, the Chairman of the Council of Tribunals, in his intervention in support of the amendment, further stated:

“The citizen is six times more likely to encounter our system of civil justice in a tribunal than in the more traditional courts. ... The law they dispense is often exceedingly complicated and requires a high degree of expertise.”¹⁹

20. Amongst the “exceedingly complicated” areas of law dispensed by such tribunals is the increasing amount of European Community legislation and jurisprudence which influences those areas of the law; by way of example, social security appeal tribunals and commissioners will frequently have to deal with arguments concerning EC Regulation 1408/71 (“On the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community”), which is widely acknowledged as one of the most complicated and complex piece of EC legislation. The majority of EC nationals seeking a resolution of their residence status in the UK are required to argue points of EC free movement law before the Immigration Adjudicator and the IAT, while there is hardly any area of employment law that does not involve a great deal of EC law. However, despite the complexity of the issues and the law involved in such appeals, the individual in question cannot under any circumstances obtain legal aid.

¹⁹ *ibid.* col. 715

21. During the Committee stage in the House of Lords the Lord Chancellor sought to meet this concern by

a) relying on budgetary considerations (an argument expressly rejected by the Court in Airey, where the Court held that legal aid must be provided irrespective of the economic cost): and

b) stating:

“... it would be premature to reach any decision about extending publicly-funded representation in tribunal proceedings before the Government have completed a review, on which they are now embarked, of the extent to which current procedures and other arrangements, including representation, comply with our ECHR and EU obligations and until we have identified the options for ensuring compliance in the future.”²⁰

22. Added to the complexity of the law dealt with by these tribunals (which expresses itself *inter alia* in the increasing number of orders for preliminary reference under Article 177 EC Treaty from tribunals), the individual will have to negotiate the complex procedures before the European Court of Justice, if and when the tribunal seized of his or her case decides to make an order for reference; these involve parties to the proceedings operating in 11 different languages²¹, lengthy written observations submitted simultaneously with all other parties to the proceedings and an oral hearing, at which the Member States and the Commission (and, generally speaking, the other party to the original case) are represented by lawyers

²⁰ *ibid.* col. 720

²¹ any order for preliminary reference registered at the ECJ is notified to all Member States, the Commission and the Council, all of which have a right to intervene and participate in the proceedings before the ECJ

experienced in EC law and ECJ procedure, and which provides the only opportunity to react to all the written observations received by the ECJ.

23. The lack of legal assistance is, therefore, capable of severely undermining the equality of arms between the parties, which is at the very heart of the “fair trial” guarantee under Article 6(1). The most extreme example of this arises in the context of ECJ references arising out of appeals to the Immigration Adjudicator and/or Immigration Appeal Tribunal, where under the existing rules, an appellant is treated as having abandoned his or her appeal once s/he leaves the United Kingdom²²; in order to even represent him or herself before the ECJ, an appellant would be left with the invidious choice between not being represented at all at the hearing in Luxembourg or travelling to the hearing in Luxembourg to be represented in order then to find that s/he may either not be admitted back into the UK²³ or, at least, upon return to have his or her appeal treated as abandoned.

24. Conditional fee arrangements also do not provide an answer to any possible complaint that the appellant did not have a fair hearing, as the ECJ does not make its own order for costs (and would thereby allow the appellant’s lawyers to be paid in case of success) but leaves the issue as to costs to be determined by the domestic tribunal. However, as the Lord Chancellor recognised in the debate

²² section 33(4) Immigration Act 1971

²³ because his or her leave ceased upon leaving the Common Travel Area: section 3(4) Immigration Act 1971

during the Committee stage, in tribunals costs do not follow the event and any payment under a conditional fee arrangement (including uplift) would therefore have to come out of the compensation awarded²⁴. In a large number of cases, however, either the tribunal is not empowered to make awards of compensation (e.g. the Immigration Appeals Authority) or, having won the argument as to the interpretation of EC law in the ECJ, the findings of the tribunal are such that no compensation is awarded (either because declaratory relief or compensation “in kind” (such as reinstatement) was considered sufficient or because the appellant, on the facts of his case, still loses the appeal).

Criminal Defence Service

25. Clause 13(1) of the Bill sets up the Criminal Defence Service “for the purpose of securing that individuals ... have access to such advice, assistance and representation as the interests of justice require.” The language used is very much in line with that used in Article 6(3)(c) of the Convention: “... if he has not sufficient means to pay for legal assistance, to be given if free when the interests of justice so require.”. The term “interests of justice” in this context is the subject of extensive case-law in the Court and Commission. As the Court held in Granger v United Kingdom²⁵:

“The question whether the interests of justice required a grant of legal aid must be determined in the light of the case as a whole. In that respect not only the situation obtaining at the time the decision on the application for legal aid

²⁴ House of Lords, *Hansard*, col. 722

²⁵ (1990) 12 EHRR 469 at para. 46

was handed down but also that obtaining at the time the appeal was heard were material.”

26. The criteria to be applied in this assessment are:

- a) the seriousness of the offence and the severity of the possible sentence: it is clear from the case law that in all cases involving a potential custodial sentence the interests of justice always require that legal representation be provided²⁶;
- b) the complexity of the case;

Furthermore, any prejudice that is likely to be caused by the refusal of legal aid is to be assessed on the basis that “it appears plausible in the particular circumstances” that the lawyer would be of assistance²⁷. As Messrs Harris, O’Boyle and Warbrick point out:

“On this basis, legal aid comes close to being generally required because a lawyer will nearly always, by virtue of his professional expertise, be able to add to the accused’s defence.”²⁸

27. This case-law seems to be reflected in the terms of Schedule 3 to the Bill and particularly paragraph 6 thereof (“Criteria for grant of right”). However, any exercise of the Lord Chancellor’s powers to add new factors or vary the existing ones set out in paragraph 6 (as provided for in paragraph 6(3)) will clearly be

²⁶ Benham v United Kingdom (quoted above) and Quaranta v Switzerland (judgment of 23 April 1991) Series A No 205

²⁷ Articoe v Italy (1981) 3 EHRR 1

²⁸ *The Law of the European Convention on Human Rights*, 1995, p. 263

limited by the above criteria as laid down by the Court and Commission of Human Rights.

28. Clause 15(7) of the Bill entitles the accused who has been granted representation under the Bill to “select any representative or representatives willing to act for him” and where he does so the Commission is under a duty to fund that representation. In principle, this goes beyond the strict requirements of Article 6(3)(c), as interpreted in the early case-law of the Court and Commission. The Commission of Human Rights has stated that the accused’s choice of a lawyer should be respected²⁹, however in the context of legal aid, the accused is, as a matter of Convention law, not entitled to choose the lawyer who represents him on legal aid³⁰. Under clause 15(8) this principle of an accused’s choice of his own representatives may be restricted by regulation. This is again subject to the restriction in by clause 15(9) which prevents those regulations from stipulating that only an employee of the Commission may be selected.

29. Clause 17(1) follows the same approach and creates a broad principle which may later be restricted by regulations. Under clause 17(1) an accused whose representation has been funded “shall not be required to make any payment in respect of the services”. The only exception to this is under clause 17(2) which

²⁹ Commission Opinion in Gaddi v Italy (1982) B61 at p. 25

³⁰ Application No 9728/82 X v United Kingdom (1984) 6 EHRR 345 and Application No. 12152/86 F v Switzerland (1989) 61 D&R 171

provides a power for a trial judge in the Crown Court to make an order requiring him to pay some or all of the costs of the representation (subject to regulations).

30. Again, the Commission has taken a more restrictive approach to this issue. It has stated that there is nothing in Article 6(3)(c) that prevents a Member State from requiring the accused to pay back the costs of any legal aid he has received if he has the necessary means to do so³¹. This was based on the fact that the right under Article 6(3)(c) is “means-tested” while the right to an interpreter under Article 6(3)(e) is expressly described as “free”³². On the basis of Airey it is clear that budgetary constraints cannot prevent effective legal assistance being provided for an accused. The Commission has, however, accepted that the need to ensure cost-effective use of funds may limit the number of consultations between the accused and his lawyer³³.

31. It is important to note again that the Lord Chancellor, in making any regulations under this Bill, will have to do so within the parameters laid down by Article 6(1) and (3)(c) and the HRA. This is particularly important if and when the Lord Chancellor seeks to “balance” the requirements of access to justice and his budget: Article 6 provides a series of minimum requirements which must be maintained

³¹ Appl. No. 13611/88 Croissant v Germany Commission Report of 7 March 1991

³² Luedicke, Belkacem and Koç v Germany 2 EHRR 249

³³ Application No. 9728/82 M v United Kingdom (1983) 36 D&R 155 at 158

irrespective of the financial constraints put upon the Lord Chancellor's Department.

Disclosure of information

32. The Interim Assessment Report rightly states that the provisions of clause 20 concerning restrictions on the disclosure of information and, in particular, the wide exceptions to the principle of non-disclosure provided in clause 20(2) "may raise questions in relation to an individual's right to respect for private life under Article 8.". It should be noted, however, that *prima facie* any issues arising in his context should fall within the protection of the Data Protection Act 1998 (1998 Chapter 29) and, in so far as the issue falls within its remit, the Data Protection Directive 95/46/EC (which, at least in part, was implemented through the 1998 Act).

Conditional Fee Agreements

33. Again, the Interim Assessment Report rightly stated that the introduction of conditional fee agreements raises issues about an individual's access to court and to an effective remedy. As pointed out above, these concerns are the most prominent in areas of the law where no legal aid (assistance) is available and disputes are heard in *fora* in which costs do not follow the event (and the tribunal may not be empowered to make any (substantial) award of damages).

34. Where the system fails to provide an individual with “real and practical” access to court and a fair hearing under Article 6 e.g. because s/he has fallen between the two chairs of Community Legal Service and Conditional Fee Agreements a violation of that provision will occur. It is therefore important that the safeguards set out above are fully in place under the Bill in order to remove these legitimate concerns about the introduction of conditional fee agreements.
35. We hope the above adequately addresses the issues raised in our instructions and in the Initial Assessment Report. Should those instructing us have any further queries arising out of this Joint Opinion or otherwise, they should not hesitate to contact us in Chambers. We, of course, remain ready to assist further if and when required.

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