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INTERNATIONAL OBLIGATIONS AND LEGAL AID

Roger Smith, Director, JUSTICE

Email: rsmith@justice.org.uk Tel: 00 44 20 7762 6412

JUSTICE, 59 Carter Lane, London EC4V 5AQ
Telephone 020 7329 5100 Fax 020 7329 5055 Email admin@justice.org.uk Website www.justice.org.uk

Introduction

1. Over the last 50 years, there has been growing international acceptance of a right to legal representation, provided free for those who are unable to pay for it themselves, as a human right. This has been one source of pressure on states to fund legal aid, particularly those who have been initially reluctant. In some states, such as the United Kingdom, Netherlands or even the USA, internal pressure to expand free representation has actually been more practically important as a motivation – either as the result of the enlightened self-interest of the legal profession, as in England where national legislation was enacted in 1949, or as the result of a political commitment to provide representation, as was the case in the United States during the 1960s and 1970s.
2. Particularly important for states which are members of the Council of Europe is the European Convention on Human Rights. This largely focuses on fair trial rights in relation to criminal cases but Article 6 also covers civil obligations. The European Convention had its origins in the original UN Declaration of Rights. Subsequent UN conventions have also stressed the need for representation, for example in relation to children.

The UN Declaration of Human Rights 1948

3. The Universal Declaration of Human Rights proclaimed by the United Nations in 1948 dealt very broadly with the rights to fair trial and due process. The relevant articles are:
 - (a) Article 10
Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.
 - (b) Article 11.1
Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

International Covenant on Civil and Political Rights

4. These provisions were expanded in the International Covenant on Civil and Political Rights (ICCPR). This states the general principle that 'all persons shall be equal before the courts and tribunals'. Article 14.3 states that:
In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) to be tried without undue delay;
 - (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any cases where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - (e) to examine, or to have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

- (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 - (g) not to be compelled to testify against himself or to confess guilt.
5. Article 14 sets out the following five core rights relevant to criminal legal aid together with a right to an interpreter in appropriate circumstances. The defendant has a right:
- (a) to communicate with his lawyer of his own choice in the preparation of his defence ('communication');
 - (b) to be defended at trial by a lawyer of his choice and to have adequate time for preparation ('defence');
 - (c) to be informed of this right ('information');
 - (d) to be 'assigned' legal representation where 'the interests of justice' require ('the interests of justice' test);
 - (e) to have free legal aid where he does not have the means to pay for it (public subsidy).

There may be other rights, depending on the nature of the legal system of an individual state. For example, the right in Article 14.3 (e) to have witnesses examined would, in the UK, be interpreted to mean that a legal representative of the defence could examine witnesses in the same way as the prosecution. In France, it might well be interpreted differently because the witnesses of both prosecution and defence could be examined by an examining judge.

European Convention on Human Rights

6. The wording of the ICCPR largely follows the European Convention on Human Rights. The Convention has the advantage over the ICCPR that its provisions can be enforced through the European Court of Human Rights in relation to states that are members of the Council of Europe. For such a country, the Convention is, thus, in practice more important than the ICCPR. The Convention is wider than the ICCPR because it is not limited to criminal cases (see below).
7. Article 6.1 states the general principle:
 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
 Article 6.3 largely repeats Article 14.3:
 Everyone charged with a criminal offence has the minimum rights:
- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the preparation of his defence;
 - (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;
 - (d) to examine and have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Representation in criminal cases

8. On the basis of the European caselaw, the following points can be made in expansion of the five rights identified above. The basic principle is that there

should be what has been called 'equality of arms' between the defendant and the state. This has been explained as follows:

'equality of arms' implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.¹

9. **(a) Communication**

The right of communication with a lawyer must be facilitated by the state where the defendant is in custody. Any restrictions on lawyers' visits must be in the public interest, eg of preventing escape or the obstruction of justice, though some restrictions may be reasonable, eg to protect the identity of an informer.²

10. **(b) Defence**

The right of defence applies to pre-trial proceedings; trial; and, subject to certain considerations, appeal against conviction.³ A leading UK textbook on human rights summarises the position of the decided cases in relation to choice as follows:

The general rule is that the accused's choice of lawyer should be respected. However, this is not absolute and is subject to limitations where free legal aid is concerned and where the court appoints defence lawyers. The right is also subject to the regulatory powers of the state, by which it governs qualifications and standards of professional conduct of lawyers. It is permissible for states to restrict the number of lawyers the accused may appoint, as long as the presentation of the defence is not disadvantageous in relation to the prosecution.⁴

11. **(c) Information**

The defendant's right to be informed of his right of legal representation has been most famously litigated in the United States, not under the Convention, but the position is clear.⁵

12. **(d) The Interests of Justice test**

Rulings of the European Court of Human Rights have established that:

The test as to whether provision of legal aid is in the 'interests of justice' is not that the presentation of the defence must have sustained actual prejudice, but whether it appears 'plausible in the particular circumstances' that a lawyer would be of assistance on the facts of the case. The following circumstances are relevant:

- The complexity of the case;
- The contribution that the particular accused could make if he defended himself;
- The seriousness of the offence with which he is charged and the potential sentence involved.⁶

Legislation in England and Wales sets out the following fuller criteria in relation to interests of justice:

- (1) Any question as to whether a right to representation should be granted shall be determined according to the interests of justice.
- (2) In deciding what the interests of justice consist of in relation to any individual, the following factors must be taken into account:

- (a) whether the individual would, if any matter arising in the proceedings is decided against him, be likely to lose his liberty or livelihood or suffer serious damage to his reputation;
- (b) whether the determination of any matter arising in the proceedings may involve consideration of a substantial question of law;
- (c) whether the individual may be unable to understand the proceedings or to state his own case;
- (d) whether the proceedings may involve tracing, interviewing or expert cross-examination of witnesses on behalf of the individual; and
- (e) whether it is in the interests of another person that the individual be represented.⁷

Thus, on the English rules, legal aid should be granted where, for example, it might be in the interests of a witness or victim – for example, in a rape case – that a defendant be represented.

13. (e) Public subsidy

There are no cases that expand on the circumstances to be taken into account when deciding whether a defendant lacks 'sufficient means to pay' for a lawyer. It is acceptable for a state to claw back the cost of legal aid from a defendant who has been found guilty.⁸ This can be done in England and Wales but very little is actually recovered because most defendants do not have any resources.

European Convention: Article 6 and civil rights and obligations

- 14. Article 6 suggests that there is also a right to legal aid in cases involving a 'civil right' or 'civil obligation'. Case-law has confirmed this but the approach has been cautious.⁹ Article 6 requires the provision of a lawyer in civil cases only where 'indispensable for effective access to the court' either because a lawyer is mandatory or there would be severe prejudice because of the 'complexity of the procedure or the case'.¹⁰ States have generally been much slower to develop civil legal aid schemes.

European Charter of Fundamental Rights

- 15. It should be noted that the European Charter of Fundamental Rights and Freedoms contains a provision on legal aid. This is based on the European Convention but makes the right clearer. At the present time, the Charter is not legally binding though the European Commission accepts it.
- 16. Article 47 of the Charter states that:
Everyone is entitled to a fair and public hearing within a reasonable time limit by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Legal aid/representation in other UN conventions

- 17. For the sake of completeness, Appendix 1 contains a number of provisions in other UN conventions which relate to a right to legal aid or representation.

Roger Smith
Director,
JUSTICE,
59 Carter Lane, London EC4V 5AQ
rsmith@justice.org.uk

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¹ *Dombo Beheer BV v Netherlands* (1994) 18 EHRR 213 at para 33.

² *Campbell and Fell v UK* (1984) 7 EHRR 165; *Kurup v Denmark* (1985) 42 DR 287, EcommHR.

³ *S v Switzerland* (1991) 14 EHRR 670; *Quaranta v Switzerland* (1991) Series A No 205; *Monnell and Morris v UK* (1987) 10 EHRR 205.

⁴ Para 11.248 Clayton and Tomlinson *The Law of Human Rights* Oxford, 2000.

⁵ *Miranda v Arizona* 384 U.S. 436 (1966)

⁶ Clayton and Tomlinson, as above, para 11.250.

⁷ Schedule 3, para 5 Access to Justice Act 1999.

⁸ *Croissant v Germany* (1992) 16 EHRR 135.

⁹ *Airey v Ireland* (1979-80) 2 EHRR 305.

¹⁰ As above, para 26.

Appendix 1

Provisions relating to legal aid and representation in UN Conventions

Convention on the Rights of the Child

Article 12

(1) State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 37

State parties shall ensure that:

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 40

1. State Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, State Parties shall, in particular, ensure that:

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interests of the child, in particular, taking account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used.

International Convention on the Elimination of all forms of Racial Discrimination

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice.

Convention Against Torture

Article 4

(1) Each State Party shall ensure that all acts of torture are offences under its criminal law.

Article 7

(3) Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

Framework Convention for Minority Rights

Article 4

1. The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.

Convention Relating to the Status of Refugees

Article 16. Access to Courts

1. All refugees shall have free access to the courts of law on the territory of all Contracting States.

2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*.