

Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Written submission from JUSTICE Scotland

I refer to the above and letter of 13th August 2012 inviting a submission from JUSTICE Scotland on the above Bill.

JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is the British section of the International Commission of Jurists.

Particularly, the views of JUSTICE Scotland are sought upon the compatibility with the European Convention on Human Rights of the requirement of criminal accused to fund, or contribute to the funding of, their legal representation.

JUSTICE Scotland has not, thus far, made any submissions upon the Bill. We note that there have been detailed submissions upon the Scottish Civil Justice Council, which appear, in our view, to highlight the various concerns about appointment to the Council. Given that these matters have been ventilated in full we see little point in rehearsing them. The Committee has been well furnished with views in this regard.

In relation to Part 2 of the Bill - the introduction of significant changes to criminal legal assistance - again we note that the Committee has been furnished with the views of practitioners. We therefore limit our submissions to the area requested.

The particular Convention right at issue will be Article 6. In terms of Article 6(3)(c):

"3. 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 ..."

Successive cases before the Strasbourg Court have pointed up the importance of that right.

In *Poitrinol v France*, Application No. 14032/88, ECtHR, 23rd November 1988, the Court declared:

'Although not absolute the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial.'

This was reiterated in a number of judgements from the Court including *Lala v The Netherlands*, Application No. 14861/89, ECtHR, 22nd September 1994

The Strasbourg Court is not prescriptive as to the manner, and upon the conditions, that such representation should be provided. It affords to States a margin of

appreciation as to how that is carried into effect. The Court would be concerned as to whether an accused's fair trial rights have been compromised.

Similarly, the Court would wish to be satisfied that any rights exercised under the Article 6(3)(c) would be effective rather than illusory. The Court explains that:

“this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive” *Gabrielyan v Armenia*, Application No. 8088/05, ECtHR 10th April 2004

This was a matter of some significance for Scotland even prior to the incorporation of the Convention in domestic law and the ability to invoke it before the Scottish Courts.

In the case of *Shaw & Milne Petrs.*, 1998 SCCR 672, 1999 SLT 215, the Lord Justice General (Rodger) discussed the interplay between the Legal Aid (Scotland) Act 1986 on the one hand, and Article 6 of the European Convention on Human Rights on the other. He discussed with reference to the cases from the Strasbourg Court the importance of the right in question. He recognised that the right was not absolute but pointed up that:

“An accused person's interest in having a fair trial is not simply his own private interest: it is an interest shared by society as a whole and it is one which our system of criminal justice exists to uphold.”

The Lord Justice General continued:

“... even uninstructed by the decisions of the Strasbourg Court, we should have little difficulty in concluding that the availability of legal aid is of fundamental importance in helping our criminal justice system to achieve its objective of ensuring that accused persons have a fair trial. Section 24(1)[of the Legal Aid Scotland Act 1986] points to such a conclusion in this specific context.”

On one view, therefore, the availability of legal aid and the statutory criteria laid down in the Legal Aid (Scotland) Act 1986 are evidence of Scotland meeting its international obligations.

In determining upon an application for legal aid in criminal proceedings the Board must be satisfied that an accused qualifies on financial grounds – “the expenses of the case cannot be met without undue hardship to him or his dependents” - section 24(1)(a) of the 1986 Act. Further, the Board must be satisfied that it is in the interests of justice that the accused be granted legal aid – section 24(1)(b) of the 1986 Act

There appears to be no impediment *per se* under the European Convention on Human Rights to the State asking for a contribution from an accused person to the funding of his representation. What is being suggested is an administrative move in connection with certain forms of legal aid to be dealt with differently by the Board in order that the cost to the public purse be reduced. That reduction is to be met by, in the main, contributions from accused persons.

There are a number of important caveats:

1. The eligibility criteria must not be drawn such as to exclude from the ambit of legal aid those with insufficient means. To do so would mean that the right to State funded representation would be rendered illusory; and
2. The practical effect of the movement between schemes and any eligibility criteria must not be such as to amount to such a significant impediment to the grant of legal aid such that representation is unable to be secured.

The groups representing solicitors have pointed up the formidable administrative difficulties that they will encounter in collecting contributions. It is clear that by directing that contributions must be collected by solicitors it is they who remain exposed in relation to the possibility of non-payment. There is conflicting information about estimated non-payment rates and about the breadth of these across different legal aid types. For Convention purposes, however, the focus must be upon the fairness of the trial. The question therefore to be asked of the Committee, and perhaps by the Committee to those who will attend, is what the effect of these new provisions will be in practice for the conduct of trials.

In the event that contributions go unpaid solicitors will be unpaid. If the consequence of that is that they withdraw from acting and/or legal aid is revoked, suspended or terminated, then an accused person will go without representation. That may amount to unfairness such as to taint the proceedings.

Dealing with the practical situation of a client failing to pay, or failing to maintain payments of contributions, it respectfully appears to us far from clear how that will be dealt with by the Board or the individual solicitor.

The solicitor may take the view, having regard to the sum in question, and the work to be done, that he should continue to act. He may do so having regard to economic factors including not interrupting the solicitor/client relationship with an eye, for example, to future business. In that circumstance, the solicitor ensures, by his taking a view of the matter, that there is no interruption to the criminal process.

The solicitor may, upon non-payment, intimate an intention to withdraw. The situation may improve by payment. It may deteriorate, or may deteriorate after further payments have been made. The solicitor may, following upon a missed payment, or a number of non-payments, cease preparations until the situation is remedied. That hiatus in preparation may well hamper the future expeditious progress of a case.

The solicitor may at some point take the view enough is enough. He has two options:

- a. To withdraw from acting and advise the Board of him ceasing to act and the reasons therefor;
- b. Advise the legal aid board of the position and have them arrive at a decision upon the termination or revocation of legal aid.

In both of these instances one can readily anticipate problems arising.

In the first instance, the accused person may take issue with the factual basis or otherwise of the decision of the solicitor. The applicant's financial circumstances may have altered. He may seek to bring payments up to date. He may not be in a position to do so. He may have an explanation or excuse in respect of the late payment. The solicitor may have to decide whether to accept instructions again. One would expect this to be resolved one way or the other by the solicitor adhering to his decision or reviewing it. If the solicitor withdraws he must advise the Board of the reasons for ceasing to act: Regulation 17(1), Criminal Legal Aid (Scotland) Regulations 1996

In the event that the legal aid board have been advised of the position they will have to reach a view upon termination or revocation of the legal aid certificate. The Board would have to have regard to the various factors enumerated by Regulation 18 of the Criminal Legal Aid (Scotland) Regulations 1996. The applicant has a right of review and at least ought to be afforded an opportunity to make representations. That decision could well be the subject of separate challenge. An accused may petition the *nobile officium*: *Lamont Petr.* 1995 SLT 566. See also, in the civil legal aid context, *Martin v Legal Services Commission* [2007] EWHC 1786 (Admin).

In all of those situations the accused person's right to representation in the continuing legal process will have been thrown into some doubt and potentially confusion.

One can readily imagine the knock on effects:

1. The Court may only be advised of the situation at a procedural or trial diet. It may be prayed in aid as a basis for adjourning a diet. Failure of the accused to furnish the solicitor with contributions, and a delay, in either bringing these up to date, or in resolving precisely what ought to happen, may mean that preparations have been hampered. It may be thought that this is a sound reason for a lack of preparation at a procedural or trial diet such as to justify an adjournment of a diet. If the alternative view is taken a trial may have to proceed with the matter not fully prepared. That may be down to sound reasons or none. The fact that adjournments may be sought on this basis may become known to accused persons.
2. At a procedural or trial diet an agent may, for the first time, intimate his/her intention to withdraw from acting. That leaves an accused unrepresented. He may wish to seek to adjourn the diet. His future chances of securing representation will, however, be seriously impeded. He may find it difficult to secure representation when legal aid has been granted and then revoked or a solicitor withdraws. He may be held liable to pay a contribution, again, to another solicitor. What is the effect of the previous non-payment upon the certificate? In light of his previous failure to pay a solicitor may be wary of receiving instructions.

In those circumstances a difficult situation arises for the presiding judge. As Lord Justice General Rodger observes in *Shaw & Milne*, having secured the benefit of legal aid, satisfying the statutory test:

“... It is not in the interests of justice that he should not have legal aid available to him for his trial and for the preparations for his trial. In concrete terms, the withdrawal of legal aid will mean that [the accused] will require to go to trial without any professional representation against the professional and qualified procurator fiscal”

In determining whether there is a potential violation of Article 6, the presiding Sheriff will undoubtedly have to have regard to the fact that the legal aid board has determined that legal aid should be made available to the accused. That decision would have been arrived at by the Board having regard to the various statutory criteria in determining that it is in the interests of justice. Clearly those factors take into account the wider system of criminal justice in the prosecution of crime by the State with all its resources and qualified personnel. Lord Justice General Rodger recognised this when acknowledging that representation was not simply a private right of an accused but rather, also, a societal right. In all those circumstances, it would be a difficult decision to choose to proceed to trial with an unrepresented accused. That is not to say that representation *per se* is required to ensure the fairness of every trial (*Gayne v Vannet* 2000 JC 51; 1999 SLT 1292; 2000 SCCR 5). As we have pointed out though, the jurisprudence of the Strasbourg court and the 1986 Act underlines the importance of representation.

The SPICE briefing on the Bill seems to have regard solely to the gravity of the case as a situation where difficulties will be encountered. It goes on to narrate that the consultation equated non-representation with a form of waiver, asserting that in a non-payment situation the client “has, in effect, chosen not to have a solicitor”. That is to presuppose that there are no possible explanations or excuses for non-payment other than a choice being made about representation. The matter is not that straightforward. The gravity of the case is not determinative. The statutory criteria have regard, amongst other factors, to the vulnerability of the accused in relation to articulacy, the complexities of the case and the sentencing powers of the judge.

Conclusion

In all the circumstances, we do not think that the proposed alterations to the legal aid regime are bound to amount to a violation of the Convention.

However, in the practical day-to-day operation of the Courts, it is not difficult to see that problematic situations will arise. The potential for a finding of a violation of Article 6, and the steps taken to avoid that scenario, may well result in disruption to the operation of the Courts, further delays in trials proceeding with all of the concomitant increase in inconvenience, expense and inefficiency that ensues therefrom.

We hope this is of some assistance to the Committee and are in a position to assist if further information is required

Tony Kelly
Chair, Scottish Executive Committee
12 September 2012