LEGAL AID IN EUROPE

1. THE BACKGROUND

The aim must surely be to make the provision of legal aid freely available across the EU for those who really need it in the criminal courts.

The day to day reality is that the words enshrined in Article 6(3)(c) of the ECHR are a symbolic gesture disguising a lamentable failure of delivery in practice.

2. The causes for this failure in the provision of legal aid in criminal cases in Europe have been much commented upon, and frequently, in detailed Articles and papers by member of the ECBA over many years. This short paper is the precursor of a broader review of what can be done to improve the delivery and the availability of legal aid to the criminal courts of the EU.

We have set out a suggested Code of Practice for lawyers "at the sharp end" of legal practice at the police stations and criminal courts across the EU. It is an uncontroversial document based on the present case-law of the European Court of Human Rights. For this reason there should be no need for any delay in the adoption of a code like this by the Council of Ministers and the member states of the EU.

3. The Right set out in Article 6(3)(c) is valueless if it cannot be exercised because the person involved in a police investigation cannot afford to pay for a lawyer, or there is no legal aid. Only in very few member states is legal aid available for a lawyer to be present right from the start of the investigation stage and during the whole of the investigation.

Indeed the trend, even in the UK, is to reduce the funds available and the occasions on which legal aid is used in criminal cases.

4. Throughout the EU there has been a move within the inquisitorial tradition to move crime investigation away from the more costly judicial enquiry, towards police investigations supervised by the public prosecutor. This increased delegation to the police has serious implications for the prosecution of those who become engaged in the criminal process whether as persons being investigated, as suspects, or as defendants. Many member states have not revised their laws and procedures to ensure that the person being investigated has rights which start to operate (as in the UK) right at the beginning of the investigation. It is at this point that the need for a lawyer arises. It is at the beginning, when a person is identified and detained by the police for investigation, that the right to legal advice and assistance is needed, supported, where necessary, by a fair and adequate legal aid system.

5. In some respects it has to be said that the problem is not only the absence of an adequate legal aid system throughout Europe, but that many member states lack proper procedural safeguards.

If "equality of arms" is to have any meaning the citizen should not be left alone with the police, the Judge, or other investigators at the most critical time in the development of the case and the evidence within it. From a UK perspective leaving a person alone like this without a lawyer is not a problem of the absence of legal aid, but the failure to apply the rights of the defence at the right time at the start of the police investigation. No amount of legal aid will compensate for the absence of a proper structure of criminal procedure safeguards.

6. **THE CODE**

Pursuant to Article 6(3)(c) of the European Convention on Human Rights legal aid shall be granted in criminal investigations and proceedings in the following circumstances:

I EUROPEAN WARRANTS:

(a) where the person is facing extradition under the fast-track cross-border procedure of the European Arrest Warrant. Legal Aid shall be granted for the proceedings in the Requested member state, and also for all proceedings thereafter in the Requesting member state;

(b) where the person is facing proceedings under the European Evidence Warrant Procedure.

II CRIMINAL PROCEDURE:

(a) where legal aid will ensure the tangible benefit of an effective access to a Court;

(b) to guarantee, not rights that are theoretical or illusory, but rights that are practical and effective;

(c) where there are complicated points of law;

(d) where a review of complex expert evidence is required;
(AIREY v IRELAND 1979-80 2 EHRR 305)

(e) where intricate personal relationships or the highly emotive nature of the evidence requires careful examination;
(PC&S v UK 2002 35 EHRR 1075)

(f) where effective representation can only be achieved by the active participation of a lawyer. The mere "nomination" of a lawyer is unacceptable;
(ARTICO v ITALY 1981 3 EFRR 1)

(g) where, without legal aid, the person will be deprived of the opportunity to develop legal arguments, or will be unable to make a useful contribution to the examination of the legal issues arising;
(PAKELLI v GERMANY 1984 6 EHRR 1)

(h) even where the case may not be particularly complex, without a lawyer the person would be unable competently to address the court and thus defend himself effectively. Account must be taken of the nature of the proceedings, the wide powers of the Court, the importance of the issues at stake, and the severity of the sentence;
(MAXWELL v UK 19995 19 EHRR 97)

(j) in pre-trial proceedings where the fairness of the trial may be prejudiced by the failure to comply with the provisions of Article 6, the accused should be allowed to benefit from the assistance of a lawyer at the initial stages of police interrogation;
MAGEE V UK 2001 31 EHRR 35)

(k) to ensure the person has a genuine and effective enjoyment of his Article 6 right, and that the state is obliged to offer the person a realistic chance of defending himself throughout the entire trial;
(RD v POLAND 2004 39 EHRR 11)

(l) where in a difficult or sensitive situation it is or becomes necessary to attack a Judge in the exercise of his discretion, or for an unfair or biased act, the legal skill and experience of a lawyer will be required.
(BONER v UK 1995 19 EHRR 246)

III HUMAN RIGHTS TREATY MONITORING BODIES AND INTERNATIONAL COURTS:

(a) for the preliminary stages of the proceedings by the member state;

(b) after the admissibility of the complaint has been accepted, by the Court or International Monitoring Bodies.

IV **APPEAL HEARINGS:**

(a) to ensure fairness in proceedings, so that the party must be able to participate effectively (see paragraph 46);
(BOBROWSKI v POLAND17 JUNE 2008; ECHR APPLICATION 64916/01)

(b) to ensure fairness and equality of arms. Even where the person had failed explicitly to request legal aid representation for his Appeal, the Judicial Authorities were required to appoint a lawyer to ensure he received the effective benefit of his rights;
(ARKADIY ANATOLIEVICH SAULEPOV V RUSSIA
26 JUNE 2008; APPLICATION 00015435/03)

(c) where there is a reasonable likelihood of success.
(MONNELL and MORRIS v UK 1988 10 EHRR 205)

V **PRISON HEARINGS:**

(a) where the offence is criminal in the eyes of the Convention;

(b) where the offence made the prisoner liable to a sanction which, by its nature and degree of severity, belongs in general to the criminal sphere.
(EZEH and CONNORS v UK 2004 30 EHRR 1)

7. **CONCLUSION:**

The reason for a Code on Legal Aid is to improve the availability of legal aid to those who need it. In the UK there are Codes of Practice which derive their authority from Acts of Parliament. Codes are used to test the admissibility or the reliability of the evidence given by police officers or other witnesses. They are not law themselves, but a Code for legal aid can be used as a yardstick to test the validity of the decisions made by the Courts or Agencies that distribute legal aid.

We desperately need a Code so that EU Courts can not only have a Guide as to what is good practice but they can begin to develop an EU-wide system and case law based on good practice.

With such a Code the Strasbourg Court Judgments would take on an enhanced value.

ECHR decisions are only at present dealing with the Convention Rights on the broadest terms, and they are further weakened by the concept of proportionality and the "margin of appreciation" generally afforded to States by the European Court of Human Rights in implementing ECHR Rights.

The ability to test the decisions to grant or refuse legal aid against a Code of Practice would make the task of the European Court at Strasbourg easier, it would enrich the case law, whilst at the same time it would lead to a reduction in the number of cases going to Strasbourg because national courts would have a more robust standard required by the Code.

It would also strengthen the Rights set out in Article 6. The Right to legal aid set out in Article 6(3)(c) would then become a "living instrument" to be interpreted in the light of present day conditions, and not the "dead duck" it is seen as by many today.

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