

Commission Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings

4 April 2014

Introduction

The CCBE has examined the Commission Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings. The CCBE has the following comments to make:

CCBE comments on the Introductory comments

5. The term lawyer in this recommendation refers to any person who in accordance with national law is qualified and entitled, including by means of accreditation by an authorised body, to provide legal advice and assistance to suspects or accused persons.

We need to be cautious with this definition as it may not solely include persons who are entitled to plead before courts. For instance, in the United Kingdom there are “agents” who are not legally qualified.

7. We welcome the broad statement of principle “*suspects or accused persons and requested persons who lack sufficient financial resources to meet some or all of the costs of the defence and the proceedings should have access to legal aid, insofar as such aid is required in the interests of justice*”.

8. We welcome the restatement of the Strasbourg principle “*that a person should not have to prove beyond reasonable doubt that they have insufficient financial means.*”

9. We welcome the statement of principle that, when deprivation of liberty is at stake, the justice test should, in principle be considered to be fulfilled.

11. “*Given the legal professions independence, the conduct of the defence is essentially a matter between the suspect or accused or requested person, and their representative*”. In order to ensure a high professional standard of legal assistance that ensures a fair trial, Member States should establish effective assistance for general quality assurance of legal aid lawyers. To this end Member States should put in place accreditation schemes for legal aid lawyers. In any event, Member States should ensure that action is taken if a failure in the legal assistance is manifest or is sufficiently brought to the Member State’s attention.”

In general, we welcome any proposal that requires persons who are publicly funded to provide defence are of an objectively high calibre. This does not prevent an individual of private means selecting a lawyer of their absolute choice whether competent or not, but

does at least ensure that those in receipt of public funds have manifested a competence and commitment in the practise of criminal law.

13. *“Given the importance of confidence between lawyer and client the relevant competent authority should as far as possible have regard to the preference and wishes of the suspect or accused person in the choice of his legal aid lawyer”.* The CCBE notes that it has been recognised in the case law of the European Court of Human Rights that they may override those wishes where there are relevant and sufficient grounds for holding this as necessary in the interests of justice. With this in mind, this is a balanced statement of the issue and we welcome it.

17. *“Within 48 months after notification of this recommendation, the Commission should assess if any further action, including legislative measures, is needed in order to ensure that the objectives of this recommendation are fully met.”*

We are disappointed that an important constituent element of the procedural safeguards package which was firstly severed from Measure C to become C2, then dropped to below the level of a Directive to a Recommendation, is now not to be reviewed for a further four years after the recommendation is adopted.

Comments on the Recommendations

2. We welcome the fact that the right to legal aid applies from the time a person is first suspected.

3. *“Member States should take appropriate measures to ensure that suspects or accused persons and requested persons are entitled to receive effective legal aid to ensure the right to a fair trial in accordance with this Recommendation.”*

We welcome this expression as concentrating on the quality of the representation that is to be provided rather than simply on the fact of nominal or token representation.

4. *“Suspects or accused persons and requested persons should, as a minimum, be granted legal aid if they lack sufficient financial resources to meet some or all of the costs of the defence and the proceedings as a result of their economic situation (means test) and/or when such aid is required in the interests of justice (merits test).”*

We do not believe it fair that an accused person is required to pay some of the costs of their defence. That might in effect become a deterrent to seeking legal aid at all depending on the scale of the contribution.

An alternative way of looking at this possibility however is that persons who might otherwise appear to be automatically excluded from legal aid could at least be legally aided after a particular level of expenditure has been incurred.

5. We welcome the fact that a person who is denied legal aid, or the legal aid lawyer provided to them is providing insufficient legal assistance, should have an opportunity to complain. The complaint process however is very vaguely addressed.

6. We welcome that the means test is to be examined on the basis of all objective factors, and that a child should not be denied legal aid because of the assets of their parent.

7. Similarly the entire household asset should not be taken into account where the household are not in harmony.

9. Again on the basis that this potentially would extend legal aid to persons who might at first analysis appear to have substantial means is to be welcomed.

11. We welcome the fact that all relevant circumstances are to be considered in the merits test.

12. We welcome that where a custodial sentence is a possible penalty, or where legal assistance is mandatory, the granting of legal aid should be considered to be in the interests of justice.

14. We welcome the statement that decisions on legal aid should be made promptly by an independent competent authority within a time frame that allows suspects or accused persons and requested persons to effectively and concretely prepare their defence.

15. We welcome the possibility of a review of a refusal.

16. We welcome the necessity to give reasons for a refusal in writing.

17. *"Legal assistance provided under a legal aid scheme should be of high quality in order to ensure the fairness of proceedings. To this end systems to ensure the quality of legal aid lawyers should be in place in all Member States".*

and

18. *"Mechanisms should be in place that allows the competent authorities to replace legal aid lawyers or require them to fulfil their obligations if those lawyers fail to provide adequate legal assistance."*

In principle, we welcome anything that tends to promote best practise. There is a danger however that this recommendation might be seen as creating a mechanism whereby the prosecution as represented by the State as a competent authority, might seek to remove lawyers against the wish of the accused on the basis that they are failing to provide adequate legal assistance. The initiative for a replacement should always come from the accused, but potentially be subject to approval by a court to avoid abuse such as repeat changes of representation to compromise the efficient conduct of the prosecution.

19. *"A system of accreditation for legal aid lawyers should be put in place and maintained in each Member State."*

In principle, we welcome this although it may cause some difficulty for national delegations if it is perceived as promoting a claim of specialisation which is not acceptable to them in their system.

24. *"The preference and wishes of the suspects or accused persons and requested persons should as far as possible be taken into account by the national legal aid systems in the choice of the legal aid lawyer".*

This is an important principle which we welcome.

25. *"The legal aid system should endeavour to ensure continuity in legal representation by the same lawyer, if a suspect or accused or requested person so wishes."*

Internationally there have been legal aid delivery models which have fallen short of this ideal. In Australia, for instance, one lawyer would handle the pre-committal phase and another lawyer the trial phase. Unfortunately, poor communication between the two lawyers meant that there were significant periods of additional time spent in custody by clients whose existence was utterly unknown to their trial lawyer.

26. *"Transparent and accountable mechanisms should be put in place to ensure that suspects or accused persons and requested persons can make an informed choice on legal assistance under the legal aid scheme free from undue influence."*

This is an important statement of principle which we support. There are repeated complaints from practitioners that suspects are directed to "pet" defence lawyers by the police and feel obliged to follow their recommendation.

Significant sanctions should be put in place in the event that any State representative is engaged in a practise of applying undue influence to a party in need of representation.