

PRESENTATION

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at the CCBE Seminar “The Legal Profession in Europe:
Access to Justice/The Lawyer and the State

Chisinau, 21 October 2005

Dear Ladies and Gentlemen,

Thank you very much for inviting the Council of Europe at this very important event. I am pleased and honoured to have an opportunity of addressing you at this Seminar, which happens to take place immediately after the Council of Europe expert meeting on legal aid in Moldova, organised in co-operation with the Ministry of Justice.

The work of my Department includes organisation of co-operation activities with the member states on legal aid matters. During those a little more than three years that I work in the Council I could witness just how complex the setting up of a comprehensive system of legal aid is in the countries that do not have such a system on the one hand and how resource-demanding it is to maintain it at appropriate level in countries where such system is already in place on the other hand.

There must be a good reason beyond all these efforts. And there is – providing fair and equal access to justice as one of the ways how states should protect the most precious value of every individual – human dignity.

The present Seminar mainly focuses on access to justice as seen from a very insightful prospect of lawyers. This insight has proved to be is very useful as lawyers always provide valuable feedback on the steps taken by the governments within their immediate or neighbouring domains of lawyers’ activities.

In the Council of Europe perspective access to justice is of course not limited to legal aid only, but also presumes co-operation of all stakeholders with a view to increasing the independence of the judiciary, strengthening of legal professions that are involved in the delivery of justice such as judges, lawyers, bailiffs and others and improving the quality of services provided by these professions.

The intergovernmental work within the Council of Europe was always very intensive in this direction, especially since the expansion of the Council of Europe Eastwards. The Council continues playing its role as a standard-setting

organisation in Europe and another very important recent result of it is the publication by the European Commission on the Efficiency of Justice (CEPEJ) of the "Report on European judicial systems 2002" that was published after its presentation to the Committee of Ministers on 19 January 2005.

This document was prepared on the basis of the replies to the questionnaire sent to the Council of Europe by 40 member states. It is a European first: no such exercise had ever been conducted in the justice field. It contains precise and argued information, grasping the main developments, identifying problems and suggesting to implement reforms aimed at making the justice system more efficient.

As regards legal aid in particular the starting point of the Council of Europe's co-operation with its member states is that the setting up of coordinated and coherent legal aid systems is the legal obligation of the states that have signed and ratified the European Convention on Human Rights (the Convention).

The standard of one's access to the right to a fair trial developed through the case-law of the European Court of Human Rights (the Court). There are a few clear tests that the Court established through a few decades of its case-law.

The notion of the "interests of justice"

Under Article 6 paragraph 3 (c) of the ECHR, two conditions must be met for legal assistance to be given freely to enable those charged with criminal offences to defend themselves: those concerned must lack sufficient means to pay for their lawyer and legal assistance must be required in the "interests of justice".

In contrast to the other clauses of Article 6 paragraph 3 of this article does not grant an absolute right: it only provides for legal assistance to be provided free if the individual concerned has insufficient means to pay for a lawyer.

In deciding whether the "interests of justice" call for free legal aid to be provided, the Convention organs leave contracting parties wide discretion and are only prepared to censure arbitrary refusals to provide such assistance¹.

A range of criteria is used to establish whether in any particular case the "interests of justice" call for a lawyer to be appointed.

Quite a while ago, in the year 1967, the Commission decided² that free assistance from a lawyer could be refused if the case was not particularly complex, from either

¹ Commission, 7 October 1967, application no 3104/67, Digest vol 2, p 855.

a legal or a factual standpoint, or if the prosecution related to minor offences. Accused persons' skills and their ability to defend themselves also had to be taken into account.

More recently, the European Court of Human Rights has made clear use of an approach based on a range of indicators.

In the Quaranta case³, the Court stated that "in order to determine whether the 'interests of justice' required that the applicant receive free legal assistance, the Court will have regard to various criteria".

The judges then considered the following criteria:

- the seriousness of the offence and the severity of the potential sentence;
- the complexity of the case;
- the personal situation of the accused.

The case of defective legal aid

In the Artico case⁴, the applicant had obtained free legal aid but, given the lack of sufficient time to defend him, the lawyer appointed had advised him to use the services of a colleague. The applicant had made pressing representations to the official lawyer and the Italian Court of Cassation, but none of these measures had born fruit.

The Court found that two courses had been open to the authorities under the Convention: either replace the recalcitrant lawyer or cause him to fulfil his obligations. In choosing a third course – remaining passive – they were in breach of paragraph 3 (c) of Article 6.

In the Goddi case⁵, as a result of being in prison the applicant had been unable to appear before the Italian Court of Appeal, which had increased the sentence handed down at first instance. The applicant's lawyer, who had not been informed of the date of the hearing, had not appeared either.

² Commission, 3 April 1967, application no 2703/66, Digest vol 2, p 854.

³ Eur. Court H.R., Quaranta judgment of 24 May 1991, Series A no 205, p 17

⁴ Eur. Court H.R., Artico judgment of 13 May 1980, Series A no 37

⁵ Eur. Court H.R., Goddi judgment of 9 April 1984, Series A no 76

While the Court of Appeal did appoint another official lawyer on the spot, it did not defer the proceedings or suspend the hearing for a sufficiently long period to enable the officially appointed lawyer to familiarise himself with the case. In the absence of positive measures to enable the applicant to defend himself properly, there was a breach of Article 6 paragraph 3 (c).

The Court has also ruled that to find a violation of Article 6 paragraph 3 (c) it is not necessary first to establish that the failure to provide assistance actually harmed the defendant's interests⁶.

Furthermore, in the Daud⁷ case the Court established violation of Article 6 paragraph 1 in conjunction with paragraph 3 (c) of the Convention due to the failure to provide the accused with “practical and effective defence”.

The lawyers provided by the authorities through legal aid system did not practically ensure proper representation of the person before the criminal tribunal and hence infringed one of the particular aspects of the right to a fair trial.

While recognizing that a state cannot be held responsible for every shortcoming on the part of the lawyer appointed for legal aid purposes, the Court took the view that in the instant case the circumstances of the case required action from the part of relevant authorities.

Legal Aid in non-criminal cases

The obligation of States to provide free of charge legal aid in non-criminal cases is not so clear though. In one of the landmark cases related to legal aid in non-criminal matter – the Airey⁸ case, Court found Ireland in violation of Article 6 (1). In this case an Irish lady had been trying to obtain a decree of judicial separation from her husband, but was unable to do so, as long as the Irish legal aid system did not provide legal assistance in such matters and the lady herself was not in a financial position to meet the costs involved. Hence she claimed that there had been violation of Article 6 paragraph 1 of the Convention, by reason of the fact that her right of access to a court was effectively denied.

True it is though that the Convention's only express provision on free legal aid, Article 6 paragraph 3 (c), relates solely to criminal proceedings and is itself

⁶ Eur. Court H.R., Alimena judgment of 19 February 1991, Series A no 195-D; Artico judgment, op cit.

⁷ Eur. Court H.R., Daud judgement of 21 April 1998.

⁸ Eur. Court H.R., Airey judgement of 11 September 1979.

subject to limitations, the Court took the view that there are certain circumstances when “fulfilment of a duty under the Convention... necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive...”

Holding that there has been a violation of Article 6 paragraph 1, the Court thereby noted that “it would be erroneous to generalize the conclusion that the possibility to appear in person before the High Court does not provide... with an effective right of access; that conclusion does not hold good for all cases concerning "civil rights and obligations" or for everyone involved therein.”

Ultimately, the Court states that in every single case the obligation of the state to ensure provision of free of charge legal aid should be determined on the particular circumstances.

As you all know, the Court only intervenes where there is a specific application made to it, alleging violation of the rights asserted in the Convention. So far most of such applications were made in connection with the Article 6 of the Convention, providing everyone with the right to a fair trial.

In order to respond to this situation possibly before the Court finds a particular state in violation of Article 6 due to the absence of a legal aid system the Council of Europe developed an effective co-operation with member states that so requested, which enables to share the experience of other European states with well established legal aid systems and include introduction of interim measures and pilot projects.

This co-operation, which is going on for about three years now with Moldovan authorities, encompasses active interaction with local and international organisations. It might soon lead to the adoption of separate legislation on legal aid in this member state, which we are very much looking forward to.

There are a number of Recommendations and Resolutions that have been adopted in relation to the provision of legal aid and access to justice by the Committee of Ministers of the Council of Europe throughout the years, which provide clear guidelines for the governments of its member States. I won't enumerate them now, but those interested can find them on the Council of Europe website.

Thank you very much again for your attention.