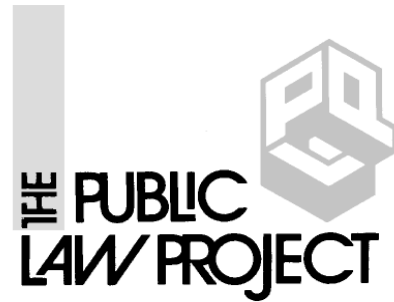


Commissioners & Representation

By Conrad Haley, Project Solicitor, PLP
Published in LAG



Introduction

In a speech in November last year (1), David Locke the Lord Chancellor's PPS, outlined the Government's criticisms to the then Legal Aid scheme. One such criticism was that:

"Too many types of dispute are covered and the legal help outside litigation, for debt and welfare or benefit problems, is far too limited. Legal Aid was devised when most disputes were settled through the court. It has not kept pace with the determination of case outside the court system – and tribunals. You can get legal aid for tripping over a pavement but not for a race or sex discrimination case. If we were starting to design a system from scratch this is not a judgment we would have made."

He went on to say that "rights" could be a route out of social exclusion and that the Community Legal Service "can be a real measure of the Government's commitment to tackle social exclusion".

Curiously, he appeared to focus on areas of law which were both outside the scope of Legal Aid and where the Lord Chancellor had been challenged in respect of his refusal to bring them within scope. These cases concerned appeals before social security tribunals and Commissioners, and sex discrimination claims before the employment tribunal.

The problem lay with the provisions of the Legal Aid Act 1988. Schedule 2 provided an exhaustive list of proceedings for which public money was made available for representation. This meant that persons could be denied effective access to courts and tribunals involving other forms of proceedings, (such as those before the Social Security Commissioners), because they did not have the means to pay for skilled representation.

Two cases had sought to challenge this state of affairs, with the arguments being framed in European Community Law, which allowed the applicants to plead the European Convention on Human Rights.

EC Law and fundamental rights.

Article 220 of the Treaty of Rome requires the European Court of Justice to “ensure that in the interpretation and application of this Treaty the law is observed”. This has enabled the Court to develop general principles of Community Law, such as proportionality, legal certainty and legitimate expectation, equality and fundamental rights. Article 230 provides for the judicial review of Community legislation, and provides the grounds upon which the Court can annul any provision of Community Law. These include the infringement of “any rule of law”, an expression wide enough to encompass the general principles of Community Law. Thus they are used in a similar way to *Wednesbury* principles in a domestic judicial review setting.

The Court has explicitly recognised the European Convention on Human Rights as a source of fundamental rights (2), and that such principles may be binding on a Member State in cases where they exercise powers granted by the Community (3). Thus the Court has the power to examine the compatibility of any domestic measures which fall within the scope of Community Law, with the general principles of law it has developed.

In the cases of *CPAG* (4), and *Bourke* (5), the applicants sought to rely on various directly effective provisions of European Community Law, in the social security and employment contexts respectively, which allowed them to seek the assistance of the concept of fundamental rights developed by the European Court of Justice. They argued that the Lord Chancellor’s refusal to exercise his powers under section 14 of the Legal Aid Act 1988 engaged Article 6. These powers enabled him to extend the categories of proceedings for which representation was available so as to include appeals before Social Security Tribunals and Commissioners, and before Employment Tribunals.

Leave was granted in both cases but neither went to a full trial, with the applicant in the first case having failed in satellite litigation to obtain an order to protect it’s costs position (6), and the applicant in the second case having been offered funding by the Equal Opportunities Commission.

Article 6.

Article 6, in so far as it concerns civil proceedings, reads as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...”

The leading case involving publicly funded litigation is *Airey –v- Ireland* (7), a case concerning a woman seeking a judicial separation in Ireland. The court recognised that Mrs. Airey would be at a disadvantage if her husband was represented by a lawyer and she was not. She herself could not secure representation because of the cost. Quite apart

from this, the court felt that she would not be able to conduct her own case because of the nature of the litigation. This was on account of:

- Complexity of procedure
- Complexity of law
- A need to establish facts by using experts and by examination and cross examination
- A need for the type of objectivity that a lawyer brings

The overriding principle was whether she could, in the absence of a lawyer, present her case properly and satisfactorily. The fact that she was not prevented from litigating in person was not of itself enough – the Convention was:

“intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective”.

Thus, the Court went on to say that Article 6:

“may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory...or by reason of the complexity of the procedure or of the case.”

The other interesting part of the judgement concerns the court’s reaction to the Irish government’s plea that she had “nothing to gain” from the legal remedy she sought. It said that the remedy was “provided for by Irish law, and, as such, it should be available to anyone who satisfies the conditions prescribed thereby. It is for the individual to select which legal remedy to pursue...”

A shift in position?

Following the abortive attempts at Judicial Review, the Child Poverty Action Group made further attempts to persuade the Lord Chancellor to place social security tribunals and commissioners within scope. Mr. David Locke MP, his Parliamentary Secretary responded by repeating earlier refusals, but referring to section 4 of the 1988 Act which he said allowed the Lord Chancellor to “direct that help be given *where it would not otherwise be available*”. Indeed, by March 2000, this “power” had been exercised on no less than 3 occasions:

- The families of the victims in the Marchioness disaster for their costs in the second inquest
- A retrospective grant to permit the use of a QC in the first trial under the War Crimes Act

- A grant for the relatives' representation at the inquest into the death of Diarmuid O'Neill, a terrorist suspect.

Section 4 was said to provide the basis for such powers, and the Lord Chancellor also developed non-exhaustive criteria as to when the power might be exercised:

- Whether issues of law or fact are likely to arise that would be unusually complex in that particular type of hearing
- Any evidential difficulties
- Whether the means of the applicant mean that he or she would qualify for legal aid in an ordinary civil case, and whether there is a sufficiently good case on the merits to justify public funds to support the case
- Whether the applicant needs representation in order to take part effectively in the hearing
- Whether there is a good prospect that, in the absence of legal aid, the applicant could get representation from another source, and the nature of that representation (whether professional, or otherwise expert), and
- The level of representation of other parties in the hearing.

The new Act

Shortly before the coming into force of the Access to Justice Act 1999, the Public Law Project entered into negotiation with the Lord Chancellor in order to obtain funding for representation in respect of two clients who had oral hearings before the Social Security Commissioner. The cases involved difficult questions of both domestic and EC Law, and in all the circumstances, appeared to fall four square within the "Airey" test. The aim was to bring another case to show that the exclusion of such cases from the scope of Legal Aid was unlawful, and/or to explore the nature of the LCD guidelines. This was particularly pertinent given the terms of the new Act, and the Lord Chancellor's Directions made under it, as well as the terms of the new funding code and guidance.

The Act similarly excludes advocacy before tribunals, (including Social Security Commissioners), from its scope by virtue of paragraph 2 of Schedule 2. However, it appears to provide a stronger basis for making grants of representation outside of the normal scope by virtue of S6 (8):

The Lord Chancellor-

- (a) *may by direction require the Commission to fund the provision of any services specified in Schedule 2 in circumstances specified in the direction, and*
- (b) *may authorise the Commission to fund the provision of any of those services in specified circumstances or, if the Commission request him to do so, in an individual case.*

The section therefore empowers the Lord Chancellor to bring certain matters within scope generally, under certain circumstances, or in relation to certain individuals. The Lord Chancellors directions provide an indication as to the type of cases he would consider suitable for the grant, and these are contained within the Legal Services Commission Funding Code (7). There is no provision for the extension of scope to Tribunals, except in individual cases. He has issued guidance in relation to such cases, and this is reproduced in the Code (8). He is prepared to consider authorising “funding for advocacy before a tribunal, inquest or public inquiry” where:

- (a) the client is financially eligible for funded representation
- (b) the case passes all the relevant criteria in the General Funding Code; and either involves a significant wider public interest or has overwhelming importance ... to the client (or clients) seeking funding; and
- (c) there is convincing evidence that, given the procedures and other arrangements in the court or tribunal concerned, legal representation was the only adequate way of establishing the facts and presenting the case; and that no alternative means of funding that representation was available;

so that taking these factors together, and having regard to our obligations under the European Convention on Human Rights, it was essential to provide public funding for representation in order to serve the interests of justice.

He goes on to give the circumstances of the second Marchioness inquest as a good example of the type of case he has in mind.

Representation before the Commissioners

The Public Law Project threatened litigation, (with a Funding Certificate granted to issue judicial review proceedings), on Airey principles. Put simply, this means that without legal representation, the clients would not enjoy effective access to the court. Such an approach involves a consideration of the client’s rights under Article 6 of the Convention to publicly funded representation, in the light of their own circumstances. If there appears to be such a right, the Lord Chancellor’s guidelines are irrelevant. A “Marchioness” type case is surely putting the threshold far too high.

The facts, if anything, seemed to strengthen the case - the appellants were effectively litigating against the State, (not another private individual as in Airey), which is invariably legally represented by solicitors from the Department, and sometimes by Leading Counsel, English was neither appellants’ first language, and issues of law were to be debated, not simply domestic law, but European Law, and the interaction between them.

Eventually, the first case settled without the need for a hearing, and perhaps unsurprisingly, the Lord Chancellor granted representation under his S6 (8)(b) powers in the other. Thus, the first ever publicly funded Commissioner's appeal hearing took place with the appellant represented by counsel.

Conclusion.

So where does this leave the scope provisions in the Access to Justice Act? From the 2nd of October, litigants, or potential litigants will be able to rely directly upon Article 6 in all cases involving matters outside of the scope of CLS funding, not simply those relating to the enforcement of EC rights. Applications will now be made directly to the CLS head office for passing on to the LCD (9). There is no formal machinery in place for so doing, still less any appeal rights for those refused. There is also a potential conflict of interest for the Lord Chancellor, in considering applications from individuals seeking to challenge decisions made by other government ministers, particularly the Secretary of State for Social Security, in cases before the Social Security Commissioners.

Nevertheless, it should be remembered that the right of access to the court is not absolute, each State having a "margin of appreciation" allowing them to regulate such access. Any such restrictions must pursue a legitimate aim and use means that are proportionate to achieving that aim. It remains to be seen what restrictions will be seen by the court as acceptable.

Cases that do involve EC rights will continue to be, arguably, a more important source of legal challenge (10), given that the remedies offered are much more effective than those within the Human Rights Act, (contrast for example, the provisions allowing the courts to make declarations of incompatibility under the 1998 Act (11), with their powers to disapply domestic primary legislation which conflicts with EC Law (12)).

It is probable that the Lord Chancellor will agree to direct grants of funding to appellants before Social Security Commissioners in "Airey" type cases, but it is to be hoped that such appeals at least are brought into scope, on account of their complexity and importance to the client. It is a source of frustration that the government's stated commitment to tackle social exclusion through the enabling of people's rights through the legal system has not been put into practice. Even having had an opportunity to "design a system from scratch", tribunals remain outside of scope, except in "exceptional circumstances".

Finally, although this article has focused on social security adjudication, the principles are transferable to any branch of law for which publicly funded representation is not currently available.

References.

1. Speech by David Locke MP 26th November 1999 to Legal Service Regional Conference, Newcastle upon Tyne.
2. Rutili - Case 36/75 (1975) ECR 1219
3. Supra
4. R -v- Lord Chancellor ex parte CPAG 11th April 1997 (unreported)
5. R -v- Lord Chancellor & The Legal Aid Board ex parte Bourke 20th May 1998 (unreported)
6. R -v- Lord Chancellor ex parte CPAG 1998 2 All ER 755
7. Airey -v- Ireland 9th October 1979, Series A, No 32 (1979-80) 2 EHRR 305
8. 3C-018
9. 3C-019
10. See "Using Human Rights Law through European Community Law" Maria Demetriou EHRLR 1999 5.
11. Section 4 Human Rights Act 1998
12. R -v- Employment Secretary ex parte EOC 1995 1 AC 1