

## **Newsletter n° 13/2010**

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## **Editorial**

### **President Griss**

*At this moment, when my colleagues - presidents of the supreme judicial courts of the European Union - have placed their trust in me for the next two years, I am only too aware of the scale of the task before me. Through the momentum provided in 2004 by First President Guy Canivet (France), maintained and developed by Lord Phillips, President of the Supreme Court of the United Kingdom, and Mr. Torben Melchior, President of the Supreme Court of Denmark, our Network, with EU financial backing, has successfully laid down the bases of a necessary cooperation and effectively promoted exchanges and collaboration between our supreme courts. Our discussions during the most recent General Assembly in Dublin on the future strategy of the Network show how essential it is to pursue and amplify what has already been started and to ensure that the work done is built upon.*

*This Newsletter publishes a summary analysis of the various approaches to legal aid in the EU countries, a comparative study compiled on the basis of the replies received from the supreme courts by the Legal Aid Office of the French Cour de cassation. The next issue of our Newsletter will be devoted to the Colloquium held by our Network in Dublin on 19 March 2010 on the practical aspects of the independence of justice.*

*The Presidents of the Supreme Judicial Courts of the European Union (Dublin, March 2010)*

## **New Members of the Board of the Network (2010-2012)**

At its meeting in Dublin on 19 March 2010, the Network's General Assembly unanimously elected the Members of its Board, which is now chaired by Ms Irmgard Griss, Präsidentin des Obersten Gerichtshofes (Austria) and consists of the following Vice-Presidents: Ms Pauline Koskelo, President of the Supreme Court of Finland, Mr. Vincent Lamanda, First President of the French Cour de cassation, Mr. Klaus Tolksdorf, Präsident des Bundesgerichtshofes (Germany), who also serves as Treasurer, Mssrs John L. Murray, Chief Justice of Ireland, Vincenzo Carbone, First President of the Corte Suprema di Cassazione (Italy), Ghislain Londers, First President of the Belgian Cour de cassation, Lasar Gruev, President of the Supreme Court of Bulgaria, Vincent A. De Gaetano, President of the Constitutional Court and of the Court of Appeal of Malta and Geert Corstens, President of the Supreme Court of the Netherlands. The General Secretary is Mr. Dominique Hascher (France).

# Legal aid and appeals to the Supreme Courts of the European Union

The following main points are covered by the replies: the criterion of financial means, which is the basic *raison d'être* of legal aid, the other conditions laid down for obtaining legal aid, exclusions regardless of the conditions relating to financial means, the body empowered to assess whether the conditions have been met, the choice of lawyer engaged to represent or assist the litigant and the number of applications for legal aid accepted or rejected. This type of aid is sometimes called judicial aid or judicial assistance, and sometimes legal aid. It is the latter term which was most often used in the replies.

## I - The criterion of financial means:

It is generally accepted that, where it is a legal obligation, the cost of engaging a lawyer to assist or represent the litigant without adequate means may be met by the State. The appointment of a lawyer paid for by the State may even be considered when access to the court of appeal is free, in criminal cases for instance.

Inadequate means may be assessed on the basis of official scales updated every year, such as in France. Other criteria are also used. In Poland for example, legal aid is granted if the cost of the proceedings contemplated would jeopardise the family's survival. Another example is the Netherlands where, when professional interests are at stake, legal aid is only granted if the applicant's continued activity is dependent on receiving it.

Sometimes, as in Romania, the total cost of legal aid is covered. In other countries, it may be covered either in whole or in part, in the latter case the applicant having to contribute to the lawyer's fees. In Ireland, a maximum contribution of 50 euros is even required, probably to make applicants aware of their responsibilities. Also, in that country, the damages awarded to the recipient of legal aid are paid to the Legal Aid Board, an independent body which administers the legal aid and which pays them out to the recipient after deducting the sums paid in lawyer's fees.

## II - Assessing the merits of legal aid applications:

In this respect, how rigorous the assessment made by the decision-making authority is varies from country to country.

In the Netherlands, Portugal and Romania, litigants' means appear to be the only condition considered. The same applies, in criminal cases, to Italy and the Czech Republic.

In Austria, Bulgaria, Greece, Italy, Luxembourg and Norway, the assessment process is fairly cursory, the appeals contemplated only needing to be not manifestly inadmissible, unfounded, improper, unreasonable, unjustified, ill-intentioned or lacking any chance of success, the terms used varying from country to country. It is particularly lenient in Norway when the welfare and interest of a child are at stake or in cases of immediate hospitalisation for mental illness, the appointment of a guardian or restraint.

In other States, controls are stricter. Appeals must have strong, reasonable or serious chances of success in Belgium, Denmark, Germany, Hungary, Lithuania and Slovenia, and Ireland for civil cases, it being noted that, in Ireland, as in Norway, applications are looked upon more favourably when the interest of a child is concerned. In Sweden, there must be a substantive defect in the lower court's decision. In France, the legal aid office only grants aid if it detects a serious ground of appeal against the decision of the appellate court owing to the breach of a procedural or substantive rule. This requirement, after first being condemned by the European Court of Human Rights (30 July 1998, *Aerts v. Belgium* 61/1997/845/1051), was recognised as legitimate and reasonable by the same Court under Article 6-1 of the Convention (26 February 2002, *Essaadi v. France*, Application No. 49384/99 and *Del Sol v. France*, Application No. 46800/99). In Poland, lawyers have an important screening role in that they can turn down their appointment after studying the case file.

In Ireland and the Czech Republic, the assessment varies depending on whether the case is a civil or criminal one. In the Czech Republic, a reasonable chance of success is only required in civil cases. The same is true in Ireland, where

appeals against decisions of the criminal court are only admitted if a point of law of exceptional public interest is involved and if it is in the public interest to settle it; in such cases, legal aid is granted by the supreme court solely on the basis of the means criterion. In other criminal cases, an appellate court must have found that, in view of the seriousness of the charge or of exceptional circumstances, it is essential, in the interests of justice, for the applicant to be granted legal aid.

The most restrictive system is that in the United Kingdom. But this would appear rather to be a reflection of the concept of the role of the supreme court in that country, with no special treatment for legal aid. As for all litigants, the appeal must first have been found admissible, either by the supreme court, or by the appellate court whose decision is being challenged, the criterion of admissibility for consideration is that it should be a matter of public interest raising a legal question which may give rise to debate. The appeal must also be justified as regards the time spent on the proceedings and their cost. Subject to these conditions, the appeal contemplated must have a reasonable chance of success.

### **III - Exclusions:**

Legal aid is excluded, regardless of the applicants' financial situation, either in certain circumstances or for certain categories of dispute.

For example, legal aid is not possible when the applicant is guaranteed against the risk of a claim by an insurance contract as in France, or Denmark, where this is often the case. In Luxembourg, legal aid may not be granted to persons having the use of a private vehicle and who are involved in a dispute over such use.

As regards the categories of dispute for which legal aid is not provided, they may be commercial or fiscal disputes (Bulgaria), slander or libel cases, cases involving land or electoral disputes (Ireland), questions of tax evasion or credit transfer (Italy), professional disputes (Luxembourg), or road traffic violations and appeals against decisions entailing only fines (Norway).

In certain European Union countries, legal aid is not granted when what it would cost the public purse is greater than the pecuniary interest at stake, unless, as in some cases, a matter of principle is at issue (Bulgaria, Denmark, Lithuania, Luxembourg, Netherlands and United Kingdom). It may also be declined when the applicant is deemed able to defend their own case (Poland, Lithuania).

### **IV - Who makes the decision to grant or decline legal aid?**

Here the replies vary greatly from country to country. The body making the decision may be either a specialised department within the supreme court, or that court itself, or indeed some part of it, or a public body outside the supreme court, or the court whose judgment or decision are disputed, or, lastly, the Bar association.

Only Belgium and France have introduced legal aid offices particular to their supreme courts. In Belgium, this is the legal aid office of the *Cour de cassation* or, in emergencies, the first president of that Court, who assesses whether there is a serious chance of success, after consulting the lawyer designated for this purpose by the *bâtonnier* (president of the Bar). The office consists of three *conseillers* (justices) of the Court, who rule in the presence of an advocate general or registrar. In France, the legal aid office in the *Cour de cassation* is made up of honorary (retired) justices of the *Cour de cassation*, of assistant judges practising in that Court, of specialised lawyers from that Court, practising or honorary, of a senior registrar, vice-president, of representatives of the Ministries of Finance and Social Affairs, and of consumers' representatives. Its decisions may be appealed against before the first president.

In other States the decision is made either by the supreme court itself, as in Bulgaria and, apparently, Sweden, or by organs of that court, which may be its president, as in Greece, its divisional presidents as in certain cases in Poland, the bench which would be competent to hear the case, such as in the German Federal Court of Justice, or the judge appointed to examine the appeal on a point of law, as in Norway.

Far more numerous are countries where decisions are taken by public bodies outside the supreme courts and which rule

for all courts: the Ministry of Justice in Denmark, whose decisions may be challenged, an administrative committee presided over by a judge, with jurisdiction for all courts in the Czech Republic, the Legal Aid Board in Ireland, an independent body which administers legal aid for legal proceedings before all courts, a legal aid office, having jurisdiction over all courts in the Netherlands, a legal aid department in the office of justice in the *département* where the litigant has filed their application, as in Hungary, regional legal aid departments in Lithuania, a legal aid department of the court in whose district the applicant resides, as in Slovenia, with the possibility of appeals before administrative commissions or tribunals.

In some countries, legal aid is granted or declined by the actual court whose decision is the subject of appeal. This is the case in Austria (the judge him or herself or, in the case of a collective decision, the president of the court), or, as in Italy and also it would seem in the Netherlands, for criminal cases. In Poland, it may also be the appellate court whose decision is challenged.

Lastly, the lawyers themselves are given the power to decide on applications for legal aid, either in general, for all disputes as in Luxembourg, where the decision is made by the *bâtonnier* (president of the Bar) or his deputy, or only for criminal cases as in Italy, where this task is entrusted to the Bar.

## **V - The selection of lawyers to assist the applicant:**

On the question of who chooses the lawyer to represent or assist a person granted legal aid, the replies are also very varied.

They fall into four categories: the choice is made by the courts, or by external public bodies, or by the lawyers? professional body, or lastly by the actual recipient of legal aid.

In Sweden, the task of selecting the lawyer falls to the Supreme Court. In Germany, the lawyer is chosen by the Federal Court of Justice from among the specialised lawyers of that court. In Denmark, the Supreme Court appoints a lawyer from a list drawn up by the Ministry of Justice. In Greece, it is also the supreme court which makes the appointment, but in the absence of a specialised bar, apparently, the legal aid lawyers must be on lists drawn up and updated monthly by the local legal aid offices. In Ireland, for criminal cases at least, this task falls to the court whose decision has been challenged. The same would appear to be the case in the Netherlands for this type of case.

Belgium and, in part, Ireland, as well as Lithuania and the Czech Republic may be placed in the second category. In the first of these countries, the lawyer is chosen by the legal aid office at the *Cour de cassation* and, in an emergency, by the first president of that Court, after consulting a lawyer designated by the *bâtonnier* (President of the Bar of the Court). In Ireland, where civil cases are concerned, it appears to be the Legal Aid Board which appoints solicitors from among those it employs and, for family and right of asylum matters, from among those who have concluded an agreement with it. In Lithuania, it is the regional legal aid departments which make the selection. In the Czech Republic, this task is assigned to a committee set up for this purpose and presided over by a judge.

In many countries, this power is delegated to the professional bodies and is the case in Austria (Austrian Lawyers' Association), Bulgaria (Bar councils which appoint lawyers on the national legal aid register), in France (the Bar of the *Conseil d'Etat* and the *Cour de cassation*), in Luxembourg (the *bâtonnier* of the Bar or his deputy) and in Poland, Portugal and in Romania.

The choices of the applicants themselves receive substantial consideration in the legal systems just mentioned. And they are the rule in the other systems, though remain limited or monitored. In the United Kingdom, the lawyer is chosen by the legal aid applicant from among the solicitors? offices having concluded an agreement with the Legal Services Commission, funded by the Ministry of Justice. In Hungary, the applicant must keep strictly to the registers kept by the justice departments and, in Italy, to the list of lawyers permitted by the Bar to provide legal aid. Applicants appear to enjoy the greatest freedom of all in Norway, where the Supreme Court confines itself to fixing the fees payable to the chosen lawyer on the basis of a tariff established by the State. In the Netherlands, in civil cases, only when the

applicant fails to choose a lawyer or, alternatively, on a proposal by the senior member of the Bar, does the legal aid office appoint a lawyer. The system in Slovenia is somewhat similar: the lawyer is chosen by the litigant; where none is chosen, a lawyer whose name is on a list drawn up by the regional Bar is appointed by the legal aid service; if that lawyer declines the appointment, they must give reasons and the legal aid service assesses the reasons given after consulting the national chamber of attorneys.

In conclusion, it is interesting to note that in Ireland, if the applicant does not accept the solicitor or barrister appointed, they may make a further application to the Legal Aid Board, but, in that case, they may be invited to pay the difference in cost as between the lawyer originally appointed and the one ultimately chosen if the latter's fees are higher.

## **VI - Acceptance rates:**

Only eight supreme courts out of the 21 which replied to the questionnaire were able to provide statistics on the percentage of applications accepted.

In 2008, 23 percent of legal aid applications for proceedings before the supreme courts in France were successful, with 33% in Belgium, 37% in Germany, 56% in Slovenia, 70% in Austria, between 80 and 85 percent of civil cases in Ireland (100% in criminal cases), 89% in Hungary and 90% of civil cases in Italy (86% of criminal cases).

## **Election of a new Juge at the European Court of Human Rights**

On 22 June 2010, Chief Justice Vincent A. De Gaetano, President of the Constitutional Court and of the Court of Appeal of Malta, was elected to sit on the European Court of Human Rights.

## **Launch of the first release of the e-Justice portal**

On 16 July 2010, the European Commission will launch the first release of the e-Justice portal which is an important step that will actively contribute to the development of a genuine European online justice.

The address of this site is: <https://e-justice.europa.eu> [1]

Attached file:

[Newsletter n° 13/2010.pdf](#)[2]

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