Improveing defence rights in Europe: Commission Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings.

Introduction

Fair Trials International has long campaigned for effective defence rights across the EU. In November 2009, the European Union adopted the groundbreaking ‘Roadmap’ on procedural defence rights. This gave a mandate for a series of laws designed to ensure stronger protection of fair trial rights, which are not adequately protected in many EU countries.

On 27 November 2013, the European Commission published a package of five new measures to establish minimum fair trial standards across the EU. This included a Commission Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings. The Recommendation was published alongside the Proposed Directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings. However, the Recommendation has a broader scope and sets out a significantly more detailed guidance for Member States on the protection of the right to legal aid. Member States should inform the Commission on the measures taken to give effect to the Recommendation by November 2016.

Why is this Recommendation needed?

The Recommendation is closely linked to Directive 2013/48/EU on the Right of Access to a Lawyer in the sense that any suspect or accused person who is unable to afford legal representation will only be able to enjoy their rights under the Directive if a corresponding right to legal aid is guaranteed. In fact, the aim was to “reinforce the right to legal aid for suspects or accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [...] in order to complement and render effective the right of access to a lawyer as set out in Directive”.

Our experience demonstrates that during the early stages of the criminal proceedings, suspects and accused persons are particularly susceptible to being coerced into giving confessions and into waiving their rights without understanding the consequences. Therefore, the support of an experienced legal representative, who can provide legal advice and support in the exercise of defence right, is imperative to ensure the fairness of the proceedings and the effective enjoyment of fair trial rights. However, despite the right to legal aid being embedded in the legal systems of all Member States, standards in the provision of legal aid during criminal proceeding vary greatly across the EU.

POLAND:
Access to a legal aid lawyer will not usually occur until first appearance in court (up to 48 hours after arrest). The suspect would have therefore been deprived of legal representation during the initial police questioning, without necessarily having knowledge of their right to silence and right to not incriminate themselves. In addition, because legal aid lawyers receive flat rate payments, such work is usually undertaken by trainees with very little experience of the criminal justice system.
Fair Trials has documented cases in which suspects and defendants a) are not guaranteed that a state-funded lawyer attends the preliminary interrogation at the police station; b) legal aid lawyers are provided but then the defendants are obliged to repay legal aid fees if found guilty; c) legal aid lawyers are very poorly paid which has a negative impact on the quality of the defence; d) suspects are not allowed to choose their legal aid lawyer and must accept whoever is appointed; e) police-appointed lawyers lack independence.

Despite the urgency to legislate in this respect, the Commission chose not to deal with legal aid in the Directive on the right of access to a lawyer, but to adopt a separate proposed Directive on the right to Legal Aid and accompany it with a non-binding Recommendation on the same subject matter. Whilst the content of the proposed Directive had to undergo further discussions, the Recommendation was adopted with immediate effect for the purpose of setting out a minimum level of convergence in the determination of eligibility of legal aid and of encouraging steps that bolster the quality and effectiveness of legal aid services consistently throughout all Member States.

**Key elements of the Recommendation**

1. **Scope:** In light of the Directive on the Right of Access to a Lawyer, the Recommendation states that any suspect or accused person shall have access to legal aid services from the time they are suspected of having committed a criminal offence. It should apply until the end of the proceedings, which includes sentencing and the resolution of any appeal.

2. **Definition of Legal Aid:** In Recital 6, the Recommendation describes Legal Aid as funding and assistance from the Member State in question, directed to cover the cost of the defence and the proceedings for suspects or accused persons in criminal proceedings and for requested persons in European Arrest Warrant proceedings.

3. **The right to Legal Aid:** In Section 2, the Recommendation states that Member States should take all the necessary steps to guarantee access to effective legal aid for suspects, accused and request persons.

4. **Eligibility:** At the very least, suspect, accused or requested persons should be granted legal aid if they cannot afford to cover some or all the cost of the defence and the proceedings and/or when the provision of financial support is required in the interest of justice. In addition, information on the application process, eligibility criteria and appeal mechanisms should be made easily accessible and understandable to all suspects, accused and requested persons.

   a) **Means test:** The evaluation of the applicants financial situation should include due consideration of objective factors such as the income, capital, family situation, standard of living and the cost of the defence lawyer, as well as all other relevant circumstances. Notwithstanding, in line with the jurisprudence of the European Court of Human Rights, the Recommendation holds that suspects or accused person should not have to prove that they lack sufficient financial resources beyond reasonable doubt.

   b) **Merits test:** In order to determine whether the provision of legal aid is required in the interest of justice, a number of factors should be assessed, including the complexity of the case, the social and personal situation of the applicant, the seriousness of the offence and 

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**Case study**

Alan Hickey was wanted under an EAW to serve trial in Belgium, while he was serving a prison sentence in France for people-trafficking. He was given little information about the charges in Belgium. He was extradited to Belgium, where the court found his extradition breached double jeopardy rules. This procedure and court cost could have been avoided with effective dual representation.
the severity of the potential penalty that can be incurred, inter alia. In any event, the granting of legal aid should be considered to be in the interest of justice in the case of deprivation of liberty as well as in other situations where legal assistance is mandatory.

c) **Cost recovery:** Where legal aid is granted on the basis of the merits test, the cost of legal aid can be recovered in the event of a final conviction, provided that the person has sufficient resources at the time of the recovery.

5. **Decisions on legal aid applications:** Decisions on the granting of legal aid should be made by an independent competent authority in sufficient time to allow suspects, accused and requested persons to effectively prepare their defence and present their case in a concrete and effective way. When applications are rejected in full or in part, appropriate reasoning should be given in writing and applicant should have the right to have the decisions reviewed.

6. **Effectiveness and quality of legal aid:**
   
a) **Quality of legal assistance:** In Section 3, the Recommendation establishes the duty of Member States to put systems in place to ensure the quality of the legal assistance to a high standard, as well as other mechanisms whereby authorities can replace legal aid lawyers that fail to provide adequate legal assistance. To this end, States should develop a system of accreditation for legal aid lawyers.
   
b) **Training:** States are also encouraged to ensure that defence lawyers and any other relevant authority involved in the decision-making on legal aid in criminal proceedings receive appropriate training in order to ensure the high quality of the services. It further encourages States to subject the accreditation of legal aid lawyers to the obligation of undergoing professional trainings in this respect.
   
c) **Appointment of legal aid lawyer:** In the making of the decision, the competent authorities should consider the preferences and wishes of the applicant in the choice of the legal aid lawyer to the extent possible.

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**HUNGARY:**

Legal aid practitioners are appointed and funded by the police. In some police stations the same lawyer will be appointed in up to 70% of all cases of mandatory legal presentation. These lawyers may not be properly independent, as the police provide a major part of their income; nevertheless, the suspect must accept the appointed lawyer.

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**BULGARIA & DENMARK:**

If the defendant is found guilty of the crime, under state-funded legal aid representation, he or she must repay legal costs as determined by the trial judge.