

Administration of Justice and Legal Services Panel

Hong Kong Bar Admission's Submission on the Provision of Legal Services

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1. This paper has been written as a result of a request contained in Paragraph ~~14~~ of the minutes of the Panel held on 27th October 2003.
 2. There are two issues arising:
 - Whether the refusal of the Director of Legal Aid (DLA) to grant legal aid on grounds of means to a person charged with a serious criminal offence and who was unable to meet the costs of his defence would contravene the BORO, taking into consideration the Administration's response set out in its letter to the Panel
 - What were the principles which should be adopted in considering the issue of financial eligibility limit for legal aid services, and how the limit should be set to give effect to the right of access to justice.

ISSUE ONE:

- The DLA's position, as stated in the letter to the Panel, is that the refusal to grant legal aid on grounds of means to a person charged with a serious criminal offence would not contravene the BORO, given that there is an in-built mechanism to enable the DLA to exercise his discretion to grant legal aid under Rule 15(2) where it is in the "interests of justice" to do so, and given the guidance provided by the Court in R v Fu Yan Criminal Appeal No. 490 of 1991 and in R v Mirchandani (Criminal Appeal No. 350 of 1990).
- Were the DLA to refuse to grant legal aid to a person charged with a serious criminal offence who was unable to meet the costs of his defence *only* because the financial resources of the person exceeds the prescribed upper financial limit, without considering whether or not there are merits in his defence and whether or not it is in the interests of justice to grant him legal aid, this seems to contravene Article 11 section 2(d) of the BORO.

The section provides:

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality—

...to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.”

- Article 11 therefore requires that if an applicant for legal aid does not have sufficient means to pay for legal assistance, then legal assistance *shall* be provided to him if it is in the interests of justice to do so.
- Under the current regime, the DLA can waive the financial eligibility limit of a legal aid applicant under Rule 15(2) of the LACCR. The rule says that the “Director *may*, if he is satisfied that it is desirable in the interests of justice, grant a legal aid certificate or an appeal aid certificate to an applicant notwithstanding that on an assessment under paragraph (1) he determines that the applicant’s financial resources, in the case of legal aid to which section 5 of the Legal Aid Ordinance (Cap 91) applies, exceed the amount specified in that section.
- A decision made under this rule refusing legal aid may be in contravention of Article 112(d) of the BORO which provides that legal assistance *shall* (not *may*) be provided to an applicant who does not have sufficient means to pay for it where the interest of justice requires so. The rule should be changed to ensure that it is consistent with Article 11.
- Another question is how to determine whether or not an applicant has “sufficient means” to pay for the legal assistance as stipulated by Article 112(d) BOR. If the applicant’s financial resources are above the eligibility limit, does it mean that the applicant has “sufficient means” to pay for the legal assistance? Not necessarily so. There are situations where an applicant’s financial resources may be above the financial eligibility limit but he is still unable to afford the cost of legal assistance in certain cases.
- A better approach is to get rid of an absolute financial eligibility restriction in respect of funding for legal representation in criminal cases, but allow for a gradation of eligibility restriction, enabling the DLA to require contributions towards the cost of higher court criminal representation such is reasonable in all the circumstances of the case.

- In England, financial eligibility testing for criminal representation was effectively abolished in April 2001, although a judge there can require contributions towards the cost of higher court representation if such is reasonable in all the circumstances of the case.

ISSUE TWO

Principles which should be adopted in considering the issues of financial eligibility limit for legal aid services

Fine tuning of the financial eligibility requirement—there should be a gradation of the eligibility requirement instead of a clear-cut upper financial limit to tailor the needs of middle class litigants who, due to the high legal fee involved, cannot afford to litigate to the extent that was needed to obtain justice in the case. The existing broad brush of setting a financial eligibility limit for applications across the board should therefore be reviewed. For example, if the financial resources of the applicant exceed the current limit of HK\$169,700, he/she should still be able to benefit from the legal aid scheme although he/she may have to pay a higher contribution to the case. The paramount consideration is whether justice of the case requires legal aid to be granted

Whether or not legal aid should be granted in a particular case should also depend on the following principles:

Proportionality – the means used must be reasonably proportionate to the aim sought to be achieved. The eligibility limit should be pitched at a level which realistically reflects the financial viability to engage in litigation, i.e. whether or not it is worth fighting the case with its implication of legal costs, considering the financial benefit one can potentially obtain from the case. It is also crucial that the eligibility limit ensures that the aided person will obtain non-pecuniary benefits from the proceedings if property is not at stake.

In criminal cases, the seriousness of the offence with which the accused is charged and the potential sentence involved—the need for legal aid (for legal advice and representation) normally increases with the complexity and length of the case as well as seriousness of the offence and the potential sentence involved.

Complexity and length of cases--the need for legal aid may also depend on the complexity and length of the case.

Fundamental rights – whether or not the applicant’s rights under the Basic Law (which incorporates the ICCPR as applied to Hong Kong) have been allegedly infringed upon should have a significant bearing on his/her eligibility for legal aid.

Prioritizing types of cases depending on the individual and public importance of the case—the individual, social and political importance of different types of cases, and individual cases within types, differ widely from each other. Funding should depend on whether cases are sufficiently important, whether to the person concerned or to the broader public, to justify the expenditure of public funds. The defence of criminal cases, civil cases where a person’s life or liberty is at stake, along with certain proceedings which involve domestic violence, care of children social welfare or abuse of power by a public body, should be classified as “high priority” cases for the grant of legal aid.

Fixed budget for the most expensive cases should be instituted to avoid an astronomical sum being spent on a particular case which involves a hugely disproportionate amount of legal aid expenditure.

Date prepared: 28th November 2003