

SCREENING CHAPTER 23 – PROCEDURAL SAFEGUARDS

2. Right to a fair trial

- *Legal Aid in civil, commercial and administrative matters*

- Legal Aid is a fundamental right recognised by the Council of Europe
 - Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) provides that everyone is entitled to a fair hearing.
 - It specifies that anyone charged with a criminal offence has the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.
 - This provision relates to criminal matters but the article has been interpreted as requiring legal aid to be granted to indigent persons in civil cases, when the interests of justice so require (see *Airey v. Ireland* A32-1979).
 - According to the jurisprudence of the Strasbourg Court, Article 6 does not give an absolute right to legal aid in all civil cases where the person concerned cannot afford to bring proceedings. Legal aid in civil cases is only required by Article 6
- The Council of Europe has adopted two important **recommendations on legal aid** which establish certain principles for national legal aid schemes.
 - **Resolution 76 (5) on legal aid in civil, commercial and administrative proceedings** and
 - **Resolution 78(8) on Legal Aid and Advice**
- What are the requirements for effective systems of legal aid and legal advice?
 - **Eligibility razione personae**
 - The recommendations require the equal treatment of legal aid applicants irrespective of their nationality
 - Legal aid for proceedings taking place in the territory of a member state of the Council of Europe should be granted not only to nationals but also to all natural persons who have their

habitual residence in that member state and to nationals of any other member state of the Council of Europe.

○ **Substantive eligibility**

- Financial eligibility: All persons should have a right to necessary legal aid, taking into account their financial resources and obligations and the anticipated costs of the proceedings. Legal aid should be available even where a person is able to pay part of the costs of his proceedings; the financial contribution of the assisted person shall not exceed what that person can pay without undo hardship.
- "Merits" of the procedure: The granting of legal aid may be refused if, having regard to the circumstances of the particular case, it would not be reasonable for proceedings to be taken or defended. A decision to grant or refuse legal aid should be subject to review.
- Type of procedure: Legal aid should be available in court proceedings in civil, commercial and administrative. The term administrative matters is to be construed widely, including notably social and fiscal matters.

○ **Scope of legal aid**

- Legal aid should cover all the costs necessarily incurred by the assisted person, in particular lawyers' fees, costs of experts, witnesses and translations. Where legal aid is granted, there should be an exemption from any requirement for security of costs.
- Legal aid should include the assistance of a lawyer, if the person cannot present the case itself due to the complexity of the court proceedings and the law or where legal representation is compulsory. The assisted person should, so far as is practical, be able to freely choose its lawyer. The person appointed should be adequately remunerated for his work.

○ **Stages at which legal aid should be available**

- A person in an economically weak position should also be able to obtain necessary pre-litigation advice in civil, commercial and administrative matters,
- Legal aid should be available for paying the assistance of an advocate at a trial and an exemption or reimbursement from court fees;

- Legal aid should also be available in the course of court proceedings, if the financial situation of the litigant has changed;
 - Legal aid should finally be granted in proceedings for the recognition and enforcement of a foreign judgment.
 - **Information on national aid schemes**
 - The state should bring the provisions of the legal aid system to the attention of the public and other interested parties, particularly those agencies in the state to which potential applicants might turn for help.
- Several **international conventions** facilitate the obtaining of legal aid for proceedings in a country other than the country of one's nationality
 - **1954 Hague Convention on Civil Procedure**
 - *N.B. both, Croatia and Turkey are parties to this convention.*
 - The Convention contains a section on legal aid which requires Contracting States to extend national treatment to nationals of other Contracting States.
 - **1980 Hague Convention on International Access to Justice**
 - *N.B. Croatia is a party to this convention; Turkey has signed but not ratified it.*
 - The Convention requires Contracting States to treat - for the purposes of entitlement to legal aid in court proceedings - nationals of other Contracting States and persons habitually resident in a Contracting State as if they were nationals of and resident in that State. The same principle applies to pre-litigation legal advice provided that the person concerned is present in the State where advice is sought.
 - **1977 Council of Europe European Agreement on the Transmission of Applications for legal aid and its 2001 Additional Protocol**
 - *N.B. Turkey is a party to this agreement and its protocol, Croatia is party to neither.*
 - The declared aim of this agreement is to facilitate the approach by the legal aid applicants.
 - The agreement sets up a system whereby applications for legal aid may be made in one country and sent, via a system of transmitting and central receiving authorities designated for this purpose by each Contracting State, to the Contracting State where legal aid is sought.

- Instead of being required to identify the competent authorities in another State, the legal aid applicant can therefore simply submit a request to the transmitting authority of their own country of residence
- The transmitting authority has to assist applicants in putting together their documents and, where necessary, translating the relevant parts, before forwarding the application to the receiving authority of the Host State
- In principle, the application and any supporting documentation may be established, at the applicant's option, either in the language of the country of the receiving authority, or English or French. Contracting States may, however, enter a reservation removing the option to use English or French and insisting that applications be received in the Host State's own language.

- The agreement is supplemented by a protocol, adopted in 2001, which aims at improving the operation of the agreement, in particular as regards the efficiency in the application of the agreement by the Central Authorities and the communication between lawyers and legal aid applicants.
- Application of the agreement and its protocol is monitored by a multilateral Committee of the Contracting States, which reports to the Committee of Ministers and which inter alia makes suggestions to improvement of the operation of the agreement.