

PE1525/A

The Scottish Human Rights Commission

**Response to the
The Public Petitions Committee**

PE No. 1525

**Public Petitions Clerks
Room T3.40
The Scottish Parliament
Edinburgh
EH99 1SP**

**by email: Public Petitions Committee, Ned Sharratt,
petitions@scottish.parliament.uk**

Dear Ned,

Thank you for your letter regarding public petition PE1525. The Commission invited the Commission's views on the petition and the discussions that took place at that meeting. In particular, the Commission was interested in whether the current provision for legal aid in defamation cases in Scotland is ECHR compliant. In providing this response, the Commission offers its views in relation to the relevant human rights standards and draws some conclusions on defamation cases in Scotland.

Legal Aid and Human Rights Law

Legal aid fulfils a key role in society as the right to a fair and public hearing and of access to a court must be meaningful and practical, not theoretical. Access to legal advice for those with insufficient resources for their right of access to court to be effective is recognised as being implicit in the right of access to justice by both the common lawⁱ and the European Convention on Human Rights (Convention).ⁱⁱ However, **the right to access to a court is not absolute and it may be subject to restrictions, provided that** they do not restrict or reduce the access to a court in such a manner that the very essence of this right is impaired, that they pursue a legitimate aim, and that there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

Article 6 of the Convention provides that everyone has the right to a fair and public hearing in both civil and criminal cases. This has been interpreted as providing for a general requirement of some measure of "equality of arms" between the state and the individual or between the parties in the case. **Article 6(3) (c) only includes provision for legal aid for accused in criminal proceedings.** There is no similar provision in civil proceedings. However, the European Court of Human Rights (ECtHR) has been prepared to find that the absence of legal aid can cause a public hearing to be unfair on the facts of specific cases on the basis that the Convention is

intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.ⁱⁱⁱ **Lack of legal aid could act as a barrier to access to justice, compromise the effectiveness of remedies under the Human Rights Act 1998**, and potentially breach Articles 6(1) and 13 which cover the right to an effective remedy.

Defamation

States have a wide margin of appreciation in how they ensure fair access to courts. This means that it is possible for a state to impose conditions on grants of legal aid and have a legitimate assessment process. **However these conditions should not undermine the essence of a Convention right, should pursue a legitimate aim, should be proportionate and must not be arbitrary.**^{iv} It is equally important to highlight that the Convention merely provides a minimal threshold for the protection of fundamental civil rights.

There are some exceptions in relation to the court proceedings for which Civil Legal Aid is available. The availability of Civil Legal Aid in defamation cases is restricted, so that applicants must meet criteria beyond the tests outlined above if they are to qualify.

In Steel and Morris v the UK^v, The European Court of Human Rights (ECtHR) made clear that:

“The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, inter alia, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively”

In Scotland an applicant has to demonstrate that at least one of the following criteria are met:

1. there is a wider public interest in proceedings
2. consider whether the applicant could, without additional assistance, challenge information before the court and/or present their arguments to the court in an effective manner, and
3. specific requirement related to access to justice in cross-border disputes requires legal aid to be made available via EU Directive 2003/8/EC.

This is the current application of the law in this area. Both the Scottish Government and Parliament **should ensure** via legislation that legal aid is available and that any restriction or denial does not “deprive an applicant of the opportunity to present their case effectively and contribute to an unacceptable inequality of arms”.^{vi}

Conclusion

There is no explicit provision on the right to civil legal aid in the Convention. However, the ECtHR has been prepared to find that the absence of legal aid can cause a public hearing to be unfair on the facts of specific cases. It is well-known that the Convention is intended to guarantee not rights that are theoretical or illusory,

but rights that are practical and effective. It is the view of the Commission that a **denial of legal aid which deprives an applicant of the opportunity to present their case effectively, and contributes to an unacceptable inequality of arms,** would be considered a violation to Article 6 of the Convention.

SHRC DQ.

ⁱ R v Shayler [2003] 1 AC 247; R v Secretary of State for the Home Department, ex p Anderson [1984] QB 778 Back

ⁱⁱ *Airey v Ireland* (1979) 2 EHRR 305

ⁱⁱⁱ See for example *Airey v Ireland* (1979) 2 EHRR 305; para 24

^{iv} See *Deb Deutsche Energiehandels und Beratungsgesellschaft MBH v Bundesrepublik Deutschland* [2011]2CMLR21, ECJ.

^v 68416/01 [2005] ECHR 103.

^v Ibid.

<https://www.pressandjournal.co.uk/fp/news/politics/holyrood/308338/highland-woman-appeals-to-msps-for-legal-aid-to-be-made-available-in-defamation-cases/>