

## Talk to YLAL on legal aid under LASPO

5 key human rights issues which arose in *Gudanaviciene*

- (1) Article 6 ECHR – “1. In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”
- no express right to legal aid in civil cases BUT implied in order to make right effective where necessary to ensure access to justice
  - first case where recognised – *Airey v Ireland* (1979)
  - “The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial. It must therefore be ascertained whether Mrs Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily.”
  - “article 6.1 may sometimes compel the state to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain contracting states for various types of litigation, or by reason of the complexity of the procedure or of the case.”
  - *Steel & Morris v UK* (2005) - 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
  - CA's summary of principles:
    - (i) the Convention guarantees rights that are practical and effective, not theoretical and illusory in relation to the right of access to the courts;
    - (ii) the question is whether the applicant's appearance before the court or tribunal in question without the assistance of a lawyer was effective, in the sense of whether he or she was able to present the case properly and satisfactorily;
    - (iii) it is relevant whether the proceedings taken as a whole were fair;
    - (iv) the importance of the appearance of fairness is also relevant: simply because an applicant can struggle through “in the teeth of all the difficulties” does not necessarily mean that the procedure was fair; and
    - (v) equality of arms must be guaranteed to the extent that each side is afforded a reasonable opportunity to present his or her case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent. (§46)
  - And (para 56):

...the critical question is whether an unrepresented litigant is able to present his case effectively and without obvious unfairness. The answer to this question requires a consideration of all the circumstances of the case, including the factors which are identified at paras 19 to 25 of the Guidance. These factors must be carefully weighed. Thus the greater the complexity of the procedural rules and/or the substantive legal issues, the more important what is at stake and the less able the applicant may be to cope with the stress, demands and complexity of the

proceedings, the more likely it is that article 6.1 will require the provision of legal services (subject always to any reasonable merits and means test). The cases demonstrate that article 6.1 does not require civil legal aid in most or even many cases. It all depends on the circumstances.

- Immigration claims do not concern “civil rights and obligations” so Article 6 does not apply
- Relevant because of issues arising under Art 47 EU

(2) Article 47(3) CFR – “Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice” – to give effect to Art 47(1) – “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article.”

- Applies only where the issue is “within the scope of EU law”/where the applicant is relying on EU law rights and freedoms
- But not restricted to determination of civil rights & obligations and does not require existence of dispute
- CA said no practical difference to approach under Art 6
- In immigration cases – applies to free movement rights of EU nationals as well as asylum/humanitarian protection cases which are governed by EU law
- 2 of the cases before CA were deportation appeals involving EU nationals

(3) Article 8, ECHR – right to private and family life

- Often arises in immigration cases – right to control entry but immigration decisions will often interfere with (1) family life (2) private life in the sense of ties built up to a wider community during a period of residence in the UK
- Critical issue in the appeal was whether Art 8 can ever require legal aid to be provided in an immigration case
- Strasbourg cases – Airey; P, C and S; AK and L v Croatia
- W v UK statement of procedural aspect of Art 8:

In the court's view, what therefore has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as ‘necessary’ within the meaning of article 8.
- Difference from Art 6 – “It is true that the test for article 8 as it is stated in the Strasbourg jurisprudence (whether those affected have been involved in the decision-making process, viewed as a whole, to a degree sufficient to provide them with the requisite protection of their interests) differs from the test for article 6.1 (whether there has been effective access to court). The article 8 test is broader than the article 6.1 test, but in practice we doubt whether there is any real difference between the two formulations in the context with which we are concerned. ... To summarise, in determining what constitutes effective access to the tribunal ( article 6.1 ) and what constitutes sufficient involvement in a

decision-making process ( article 8 ), for present purposes the standards are in practice the same.” (para 70)

- “Whether legal aid is required will depend on the particular facts and circumstances of each case, including **(a) the importance of the issues at stake; (b) the complexity of the procedural, legal and evidential issues; and (c) the ability of the individual to represent himself without legal assistance, having regard to his age and mental capacity.** The following features of immigration proceedings are relevant: (i) there are **statutory restrictions on the supply of advice and assistance** (see section 84 of the Immigration and Asylum Act 1999 ); (ii) individuals may well have **language difficulties**; and (iii) the **law is complex and rapidly evolving**: see, for example, per Jackson LJ in *Sapkota v Secretary of State for the Home Department* [2012] Imm AR 254 , para 127.”
- **Deportation cases are of particular concern.** It will often be the case that a decision to deport will engage an individual's article 8 rights. Where this occurs, the individual will usually be able to say that the issues at stake for him are of great importance. This should not be regarded as a trump card which usually leads to the need for legal aid. It is no more than one of the relevant factors to be taken into account. The fact that this factor will almost invariably be present in deportation cases is not, however, a justification for giving it reduced weight.
- Need for legal aid to be made available at the pre-decision/application stage in order to enable effective access to the procedure
- Decisions on facts of the individual cases:
  - IS
  - B
  - Edgehill
  - LS

#### (4) Rights of victims of trafficking

- Paragraph 32(1) of Sch 1 Part 1 LASPO
- Trafficking Directive/CAT argument rejected
- Claim based on Art 8 failed
- Appeal to SC

#### (5) Refugee family reunion

- Paragraph 30 of Pt 1 Sch 1 LASPO – “rights arising from”
- Refugee Convention – no explicit right to family reunion
- Final Declaration of the Conference
- Customary international law
- Appeal to SC