Civil Legal Aid and Parliamentary Implementation of Human Rights: A Cautionary Tale

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Abstract – The Legal Aid, Sentencing and Punishment of Offenders Act came into force in April 2013 and has severely restricted the scope of civil legal aid in England and Wales. The Act includes an ‘exceptional category’ (section 10) through which legal aid will be provided to out-of-scope cases “if failure to do so would be a breach of the person’s Convention rights.” This paper casts doubt on the practical effectiveness of this category in ensuring protection of the right to a fair trial (Art 6 ECHR), largely due to knowledge barriers which will prevent potential legal aid clients from identifying the factors that the European Court of Human Rights considers as persuasive for mandating legal aid provision, and thus making use of the category. Further, it frames the issue as an example of the pitfalls of relying primarily on Parliament to implement human rights in new legislation. Notwithstanding the European Court’s increasingly unmanageable caseload, the story of the Legal Aid Act is a cautionary tale which counters the notion that – in the sphere of rights protection - parliamentary implementation can be an effective substitute for swift access to a court.

Keywords: legal aid, European Court of Human Rights, Convention rights, fair trial, role of parliament, access to justice

1. Introduction

When is the assistance of a lawyer ‘indispensable’? The Legal Aid, Sentencing and Punishment of Offenders Act came into force in April 2013 and severely restricted the scope of civil legal aid in England and Wales. Section 10 of the Act created an exceptional category whereby legal aid will be provided to out-of-scope cases “if failure to do so would be a breach of the person’s Convention rights.” In this way, the Government purported to comply with its minimum obligations under Article 6 (right to a fair trial) of the European Convention for the

1 Airey v Ireland (1980) 2 EHRR 305, para 26.
Protection of Human Rights and Fundamental Freedoms (henceforth, ‘the Convention’ or ‘ECHR’). Meanwhile, the caseload burden of the European Court of Human Rights’ (henceforth, ‘the European Court’ or ‘the Court’) has become increasingly unmanageable, and this has led to increased calls for parliamentary participation in the implementation of Convention rights in new legislation.

This paper aims to look at these two issues in tandem, by critically examining parliamentary implementation of Convention rights in the context of the Legal Aid Act. Although Art. 6 does not guarantee an express right to civil legal aid, the Court has expanded its scope in several landmark rulings. As a result, when the right combination of factors is present, a State may be compelled to provide civil legal aid to an individual. These factors include the type of domestic court, the type of litigation, and the level of education, background and emotional involvement of the claimant.

Consequently, there are several significant problems with the use of the exceptional category to implement Art. 6 in the Act. Firstly, the majority of claimants with potential ‘exceptional’ cases will not be able to independently assess the list of factors and determine whether they would fit the category. This creates an inherent catch 22, where individuals need legal assistance in order to secure legal assistance, and it makes the right inaccessible and ‘practically ineffective’. Secondly, there is likely to be a large number of people in this situation despite the rarity that the term ‘exceptional’ may imply. Thirdly, the use of the exceptional category as a drafting tool encourages minimal compliance with the spirit of the human rights Convention.

This paper contends that parliaments are faced with unique motivations and pressures, and thus parliamentary implementation of Convention rights may result in theoretical protection but practical ineffectiveness. Consequently, the Legal Aid Act should serve as a cautionary tale to counter the notion that parliamentary implementation can be an effective substitute for swift access to the European Court.

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2. Parliament and the European Court

National implementation is “the alpha and omega” of human rights protection”,\(^3\) as rights created in international law are worth little until they are accessible to individuals at state level. However, in the case of the ECHR, judicial forms of interpretation and implementation have historically taken precedence. Decisions of the pioneering European Court often make headlines across the continent. In the United Kingdom, where the Convention was implemented through the enactment of the Human Rights Act (HRA) 1998, much of the popular and academic focus has been on the responsibility of national courts to ‘take into account’ the decisions and opinions of the Court, to interpret legislation in a way which is compatible with Convention rights, and their powers to make ‘declarations of incompatibility’ of current legislation.\(^4\) National parliaments were “often overlooked” in this context.\(^5\) Discussions of national implementation tended to focus on the failure of Member States to implement decisions handed down against them by the European Court (as required by Art. 46(1) ECHR)\(^6\), rather than on their readiness to incorporate the Court’s jurisprudence when drafting new laws.

However, in recent times, national parliaments have gained prominence. In 2004, Protocol 14 to the Convention came into force, increasing the powers of the Committee of Ministers to hold States responsible for failing to abide by a final judgment of the European Court. In its list of Recommendations accompanying the Protocol, the Committee highlighted the need for “effective mechanisms for systematic verification of the Convention compatibility of draft laws, existing laws and administrative practice (…)”.\(^7\) The Interlaken Conference on

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\(^6\) Article 46(1) ECHR only requires states “to abide by the final judgment of the Court in any case to which they are parties” but Member States are in principle expected to respect all Court judgments e.g. the Interlaken Declaration (2010) called on States to take into account the Court’s developing case-law in judgments finding a violation of the Convention by other States. It urges states to consider the conclusions to be drawn from such judgments against other states where the same problem of principle exists within their own legal system; see also Adam Bodnar, ‘Res Interpretata: Legal Effect of European Court of Human Rights’ Judgments for other States Than Those Which Were Party to the Proceedings’ in Yves Haeck and Eva Brems (eds), *Human Rights and Civil Liberties in the 21st Century* (Springer 2014).

\(^7\) Committee of Ministers of the Council of Europe, ‘Declaration: Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels’ (114th session, May 2004).
the Future of the European Court of Human Rights, held in 2010, expanded this idea by emphasizing the crucial role of national parliaments, and calling on States in a resulting Action Plan to take into account the Court’s developing case law. It directed them to consider and adapt judgments finding a violation of the Convention by other States, when drafting their own laws.  

The following year, the Parliamentary Assembly of the Council of Europe “called on all Member States to provide for adequate parliamentary procedures to systematically verify the compatibility of draft legislation with Convention standards, and avoid future violations of the Convention, including regular monitoring of all judgments which could potentially affect the respective legal orders.” The need for parliamentary implementation also featured prominently in the Izmir (2011) and Brighton (2012) Declarations, as well as in reports by the Rapporteur on the Implementation of Judgments of the European Court of Human Rights.

To some degree, this attitude shift could be justified as simply restoring the original intent of the Convention. After all, decisions of the European Court are binding on governments, not national courts, and the executive and legislature have always had a responsibility to ensure that State laws and practices comply with the Convention. This means stopping the violation in question, expunging its effects (restituo in integrum) and taking any necessary steps to prevent new violations of the same kind from occurring. The latter includes initiating parliamentary procedures to amend existing laws, and to ensure that newly drafted laws are in line with the Convention and the Court’s case law. Moreover, this obligation is inherent in the principle of subsidiarity; the Convention was intended to play a subsidiary role to the national system and State Parties must attempt to reflect the Convention in their national laws. It is further exemplified in Art. 1 ECHR, which requires States to “secure” Convention rights to all within their jurisdiction.

Nevertheless, the true reason for this shift is much more practical - it stems from the European Court’s increasingly unmanageable caseload. Often called “a victim of its own success”, the Court has seen a startling seven-fold increase in applications over the past decade,

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9 Parliamentary Assembly of the Council of Europe (n 5) Point 6.4.
10 Joint Committee on Human Rights (n 2) 9.
12 Execution of Judgments of the European Court of Human Rights’ (Council of Europe, Date Unknown) <http://www.coe.int/t/dghl/monitoring/execution/Presentation/About_en.asp> accessed 8 October 2013
as its remit has expanded to include the 800 million citizens of the 47 members of the Council of Europe. For example, in 2007 it received 57,000 applications, compared to 8400 in 1999\(^{14}\) and a mere 404 in 1981.\(^{15}\) This sharp increase now threatens to overwhelm the Court and to undermine the effective operation, credibility and viability of the Convention system.\(^{16}\)

In 2008, 70% of the Court’s judgments involved issues that had been previously determined in prior cases.\(^{17}\) This high number of repetitive applications indicates that State Parties are not effectively reforming their laws based on past decisions. Moreover, States often fail to respect the Convention when drafting new laws, preferring instead to wait for a claim to be brought and a violation to be found before making the necessary changes. This “passive approach”\(^{18}\) has been widely criticized; then President of the Court, Judge Costa in his 2009 *Memorandum (…) to the States with a view to preparing the Interlaken Conference* warned that "it is no longer acceptable that States fail to draw the consequences as early as possible of a judgment finding a violation by another State when the same problem exists in their own legal system."\(^{19}\)

With this in mind, the drive to increase parliamentary involvement in the ECHR process and to ensure that new legislation is “Strasbourg proof”\(^{20}\) is understandable. Surely, the best way to “(stem) the flood of applications to the Court” would be “to enhance the authority and effectiveness of the ECHR in the national legal system.”\(^{21}\) By ensuring that human rights are effectively protected and implemented domestically, parliaments can reduce the need for individuals to seek justice in Strasbourg and thus the caseload of the Court.

The United Kingdom has a uniquely parliamentary model of human rights protection, which resulted from the drafting and debate that preceded the HRA.\(^{22}\) When seeking to incorporate the ECHR into UK law, there was a specific intention to do so “in a manner that

\(^{13}\) Joint Committee on Human Rights (n 2) 5.

\(^{14}\) Ibid.


\(^{17}\) Joint Committee on Human Rights (n 2) 5.

\(^{18}\) Joint Committee on Human Rights (n 2) 57.

\(^{19}\) Ibid.


\(^{21}\) Joint Committee on Human Rights (n 2) 5.

strengthened and did not undermine the sovereignty of Parliament.” The resulting ‘British model’ paid heed to the notion that Parliament should have a major role in protecting the rights of a parliamentary democracy.

This role is now played by the Joint Committee for Human Rights. Announced in 1998 in conjunction with the HRA, and established in 2001, the JCHR is a non-departmental body appointed by and comprising members of both Houses of Parliament. It was the first event standing joint committee and was given a very broad mandate. Its main task is to independently scrutinize most bills that engage the UK’s human rights treaties; it reviews both current and draft legislation, and also monitors the Government's responses to court judgments concerning human rights. Robust procedures are in place to attempt to ensure that draft bills are vetted in advance for human rights compatibility. There are two stages of review: Before a bill can be introduced into legislative session, the Cabinet’s Parliamentary Business and Legislation (PBL) Committee requires a memorandum laying out its compatibility with the ECHR; and after the bill is introduced, the Joint Committee for Human Rights (JCHR) scrutinizes it for human rights issues and prepares a report, to which the executive issues a reply.

In her study of the JCHR, Janet Hiebert noted that the “conventional view of how a bill of rights operates assumes that rights based scrutiny occurs only after legislation has been passed and only courts are actively engaged in such scrutiny.” Consequently, having a special parliamentary body with a mandate to verify and monitor the compatibility of new laws and practices with the Convention puts the UK in a special category; only five other Council of Europe governments have similarly dedicated committees. In its 2011 Resolution, the Council of Europe Parliamentary Assembly highlighted the UK as a “positive example” of

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23 Joint Committee on Human Rights (n 22) para 2.2.
24 Joint Committee on Human Rights (n 22) para 2.4; See also Home Office, Rights Brought Home (White Paper, Cm 3782, 1997).
26 Joint Committee on Human Rights (n 22) para 6.1.
28 Joint Committee on Human Rights (n 2) 9.
30 Hiebert (n 25) 35.
31 Drzemczewski (n 16) 174.
national implementation. However, despite its seemingly unparalleled efforts to facilitate parliamentary implementation of the Convention, the UK still fails to do so effectively and this was made clear recently in the case of legal aid. The rest of this paper will analyze the failure of parliamentary implementation of Art. 6 ECHR in the legal aid context, and further explore whether this calls into question the validity of the paradigm as a solution to the Court’s backlog.

3. Parliamentary Implementation in the Legal Aid Context

Recent legislation to enact changes to the legal aid regime in England and Wales provides a timely and interesting case study for the shortcomings of parliamentary implementation of human rights. When the Legal Aid, Sentencing and Punishment of Offenders Act came into effect on April 1, 2013, it eliminated access to free legal services to those below a certain means for the majority of debt, employment, education, housing, immigration, welfare benefits and family law matters. These cuts are intended to reduce the state legal aid budget, hailed as the one of the highest in the developed world, by as much as 350 million pounds. The Act is the central piece of a series of reductions to the scope, remuneration and eligibility levels of legal aid.

The extreme nature of the cuts predictably caused great uproar, with voices from as high as the Supreme Court warning that these changes would “undermine the rule of law.” More pertinently, questions emerged about the Act’s compliance with the Government’s obligations under Art. 6 of the Convention (right to a fair trial), and more specifically the ‘right of access to a court’ that is “inherent” in Art. 6. In response, the Government pointed to the ‘exceptional funding’ scheme provided for in section 10 of the Act. Under this section, it will fund any case where:

(a) (…) it is necessary to make the services available to the individual under this Part because failure to do so would be a breach of—

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32 Parliamentary Assembly of the Council of Europe (n 5); However, there is no system in place to systematically monitor judgments against other States and consider implications in policy and practice for the UK, a system which exists in other countries such as Switzerland and the Netherlands. The JCHR has also criticized “lengthy” delays in implementation of some Strasbourg judgments against the UK. See JCHR (n 8) 57


34 Golder v UK (1975) 1 EHRR 524, para 36.

(i) the individual’s Convention rights (within the meaning of the Human Rights Act 1998), or
(ii) any rights of the individual to the provision of legal services that are enforceable EU rights, or
(b) (…) it is *appropriate* to do so, in the particular circumstances of the case, *having regard to any risk* that failure to do so would be such a breach. (emphasis mine)

In order to effectively analyze this form of parliamentary implementation of the Convention, we must first review the leading case law from the European Court in order to determine the types of situations that would engage this exceptional category.

### 3.1 The Case Law of the European Court on the Right to Civil Legal Aid

Article 6 of the Convention requires that:

‘(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.

(…) (3) Everyone charged with a criminal offence has the following minimum rights: (…) (c) 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;’

The right to free legal assistance has been described as “one of the most sensitive issues arising from Art. 6.” It juxtaposes the fundamental issue of equality in the judicial process with the problem of the proper use of state funds in the administration of justice, “the availability of which does not always keep pace with ever increasing demands.” Unsurprisingly, most governments “have found that expenditures on legal aid have the potential to be ungovernable” and struggle to find ways to successfully combine commitments to access to justice with the need to constrain growth in costs.

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Evidently, while the Article guarantees a minimum right to legal assistance for those of insufficient means who are charged with a criminal offence, it does not explicitly give the same right in the context of civil legal assistance.\(^{38}\) Nevertheless, in a string of landmark cases, the European Court has interpreted the provision in Article 6(1) as having this wider meaning in the right circumstances. This is in part due to the Court’s “creative” method of interpreting the Convention with an eye to ensuring that rights and freedoms are applied so that they are “of practical and effective use” to claimants.\(^{39}\) Notwithstanding the express wording of the Convention, it has established that the right of access to the court in civil matters will not be practically accessible to some claimants without the assistance of the state.

The leading case is *Airey v Ireland*\(^{40}\), where the Court recognized that in the context of civil litigation, “Article 6(1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for effective access to court.”\(^{41}\) Ms. Airey wished to petition for judicial separation at the Irish High Court, but she could not afford a lawyer and legal aid was not available in Ireland for civil proceedings. The Court had several reasons which taken together led it to rule that Ms. Airey had been denied an effective right of access to court. Firstly, her proceedings needed to be conducted in the High Court where the procedure was complex. Secondly, arguing the case might have required the use of expert evidence and witness examination, which presumably would be difficult for a non-lawyer. Thirdly, it was a marital dispute and thus entailed an ‘emotional involvement’ on her part that would be incompatible with the degree of objectivity required for court advocacy. Finally, Ms. Airey was from a “humble”\(^{42}\) background, with little education and had been unemployed for most of her life. As a result, the Court found it “most improbable” that Ms. Airey could effectively present her own case.\(^{43}\) It also took note of the fact that in all other judicial separation proceedings initiated in Ireland in the six years prior, the petitioners had legal representation. The key question was not whether the law allowed the claimant to represent

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\(^{38}\) Note that the more recent EU Charter of Fundamental Rights explicitly recognizes a very general right to legal aid (Article 47: "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"). The Charter is declaratory of the existing human rights obligations of EU Member States and only applies to EU institutions and member states when implementing EU law.


\(^{40}\) (1980) 2 EHRR 305.

\(^{41}\) Para 26.

\(^{42}\) Para 8.

\(^{43}\) Para 24.
herself before the court but whether her appearance would be “effective” i.e. whether she would
be able to present her case “properly and satisfactorily.”

The Court has further expanded on the scope of the rule introduced in *Airey* in
subsequent cases against the UK. In *McVicar v United Kingdom (2002)*, the applicant was a
journalist who was accused of defamation after he wrote an article accusing an athlete of taking
performance-enhancing drugs. As legal aid is not available for defamation actions in the UK,
he was a litigant-in-person, with some sporadic assistance from a specialist defamation lawyer.
He lost his case and subsequently complained to the European Court that his inability to claim
legal aid violated Article 6(1) of the Convention.

The *McVicar* judgment illustrates the fact-sensitive nature of the qualified right to legal
aid. The applicant sought to rely on many of the same reasons which swayed the Court in *Airey*.
His action was also conducted before a High Court judge and jury, but the Court held this to
be inconclusive, noting that domestic law allowed self-representation before the court.
Potentially thus, the reverse is also true: a case in a lower court, if sufficiently complex, could
entitle the litigant to legal representation under Article 6(1). In *McVicar*, the Court found that
proving allegations on a balance of probabilities was not “sufficiently complex to require a
person in the applicant’s position” recourse to legal assistance under Art. 6(1).

The case also required witnesses, expert evidence and cross-examination. However, the
judges placed great emphasis on the fact that, unlike Ms. Airey, Mr. McVicar was well
educated with a university degree and significant work experience, and thus “capable of
formulating cogent argument” and understanding the rules of procedure. The Court also
considered the assistance Mr. McVicar received from the specialist lawyer, finding that the
applicant could have sought further guidance from him if he was confused about the relevant
law and procedure before the trial began. Finally, he claimed similar emotional involvement as
Ms. Airey, arguing that the proceedings were conducted in a “highly charged emotional
environment” with intense media coverage, where his reputation and finances were at stake.

The court first pointed to *Munro v UK* which distinguished a defamation action from a judicial
separation, the former being about just one person’s reputation while the latter involves at least

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44 Para 314-315.
46 Schedule 1, Part II, s. 7 of the Legal Aid, Sentencing and Punishment of Offenders Act.
47 Para 55.
48 Para 53.
49 Para 33.
50 (1987) 52 DR 158.
two individuals and possibly children as well.\textsuperscript{51} It also looked again at Mr. McVicar’s background and experiences, holding that this, in conjunction with the distinction above, showed that he lacked the necessary level of emotional involvement. The \textit{McVicar} judgment effectively demonstrated 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.”\textsuperscript{52}

\textit{Steel & Morris v United Kingdom}\textsuperscript{53} was another defamation case where the same issue arose but the claimants here were successful in claiming a right to civil legal aid. More widely known as the ‘McLibel Case’, it initially involved a suit brought by McDonalds against two social and environmental campaigners who had published and distributed leaflets making serious allegations against its organizational practices. When the fast food giant won, the defendants brought an action in the European Court complaining that the denial of legal aid for their case violated their Art. 6 rights.

The Court agreed, finding that in addition to being able to effectively present his case, the litigant must also be able to “enjoy equality of arms” with the opposing party.\textsuperscript{54} The applicants were “articulate and resourceful”, thus more like Mr. McVicar than Ms. Airey in terms of their ability to present their case.\textsuperscript{55} But while the claimant in \textit{McVicar} had to prove only one single allegation, the applicants in \textit{Steel & Morris} needed to prove several and the case involved extensive legal and procedural issues, scientific experts, 130 oral witnesses, 40000 pages of documentary evidence, and certain issues held by domestic courts to be too complicated for a jury to properly understand and assess.\textsuperscript{56} The scale of the case was a significant factor in the Court’s finding that legal assistance was required, and this is further evident from the fact that when the applicants made a similar claim before the start of the trial, it was declared inadmissible.\textsuperscript{57} The Court acknowledged that at that time it did not anticipate “the length, scale and complexity of the proceedings.”\textsuperscript{58}

The applicants, not unlike Mr. McVicar, had sporadic assistance from lawyers acting pro bono (or paid through external donations) pre-trial and during the appeal, and “extensive”

\begin{thebibliography}{9}
\bibitem{51} Para 61.
\bibitem{52} Para 61.
\bibitem{53} (2005) 41 EHRR 22.
\bibitem{54} Para 59.
\bibitem{55} Para 68.
\bibitem{56} Paras 65-66.
\bibitem{57} \textit{H.S. and D.M. v United Kingdom} App no 21325/93 (Commission Decision, 5 May 1993).
\bibitem{58} Para 70.
\end{thebibliography}
judicial assistance as well.\textsuperscript{59} However, this was no “substitute for competent and sustained representation by an experienced lawyer familiar with the case and with the law of libel.”\textsuperscript{60} The difference between the respective levels of legal assistance available to the applicants and to McDonalds was “of such a degree that it could not have failed (…) [give] rise to unfairness, despite the best efforts of the judges.”\textsuperscript{61} While total equality is not required, each side deserves “a reasonable opportunity to present its case under conditions that do not place it at a substantial disadvantage vis-à-vis the adversary.”\textsuperscript{62} Finally, the court placed emphasis on the fact that the applicants did not choose to commence the proceedings, and were acting to protect their right to freedom of expression, another important Convention right.\textsuperscript{63} It was also conscious of the high financial consequences of failure for the applicants,\textsuperscript{64} and took this into account despite the known fact that McDonalds had not attempted to enforce payment, noting that the applicants could not have foreseen or relied upon such an outcome.\textsuperscript{65}

It is important to recognize that \textit{Steel v UK} is potentially in a class of its own due to its massive scale; it was the longest trial in English legal history. Nevertheless, it would be absurd to expect future applicants to meet this standard in order to deserve legal aid and the Court’s approach of assessing a variety of intersecting factors reflects this view.

An additional civil legal aid claim which sheds further light on the Court’s methodology is \textit{P, C and S v UK}.\textsuperscript{66} The applicants were two parents and their child, and the parents had lost at trial against the local authorities which resulted in the child being taken away at birth, placed with foster parents (care proceedings) and freed for adoption (adoption proceedings). Although they initially had representation for the care proceedings, their lawyers withdrew mid-way and they were unsuccessful in finding another in the four days that the judge gave them. An application to defer the adoption proceedings in order to find legal representation was also denied.

In deciding that the parents should have received legal assistance, the European Court gave weight to the seriousness of the outcome for the parents, the “exceptional complexity” of the proceedings, and the “highly emotive nature of the subject-matter” for a parent.\textsuperscript{67} It held

\textsuperscript{59} Para 69.  
\textsuperscript{60} Ibid.  
\textsuperscript{61} Ibid.  
\textsuperscript{62} Para 62.  
\textsuperscript{63} Para 63.  
\textsuperscript{64} Para 63.  
\textsuperscript{65} Para 67.  
\textsuperscript{67} Para 95.
that even if the applicants were intellectually capable of handling the case, they should not have
been expected to shoulder that burden due to their emotional distress. When considered
together with Airey, this seems to indicate that the Court considers legal aid to be integral for
cases that are “determinative of important family rights and relationships.” It was also
considered significant that the trial judge explicitly stated in his judgment that the case would
have been conducted differently with the help of a lawyer. For example, the applicants did not
realize they could or should raise the possibility of an open adoption with continued direct
contact as opposed to the closed adoption ordered by the judge.

From these key cases, we can distil the essentials of the Article 6(1) recipe, a
comprehensive list of factors that the courts will take into account when considering whether
to find a breach of the right to civil legal aid:

i. The applicant’s position/background
ii. The complexity of substantive law at issue
iii. The type of court and complexity of proceedings
iv. The type of litigation
v. The applicant’s emotional involvement in the subject matter of the dispute
vi. The scale of the case
vii. Existence of radical inequality of arms between the parties
viii. The use of legal representation in previous similar cases
ix. The applicant’s overall capacity to represent him or herself effectively

It is therefore clear the right to legal aid is dependent on a complex mix of factors.
Rather than applying a clear test, the Court’s undertakes a case-determinant and holistic
assessment. The factors are unweighted and “deployed flexibly in the case law (...). One does
not need to tick all the boxes: strong evidence under one heading may compensate for weaker
evidence under another.” Overall, the general requirement seems to be that the lack of legal
aid will prevent the applicant from presenting an effective defence.

68 Ibid.
69 Steel & Morris v United Kingdom (n 53), para 63.
70 Jo Miles, ‘Legal Aid, Article 6 and ‘Exceptional Funding’ under the Legal Aid (etc) Bill 2011’ [2011] Fam Law
1003, 1005.
3.2 The Problematic Implementation of Art. 6 of the Legal Aid Act

As described above, the ‘exceptional category’ created by s. 10 of the Act provides legal aid for all issues outside the narrow scope of the new law, where failure to do so would breach the applicant’s Convention rights. In this one clause, the Act purports to take into account the dense and malleable jurisprudence of the European Court. Given this background, three main problems with the implementation of the Convention, and of Art. 6 specifically, in the Legal Aid Act become clear.

Firstly, the Act is designed with the expectation that potential legal aid recipients with out-of-scope cases will assess their own eligibility for consideration under s.10. Legal aid solicitors cannot receive funding for the preliminary work involved in applying for an exceptional case funding determination unless the application is successful.71 Presumably, providing funding at this early stage would reduce the costs savings the Government seeks to achieve, as every sensible legal aid solicitor would put in an exceptional claim as a backup measure. An unsuccessful application can be reviewed by a second Legal Aid Agency caseworker, but after that there is no right of appeal or further review.72

As a result, potential legal aid recipients will be disadvantaged in the likely scenario where solicitors do not want to take the risk of preparing an exceptional claim without guarantee of payment. After more than a decade of frozen pay rates, and the introduction of fixed fees and fee cuts, many legal aid providers “cannot assume any more financial risk in their businesses. Even where a lawyer is willing to bring an application on this basis, this approach will affect the amount of [legal work] a solicitor or barrister is willing to do at any one time because the work is ‘at risk’.”73

Moreover, prospective legal aid recipients are often from humble backgrounds with little legal knowledge or free time.74 Thus there is a real risk that they will not be able to identify unassisted whether their case falls within the category of civil legal aid claims protected under the ECHR. This results in an intractable catch-22, as the prospective legal aid recipient will need legal assistance to assess whether her out-of-scope case should be funded under the exceptional category, but will have no access to a lawyer. It renders the right to legal aid under

72 Ibid.
74 According to Ministry of Justice figures, 80 per cent of those receiving legal help and around 90 per cent of those receiving legal representation were in the poorest 20 per cent of the population; see Jon Robins (ed.), ‘Unequal before the law? The future of legal aid’ Solicitors Journal Justice Gap Series (Wilmington Publishing 2011) 11
Art. 6 inaccessible and ‘practically ineffective.’ Furthermore, the Civil and Social Justice Survey, conducted before the Legal Aid Act came into force, estimated that up to 24% of people who sought and received free legal advice from a solicitor to tackle a family, social welfare or clinical negligence problem would not have sought alternative advice (from the local council, Citizens Advice Bureau, employer or other sources) had their advisor not been available. Regrettably, this indicates that many those denied legal assistance due to out-of-scope claims are unlikely to explore their options under section 10 of the Act.

Secondly, despite the use of the term ‘exceptional’, cases which engage section 10 may be more common than the word implies and than the Government expects. For example, family law is one the most significantly reduced areas in the Act, generating 60% of the savings expected from the scope restrictions. The Government estimated that approximately 5% of excluded family law cases would be re-admitted under the exceptional funding scheme. However, as is clear from Airey v Ireland and P, C, S v UK, family law cases will likely be one of the most promising contenders for the exceptional category due to the ‘emotional involvement’ factor. Graham Cookson’s report for the Law Society similarly found that the costs savings flowing from the Act may be less than anticipated, in part because of the potentially wide reach of the exceptional category. This compounds the problem, as the number of cases that merit legal aid but do not receive exceptional funding due to lack of knowledge or resources on the part of the applicant, may be a sizeable proportion of those who satisfy the means test for aid.

Thirdly, the use of the exceptional category as a drafting tool is also problematic. Granted, the Act’s predecessor, the Access to Justice Act 1999, also contained a similar provision, allowing discretionary “exceptional funding” for cases outside the scope of legal aid by the Lord Chancellor if certain criteria was satisfied, including human rights concerns. Thus, exceptional funding is not new to legal aid. Rather, it seems to be “the narrowing of the

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75 Joint Committee for Human Rights (n 2) 9.
76 These were the most common areas of law where respondents sought advice.
78 Miles (n 70) 1007. It is anticipating 6,000 applications to be readmitted under the exceptional funding scheme, representing approximately 5% of the 45,000 legal representation cases which have been taken out of scope by the Act.
79 Cookson (n 77) 19-20.
80 Cookson (n 77) 19-20.
81 (1980) 2 EHRR 305.
83 Cookson (n 77) 19-20.
84 Access to Justice Act 1999, (s 6(8)(b)).
that has led the criteria to operate in a way which makes the right of access to a court practically ineffective. This further demonstrates the complex nature of parliamentary implementation of Convention rights; it is rarely possible to point to a simple solution and each piece of legislation is unique and can raise human rights concerns in different ways. Nevertheless, it seems that the use of an exceptional category – when applied specifically as a form of ECHR protection – may encourage minimal compliance by the executive. The inclusion of such a broad fallback clause potentially leads to a greater tolerance for Convention incompatibility in the rest of the legislation, since any ECHR violations that the new law may produce will in theory be in caught by the clause.

Thus, Parliament’s use of an exceptional category in order to shoehorn rights protection into the law results only in protection of an illusory nature. The Legal Aid Act seems compatible with Art. 6 on its face but “giv(es) rise in practice to breaches of human rights.” There is a serious possibility of prospective aid recipients slipping through the cracks i.e. failing to receive protection when they are entitled to it. Section 10 of the Act does not provide "sufficient guarantee that the new legal aid regime will not create a serious risk that its operation will lead to breaches of Convention rights." The failure of Parliament to properly implement the Convention is especially clear in the case of legal aid because access to justice gives practical effect to most other legal rights. This explains the stark clarity of the paradox found in s.10 where one needs access to a lawyer in order to secure access to a lawyer.

4. A Cautionary Tale

Parliamentary implementation of human rights is undoubtedly a worthy objective. Since parliaments are democratically elected, they can hold government to account, influence the direction and priority of legislative initiatives and channel funds to ensure implementation. Strengthening national compliance mechanisms raises awareness of human rights issues in Parliament, encourages greater transparency of government responses to Court judgments, and provides an opportunity for public scrutiny of government justifications. Moreover, the European Court seems more likely to respect national laws which are the result of significant

85 Miles (n 70) 1007.
86 Francis (n 27).
87 Joint Committee on Human Rights, Legislative Scrutiny: Legal Aid, Sentencing and Punishment of Offenders Bill (twenty-second report) (2010-12, HL 237, HC 1717) para 1.31
88 Francis (n 27).
89 Drzemczewski (n 16) 178.
90 Joint Committee on Human Rights (n 2) 9.
parliamentary debate as to their compatibility with the Convention.\textsuperscript{91}

Nevertheless, it is important to recognize that Parliament has both unique capabilities and priorities. Hiebert describes how, in a Westminster-based parliamentary system, complex issues must be reduced to two viewpoints: in favour and opposed. In a partisan environment focused on goals, benefits and costs, and a culture where governments are hostile to any inquiries which seem to challenge or delay the pursuit of their policy goals, effective review for rights compatibility is bound to face difficulties.\textsuperscript{92} Politicians have an interest in cutting costs and are more concerned about political embarrassment. For example, they “may have political incentives to avoid publicly acknowledging the full implications of how a legislative initiative affects rights.” Furthermore, they are aware of the potential for reasonable philosophical differences which may arise between legislators about the scope of rights, notions of proportionality, or the proper role of the state, to be portrayed by the media as an intention to violate rights.\textsuperscript{93}

This goes some way in explaining the problems faced in parliamentary implementation of Convention rights. It also cautions against reliance on Parliament as the main arbiter of individual rights, and suggests a need to revisit and strengthen other reforms enacted to improve the European Court. This is not a revolutionary proposal by any means, and devotees of the late Ronald Dworkin may appreciate that the weaknesses of parliamentary implementation were hinted at in his conception of law as integrity. He showed that judges must engage in constructive interpretation of legal practice in order to “identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – the community personified – expressing a coherent conception of justice and fairness.”\textsuperscript{94} This involves going through the whole law (judicial precedent) to consider how to interpret it in a specific case, as well as employing their own moral convictions about what would be the best justification for past decisions and best “fit” the community’s principles. They will also consider whether their interpretation shows the interpreted practice in its best light.\textsuperscript{95} Consequently, courts rely on a different set of considerations then the legislature and this is what separates adjudication from legislation even in a novel case. Unlike parliament, judges are looking for principles that are coherent, morally attractive and which fit the existing law.

\textsuperscript{91} Francis (n 27).
\textsuperscript{92} Hiebert (n 25) 11 .
\textsuperscript{93} Hiebert (n 25) 11-12.
\textsuperscript{95} \textit{Ibid.}
In addition, measures must still be taken to strengthen rights review in parliament. Only a fraction of issues can ever be litigated, thus relying on judicial correctives to prevent infringement of rights may also result in rights abuses that go un-remedied.\textsuperscript{96} However, progress will require “a significant shift in mindset about how parliamentarians are to conduct their scrutiny function.”\textsuperscript{97} Possible solutions include strengthening the JCHR by, for example, allowing it to review secondary legislation. This has been a problem in the legal aid context as secondary legislation was introduced which further reduced the scope of aid available, by for example requiring lawful residence of 12 months or more and denying aid work done on judicial review cases that that fail at the permission stage.\textsuperscript{98} This activates human rights concerns but is outside the domain of review of the JHCR. The same logic applies to “the late introduction of Government amendments with significant human rights implications”\textsuperscript{99}, as then the JCHR lacks sufficient time to scrutinize and report on the amendments before the Bill moves to the next stage.

In the lead-up to the Interlaken Conference, multiple actors such as the President of the Court, the Secretary General of the Council of Europe, the European Commissioner for Human Rights, and the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly opined that “the future effectiveness of the Court depends to a large degree on better national implementation of the Convention.”\textsuperscript{100} This article has called into question this emphasis on parliamentary implementation as a solution to the European Court’s dilemma. The case of legal aid shows that, despite the Parliament’s model efforts at rights implementation in new laws, it is faced unique motivations and pressures, and thus parliamentary implementation of Convention rights may result in theoretical protection but practical ineffectiveness. Consequently, LASPO should serve as a cautionary tale to counter the notion that parliamentary implementation can be an effective substitute for swift access to the European Court of Human Rights.

\textsuperscript{96} Hiebert (n 25) 11.
\textsuperscript{97} Ibid.
\textsuperscript{98} Ministry of Justice, \textit{Transforming legal aid: delivering a more credible and efficient system} (Consultation Paper CP14/2013, 9 April 2013)
\textsuperscript{100} Joint Committee on Human Rights (n 8) 6.