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Legal Aid Cuts: A Criminal

Justice Pain Chain

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Abstract

In England and Wales “justice for all” is a legal principle that can be traced back to 1215 in Magna Carta, which states: “We will sell to no man, we will not deny or defer to any man either Justice or Right.”¹ Also, according to article 6 of the European Convention on Human Rights, “everyone has the right to a fair trial ...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;”² However, the repeated cuts on legal aid seem to become a burden to this fundamental right.³ To understand this though, it has to be shown what legal aid is, how it works, how it has affected the Criminal Justice System and what the intricacies that have taken place, in relation to this matter are.

Keywords

Legal Aid, Cuts, Criminal Justice Crisis

1 s.29 (Magna Carta) 1215 c.29.

2 Article 6 European Convention on Human Rights and Fundamental Freedoms 1951.

3 ‘Cuts that hurt’ (*Amnesty International UK*, October 2016)

<https://www.amnesty.org.uk/files/aiuk_legal_aid_report.pdf > accessed 19 March 2019.

Legal aid was first introduced in 1949, with Legal Aid and Advice Act by the post war Labour government, as a state funded initiative to allow access to legal advice and representation help, for most of the British population and especially the poor, along with the NHS and welfare reforms.⁴ However, the public never focused as much on it as it did for the two others, because people did not really anticipate having to go to court.⁵ The way it works in particular is; the amount of money that the state gives to each defendant is objective and it is a part of the defence solicitor's job to find out how much it is for their client.⁶ The defence solicitors come from firms and in order for them to get paid they have to report the work they have done to the LAA; the firms are selected based on the Standard Crime Contract, which except of the terms and the criteria of the firms selected, also ensures the confidentiality of the clients.⁷ According to the Criminal Legal Aid (Remuneration) Regulations 2013/435, sch.1, part 1, the solicitors' payment is usually fixed depending on the type of work they have done.⁸ In order for someone to get represented in Court, they must either seek representation by the Court Duty Solicitor, or at the police station by the Police Duty Solicitor, get help by telephone or pay privately a legal advisor.⁹ Whether the defendant is eligible for legal aid depends on their financial situation and on the type of their case.¹⁰ In criminal cases the defendant has the right to free legal advice at the police station and 'gets automatically legal aid for legal representation in court if they are under 16 (or under 18 and in full-time education) or on certain benefits'.¹¹

According to the LASPO 2012 in order to be eligible for legal aid, two tests must be satisfied; the means test and the interests of justice (merits) test.¹² The first test is playing a particular role in covering some or all of the defence costs. In this instance, the income, the family

4 Owen Bowcott, 'Impact of cuts to legal aid to come under review' (*The Guardian*, 31 Oct 2017) <<https://www.theguardian.com/law/2017/oct/31/impact-of-cuts-to-legal-aid-to-come-under-review>> accessed 19 March 2019.

5 Ibid.

6 UK Government, Legal Aid (Gov.uk) < <https://www.gov.uk/legal-aid/how-to-claim> > accessed 19 March 2019.

7 'Standard Crime Contract 2017' (*Legal Aid Agency*, 21 July 2016)

<<https://www.gov.uk/government/publications/standard-crime-contract-2017>> accessed 19 March 2019.

8 Criminal Legal Aid (Remuneration) Regulations 2013/435.

9 UK Government, Legal Aid (Gov.uk) <<https://www.gov.uk/legal-aid/how-to-claim>> accessed 19 March 2019.

10 Ibid.

11 Ibid.

12 Legal Aid, Sentencing and Punishment of Offenders Act 2012.

circumstances; such as the number of children and the essential living costs; for example, the mortgage or rent, have to be considered. Other than that, account is also taken of the type of the case and in which court it is going to be heard.¹³ The interest of justice test has to do with the merits of the case, such as a client's past convictions, the nature of the offence and the risk of custody. The qualification for legal aid depends in how serious the charge and the possible consequences that the defendant is facing are. The more serious they are, the more likely that their case is going to qualify. The Crown Court trials satisfy this test automatically.¹⁴ The criteria are defined under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Criminal Legal aid (General) Regulations 2013).¹⁵ Some of the most important criteria are danger of losing liberty; which means imprisonment, loss of livelihood; which means loss of job, and damage of reputation. Also, it has to be considered if the case involves a substantial question of law. Lastly, the witnesses must be found and interviewed; it has to be examined if the representation of the defendant is also in the interests of someone else and for any other reason. In the Magistrates Court income will be considered whereas in the Crown Court both income and capital will be taken into account.¹⁶

So, as it is shown it is really hard and complicated for someone to get legal aid. However, that is not the only reason that nowadays, the field of criminal legal aid is in a crisis; since serious cuts have taken place. The first cut in Criminal aid happened in 1980 when its administration was a job of the Legal Aid Board.¹⁷ Now, the organ of the state whose role is to assess and monitor legal aid funding is from the beginning of April 2013 the Legal Aid Agency (LAA), a part of the Ministry of Justice.¹⁸ Research which was conducted from 2010 to 2017 showed the effect that the recent universal financial crisis of our ages had on the nation's finances. One of the 'victims' of it, was among others, the Ministry of Justice, which saw cuts of more

13 'Criminal legal aid: means testing' (*Legal Aid Agency*, 1 June 2014) <<https://www.gov.uk/guidance/criminal-legal-aid-means-testing>> accessed 19 March 2019.

14 'Work out who qualifies for criminal legal aid' (*Legal Aid Agency*, 1 June 2014) <<https://www.gov.uk/guidance/work-out-who-qualifies-for-criminal-legal-aid>> accessed 19 March 2019.

15 Legal Aid, Sentencing and Punishment of Offenders Act 2012.

16 'Work out who qualifies for criminal legal aid' (*Legal Aid Agency*, 1 June 2014) <<https://www.gov.uk/guidance/work-out-who-qualifies-for-criminal-legal-aid>> accessed 19 March 2019.

17 Owen Bowcott, 'Legal aid: how has it changed in 70 years?' (*The Guardian*, 26 Dec 2018) <<https://www.theguardian.com/law/2018/dec/26/legal-aid-how-has-it-changed-in-70-years>> accessed 28 March 2019.

18 Ibid.

than 40%.¹⁹ However, the first cuts begun by Tony Blair's last Labour government before 2010.²⁰ In 2010 the Ministry of Justice provided a £10.9 billion budget to give to the courts, legal aid, prisons and probation service. In 2012, when the Legal Aid, Sentencing and Punishment of Offenders Act was introduced by the Coalition government, public spending on legal aid was cut by £450m a year.²¹ By 2017-18 the budget was cut to £7.6 billion.²² For 2019-20 it is set to be reduced even more down to £6.38 billion.²³ The statistics of the government show that legal aid funding has been significantly reduced from £2.6 billion in 2005-06 to £1.5 billion last year, with LASPO making the biggest contribution to this change.²⁴ According to Amnesty in the year before the act was introduced, legal aid was granted in 925,000 cases, whereas, in the year after it was only used in 497,000 cases, a drop of 46%.²⁵ In June 2011 the Justice Secretary, Kenneth Clarke, in a statement to MPs, underlined characteristically the reason behind all these changes:

"I turn to legal aid reform. We have the most expensive system in the world, except for Northern Ireland... I am bringing forward proposals that I believe will ensure access to public funding in the cases that most require it, encourage early resolution of disputes instead of unnecessary conflict and ensure much better value for money for the taxpayer..."²⁶

The former Justice Secretary, James Lidington, seems to also agree and has said that:

"Our legal aid system is a fundamental pillar of access to justice, accounting for more than a fifth of the Ministry of Justice's budget. The reforms within the Act were

19 Carl Emmerson, 'Two parliaments of pain: the UK public finances 2010 to 2017' (*Institute for Fiscal Studies*, 02 May 2017) <<https://www.ifs.org.uk/publications/9180>> accessed 20 March 2019.

20 Owen Bowcott, 'Impact of cuts to legal aid to come under review' (*The Guardian*, 31 Oct 2017) <<https://www.theguardian.com/law/2017/oct/31/impact-of-cuts-to-legal-aid-to-come-under-review>> accessed 20 March 2019.

21 Ibid.

22 Jane Croft and Barney Thompson, 'Justice for all? Inside the legal aid crisis' (*Financial Times*, 27 Sept 2018) <<https://www.ft.com/content/894b8174-c120-11e8-8d55-54197280d3f7>> accessed 20 March 2019.

23 Ibid.

24 'Legal Aid Statistics quarterly, England and Wales' (*Ministry Of Justice and Legal Aid Agency*, 27 June 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/821851/legal-aid-statistics-bulletin-jan-mar-2019.pdf> accessed 20 March 2019.

25 'Cuts to legal aid have 'decimated access to justice' for thousands of the most vulnerable' (*Amnesty International UK*, 10 Oct 2016) <<https://www.amnesty.org.uk/press-releases/cuts-legal-aid-have-decimated-access-justice-thousands-most-vulnerable>> accessed 20 March 2019.

26 HC Deb 21 June 2011, vol 530, col 166.

founded on delivering better value for money for taxpayers by reducing the cost of the scheme and discouraging unnecessary and adversarial litigation, while ensuring that legal aid continues to be available for the highest priority cases..."²⁷

These cuts, though, as can be imagined have been proven disastrous, especially for criminal courts. More specifically, the number of legal providers' contracts for the police station and the magistrates' court has dramatically declined from 1,600 to 527.²⁸ Also, ministers have admitted that 20% of the legal aid solicitors across England and Wales have been reduced in just five years.²⁹ According to former Justice Minister Sam Gyimah's, published statistics, a steep fall of duty solicitors was reported across the country and especially in Wales, that showed the largest drop of 29%.³⁰ As seen, the fall of numbers of duty solicitors has been seriously affected by the recent changes. However, this is not the only thing that the legal profession has to face. The specialists in this field are also facing problems with their payments. Both the reduced amount of work and the slow rate of payments, after the legal aid's cuts, are making them struggle. Especially, since the fixed fees of their payment were already not much.³¹ Consequently, the interest of young people in the field is becoming more and more extinct as the time passes.³² The Law Society conducted a survey that, proved how big the size of the problem, with the criminal duty solicitors' deficit, is. They found that the average age of a criminal duty solicitor across the whole of England and Wales is now 47, and in many regions the average age is even higher.³³ They warned for a possible extinction of the profession and the subsequent, miscarriage of justice that is threatening the nation.³⁴

27 HC 30 November 2017, vol 630, col 15WS.

28 Owen Bowcott, 'Legal aid fees to be cut by 8.75%, confirms Ministry of Justice' (*The Guardian*, 10 Jun 2015) <<https://www.theguardian.com/law/2015/jun/10/legal-aid-fees-to-be-cut-by-875-confirms-ministry-of-justice>> accessed 20 March 2019.

29 Anushka Asthana, 'Number of legal aid providers falls 20% in five years, figures show' (*The Guardian*, 19 Sep 2017) <<https://www.theguardian.com/law/2017/sep/19/number-of-legal-aid-providers-falls-20-in-five-years-figures-show>> accessed 20 March 2019.

30 Parliament, Written Answers (Parliament.uk) <<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-09-11/9862>> accessed 20 March 2019.

31 Conor James McKinney, 'Legal aid lawyers aren't on £200 an hour' (*Full Fact*, 6th Jul 2015) <<https://fullfact.org/law/legal-aid-lawyers-arent-200-hour/>> accessed 21 March 2019.

32 Deena Blacking, 'So you want to be a legal aid lawyer?' (*Lacuna Magazine*, 18 July 2014) <<https://lacuna.org.uk/justice/so-you-want-to-be-a-legal-aid-lawyer/>> accessed 21 March 2019.

33 'Criminal duty solicitors: a looming crisis' (*The Law Society*) <<https://www.lawsociety.org.uk/policy-campaigns/campaigns/criminal-lawyers/>> accessed 23 March 2019.

34 'Criminal defence lawyers face extinction amid justice crisis' (*The Law Society*, 17 April 2018) <<https://www.lawsociety.org.uk/news/press-releases/criminal-defence-lawyers-face-extinction-amid-justice-crisis/>> accessed 23 March 2019.

Aside from the profession itself and the solicitors' struggles, a much greater and more general problem is arising; the access of the general public to legal representation is becoming almost impossible and their relevant legal right is subsequently, being indirectly infringed. As the Law Society has said, behind the numbers of the cuts that the Labour government has introduced, there was a large number of United Kingdom's citizens, being left helpless and unprepared.³⁵ According to statistics, the percentage of the litigants that had access to representation, downsized from 60% in 2012 to 33% in the first quarter of last year.³⁶ In 2015, tenders were submitted by law firms and 520 contracts were awarded, with 519 firms accepting the contracts.³⁷ That means that the public can no longer choose their defence solicitors. This fact along with the solicitors' insufficient payment, may lead to a miscarriage of justice, since the legal professionals may need to defend a larger number of cases in short amount of time.³⁸ Things were even worse for prisoners who after the decision of Lord Chancellor, Chris Grayling, in 2013 under Criminal Legal Aid (General) (Amendment) Regulations 2013, were cut off from legal aid.³⁹ Fortunately, after *R. (on the application of Howard League for Penal Reform) v Lord Chancellor* [2017] this decision was ruled unlawful.⁴⁰ The first claimant, penal reform charity and the second claimant, legal advice charity, challenged changes made to criminal legal aid introduced by the Criminal Legal Aid (General) (Amendment) Regulations 2013. The removal of legal aid in certain areas was alleged to result in inherent or systemic unfairness. The court focused on the position of prisoners who were vulnerable, had learning and general communication difficulties and mental health problems. As this case shows steps are being made for minimization of the problem.

For example, in *R. (on the application of Law Society) v Lord Chancellor* [2018] the Law Society applied for judicial review of the Lord Chancellor's decision to reduce the fees payable under the Litigators' Graduated Fees Scheme for defence work in criminal prosecutions. The court

35 'Criminal duty solicitors: a looming crisis' (*The Law Society*) <<https://www.lawsociety.org.uk/policy-campaigns/campaigns/criminal-lawyers/>> 20 March 2019.

36 'The Guardian view on legal aid: cuts have caused chaos and must be reversed' (*The Guardian*, 12 Aug 2018) <<https://www.theguardian.com/commentisfree/2018/aug/12/the-guardian-view-on-legal-aid-cuts-have-caused-chaos-and-must-be-reversed>> accessed 20 March 2019.

37 'Legal aid crime tender 2015' (*Legal Aid Agency*, 10 July 2014) <<https://www.gov.uk/government/publications/legal-aid-crime-tender-2015>> accessed 21 March 2019.

38 Richard Moss, 'Miscarriage of justice fears over legal aid cut plans' (*BBC*, 31 May 2013) <<https://www.bbc.co.uk/news/uk-england-22729956>> accessed 21 March 2019.

39 Criminal Legal Aid (General) (Amendment) Regulations 2013/2790.

40 *R. (on the application of Howard League for Penal Reform) v Lord Chancellor* [2017] 4 WLR 92.

decided that The Criminal Legal Aid (Remuneration) (Amendment) Regulations 2017 were unlawful and would be quashed. The reason behind it was that the Regulations implemented a decision by the Lord Chancellor following an unlawful consultation process in which information crucial to the decision-making process was withheld from consultees.⁴¹ That was not the first time, though, that the criminal branch has gone to court to resist to the legal aid changes. In *R. (on the application of London Criminal Courts Solicitors Association) v Lord Chancellor* [2014] EWHC 3020 (Admin), the court found that the Lord Chancellor has failed to fairly consult on the content of two reports which had determined the number of contracts to be offered to law firms for criminal legal aid services and that was illegal, Judge Barnett J has said:

“...the failure to consult was unfair. In the context, in particular, of a decision which would so profoundly affect the way in which the market in criminal legal aid operates, indeed pose a threat to the continued existence of many practices, in my judgment it was indeed unfair...”⁴²

Also, in 2017 the 2015 tender was withdrawn and 1299 organizations have entered into a contract with the LAA and are contracted to deliver Criminal Legal Aid Services from 1960 different offices.⁴³ Lord Faulks had addressed the issue in a debate in the House of Lords:

“Criminal legal aid has undoubtedly suffered in terms of remuneration for lawyers. The Government are well aware of the concerns expressed... about the possible damage to careers and the prospect, in due course, of a reduction in the quality of criminal judges... In fact, there is no reduction in the availability of legal aid to defendants, but I think the issue was that the career structure is so unattractive that this will diminish in the long term the quality of those involved in what is... However, the Bar cannot be entirely immune from the need to reduce legal aid expenditure, but the Government remain committed to maintaining a vibrant and independent Bar and

41 *R (on the application of Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin).

42 In *R (on the application of London Criminal Courts Solicitors Association) v Lord Chancellor* [2014] EWHC 3020 (Admin).

43 ‘Legal aid crime tender 2017’ (*Legal Aid Agency*, 21 July 2016)

<<https://www.gov.uk/government/publications/legal-aid-crime-tender-2017>> accessed 21 March 2019.

decided in June 2015 not to proceed with the planned reduction in advocacy fees, as we made clear in a Written Ministerial Statement.”⁴⁴

A review of 2012’s Legal Aid, Sentencing and Punishment of Offenders Act (Laspo) was subsequently carried out. The reforms in criminal legal aid were mainly focused on the prisoner’s availability to it.⁴⁵ There was also reduction in the solicitors’ fees.⁴⁶ Other than that a Legal Support Action Plan was published in order to help the legal aid scheme.⁴⁷ At first sight, the government claims that with LASPO, legal aid would be especially targeted to people who need it the most.⁴⁸ However, after four years of LASPO were completed, the Law society review in June 2017, showed the catastrophic changes that the legal aid system has endured.⁴⁹ The main points were that, legal aid is not available for everyone who needs it, but even for those eligible for legal aid it is hard to access. Also, the provision has wide gaps that the review failed to address.⁵⁰ It has been argued that, the reforms were not, in reality, almost any help to the problem and they did not make much difference and most of the people in the world of justice expressed their disappointments over these reforms.⁵¹ The Law Society has responded to the Ministry of Justice and has criticised the review.⁵² Another thing that was criticized was that, the review that the government conducted is especially focused

44 HL Deb, 10 Dec 2015, vol 767, col 1716.

45 Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

46 Ibid.

47 ‘Legal Support: The Way Ahead’ (*Ministry Of Justice*, February 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777036/legal-support-the-way-ahead.pdf> accessed 23 March 2019.

48 ‘Post-Implementation Review of Part 1 of LASPO’ (*Ministry Of Justice*, 7 February 2019) <<https://www.gov.uk/government/publications/post-implementation-review-of-part-1-of-laspo>> accessed 23 March 2019.

49 ‘LASPO 4 years on: Law Society review’ (*The Law Society*, 29 June 2017) <<https://www.lawsociety.org.uk/support-services/research-trends/laspo-4-years-on/>> accessed 23 March 2019.

50 ‘LASPO review’ (*The Law Society*) <<https://www.lawsociety.org.uk/policy-campaigns/campaigns/access-to-justice/laspo-review/>> accessed 23 March 2019.

51 Sam Blewett, ‘Boost to legal aid spending just ‘a drop in the ocean’ compared to the cuts it follows, lawyers say’ (*Independent*, 7 February 2019). <<https://www.independent.co.uk/news/uk/home-news/legal-aid-spending-austerity-cost-money-ministry-of-justice-a8768851.html>> accessed 23 March 2019.

52 ‘Ministry of Justice’s LASPO Part 1 post implementation review - Law Society response’ (*The Law Society*, 28 September 2018) < <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/ministry-of-justice-laspo-part-1-post-implementation-review-law-society-response/>> accessed 23 March 2019.

on civil law. However, there was a research conducted that showed the concerns of the judiciary on criminal legal aid from a couple of years ago.⁵³

In the context of the research some judges and prosecutors were interviewed, to express their opinion on the impact of people appearing in court without lawyers.⁵⁴ This report has been leaked to BuzzFeed News, although the government tried to hide it away from the eyes of the public and it showed that the people involved in it, were very concerned about the situation.⁵⁵ A judge that took part in the research has allegedly said about the people going to court without representation: "Some of them just sit there like a rabbit in the headlights and haven't got a clue what's going on." Another has said: "It's like saying if you felt unwell would you want to go and ask someone with no medical qualification how to cure yourself?"⁵⁶

The criminal Bar reached a breaking point with all of this and decided to take further action. After an official announcement, that underlined the crucial problems that they are facing, they proposed solutions to the public authorities and called their fellow colleagues to join them in the race against the unfair cuts, by striking.⁵⁷ After a long time of strikes and protesting the Ministry of Justice gave £15m to the Criminal Bar Association, for payment raises.⁵⁸ Consequently, for all of these reasons LASPO and the cuts in criminal legal aid in general, brought catastrophic consequences in today's society and in the criminal courts. There are, however, solutions that the public authorities should take into consideration. One of them is creating a standard fee system for the solicitors; this should also make justice for

53 Joe Thomson and Jane Becker, 'Unrepresented Defendants: Perceived effects on the Crown Court in England and Wales – practitioners' perspectives' (*Ministry Of Justice*, 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/810051/unrepresented-defendants.pdf> accessed 23 March 2019.

54 Emily Dugan, 'The Government Tried To Bury This Research Showing Judges' Concerns About The Rise In People Defending Themselves In Court' (*Buzzfeed News*, 30 April 2018) <https://www.buzzfeed.com/emilydugan/the-government-tried-to-bury-this-research-showing-judges?utm_term=.sjbbYQEQO#.cunjwpxwn> accessed 23 March 2019.

55 Ibid.

56 Joe Thomson and Jane Becker, 'Unrepresented Defendants: Perceived effects on the Crown Court in England and Wales – practitioners' perspectives' (*Ministry of Justice*, 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/810051/unrepresented-defendants.pdf> accessed 23 March 2019.

57 'Members Announcement'

<<https://www.criminalbar.com/resources/news/announcement-for-cba-members/>> (*The Criminal Bar Association of England & Wales*, 29 March 2018) accessed 27 March 2019.

58 Owen Bowcott, 'Barristers in England and Wales call off industrial action' (*The Guardian*, 12 Jun 2018) <<https://www.theguardian.com/law/2018/jun/12/barristers-in-england-and-wales-call-off-industrial-action>> accessed 23 March 2019.

the work that is done by the solicitors that is not seen, such as the processing of unused material, the use of medical reports and witness statements. Also, the time length of a case should be considered since it determines the workload. Lastly, work that includes special instances, such as mental health, needs to be awarded additionally.⁵⁹ Concluding, it needs to be understood that the criminal legal aid cuts have become a matter of survival not only for the solicitors but for the profession itself and for the citizens' right to legal representation and aid. Unfortunately, there is the fear that it will come to a point, where only the financially privileged will have access to justice and that is why a drastic change needs to be done as soon as possible.

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59 Anthony Edwards, 'Criminal Fees' (2018) CLR 11, 894-903.