

CASE SUMMARY

Complaint against the Legal Aid Department for inappropriately advising legal aid applicant to withdraw his appeal lodged with the court against the refusal of legal aid

The Complaint

The complainant first applied for legal aid on 2 June 1997 to continue to defend a High Court case. His application was refused by the Director of Legal Aid (DLA) on the ground of excepted proceedings on 11 June 1997. He filed an application for appeal against the refusal. The appeal was scheduled to be heard on 12 August 1997 and he was prepared to attend the appeal hearing. However, he received a phone call from the Department on 4 August 1997 asking him to visit the Department as soon as possible. He made the visit on the same day and was advised by a Legal Aid Counsel (LAC) to withdraw his appeal and applied for legal aid afresh because he stood a good chance of being granted legal aid without going through the appeal hearing. Though he would like to consult his solicitor and wait until 12 August 1997 to make a decision whether to withdraw his appeal or not, he was told he should do so immediately. He did so but this new application was also turned down as he failed to pass the means test. He appealed against the refusal of legal aid on his second legal aid application. The case was heard and dismissed on 10 September 1997. Feeling aggrieved by the advice he had received, the complainant lodged a complaint with The Ombudsman.

Findings and Conclusion

2. Upon investigation, this Office notes that subsequent to the taking over of conducting means tests on the legal aid applications from the Social Welfare Department, the LAD had on 1 September 1997 revised the processing procedures and introduced the " One Stop Service " which means both the means test and statement would be conducted and taken at the same time in one appointment. Before the revision, it was the normal practice to request the Social Welfare

Department to conduct means test in most cases except for those cases where immediate consideration was given on merits.

3. Regarding the complainant's original legal aid application, a decision was made to refuse legal aid on 11 June 1997 as it was considered one of excepted proceedings under the Legal Aid Ordinance and no means test was therefore conducted. In early August 1997, the said LAC took over the case from one of his colleagues and considered that there might be merits in the case. He invited the complainant to withdraw his appeal so that his application would be re-considered. He was unaware that the complainant's financial position had not been assessed. Consequently, the complainant withdrew his appeal as advised and submitted a second legal aid application on 4 August 1997 which was finally refused on means.

4. The Department stressed that the LAC was acting out of good intention to invite the complainant to withdraw his first appeal. If the LAC was aware that the complainant had not been tested on means, he could either ask for an adjournment of the appeal hearing or amend the reasons for refusal from merits to means. Unfortunately, the LAC did not check the position on means test nor did he consult the Senior Legal Aid Counsel who was to attend the appeal before inviting the complainant to withdraw his appeal. The Department admitted that it was a case of oversight and lack of common sense on the part of the LAC rather than one of bad faith. The Department pointed out that the LAC had no intention or motive to thwart the appeal and that no coercion or pressure had been applied onto the complainant to have his appeal withdrawn. It was pointed out that the complainant's eligibility for legal aid had not been jeopardized since in order to be eligible for legal aid, he had to satisfy both the means and merits tests.

5. This Office considers although the LAC was apparently acting in good faith, he had simply forgotten that the complainant had yet to go through the means test even if he was eligible on merits. This Office notes that if conflicting opinions arose on how a particular case should be conducted, the usual practice was for the officer in question to refer the matter to his section head for a final decision. In the present case, the LAC had not done so.

6. This Office is of the view that the complainant had reasons to feel aggrieved as he had been given false hope regarding the success of his legal aid application. Had the LAC checked on the matter, his handling of the case could have been different and the complainant could have been given a fuller picture on his eligibility for legal aid. The anxiety and frustrations so caused to the complainant would be understandable. The handling of his legal aid applications was clearly unsatisfactory although this Office finds no evidence of the complainant being coerced to withdraw his first appeal or the LAC had acted in bad faith in the process. All points considered, The Ombudsman finds the complaint substantiated.

Recommendations

7. The Ombudsman notes that arising from this complaint, the Department had taken remedial actions to prevent recurrence of similar incidents by issuing a circular to its professional officers and law clerks providing guidelines on the handling of conflicting opinion and withdrawal of legal aid appeal. The Ombudsman therefore recommends that-

- (a) the Department extends an apology to Mr Lee for the unsatisfactory handling of the matter;
- (b) the Department should consider the need to show prominently the status of means test and merits test of an application in the case file; and
- (c) in cases of refusal of legal aid where the application has only been tested on merits but not means, or vice versa, the situation should be explained in detail to the applicant.

Response from the Department

8. The DLA responded that procedurally legal aid could not be granted in an application that has been refused unless there had been a legal aid appeal and that the court had allowed the appeal. The only way the LAC implicated in the matter

could have helped the complainant was to invite him to make a fresh application so that subject to the passing of means test, legal aid may be granted to him in an expedient manner. It was therefore appropriate for the LAC to advise the complainant to withdraw his appeal in respect of his first legal aid application which was refused on merits. It would clearly amount to a waste of time if the appeal went ahead as scheduled as there was already agreement between the LAC and the complainant on the question of merits.

9. The DLA further pointed out that the complaint should not be found substantiated either against the Department or the LAC who had followed the proper procedures in the processing of legal aid applications in accordance with the Legal Aid Ordinance. It was unfortunate that there was a misunderstanding on the part of the complainant as to why the steps were taken. A letter of explanation instead of a letter of apology would be issued by the Department to the complainant to resolve the misunderstanding.

10. The LAC himself also made his representations on the case and reiterated the same that the action was taken to save everybody's time. By reapplying, the complainant could automatically obtain a stay of 42 days during which his case could be reconsidered and the means test done. The complainant was assured that he got merits in his case but he needed to pass the means test. Moreover, the way in handling the case was proper and in line with the practice adopted by all legal aid counsels in order to save time.

Final Remarks

11. The Ombudsman considers that the suggestion given to the complainant to submit a second application after withdrawing his first was taken as an indication that he would be granted legal aid. To the average laymen an invitation to submit a fresh application on the same matter would at least indicate a very good chance of success in his second attempt. The Ombudsman wishes to stress that there is no doubt that LAC A was apparently acting in good faith in advising the complainant to withdraw his appeal and submit a new application, but the advice so given has led to a false hope and more misunderstanding. A letter of apology is deemed appropriate.

12. The Ombudsman is pleased to be re-assured that starting from 1 September 1997, all applications will be means tested before any consideration on merits will be given. He is also pleased to be re-assured that there is already in existence relevant procedures in explaining to legal aid applicants the reasons for refusal of legal aid.

13. Having regard to the DLA' s comments and representations of the LAC, The Ombudsman considers that the findings and conclusion of this report should stand.

Office of The Ombudsman
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