

Section 120 Public Consultation
Legal Services Regulatory Authority
Floor 2 St
Stephen's Green House
Earlsfort Terrace
Dublin
DO2PH42

30th of May 2017

Re: Section 120 Public Consultation

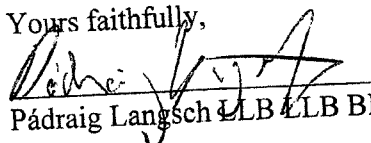
Dear Sirs,

I have been recently approached by a few members of the Bar of Ireland in relation to a LinedIn article which I published in February 2017. In the said article I argue, *inter alia*, that the current regime whereby members of the public are precluded from instructing Barristers directly is, albeit in some limited circumstances, unconstitutional and in breach of Ireland's obligations under the European Convention of Human Rights and the EU Charter of Fundamental rights.

By way of background, I am 25 years old paralegal at Aonghus McCarthy Solicitors in Dublin and I have recently completed the Barrister-At-Law degree at the Honourable Society of King's Inns. Over the past 4 years I have been working with a number of solicitors and I have developed experience in both civil and criminal litigation, judicial review, immigration law and employment law.

I hope you will find the enclosed article helpful. Should you have any questions, please do not hesitate to contact me.

Yours faithfully,


Pádraig Langsch LLB & LLB BL (Candidate)

Encl.

Lay Litigants and the Young Bar- A Bridgeless River

(Published on LinkedIn , 4th of February 2017

Link: <https://www.linkedin.com/pulse/lay-litigants-young-bar-bridgeless-river-p%C3%A1draig-langsch>)

Almost every time I set my foot in the High Court, I see at least one person who stands there without legal representation. Unrepresented parties (or lay litigants) are people who represent themselves in complex legal matters and often appear before the Superior Courts.

I usually roll my eyes, realising that we are about to witness yet another theatrical “*Boston Legal*” TV performance. Sometimes their actions and demeanour in court attract subtle giggles from a few legal practitioners. I, however, feel a great degree of dissatisfaction with a legal system that forces ordinary people to go through this experience that is almost always very hard to watch.

When I worked for FLAC (Free Legal Advice Centres) in 2015, I came across many people in ominous need of legal representation who could not afford the services of a solicitor. Very often they would come to see us the night before their hearings and desperately looking for advice. It was a very unsettling experience to see those people leaving the room and knowing that tomorrow they will appear before a real judge, in a real court, unrepresented and all alone. I have encountered people in highly complex and sensitive judicial review cases brought against the Child and Family Agency that found it

difficult to obtain legal representation following the recent Supreme Court Decision in *Child & Family Agency (formerly Health Service Executive) –v- OA* [2015] IESC 52, which made it more unlikely to recover costs in judicial review proceedings against bodies like TUSLA. As a result, solicitors may often require considerable funds from a client before taking on a case. However, one cannot blame solicitors for the status quo as litigation is costly and solicitors have to make careful financial considerations before taking a matter on a “no win no fee” basis. Oftentimes, cases are simply too risky (or even hopeless), leaving many people standing in court without a lawyer.

Recently, the Irish Times published an article concerning lay litigants. Maurice Coffey BL explained the difficulties faced by people who represent themselves in court proceedings: “*They [lay litigants] don’t understand how to cross-examine. They start making speeches instead of asking questions. You always dread when there’s a lay litigant for the other side purely because you know it’s going to be painful to get to the finish line*”

Ken Murphy of the Law Society of Ireland also expressed his concerns: “*No sensible person would allow themselves be operated on by someone who had no qualification in Medicine*“ . However, many of those people are simply not in a position to pay for any legal representation and they do not qualify for civil legal aid. The actual numbers are alarming. According to the Irish Times, there were 641 cases involving lay litigants on the High Court’s plenary list in 2016 (one in every twenty cases). Every third case before the Court of Appeal has at least one lay litigant.

On the other hand, we have the Junior Bar and Devils; Young barristers who spend their days sitting quietly in courts and waiting patiently for their first breaks or, alternatively, driving hundreds of kilometres to various District Courts throughout the Republic in order to collect their 25 euro remand fees. One could reasonably wonder how can we live in a system where hundreds of people appear before the Superior Courts without any legal representation, while at the same time see dozens of young barristers unable to get work?

The Current Rules

After almost four years of working with solicitors, I am finally at the end of my training at the Honourable Society of King's Inns and I hope to be called to the Bar later this year. As a very junior practitioner, I would be very eager to take a High Court case on a pro bono basis simply because cases before the Superior Courts provide a great exposure opportunity to young lawyers. In addition, it is borderline impossible for a young barrister to appear in a fully contested High Court hearing. However, as per the current rules, I will be forbidden to do unless I am instructed by a solicitor. Rule 4.3 of the Code of Conduct of the Bar of Ireland states:

“In contentious matters, save for the purpose of acting in proceedings in accordance with Rule 5.25 Barristers should not take instructions directly from a client. “

Moreover, barristers usually have to be attended in court by their instructing solicitors (Rule 5.26 of the Code of Conduct). In other words, where a person cannot afford to engage a solicitor, he cannot

instruct a barrister directly, even in circumstances where the barrister is willing to take his case for free.

Constitutional and ECHR implications

I say that the current system as described above is incompatible with the State's obligations under the Constitution and the European Convention on Human Rights. Article 40.3.1 of the Constitution provides that "*The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.*" Assuming that a person is in a position to access the services of a qualified barrister (who is not instructed by a solicitor) free of charge, but that barrister is precluded from taking instructions and appear for that person in court, one can only hardly imagine compatibility with the said constitutional principle, especially in circumstances where a person is involved in complex legal proceedings which are likely to have far reaching consequences in terms of his personal rights (such as property or even family rights).

The right to a fair trial is also protected by Article 6 (1) of the European Convention on Human rights which states that "*in the determination of [a person's] civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*"

" However, the article should not be read restrictively and as the European Court of Human Rights reiterated in *Airey v Ireland* [1979] ECHR 3: "*the Convention is intended to guarantee*

not rights that are theoretical or illusory but rights that are practical and effective".

While neither the Constitution nor the European Convention on Human Rights protects the right to legal representation in civil matters, Article 47 of the EU charter of Fundamental Rights states that:

"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. Everyone shall have the possibility of being advised, defended and represented." Arguably, a person can be deprived of this possibility in cases where he cannot pay for a solicitor, but at the same time is simply precluded from instructing a barrister directly.

Interestingly, Forde and Leonard note in their book on Constitutional Law:

"Both branches of the legal profession have the right of audience in every court, and in principle anybody is entitled to call on the services of any solicitor or barrister. That a person involved in a legal dispute is entitled to be represented by the duly qualified lawyer of his choice, at all stages in the legal process, is so fundamental that it has been held that such a right cannot be interfered with other than by way of unequivocal legislation." (also see *O'Brien v Personal Injuries Assessment Board [2008] IESC 71*)

One could therefore argue that where a citizen cannot afford legal representation due to financial reasons, and at the same time he is

unable to access the services of a qualified lawyer (i.e. a barrister), who is willing to act for that person on a pro bono basis, then the State has failed in their obligations discussed above and the person's constitutional rights have been breached. It is therefore my submission that it is incumbent upon the State to ensure those lay litigants have direct access to barristers in cases where such access is available and where the litigant is not in a financial position to engage a solicitor. While it is accepted that an increased access to barristers will not by itself solve the problem regarding lay litigants, it will undeniably help many unrepresented parties at virtually no cost to the taxpayer.

Pádraig Langsch
