The provision of legal aid in asylum procedures

A comparative case study in the Netherlands, the UK and France

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Introduction

Several reports covering the provision of legal aid in asylum procedures in a selection of European countries expressed concerns on the effectiveness of the legal aid provided to asylum seekers. Among others, the cuts in legal aid funding and the speed of the asylum process were put forward as issues affecting the provision of adequate and effective legal aid. Lawyers providing legal aid in asylum procedure have to cope with the day-to-day realities arising from the national asylum procedure and legal aid system in which they operate. These may include lack of time and financial resources, limited access to interpretation facilities and relevant documents, and restricted access to clients.

The ways in which legal aid providers deal with the demands of practice – as well as the ways in which governments try to control this – have been the topic of public debate. In the Netherlands, for instance, criticisms were expressed from different sides. On the one hand, there was concern that legal aid providers did not put sufficient effort into assisting their asylum-seeking clients, thereby jeopardising the quality of the legal aid provided. On the other hand, objections were raised against the perceived zealous assistance and defence of clients by starting appeal after appeal, thereby excessively burdening the asylum system as well as the legal aid budget. The latter is still very topical since, in order to combat that practice, the Dutch government introduced the plan of a ‘no cure, less fee’ payment for repeated asylum applications, which entails that in case a subsequent asylum application is unsuccessful, the lawyer’s fee is reduced.

Governments make use of different mechanisms to steer the conduct of legal aid providers, ranging from the way in which the providers are remunerated to imposing conditions and quality mechanisms, such as peer review. Such measures are introduced for several reasons, e.g., to control the legal aid costs, expedite the asylum process or increase the quality of the legal aid provided. But to what extent do these endeavours actually affect legal aid providers’ conduct? How are

1 European Commission 2010; ECRE/ELENA 2010; FRA 2010; UNHCR 2010.
2 Recently, the debate was revived by the dean of the Dutch bar association (Sillevis Smitt 2012).
3 See e.g., Laemers & De Groot-van Leeuwen 2004, p. 13 ff for an overview of the discussion.
steering mechanisms – such as ‘no cure less fee’ – balanced against the other factors influencing legal aid providers’ conduct?

The Effect of Context on Legal Aid Providers’ Conduct

The choices lawyers make in the course of their work are influenced by many factors, ranging from the professional and ethical rules with which they need to comply, to the (economic) demands of the workplace. In particular the research conducted by Mather et al. on the practice of divorce lawyers⁵ and more recently the work of Levin and Mather⁶ provide a comprehensive overview of the different elements relevant in understanding lawyers’ decision making and conduct. Mather et al. presented a clear overview of the prevailing accounts in socio-legal research for understanding lawyers’ conduct. These include ‘the professional’ (formal codes of professional responsibility), ‘the workplace’ (economic incentives and the work settings in which the legal aid provider operates), ‘the personal’ (personal identity and values), and they advanced a fourth alternative, a general explanation that draws something from each of the three accounts: ‘communities of practice’, i.e., ‘groups of lawyers with whom practitioners interact and to whom they compare themselves and look for common expectations and standards’.⁷

Levin and Mather’s Lawyers in Practice: Ethical Decision Making in Context, further draws upon these findings and examines lawyers’ ethical decision making in context by covering different practice areas. Among the many factors influencing lawyers’ ethical decision making identified in this contribution, the practice area in which they work was considered one of the most significant.⁸

While research has been done into the factors influencing lawyers’ conduct in many different practice areas, the area of publicly funded asylum law has not been studied from this angle. This particular practice area is characterised by a prominent State presence. It is the impact of this aspect at which I will be looking more closely in this study.

Objective and Research Question

The Institutional Context: Impact of the Asylum Procedure and the Legal Aid System?

The work setting of legal aid providers in asylum procedures consists for a considerable part of the institutional context of the asylum procedure and the legal aid system and is thus to a large extent created by the State. It shapes the conditions under which legal aid providers operate, since it determines the following: the lawyer’s remuneration; what conditions need to be fulfilled in order for legal aid

⁵ Mather et al. 2001. In their study, the authors sought to discover the forces shaping lawyers’ choices through a detailed study of the work of divorce lawyers in two states located in the New England region of the United States. The study contributed to the debate on legal professionalism – that originated and primarily took place in the United States – and showed how professionalism in practice is both constructed and enacted in the day-to-day work of divorce lawyers.
⁶ Levin & Mather 2012.
⁷ Mather et al. 2001, p. 6 ff.
⁸ Levin & Mather 2012, p. 18.
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to be provided (eligibility), and how and by whom this is determined; the conditions under which legal aid providers are allowed to assist asylum applicants under the legal aid scheme; the stage in the procedure at which the provider may step in; whether the lawyer is appointed to the client or not; access to facilities and coverage of additional expenses (e.g., interpretation, travel costs); and, to some extent, when and where the lawyer can meet with the client.

The aim of this research is to explore and understand the impact of the functioning of the asylum procedure and the legal aid system (i.e., the institutional context) on lawyers’ conduct. To this end, I will conduct a comparative case study in three EU Member States which have arranged for the provision of legal aid in different ways, i.e., Netherlands, the United Kingdom, and France. The central question guiding my research is this:

What are the difficulties and dilemmas legal aid providers in asylum procedures in the Netherlands, the United Kingdom and France are confronted with, and how do they respond and to what extent can differences and similarities in their conduct be explained by the functioning of the asylum procedure and the legal aid system (i.e., the institutional context)?

Country Selection

Taking the Netherlands as a starting point for this research, I selected the UK and France because of the clear differences on critical points in the institutional context in which the legal aid providers operate. The three countries are comparable regarding the standard of welfare and development, the presence of a legal aid system which seeks to ensure access to justice for its inhabitants, and a long tradition in the reception of (relatively) large numbers of asylum seekers. Yet, the role of the legal aid provider in the asylum procedure and the provision of legal aid are arranged differently in the UK and France. The selection thus constitutes an information-oriented selection based on a maximum variation in respect of particular aspects of the legal aid system.

9 Here it must be noted that the UK comprises four constituent countries with different regimes. This research will be confined to the England region of the UK.

10 France and the UK are among the four countries receiving the most asylum applications in Europe, and the Netherlands, being a smaller country, is also in the top ten. UNHCR 2011a; UNHCR 2011b.

11 There is no room in this contribution to elaborate on the differences, but these see, among others, to the requirements imposed on lawyers participating in the legal aid scheme, mechanisms to monitor their conduct, payment and covering of additional expenses (interpreters, travel costs etc), appointment to clients and decisions on the eligibility of asylum applicants to legal aid.

**Approach & State of Affairs**

In order to explore the relation between the institutional context and the conduct of legal aid providers, I will examine the topic from both the top down and the bottom up. The topic is approached from the top down through studying the relevant socio-legal literature on lawyer conduct and by identifying the differences and similarities in the Netherlands, the UK and France regarding the functioning of the asylum procedure and the legal aid system (as reflected in the country selection) in order to see which issues are particularly relevant to compare and thus merit special attention in the bottom-up fieldwork. The matter will be studied from the bottom up through examining the difficulties and dilemmas legal aid providers in these countries encounter when assisting their asylum-seeking clients, how they act in response, and why. The bottom-up approach serves to obtain insight into the situation of legal aid providers in asylum procedures from their perspective: How do lawyers experience the situation they work in, and how do they view their role in the asylum procedure? How do they operate, based on these views? Can their views and understanding of their role in the procedure and their subsequent conduct be explained by the institutional context in which they work? Combining these approaches will lead to a better understanding of the relation between the functioning of the asylum procedure and the legal aid system and the conduct of legal aid providers.

I started this research in December 2011, and during the first fifteen months of this project, I conducted a literature study\(^\text{13}\) and an exploratory pilot study in the three countries under review into the functioning of the asylum procedure and the legal aid system and the difficulties and dilemmas which legal aid providers experience in these institutional contexts. The preliminary exploration consisted of a study of the legal framework underlying the asylum procedure and the legal aid system in the Netherlands, the UK, and France and of studies and reports on the functioning thereof; test interviews with legal aid providers, legal aid authority employees, and NGO’s.\(^\text{14}\) Based on both the literature and the exploratory pilot study, I distilled three main elements of the institutional context that may have an impact on the conduct of legal aid providers in asylum procedures. These are the aspects I will consider more closely in the empirical investigation:

1. the lawyer’s institutional position, including the existence of dependency relations between the provider and the authorities and the degree to which the legal aid provider is made part of a bureaucratic and fixed asylum procedure;
2. legal aid remuneration (exclusively fixed fee or alternative possibilities), including the coverage of additional expenses;


\(^{14}\) It proved impossible in the pilot to consult all these players in all three countries, but this condition will be corrected later on in the study so that the same (or equivalent) actors are consulted in the three countries.
3. the presence or absence of requirements for legal aid providers participating in the legal aid scheme and monitoring mechanisms to monitor their conduct.

In the remaining part of the study I will adopt a hierarchical approach, which entails an examination in two phases. In the first phase, lawyer conduct, i.e., their decision making in response to the difficulties and dilemmas they encounter in the course of their work, will be studied in the three countries independently. In the second phase, I will conduct a comparative analysis of the three case studies in order to look for explanations for the differences and similarities found in legal aid providers’ conduct. This first phase will be conducted in the three countries separately through a qualitative study consisting of interviews with legal aid providers (about twenty) and related actors. The legal aid providers will be consulted both as respondents and informants. As respondents, they can provide insight into who they are, what they do, the issues they are confronted with in every-day practice, their understanding of their role in the process and the varied ways that legal aid providers respond to the demands of practice. To that end, I will carry out an interpretative examination: my aim is to understand the meaning of an action through the lawyer’s point of view. In their capacity as informants, the legal aid providers can offer observations of practice that may help to elucidate the work they do and the institutional context in which they operate and they can reflect on the conduct of others. In addition to this main group, national legal aid authorities and possibly immigration authorities, judges, and other organisations involved in the organisation and regulation of legal aid in asylum procedures will be consulted insofar as these have not been part of the pilot study. These actors will be consulted as informants, since they have a broader view and are most likely able to reflect from the different angles on the provision of legal aid and the environment, role and performance of legal aid providers in this respect.

References

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