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Oversight of legal aid decisions: alternative approaches in the Nordic countries, the UK and the Republic of Ireland

Many initial grants and refusals of legal aid in the Nordic countries, the United Kingdom and the Republic of Ireland are made by civil servants working within public bodies of various kinds. These decisions have implications not only for the individual concerned but also for the public purse; often conflicting perspectives. In several of the jurisdictions procedures are in place to provide a check on the use of this power in the form of an external oversight mechanism. How this is done varies considerably: in Denmark the Appeals Permission Board (Procesbevillingsnaevnet), the body which grants leave to appeal to higher courts, also hears appeals from the Legal Aid Office of the Department of Civil Affairs; in England and Wales Independent Funding Adjudicators drawn from the profession hear appeals and report back to the Director of Legal Aid. In Sweden, independent oversight is extended to legal aid decisions made by the courts in addition to those made by the Legal Aid Agency; all decisions can be monitored by the Chancellor of Justice (Justitiekanslern) who has locus standi to instigate appeals to the higher courts. External review can counter the risk of inappropriate factors being taken into account in legal aid decision-making by balancing the interests of the various bodies involved in the process. This improves the chance of a proper outcome in the case under consideration and can also improve the quality of future decisions if an appropriate feedback mechanism is used. The oversight role has a potentially profound effect upon the legal aid system in a jurisdiction and this comparison of the above-mentioned and other mechanisms in these jurisdictions of North-West Europe concludes that some are more effective than others at achieving the aims of reducing arbitrariness and improving future decisions.

1. Introduction

Legal aid decisions are very different in different jurisdictions, primarily for the obvious reason that the rules of eligibility for legal aid vary dramatically. Financial limits and merits tests, as well as the overall scope, particularly of civil legal aid schemes, can be configured in myriad ways resulting in a wide variety of schemes. In addition to these substantive differences, the structure of legal aid can differ widely both in terms of delivery of services and in administration of the system.

This paper examines one aspect of the differing administration of legal aid; the oversight of the initial decisions made on applications for legal aid. The jurisdictions to be considered are those of the Nordic countries (excluding Iceland[1]), the United Kingdom and the Republic of Ireland. These jurisdictions are grouped geographically in North-West Europe, and are all high spenders on legal aid.[2]

The choice of a decision-making structure for a legal aid system has various consequences and cannot be undertaken lightly. The process of considering the documents submitted with a legal aid application, assessing the compliance with eligibility requirements and reaching a conclusion requires human and practical resources which are potentially expensive. If structures which already exist outside the specialist legal aid arena can absorb the additional task of assessing legal aid applications, it may be possible to make costs savings. Making use in legal aid decision-making of courts, regional governmental administration or the lawyers conducting the client work, for example, will reduce the need for specific legal aid administration and thus have an impact on the overall cost of a legal aid system.

Mitigating against this 'outsourcing' approach is the need of those responsible for the final budget for legal aid to control expenditure. Whilst the main mechanism for cost limitation is of course amendment of the substantive rules of legal aid, keeping individual case decisions within government is often seen as enabling additional control. When legal aid systems are changed, bringing decision-making closer to central government, the need for greater control over expenditure is a common rationale.

There is a tension here between cost and control which different jurisdictions address in different ways. Some jurisdictions seem not to have difficulties with escalating expenditure and are content to leave decisions to be made outside government with little or no opportunity for government to intervene other than by changing eligibility rules. Finland is an example of a system where expenditure has remained within acceptable limits despite a very hands-off approach to decision-making; only 'soft' methods for steering the decisions of the Legal Aid Offices are used. Others find that expenditure spirals easily out of control unless legal aid decision-making is kept within government. This has been the experience in England and Wales where over time decision-making has been removed from the legal profession and, via several intermediate stages, brought into the Ministry of Justice. Each non-governmental or quasi-governmental body in turn was found to

[1] Iceland forms part of the doctoral research I am undertaking but at this stage insufficient material has been collected to enable the jurisdiction's inclusion in this paper.
[2] European judicial systems: Efficiency and quality of justice CEPEJ Studies No. 23 Edition 2016 (2014 data) available at http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp [last accessed 10 April 2017].

be unable to exercise adequate control over legal aid spend,[3] leading to the creation of an executive agency within the Department of Justice to administer legal aid.

Within the jurisdictions under consideration in this paper, applications for legal aid are decided by the courts or government employees of various kinds including those working directly within the relevant justice departments, employees of independent statutory bodies, regional government staff and government lawyers within the legal aid delivery service.

However, the decision-making structure for legal aid is rarely limited to the arrangements for applications to be decided; almost all first-instance decisions are subject to some form of oversight, again by a variety of types of body.[4] It is useful for the purposes of analysis to observe cross-jurisdictional patterns to the decision-appeal structure.

2. Patterns

2.1. Court oversight of court decisions

In North-West Europe, in most situations where an initial decision to grant or refuse legal aid is made by a court, refusal of legal aid can be appealed to a higher court. The applicable instances are in Sweden, Norway, Denmark and the Republic of Ireland.

In the three Nordic jurisdictions, courts appoint Public Attorneys in criminal cases[5] and appeal against the decision of the court is to the higher court following the normal process for appeals. Decisions ancillary to the appointment of defence counsel in Denmark, such as refusal to accede to the defendant's choice of counsel, are appealable to the Special Court of Indictment and Revision, rather than the regular appeal courts.[6]

Within the civil sphere, the Swedish courts deal with legal aid applications if court proceedings are underway or anticipated at the time of application[7] whereas in Norway, the courts have statutory authority to grant free legal representation in non-

[3] Sir Ian Magee CB *Review of Legal Aid Delivery and Governance* (2010) available at http://webarchive.nationalarchives.gov.uk/20100303150243/http://www.justice.gov.uk/about/docs/legal-aid-delivery.pdf [last accessed 6 April 2017].
[4] It should be noted that in the jurisdictions of the UK, and the Republic of Ireland, decisions of government and public bodies may be challengeable through judicial review. This possibility may be a way to contest legal aid decisions in some circumstances, in addition to the appeal mechanisms described in this paper. Judicial review, however, does not equate to an appeal against a decision as the grounds on which a decision can be challenged are very limited, and this paper will not include a consideration of the potential impact of judicial review on legal aid decisions.
[5] Swedish Code of Judicial Procedure Ds 1998:000, Chapter 21 (Sweden); Straffeprosessloven §102 (Norway); Public Administration Act, Act No. 571, 19 December 1985, Chapter 66 (Denmark).
[6] Public Administration Act §737(1).
[7] Rättshjälpslag §39.

means tested priority cases[8] and delegated authority to assess legal aid in means tested priority cases.[9] The relevant Danish legislation defines certain categories of civil case for which legal aid will be granted or refused by the court dealing with the substantive matter,[10] although in some types of cases such as child custody disputes it can be difficult to judge whether the matter is to be decided by the court or not. Despite the different remits, in all three jurisdictions appeals against court decisions on civil legal aid are appealable to the relevant higher court.[11]

Courts also deal with criminal legal aid applications in the Republic of Ireland. Some, but not all such decisions are appealable to higher courts. As noted below, refusals of legal aid for criminal cases to be heard in the District Court or on indictment are not appealable, but upon refusal of legal aid for criminal appeals[12] (including appeals to the Supreme Court[13] and appeals on points of law[14]), an applicant may renew his application to a higher court.

2.2. Court oversight of bureaucratic decisions

In a small group of situations, legal aid decisions made by civil servants can be appealed to court. The most straightforward example of this is Finland. The Finnish system places initial legal aid decision-making in the hands of the lawyers in the State Legal Aid Offices in both civil and criminal cases. These lawyers, despite being state employees, are given independence in exercising this power, in accordance with the general approach in Finland. The discretion must, naturally, be exercised within the legislative framework and the lawyer is individually liable for the decisions. Refusals of legal aid in both civil and criminal cases can be submitted to court for 'reconsideration'[15] in a specific process outside the normal appeal process for administrative decisions[16]. Under Finnish administrative law, the Administrative Court is charged with oversight of administrative decisions but in the preparation of the current legal aid legislation it was proposed that this may not always be the best venue for a legal aid reconsideration as there may be a court with direct knowledge of the substantive case for which legal aid is sought, which would be better placed to make a well-informed legal aid decision.[17] Thus, if there is a court already dealing with the substantive matter or with jurisdiction in the case, that court will hear the

[8] Rettshjelploven §19. Free legal representation in the Supreme Court is always decided by that court whatever the subject-matter of the case.
[9] Forskrift til lov om fri rettshjelp §4-1.
[10] Retsplejeloven §327.
[11] Rättshjälpslag §43 (Sweden); Rettshjelploven §27 (Norway); Retsplejeloven §327 (Denmark) specifies that refusals of legal aid are orders of the court, and thus appealable according to the two-tier principle. It is unclear from Danish praxis whether leave to appeal such refusals is required or not.
[12] Criminal Justice (Legal Aid) Act, 1962, s.4.
[13] Ibid., s. 6.
[14] Ibid., s. 5.
[15] Rättshjälpslag 257/2002 11§1 and 24§.
[16] 'Besvär'.
[17] *Regeringens proposition till Riksdagen med förslag till rättshjälpslag och vissa lagar som har samband med den* RP 82/2001 rd 219168H, 3.2.4, available at http://www.finlex.fi/sv/esitykset/he/2001/20010082.pdf [last accessed 11 April 2017].

renewed legal aid application. If the substantive matter is not one which is within court jurisdiction, the renewed application will be dealt with by the Administrative Court.[18]

Within the jurisdictions under consideration, this is the only general right of appeal to court from administrative legal aid decisions. Elsewhere, the possibility is very limited. In Sweden, in immigration cases, Public Attorneys are appointed by the Migration Agency,[19] which also processes immigration and asylum applications and from which appeals can be made to the Immigration Courts,[20] which are specialist Administrative Courts. In England and Wales, if criminal legal aid is refused on the grounds that it is not necessary in the interests of justice, a reconsideration may be requested, with reasons, in writing. If the result of this administrative review is still negative, the applicant can ask for an appeal to the court and a judge will consider whether the test is met.[21]

2.3. **Bureaucratic oversight of bureaucratic decisions**

The most usual types of oversight of legal aid decisions made by civil servants are non-judicial. However, these vary considerably in nature; some are completely independent from the original decision-making body and quasi-judicial; others are internal to the original authority.

One of the most independent is Denmark, where legal aid applications which are not legislatively allocated to the court are to be decided by the Minister of Justice; [22] in practice the Legal Aid Office within the Department of Civil Affairs (Civilstyrelsen). Appeals against such decisions can be made on any grounds to the Appeals Permission Board,[23] which was originally established for hearing requests for leave to appeal to higher courts, with legal aid jurisdiction added in 2007. When sitting as the appeals instance for legal aid, the Board, which is appointed by the Minister for Justice, consists of a High Court Judge, a District Court Judge and a lawyer.[24] The Appeals Permission Board is an independent body administered within the Danish Court Administration. Thus, whilst the appeal is in a strict sense bureaucratic, the nature of the oversight body is quasi-judicial and it is completely outside the legal aid granting body, with responsibilities that extend beyond legal aid.

In Sweden the bulk of legal aid decisions are made by the courts according to the division described above. The remainder of applications are decided by the Legal Aid Authority (Rättshjälpsmyndigheten), a public authority within the Department of

[18] Rättshjälpslag 257/2002 24§2. Further appeals against Administrative Court reviews of Legal Aid Office decisions and appeals in relation to substantive matters which can only be appealed to the Supreme Administrative Court can be taken to the latter court, with leave.
[19] Utlänningslag (2005:716) Chapter 18.
[20] Ibid., Chapter 14, §8.
[21] Criminal Legal Aid General Regulations 2013, Regs. 28-30.
[22] Retsplejeloven §328(5).
[23] 'Procesbevillingsnaevnet' Ibid., §328(5).
[24] Retsplejeloven Chapter 1 a.

Justice. In addition, all grants of legal aid, changes to legal aid certificates and taxations of bills by the courts are reported to the Legal Aid Authority for collation and analysis.[25] Appeals against refusals of legal aid by the Legal Aid Authority can be made to the Legal Aid Board (Rättshjälpsnämnden)[26], a public administrative body which falls within the remit of the Department of Justice. The Legal Aid Board is not a court, but shares buildings and administration with one of the regional Courts of Appeal[27] and is chaired by a judge. The Board president and four additional members, two of whom must be lawyers, are appointed by the government. Legal Aid Board decisions cannot be appealed further.[28] This situation is very close to the Danish model, with the minor difference that the Legal Aid Board in Sweden only has jurisdiction in legal aid appeals, whereas the Danish Appeals Permission Board has a broader remit.

Norway is divided into 18 counties, each of which has a County Governor who is a representative of the King and Government.[29] As well as acting as an appeal body against municipal decisions, the County Governors also have some specific duties, amongst them the granting of civil legal aid in non-priority cases and in cases where exemption from the financial eligibility requirement has been requested.[30] These decisions are subject to appeal to the Ministry of Justice[31]; in practice the Civil Affairs Authority. Such appeals are to be dealt with according to the provisions of the Public Administration Act and are not subject to any further appeal.[32] There is thus no possibility of a judicial appeal of a Norwegian legal aid decision unless the original decision was also taken judicially. Appeal from many civil legal aid refusals in Norway is thus to another public body, but in this case the appeal does not involve judges or have other features which imply a judicial character to the process.

All of the above bureaucratic appeal mechanisms involve other government departments or public authorities. However, some oversight mechanisms are administered from within the body making the original legal aid decision, albeit with attempts to allow the reviewers to remain independent.

In Northern Ireland, if an applicant or acting lawyer is unhappy with any decision concerning civil legal services they can request a review by the Legal Services Agency, the body which also makes the initial legal aid decision.[33] If the decision is still not accepted, a further appeal is possible in some cases. Following recent

[25] Domstolsverkets föreskrifter (DVFS 2012:15) om rättshjälp §17 & 18. Refusals of legal aid are not so reported, leading to a gap in the information available to the Legal Aid Authority.
[26] Rättshjälpslag §44.
[27] The Hovrätten för Nedre Norrlands in Sundsvall, as directed by Förordning med instruction för Rättshjälpsnämnden 2007:1079 §5.
[28] Rättshjälpslag §44(3).
[29] https://www.fylkesmannen.no/en/, accessed 21 April 2016.
[30] Forskrift til lov om fri rettshjelp §4-2.
[31] Rettshjelploven §26.
[32] Ibid.
[33] The Civil Legal Services (General) Regulations (Northern Ireland) 2015, Reg 14.

legislation,[34] an independent appeal panel is available to hear appeals against refusal of legal aid for representation in the higher courts.[35] The panel consists of one presiding member (a barrister or solicitor of at least 7 years' standing) and two others with relevant knowledge or experience, at least one of whom must be a lawyer. There are a number of categories of decision which are not capable of appeal,[36] including: extension of advice and assistance funding; refusal of an emergency certificate; financial eligibility decisions; exceptional funding decisions and statutory charge determinations. Additionally, decisions on civil legal services for representation in the lower courts are excluded and thus the only possible challenge to such decisions is review by the Legal Services Agency. However, in decisions which are appealable through the process, the panel provides a measure of independence; whilst panel members are paid for their time by the Legal Services Agency, they are not employees and the majority of their time is spent in independent legal practice. The decision of the panel is binding upon the Legal Services Agency.[37]

England & Wales follows a similar approach, although the detail is somewhat different. Appeals against refusals of civil legal aid by the Legal Aid Agency are initially internal, by way of review. If the applicant is still dissatisfied, they may appeal to an independent adjudicator. These adjudicators are drawn from a panel of practising lawyers with at least three years' experience of legal aid work appointed by the Lord Chancellor.[38] Adjudicators hear appeals against refusals or withdrawals of civil legal aid [39] and if the decision is that the original decision was unlawful or unreasonable the Legal Aid Agency must reconsider the decision.[40] Although the adjudicator's view is only binding in certain circumstances,[41] the Legal Aid Agency does usually follow the recommendations. Unless the Legal Aid Agency's new decision raises novel points which can lead to a second appeal to an adjudicator, this is the final appeal stage for civil legal aid. Appeals in high cost or complex hearings may be heard by a panel of adjudicators, known as the Special Controls Review Panel,[42] whose decisions are only binding if they concern prospects of success.[43] There is no possibility of judicial appeal in civil legal aid cases. In criminal cases, the adjudicators' role is limited to appeals concerning advice and

[34] The Civil Legal Services (Appeal) Regulations (Northern Ireland) 2015.
[35] Ibid., Reg 4.
[36] The Civil Legal Services (Appeal) Regulations (Northern Ireland) 2015, Schedule.
[37] Ibid., Regulation 27.
[38] The Funding & Costs Appeals Review Panel Arrangements 2013, Schedule 1, para. 1, accessible at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/336133/Appeals_Arrangements_2013.pdf.
[39] Civil Legal Aid (Procedure) Regulations 2012, Regulation 2, 'Interpretation' and Regulation 28.
[40] Ibid., Regulation 46.
[41] Ibid., Regulation 47.
[42] Funding & Costs Appeals Review Panel Arrangements 2013, paragraph 1 and Civil Legal Aid (Procedure) Regulations 2012, Regulation 58.
[43] Civil Legal Aid (Procedure) Regulations 2012, Regulation 58.

assistance pre-trial;[44] appeals of interests of justice refusals of representation are dealt with judicially as seen above. Again, as in Northern Ireland, adjudicators are not employees of the Legal Aid Agency and are as such independent. However, the powers of the independent adjudicators in England and Wales are more restricted that those of the Northern Irish appeal panel, as not all decisions are binding upon the Legal Aid Agency.

In the Republic of Ireland, initial decisions on civil legal aid are taken by the Legal Aid Board,[45] either centrally or through delegated powers at the Law Centres. A negative decision can be reviewed[46] internally by the Board, in theory by the original decision-maker but in practice by a more senior decision-maker.[47] If the review is unsuccessful, an appeal may be made to a committee of Board members[48], consisting of a chairperson and four other members of whom two were practising barristers or solicitors prior to their appointment as Board members. There is no legislative appeals process from this decision. The keeping of appeal decisions within those who are members of the Legal Aid Board itself prevents this appeal process being considered independent, although it is an opportunity for oversight by senior personnel who had no involvement with the original decision.

The internal review of decisions is the only available oversight option in some circumstances. The Scottish Legal Aid Board has a statutory duty to ensure a right to review of the decision upon refusal of civil,[49] children's[50] or criminal[51] legal aid. Reviews are conducted internally by SLAB and no further appeal is possible. Similarly, as seen above, in lower court cases in Northern Ireland, only an internal review is possible. As such reviews are conducted within or close to the original decision-making teams, they do not add any element of independent oversight to the decision-making process.

2.4. **No appeal**

Whilst rare, there are instances in criminal legal aid in these jurisdictions where no appeal is possible against a negative decision. Appeals against refusals of legal aid for criminal representation in Northern Ireland are to be made 'to such court or other

[44] The Criminal Legal Aid (General) Regulations 2013, Regulation 17.
[45] A statutory, independent body.
[46] SI 273/1996 Civil Legal Aid Regulations 1996, Regulation 12(1).
[47] *Circular on Legal Services: A guide to decision making and best practice*, Legal Aid Board, 8th ed., November 2015, Part 6, p. 6-2.
[48] SI 273/1996 Civil Legal Aid Regulations 1996, Regulation 12.
[49] Legal Aid (Scotland) Act 1986, s.14(3). The procedure is contained in Civil Legal Aid (Scotland) Regulations 2002, Regulation 20.
[50] Legal Aid (Scotland) Act 1986, s. 28H.
[51] Legal Aid (Scotland) Act 1986, s. 24(5) (summary proceedings) and 23A(4) (solemn proceedings). The procedures are found in the Criminal Legal Aid (Scotland) Regulations 1996 S.I. 1996 No. 2555 (S.200), Regulation 7A(3)(b).

person or body as may be prescribed'.[52] However, no such prescription has been made and there is thus no formal route for appeal against decisions.

In criminal cases in the Republic of Ireland, it is explicit that no appeal lies against a decision of the court in an application for a legal aid certificate in the District Court.[53] No appeal provisions at all are present in relation to legal aid certificates for trial on indictment.[54]

2.5. **Additional oversight**

There is an interesting oversight mechanism operating in Sweden in addition to the appeals processes described above. Since 2005, a monitoring role previously within the remit of the National Courts Administration has been held by the office of the Chancellor of Justice (Justitiekanslern)[55] in a move to "improve and streamline the [legal aid] payment system and its control mechanisms"[56]. The function involves receiving reports on particular types of legal aid decisions felt to indicate a possible risk to the public purse, [57] such as grants made in exception to the usual rules concerning legal costs insurance, grants of legal aid in certain exceptional cases and cases where costs exceed 150,000 SEK.[58] Reports come from both the courts[59] and the Legal Aid Authority and if it is concerned about the decision, the Chancellor's office has locus standi to make an appeal to the Appeal Court or Administrative Appeal Court against the decision in question[60]. This standing in appeals is a general one and applies equally to decisions for which there is no reporting duty;[61] however, such decisions are of course highly unlikely to come to the attention of the Chancellor in order for an appeal to be contemplated by her. The intended effect of this arrangement is not only the saving of funds in particular individual cases but also wider benefits to the legal aid system. The original decision-makers will in principle think more carefully about their high-impact and high-value decisions as they know these are being monitored. Furthermore, it is believed that consistency of decisions between the numerous courts and the Legal Aid Authority can be improved by having a central body scrutinising decisions and taking appeals which will clarify the proper application of funding rules. Approximately 2,500 decisions are reported to

[52] Access to Justice (Northern Ireland) Order 2003 s. 28.
[53] The Criminal Justice (Legal Aid) Act, 1962 s. 2(2).
[54] Ibid., s. 3.
[55] At the time of the transfer of responsibility for this task, the Chancellor of Justice expressed concerns that there might be a perceived conflict of interests between her office and lawyers acting in cases against the state. However, this concern was not sufficient to counteract the benefits of the transfer. *Justitiekanslerns remissyttrande över departementspromemorian (Ds 2003:55) Rättshjälp och ersättning till rättsliga biträden* document number 3866-03-80 of 9 February 2004.
[56] Justice Department Proposal *Rättshjälp och ersättning till rättsliga biträden* Ds 2003:55 1 January 2003.
[57] Domstolsverkets författningssamling DVFS 2016:16 *Domstolsverkets föreskrifter om ändring av Domstolsverkets föreskrifter (DVFS 2012:15) om rättshjälp* §28.
[58] Approximately 15,600 EUR. Domstolsverkets författningssamling DVFS 2016:16 Domstolsverkets föreskrifter om ändring av Domstolsverkets föreskrifter (DVFS 2012:15) om rättshjälp.
[59] Domstolsverkets föreskrifter (DVFS 2013:7) om rättshjälp §28.
[60] Rättshjälpslag §45.
[61] See e.g. Rättshjälpslag §45 and Lag om offentligt biträde 1996:1620 §8.

the Chancellor's office each year and about 35-40 appeals are brought by them annually.

3. Analysis

3.1. Error in decision-making

3.1.1. Human error

The possibility of appeal against a legal aid decision is important for several reasons. Of primary importance is the need to correct a wrong decision. Legal aid forms part of a system for upholding the core human right to fair legal hearings, which in turn is fundamental to the protection of the rule of law. It is thus of evident importance that efforts be made to ensure that decisions within a legal aid system should be as accurate as possible. Legal aid applications are assessed by individuals and as humans are not infallible there is always a possibility of error. The availability of a check of some kind is therefore important so that there is an opportunity for mistakes to be rectified.

3.1.2. The risk of unconscious bias in decision-making

In addition to the risk of occasional poor quality decision-making, there is also a possibility of unconscious bias. There are a number of conflicting interests involved in legal aid; indeed, one group of actors may even have several contradictory interests. Amongst the various groups given the power to make decisions on legal aid applications there is ample potential that inappropriate factors, i.e. those which do not arise from the statutory eligibility provisions, might influence a decision.

Maybe the most obvious potential conflict of interests occurs when decisions are made by government. The department which employs the decision-makers may also be responsible for the legal aid budget and subject to political pressure to ensure that 'deserving' claimants receive legal aid and others do not. The government department may also be responsible for the proper functioning of the justice system as a whole, in which context legal aid has a complex interactional functionality. Pressure will also be felt by government if international tribunals criticise the legal aid system's compliance with human rights accords.

Courts have a range of interests which are relevant when assessing applications for legal aid. In general, courts are under considerable pressure of time and therefore speed and efficiency are at a premium. Enabling a hearing to go ahead with the minimum of delay and in a time effective manner are important considerations, and may generate a positive attitude to legal aid applications. Likewise, the fairness of a hearing is of immediate importance to the court and may be a much more evident consideration than it would be for a civil servant making a legal aid decision in an office away from the parties, whom they have never met. Some judges, on the other hand, are reluctant to have a role in legal aid decision-making if any merits

assessment is involved, because of the risk that they will be seen to be pre-judging the substantive case. Some legal aid systems such as Denmark and Norway deal with this potential problem by giving courts jurisdiction over legal aid only where there is minimal, or no, merits testing involved.

In situations where the lawyer who may also conduct the case decides on legal aid eligibility, there may again be various competing interests. Most obviously, a grant of legal aid may result in additional income for a lawyer who is not a government employee. However, if demand is very high and the available lawyers cannot deal with all the potentially eligible clients, there may be a subconscious tendency to reduce the numbers of applicants receiving assistance. Against this impetus will be the likely empathy between the lawyer and the client before them.

3.2. Efforts to reduce arbitrariness

3.2.1. Approaches at the initial decision-making stage

The existence of such potentially conflicting interests results in a risk of arbitrariness. It is important for the legitimacy of legal aid decisions that this risk is minimised as far as possible. Some jurisdictions make the attempt to remove potential conflicts from the decision-making parties. In Sweden and Denmark, for example, the government agencies responsible for some legal aid decisions (the Legal Aid Authority and Legal Aid Office, respectively) intentionally have no target for legal aid spend or budgetary responsibility.

Likewise, in Finland the Legal Aid Offices, who make initial legal aid decisions, do not have any budgetary duties; their own costs are paid on a salaried basis and when they assess legal aid applications from lawyers in private practice they do so without any duty to consider the effect on the legal aid budget.

3.2.2. Appeal as a protection against arbitrariness

However, it is the possibility of appeal to a different body which in most of the jurisdictions reduces the risk of decisions being based on inappropriate criteria.

Appeal or oversight gives the opportunity for a situation to be reconsidered by a body which does not share the same inherent interests as the original decision-making body. As discussed above, all the players in legal aid have a variety of interests which may, albeit subconsciously, affect assessment of legal aid applications. However, if the review or appeal body has different vested interests to the first-tier decision-maker, any initial unintentional bias stands a chance of being neutralised. Additionally, as appeal bodies are often a step removed from the case, any bias which that body might have in an initial legal aid decision has less force. An example of this is court decisions on legal aid which can be appealed to a higher court. Whilst the court of first instance may have the interests described above, these largely relate to the dual role of that court in dealing with the substantive case as well as the application for legal aid. An appeal to a higher court would lead to the

legal aid issue being considered separately by a court not handling the substantive case, thus removing some of the conflicting pressures.

Clearly the success of appeal in overcoming the effects of unconscious bias will depend upon the nature of the appeal route, and in particular the identity of the appeal body and its similarity to or links with the primary decision-making body. The European Court of Human Rights has drawn attention to the importance of variety in decision-making and appeal bodies in avoiding arbitrariness.[62]

It can be seen from the brief outline above that oversight in the jurisdictions under consideration usually involves a decision-maker of similar nature to the initial decision-maker. Court decisions, when appealable, are reviewed by higher courts. This is of course not surprising as bureaucratic appeal from court decisions would be considered fundamentally inappropriate in all the jurisdictions. In terms of avoiding arbitrariness, these initial decisions are not protected by a change of outlook in the appeal body but rely on the inherently impartial nature of the courts. As has been seen above, this neutrality is not necessarily a given in legal aid decisions, as the court itself has an interest. When a court performs the quasi-administrative task of assessing legal aid applications only one of the interested parties, the applicant, is present; the government does not provide an input to the individual case beyond the rules of the scheme. This is in contrast to the courts' usual task of considering a dispute of one kind or another where opposing parties both present their case. The task of assessing legal aid is not one which courts are always comfortable with, nor is government always content to allow the courts to have this impact on public expenditure in circumstances where they may be inclined to be generous. The Swedish oversight by the Chancellor provides a balance to the considerable involvement of courts in legal aid decisions in that country. This oversight role is cleverly designed in that it does not interfere with the integrity of the court process; appeals against court decisions are still to higher courts but the government gains an opportunity to be heard as a party.

Bureaucratic decisions on legal aid are also, as seen above, generally overseen by other bureaucratic bodies. However, within this overall picture there is considerable variation in how far the appeal body is removed from the original decision-making body. In the few instances where only internal reviews are available, there is no division at all between the initial and secondary decision-maker and therefore the protection against arbitrariness is weak; all the same vested interests are present at both levels. The internal appeals processes in Ireland, Northern Ireland and England and Wales are interesting in that an attempt is made to bring an independent element into the legal aid bureaucracy at the appeal stage. In all three cases reliance is placed on the independence of the legal profession; in Northern Ireland and England and Wales the persons dealing with appeals are still practicing as

[62] *Del Sol v. France* (App. No. 46800/99) Reports of Judgments and Decisions 2002-II (26 Feb. 2002), para. 26.

lawyers alongside their work for the legal aid bodies. In the Republic of Ireland the statutory provision suggests that the appeal committee members need only have been practising lawyers before their appointment to the Board but in practice, as Board membership is not full-time, they are almost certain to be still carrying on their legal practice. However, their position as Board members ties their interests closely to the Board in a way which provides less independence than in the other two jurisdictions. In England and Wales, the recommendation of the Independent Funding Adjudicator is not always binding on the Legal Aid Agency and even though in fact it is almost always followed, this aspect of the system is significant as it maintains ultimate control in the hands of the Legal Aid Agency in many cases.

The Norwegian structure is unusual in that appeals from regional government decisions on legal aid go to central government. Whilst the interests of these two bodies differ, it is the appeal body which arguably has a stronger interest in controlling overall costs of the legal aid system. Thus, appeal is to a less financially neutral organisation. However, because the bodies are not mutually dependent in the way that the UK and Irish decision and appeals bodies are, it may be that greater protection against arbitrariness is achieved.

In both Sweden and Denmark, the appeals bodies are positioned within the court structure, although they are not themselves courts. Both are staffed by senior judges and lawyers. The level of separation from the governmental initial decision-making bodies is significant and the vested interests are not shared. Indeed, by keeping the appeal body separate from the courts as well, even greater neutrality should be assured. Thus, whilst nominally of the same basic nature, the appeal bodies do not share the vested interests of the initial decision-making body and it can be presumed that protection against subjectivity is good.

The oversight of bureaucratic legal aid decisions by courts, as seen in Finland and, to a lesser degree, England and Wales and Sweden, is a very evident protection against influence from inappropriate factors, as it places the oversight in the hands of a completely separate body with different interests. However, in the context of neutrality it is interesting that the Finnish government rejected the option of oversight through the normal administrative court route in favour of oversight by the court in the substantive matter. The reasoning was to ensure that the court taking the decision on appeal had as much expertise in the matter as possible, but the corollary effect is necessarily to reduce impartiality, as the court re-considering the legal aid application will have all the vested interests applying to first-instance decisions by courts discussed above.

3.3. **Improving future decision-making**

The impetus for an individual appeal comes from an individual who is dissatisfied with the outcome of their application, in most cases.[63] The motivation for the appeal

[63] But see the role of the Swedish Justitiekanslern, above.

is the hope that the decision will be reversed and legal aid granted on the terms sought. A successful appeal implies that the original decision in that case was incorrect, for one of many possible reasons. If the reason for the error is only specific to that particular case then the appeal decision is of little benefit beyond that case unless it points to a training need for a particular decision-maker. However, in many cases an appeal decision may have relevance to potential future decisions because it addresses one or more issue of general importance. For example, the interpretation of the applicable legal aid rules may be considered, with an indication that the approach of the first-tier decision-making body hitherto has been flawed. Likewise, an appeal body may find that the wrong weight is being given to various factors in decisions, or even that extraneous circumstances are inappropriately being taken into account. Such findings are an opportunity for future decisions to be improved if steps are taken to feed the results back into the primary decision-making structure. Improving future decisions not only improves the quality of outcomes in individual cases but also reduces systemic costs by lessening the risk of future appeals.

The various appeal routes considered above show different levels of commitment to this potential for improvement. In Norway the hope of encouraging consistency and quality of decision-making by the County Governors has led the Civil Affairs Authority to publish useful appeal decisions online.[64] In stark contrast in Denmark, the Appeals Permission Board does not give reasons for its decisions, which makes it very hard for the Legal Aid Office to improve its practice following Board decisions. The reasoning behind this relates to the originating purpose of the Board, before it gained its legal aid function. The Board was set up to decide cases where there is no automatic right to appeal to a higher court but leave is required. It was felt that it was advantageous to keep this function separate from the court which would hear the substantive appeal, and to not release detailed reasons for the decision to grant or refuse leave, to avoid any possible influence over the substantive case. When the legal aid appeal function was added to the Board's remit, it was decided that these cases should be dealt with in the same manner, and the Minister of Justice confirmed that this meant that legal aid decisions would not include detailed reasons.[65]

In Sweden, decisions of the Legal Aid Board and the higher courts on appeal from initial legal aid determinations are considered by the National Courts Administration[66] and useful decisions are added to the online legal aid handbook used by the first-instance courts and the Legal Aid Agency in assessing legal aid applications.

[64] At www.lovdata.no. A subscription is required to access the case decisions.
[65] Justitsministerens svar af 12. april 2010 på spørgsmål nr. 791 (Alm. del), som Folketingets Retsudvalg stillede Justitsministeren den 15.marts 2010, available at http://www.ft.dk/samling/20091/almdel/reu/spm/791/svar/702856/824157/index.htm.
[66] Domstolsverket.

Where courts hear legal aid appeals or renewed applications, their decisions are of course public records and available for learning or training purposes. As most of the decisions appealed come from lower courts it may be assumed that judges in the lower courts will simply take notice of superior court judgments in the usual way and amend their practice accordingly. Likewise, in Finland, lawyers dealing with initial applications for legal aid have access to the decisions of courts in previous cases, for guidance as necessary.

The more internal oversight mechanisms found in the UK jurisdictions can also be used to improve the quality of initial decision-making. In Northern Ireland the new appeals panel is developing a feedback loop to this end, although in England and Wales there is currently no such system. It is to be expected that reviews within the Scottish legal aid system influence future decision-making, although the lack of independent input to review decisions reduces the utility of this mechanism for improving the quality of decisions. Likewise in the Republic of Ireland, decisions on internal appeals to the Board have the potential to be used to improve future decisions, within the inherent limitations of such internal review processes.

4. **Conclusion**

This short overview has revealed considerable variation in the legal aid appeal and oversight processes in North-West Europe. Some systems are relatively simple, with review and appeal kept within the original decision-making bureaucracy, in some cases using outside legal expertise brought to conduct an 'independent' appraisal. Equally straightforward are the processes where court decisions on legal aid are appealable to a higher court although a number of jurisdictions fine-tune the legal aid appeals process such that the appeal does not follow the routine path but is diverted to another higher court.

Whilst having the advantage of simplicity, these schemes do not necessarily provide a good balance between the various competing interests in the legal aid system, nor do they provide the best protection against arbitrariness. As discussed above, if the vested interests of decision-makers at the initial and appeal stages are the same, there is a risk that inappropriate factors may influence decisions, and that inadvertent bias goes unchecked. It is not suggested that decisions in such jurisdictions are routinely partial; however, it is submitted that there is a real risk of both actual and perceived bias in any system which does not acknowledge and counter potential impartiality.

A number of imaginative approaches to oversight improve neutrality in the jurisdictions considered. The use of the Appeals Permission Board in Denmark adds a clearly independent review mechanism; whilst the Board only reviews bureaucratic initial decisions, its position outside both government and the courts insulates it against vested interests when considering legal aid appeals.

The system with the most finely-tuned checks and balances, however, is Sweden. As in Denmark, there is a quasi-judicial appeal body for governmental decisions on legal aid, but this is supplemented by over-arching oversight by the Chancellor of Justice, which applies to both bureaucratic and judicial legal aid decisions. The Chancellor's office falls under the responsibility of the Ministry of Justice, as does the Legal Aid Authority, but they are separate agencies and some objectivity is thus gained. Furthermore, Legal Aid Authority decisions are subject to appeal to the Legal Aid Board in addition to oversight by the Chancellor, and thus a non-governmental perspective is also provided. Court decisions on legal aid, which are appealable to higher courts, can receive input from the governmental perspective through the role of the Chancellor. Whilst the reporting duties are limited, the categories of case which must be notified to the Chancellor can be and from time to time are altered by regulation; if it was considered necessary, the reporting grounds could be broadened. As the ability of the Chancellor to intervene as a party and institute an appeal extends to all legal aid decisions,[67] not just those which must be reported, her role thus provides, in theory at least, comprehensive oversight.

Whatever the success of an individual appeal system in rectifying arbitrariness in individual decisions, its reporting and feedback process can magnify the positive effect by ensuring that future decisions avoid repeating the failings identified. This important role is not realised in all the jurisdictions considered, and should be developed wherever possible. Various methods have been used, most commonly the publishing of appeal decisions (in Sweden and Norway) and the collation of useful decisions in handbooks or other practical texts (in Sweden, Denmark and Norway). A feedback mechanism is under development in Northern Ireland, with an exact nature still to be determined. Appeal decisions in situations where courts are overseeing courts may also, as suggested above, influence future decision-making through normal channels.

The Appeals Permission Board in Denmark is in stark contrast to the other appeals bodies, in that it does not give reasons for its decisions, thus preventing future lessons from being learned. As well as being unhelpful, this lack of reasons is striking given the statutory right to written grounds for administrative decisions,[68] and hinders further appeal. The reason for the stance is seemingly consistency between the different functions of the Board, but it can be questioned whether this aim is sufficiently compelling to justify the negative impact on legal aid quality improvement.

It must be remembered that the pursuit of good legal aid decisions is only part of the puzzle within a legal aid system, and what is achievable is limited by financial restraints. The choice of decision-making structure in general, and appeals in particular, may be constrained by cost; both the cost of the structure and the control it gives over the total cost of the legal aid system. However, actual and perceived

[67] Lag (2005:73) om rätt för Justitiekanslern att överklaga vissa beslut; Rättshjälpslag (1996:1619) §45.
[68] Public Administration Act, Act No. 571, 19 December 1985, §22 & 23.

legitimacy of decisions is necessary for public faith in legal aid to be maintained. Structural changes to appeals processes could in some jurisdictions improve the quality of legal aid decision-making, and increase trust in the system.