

Resolution (76) 5 on legal aid in civil, commercial and administrative matters

(Adopted by the Committee of Ministers on 18 February 1976 at the 254th meeting of the Ministers' Deputies)

The Committee of Ministers,

Considering that with a view to eliminating economic obstacles to legal proceedings and permitting persons in an economically weak position more easily to exercise their rights in member states, it is expedient to ensure equality of treatment in granting legal aid to nationals of member states of the Council of Europe and to those aliens for whom such equality of treatment appears to be most justified,

Recommends to governments of member states to accord under the same conditions as to nationals, legal aid in civil, commercial and administrative matters irrespective of the nature of the tribunal exercising jurisdiction :

- a. to natural persons being nationals of any member state,
- b. to all other natural persons who have their habitual residence in the territory of the state where the proceedings take place.

Explanatory memorandum

1. At their 9th Conference held in Vienna on 30 and 31 May 1974, the European Ministers of justice, having examined the reports submitted by the Ministers of Justice of Italy and Austria, recommend the Committee of Ministers of the Council of Europe "to instruct the European Committee on Legal Co-operation to study the problem of economic and other obstacles to civil proceedings at home and abroad in the light of the discussions at the 9th Conference, the examination of which might be entrusted to a committee of experts".

2. Harmonisation of national systems of legal aid is likely to facilitate matters for persons in an economically unfavourable situation, but such harmonisation calls for detailed studies which are at present being carried out within the Council of Europe.

It is apparent that, pending the outcome of these studies, it was already possible to ensure some degree of harmonisation in respect of

equality of treatment to be granted in each member state between the nationals of these states and foreign nationals and that it was urgent to take steps to this end, having regard to reforms pending in several countries.

3. There are indeed fairly wide divergencies among the legal systems of member states with regard to legal aid to foreign nationals.

In some countries all foreign nationals are entitled to legal aid in the same way as the nationals of those countries, without regard to their nationality or residence (Cyprus, Denmark, Norway, United Kingdom).

In other countries, foreign nationals who have their habitual residence there are entitled to legal aid on the same basis as nationals of those countries; other foreign nationals are entitled thereto only if that right has been recognised in international treaties (France, Sweden and, *de facto*, the Netherlands and Switzerland).

In a third category of country, foreign nationals are entitled to such aid only if reciprocity is guaranteed by convention, legislation or *de facto* (Austria, Federal Republic of Germany, Greece, Iceland, Turkey).

Lastly, in a fourth category of country, reciprocity provided for by convention is required (Belgium, Italy, Luxembourg). Some countries have several systems as regards non-resident aliens.

In Ireland, there is as yet no statutory system of legal aid. However, legal aid for needy persons is provided in certain circumstances on an administrative basis. Legal aid and advice is also available to a limited extent from private organisations. To the extent that such legal aid is available, no distinction is made between nationals and foreigners.

4. The Committee also found that, with a few exceptions, the nationals of a Council of Europe member state could be granted legal aid in the territory of the other member state, in pursuance of the 1905 and 1954 Hague Conventions relating to Civil Procedure,¹ the 1955 European Convention on Establishment,² or bilateral agreements.

1. Parties to the 1954 Hague Convention are: Austria, Belgium, Denmark, France, the Federal Republic of Germany, Italy, Luxembourg, the Netherlands, Norway, Sweden, Switzerland and Turkey.

The 1905 Hague Convention relating to Civil Procedure still applies to Iceland, which is not a party to the 1954 Hague Convention.

2. Parties to the European Convention on Establishment are: Belgium, Denmark, the Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom.

5. As, however, the network of these conventions and agreements is not complete, it was held that measures should be taken for all nationals of a Council of Europe member state to be allowed to have the benefit of legal aid in the territory of another member state on the same basis as the nationals of those states, without any additional condition, including that of residence, being imposed upon them. Member states that impose special conditions on the granting of legal aid to their nationals who reside abroad may apply the same conditions to the nationals of other states who reside abroad.

6. It was also considered that special attention must be given to foreign nationals, whatever their nationality, who have their habitual residence in the territory of a member state and that they should be granted in that state the same treatment as nationals.

These foreign nationals take part in the economic, social and cultural life of their country of residence and equity demands that they be in a position to assert their legal rights and have the benefit of legal aid when they are in a difficult financial situation. If they are not granted the benefit of such aid, they might not be in a position to exercise their rights in the event of legal proceedings. In this connection, emphasis was laid on the fact that the competence of the defendant's forum, formally recognised in the Brussels Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgments, as a fundamental principle of competence, is widely recognised and that it was consequently important to put the foreign national in a position to ensure his defence.

7. Under the terms of the resolution, a Council of Europe member state must grant to nationals of other Council of Europe member states, as well as to all persons having their habitual residence in its territory, the same treatment in respect of legal aid as that accorded to its nationals. It is the legislation of that state which determines the conditions to be fulfilled in order to receive the benefit of legal aid and the extent of that aid.

8. The expression "in civil, commercial and administrative matters" would be construed in a broad sense, including social and taxation matters; criminal matters are not covered by the resolution.

9. The resolution does not cover legal persons because the problem of granting legal aid to such persons is the subject of a study being carried out by the Council of Europe.

10. In order that the benefit of legal assistance may be granted to the nationals of each Council of Europe member state, it will be for these

states to take appropriate measures (reform of the law, conclusion of bilateral agreements or ratification of multilateral conventions in particular the 1954 Hague Convention and the 1955 European Convention on Establishment, etc.).

11. It should be noted that the granting by a state of legal aid to all persons habitually resident in its territory extends to stateless persons (see the 1954 New York Convention relating to the Status of Stateless Persons which has been ratified by the following Council of Europe member states: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, Switzerland and the United Kingdom).

12. As far as the concept of "habitual residence" is concerned, it should be recalled that it has been defined in Resolution (72) 1 and annex, which were adopted by the Council of Europe Committee of Ministers on 18 January 1972. Residence is there treated as a question of fact which must, in order to be considered as habitual, be accompanied by "a more stable territorial link. This stability may take the form of either a greater length of stay or a particularly close tie between the person and the place" (see the explanatory memorandum to Resolution (72) 1, paragraph 56). It should also be recalled that in accordance with the above resolution "the residence of a person may not depend upon granting or refusal of an official authorisation" (see the above-mentioned explanatory memorandum, paragraph 48). It therefore follows that the present resolution should not be interpreted as excluding from entitlement to legal aid those persons having their habitual residence in a state but not having been granted official authorisation to reside in that state.

13. It goes without saying that member states which already grant the benefit of legal aid to the persons referred to in sub-paragraphs *a* and *b*, either in pursuance of the law or in pursuance of international undertakings, will not be required to take any action on the resolution.

Similarly, any member state may go beyond the terms of the resolution by granting legal aid to all foreign nationals, without making residence a condition thereof.