Submission to the Joint Committee on Human Rights on the subject of the Legal Aid, Sentencing and Punishment of Offenders Bill

From:

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Human Rights Exception Sought

The CORE Coalition of NGOs, including Amnesty International, CAFOD, Friends of the Earth, Oxfam and Traidcraft, is drawing attention to an aspect of the Legal Aid, Sentencing and Punishment of Offenders Bill, which will have the serious and apparently unintended consequence of making it financially unviable for foreign victims of human rights abuses by UK multinational corporations to be able to bring litigation in the UK. The UN Special Representative on Business & Human Rights expressed his deep concerns about the proposed changes in a letter to the justice minister warning that they could "constitute a significant barrier to legitimate business-related human rights claims being brought before the UK courts in situations where alternative sources of remedy are unavailable".

At the Human Rights Council on 16th June 2011, the UK Government restated its commitment to implement the Guiding Principles on Business and Human Rights which accompany the UN Protect, Respect and Remedy Framework. One of its three pillars is greater access to remedy, including through judicial mechanisms, for victims of corporate harm.

In the report of the Joint Committee on Human Rights (JCHR) '*Any of our business? Human rights and the UK private sector*' (December 2009), the JCHR asserted on the subject of the right to a remedy that:

"*We recommend that, in its response to the Jackson Review of Civil Litigation Costs, the Government consider the evidence we received that current costs rules and funding limitations undermine the ability to seek redress of alleged victims of breaches of human rights standards as a result of actions or omissions by UK companies*" (para 296, page 88)

Notwithstanding the JCHR's concerns, the Legal Aid, Sentencing and Punishment of Offenders Bill that is currently being debated in Committee contains provisions that will impose further constraints on access to remedy.

In our submission below, we set out the three elements of the Bill that would have impacts that undermine access to civil litigation in the UK. We also propose amendments that would reverse these effects which would not involve any additional cost to the UK taxpayer and would not be counter to the overall objective of the Bill. We are attempting to ensure that a particularly vulnerable group of claimants would not be denied access to justice in circumstances where they would currently be in a position to make a claim.

Proposed Reforms

Three reforms to the costs regime for civil litigation will have the greatest negative impact on international victims of human rights abuses by UK companies:

1. Abolition of 'success fees'
   Multinational corporations devote enormous resources to defending claims and often deluge the claimants' lawyers with procedural disputes before the cases come to trial. Claimants'

lawyers in these cases are exposed to enormous costs which they have to shoulder if the case is unsuccessful. To date success fees have enabled claimants' lawyers to spread their risk by using costs recovered in successful cases to fund the costs of those that are not.
The abolition of success fees payable by defendants will mean that claimant firms will not be able to run the risk of taking on these types of cases in the future.

2. Non-recoverability of 'After The Event' (ATE) insurance premiums from defendants
   The loser pays principle means that claimants are at risk of facing a demand for massive costs from the multinational corporation if the claimants' case fails. So they often take out insurance to cover them for this risk. Under the current system, the defendant corporation is liable to pay the premium (the size of which reflects the level of cover and risk involved) if the case succeeds. This Bill proposes the non-recoverability of ATE premiums from defendants other than in clinical negligence cases, in recognition of the significant expense and expertise required there. However, human rights cases are similar to clinical negligence cases in the levels of expense and expertise required.
   The same exemption which the Bill already applies to clinical negligence cases should be extended to cases brought against UK companies by human rights victims.

3. Non-recoverability of basic costs
   This issue is not presented in the Bill but is likely to be dealt with via Court Rules.

   A potential change to the "proportionality" test, applied in recovering basic costs from defendants, could mean that costs spent on bringing the case may not be covered even if the case is won. This is the result if it is deemed that any legal costs incurred by the claimant that exceed the compensation amount awarded are not recoverable from the defendant. It is almost inevitable that legal costs in such cases against multinational corporations exceed the amount of compensation awarded. This is in part due to the resources required to communicate with and collect evidence from claimants and witnesses, especially when the events occurred in remote or unstable areas, where access and security are problematic.

   Further, the disparity between the costs and the compensation awarded has actually increased since 2009 with the introduction of the 'Rome II Regulation (EC) No 864/2007', where victims' compensation is now determined according to the law of the country where the harm occurred rather than in accordance with UK legal standards (resulting in a much lower compensation amount for the victims of developing and emerging countries).

   In order to maintain a level playing field between claimants and multinational corporations, the proportionality test for recoverable costs must be meaningful and take into account the actual financial resources that have been expended on a case by both sides.

Consequences

The combined effect of the changes proposed in the legislation will prevent claimants from pursuing a case because of the severely reduced ability of law firms to take on human rights litigation against multinational companies in the future. Claimants' lawyers will face the prospect of investing enormous amounts of time and money not knowing whether, even if the

case is successful, they will recover anything more than a fraction of the costs incurred. Only the very strongest claims will justify the risk and, even then, companies will be able to exert unfair pressure on claimants to settle for less, rather than running up costs that may not be recoverable. Victims of human rights abuses in the emerging and developing worlds, where levels of compensation are typically lower, will lose out most, as their cases will be the least economically viable.

Rationale for Amendments that we are asking the Committee to incorporate in the Bill

Proposed Amendments to clauses 41 & 43 of the Bill
The amendments below are proposed to clauses 41 & 43 of the Bill in order to safeguard future litigation on behalf of claimants from developing companies against large corporations domiciled in the UK or other EU countries. The dumping of toxic waste in the Ivory Coast by Trafigura is one of the best known examples in the UK.

Such litigation tends to be very expensive, given the great logistical challenges to representing developing world claimants, and the risks in doing so. Costs are also increased because well-resourced multi-national companies instruct the most skilled and expensive City of London lawyers, who leave no stone undisturbed in defending claims.

Conversely, damages in such cases tend to be relatively small, as damages are currently calculated in accordance with Rome ii which requires that they be assessed with reference to the law in the affected country, and not the UK. For obvious reasons, this tends to lead to lower compensation than would be recovered under UK law. Equally, and again for obvious reasons, financial losses such as loss of income will be far smaller where the claimant is, for example, an African subsistence farmer rather than a person living in the UK.

The professional and personal risks experienced by lawyers in undertaking such cases make them unattractive, which is why even under current regulations most law firms are unwilling to take these on. Given the high costs and relatively low damages, it will be impossible for such litigation to be presented if success fees and insurance premiums cannot be recovered from the defendant. The proposed amendments below would impose safeguards to ensure the exception is limited to deserving cases where there is no other way of achieving effective access to justice - an obligation of the UK under article 6 of the European Convention on Human Rights.

The structure is as follows:

- The Lord Chancellor is endowed with a power to exempt, by order, certain Conditional Fee Agreements (CFAs) from the new provisions limiting the success fee to 25% of the damages and prohibiting recovery of the success fee from the opposing party.

- Hence, all that is created is a future power to provide for an exception, not an exception with immediate effect.

- The potential exception is limited to cases where the claims include those brought by individuals in tort – i.e. it does not apply to businesses, and does not apply to commercial disputes.

- It is further limited to torts alleged to have been committed in a developing country.

- Developing county is defined with reference to the per capita gross national income [PCGNI] of the country in question. This is the method used by the World Bank: see http://data.worldbank.org/about/country-classifications

- We have suggested a developing country is a country whose PCGNI is less than half of the UK's, although a lower percentage could be used (50% would on present data - http://siteresources.worldbank.org/DATASTATISTICS/Resources/GNIPC.pdf - capture some Eastern European countries, whereas a lower percentage would essentially limit the exception to countries outside Europe, North America and Australasia).

- The exception is further limited to cases which are certified as appropriate by a High Court judge. The criteria for the judge would be:

    - That the proceedings should be considered by a court in England or Wales in the interests of justice. This would exclude (i) weak cases (justice does not require weak civil cases to come before a court); (ii) cases without adequate links to the jurisdiction (justice will not require a case to be heard by a UK court if there is no link to the UK); (iii) cases involving very low level complaints (justice does not require civil cases to be heard where the subject matter is trifling).
    - A disparity in resources between claimant and defendant. Thus, the exception is reserved for cases where claimants are financially weak and defendants are well-resourced.
    - A finding that in the absence of such an exclusion from the ordinary rules on success fees, the claimants would be at significant risk of being unable to secure effective representation. Thus, a claimant would only qualify for the exception if he could show that his apparently meritorious claim would be stifled if he was unable to recover a success fee.

- The concept of certification by a High Court judge is based on the tried and tested position in public law cases, eg for judicial review. There, in cases brought in the public interest which might otherwise be stifled by the risk of paying costs to the defendant in the event of success, a High Court judge may make a pre-emptive order either preventing the defendant from recovering costs, or limiting the defendant to recovering a specified sum which the claimant could afford to pay. These are generally known as "protective costs orders". In the same spirit, we have provided (in effect) that a High Court judge

may allow a success fee to be recovered if this is the only realistic way in which a claim can be brought which it is in the interests of justice to bring.

- Where a case fulfils all of the criteria we have provided for, a success fee may be recovered from the opposing party, which is not limited to a percentage of the damages. A corresponding change to clause 43(1) of the Bill provides that insurance premiums may also be recovered in these circumstances.

Proposed Amendment to Clause 41 of the Bill

(7) After sub-section 7 of that section insert –

"(8) The Lord Chancellor may by order prescribe that section 58(4A) and 4(B) and sub-section 6 above shall not apply to any conditional fee agreement where all of the following conditions are met:

(a) The proceedings include a claim by an individual or group of individuals for damages in tort;

(b) The tort is alleged to have been committed in a developing country;

(c) A judge of the High Court has certified (whether before or after the commencement of court proceedings), that:

i. The proposed litigation raises issues which ought, in the interests of justice, to be considered by a court in England or Wales;

ii. The resources of the proposed claimant or claimants are significantly less than those of the proposed defendant or defendants; and

iii. In the absence of the provisions of this sub-section there would be a significant risk that the proposed claimant or claimants would be unable to secure effective legal representation in England or Wales.

(9) In sub-section 8 'developing county' means a country, not being a member state of the European Union, whose per capita gross national income was less than 50 per cent of the per capita gross national income of the United Kingdom in any of the three years prior to the year (or if more than one year, the first year) in which a relevant tort is alleged to have been committed."

(8) In section 120(4) of that Act (regulations and orders subject to parliamentary approval) after the amendment made by sub-section (5) of this section, insert "58A(8)".

Proposed Amendment to Clause 43 of the Bill

Substitute for the existing text of sub-clause (1):

(1) In the Courts and Legal Services Act 1990, after section 58B insert –

"58C Recovery of insurance premiums by way of costs

(1) A costs order made in favour of a party to proceedings who has taken out a costs insurance policy may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy, unless:

(a) The party is one to whom section 58(A)(8) applies; or
(b) Such provision is permitted by regulations under subsection (2)."
