**McKenzie friends, the end in criminal courts?**

The English Court of Appeal, Criminal Division, gave a clear indication that the present concept of a McKenzie friend is not appropriate .

Four cases for leave to appeal were listed together. No party was legally assisted.

Giving the judgment of the court, Lady Justice Hallett listed the problems which have occurred

*(i) Third parties have submitted applications on a litigant in person's behalf where it has been unclear that they were acting in an applicant's best interests and or with their full authority.*

*(ii) Third parties have requested transcripts and other documents on behalf of a litigant in person and at- tempted to correspond with the office directly as if they were a legal representative.*

*(iii) Staff, particularly administrative staff, have been unsure about what information they can provide to third parties, particularly over the telephone.*

*(iv) Third parties have advanced applications in which criticisms are made of trial lawyers, without consulting the trial lawyers as is required of fresh legal representatives by the judgment in R v McCook [2014] EWCA Crim 734.*

*(v) Third parties with a personal interest in the proceedings, or with a cause they wish to advance, or simply with the best of intentions, have presented totally unmeritorious applications. They have thereby raised the hopes of an applicant, taken up a very considerable amount of time and resources of the court, and put an applicant at risk of a loss of time order pursuant to the judgment in R v Gray & Ors [2014] EWCA Crim 2372. In Gray & Ors the court declared that:*

*"The only means the court has of discouraging unmeritorious applications which waste precious time and resources is by using the powers given to us by Parliament in the Criminal Appeal Act 1968 and the Prose- cution of Offences Act 1985".*

*(vi) Third parties have taken years to advance an application, seemingly unaware of the approach this court takes to applications requiring significant extensions of time.*

*(vii) Third parties have advanced applications seemingly unaware of the approach this court takes to applica- tions to advance fresh evidence, particularly those based on fresh expert evidence.*

She moved on to set out the personal circumstances of each applicant. [Some of it makes unhappy reading. Failures by law students, seemingly supervised by lawyers, occurred in the most basic issues, such as how to approach the criticism of counsel who previously conducted the case, how to deal with the evidence of expert witnesses and how to make a timely application. In one case the students of Northumbria University took six years to lodge an application.]

*5. In this Special Court, the third parties seeking to assist the litigant vary. James is a litigant in person. He has been assisted throughout these proceedings by his wife, Mrs James, on the basis he is dyslexic, not articulate and cannot answer questions very quickly. Mrs James has lodged grounds of appeal on her hus-*

*band's behalf and with his authority. She initially applied to address the court orally but abandoned her ap- plication. She was a defence witness at trial and with an obvious personal interest in the proceedings.*

*6. Solomon is assisted by Mr Whetstone, who informed us that he is a friend of long standing. He got in touch with the applicant after the trial and offered to help, when he discovered trial counsel had advised against an appeal. He says he is not being paid but has declined to provide any further information on his background. We assume, therefore, he is not and never has been professionally qualified. He calls himself a "McKenzie type friend". He has lodged grounds of appeal on the applicant's behalf and has been corre- sponding with the office on a regular basis. He lodged a complaint with his MP that the applicant's case had been delayed pending this hearing. He made an application to address the court. This was refused because the court did not consider this was an exceptional case. He then submitted written representations and a video recording said to undermine the safety of the conviction. These have been considered, but, as we note later in this judgment, his representations contained explicit criticism of trial counsel and reliance on comments allegedly made by trial counsel, but no documents have been provided to support the representa- tion and there has been no proper compliance with the procedure set out in McCook.*

*7. Conaghan is now assisted by law students of Northumbria University. The students prepared his appli- cation for leave to appeal but the process took nearly six years. The students settled the grounds of appeal including criticism of trial counsel without complying with the requirements of McCook and they lodged a re- port on the applicant's behalf from a witness whose expertise in the relevant field has been doubted on a previous occasion by this court. The same students are assisting in other live cases before the court. Alt- hough the Court of Appeal Office has been told they are supervised by a solicitor, it is not clear the extent of the supervision. However, it was not the students who sought to represent Mr Conaghan at today's hearing. He had the very considerable advantage of being represented before us by Miss Suttle on a pro bono basis, and we are indebted to her.*

*8. In the case of Ramchaitar, the Registrar granted an application for a non‐ qualified third party to con- duct litigation namely the Criminal Appeal Project of BPP Law School. The project was established to assist applicants who have exhausted their appeals process. The Law School first submitted an application to the Criminal Cases Review Commission for the applicant, but it was rejected because he had not exhausted his avenues of appeal before this court. By that time they had carried out substantial work on the applicant's behalf and the Registrar allowed them to continue acting for him. They have twice sought an adjournment of the application on the basis that two different counsel instructed to attend pro bono could not attend. The most recent application was yesterday, less than 24 hours before the hearing. Both applications were re- fused. The Law School were unable to obtain the services of another counsel to advance the application.*

Reviewing the present state of the law and the Registrar’s Practice Note of December 2015, she went on to say:

*16. Having considered these developments and the Registrar's Practice Note, it is our view that:*

*(i) The term "McKenzie friend" is not appropriate in the Court of Appeal Criminal Division. Terms such as "applicant's friend" or "applicant's helper" might well be more appropriate, but it would be wrong to express a concluded view pending the results of the consultation in the Civil and Family jurisdictions.*

*(ii) The court will only allow a non‐ qualified third party to address the court in exceptional circumstances, and this will be decided on a case‐ by‐ case basis.*

*(iii) If the Registrar has exceptionally granted permission for a non‐ qualified third party to act as a litigator, it does not follow that the court will also grant the third party a right of audience. It will only do so in exception- al circumstances.*

*(iv) The Registrar's Practice Note is generally consistent with the current law and best practice in this area.*

*However, we recommend a number of possible improvements. First, we would invite the Registrar to con- sider whether the terminology is such that it can be properly understood by the majority of litigants in person. Second, we suggest the Registrar may wish to structure the guidance in such a way it better highlights the individual stages in the process. This should enable bodies (such as student law advisory bodies) to make an informed decision as to how far they can go in assisting a litigant before involving the services of a lawyer. Third parties should be put on clear notice that an application should not be advanced beyond the single judge stage, following a refusal, without the applicant being fully advised as to the possible consequences.*

There is an obvious tension between the need to regulate the legal profession and protect its users and the need to provide assistance to those who are entitled to try to appeal. It is questionable what good is done to the McKenzie friend idea by a university failing to properly supervise its students, either regarding basic practice or timely action.

The present model of access to justice has been criticized from all quarters of the legal profession. Even ten years ago a McKenzie friend was a rare beast, spotted only occasionally in the halls of justice. In many ways its increase and the attendant problems have been brought on by the government and by the professions’ inability to stop the rot.

It is probably not the end of the lay helper but the McKenzie friend may now be an endangered species.