

Lesson Four: Access to Justice and Fair Trial

Lesson Four - Lesson Plan

PLTS:

Independent enquirers, creative thinkers and reflective learners

FUNCTIONAL SKILLS:

Aural comprehension, listening for gist, sorting information for relevance

OBJECTIVES:

- Students will explore the issues of access to justice and fair trial from different perspectives
- Students will analyse and evaluate different situations and identify information relevant to the concepts of access to justice and fair trial
- Students will understand how the concepts of access to justice and fair trial are applicable to contexts relevant to themselves as young people living in the UK

OUTCOMES:

- Students will be able to identify some of the main factors that contribute towards access to justice and fair trial

KEYWORDS:

Access to justice, legal aid, fair trial, independence and impartiality, reasonableness

4.1 Introduction: Access to Justice and Fair Trial

Read the following:

We have learned that the way disputes are resolved in this country is through the trial system in courts and tribunals. In order to be able to get a fair outcome and achieve justice for both sides involved in the dispute, the process of the trial and everything leading up to the trial must be fair. In this lesson, we will look at the elements that are necessary for a fair legal process.

Both sides involved in the dispute need to be equipped for their involvement in the legal process. This means being able to have legal advice and being represented in court whatever your circumstances, including the situation where you cannot afford to pay for it. Having legal advice and representation in court paid for you where you cannot afford it is called legal aid and this is a key part of being able to access justice.



4.1.1 STARTER ACTIVITY: Arrested in Malta – Instructions for teachers (10 minutes)



P 1. Play the video 'Vulnerable Suspects in the EU' – Client Testimony – by Fair Trials International.

<http://www.fairtrials.org/publications/videos/vulnerable-suspects-in-the-eu-client-testimony/>

In this 5-minute video, James Milton (not his real name) talks about his arrest in Malta when he was 16, where he was interrogated for over five hours without a lawyer. He was later cleared of all charges.

2. While they are listening, give the students the following instructions:

Watch the video about a 16 year old being questioned in Malta. As you watch, write down what you think was not fair about the process of arresting and questioning this young person.

3. Briefly discuss the answers as a class.



4.1.2 STARTER ACTIVITY: Arrested in Malta - Background for teachers

Answers may include:

Sample answers:

He did not have a lawyer

His parents were not allowed to be there when he was questioned

He was made to feel intimidated

His rights were not made clear to him

MAIN ACTIVITIES

4.2 Access to Justice



4.2.1 Access to Justice – Teacher-led introduction

You may wish to read or paraphrase the following to the class:

Think back to what we discussed in the previous lesson about justice being the 'fair process' which gives the best chance of leading to the 'right outcome.' So what we are asking is 'What do we need in order to be able to achieve the right outcome?' This right to be able to get access to justice gives us the best chance of getting the right outcome, and is one of the many important benefits that we are entitled to under the law.



4.2.2 ACTIVITY 1 - Caught Up In A Protest – Printouts for students

Imagine this situation:

1



1. You are walking home from school when you come across a large crowd of people shouting loudly and holding placards. You are not sure what is happening but you can hear them saying something about recent cuts to the benefits system, and that their families will find it difficult to get by. They are blocking the street so you are not able to get past.

2



2. You stand at the back of the crowd, hoping to squeeze through when you can in order to get home. There are police officers around monitoring the protest. You can't quite see what's happening, but suddenly, a scuffle starts at the front of the crowd which escalates. Someone in the crowd throws a brick, smashing a shop window. This sets the crowd off, and soon many people start to throw things.

3



3. Soon there is a struggle involving the crowd and the officers. You realise that you have been pushed to the middle of the crowd. You feel frightened and you are unable to move. Police vehicles arrive and you realise people in the crowd are being arrested. You suddenly feel a hand on your shoulder and you are guided into a police van.

4



4. You are not told what is going to happen and you don't know what you should do at this point. You were just trying to get home, and ended up being arrested. What will you need in order for justice to be done?

In the box below, write down what you think you will need in order for justice to be done. You can use some of the following key words to help you, and add some of your own too.

Lawyer

Money

Parents

Advice

Trial

My rights

Police

Fairness

Freedom

Court



4.2.3 ACTIVITY I: Caught Up In A Protest - Instructions for Teacher (15 minutes)

P If there are the facilities to do so, play the audio slideshow 'Caught Up In A Protest' in the folder called 'Videos' on the CD-ROM. Otherwise, read through the scenario with the students. Ask students to work in pairs or small groups. The scenario could also be acted out by the class. Ask the students to think about how they would feel and what they would need as individuals in that situation in order for justice to be done. The box with word prompts may be helpful for students who need it, but could be omitted for more advanced students.



4.2.4 ACTIVITY I: Caught Up In A Protest - Background for Teachers

SAMPLE ANSWERS:

I need the law explained to me and to know what my position is under the law, or more generally I would need legal advice.

I need someone to tell me what my rights are and what the police can or can't do.

I need to phone my parents so that they know what is happening. I would feel less worried if my parents could be present while I am being questioned and held at a police station.

I need to understand what is going on and what might happen to me.

I need to understand what I'm being accused of.

I need to be able to explain my situation and to tell my side of the story.

I need someone to represent me in court.

I need a fair trial.

All of these are valid answers, but to draw the discussion out further, and to understand access to justice more generally, it may be helpful to break the topic of access to justice down into two components.

Firstly, there must be the policies and institutional structure for people to be able to have legal representation and access to the court system. This means being helped to understand what the details are of the case being brought against you, what the law is, and what your best course of action is. Where the case goes to court, this means having your case managed by someone who is able to file the right documents at the right time in order for proceedings to be able to go forward, and once the case starts, it means being represented in court by someone trained in the law and who is serving your interests before the court. Usually, you would have to pay the professionals providing these services, but what if you can't? The basis of legal aid is that where you cannot afford to pay for these services, the state will pay for you. Otherwise, those who could not pay would not have access to justice.

Secondly, people should be aware of their rights and processes in the legal system and aware of the law itself to access the processes that the justice system is made up of. They should also be able to engage with the system on a practical level. For example, if they do not have the language skills to be able to understand the legal advice they are given, then access to justice remains rather theoretical. In order for there to be true access to justice, individual circumstances have to be taken into account. You may wish to refer back to lesson one, reminding students of the idea that equality sometimes means unequal treatment where some individuals/groups are starting at a disadvantage and therefore need extra help in order to get to the same starting point and in order to benefit from an opportunity on an equal footing to everyone else. In this case, for example, those without the relevant language capacity would need extra help in this regard in order to be able to access justice on an equal basis to those who do have the requisite language capacity to understand the advice and proceedings before them.

In this particular situation, the person arrested is a child. To reflect the particular needs of children, those under 17 have particular rights from the moment of arrest and must be made aware of these rights. Relevant to the facts of the situation outlined above: the police must inform the child's parents or guardian as soon as possible of the arrest; children have the right to have an adult present at the police station; children have the right to talk in private to the adult if he/she wishes; steps should be taken to contact an adult such as a parent if the child has requested his/her presence at interview and only in limited circumstances may the interview go ahead without the adult requested. It would be useful to draw out once again the point about different treatment under the law being necessary for people with individual circumstances or particular vulnerabilities that require extra help in order to be able to benefit equally from the law. In order to access justice on an equal basis to adults, children are given the extra rights outlined above to deal with the fact that they are generally less experienced, less mature and less able to understand and cope independently with situations than adults. Were children not to be given these extra rights, they would not be enjoying access to justice on the same basis as adults.



4.2.5 ACTIVITY 2: Legal Aid in the UK – Teacher-led introduction

Read the following:

Legal aid is the provision of advice and representation in court to those who cannot afford to pay for it. This means that even if you can't pay for it, you will be given help to understand the details of the case, what the law is and what the best option is for you to have the best chances of succeeding with the case.

Where the case goes to court, having legal aid means that if you can't pay for a lawyer you will have one paid for so that you can have your side of the dispute represented in court. Without legal aid, those who could not afford a lawyer would not be able to have legal advice and would not have anyone to fight their case in court.

Recently the government has made some changes to legal aid. The Ministry of Justice describes the UK legal aid system as the most expensive system of its kind in the world and says that it has had to make cuts to the legal aid budget because it could not afford to continue to keep legal aid as it was. This means that legal aid is no longer available in certain areas of law such as housing, debt, welfare and family law (except in exceptional circumstances) and its availability has been decreased in some areas such as criminal law.



4.2.6 ACTIVITY 2: Legal Aid in the UK – Printouts for students

You are going to hear three legal professionals talking about recent cuts to the legal aid budget. The cuts have made legal aid unavailable for certain situations and certain people.

The government says that due to economic challenges it is necessary to make budget cuts within the justice system and to legal aid. Even with the cuts to legal aid, the government says that the legal aid system would still be one of the most generous in the world.

The people you will hear being interviewed think the cuts will have an important negative impact on access to justice in the UK.



Lord Macdonald QC, criminal barrister and former Director of Public Prosecutions



Raymond Shaw, partner in a law firm whose work includes work funded by legal aid



Neil Kerr, barrister dealing with family law

Before you listen to the recording:

Brainstorm with the class:

Who do you think cuts to the legal aid budget might affect?

Do you think cuts to the legal aid budget would have a positive or negative impact on equality and fairness in the UK legal system? Why?

As you listen to the recording:

Note down in the table what each speaker thinks about the questions you have just thought about with the class:

Who do you think cuts to the legal aid budget might affect?

Do you think cuts to the legal aid budget would have a positive or negative impact on equality and fairness in the UK legal system? Why?

Don't worry if you cannot write down all the answers – just listen for the main points.

Speaker	Who will cuts affect?	Positive (+) or negative (-) impact?	Why?
Lord Macdonald QC			
Raymond Shaw			
Neil Kerr			

After you listen:

Discuss in small groups:

1. Lord Macdonald QC said that a reduction in legal aid might mean that there could be one quality of justice for the rich and one for the poor:

a) Do you think it is right that you should be able to have a better quality of service if you can pay for it?

b) Should people who cannot pay for legal advice and representation be entitled to have it paid for them by the state and why?

2. If you completed Activity 1, go back to the situation of your arrest and imagine if you were not entitled to legal aid. What would the consequence of that be?



4.2.7 ACTIVITY 2: Legal Aid in the UK



- Instructions for teachers (25 minutes)

P (This is an optional activity.)

Play the audio recording 'Legal Aid in the UK' in the folder called 'Audio Recordings' on the CD-ROM.

Before students listen:

The purpose of this pre-listening brainstorming activity is to invite the students to think about what they are about to hear. Don't worry if the students' ideas are not well-formulated or articulated at this stage. By the end of the activity they should have grasped these concepts.

As students listen:

The purpose of this activity is to encourage active listening skills, which will introduce them to the concepts of justice surrounding the issue of legal aid.

Students should be encouraged to listen for gist and pick out the most important points in the interviews rather than write down everything. It is not important for them to understand everything that is said in depth, but rather to draw out the main opinions of the interviewees.

After students listen:

This section is intended to provide students with the opportunity to present different points of view and critically evaluate the opinions they have heard.

These questions are best discussed in small groups first, before the answers are fed back to the class.



4.2.8 ACTIVITY 2: Legal Aid in the UK - Background and answers for teachers

In Lesson Two, we explored the concept of having equal benefit of the law. Here, we explore the concept of equal access to justice, including a fair trial.

1.a) Do you think it is right that you should be able to have a better quality of service if you can pay for it?

The students should understand from the Exercise 1 discussion and the Exercise 2 listening activity that legal aid enables those who cannot pay for advice and representation in the legal system to receive it, paid for by the state. The consequence of reducing legal aid is that:

- In areas of law where legal aid is no longer available, those who cannot afford to pay for a lawyer will have to represent themselves and their interests without legal knowledge or training. This means a lack of equality between those who can pay for lawyers to represent them and those who cannot. The lack of equality means a lack of fairness as there is no justification for why those who have a lesser capacity to pay should have a poorer standard of representation in the justice system leading to a greater risk of mistakes and the wrong result being reached. As discussed in Lesson One, a situation is probably unfair where benefit is linked not to effort or sacrifice but to an arbitrary factor such as luck.

Without equality and fairness, justice cannot be done.

b) Should people who cannot pay for legal advice and representation be entitled to have it paid for them by the state and why?

Some students may feel that being able and willing to pay for a service may entitle someone to a better quality of service since they are prepared to give up something for it. However, the point here is that not everyone has an equal capacity to pay. Everyone does however have an equal right to justice, so if they cannot pay for access to it, then the only way to realise this right is for the state to help them pay for that access. It should be stressed to students that justice does not necessarily mean being acquitted or winning a case. It means getting 'the right result' based on correct application of the law through a fair procedure.

2. If you completed Activity 1, go back to the situation of your arrest and imagine if you were not entitled to legal aid. What would the consequence of that be?

This question is intended to personalise the consequences that have been discussed in questions 1 and 2 and to put them in specific context. Students may respond to the question by saying that without legal aid, they wouldn't know what the law was, be able to receive legal advice and advice on their rights, or be able to defend themselves adequately if they ended up being charged and ended up going to court. They might even end up with a conviction.



4.2.9 Activity 2: Legal Aid in the UK - Audio transcript for teacher's reference

Lord Macdonald QC
Former Director of Public Prosecutions

The broad principle we have always had is that on legal aid you get high-quality representation. In many countries if you rely on the state for a lawyer in criminal cases, you receive very sub-standard representation. You see that particularly in the US where people facing charges on capital crimes get terrible representation from \$10-an-hour lawyers because that's all the state is prepared to pay for.

Access to justice has to be as equal as possible. We don't want one quality of justice for the rich and one for the poor. If we are moving in that direction, it's a risky business. It can mean that the quality of justice differs according to the size of your bank balance.

I'm not a civil lawyer but it looks as though we are moving [in civil law] from a system that provided coverage across all areas to one that is now limited to certain areas. The legal aid cuts are directed at those most in need of legal assistance, such as housing or social welfare law. There's virtually no legal aid available in these areas now.

In housing law, unless you are in imminent danger of losing your home, you can't get legal aid. Housing disrepair has been badly impacted by these changes. The result is that people will be living in worse conditions – and sometimes in intolerable conditions – with no recourse to law.

People who haven't got money can't afford to go to law. It will lead to a increasing lack of respect for the law if it's seen as being for people with money rather than people without money.

As far as judicial review is concerned [where the Mo] is also planning to restrict financial support], it's a major area of concern. My sense is that the approach of the justice secretary is, as with legal aid, not so much driven by financial considerations but ideology. He doesn't think that the courts ought to be able to challenge government actions because it's an undermining of democracy. He's wrong about that.

Raymond Shaw
Partner, Shaw Graham Kersh, London

In the old days, we solicitors used to be paid an hourly rate for most of the work we did under legal aid. The rates may have been lower than privately paid work, but we were at least paid for what we did. That meant the most complex and demanding cases would often prove to be the most profitable. Some years ago, the payment system was replaced by a computer program that in most cases provides a fixed fee

for a particular case. That fee has been driven down and down, and is now at the point where people are finding it difficult to do the necessary work.

If a defendant comes to me with a complicated defence and multiple witnesses that need to be seen, and possibly with the need for expert evidence – or if they have mental-health problems or language difficulties – these issues add to the time required to prepare the case but generally produce no additional payment. What this means in practice is that the very cases that require the most time and attention are also the least profitable. The danger is obvious.

Fees for police station work are about £200 per case. That's fine for a simple shoplifting case, but if, say, you are called to a case where five people have been arrested for a street fight, that could be two days' work, and you might have to return for a further interview on another day. We've entered a bizarre world where the most complicated cases earn the same as the simplest ones; you get the same fee regardless of whether it's shoplifting a packet of crisps or a murder.

Everyone knows these cuts are not sustainable. Standards have already fallen. You might be lucky and get a lawyer on legal aid who defends you brilliantly, but generally the standard of justice has been reduced. The direction of travel favoured by the government is that many firms will go out of business, and big practices will come to dominate. There will be mass redundancies among lawyers and shotgun weddings between practices.

Lawyers will be less inclined to take on the toughest cases. Think about the famous miscarriage-of-justice cases. There, the image is usually of a committed lawyer with a bee in his or her bonnet, determined to do something for their client. In the brave new world of factory law firms with non-qualified staff monitored for their productivity, where's the room for the lawyer to do this unprofitable and often unpaid work?

We pride ourselves on giving the fullest and best service to people of all backgrounds and whatever their needs, but changes to the legal aid system are making it difficult to protect some clients. We can now identify people who, when they walk through the door, we know are going to lose us money, and some firms are already turning those people away.

Imagine a 'bag lady' walks in with bundles of papers. From a sea of paperwork she fishes out a summons for, say, not informing the benefits agency of a change in circumstances. She doesn't recall whether she ever told them, but she wants to fight the case. It would be so easy to send her on her way. Who will now take time to build up her trust, go through her papers, and work out what's really going on in her life? Who has the time and energy to do that in a world where everything is being cut? The government seems to think it's a badge of shame rather than a badge of honour that we have a legal system that is the pride of the world. You get what you pay for.

Neil Kerr
Family law barrister

Legal aid has been removed from most branches of family law. It used to be available for divorce cases, though there were limits and it was means-tested. It was also available for contact and residence cases involving children, and for injunction proceedings for both alleged victims and perpetrators of domestic violence. Much of this has been dismantled.

It is still possible for alleged victims of domestic violence to get legal aid, but only if they supply some form of documentary evidence to support their case – a police report or a letter from their GP. But many of these victims do not want to report violence to doctors or the police, and the most vulnerable – such as people with language difficulties – are the least likely to make a report.

The one area where the government has retained legal aid, almost certainly because of the level of public and media interest, is where there are allegations of child abuse. Parents can still get legal aid if a child has been removed by the local authority, though even in this area there are concerns that the government may seek to tighten the rules.

The main difficulty that we're increasingly seeing as a result of these changes is the number of litigants in person – people forced to represent themselves in court because they can't get legal aid. This clogs up the system and makes it difficult for judges. Previously, where lawyers were representing both parties, it was possible in nine-tenths of cases for the lawyers themselves to frame some sort of accommodation, but now everything is left to the judge who is faced with two warring sides. The issue of an alleged perpetrator of domestic violence cross-examining an alleged victim also poses obvious problems.

During my career at the family bar, I've represented many fathers wanting access to their children, and I know they simply wouldn't have the wherewithal to represent themselves. They'll think, "I can't handle the stress of going to court myself", so that child never sees their dad again.

The family bar has not been as badly affected as the criminal bar, but there is a lot less work now and our incomes have fallen by about 30%. In my chambers, we haven't taken on any new pupils for five years. There's a danger that the bar will revert to what it used to be like – people with other sources of income who were treating the bar as a hobby. I don't think the criminal bar and the family bar will survive in their present form, not that that will worry the government. Justice is at the bottom of their list of priorities, and it's all about saving money. Perhaps Tesco will be doing the work in a few years' time.

4.3 Fair Trial



Fair Trial – Teacher-led introduction

Read or paraphrase the following:

In Lesson 1, we explored the idea that justice requires both fair laws and a fair procedure as these give the best chances for a fair outcome. We explored the concept of fair laws in lessons two and three, in the sense of being clear and predictable, involving a careful use of discretion and promoting equality. We will now look at the concept of fair procedure.

In the UK, where someone has potentially committed a crime or is involved in a dispute, the process by which responsibility is determined is a trial. The trial will be presided over by a judge (or more than one judge in the higher courts) who will decide on the responsibility of the person accused of a crime or civil wrong by looking at the facts of the case and deciding whether what was done was against the law. In serious criminal cases, a jury will make the decision on whether a person was guilty of a crime, with help from the judge who will advise them on what facts they have to consider and what the law is.



4.3.2 ACTIVITY 3: Choosing a Judge – Printouts for students

The role of the judge is very important as either the decision-maker in the outcome of trials or as the person advising those who will make the decision. Judges should have certain characteristics to ensure that trials are fair. By characteristics, we mean the judge's knowledge, attributes and behaviour.

Imagine you are helping to select judges for an important trial. What characteristics do you think it would be important for the judge to have, in order for you to have confidence that justice was being done?

In groups of three, choose three characteristics for your judge from the following suggestions. If you wish you can add more of your own.

Strict

Friendly

Impartial

Rational

Have a good knowledge of the law

Rich

Kind

Fair

Clever

Reasonable

Have strong opinions

Powerful

Independent



Explain to the class why you chose your three characteristics.



4.3.3 ACTIVITY 3: Choosing a Judge – Instructions for teachers (10 minutes)

You may choose whether to do this activity depending on time.

P Look through the words in the text box with the students and check that they understand the meaning of all the words. Higher ability students may not need the prompt box. Ask the students to imagine that they are selecting a judge for an important case. You could tell the students to imagine the judge would be for a trial that has recently featured in the news.

When you ask students to discuss and feed back their answers, ensure that they examine how each characteristic relates to fairness and justice.



4.3.4 ACTIVITY 3: Choosing a Judge - Background for teachers

The main relevant characteristics listed that would ensure access to justice are: impartiality and independence, rationality, fairness, reasonableness, and having a good knowledge of the law.

As students feed back their answers to the class about why they chose their three characteristics, try to draw out the following:

- Independence and impartiality of the judge: a judge should not be connected to either party in a dispute and should have been appointed independently. This is because judges should not have any interests vested in a particular outcome as this could prejudice the fairness of their decision (whether consciously or unconsciously).¹
- Knowledge of the law: a judge should consider (or direct the jury to consider) the facts of the case before him and the applicable law to make a decision on responsibility of the defendant. Judges should not consider issues that are not relevant to the case as this may give rise to an unfair outcome.
- Reasonableness: a judge should be able to come to a decision (or direct the jury to come to a decision) that is not totally unreasonable

based on the relevant facts and applicable law. Judges must therefore as a minimum be rational and of sound mind.

You should remind students of the principle discussed in Lesson Two that all should be equal before the law. You should also remind students of the principle discussed in Lesson 3, that the law should be clear and certain. The characteristics discussed seek to promote these principles.



4.3.5 ACTIVITY 4: Video - Lord Justice Kay on the Role of Judges (5 minutes)

(You may decide whether to play this video depending on time.)

Play the video on the role of judges in the 'Expert Interviews' folder on the CD-ROM. In this video, Lord Justice Kay explains the role of judges in the justice system and how this fits with the rule of law.



4.3.6 ACTIVITY 5: The Maverick Judge – Teacher-led introduction

Read or paraphrase the following:

Besides the characteristics and behaviour of the judge, there are several other factors that have to be in place to enable a fair trial to be held. You may have heard of certain principles relevant to fair trials, such as the principle that everyone is innocent until proven guilty and the principle that everyone has a right to be heard. These principles are recognised not only in UK law, but also in international law.

You are going to think about some of the other elements essential to a fair trial.



4.3.7 ACTIVITY 5: The Maverick Judge – Printouts for students

Imagine that you are the legal assistants to a maverick judge, who is independent-minded and does not have all the characteristics you discussed in Activity 3. A trial is about to take place where someone has been charged with terrorist violence. The person charged maintains his innocence saying that he has been wrongly arrested and charged. There has been a lot of negative public opinion about him and most people want him to be found guilty and locked away.

You have some doubts about how the maverick judge is planning to conduct the trial. Below are some of the things the judge has said to you about the trial. Based on what he has said,

What advice would you give the judge in order to make sure the trial is fair?

This is what the judge has told you in his own words:

a. I just want to get this trial over and done with, the quicker the better. The sooner the terrorist is found guilty, the sooner I can rest easy in the knowledge that he is behind bars and that people will feel safe in their homes.

b. Why don't we hold the trial next week? We don't need to tell him that he is going to be on trial until the day before. That way he won't have too much time to invent stories to tell the judge and jury.



c. I don't want him to know the facts that we plan to use against him in the case because it'll be much easier to deal with him if he isn't prepared for what we say about him in court. It's quite convenient that he doesn't speak English very well because then he won't be able to question the story we put forward in court too much.

d. We'll let him know that if he doesn't want to be found guilty, he's going to have to have to prove that he didn't do it. We'll give him a couple of days to come up with something, and if he doesn't manage to, that'll show that he's guilty.

e. I think it's best to be quite discreet with the case and I won't let the public know what's going on. I won't need to give too much reasoning for the guilty verdict when we get to it. It's obvious that he's guilty and when you start giving too many reasons that just invites people to start talking about the trial and to ask difficult questions. We really don't need the public involved. That just creates more trouble than is necessary.

f. To be honest, I'm not that worried. If the worst comes to the worst, I'm sure we can get a confession out of him by the end of the trial. He has a wife and two young children and I'm sure he wouldn't want anything to happen to them. We can let him know that if he wants them to be safe he should do as he's told.

Write down your advice for the judge here:



4.3.8 ACTIVITY 5: The Maverick Judge - Instructions for teachers (15 to 20 minutes)

Divide students into pairs or groups of three for this activity. Ask them to imagine that they are legal assistants to the judge who share concerns about the judge's approach to the trial. They will discuss the problem together and come up with the best advice they can to give him.

To make the activity clearer for the students, model a piece of advice they might give based on the first speech bubble. You may draw out an answer similar to the sample below:

The defendant must be given enough time to prepare a defence and should be told the details of what crime(s) he is being accused of. Without this time and information, the defendant is not being given the opportunity to tell his side of the story. The short timeframe that the judge is proposing is not going to be sufficient time for the preparation of a defence, particularly in such a serious case where the charge is one of terrorism.

If you have limited time, you may give each group two speech bubbles to base their advice on. This can be fed back to the class in order to cover all the elements of a fair trial in the exercise.



4.3.9 ACTIVITY 5: The Maverick Judge - Background for teachers

Note for teachers: The law (particularly from the International Covenant on Civil and Political Rights (ICCPR), The European Convention on Human Rights (ECHR) and the UK Criminal Procedure Rules (CPR)) behind the principles for this activity has been cited in footnotes for your information but is not necessary for students' understanding of the principles.

Sample answers

a. The defendant must be told the details of what crime(s) he is being accused of and be given enough time to prepare a defence. Without information and enough time, the defendant is not given the opportunity to tell his side of the story. The short

timeframe that the judge is proposing is not going to be sufficient time for the preparation of a defence, particularly in such a serious case where the charge is one of murder².

b. In order to be able to defend himself fully, the defendant must also be informed of the argument that the prosecution plans to use against him. Otherwise, he may not, for example, mention facts that would be crucial to disproving that argument because he doesn't know that they are relevant³.

c. The defendant must be provided with an interpreter so that he can fully understand the court proceedings and so that he is not disadvantaged as compared to the prosecution. Again, if he doesn't know exactly what the argument is that is being mounted against him, or what questions the judge is asking, he won't be able to defend himself fully⁴.

d. The judge is wrong that the defendant should have to prove his innocence. The principle that everyone is innocent until proven guilty means that the burden is on the prosecution to show that the defendant is guilty⁵.

e. Although closed trials are carried out in certain situations where, for example, the trial could be prejudiced because of strong public opinion, in general, a trial should be open to the public so that they can scrutinise its fairness. Closed trials mean that unfair proceedings could be going on (as with this case) and nobody would ever know⁶. The judge must give reasoning in coming to a decision so that everyone can see that the judge has based his decision on the facts of the case and the law, and not on arbitrary or irrelevant reasons. If the decision is illogical, the defendant can then appeal against it.⁷

f. The defendant cannot be forced into a confession. Threatening that something untoward will happen to his family means that the defendant may confess in order to protect his family rather than because he is guilty.⁸

You may if there is time now wish to explore the case study below with students, explaining that many of the unfair elements of the trial explored above were at risk of being put into action through the government's proposal to use secret trials in certain cases.

Case Study on Secret Trials

R v AB and CD was a recent case reported in the news about two men being put on trial on terrorism charges. The UK government wanted the trial to be heard entirely behind closed doors for reasons of national security, so that the identities of the men, exact charges against the men and the judgement of the court would not be revealed to the public. **This departs significantly from the principle of 'open justice', which guarantees the right of defendants to a public trial, and to have the judgement made public so that everyone may see the reasons for a conviction if there is one.**

The case went to the Court of Appeal for a decision on whether the case could be heard entirely in secret. The Court of Appeal came to the decision in June 2014 that the most sensitive parts of the case could be heard privately, but there was no reason for all details of the case to be withheld from the public and media and said that movement away from open justice should be kept to the minimum necessary for the administration of justice. The Court of Appeal found that the swearing in of the jury, the readings of charges to the jury, at least part of the judge's introductory remarks to the jury, at least part of the prosecution opening, the verdicts and sentencing (should convictions result) could be heard in open court. They also said that keeping the identities of the defendants' secret was not justified on national security grounds. The Court also decided that a small number of journalists would be allowed to hear even the most sensitive parts of the case.

This is a significant case because had the Court allowed the trial to go ahead completely behind closed doors, going forwards, fair trials principles could have been limited severely for individuals on trial in situations where national security could be a concern.

4.4 Conclusion



4.4.1 Plenary

P Instruct the students as follows:

1. Think about what has been discussed in this lesson on access to justice and fair trial.

Work by yourself. Imagine you were accused of a crime you did not commit. You have two minutes to write down all the things that would help you have access to justice and a fair trial.

2. Now look at what your neighbour has written. Have you written the same things or different things?

Footnotes:

¹ An example of this was seen in the case of *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No.2), 2 W.L.R. 272 (H.L. 1999) where the judgement in the House of Lords was set aside due to the possibility of bias of one of the judges. Spain had issued an arrest warrant to extradite Pinochet, the former Chilean Head of State, to Spain from the UK to stand trial for crimes against humanity committed while he was Head of State. The case turned on whether Pinochet as a former Head of State was entitled to immunity. Amnesty International, of the opinion that he was not entitled to immunity, had taken part in the hearing. The House of Lords came to the decision (3-2) that he was not entitled to immunity with Lord Hoffman being one of the majority. However, the fact that Lord Hoffmann had failed to declare his links to Amnesty International meant that the judgement was set aside due to his possible interest in the outcome of the proceedings.

² *Art 6(3)(b) ECHR and Art. 14(3)(b) ICCPR* provide for the right to adequate time and facilities to prepare a defence. *Article 9(2) ICCPR, and Art. 5(2) ECHR* provide for the right of defendant to know the crime he is accused of. *Part 3A, Criminal Practice Directions I: General matters* provides that 'the parties should be allowed adequate time to prepare. 7.3(1)(a)-(b) UKCPR provides for clear statement of allegations made by the prosecution.

³ *Article 6(2) ECHR, Article 14(1) ICCPR and Part 10.2 of the Criminal Procedure Rules 2013* contain the requirement for the prosecutor to serve initial details of the prosecution case upon both the defendant and the court.

⁴ *Article 14(3)(f) ICCPR and Art 6(3)(e) ECHR* provide for interpretation for the defendant where necessary *Part 3.8(5)-(6) CPR* provides for interpretation where necessary to facilitate the defendant's participation in the trial proceedings.

Article 14(2) ICCPR and Article 6(2) ECHR set out the position that all individuals are innocent until proven guilty.

Part 1A, Criminal Practice Directions I: General matters, provides that 'The presumption of innocence and an adversarial process are essential features of English and Welsh legal tradition and of the defendant's right to a fair trial.'

⁶ *Article 14(1) of the ICCPR* provides for the entitlement of everyone to a 'fair and public hearing.' The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Article 6 of the ECHR provides that hearings should generally be open to the public so that justice can be seen to be done. Hearings may only be held wholly or partly in private if it is considered necessary to do so – for example, for national security reasons, because the trial involves children, or to protect the interests of justice.

Criminal Practice Directions VI: Trial, 39N, provides that it is imperative that, so far as possible, justice must be administered in open court.

Part 16.6 CPR requires an applicant who wishes a trial to be conducted in private to show why no other measure other than a trial in private would suffice

⁷ *The UN Human Rights Committee* explains in its *General Comment no.32* the fair trial obligations in *Article 14(1) of the ICCPR*, saying that 'even in cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and *legal reasoning* must be made public, except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children.'

The European Court of Human Rights has established through its case law (for example in *Tatishvili v Russia* (2007) 45 EHRR 52 at §58) that *Article 6(1) of the ECHR* obliges courts to give reasons for their judgments (although the way in which this is done may vary according to the nature of the case and according to different legal traditions in countries.)

In the first annual BAILII Lecture '*No Judgment – No Justice*' 20 November 2012, President of the UK Supreme Court, Lord Neuberger, said that 'The need, the duty, to provide a reasoned judgment is a well-established function of due process, and therefore of justice.' A clearly reasoned judgment enables the litigants to understand why the court arrived at its decision. As for the general reason, a clearly reasoned judgment enables the public to understand the law and to see what is being done and said by the judges in the courts, to see how justice is being dispensed.'

⁸ Under *Article 14(3)(g) ICCPR*, those charged with a criminal offence may not 'be compelled to testify against himself or to confess guilt.'

The European Court of Human Rights has held that the use of evidence secured as a result of a violation of one of the core and absolute rights guaranteed by the Convention, always raises serious issues as to the fairness of the proceedings, even if the admission of such evidence was not decisive in securing a conviction. For example, *Gafgen v Germany*.

Under *section 76 of Police and Criminal Evidence Act 1984*, the court must be satisfied that a confession made was not in fact made as a result of oppression, nor in circumstances which were likely to have made it unreliable.

Lesson 4 Glossary

Access to justice – the means to use the justice system to get a just result

Alleged – something claimed but not yet proved

Arbitrary factor – a factor based on criteria that are subjective and therefore not fair

Benefits system – state-funded system that provides financial and other help for those in need

Civil law – the law governing rights and obligations between individuals, companies, governments, organisations, etc, or non-state parties. In civil matters one party takes legal action against (or sues) another party. Breach of contract or injury caused by negligence are examples of civil legal matters.

Conviction – being found guilty of a crime

Cross-examining – the questioning of a witness in court by the opposing side

Defendant – someone being accused of a criminal or civil wrong

Fair process – fairness in civil or criminal proceedings

Fair trial – fair proceedings in a civil or criminal trial

Judicial review – legal process where judges review the legality of a decision or action of a public body

Legal advice – advice relating to your legal dispute or problem, including what your rights are, what the law is and how you should proceed

Legal aid – legal advice and representation in court paid for by the state where a person cannot afford to pay for a lawyer

Legal aid budget – the total amount of money the government allocates in a year to pay for legal advice and representation in court for people who can't afford it

Legal defence – a defence against an accusation made against someone

Legal process – civil or criminal proceedings in order to resolve a legal dispute or determine whether someone is guilty of a crime

Legal system – a state's system for resolving disputes and determining criminal liability through application of the law

Litigants – parties to a dispute in court

Maverick – unorthodox; eccentric

Open justice – the principle that court hearings are open to the public and that decisions made within the justice system will be made publicly

Represented (in court)/representation (in court) – having a lawyer to put your case forward

Social welfare law – the law relating to the provision of financial and other help by the state for those in need

State – a country with its own government

The Bar – the legal profession made up of barristers

Verdict – the judgment or outcome of a case