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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY COLETTE HEMSWORTH

FOR JUDICIAL REVIEW

KERR J

Introduction

[1] This is an application by Colette Hemsworth, the widow of John Hemsworth deceased, for judicial review of the decision of the Lord Chancellor not to grant funding for legal services rendered to her in preparation for the inquest into his death.

Background

[2] It is alleged that on 6 July 1997 Mr Hemsworth was assaulted by police officers at Malcolmson Street, Belfast. On 7 July 1997 he was admitted to the Royal Victoria Hospital and was found to have a crack fracture on the right mandible. He was treated and discharged. He later attended the dental department of the same hospital. Some 5 or 6 weeks before his death Mr Hemsworth began to complain of headaches and a tingling sensation in one arm.

[3] On 27 December Mr Hemsworth was out with friends for a drink and complained of worsening headaches. He went to his wife's house and collapsed there, possibly striking his head when he fell. He was admitted to Belfast City Hospital at 1 am on 28 December and was found to have a left sided weakness. He gave a history of having had a headache all day but he had also been drinking all day on Christmas Day and Boxing Day. A CT scan revealed a cerebral infarction in the distribution of the right middle cerebral artery. He was transferred to the Neurology Unit of the Royal Victoria Hospital but his condition deteriorated and he died on 1 January 1998. He was thirty-nine years old.

[4] On post mortem examination a major lesion of the right side of the brain was found. After further examination of the brain and carotid vessels it was concluded that the deceased had suffered a complete thrombosis of his right internal carotid artery a few days before his death and that this had caused a major infarct on the right side of his brain that had in turn caused his death. Dr Derek Carson, the deputy state pathologist who conducted the autopsy, concluded that it was not possible to correlate the thrombosis which caused the infarction with any facial injury suffered in July 1997.

[5] The applicant's solicitors, Flynn & McGettrick, engaged Professor Derrick J Pounder to advise on the cause of the deceased's death. He reported that the cause of the blood clot that had produced the stroke was damage to the wall of the artery. This damage pre-dated the formation of the blood clot. He advised that such damage could occur as a result of direct trauma. This would require a significant impact to the right side of the neck in the area immediately adjacent to the angle of the jaw.

[6] Professor Pounder considered that the episode that had occurred some 5 to 6 weeks before the deceased's death was a minor transient stroke. Taking this and other pertinent factors into account he expressed his opinion on the cause of the deceased's death thus: -

> "Given that (a) the cause of death as stated arose directly from damage to the right carotid artery and (b) such damage can arise only as a consequence of either natural disease or trauma and (c) there is no evidence of any causative natural disease following a very thorough examination and (d) there is a history of trauma implicating the general area of the artery damaged and (e) notwithstanding the delay between initial trauma and the final death, which is a recognised but uncommon occurrence, it is in my view highly likely that the trauma (*ie* the alleged assault) was the sole direct underlying cause of death".

[7] On 16 December 1999 Flynn & McGettrick wrote to Her Majesty's Coroner for Greater Belfast, John L Leckey, enclosing the report of Professor Pounder and requesting that an inquest be held. Mr Leckey replied on 20 December explaining that, having read the post mortem report of Dr Carson and that of Dr Mirakhur (the consultant neuropathologist who had carried out the examination of the deceased's brain) he had decided that it was not necessary to hold an inquest and arranged for the death to be registered. As a result he had no power to hold an inquest unless ordered to do so by the Attorney-General.

[8] On 20 January 2000 Flynn & McGettrick wrote to the Attorney-General's legal adviser, Mr Kevin McGinty, asking that the Attorney direct an inquest under section 14 of the Coroners Act (Northern Ireland) 1959. On 2 February 2000 Mr McGinty replied informing the applicant's solicitors that the Attorney-General had decided to exercise his powers under this provision to direct the coroner to hold the inquest.

[9] Because legal aid is not generally available for inquests, Flynn & McGettrick applied on the applicant's behalf to the Northern Ireland Human Rights Commission on 25 July 2000 under section 70 of the Northern Ireland Act 1998 for funding of legal representation at the inquest. This was refused because of the existence of the Lord Chancellor's extra statutory scheme for the grant of funding for legal representation at inquests.

[10] Accordingly on 1 September 2000 the applicant's solicitors wrote to the Lord Chancellor asking that consideration be given to granting financial assistance to the deceased's family for legal representation at the inquest. A letter in similar terms was sent on the same date to Mr Alan Hunter, acting director of legal aid in the Northern Ireland Court Service. On 18 September Mr Hunter replied. He explained that the Lord Chancellor had set up as an interim measure an extra-statutory, ex gratia scheme to enable him to grant funding for legal representation at inquests in exceptional cases. He asked for more details of Mr Hemsworth case and indicated that ministers would be interested in why the case was considered to be exceptional. In particular, some of the information needed would include: -

> "(a) the facts of the case;
> (b) an indication of the complexity of the issues;
> (c) the relationship of the applicant to the deceased;
> (d) why you think there is a need for representation to enable the applicant to take part effectively"

An indication of the anticipated cost of representing the applicant was also requested. The applicant's solicitors were informed that funding would only be provided from the extra-statutory scheme for "a specific amount of money to cover representation at the inquest only".

[11] On 9 October 2000 the coroner wrote to Flynn & McGettrick enclosing a report that he had obtained from Professor Helen Whitewell, a consultant pathologist to the Home Office. Her conclusions included the following observations: -

> "From the histology alone it is difficult, indeed impossible, to accurately age the dissection or damage to the right carotid artery. There are no such changes involving the left carotid artery which implies that at least at some point in time the right is likely to have been injured. Clearly there is a history of trauma to that region and this could have precipitated the arterial changes and the, albeit delayed, cerebral infarction. It is also recognised, however, that in a few instances minor trauma can precipitate dissection and one would need to exclude any other possible candidate in terms of injury to the deceased's face. I can, however, not see any evidence of such from the medical notes nor the statements.
>
> In summary, my opinion, despite the rime delay between the fatal cerebral infarct and the injury received, it is likely that they are linked in terms of causation."

[12] On 13 October 2000 the applicant's solicitors wrote to Mr Hunter asking to be provided with a copy of the criteria that the Lord Chancellor intended to apply to applications such as they had made on behalf of Mrs Hemsworth when such criteria were published. On 27 March 2001 Mr Hunter replied, indicating that the Lord Chancellor had published the criteria on that date. He stated that the Lord Chancellor would consider each application for funding on its merits and would also have regard to the following factors: -

> "(a) whether the issues raised in the application fall outside the scope of a coroner's inquest;
>
> (b) whether the applicant would qualify financially for full civil legal aid in other circumstances;
>
> (c) whether an effective investigation of the death by the state is needed and whether the inquest is the only way to conduct it;
>
> (d) whether the applicant has a sufficiently close relationship to the deceased to warrant funding;
>
> (e) whether an alternative to public funding is available;

(f) whether the applicant needs representation in order to participate effectively in the inquest – for example, because there are unusually complex questions of law or fact, or evidential difficulties, or because of the level of representation of others who have an interest in or are involved in the inquest;

(g) whether there is a significant wider public interest in representation being provided;

(h) the views of the coroner, if expressed; and

(i) any other matters which appear to be relevant to the individual circumstances of the case."

[13] On 21 May 2001 Flynn & McGettrick wrote to the legal aid division of the Northern Ireland Court Service enclosing an application by Mrs Hemsworth to the Lord Chancellor for legal representation funding at the inquest into the death of her husband. This had been prepared by counsel and it addressed each of the criteria outlined in the letter of 27 March 2001.

[14] On 23 May 2001 the coroner wrote to the applicant's solicitors informing them of the holding of a preliminary hearing in relation to a number of inquests to discuss the implications of the decisions of ECtHR in the related cases of *Jordan v United Kingdom; McKerr v United Kingdom; Kelly & others v United Kingdom* and *Shanaghan v United Kingdom.*

[15] The legal aid division of the Northern Ireland Court Service replied to Flynn & McGettrick's letter of 21 May 2001 on 25 May 2001. The letter asked the solicitors to address a number of outstanding issues including the proposed date and likely duration of the inquest and detailed costings on the representation sought. Flynn & McGettrick replied on 31 May 2001. On the same date they stated that an application for judicial review would be made if a decision on the application for funding was not made by the following day. No such decision having been made, an application for leave to apply for judicial review was made on 5 June 2001. This challenged the Lord Chancellor's avowed refusal to reach a decision on the question of funding for the applicant's legal representation at the inquest.

[16] By a letter faxed to the applicant's solicitors' office at 7.05 pm on 5 June 2001 the legal aid division of the Court Service informed them that the Lord Chancellor had agreed to the application for funding from the extra-statutory ex gratia scheme for representation at the inquest into the death of Mr Hemsworth. The letter also informed the applicants' solicitors that the Court Service had been authorised to pay a certain specified maximum sum which

was to be devoted solely to the costs of Flynn & McGettrick and counsel incurred in representing the applicant in relation to the preliminary hearing. The payment was to cover only those costs incurred after 4 June 2001.

[17] The leave hearing of the judicial review application lodged on 5 June 2001 was due to be heard on 6 June but was adjourned after the letter from the Court Service of 5 June was received. On 11 June 2001 the applicants' solicitors wrote to the Court Service seeking clarification of certain matters arising from the letter of 5 June. In particular they asked that work undertaken on behalf of the applicant before 4 June would be funded. In a letter from Mr D P Andrews of the legal aid division of the Court Service of 12 June 2001 he rejected the request for funding for work undertaken before 4 June, stating,

> "Funding from the extra-statutory scheme is not available retrospectively as work undertaken before a grant is approved could attract legal aid under the legal advice and assistance scheme. In my letter of 5 June I indicated that the grant covered work, up to the financial ceiling, commenced on or after 4 June 2001. The extra-statutory scheme provides funding for representation only."

The affidavit evidence

[18] In light of the indication from the Court Service that the work undertaken before 4 June 2001 would not be funded under the scheme, the application for leave to apply for judicial review proceeded, albeit with a different focus. In a second affidavit filed in support of Mrs Hemsworth's application Brendan Blaney, a partner in the firm of Flynn & McGettrick, challenged the assertion that Mr Andrews had made about the availability of the legal aid to cover work undertaken before the extra-statutory scheme came into play. He set out his challenge to this claim in the following paragraphs of his affidavit: -

> "7. Under the terms of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 clients are only entitled to receive initially two hours of advice and assistance not exceeding the sum of £88 [The Green Form scheme]. The two hours only cover the preliminary stages of work on each case such as the initial consultation with your client. The sending and receiving of correspondences. Our initial two hours work on this file was covered by the Green Form scheme.

> 8. Further extension of time for preliminary advice and assistance may be sought from the Legal Aid department by way of a Green Form extension requesting authority to provide your client an additional hour or two hours of advice and assistance. It is at the discretion of the Legal Aid department whether the authority is granted.
>
> 9. It is my experience in relation to the operation of this scheme and in particular in relation to the requests for extensions of time under the Green Form scheme that requests are not granted to the extent required to cover the work carried out on a file. In my experience it can take as much time negotiating with the Legal Aid department for an extension of time as the time eventually allowed and it is in my experience a pointless exercise to pursue extensions of time under the Green Form scheme as it is not cost effective."

Mr Blaney went on to assert that civil legal aid was not available for preparatory work carried out for inquests and much of the work undertaken by his firm before 4 June 2001 would not in any event be covered. In paragraph 10 of his affidavit he set out a number of items of work that had been carried out on behalf of Mrs Hemsworth which, he said, would not be covered by the Green Form scheme.

[19] On 15 June 2001 Flynn & McGettrick wrote again to Mr Andrews of the Court Service seeking further clarification of a number of points arising from the letter of 12 June. In his reply dated 18 June 2001 Mr confirmed that the Lord Chancellor had approved funding for legal representation at the inquest but pointed out that before he could consider the amount of funding that would be approved, the Lord Chancellor would require a breakdown of costs for preparation and representation at the inquest.

[20] An application for legal aid to pursue a civil claim for damages against the Chief Constable on Mrs Hemsworth's behalf had been lodged on 15 December 1998. On 27 September 1999 Flynn & McGettrick were informed that this had been refused. On 16 October 1999 an appeal was lodged against the refusal.

[21] In an effort to discover what funding might be available from the legal aid fund for the inquest and the preparatory work Miss Jennifer McCann, a law clerk in Flynn & McGettrick contacted the Legal Aid department of the Law Society on 21 June 2001. She spoke to Miss Ashe of that department and

on 25 June wrote to Miss Drusilla Hawthorne, the director of legal services in the legal aid department, asking that she particularise which aspects of the applicant's case would receive funding from the department; what limitations would be attached to funding and what work that had already been carried out would not be covered by legal aid.

[22] Miss Hawthorne replied on 26 June. Her letter contained the following passages: -

> "In relation to your request for information in relation to any potential funding from the Legal Aid department, I can confirm that in general terms the position is as follows.
>
> Provided that a person is financially eligible, he/she may obtain oral or written advice and assistance under the Green Form Scheme in relation to the application of Northern Ireland law to any particular circumstances which have arisen and certain preparatory steps that any person might take regarding those circumstances which, in this case, would presumably be in relation to the holding of an inquest.
>
> There is no fixed maximum higher limit in respect of extensions under the Green Form Scheme.
>
> I enclose for your information and convenience a copy of the General Authority dated June 1992 which is still in force and which confirms certain disbursements covered as extensions under the Green Form Scheme without the necessity of obtaining prior written authority.
>
> Other extensions sought require prior written authority and I can confirm that the Legal Aid department in considering each and every request received has regard to the appropriate Legal Aid legislation, including article 4 of the 1981 Legal Aid, Advice and Assistance (Northern Ireland) Order. The outcome entirely depends on the individual circumstances in each case. Such extensions may include the obtaining of experts reports such as a pathologist's report if the circumstances warrant it.

> As regards the instruction of counsel it is possible that counsel's opinion may be authorised in certain circumstances where difficult legal issues arise which require preliminary advices from counsel and in particular where civil legal aid is not available.
>
> Any request for an extension under the Scheme receives due consideration.
> The current Green Form Scheme does not cover representation at any hearing and civil legal aid is not yet available for such matters to instruct a solicitor or counsel to participate in the inquest procedure. However, it is possible in certain circumstances in the event that there is a related civil action for the solicitor acting in that matter to attend the inquest on a 'watching brief' basis and this aspect of the work carried out would be covered under the existing certificate, although this would not extend to cover the solicitor's active participation in the Inquest procedure."

[23] In an affidavit filed on behalf of the respondent Miss Hawthorne pointed out that no application for Green Form assistance had been made by Flynn & McGettrick in relation to any of the matters which Mr Blaney had claimed could not be legally aided. As a matter of principle, each of the items enumerated in his affidavit was eligible for the grant of legal aid under the Green Form scheme, she claimed. She also challenged his assertion that it was not cost effective to make application for extensions to the Green Form scheme. Of 4542 applications for an extension made in the year 1 April 2000 to 31 March 2001 3422 were successful and a further 270 fell within the Law Society's general authority to grant legal aid and therefore no application for an extension was necessary in those cases.

[24] In the affidavit referred to in paragraph 18 above Mr Blaney had claimed that Jennifer McCann had confirmed with Miss Ashe that the contents of paragraphs 9 and 10 of his affidavit were accurate. This was disputed by Miss Ashe in an affidavit filed on behalf of the respondent. She stated that the only matter that she discussed with Miss McCann was whether an extension of the Green Form scheme would be granted for the obtaining of a pathologist's report. She accepted that she had told Miss McCann that she was unaware of any case where authority to obtain a report such as a pathologist's report had been granted. Miss McCann made an affidavit reiterating the claim made by Mr Blaney that she had been told by Miss Ashe that the contents of paragraphs 9 and 10 of Mr Blaney's affidavit were accurate and exhibiting a contemporaneous note which, she said, verified that

claim. This was disputed by Miss Ashe in a second affidavit. Miss McCann repeated her claim in two further affidavits.

[25] In his affidavit Mr Hunter stated that the extra statutory scheme for funding representation at inquests was aimed at exceptional cases. The considerable expense that such cases may involve had to be balanced against the various spending obligations that he state had to meet. Mr Hunter confirmed that the applicant's application for retrospective funding in respect of the work undertaken by the applicant's legal advisers before 5 June 2001 had been considered by the Lord Chancellor in light of the representations made by Flynn & McGettrick but that it had been concluded that it would not be appropriate to provide such funding.

[26] Mr Hunter also dealt with the mechanics by which funding would be provided in the following paragraph of his affidavit: -

> "4 (iv) Funding in respect of the full inquest has been approved in principle and this was made clear in the Court Service letter to the applicant's solicitor of 12 June 2001. However, in the absence of further information in respect of the inquest proper it is necessarily the case the respondent cannot be specific about the maximum amount of funding that can be authorised. The respondent, before arriving at any view as to this amount will need to know the date and probable duration of the inquest, the level of representation proposed by the applicant and will need to be given detailed costings of the representation sought and detailed information about the representation of other parties at the inquest. It is appreciated that it may not be practicable to provide all of this information at this stage. Issues concerning the duration of the inquest will no doubt depend on the number and range of witnesses to be called by the coroner and the coroner may not yet be in a position to provide information about this. However, it is not reasonable to expect that the respondent, who is under a duty to obtain value for money in relation to the making of grants from public funds, should commit himself in advance to a particular level of funding in ignorance of material facts. Once the necessary information is available the respondent will in the same way as has been done in relation to the preliminary hearing, decide upon a maximum figure of funding."

[27] Mr Hunter also explained (in paragraph 4 (vi) of his affidavit) that although the normal approach would be that funding be provided on a prospective basis, the respondent would be prepared to consider exceptional cases where there are strong reasons for allowing a measure of retrospective funding. The present case was one in point. Some work had been undertaken before the scheme came into existence. In deciding whether to allow retrospective funding the Lord Chancellor will take into account whether an applicant had exhausted all possibilities of funding from an alternative source.

[28] In a further affidavit, Mr Blaney was critical of this approach set out by Mr Hunter in paragraph 4 (iv) quoted above. He suggested that the information that Mr Hunter had indicated would have to be provided before the amount of funding would be fixed was not known to the applicant and could not be discovered until various preliminary matters had been dealt with such as the furnishing of a list of witnesses and pre-Inquest disclosure. He suggested that the applicant could not carry out preliminary work for the inquest unless he was able to provide the information sought by Mr Hunter but that it did not lie within her power to furnish it.

[29] In reply to Mr Blaney's affidavit Mr Hunter filed a further affidavit in which he explained that the costings necessary before the amount of funding can be determined may take the form of estimates. These can subsequently be revised on further application.

The case for the applicant

[30] For the applicant Mr Barry MacDonald QC argued that the net effect of the Lord Chancellor's approach was that the applicant would not receive funding for the considerable amount of preparatory work that had been undertaken before 4 June 2001. That approach was, he claimed, incompatible with the applicant's rights under article 2 of the European Convention on Human Rights. Moreover, until the applicant was aware of the witnesses to be called by the coroner and had obtained pre-inquest disclosure it was impossible to provide the estimate of costs that Mr Hunter had insisted was a prerequisite to funding.

[31] It was also submitted that the extra statutory scheme put the applicant at a conspicuous disadvantage, especially in relation to other participants in the inquest such as the police. The Chief Constable and the individual police officers will be represented and all the preparatory work necessary to allow them to fully participate in as effective a manner as is possible will be underwritten by public funds.

The case for the respondent

[32] For the respondent Mr Maguire explained that the impetus to make provision for the funding of legal representation at inquests derived from a number of factors. Not the least of these was the reform of the legal aid scheme itself. It is intended to provide the Lord Chancellor with a statutory power to make this available in exceptional and appropriate cases. The extra statutory scheme is a precursor of this.

[33] Mr Maguire submitted that the scheme was not required to mimic existing public funding nor follow any particular model. The Lord Chancellor was entitled to devise his own scheme. He was entitled to jettison "old thinking" about open ended funding such as is provided under some current legal provision. The Lord Chancellor's approach – although novel – was perfectly rational.

The statutory provisions relating to the Green Form scheme

[34] Article 3 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 provides that legal advice and assistance shall, subject to the provisions of Part II of the Order, be available for any person whose means come within certain specified limits.

[35] So far as is material Article 4 of the 1981 Order provides: -

> "**4.** –(1) Subject to paragraph (2) and Article 5 and to any prescribed exceptions and conditions,[which are not relevant for present purposes] Article 3 applies to any oral or written advice given by a solicitor or, if and so far as may be necessary, counsel-
>
> (a) on the application of Northern Ireland law to any particular circumstances which have arisen in relation to the person seeking the advice; and
> (b) as to any steps which that person might appropriately take (whether by way of settling any claim, bringing or defending any proceedings, making an agreement, will or other instrument or transaction, obtaining further legal or other advice or assistance, or otherwise) having regard to the application of Northern Ireland law to those circumstances;

> and applies to any assistance given by a solicitor or, if and so far as may be necessary, by counsel to any person in taking any such steps as are mentioned in sub-paragraph (b), whether the assistance is given by taking any such steps on his behalf or by assisting him in taking them on his own behalf"

[36] These provisions are sufficiently wide, in my opinion, to comprehend all of the preparatory work undertaken on behalf of the applicant in the present case before the application for extra statutory funding was made. This is clearly also the view of the director of legal services, Miss Hawthorne. The dispute as to whether applications for Green Form assistance are transacted as efficiently as they ought to be I find unnecessary to resolve. I am of the firm opinion that it was intended by the legislature that steps such as were taken by the applicant's legal advisers in this case should be covered by these provisions. I am equally clearly of the view that the Lord Chancellor was entitled to have regard to those provisions and the intention of the legislature in devising the extra statutory scheme. Any deficiency in the implementation of the provisions, if it is the fault of the Legal Aid department, (as to which, I should make clear, I am far from persuaded) should be the subject of challenge to that department, not the Lord Chancellor.

[37] In these circumstances it is unnecessary to resolve the conflict between Miss McCann and Miss Ashe as to what was said about the contents of paragraphs 9 and 10 of Mr Blaney's affidavit. Even if it were the case that Miss Ashe believed that the matters there enumerated were not covered by the Green Form scheme that view would clearly be erroneous and is not shared by Miss Hawthorne. Had it been necessary to reach a conclusion on this dispute it would not have been possible to resolve it in the applicant's favour. Where there is a conflict of evidence onus remains on the party asserting - *Re Curl* – Supperstone and Goudie Judicial Review (2nd ed, 1997) p 17.8. I could not have been satisfied that Miss McCann's version of this exchange was to be preferred to that of Miss Ashe.

Article 2 of ECHR

[38] Article 2 of the Convention provides: -

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> a. in defence of any person from unlawful violence;
> b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
> c. in action lawfully taken for the purpose of quelling a riot or insurrection."

[39] In *Jordan v United Kingdom* [2001] ECHR 24746 ECtHR considered the procedural safeguards that were required to underpin the substantive right guaranteed by article 2. In paragraph 105 the court described the nature of those procedural safeguards thus: -

> "105. The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, the *McCann* judgment cited above, p 49, para 161, and the *Kaya v Turkey* [1998] ECHR 22729/93, judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p 324, para 86 of the latter reports). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any

> investigative procedures (see, for example, *mutatis mutandis*, *Ilhan v Turkey* [GC] [2000] ECHR 22277/93, ECHR 2000-VII, para 63)."

[40] The participation of the next of kin in the investigation of the circumstances of the death of the deceased was deemed to be essential. In paragraph 109 the court said: -

> "109. … In all cases … the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see *Güleç v Turkey*, cited above, p 1733, para 82, where the father of the victim was not informed of the decisions not to prosecute; *Ögur v Turkey*, cited above, para 92, where the family of the victim had no access to the investigation and court documents; *Gül v Turkey* judgment."

The court also found that the absence of legal aid for the next of kin at the inquest had prejudiced the applicant's ability to participate in the inquest – see paragraph 142.

[41] The following principles relevant to the present case can be derived from these passages in *Jordan*: -

1. There must be an effective official investigation when individuals have been killed as a result of the use of force.
2. The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.
3. The next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard her legitimate interests
4. Where necessary to allow the required level of participation by the next of kin legal aid should be provided.

[42] It is no longer in issue that funding of legal representation for the applicant at the inquest into the death of her husband should be provided. The sole remaining issue is whether the provision of funding as proposed by the Lord Chancellor meets the requirements of article 2 and is generally reasonable. The applicant has accepted that an unlimited budget for legal aid cannot be insisted upon. As ECtHR has said, in the context of article 6 (3) (c)

of the Convention, (which guarantees to an individual the right … if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require) the essence of the right to free legal assistance is that the assistance should be practical and effective – *Artico v Italy* [1980] 3EHRR 1, paragraph 33.

[43] In this case the reasonable cost of the applicant's legal representation at the inquest will be met. All that is necessary to secure this is that the applicant's solicitors should provide an estimate of what those costs are likely to be. I do not accept that this is impossible because pre-inquest disclosure has not been made or because the coroner has not provided a list of the witnesses who are due to be heard. These factors may make it impossible to estimate *precisely* the level of costs but it is clear from Mr Hunter's affidavit that a precise estimate is not required and that a review of the figures allowed based on the estimate made will be considered.

[44] In *M v United Kingdom* [1983] 6 EHRR 345 the Commission recognised that financial restraints may be necessary to ensure the most cost effective use of funds available for legal aid. The measures imposed by the Lord Chancellor in relation to the provision of estimates of the amount of costs for the representation of the next of kin and the refusal to extend the extra statutory scheme to areas that can be covered by the Green Form scheme are clearly designed to ensure that the scheme is cost effective. In my judgment these measures are both reasonable and proportionate to achieve that entirely proper aim.

[45] I do not accept that the applicant will be placed at a disadvantage *vis-à-vis* other participants in the inquest by availing of the extra statutory scheme. As Lord Hope of Craighead said in *McLean v Buchanan* [2001] 1 WLR 2425, 2439 (in the context of a claim that a limitation on the availability of legal aid would create an inequality of arms between a defendant and the prosecuting authorities) it is necessary to demonstrate that the other participants "will enjoy some particular advantage that is not available to the defence or that would otherwise be unfair". I do not consider that this has been demonstrated. The combined effects of the Green Form scheme and the extra statutory scheme should be sufficient to ensure that the applicant is provided with the services of solicitors and counsel of equal calibre to those who will represent other parties. There is no reason that preparatory work that is properly undertaken will not be adequately remunerated under one or other or both schemes.

[46] In judging the reasonableness of the scheme it is to be remembered that ECtHR has recognised that contracting states must be accorded a margin of appreciation in choosing the means by which a right arising under the Convention is to be secured. An example of this principle is *Imbrioscia v Switzerland* [1993] 17 EHRR 441, 455 paragraph 38 where the court said that article 6 (3) (c) leaves to the contracting states the choice of the means of

ensuring that the right guaranteed by that provision is secured in its judicial system.

Conclusions

[47] I have concluded that none of the grounds of challenge has been made out and the application for judicial review must therefore be dismissed.