

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 26/08/2005

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY MICHAEL McKEVITT
FOR JUDICIAL REVIEW

COGHLIN J

[1] In this case the applicant, Michael McKeivitt, seeks declarations that the Access to Justice (Northern Ireland) Order 2003 (Commencement No. 1) (Amendment) Order 2003 and that Articles 4(1) and (2) of the Access to Justice (Northern Ireland) Order 2003 (Commencement No. 2) Order 2003 are unlawful together with an order of certiorari quashing the Direction of the Lord Chancellor to the Northern Ireland Legal Services Commission dated 4 February 2003.

[2] For the purposes of these proceedings the applicant was represented by Mr O'Donoghue QC and Mr Doran while Mr McCloskey QC and Mr Maguire represented the Lord Chancellor ("the respondent") and Lord Brennan appeared on behalf of the plaintiffs in the civil action ("the notice parties"). I am grateful to all counsel for the assistance that I derived from their carefully prepared and well reasoned oral and written submissions.

Background facts

[3] The following is a brief summary of the background facts relevant to this application:

- (i) On 15 August 1998 a group of terrorists who apparently belonged to an organisation calling itself the Real Irish Republican Army caused an explosion in the centre of Omagh which resulted in widespread devastation, appalling injuries and deaths among the population of that town.
- (ii) On 12 August 2001 some 20 individuals who suffered as a result of the deaths and injuries caused by that explosion issued proceedings in the High Court of Justice in Northern Ireland against a number of persons, including the applicant, who were sued both in their personal capacity and as representing the organisation styling itself the Real Irish Republican Army.
- (iii) On 12 August 2002 the applicant was granted legal aid to defend those proceedings.
- (iv) On 7 August 2003 the applicant was convicted at the Special Criminal Court in Dublin on charges of directing terrorism and membership of the Real Irish Republican Army. As a consequence of those convictions he is currently serving a sentence of 20 years imprisonment in Portlaoise prison.
- (v) On 8 August 2003 the applicant's solicitors were advised by the Legal Aid Department of the Law Society for Northern Ireland not to take any further steps in preparation for the defence of these proceedings without the authority of that department.
- (vi) On 22 December 2003 the applicant was advised that his Legal Aid Certificate had been discharged under the provisions of Regulations 5(11) and 12 (3) (b) of the Legal Aid General Regulations (Northern Ireland) 1965. On 21 May 2004, in response to a letter from the applicant's solicitor, the Chief Executive of the Legal Services Commission stated that the reasons for discharging the applicant's certificate were:
 - (a) The applicant's conviction for directing terrorism which was not consistent with his statement of innocence to the Legal Aid Department.
 - (b) There was no prospect of the applicant ever being able to meet any judgment which might be made against him, given the expected level of damages that the plaintiffs were likely to be awarded if successful. In such circumstances, it was believed that the defence of the proceedings was futile and that it was unreasonable to expend substantial public funds in defending such a case.

- (c) That account had been taken of the existence of others who were in a position to defray the costs of the proposed litigation in accordance with the provisions of Regulation (5) (11).
- (vii) On 21 June 2004 the applicant instituted proceedings seeking judicial review of the decision to discharge his Legal Aid Certificate but this application was dismissed by Girvan J in a reserved judgment on 12 November 2004. In the course of that judgment Girvan J rejected the third reason as being bad in law but upheld the decision, in accordance with principle, upon the basis that the first two reasons were good in law and that they were the dominant reasons for the decision.

The statutory framework

[4] Prior to 2003 the grant of legal aid in civil litigation was administered by the Legal Aid Department of the Law Society of Northern Ireland in accordance with the provisions of the Legal Aid and Advice and Assistance (Northern Ireland) Order 1981 and the Legal Aid (General Regulations) (Northern Ireland) 1965.

[5] The Access to Justice (Northern Ireland) Order 2003 ("the 2003 Order") was published on 27 February 2003 but, apart from Part 1 and Articles 45, 46(4) to (6) and Article 48(1), which came into force one month from the making of the Order, by virtue of Article 1(2) the remaining provisions of the Order were to come into operation upon such day or days as the Lord Chancellor should duly appoint.

[6] The 2003 Order established a new statutory code for the provision of state funding of both civil and criminal cases in Northern Ireland and the schedules to the Order provided for the repeal of the whole of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 ("the 1981 Order"), the winding up of the Legal Aid Fund and the transfer of the rights, obligations and property of the Law Society referable to its function under the 1981 Order to the new Legal Services Commission ("LSC") - see schedules 3 to 5. However, pending the coming into operation of the relevant parts and schedules of the 2003 Order, the LSC, which came into being as a consequence of the Access to Justice (Northern Ireland) Order 2003 (Commencement No. 1) (Northern Ireland) Order 2003 ("the Commencement No. 1 Order"), was to administer the relevant funds in accordance with the provisions of the 1981 Order. Schedule 2 of the Commencement No. 1 Order provided for further provisions of the 2003 Order to come into effect on 1 November 2003 including Article 8 and Articles 46 (1) to (3). Article 8 of the 2003 Order gave the Lord Chancellor power to give guidance to the LSC as to the manner in which he considered it should discharge its functions but prohibited such

guidance from being given in relation to individual cases. The Article required such guidance to be published either by the Lord Chancellor or the LSC. Article 46(1) gave power to the Lord Chancellor to vary or revoke any direction given by him to the LSC under Part 2 of the 2003 Order and sub-para. (3) required the publication of such directions by either the Lord Chancellor or the LSC. Article 46(2) prohibited the Lord Chancellor from giving any directions to the LSC under Part II in relation to individual cases.

[7] On 9 August 2003, subsequent to the conviction of the applicant by the Special Criminal Court in Dublin, articles appeared in the National Press referring to a government announcement that a sum of £800,000 was to be given to the notice parties. The article that appeared in the Guardian newspaper quoted the then Secretary of State for Northern Ireland, Mr Paul Murphy, as stating that the families would be given public money to fight the case and confirming that he had asked the Law Society to review its decision to grant legal aid to the applicant. The quotation continued in the following terms:

“While I recognise the legal constraints and complexities, I have always believed that this is an exceptional case and the vast majority of people in Northern Ireland and beyond want to see the families bring it to court... I have been working for many months with ministerial colleagues in the Department of Constitutional Affairs to try to find ways of helping the Omagh families fund their legal case. I am delighted these efforts have borne fruit. I have discussed the families concerns with the Lord Chancellor, Lord Falconer, and he has found a way to give the families the money they need.”

[8] On the 4 October 2003, again in exercise of the power conferred upon him by Article 1(2) of the 2003 Order, the Lord Chancellor published the Access to Justice (Northern Ireland) Order 2003 (Commencement No. 1) (Amendment) Order (Northern Ireland) 2003 (“the Commencement No. 1 Amendment Order”). The Commencement No. 1 Amendment Order substituted for the words “Article 46(1) to (3)” in schedule 2 to the Commencement No. 1 Order the words “Article 46(1) and (3).” Thus, the sole function of this delegated legislation was to remove the prohibition against the Lord Chancellor giving directions to the LSC under Part II of the 2003 Order in individual cases from amongst those provisions of the 2003 Order that were to come into operation on 1 November 2003. The powers given to the Lord Chancellor by Articles 46(1) and 46(3) of the 2003 Order were still to come into operation upon that date.

[9] Upon the same date, 4 October 2003, a further piece of delegated legislation was made by the Lord Chancellor in exercise of the powers conferred upon him by Articles 1(2) and Article 48(1) of the 2003 Order. This was the Access to Justice (Northern Ireland) Order 2003 (Commencement No. 2) (Northern Ireland) 2003 (“the Commencement No. 2 Order”). Article 3 of this Order provided that the provisions of the 2003 Order specified in the schedule should come into operation on 2 November 2003 subject to transitional provisions set out in Article 4. The transitional provisions provided that, inter alia, until the second appointed day, being the day to be fixed by the Lord Chancellor for the establishment and maintenance of a fund from which the LSC should fund civil legal services, in Article 12(8) (a) of the 2003 Order the words “advice, assistance or representation” should be substituted for the words “any of the services specified in schedule II” and in sub-para. (b) of the same Article the words “advice, assistance or representation” should be substituted for the words “any of those services”. In Article 12(9) of the 2003 Order the words “advice, assistance or representation” were substituted for the words “a service specified in schedule II” and the words “the advice, assistance or representation” were substituted for the words “the service”.

[10] The combined effect of these Orders was to give the Lord Chancellor power to issue directions to the LSC to provide funding for advice, assistance or representation in relation to any individual case of civil litigation whereas the provisions of the 2003 Article, as originally published, restricted his power to give directions to funding to the provision of services specified in schedule II and, in any individual case, only at the request of the LSC.

[11] The minutes of a meeting of the LSC held on 5 December 2003 at 10.00 am record, at paragraph 4 under “Chairman’s Business,” an enquiry by the chairman, Sir Kenneth Bloomfield, KCB, about the Omagh case. The minute then reads as follows:

“It was confirmed that a draft direction was almost ready. This would issue to H20, the solicitors for the families of the victims, and NILSC for comment. Once the draft was accepted and agreed, it would be issued by Lord Falconer and published by the Commission. The direction would specify rates. The Commission would not be asked to decide on whether to grant or not.”

[12] On 4 February 2004 the Lord Chancellor issued a direction in accordance with Article 12(8) (a) of the 2003 Order to the LSC to administer a sum not exceeding £804, 322.51 plus VAT to be used solely for the costs of H20 Northern Ireland or H20 acting as agents for H20 Northern Ireland in relation to the legal costs of the notice parties in the civil action.

[13] Section 17(2) of the Interpretation act (Northern Ireland) 1954 provides as follows:

“Where an enactment confers a power to make any statutory instrument the power shall be construed as including power, exercisable in the like manner and subject to the like consent and conditions, if any, to amend, alter, rescind or revoke that instrument and to make other statutory instruments in lieu thereof but this sub-section shall not apply to an order which is not made by a rule-making authority in the exercise of a statutory power which is of a legislative character.”

Section 1 of the Interpretation Act (Northern Ireland) 1954 defines “statutory instrument” as “an instrument made under an Act” and “instrument” includes an Order in Counsel.

The submissions of the parties

[14] The fundamental submission advanced by Mr O’Donoghue QC on behalf of the applicant was that the direction made by the Lord Chancellor on 4 February 2004 was unlawful having been issued in accordance with Orders in Council, namely Commencement No. 1 Amendment Order and Commencement No. 2 Order which were themselves unlawful being wrongful exercises by the Lord Chancellor of the powers afforded to him by the provisions of the 2003 Order. Mr O’Donoghue QC argued that, viewed objectively, the power conferred upon the Lord Chancellor by the Orders in Council to give directions in individual cases of civil litigation generally in relation to advice, assistance or representation was contrary to the clear intention of Parliament expressed in the originally published text of the 2003 Order and could not be regarded as having been conferred for the purpose of bringing into operation the provisions of that Order. He submitted that it was clear that the original intention of Parliament had been to restrict the power of the Lord Chancellor to give directions in accordance with Article 12(8) to services specified in schedule II and he noted that, apart from the impugned direction, the four other directions issued by the Lord Chancellor in accordance with Article 12(8) (a) had all concerned such services. Mr O’Donoghue QC also referred the court to the equivalent legislation in England and Wales, the Access to Justice Act 1999, in respect of which, he pointed out, no similar Orders had been made. He also directed the attention of the court to the entry in Current Law Statutes Annotated 1999 relating to section 25 of the Access to Justice Act 1999 which notes:

“As with the Lord Chancellor’s powers to give guidance to the Commission, he is not permitted to make directions or orders in connection with individual cases.”

[15] Mr O’Donoghue QC emphasised that the applicant was not making a case of “bad faith” in relation to the exercise of the Chancellor’s powers but that he was relying upon “improper motive” in the apparent conversion of a specifically limited power conferred by the provisions of an Order expressing the intention of Parliament into an apparently unfettered power by the use of delegated legislation.

[16] By way of response Mr McCloskey QC emphasised the fact that only a limited number of provisions of the 2003 Order had come into force, namely, Articles 1 and 2, 3 to 9, 11, 12(8), (9) and (10), 45, 46, 48 and schedules 1 and 3. This he said reflected the intention of Parliament that the remaining provisions should not come into force immediately and that the circumstances and timing when they should do so should be determined by the Lord Chancellor. This was clearly illustrated by Article 1(2) of the 2003 Order in conjunction with Section 17(3) of the Interpretation Act (Northern Ireland) 1954. Thus, for example, the Lord Chancellor was perfectly entitled to and acted in accordance with the expressed will of Parliament when he revoked the proposed coming into of operation Article 46(2) contained in the Commencement No. 1 Order by making the Commencement No. 1 Amendment Order. Mr McCloskey QC rejected the applicant’s argument based on conflict with or frustration of Parliamentary intent as expressed in the provisions of the 2003 Order upon the ground that such an argument could only be legitimate if that Order had come into operation in its entirety. In simple terms he submitted that no statutory purpose could be identified or served where the relevant statutory provisions remained inoperative and, while they remained inoperative, the correct approach was to treat them as if they had never been made at all. According to Mr McCloskey QC Commencement No. 2 Order reflected the hierarchical structure created by the 2003 Order within which the LSC was subservient to the overarching functions of the Lord Chancellor. He referred the court to Article 4(3) of Commencement No. 2 Order and submitted that the effect of revoking the coming into operation of Article 46(2) was to align the transitional provisions with the 1981 Order. He further argued that the motive for making the impugned Orders and Direction was irrelevant and that no such ground had been included in the Order 53 Statement.

[17] Lord Brennan, on behalf of the notice parties, adopted the submissions made on behalf of the respondent by Mr McCloskey QC and, in addition, advanced detailed submissions in relation to the issue of delay and prejudice.

Conclusions

[18] The system for providing and administering civil and criminal legal aid in this jurisdiction as contemplated by the provisions of the 2003 Order is fairly complex comprising, as it does, a number of distinct but inter-related elements. In such circumstances, it is not at all surprising that Parliament should have given the power to bring the provisions into operation to the Lord Chancellor in Article 1(2) and, since the demand for legal aid is a continuing demand, the power to make transitional provisions and savings as he considers appropriate contained in Article 48(1). It seems clear from the press statement 9 August 2003 by the then Secretary of State for Northern Ireland that a decision had been taken by government to fund the legal costs of the notice parties and that the Lord Chancellor had found a way to give the families the money that they needed. The LSC minute of 7 November 2003 confirms that the government had decided that the LSC would not be asked to decide whether legal aid should be granted to the notice parties. There is a clear inference from the subsequent sequence of relevant events that the respondent had formed the view that a fund should be provided for the purpose of defraying the legal costs of the notice parties, that the LSC would be the appropriate body to have responsibility for the supervision and administration of such a fund and that he made Commencement No. 1 Amendment Order and Commencement No. 2 Order in order to secure that objective. No doubt the overwhelming majority of right thinking people in this jurisdiction, so many of whom have suffered as victims of terrorist crimes in respect of which no-one has ever been brought before a court, would have little difficulty in giving their approval to such a strategy. The question that this court is asked to consider is whether the respondent acted lawfully in making these two Orders in Council and the subsequent Direction.

[19] In his attractively presented oral and written submissions Mr McCloskey QC sought to restrict the court to a consideration of the operational legal powers in accordance with which the respondent had acted, namely, Articles 1(2) and 48(1) of the 2003 Order and section 17(2) of the Interpretation Act (Northern Ireland) 1954. He rejected any argument that, in so doing, the respondent had frustrated or acted inconsistently with the intention of Parliament by maintaining that, in simple terms, no statutory purpose could be identified or served where the relevant statutory provisions were not in operation. The correct approach to such inoperative statutory provisions was to treat them as if they had never been made at all. He further refined this argument by using it to support the proposition that the prohibition contained in Article 46(2) could have no bearing on the changes introduced by the Commencement No. 2 Order since the coming into operation of the former had been postponed by the Commencement No. 1 Amendment Order. I am unable to accept this submission which seems to me to reflect the dissenting judgment of Hobhouse LJ in the Court of Appeal in R v Secretary of State for the Home Department ex parte Fire Brigade's Union

and Others [1995] 2 AC 513 at 529. Such an approach did not find favour with the majority in the House of Lords in which Lord Lloyd observed at p. 570 G:

“But quite apart from section 171(3), I would construe section 171 so as to give effect to, rather than frustrate, the legislative policy enshrined in sections 108 to 117, even though those sections are not in force. The mistake which, if I may say so, underlines the dissenting judgment of Hobhouse LJ is to treat these sections as if they did not exist. True, they do not have statutory force. But that does not mean that they are writ in water. They contain a statement of Parliamentary intention, even though they create no enforceable rights.”

Lord Brown-Wilkinson also referred to the decision of Hobhouse LJ that since the relevant statutory provisions had not been brought into force they had no legal significance of any kind and went on to say at p. 553:

“He then turned to consider whether it could be said that the Secretary of State had abused those prerogative powers and again approached the matter on the basis that since the sections were not in force they had no significance in deciding whether or not the Secretary of State had acted lawfully. I cannot agree with this last step. In public law the fact that a scheme approved by Parliament was on the statute book and would come into force as law if and when the Secretary of State would so determine is in my judgment directly relevant to the question whether the Secretary of State could in the lawful exercise of prerogative powers both decide to bring in the tariff scheme and refuse properly to exercise his discretion under section 171(1) to bring the statutory provisions into force.”

I accept that there are significant differences in the legal and factual circumstances of this application and the Fire Brigade's Union case, the latter being concerned with the omission to bring into operation a statutory criminal injury scheme coupled with an exercise of the prerogative to institute an alternative scheme inconsistent with that contained in the statute. However, I am satisfied that the decision lends no support to and, in fact, is inconsistent with the proposition advanced by Mr McCloskey QC. Once again I refer to the words of Lord Lloyd in the Fire Brigades Union case when he confirmed that the ordinary function of the court was to grant

discretionary relief if a minister exceeded the powers conferred on him by Parliament and went on to say at p.572:

“In granting such relief the court is not acting in opposition to the legislature, or treading on Parliamentary toes. On the contrary: it is ensuring that the powers conferred by Parliament are exercised within the limits, and for the purposes, which Parliament intended. I am unable to see the difference in this connection between a power to bring legislation into force and any other power.”

I respectfully adopt those sentiments as a clear and helpful guide to the court in discharging its duty in accordance with the rule of law.

[20] A new framework for the provision and delivery of legal aid funding in Northern Ireland was contained in the 2003 Order. Whatever the reasons may have been, a substantial portion of this legislation has yet to come into effect and, in order to provide for the continuing demand for legal aid in the meantime, it has been necessary to institute transitional arrangements. The discretionary powers to regulate the coming into operation of the legislation and the interim transitional arrangements have been delegated by Parliament to the Lord Chancellor. Currently the LSC, which has been brought into existence, has the task of administering legal aid funding in accordance with the relevant provisions of the 1981 Order pending the coming into operation of the rest of the 2003 Order. Those arrangements and the powers under which they have been instituted are not in dispute in this litigation.

[21] The reforms initiated by the 2003 Order included an articulation of the relationship between the Lord Chancellor and the LSC with regard to the provision and administration of legal aid funding. There is no doubt that the provisions of the Order afford the Lord Chancellor extensive supervisory powers which Mr McCloskey QC had described as “hierarchical”. In such circumstances, it is submitted that the Commencement Orders achieve no more than the preservation of the Lord Chancellor’s powers to direct the LSC during the transitional period. By way of analogy, Lord Brennan referred the court to Article 76 of the Justice (Northern Ireland) Order 2002 which contained a similar provision to Article 12(8) of the 2003 Order, the equivalent of section 6(8) of the Access to Justice Act 1999. This was designed to be inserted as Article 10(A) of the 1981 Order but was never brought into force because it was superseded by Article 12(8).

[23] The nature and extent of the supervisory role conferred upon the Lord Chancellor by the provisions of the 2003 Order in his relationship with the

LSC is illustrated by the various provisions affording him the power to make orders and regulations, give guidance and directions and approve a funding code. The members of the LSC itself are appointed by the Lord Chancellor in accordance with the factors identified in Article 4. However, despite the extent of the supervisory powers reserved to the Lord Chancellor, it seems to me that the provisions of the 2003 Order also reflected an intention to invest the LSC with a degree of autonomy in relation to the funding of individual cases. In so doing, amongst other matters, no doubt Parliament was conscious of the need to establish a degree of independence in the public funding of civil litigation which might well involve some manifestation of the executive as a litigant. Thus, Article 8(3) specifically prohibited the Lord Chancellor from giving guidance to the LSC in relation to individual cases and Article 46(2) contained an equivalent prohibition in relation to directions to the LSC under Part II. Article 12(8) permitted the Lord Chancellor to authorise exceptional funding in individual cases but only after a request from the LSC.

[24] It seems to me that, in the context of the implementation of the 2003 Order by stages, the Lord Chancellor was perfectly entitled to introduce a modified form of Article 12(8) compatible with the continuing existence of the relevant provisions of the 1981 Order. A template as to how this might have been achieved existed in the non-operational section 76 of the Justice (Northern Ireland) Act 2002 which, it may be noted, also limited the Lord Chancellor's power to direct the provision of exceptional legal aid in individual cases to situations in which the same was requested by the Legal Aid Committee. However, rather than utilise this template, the net effect of the combination of Commencement No. 1 Amendment Order and Commencement No. 2 Order was to repeal Section 76 and to confer upon the Lord Chancellor a general power to direct the Commission to fund the provision of advice, assistance or representation in individual cases. It would appear from the minute of the LSC meeting referred to at paragraph [11] hereof that the Lord Chancellor decided that the LSC would not be asked to make or seek authorisation for a grant of legal aid to the notice parties. No explanation for this decision or why it was thought appropriate to confer such a power upon the Lord Chancellor as a transitional measure in connection with the coming into operation of the 2003 Order has been forthcoming from the Respondent at any stage in these proceedings. At paragraph 4.2 of his skeleton argument Mr. McCloskey QC referred to the Lord Chancellor's duty to protect the right of access to the court in accordance with Article 6 of the European Convention on Human Rights but it seems to me that Parliament had already specified the circumstances under which that was to be achieved in the original provisions of the 2003 Order.

[25] After making due allowance for the discretion conferred upon the Lord Chancellor with regard to the implementation of the legislation, was the power conferred as a consequence of the combination of the impugned

Orders in accordance and consistent with the intention of Parliament as expressed in the 2003 Order? It seems to me that the answer must be in the negative. Even if granted upon a temporary basis, I am unable to accept that such a power could be reasonably considered to be appropriate as a transitional provision in connection with the coming into operation of Article 12(8) of the 2003 Order which specifically restricted his powers in relation to individual cases to the authorisation of requests by the Commission. The combination of these two Orders removed the consistency between the prohibitions against the Lord Chancellor giving guidance or directions to the Commission in individual cases originally preserved by the Lord Chancellor in Commencement Order No. 1. In my opinion, in the context of the intention of Parliament as expressed in the overall statutory framework, it amounted to an amendment of the 2003 Order. Neither Article 1(2) nor Article 48(1) nor section 17 (2) of the Interpretation Act (Northern Ireland) 1954 empowered the Lord Chancellor to affect such an amendment which could only be achieved by an exercise of the powers of the sovereign Parliament.

Delay

[26] Mr McCloskey QC on behalf of the respondent advanced submissions in relation to the issue of delay at the leave stage. Lord Brennan declined to advance any argument in relation to delay that stage but he did deal with the issue during the hearing before this court. In the course of his helpful submissions he emphasised the discretionary nature of the remedy involved in judicial review and the need to act promptly particularly where prejudice was likely to accrue to third parties. It seems to me that the following factors are relevant when considering the issue of delay:

- (i) The impugned Orders in Council were made on 4 October 2003 and the Direction on 4 February 2004, the former date being some 16 months and the latter some 12 months prior to the application for judicial review.
- (ii) Order 53 rule 4 provides that judicial review proceedings shall be initiated "...promptly and in any event within three months from the date when grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made." Cases such as Re: Shearer's Application [1993] 2 NIJB and Re: McCabe's Application [1994] NIJB 27 emphasise the importance of prompt applications.
- (iii) As a consequence of the submissions advanced on behalf of the respondent at the leave hearing, Weatherup J directed that an affidavit should be filed on behalf of the applicant. An affidavit was duly sworn on 11 April 2005 by the applicant's solicitor, Kevin Winters, in which he recited the difficulties encountered by the

applicant in initially obtaining legal aid to defend the civil proceedings. The applicant's certificate of legal aid was discharged on 19 December 2003 and the applicant subsequently challenged that decision by way of judicial review proceedings. The application came before Girvan J who granted leave to apply on 28 June 2004. The substantive hearing took place on 26/27 September 2004 and the application was dismissed by Girvan J in a reserved judgment delivered on 12 November 2004. The applicant's solicitor deposed that from December 2003 until the judicial review judgment of 12 November 2004 all the efforts of the applicant's legal team had been focused on the possible reinstatement of the applicant's legal aid certificate and it was not until completion of those judicial review proceedings that attention was directed to the funding which had been granted to the notice parties. That matter had been touched upon during the hearing before Girvan J who referred to it at para. 10 of his reserved judgment. Subsequent to the delivery of that judgment a further detailed opinion was furnished by counsel on 12 January 2005 and the applicant's legal advisors consulted with him at Portlaoise Prison on 29 January 2005. An application for legal aid for the purpose of taking the present proceedings was made on 4 February 2005 and rejected on 10 February 2005. An appeal was lodged against that decision on 10 February 2005 and on 11 February 2005 this application was commenced.

- (iv) Mr Paul Andrews of the Northern Ireland Court Service has exhibited to his affidavit, filed on behalf of the respondent, items of correspondence between the applicant's solicitors and the Northern Ireland Court Service relating to applications made on behalf of other clients of Mr Winters for exceptional funding in accordance with Article 12(8) (a) of the 2003 Order between June 2004 and October/November 2004.
- (v) On 5 May 2005 Mr Andrews wrote to the solicitors acting on behalf of the notice parties requesting their comments upon the possibility of repayment of the sum advanced to date of £417, 938.74, should the judicial review proceedings prove successful. The solicitors replied on 10 May 2005 confirming that all of the sum in question had been expended in good faith in discharging legal costs and disbursements and that if their legal aid funding was withdrawn they would be unable to proceed with their civil litigation thereby undermining their rights under Article 6 of the European Convention on Human Rights. I note that the trial of the civil action has been scheduled to begin in September 2005 although there may be some uncertainty about the precise date.

[26] There is no doubt that there has been substantial delay since the making of the impugned Orders and Direction by the Lord Chancellor. Lord Brennan submitted that the inference to be drawn from the facts was that the applicant's solicitor had waited until any prospect of the applicant obtaining legal aid had finally disappeared before concentrating his attention upon this application. I do not think that such a submission is unreasonable and the attempts to obtain legal aid for other clients by way of exceptional grant before launching an attack upon the legitimacy of such a procedure are not particularly attractive.

[27] As I have already noted, at the leave stage, Weatherup J had the benefit of detailed submissions from the applicant and the respondent in relation to delay and gave leave for the application to proceed. I take into account that decision together with the additional submissions made by Lord Brennan before this court. While this seems to have been the only Direction issued in relation to an individual case to date, ultimately, these are public law proceedings concerning delegated legislation the validity of which may have substantial significance for the availability of legal aid within this jurisdiction. On the other hand, at all times, the notice parties have proceeded with their arrangements in good faith. As I indicated to Lord Brennan during the course of the hearing, I find it difficult to conceive of circumstances in which the funding could now be withdrawn or jeopardised as a consequence of a finding that the respondent's officials had acted in excess of jurisdiction in arranging for it to be administered, particularly in view of the subject matter of the proceedings and the stage which they have reached. In such circumstances, I am not at present persuaded that it would be appropriate for me to exercise my discretion to withhold relief on the ground of delay and associated prejudice. Accordingly, I am minded to grant the applicant the relief sought. However, as requested by the respondent, I shall hear counsel further in relation to my discretion and as to the precise form of relief and the consequences thereof together with any submissions in relation to the issue of costs.