

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY  
COLETTE HEMSWORTH**

**CAMPBELL LJ**

*Introduction*

[1] This is an appeal by Colette Hemsworth, the widow of John Hemsworth, from a judgment of Kerr J (as he was then) dismissing her application for judicial review of a decision by the Lord Chancellor concerning her application for funding for legal representation in connection with an inquest into the death of her husband.

*The decision to hold an inquest*

[2] On 10 July 1997 the late John Hemsworth instructed his solicitors to issue proceedings against the Royal Ulster Constabulary for assault, battery and trespass as a result of an incident that had occurred in Malcolm Street, Belfast on 6 July 1997. He claimed that in this incident a police officer struck him on the face with a baton causing him to fall to the ground where he was then kicked on the left side and struck on the back with a baton. He was taken to hospital where he was treated for a crack fracture of his right mandible and discharged.

[3] On the evening of 27 December 1997, Mr Hemsworth, who was then 39 years of age, suffered a stroke and he was admitted to hospital where he died on 1 January 1998.

[4] At a post-mortem examination it was established that he had suffered a complete thrombosis of his right internal carotid artery leading to a major infarct in the right side of his brain. Dr Derek Carson, the pathologist who performed the autopsy, reported that it was not in his view possible to correlate the recent thrombosis causing the fatal cerebral infarction with any facial injury sustained by Mr Hemsworth in July 1997. At the request of Dr Carson an examination of the brain and carotid vessels was carried out by Dr M Mirakhur, a consultant neuropathologist.

[5] The Coroner was provided with reports by Dr Carson and Dr Mirakhur and he decided that it was not necessary to hold an inquest into the death and on 30 April 1998 and arranged for it to be registered.

[6] Subsequently Mrs Hemsworth's solicitors obtained a report from Professor Derrick Pounder of the University of Dundee. In his opinion it is highly likely that the assault, alleged to have occurred on 6 July 1997, was the sole direct underlying cause of Mr Hemsworth's death.

[7] This report was brought to the attention of the Attorney General in February 2000 and he exercised his powers, under section 14 of the Coroner's Act (Northern Ireland) 1959, to order an inquest.

[8] Later that year the Coroner obtained an opinion from Professor Helen Whitwell of the University of Sheffield who is a consultant pathologist to the Home Office. Despite the time delay between the fatal cerebral infarct and the injury received by Mr Hemsworth in her view it is likely that they are linked in terms of causation.

#### *Funding for legal representation at the Inquest*

[9] After the Attorney General ordered that an inquest was to take place Mrs Hemsworth's solicitors set about finding a source of funding to allow her to be represented by solicitor and counsel at the hearing.

[10] At present a power to grant funding for exceptional inquests is contained in Article 12(8) of the Access to Justice (Northern Ireland) Order 2003. Prior to this legal aid was generally not available for representation in proceedings before a coroner. Provided an applicant fulfilled the financial criteria limited assistance was available under the Green Form Scheme (Part 11 of the Legal Aid, Advice and Assistance (NI) Order 1981) confined to obtaining preliminary advice as to the legal position generally, the conduct of the inquest and what may and may not be said at the hearing. The scheme was administered by the Legal Aid Department of the Law Society ("the Legal Aid Department") under the direction of the Legal Aid Committee.

[11] The solicitors' attention was drawn to an announcement in July 2000 that the Lord Chancellor intended to establish an extra statutory *ex gratia* scheme that would enable him to grant funding for legal representation in proceedings before coroners in exceptional cases.

[12] In early September 2000 they wrote to the Lord Chancellor and to the Legal Aid Division of the Northern Ireland Court Service (which I shall refer to as "the Court Service") asking that consideration be given to granting financial assistance to Mr Hemsworth's family. In the reply an official in the Court Service explained the background to the Lord Chancellor's decision to

make funding available. He confirmed that legal aid was not available for proceedings before coroners in Northern Ireland and that in England and Wales the Lord Chancellor had the power to allow funding in exceptional cases on a one-off basis. There was no similar power in Northern Ireland and it was as an interim measure that an extra-statutory *ex gratia* scheme was being established. It was made clear that funding would only be provided for “a specific amount of money to cover representation at the inquest only”.

[13] The writer added that in the autumn the Lord Chancellor would publish consultation proposals as to the criteria that he intended to apply in terms of whether to grant funding in individual cases. It was made clear that all applications for funding from the extra-statutory scheme would be considered by the Lord Chancellor and an indication was given of some of the information that would be required including the anticipated cost of representation.

[14] Mrs Hemsworth’s solicitors then awaited publication of the criteria and in March 2001 they were told that the criteria that it was proposed to apply had now been published and a copy was provided inviting their views. In these criteria no reference was made to the Green Form Scheme.

[15] On 21 May 2001 the solicitors sent an application for funding for legal representation at the inquest together with a financial application form to the Court Service. The application, drafted by junior counsel, was comprehensive and referred to a number of issues connected with the inquest. The Court Service in its response asked for some additional information.

#### *Funding for the preliminary hearing*

[16] Soon after this on 23 May 2001 the Coroner invited submissions at a preliminary hearing to be held on 7 June 2001 to consider the implications of judgments in the cases of *Jordan, Kelly, McKerr and Shanaghan v UK* 37 EHRR 2 delivered by the European Court of Human Rights and published on 4 May 2001.

[17] On 31 May Mrs Hemsworth’s solicitors wrote to the Court Service asking that their original request for funding be processed or that it be granted limited to attendance and representation at this preliminary hearing.

[18] The date for the preliminary hearing was then close so the solicitors decided to ask for leave to issue proceedings to judicially review a decision of the Lord Chancellor to refuse to reach a decision on their application for funding for legal representation at this preliminary hearing. On the eve of the date fixed for the hearing of their application they were informed that the Lord Chancellor had agreed to the application for funding from the Extra-Statutory *ex gratia* Scheme for representation at the inquest. He had also

authorised a sum not exceeding £11,365.50 plus VAT for solicitor and counsel appearing at the preliminary hearing, to cover only those costs incurred on or after 4 June 2001. The basis upon which the maximum grant was calculated was explained and it was stated that approval for funding for the actual inquest, would be reconsidered after the preliminary hearing.

[19] The application for leave to issue proceedings for judicial review was adjourned until 13 July and the preliminary hearing before the Coroner was adjourned to 4 September. In the interval the solicitors asked for confirmation from the Court Service that all reasonable costs incurred in furtherance of representation of their client at the preliminary hearing and substantive hearing would be covered from 4 June 2001. They also asked for confirmation that all reasonable costs incurred from 4 June 2001 in preparation for the adjourned preliminary hearing would be covered. Finally they asked that the reasonable costs incurred to date be paid out of public funds.

[20] The response from the Court Service confirmed that the grant would cover reasonable costs incurred for the preliminary hearing to the ceiling of £11,365.50 plus VAT. The letter contained the following paragraph:

“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”.

This is the first reference in correspondence from the Court Service to the Green Form Scheme as a source of funding.

[21] When Mrs Hemsworth’s original application for leave to apply for judicial review resumed on 13 July 2001 she relied on amended grounds for relief to cover the decision of the Lord Chancellor not to provide her with funding for the reasonable legal costs incurred before 4 June 2001, and the imposition of what is described as a “cap” or ceiling on the costs that may be incurred.

[22] In an affidavit in support of this application, sworn on 26 June 2001, Mr Brendan Blaney, a partner in the firm of solicitors acting for Mrs Hemsworth, stated that the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 entitles clients to receive initially two hours of advice and assistance not exceeding the sum of £88.00. In this instance the first two hours of work carried out by his firm were covered by the Green Form Scheme.

[23] Mr Blaney went on to explain in his affidavit that it is possible to obtain an extension of time for preliminary advice and assistance to provide an additional hour or two hours of advice and assistance. He said that in his experience such extensions were not granted to the extent required to cover the work required and that it can take as much time to negotiate with the Legal Aid Department for an extension as the time eventually allowed. He gave examples of steps taken in these inquest proceedings that would not, in his opinion, be covered by the Green Form Scheme such as obtaining the report from Professor Pounder, applying to the Attorney General for an order for an inquest to be held and other preparatory work including correspondence with the Coroner. He mentioned also the instruction of counsel to advise on preparatory steps.

[24] In view of the decision of the Lord Chancellor to approve in principle the application for funding at the inquest, Mr Blaney contended that he should be authorised to engage at once in preparatory work and should not be precluded from so doing so by the suggestion that any work undertaken prior to the Lord Chancellor's decision in relation to the amount of funding to be made available would not be covered by the Extra- Statutory Scheme.

[25] In her replying affidavit the Director of the Legal Aid Department said that neither Green Form assistance nor any extension of time had been asked for in relation to the matters mentioned by Mr Blaney. The Director expressed the opinion that in principle there was no reason why an application for an extension in relation to any matters referred to by him should be ruled out. As for extension applications she countered the suggestion that this is a pointless exercise by referring to statistics to show that between 1 April 2000 and 31 March 2001 there were 4542 such applications and of these 3422 were successful and a further 270 fell within the Society's general authority and no request for an extension was necessary.

[26] There is a conflict of evidence as to whether or not the shortcomings in the Green Form Scheme, suggested by Mr Blaney in his affidavit, were confirmed during a telephone conversation between a solicitor in his firm and an official in the Legal Aid Department to be correct. What is not in dispute is that the solicitor was told that although extensions may be allowed to Green Form funding to allow reports to be obtained from experts no one in the Department knew of any case in which such authority had in fact been granted.

#### *The judicial review application*

[27] The application for judicial review which began in June 2001 came on for hearing before Kerr J. in January 2002. The case made on behalf of Mrs Hemsworth was that as a result of the approach adopted by the Lord Chancellor she would not receive funding for a considerable amount of

preliminary work that had been undertaken prior to 4 June 2001. This was said to be incompatible with article 2 of the European Convention on Human Rights. In addition as it was impossible to estimate the costs that Mrs Hemsworth would incur in advance of the inquest this, together with the limit placed on the amount that could be expended, put her at a disadvantage to other parties such as the police who would also be funded from the public purse. As a result an inequality of arms would exist.

[28] The case for the Lord Chancellor was that the Extra Statutory Scheme was introduced pending a reform of the legal aid scheme which would allow funding of legal representation at inquests. As it was an interim arrangement it did not have to follow the pattern of existing public funding

[29] Kerr J. concluded that the Green Form Scheme was sufficiently wide to cover all of the preparatory work undertaken on behalf of Mrs Hemsworth before the application for extra- statutory funding was made. The dispute as to whether applications for Green Form assistance were dealt with as efficiently as they ought to be, he did not find necessary to resolve. He was of the firm opinion that it was intended by the legislature that steps such as those taken by Mrs Hemsworth's advisers should be covered by these provisions. He was equally clearly of the view that the Lord Chancellor was entitled to have regard to those provisions and to the intention of the legislature, when devising the Extra Statutory Scheme. Any deficiency in the implementation of the provisions, if it was the fault of the Legal Aid Department, (as to which, he made it clear that he was far from persuaded) should, he said, be the subject of challenge to that department and not the Lord Chancellor

[30] The judge considered the application of article 2 of the Convention and stated that in light of the decision in *Jordan v The United Kingdom* he was satisfied that it was 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 remaining issue that he decided was whether the funding proposed by the Lord Chancellor met the requirements of article 2 and was generally reasonable. The judge was satisfied that the reasonable cost of the applicant's legal representation at the inquest would be met and he did not accept that the applicant would be placed at a disadvantage *vis-à-vis* other participants. The combined effects of the Green Form Scheme and the Extra Statutory Scheme should, he said, be sufficient to ensure that the applicant was provided with the services of solicitors and counsel of equal calibre to those who represented other parties. For these reasons he held that none of the grounds of challenge had been made out and dismissed the application.

*The challenge to the Legal Aid Department- Hemsworth No 2*

[31] Immediately after Kerr J gave judgment Mrs Hemsworth's solicitors applied to the Legal Aid Department for an extension to the Green Form assistance. They set out what was required, including authority for counsel to direct proofs and to engage in other preparatory work. They referred to the affidavits sworn by the Director of the Legal Aid Department in the proceedings that had just concluded in which she said that preparatory work for an inquest would be covered under the Green Form Scheme.

[32] During the judicial review application against the Legal Aid Department that followed it was revealed that a meeting took place on 5 February 2002 between officials in the Legal Aid Department and in the Court Service. This meeting was intended to develop a workable system between the two schemes. A paper outlining the steps that would be funded under the Green Form Scheme and those that would fall within the Extra Statutory Scheme was discussed. One topic was "briefing counsel - either generally or on a limited aspect of the matter." On this subject the Director told the meeting the Legal Aid Committee would have to give directions.

[33] The need for directions had arisen because shortly after the hearing before Kerr J. the Director was advised by the civil manager of the Legal Aid Department that there had been a decision of the Legal Aid Committee in the past not to use the Green Form Scheme to brief counsel. After some research a letter of 8 Aug 1990 was found confirming that there was such a decision though it was stated in the letter that this was not to be treated as an absolute bar to instructing counsel.

[34] A meeting took place between the Director and the Chairman of the Legal Aid Committee on 8 February 2002. The Chairman said that if there was such a decision by the Committee some years earlier not to include counsel in the Green Form Scheme they should stay with it until it was challenged successfully by judicial review. He is recorded as saying that one could not say that counsel would never be allowed under the scheme but the "mess is of the NICTS/LC Department making".

[35] In accordance with this instruction the Director wrote to Mrs Hemsworth's solicitors on 11 February 2002 allowing an extension of 3 hours for the solicitors but stating that if they intended to brief counsel in regard to the matter they should apply to the Court Service. It was the decision of the Legal Aid Department contained in this letter of 11 February 2002 that was the subject of the application for judicial review against the Legal Aid Department.

[36] This departure from the policy that had been outlined by the Director in her affidavit in the proceedings before Kerr J. was not brought to the

attention of the judge by the Legal Aid Department. Although the hearing was over he had reserved judgment and it would have been possible to have done so. An explanation that has been offered is that the Director became seriously ill and went into hospital on 19 February and was unable to return to work until 25 April 2002.

[37] Mrs Hemsworth's solicitors, on receiving the decision in the letter of 11 February 2002, wrote and asked why the extension did not include counsel and they were told that their letter would be placed before the Legal Aid Committee. After sending a reminder they filed affidavits in an unsuccessful effort to persuade Kerr J. to re- open their application in light of this change of policy.

[38] On 22 February 2002 the Court Service, which was by then aware of the decision of the Legal Aid Committee not to include counsel, drew to the attention of the Legal Aid Department the wording of article 4(1) of the Legal Aid, Advice and Assistance (NI) Order 1981 which provides that Green Form advice and assistance;

“...applies to any oral or written advice [and also any assistance] given by a solicitor or, if and so far as may be necessary, counsel...”

It was also pointed out that there was nothing in regulation 15 of the Legal Advice and Assistance Regulations (NI) 1981 to suggest that an extension under those regulations may not include counsel. Further that the provisions for payment in article 8 of the Order and regulation 23 of the Regulations both include references to services provided by counsel as well as by a solicitor.

[39] Despite this advice the Legal Aid Committee persisted in the view that only advices and opinions of counsel would come within the scheme and that work carried out by counsel in preparation for inquest hearings would not. The Court Service maintained its position that under the legislation it was included.

[40] On 3 April 2002 the Court Service wrote to the Legal Aid Department stressing the need to develop a workable system pending the enactment of the Justice Bill when the Legal Aid Department would have statutory power to provide funding for exceptional inquests. A sub-committee of the Legal Aid Committee met on 27 March 2003 and agreed a table of steps that had been prepared by the Court Service making clear the items that would fall under the Green Form Scheme and those that would come under the Extra-Statutory Scheme. In this table briefing counsel either generally or on a limited aspect of the matter came under the Green Form Scheme.



[41] In accordance with this table on 28 March 2003 funding was granted to Mrs Hemsworth under the Green Form Scheme by the Legal Aid Department for counsel and additional funding for the solicitors.

[42] When Mrs Hemsworth's application to judicially review the Legal Aid Department's decision of 11 February 2002 came on for hearing before Weatherup J. the Department did not attempt to stand over the lawfulness of that decision. Mrs Hemsworth challenged the good faith of the Legal Aid Committee on the basis that in the application before Kerr J. the court had been misinformed by the Director when she said that the Green Form Scheme extended to counsel which, it was said, had influenced the judge's decision.

[43] In his judgment, reported at [2004] NIQB 26, Weatherup J. found that the Green Form Scheme as operated by the Legal Aid Department up to March 2003 had an inadequate reach and that it was operated in a manner that made it not cost effective. He held that the decision was reached after undue delay and that the shortcomings rendered the scheme incompatible with the obligation to provide appropriate legal representation for the applicant. The judge made a declaration that the decision of 11 February 2002 under the Green Form Scheme was not sufficient to offer practical and effective legal representation for the family of the deceased in relation to the preparatory work for the inquest, for the purposes of article 2 of the Convention. He declined to make any declaration in relation to the decision of 28 March 2003 or the operation of the Green Form Scheme subsequent to this.

[44] A letter with a copy of the table of steps that had been agreed with the Court Service was sent to legal aid practitioners on 21 May 2003 by the Legal Aid Department referring to the confusion highlighted in *Hemsworth v Legal Aid Department* and to the guidance now issued by the Legal aid Committee. So far as the Extra-Statutory Scheme was concerned practitioners were referred to the Statement of General Policy issued on 10 January 2002 which remained unchanged.

[45] On 21 August 2003 Mrs Hemsworth's solicitors made a further application to the Court Service for funding in respect of a preliminary hearing due to take place on 2 September and this was approved to cover costs incurred on and after the date of the application.

[46] The Legal Services Commission ("the Commission") became responsible for the administration of legal services on 1 November 2003 and it was to the Commission that Mrs Hemsworth's advisers turned on 14 November 2003 for approval for further funding as a preliminary hearing had been fixed for 12 December 2003. This was not straightforward as it required

an extension to the existing grant for a preliminary hearing and had to follow the policy statement issued by the Lord Chancellor. The application had therefore to be passed from the Commission to the Court Service before submission for ministerial approval. Once the preliminary hearings are completed funding will come under the Commission to be dealt with in accordance with the Lord Chancellor's guidance and direction of November 2003. The application of 14 November 2003 was approved on 6 January 2004 when the solicitors were told that the Minister had agreed to an extension to a maximum of £13,082.80 plus VAT for costs incurred after 9 November 2003 and after 18 November in respect of senior counsel and costs of junior counsel on expiration of the existing grant.

*Supervision of the execution of the judgment in Jordan and others v United Kingdom*

[47] In *Jordan and others v United Kingdom* the European Court of Human Rights found that there had been a failure to comply with the procedural obligations imposed by article 2 of the Convention and that there had been, in this respect, a violation of that provision. Under article 46(2) it was left to the Committee of Ministers to supervise the execution of the judgment of the Court. Mrs Hemsworth's solicitors have produced a document which they have identified as a copy of the Package of Measures proposed by the United Kingdom; a document prepared by the Secretariat of the Committee of Ministers entitled "Cases concerning the action of security forces in Northern Ireland "; and a document prepared by the United Kingdom described as "Responses to Secretariat Responses." These documents were not in the public domain when the application for judicial review was before Kerr J. In the copy of the Package of Measures there is a statement that the Government takes the findings of the Court very seriously and is determined to comply fully with the judgments. Dealing with the absence of legal aid for the representation of the victims' family the following passage appears:

"A scheme has been established by the Lord Chancellor to provide for legal representation at certain exceptional inquests in Northern Ireland. This legal aid scheme applies where the applicant has a sufficiently close relationship to the deceased to warrant the funding of representation. In deciding whether to grant legal aid under this scheme, the Lord Chancellor will be obliged, by virtue of the Human Rights Act, to act in a manner compatible with the Convention ...."

It is also stated that:

"As already indicated, coroners are now required to act in a manner compatible with Article 2 of the Convention to ensure that inquest proceedings are

commenced promptly and pursued with reasonable expedition.”

*The appellant's case.*

[48] It is not possible to reproduce in detail the arguments put forward by counsel for both parties in their skeleton arguments and at the hearing and I shall therefore do so in outline. Mr Macdonald QC (who appeared with Ms Quinlivan on behalf of Mrs Hemsworth) relied on his client's right of access to the inquest under the Convention, a right which is to be both practical and effective. A number of grounds were advanced on which it was said that the Extra Statutory Scheme on its own and in conjunction with the Green Form Scheme failed to meet these standards. Mr Macdonald submitted that Mrs Hemsworth is at a disadvantage as compared to other parties represented at public expense resulting in an inequality of arms. In addition he submitted that the Scheme ought to be retrospective and to include work undertaken prior to 4 June 2001.

[49] The statement of policy by the Government in the Package of Measures was relied upon by Mr Macdonald as giving Mrs Hemsworth a legitimate expectation that the inquest into the death of her husband will comply with the requirements of article 2 of the Convention.

*The respondent's case*

[50] Mr Shaw QC (who appeared with Mr Paul Maguire for the Respondent) argued that following the decision of the House of Lords in *re McKerr* [2004] 1 WLR 807 the Human Rights Act has no application to this appeal. He suggested that the Package of Measures should be regarded as no more than a statement of aspiration on the part of the Government. The Scheme was therefore to be judged by the standard to be applied to an exercise of discretion in public law namely irrationality. If contrary to his submission article 2 of the Convention is applicable under domestic law, Mr Shaw suggested that the Scheme, as was found by Kerr J. is both practical and effective.

*The Human Rights Act*

[51] It was after Kerr J. had given judgment that the House of Lords held in *In re McKerr* that as the Human Rights Act 1998 was not generally retrospective the obligations under section 6 (1) and article 2 of the Convention to carry out a proper investigation into a violent death did not apply to a death occurring before 2 October 2002. In the present case the death occurred a considerable time before this date.

*Legitimate expectation*

[52] An individual may have a legitimate expectation that a public authority will act in accordance with stated policy- *Council of Civil Service Unions v Minister of the Civil Service* [1985] AC 374 - however the context and the way in which the policy is stated is important.

[53] A distinction is to be drawn between a legitimate expectation based on the ratification of an international treaty by the executive and a statement that a policy will be pursued that accords with such a treaty. As to the former Lord Nicholls of Birkenhead *In re McKerr* emphasised the difference between (1) rights arising under the Convention and (2) rights created by the 1998 Act by reference to the Convention. He went on to say that it by no means follows that the continuing existence of a right arising under the Convention in respect of an act occurring before the 1998 Act came into force will be mirrored by a corresponding right created by the 1998 Act.

[54] In *J H Rayner v Department of Trade* [1990] 2 AC 418 at 476 Lord Templeman said:

“A treaty may be incorporated into and alter the laws of the United Kingdom by means of legislation. Except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual.”

[55] Philip Sales and Karen Steyn in an article entitled *Legitimate Expectations in English Law: An Analysis* P.L. 2004, Aut 564-653 describe the underlying conceptual justification for maintaining that treaty obligations give rise to legitimate expectations (let alone expectations deserving of such special protection) as questionable. They note that in the Court of Appeal in *R (European Roma Rights) v Prague Immigration Officer* [2004] 2WLR 147 Simon Brown LJ at para 51 described a contrary view that he expressed in *Ex p Adimi* [2001]QB 667, as suspect, and Laws LJ, at para100 showed similar unease.

[56] In *Chundawadra v Immigration Appeal Tribunal* [1988] Imm AR 407 the Court of Appeal in England and Wales held that ratification of the Convention created no justiciable legitimate expectation that the Convention's provisions would be complied with. In the course of his judgment Slade LJ said, when commenting on the absence of any evidence of;

“...any relevant express promise or regular practice on the part of the Secretary of State. In default of such

promise or practice, however, I do not see how the doctrine of legitimate expectation can avail the appellant.”

[57] In *R v Secretary of State for the Home Department ex p. Behluli* [1998] Imm. AR 328 the appellant argued that he had a legitimate expectation, based on letters to his solicitor from the Secretary of State, that his application for asylum would be considered pursuant to the Dublin Convention, an unincorporated international treaty. In dismissing the appellant’s appeal against refusal of leave to apply for judicial review the Court of Appeal said:

“The extent to which statements could found a legitimate expectation depended upon the circumstances in which they were made: whether, reasonably construed, they could be taken as propounding a policy, or were merely statements applicable to particular cases or classes of cases. Regard had to be given to the background against which they were made and, if made against the background of statutory provisions, to the terms of the Act and any relevant rules.”

[58] It is therefore necessary to examine the Package of Measures to see if the Government has spelled out with sufficient clarity that it will give effect to article 2 of the Convention with regard to the provision of legal assistance to Mrs Hemsworth. First there is the statement that coroners are now required to act in a manner compatible with article 2, and we were informed that there has been a ruling by the Coroner that he will do so in this case. This does not in my view advance Mrs Hemsworth’s case on legal aid as the Coroner has no control over its provision, though he may be consulted by the Lord Chancellor for advice. It is the Lord Chancellor who decides under the Scheme if legal aid is to be provided and the amount that is to be paid.

[59] Second there is the statement in the Package of Measures that in deciding whether to grant legal aid under the Scheme (for exceptional inquests) the Lord Chancellor will be obliged, by virtue of the Human Rights Act, “to act in a manner compatible with the Convention...” On its face this provides the basis for a legitimate expectation that the obligation will be met. The copy of the Package of Measures provided to this Court is undated but it is commented upon in a memorandum prepared by the Secretariat of the Committee of Ministers dated 27 March 2003. It was therefore written at a time when it was widely accepted that inquests into deaths that occurred before 2 October 2000 would come within the Human Rights Act. In light of the decision in *In re McKerr* this is not so and the Lord Chancellor is not so obliged under the Human Rights Act in this case. Against this background I

do not accept that this statement provides a basis for a legitimate expectation on the part of Mrs Hemsworth that the Lord Chancellor will be obliged by the Human Rights Act to act in a manner compatible with the Convention in the provision of funding for legal representation.

### *Irrationality*

[60] As I consider rights under the Convention are not engaged *Wednesbury* continues to be the test to be applied (see *Association of British Civilian Internees- Far Eastern Region v Secretary of State for Defence* [2003] EWCA Civ.) Irrationality can take many forms and may include taking into account something that is wrong or misunderstanding the facts upon which the decision is based. Mr Macdonald submits that when the Extra Statutory Scheme was introduced the Lord Chancellor did not know to what extent preparatory work would be covered by the Green Form Scheme and that any reliance he placed upon it was unwarranted and so irrational.

[61] As Lord Slynn said in *R v Ministry of Defence ex p Walker* [2000] 1 WLR 806 where it was argued that an *ex gratia* scheme for compensating soldiers injured in Bosnia was irrational as compared with a scheme for compensating those injured in Northern Ireland;

“It is not for the courts to consider whether the scheme with its exclusion is a good scheme or a bad scheme, unless it can be said that the exclusion is irrational or so unreasonable that no reasonable minister could have adopted it.”

[62] A number of factors are relied upon by Mrs Hemsworth as contributing to an inequality of arms with others whose representation is paid for out of public funds, such as the Chief Constable and individual police officers. In summary they do not have to obtain authority in advance for work to be funded, they are not subject to financial limits or to the delays involved in obtaining authority. As the European Ct. HR said in *DeHaes and Gijsens v Belgium* 25 EHRR 1 at para 53;

“...the principle of equality of arms - a component of the broader principle of a fair trial- requires that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.”

[63] Public money has been made available under the Scheme to allow Mrs Hemsworth to be represented by a solicitor and both junior and senior counsel. The sum originally authorised in June 2001 was increased when it

was shown that additional hours of work were required. It is therefore incorrect to say that an arbitrary cap was put in place when authority was given initially. To require authority to be obtained in advance is a common feature of funding of litigation with public money – see for example the decision of the Court of Appeal in *Tom Hartley- application for Judicial Review* [2000] NIJB 50 where it was held that a certificate under the Legal Aid legislation cannot operate retrospectively. It may put Mrs Hemsworth’s advisors to considerable inconvenience to have to obtain authority in advance but I do not accept that this or the fact that time is required to obtain ministerial approval means that she does not have a reasonable opportunity to present her case.

[64] Before an application was made for funding under the Extra Statutory Scheme a considerable amount of work had already been done and the Lord Chancellor was asked to authorise remuneration for this. Mr Hunter in his first affidavit (sworn on 13 September 2001) explained that funding is normally provided only on a prospective basis and that this is to allow financial control in advance of expenditure. Allowance is made for exceptional cases and the Lord Chancellor has conducted a review of his earlier decision in the present case and has decided that it would not be appropriate to provide funding under the Scheme before 4 June 2001. That such a review has taken place shows that the policy that funding should normally be prospective is not inflexible. There is no reason to believe that at this stage Mrs Hemsworth’s representation has been less than effective.

[65] Funding for the inquest has been approved in principle and in detail for the preliminary hearings. As Lord Clyde pointed out in *McLean v Buchanan* [2001] 1 WLR 2425 at 2446, when considering whether inequality of arms caused by funding was such as to deprive the accused in a criminal case of his right to a fair trial:

“The precise question is not as to the adequacy of the funding provided under the legal aid scheme, but whether, albeit on account of inadequacy in that respect there will inevitably be an absence of effective representation for the appellants in the preparation and presentation of their defences, thus depriving them of their right to a fair trial.”

[66] In support of his argument that the Lord Chancellor was not justified in assuming that the Green Form Scheme would work in conjunction with the Extra Statutory Scheme, Mr Macdonald relied on the decision of Weatherup J in *Hemsworth v Legal Aid Department*. The failure of the Legal Aid Department to operate the Green Form Scheme correctly was due to the Legal Aid Committee disregarding the clear wording of the Legal Aid, Advice and Assistance (NI) Order 1981. I consider that the Lord Chancellor

was entitled to assume that the Green Form Scheme would be operated in accordance with the Order. He expressed, through his officials in the Court Service, the firm opinion that the Legal Aid Committee was wrong and that the Green Form Scheme did extend to cover counsel. To rely upon an interpretation of the legislation that proved to be correct cannot be irrational.

[67] It took considerable time before the table of steps was published giving guidance to practitioners as to which scheme covers the different aspects of work likely to arise in connection with representation at inquests. There may still be a need for clarification on issues such as what constitutes "informal" disclosure. It is inevitable that when a novel scheme is set up it will take time before it runs smoothly but it has not been demonstrated that this has rendered Mrs Hemsworth's representation ineffective.

[68] Although there is much material before this Court that was not before the trial judge I am not persuaded that the Extra Statutory Scheme or the way in which it has been operated is irrational. I would therefore dismiss the appeal.