Neutral Citation No. [2005] NICA 12(2) | *Ref:* **GIRF5097**

Judgment: approved by the Court for handing down | *Delivered:* **09/03/2005**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

COLLETTE HEMSWORTH JUDICIAL REVIEW

GIRVAN J

[1] The applicant is not entitled to rely on Article 2 since the death preceded the commencement of the Human Rights Act (see McKerr). She is not a victim for the purposes of the Human Rights Act. She can only rely on the scheme as formulated. If the scheme as formulated (which was the scheme the State attached to the submission to the Council of Ministers in the bundle of measured documentation) fails to satisfy Article 2 she does not have a remedy under domestic law. Her only legitimate expectation is that the scheme as formulated would be properly applied by the Lord Chancellor.

[2] Even assuming that the applicant was entitled to argue that the Lord Chancellor was bound to formulate a scheme that was compliant with Article 2 the overall scheme formulated and applied by the Lord Chancellor in this case did not infringe the requirements of Article 2. I agree with the reasoning the Kerr J that the overall scheme does provide a system that is reasonable practical and effective (see Artico v Italy (1980)). The application is not entitled to expect that any funding scheme should be the same as existing legal aid or that it should be formulated on any particular basis other than that it should provide funding which is reasonably practical and effective. How a State fulfils its duty and to comply with its obligations under Article 2 leaves to the State a margin appreciation as discussed by Kerr J.

[3] There is no application before the court to quash the making of the scheme itself. Indirectly the applicant's seeks to challenge the validity of the scheme. In theoretical terms an application to quash the scheme could be entertained if

(a) It was shown that the scheme in fact manifestly failed to achieve the purpose which he had expressed the necessary implication was designed to achieve. Here it was argued that the scheme was intended to achieve a scheme that was compliant with Article 2. For the reasons indicated above the scheme is compliant with Article 2.

(b) Alternatively, if it could be argued that the Lord Chancellor failed to take account of relevant considerations or took into account irrelevant considerations.

(c) Alternatively the scheme was so irrational that it cannot stand.

[4] It is not open to the court to sever parts of the scheme (eg the non-retrospective part, the green form part or the prospective assessment part). Such an exercise would be to effectively substitute a new and different scheme for that of the Lord Chancellor and this would be permissible. In any event severing those portions would leave what remains wholly ineffective and meaningless scheme.

[5] Under the scheme it is clearly provided that the funding covers representation only and not preliminary work. The Lord Chancellor has applied that policy and it is expressly part of the scheme. If the scheme is not quashed the Lord Chancellor was entitled to inbound to give effect to that part of the policy.

[6] In any event such a provision in the scheme is not irrational. What was actually happening with the Legal Aid Department does not mean that the provision in the scheme was bad. The Lord Chancellor was entitled to conclude that under the existing state provision of legal aid there was a mechanism for funding work done before the commencement of representation at the inquest. If the legal aid was not fulfilling its obligations under Article 4 an agreed party had a remedy against the Legal Aid Department (see the reasoning of Kerr J).

[7] Under the scheme itself and as a matter of public principles it is open to the Lord Chancellor in any given case to conclude that he should disapply the policy and it would be open to him in an appropriate case to decide to give retrospective funding if a party can satisfy him that that should occur. The applicant's attack wrongly focussed on a generalised complaint that the scheme was non-retrospective and that as a matter of principle this invalidated the scheme or was an invalid part of the scheme. On the facts known to the Lord Chancellor at the time of the original decision there was material on which the Lord Chancellor was entitled to conclude that he should apply his general policy. It would be and still is open to the applicant to invite the Lord Chancellor to reconsider that decision in the light of new circumstances flowing, inter alia, from Weatherup J's judgment. This case is not concerned because the Lord Chancellor ought now to re-open the issue of whether retrospective funding should be provided. He has not been put in possession of a case properly formulated to reconsider the earlier decision. Relevant matters would include, inter alia, the precise number of hours and outlays claims in the period before 4 June, the hourly rates claimed, the terms

of any agreement or understanding between the applicant and the solicitors in relation to the payment of the fees and costs for 4 June and when the work was done (before and after the commencement of the scheme). None of this information has been established by the applicant. In the absence of such information, even if the applicant could in theory challenge the earlier decision to refuse retrospective funding, the applicant has failed to put any material before the court to justify granting her the relief sought.

[8] I agree with the decision of the judge at first instance.