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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

BETWEEN:

COLM MURPHY and SEAMUS DALY

Applicants;

and

THE LORD CHANCELLOR and
THE NORTHERN IRELAND LEGAL SERVICES COMMISSION

Respondents.

GILLEN J

THE PARTIES

[1] The applicants in this matter are Colm Murphy and Seamus Daly, the fifth and sixth defendants in a civil action pursued by members of eight families who lost relatives and or were themselves injured as a result of a bomb which exploded in Omagh on 15th August 1998. They are represented in the civil action by solicitors under the title H20. The writ in the action was issued on 10th August 2001 claiming damages for personal injury and under the Fatal Accidents (Northern Ireland) Order 1997 against the Real IRA and a number of defendants of which the applicants are two. The first named respondent, the Lord Chancellor ("LC"), is responsible for legal aid in Northern Ireland. Responsibility for legal aid was transferred to him on 1st April 1982 from the Secretary of State for Northern Ireland. Legal aid is a reserved matter under the Northern Ireland Act 1998 (Schedule 3, paragraph 15). The scheme for the provision of legal aid and advice in Northern Ireland is largely governed by the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 ("the 1981 Order"). Under the 1981 Order the legal aid Committee of the Law Society of Northern Ireland was responsible for the

administration of civil legal aid. Part 2 of the 2003 Access to Justice (Northern Ireland) Order 2003 ("the 2003 Order") created a Northern Ireland Legal Services Commission who are the second named respondent. ("the Commission"). With effect from 1st November 2003, responsibility for the administration of legal aid was transferred from the Law Society to the Commission. The Commission provides legal aid under the 1981 Order because the main legal aid provisions of the 2003 Order have not yet been brought into operation. (See paragraph 4(2)(d) of Schedule 3 to the 2003 Order).

THE APPLICATION

[2] The Legal Aid (Northern Ireland) Order 2005 ("the 2005 Order") inserted a new exceptional grant power into the 1981 Order at Article 10A. This provision permits the LC to direct the Commission that legal aid be available in connection with excluded (out-of-scope) proceedings in circumstances specified in the direction. It also enables him, if requested to do so by the Commission, to authorise legal aid in connection with in-scope as well as out-of-scope proceedings, both in relation to categories of proceedings and in relation to individual cases. I shall deal in some detail with the sequence leading up to this legislation later in this judgment. The applicants seek in the first place a declaration that the decision of the Commission to request exceptional authorisation from the LC to fund the legal costs of the plaintiffs in the action ("the decision") was unlawful. They further seek a declaration that the decision of the LC to grant this exceptional funding to the plaintiffs made on 11th February 2006 and the decision to pay the plaintiffs' solicitors the sum of £25,711.69 in respect of legal costs incurred before 11th February 2006 should be declared unlawful. Next, the applicants seek a declaration that the LC had no power to make and the second respondent had no power to request the ex post facto payment under the 1981 Order. The applicants further seek an order of certiorari quashing the decision and an order of mandamus requiring the LC to repay to the Northern Ireland legal aid fund a sum equivalent to the amount of any payments which he unlawfully authorised or directed to be paid out of the fund.

[3] Leave to bring these grounds (excluding certain other grounds) was granted by Weatherup J on 12th June 2006.

GROUNDS OF THE APPLICATION

[4] The grounds upon which the applicants seek the above mentioned relief can be summarised as follows:-

(1) The decision of the LC to authorise funding was unlawful in so far as it related to legal costs already incurred between 1st November 2005 and 17th January 2006 ("the retrospective claim"). The

applicants submit that Article 10A(2)(b) of the 2005 Order does not permit such payments prior to the date of authorisation, that the LC is not empowered to direct the legal aid payments which will be made available or the terms on which the payment will be made and that it constitutes a breach of Article 46(2) of the Access to Justice (NI) Order 2003 as it amounts to a direction in an individual case.

(2) The decision to provide exceptional funding to the plaintiffs was predetermined and made in circumstances where the LC had unlawfully fettered his discretion.

(3) The decision of the LC was vitiated by actual or alternatively apparent bias.

(4) The applicants had a legitimate expectation that there would be consultation prior to the introduction of legislation conferring a power to fund exceptional cases not excluded from the ambit of the 1981 Order. The failure to occasion either general or targeted consultation, whilst not vitiating the 2005 legislation, was nonetheless indicative of a pattern of procedural impropriety and general unfairness in the decision making process. The unfairness was fuelled by the failure to take into account a number of relevant matters which were ignored.

(5) There was a failure to observe the duty of candour on the part of the LC in the course of the process.

(6) The LC acted in a Wednesbury unreasonable fashion, failing to take account of relevant factors when deciding to grant authorisation of payments under Article 10A(2)(b) of the 1981 Order.

(7) The decision of the Commission dated 10th January 2006 ("the second decision") to request exceptional authorisation from the LC to part fund the legal costs of the plaintiffs, was challenged on the following grounds:-

(a) There was a similar lack of candour and misrepresentation by the Commission in the second decision making process.
(b) The second decision was unreasonable, ignoring the terms of Article 7(6) of the 2003 Order and the principle of fair remuneration.
(c) There was a lack of candour on the part of the Commission in its representations to the court .

THE STATUTORY CONTEXT

[5] For ease of reference I shall set out those statutes which were principally addressed during the course of this hearing:

[6] The Legal Aid, Advice and Assistance (Northern Ireland) 1981

[7] This is the legislation that governs legal aid in Northern Ireland under Part 2. It is administered by the Commission. An important amendment to the 1981 Order was inserted by the 2005 Order to which I shall refer shortly in its appropriate chronological sequence. Under the 1981 Order, ordinary civil legal aid is available in respect of proceedings mentioned in Part 1 of Schedule 1 to the Order eg the High Court, the Court of Appeal, County Court etc. Inter alia, ordinary legal aid is not available for the hearing of proceedings before a coroner nor for the hearing of most tribunal proceedings. Moreover entitlement to ordinary civil legal aid for proceedings which fall within Part 1 of Schedule 1 to the 1981 Order is dependent upon an applicant satisfying a financial eligibility test – under Article 9(1) of the 1981 Order – and a merits test – under Article 10(4) and (5) of the Order. In the course of the hearing before me, the expression "in-scope proceedings" was used by all parties to refer to proceedings for which ordinary legal aid was available and "out of scope proceedings" (or "excluded proceedings") to refer to proceedings for which ordinary legal aid is not available under the 1981 Order.

[8] The Justice (Northern Ireland) Act 2002

The relevant section in this matter is 76 which reads as follows:

> "76. **Exceptional legal aid**
>
> After Article 10 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 … insert –
>
> `10A Exceptional legal aid
> The Lord Chancellor may by direction require that legal aid is to be available in connection with excluded proceedings –
>
> (a) in circumstances specified in the direction; or
>
> (b) if the Legal Aid Committee requests him to do so, in an individual case so specified".

This Act was enacted but not brought into force.

[9] The Access to Justice (NI) Order 2003

The relevant Articles of this Order are as follows:

> "7.-(6) In considering any question as to the remuneration of persons or bodies providing civil legal services or criminal defence services (whether in individual cases, or by reference to the provision of such services in specified numbers of cases), the Commission shall have regard, among the matters which are relevant to –
>
> (a) the time and skill which the provision of services of the description to which the question relates requires;
>
> (b) the number and general level of competence of persons providing those services;
>
> (c) the cost to public funds of the remuneration of persons or bodies providing those services; and
>
> (d) the need to secure value for money.
>
> 8.-(1) The Lord Chancellor may give guidance to the Commission as to the manner in which he considers it should discharge its functions.
>
> (2) The Commission shall take into account any such guidance when considering the manner in which it is to discharge its functions.
>
> (3) Guidance may not be given under this Article in relation to individual cases.
>
> (4) The Lord Chancellor shall either –
>
> (a) publish, or
>
> (b) require the Commission to publish any guidance given under this Article.

12.-(8) The Lord Chancellor –

(a) may by direction require the Commission to fund the provisions of any of the services specified in Schedule 2 in circumstances specified in the direction, and

(b) may authorise the Commission to fund the provision of any those services in circumstances specified in the authorisation or, if the Commission requests him to do so, in an individual case so specified.

(9) A direction or authorisation under paragraph (8) may impose limitations on the funding of a service specified in Schedule 2, and may, in particular, require or authorise the Commission to fund the service for a limited period, for the purposes of specified proceedings only, or for the purposes of limited aspects of proceedings.

(10) Articles 13-20 do not apply to civil legal services funded under a direction or authorisation under paragraph (8) unless they are applied (with or without modifications) by the provisions of the direction or authorisation.

(11) The Lord Chancellor shall either –

(a) publish, or

(b) require to be published, any authorisation under paragraph (8)(b), unless it relates to an individual case,(in which case he or the Commission may publish it if appropriate.) ……

(46) – (2) No directions may be given by the Lord Chancellor to the Commission under Part II in relation to individual cases. …….

[10] <u>The Legal Aid (Northern Ireland) Order 2005</u>

The relevant Article in this matter is Article 2 which states:

> "Exceptional Legal Aid
>
> 2. After Article 10 of the Legal Aid Advice and Assistance (Northern Ireland) Order 1981 (NI8) insert -
>
> **'Exceptional Legal Aid**
>
> 10A(1) The Lord Chancellor may by direction require that Legal Aid is to be available in connection with excluded proceedings in circumstances specified in the direction.
>
> (2) If the Commission requests him to do so, the Lord Chancellor may authorise Legal Aid to be available in connection with any proceedings (whether excluded proceedings or not) –
>
> (a) in circumstances specified in the authorisation;
> (b) in an individual case so specified.
>
> (3) For the purposes of this Article, "excluded proceedings" means proceedings before a court or tribunal which are not -
>
> (a) proceedings of a description mentioned in Part I of Schedule 1;
> (b) proceedings for the purpose of which free Legal Aid may be given under Part III; or
> (c) proceedings in relation to which assistance by way of representation may be approved under Article 5.'"
>
> (4) Legal Aid under a direction or authorisation under this Article shall consist of such representation, on terms provided for by the direction or authorisation, by a solicitor or by counsel (or by both) as is specified in the direction or authorisation.

(5) In paragraph (4) "representation" includes all such assistance as is usually given by a solicitor or counsel in -

(a) the steps preliminary or incidental to proceedings; or
(b) arriving at or giving effect to a compromise to avoid or bring an end to proceedings;

(6) A direction or authorisation under this Article may make provision about financial matters relating to Legal Aid under the direction (including, in particular, provision about eligibility, contributions, charges, remuneration and costs).

(7) Articles 10(3) to (5a), 11, 12, 14, 16 and 17 and Schedule 2 do not apply to Legal Aid under a direction or authorisation under this Article, unless they are applied (with or without modification) by the provisions of the direction or authorisation.

(8) A direction or authorisation under this Article may be varied or revoked."

I shall hereinafter refer to Article 10A of the 1981 Order as "Article 10A".

[11] I pause to observe at this stage that there was no application before me to impugn the validity of Article 10A or the 2005 Order under which the former was introduced. The applicants had been refused leave to proceed on that basis. A live issue however was the alleged unlawfulness of the decision to authorise funding under Article 10A.

[12] The circumstances under which the 2005 Order came into force became a subject of close examination in this case and I shall deal with the background at this stage before comprehensively reviewing the issue at paragraphs 124 et seq of this judgment . Prior to the Order coming into place, the exceptional grant power had been contained in Article 12(8) of the 2003 Order. The 2003 Order became the subject of judicial scrutiny in a judicial review In the Matter of an Application by Michael McKevitt (No.2) (2005) NIQB 56 ("the McKevitt case"). In that case Mr McKevitt sought a judicial review seeking a declaration that the Commencement No. 1 (Amendment) Order and Articles 4(1) and (4) of the Commencement No. 2 Order used to

bring Article 12(8) of the 2003 Order into force were unlawful and to quash the direction given by the LC under Article 12(8) of the 2003 Order directing that part funding be provided to the plaintiffs in the Omagh action ("the Omagh direction"). That judicial review occurred on 21 June 2005 and on 26 August 2005 Coghlin J granted the relief sought. In terms the judge held that although the LC was entitled in principle to exercise his discretion under the commencement powers to introduce Article 12 (8) of the 2003 Order in a transitional form so that it could operate within the context of the 1981 Order, he had acted beyond those powers in the manner in which he had in fact done so. In particular he determined that it was an unlawful exercise of his discretion to amend Commencement No. 1 Order in order to prevent Article 46 (2) of the 2003 Order from coming into operation because that was inconsistent with Parliament's contention, expressed in Article 46(2), that the LC should not have power to issue directions in individual cases. At a remedies hearing on 9 September 2005, counsel on behalf of the LC gave a series of undertakings as follows:

(1) to revoke the Omagh direction within 14 days during which time no further payment would be made;

(2) to repeal the Commencement No. 1 (Amendment) Order within 14 days;

(3) to make a Commencement Order bringing Article 46(2) of the 2003 Order into operation;

(4) to review the Commencement No. 2 Order with a view to replacing it in due course.

[13] An affidavit made in this case by David Paul Andrews ("DPA") the then acting Director of the Public Legal Services Division on 18 October 2006 ("the Andrews affidavit") deposed that it was necessary for Article 12(8) of the 2003 Order to remain in force so that exceptional grant funding could continue to be provided for cases other than Omagh pending introduction of a new statutory exceptional grant power in order to ensure compliance with the Government's obligations under Articles 2 and 6 of the European Convention on Human Rights and Fundamental Freedoms and also his obligations under EU Law. At paragraphs 37 and 38 the Andrews affidavit declares:

> "37. Thus the effect of the McKevitt judgment with that first, the part funding for the Omagh families civil action could not continue to be provided through the Omagh direction and, second, the extant statutory exceptional power

had to be reviewed with a view to its replacement. …

38…. The Legal Aid (Northern Ireland) Order 2005 was then introduced, which repealed Article 12(8)-(11) of the 2003 Order and inserted a new exceptional grant power into the 1981 Order, at Article 10A. This provision permits the Lord Chancellor to direct the Commission that legal aid be available in connection with excluded (out of scope) proceedings and circumstances in the direction. It also enables him, if requested to do so by the Commission, to authorise legal aid in connection with in-scope as well as out-of-scope proceedings, both in relation to categories of proceedings and in relation to individual cases. It was considered necessary to include an extraordinary grant of power in relation to in-house-scope cases to rectify the inflexibility of the 1981 Order…..

39. It is this 2005 Order, the Commission's request, and the Lord Chancellor's authorisation, for funding in the Omagh action made under the new Article 10(a) of the 1981 Order which together are the subject of the present proceedings."

[14] **THE GROUNDS OF THE APPLICATION**

[15] The applicants relied essentially on several grounds in the processing of this application. I do not intend to deal with them in the order that they emerged at the hearing. I shall deal with the first two grounds – retrospective payment and legitimate expectation for a consultation process – as they largely involve discrete issues of law and statutory interpretation. The remaining grounds require a more detailed analysis of the factual background of the case and I shall turn to them thereafter.

[16] **RETROSPECTIVE PAYMENTS**

[17] Factual Background

Under the powers conferred on the LC by Article 10A(2)(b) of the 1981 Order, the LC was entitled to authorise the Commission to fund the

action in this matter. That authority was granted by the Parliamentary Under Secretary of State for Constitutional Affairs (hereinafter called "the Minister") by the authority of the LC on 11 February 2006 ("the authorisation"). That authorisation, which was before me, stated at paragraph 4:

> "The Commission is hereby authorised to fund the plaintiff's action, subject to paragraph 3, up to a maximum cost of £998,368.93 plus VAT."

That sum was then broken up into various categories as referenced to professional fees, counsel's fees and displacement

Paragraph 8 of that authorisation stated:

> "The Commission shall pay the sum of £25, 711.69 plus VAT to H2O within 7 days of the date of this authorisation in respect of its invoice numbered 5718, being authorised work, for the purpose of this authorisation. This payment forms part of the sum outlined at paragraph 4 above."

[18] **THE APPLICANTS' CASE**

[19] Ms Higgins QC, who appeared on behalf of the applicants with Mr Doran submitted that this authorisation of retrospective payments was unlawful in that the 1981 Order as amended did not give power to the Commission to make retrospective payments. It was her submission that the terms of the Order did not empower the Commission to seek authority for legal aid payments in respect of work carried out on a case before a decision was taken to grant legal aid.

[20] Counsel relied on the authority of Northern Bank v Leyburn (1999) NI 62 ("Leyburn's case"). That case involved a dispute as to whether counsel was entitled to a brief fee out of the legal aid fund for work done before the legal aid certificate had been issued. At paragraph 65(d) Girvan J (as he then was) said:

> "It is not in dispute that if a solicitor or counsel undertakes work for a person at a time when the client is not in receipt of legal aid that work is not covered by the legal aid certificate. A party only becomes an 'assisted person' when he is a person 'in respect of whom a certificate is in force.'" (See reg 1 of the Legal Aid (General) Regulations (Northern Ireland) 1965 SR1965/217 as revised from time to time ("the 1965 Regulations").

> Legal Aid is available to any person 'to whom a certificate has been issued' in accordance with the 1965 Regulations. The 1965 Regulations make provision for investigation of a person's needs and for timing of the sending of a copy of the certificate to the applicant. (They also) make provision for the granting of emergency legal aid and certificates in respect of urgency but in this case no such emergency certificate was issued. Regulation 14 provides that whereas after proceedings have been instituted in any court, any party becomes an assisted person in respect of proceedings, the statutory provisions which limit the liability of an assisted person under an order for costs made against him shall apply only to so much of the costs of the proceedings as are incurred when a certificate is in force."

[21] Ms Higgins argued that Article 10A(2)(b) permits authorisations in individual non-excluded cases only after consideration by the Commission of applications for ordinary legal aid. For this proposition she relied on the LC's guidance to exceptional legal funding under Article 10A of the 1981 Order ("the LC's guidance"). This guidance was issued to the Commission under Article 8 of the 2003 Order to explain the purpose and intentions of the Government in respect of the provision in Article 10A of the 1981 Order. It was counsel's submission that there is no reason why non-excluded applications that fail the normal prescribed test in regard to merit/financial aspects and yet are for exceptional reasons granted legal aid, should also be entitled to exceptional terms of funding.

[22] It was counsel's further submission that the LC was only entitled to authorise payments whereas in fact the terms of the authorisation in this instance directed such retrospective payment. She relied on the wording of paragraph 8 of the authorisation which is couched in terms that "the Commission shall pay the sum of £25,711.69 plus VAT etc." She sought to underline her case by drawing my attention to paragraph 32 of the LC's guidance which specifically states:

> "Article 10A(2)(b) of the 1981 Order also empowers me, if the Commission requests me to do so, to grant an authorisation to enable it to provide exceptional legal aid in an individual case in connection with non-excluded proceedings, that is proceedings which fall within the scope of ordinary legal aid. However in view of the scope

> of the statutory scheme, the Commission's request would have to be compelling before I would entertain authorising exceptional legal aid funding for such an individual case which has not satisfied the prescribed test for ordinary legal aid".

[23] It was Ms Higgins' case that in this instance the L C had gone beyond his powers in directing payment rather than simply authorising it.

[24] **THE RESPONDENT'S RESPONSE**

Mr Sales QC who appeared on behalf of the respondent with Mr Lewis made the following points:

[25] He distinguished the present circumstances from the factual matrix in Leyburn's case in that the latter dealt with a situation under the 1965 Regulations when a certificate was in force. Exceptional legal aid governed by article 10A does not depend on the prior issue of a certificate. The Commission's draft guidance on funding under article 10A at paragraph 34 specifically states:

> "Any funding provided under Article 10A is discretionary. Accordingly the Commission will not issue a legal aid certificate but will instead issue a letter offering a grant up to a sum specified in each case. The grant itself is the authority for payment"

[26] Thus the legislative mechanism which has been chosen differs from the established model applicable under the general legal aid regulations i.e. a certificate procedure is no longer applicable.

[27] The language of Article 10A contains no prohibition express or implied on such authorisations. Counsel submitted that a consideration of Article 10A(4)-(8) reveals that the terms on which exceptional legal aid may be authorised are deliberately widely drafted. The LC is given a wide discretion as to the circumstances in which he may authorise legal aid to be available, the terms on which it can be provided and the right to vary or revoke those terms. Counsel asserted that the purpose of Article 10A was to make public funding available where the LC considered that the ordinary rules governing legal aid are inappropriate and should be dis-applied. A narrow interpretation restricting authorisation for representation provided to a party in circumstances where the LC considered it was an exceptional case which required funding to be available and where the steps taken to date had been reasonable would serve only to frustrate the purpose of the legislation. Thus he drew my attention to the draft guidance issued by the Commission on

funding for excluded proceedings under Article 10A which declares at paragraph 25:

> "The Commission will try to deal with applications as quickly as possible but inevitably there will be some cases where a final decision cannot be made before the hearing and question has taken place. Since any funding under Article 10A will be by way of a one-off grant (that is, it does not involve the issuing of a certificate), it is within a minister's power to approve funding retrospectively if necessary. However, this will only be considered if the application for funding was made to the Commission at the earliest reasonable opportunity."

[28] Refusal of funding in these circumstances would not only lend a very narrow interpretation to Article 10A but it would be against the public interest to encourage litigants to delay the procedures so as to avoid incurring legal costs before the separate administrative process leading up to the grant of an authorisation for exceptional legal aid was completed. It would also discourage legal firms taking prompt action on a potentially pro-bono basis before first testing whether exceptional legal aid would be authorised.

[29] Mr Sales submitted that the LC has power under article 10A(4) and 10A(6) to specify the terms in which remuneration shall be provided in an authorisation in the same way as he may specify the terms in which remuneration is provided pursuant to a direction. The only relevant direct distinction is that he may not do so without a prior request for authorisation from the Commission.

[30] **CONCLUSION**

I consider that the applicants' argument is unsustainable for the following reasons:

[31] Construction of statutes draws a court into the task of ascertaining the meaning of the text from the nature of the legislation and the content of the articles or sections contained therein. As Lord Steyn said in the course of the Brian Dickson Memorial Lecture in Ottawa in October 2003 (2004) EHRLR Issue 3:

> "The primacy of the text is the first principle of interpretation for the judge considering a point of interpretation."

At page 248 he went on to say:

> "The purpose of interpretation is to ascertain the meaning of the language employed in a text, taking into account syntax, background and social context."

The essential setting of the text of 10A is against the backdrop of the absence in Northern Ireland, prior to November 2003, of any statutory exceptional grant power either under the 1981 Order or elsewhere. This was in stark contrast with the position in England and Wales. In the absence of a statutory exceptional power in Northern Ireland, in July 2000 the LC had established an ex gratia scheme to allow public funding for representation in exceptional cases involving inquests in Northern Ireland (see Andrews affidavit at paragraph 21). The LC had clearly sought a suitable vehicle to bring forward a statutory exceptional grant power in Northern Ireland to place the exceptional funding scheme on a statutory basis for the future. That led eventually to the 2003 Order to allow the exceptional grant provision to work within the context of Part II of the 1981 Order. The McKevitt challenge by way of judicial review in turn led to the introduction of the 2005 Order. This background illustrates that this legislation was intended to be wholly exceptional and quite distinct from the former inflexible provisions of the 1981 Order. Indeed the purpose of Article 10A was to make public funding available in cases where the LC considers that the ordinary rules governing legal aid were inappropriate and should be dis-applied. I have no doubt that this contextual setting lends weight to the argument of Mr Sales that Article 10A must not be interpreted narrowly in a manner that would frustrate the purpose of the legislation. A wholly separate vehicle from the certificate based approach of the 1981 Order was now to be invoked and that in itself is illustrative of the need to distinguish cases such as Leyburn where the conventional certificate based approach to legal aid was under scrutiny. Hence I do not find my interpretation of the terms of 10A in anyway constrained by the Leyburn case.

[32] Apart from the absence of any express or implied statutory prohibition on authorisation of payments for work already undertaken at the date of authorisation, I consider there is great merit in Mr Sales' submission that Parliament must have envisaged the administrative processes which had to be gone through. The Commission was to consider whether to seek authorisation, the LC then was to consider whether to grant it and make the

subsequent authorisation of payments. This could all take place whilst the relevant legal proceedings might be proceeding. Parliament cannot have intended that such exceptional funding should deny an applicant retrospective payment in such exceptional circumstances. It would be against the public interest for work on such exceptional cases to be delayed or postponed whist the final decision is being taken. Provided, as the Commission's draft guidance suggests it is made at the earliest reasonable opportunity, I see no public interest reason why retrospective payments should not be made in such circumstances . The presumption against retrospectivity of effect in statutes cannot apply where it would serve to frustrate a key purpose of the legislation.

[33] I find nothing in the authorisation in this particular case which leads me to conclude that the authorisation in any manner failed to comply with the terms of Article 10A of the 2005 Order. There is no reason why the legal aid cannot be directed or authorised under the terms of 10(a)(4) of the 2005 Order. In any event the authorisation itself is punctuated with references to "shall" e.g. paragraphs 3, 5, 7 and 9 which are clearly merely authorisations and not mandatory imperatives . I have no reason to interpret the wording of paragraph 8 in any different manner. In short I am satisfied that paragraph 8 of the authorisation was fully compliant with the terms of the Order.

[34] I am satisfied that the request from the Commission for authorisation was broad enough to cover all aspects, including a retrospective payment and that there was no need for a separate request from the Commission in relation to this aspect.

[35] Accordingly I find the grounds upon which relief is sought at paragraphs 4(1) and 4(2) of the amended Order 53 statement are not sustained.

[36] **LEGITIMATE EXPECTATION AND THE NEED TO CONSULT**

[37] <u>The Applicants' Case</u>

It was the applicants' case that the LC was guilty of procedural impropriety and unfairness in denying them their legitimate expectation that the proposal to grant the Commission and the LC a power to fund exceptional cases which were not excluded from the ambit of the 1981 Order would be consulted upon. Ms Higgins relied on what she claimed was the established practice of government of consultation on such issues. Alternatively counsel submitted that the principles of fairness required this proposal be consulted upon and specifically required that the applicants or their representatives were consulted and afforded an opportunity to make representations given that the

government has consulted with the plaintiffs and their representatives and afforded them the opportunity to make representations.

[38] Ms Higgins in the course of her skeleton argument and oral submissions made the following points in support of these propositions:

[39] The 2005 Order had introduced a new power to enable the LC, in response to a request by the Commission, to authorise funding in respect of individual cases that are within the scope of the ordinary legal aid scheme. This was a power which had never before been considered by Parliament and had not been consulted upon.

[40] The need to consult on the basis of legitimate expectation was canvassed in Treacy and McDonald's Application [2000] NIQB 6 in which Kerr J (as he then was) said at paragraph 160:-

> "It is well established that a legitimate expectation must be induced by the conduct of the decision maker. As De Smith, Woolf and Jowell puts it, a legitimate expectation 'does not flow from any generalised expectation of justice based on the scale or context of the decision.' In general the conduct of the decision maker required to constitute the inducement of a legitimate expectation would either be an express promise to consult or an established practice based on the past actions or settled conduct of the decision maker. Whether the representation is expressed or implied, it must be 'clear and unambiguous' and devoid of relevant qualifications."

[41] Dilating upon this, Ms Higgins submitted that a public authority which has adopted such a policy is required to follow and apply it where the decision maker has committed itself in advance to a particular course of conduct in a particular class of case. Whilst departure from that policy is permissible, this can only be done if at the time of the decision it considers there is some overriding reason or if the public interest so requires it. Where this occurs, that public authority must identify to what extent it is open to the public authority to depart from it and the Courts should insist upon a high standard of justification before such legitimate expectations are overridden.

[42] Counsel drew my attention to a Cabinet Office publication "Code of Practice and Consultation" published in January 2004 which contained a forward by the Prime Minister in the following terms:

> "Effective consultation is a key part of the policy making process. People's views can help shape policy developments and set the agenda for better public services. But we also need to make the process of consultation less burdensome."

[43] The introduction to that document indicated that whilst the Code does not have legal force and cannot prevail over statutory or mandatory external requirements, it should otherwise generally be binding on UK Departments and their agencies unless ministers conclude that exceptional circumstances are required to depart from it. It goes on to record, inter alia, that any deviation from the Code must be highlighted in the consultation document and should state the minister's reasons for departing from it.

[44] Counsel submitted that there was an established practice of consulting upon legislative changes to the legal aid scheme and that there was a greater practice of consultation and expectation of consultation in Northern Ireland as a result of s75 of the Northern Ireland Act 1998 than elsewhere in the United Kingdom. She asserted that the Commission had a practice of consulting with the profession or more widely about proposed changes to the administration of the legal aid scheme. Relying on this established practice, counsel submitted that the introduction of Article 10A(2)(b) constituted a significant departure from the previous policy granting new powers to the Commission and the LC. It was common case that no specific consultation had taken place and indeed it was expressly stated so in the explanatory memorandum to the 2005 Order. No explanation she asserted had been given by the LC or the Commission as to why there had been a departure from the normal practice of consultation.

[45] The affidavit of Mr Murphy, the first named applicant, asserted at paragraph 19 that his Solicitor, Matthew Higgins, had informed him that proposals to introduce new government powers changing the basis on which legal aid was granted or which impacted on the funds available to grant legal aid had always in the past been put out to public consultation before being introduced. The affidavit of Mr Higgins dated 26 February 2007 asserted that the Commission had an ongoing consultation on the granting of prior authority for senior counsel currently and had conducted a consultation on the funding Code. He goes on to assert that the Commission is currently consulting on its draft equality impact assessment of the proposed NI funding Code.

[46] Turning to the argument that fairness in this instance required that a person who might be adversely affected by the decision should have an opportunity to make representations on his own behalf (relying on R v SOS For Home Department ex p Doody [1994] 1 AC531 at 560 d-g), Ms Higgins submitted that the LC had permitted the Omagh plaintiffs to make

representations on public funding and on the content of the draft authorisation. On the principle that there is a duty to listen fairly to both sides before a decision maker acts, she asserted the applicants and or their representatives ought to have been offered a similar opportunity to make representations.

[47] Counsel further submitted that the proposal was likely to have directly and adversely affected the applicants or potential applicants for legal aid and their lawyers as it would reduce the size of the legal aid budget available. "These parties" ought therefore to have been consulted.

[48] **THE FIRST NAMED RESPONDENT'S CASE**

Mr Sales made a number of submissions which included the following ;
Article 10A(2) of the 1981 Order enabled the LC, if the Commission requested, to authorise legal aid for excluded and in-scope proceedings ie proceedings for which legal aid is in principle available under Part II of the 1981 Order subject to the ordinary merits and means tests. The Article was inserted into the 1981 Order by the 2005 Order. The 2005 Order was made under the schedule to the Northern Ireland Act 2000. Whilst the NI Act 2000 provides that orders made under paragraph 1(i) should be subject to the scrutiny and approval of each House of Parliament, it does not impose any statutory duty to consult on such orders. In any event there is no right to be heard before the making of legislation, whether primary or delegated unless provided by statute. Accordingly there is therefore no express statutory obligation to consult.

[49] The attack on the failure to consult is a scarcely veiled attempt to suggest that by virtue of the failure to consult Article 10A is invalid in that it was unlawful for the 2005 Order to be made without such consultation. There is no application before the Court on the part of the applicants to challenge the validity of the 2005 Order (it was expressly refused at the leave stage). Mr Sales submits that this should be sufficient to dispose of this aspect of the case.

[50] The doctrine of the legitimate expectation is predicated on an express undertaking to consult as a matter of fairness (see R v Lord Chancellor, ex p The Law Society [1994] 6 Admin. 833) or a practice of public consultation on proposed legislative amendments to the legal aid scheme. It was counsel's assertion that a claim based solely on past conduct rather than any actual promise will succeed only in exceptional circumstances (see R (ABCIFER) v Secretary of State for Defence [2003] 1 QB 1397 and R v Inland Revenue COMRS, ex p Unilever Plc [1996] STC 681). The onus is on the applicants to satisfy the court that they did have a legitimate expectation of consultation. Mr Sales argued that neither the assertion of Mr Murphy nor that of Mr

Higgins constituted evidence of a clear unambiguous practice as is required under the law. In particular he drew attention to the assertions by Mr Higgins which in any event amounted to consultations by the Commission and did not illustrate examples of consultation about legislative changes. No invariable practice was therefore established at the date of the impugned legislation.

[51] The Cabinet Practice Document of January 2004 did not prescribe when consultation should be undertaken and came into play only once it was decided that consultation should take place.

[52] Moreover counsel submitted that even when there is a statutory duty to consult on the making of legislation (which he strongly asserted was not present in this case), there is no general principle to be extracted from the case law as to what kind or amount of consultation is required before delegated legislation can validly be made (see R v Secretary of State for Social Services ex p AMA [1986] 1WLR 1 at 4(f) –(g)). Inevitably practice on consultation will vary from case to case. In this case the applicants had failed to establish the existence of any practice whatsoever of consultation in relation to amendments to the legal aid system giving rise to a legitimate expectation.

[53] Counsel reminded the court that the 2005 Order had been introduced as a matter of urgency to replace the exceptional grant power previously contained in Article 12(8) of the 2003 Order in the wake of the McKevitt decision. This was necessary to enable exceptional legal aid in a variety of existing cases and potential future cases to be made on a valid statutory basis and for the government to meet its obligations under European Law and the ECHR. The need for an exceptional grant power in Northern Ireland had already been the subject of public consultation and parliamentary debate in relation to Article 12(8) of the 2003 Order and Section 76 of the 2002 Act albeit the latter had not yet been brought into force. The draft 2005 Order had been published together with a draft explanatory memorandum explaining that the Lord Chancellor would be empowered to authorise exceptional funding for in-scope cases in circumstances where the Commission had requested an authorisation. A draft copy guidance was provided to MPs and peers in advance of the debates in each House of Parliament. The draft 2005 Order was duly debated in both Houses of Parliament with government ministers drawing attention to the power to grant exceptional legal aid for in-scope cases highlighted in each debate. It was counsel's submission that in such circumstances the applicants could not legitimately expect any particular procedure to be followed other than compliance with the procedure prescribed by the Northern Ireland Act 2000 itself namely that the Order would not be made without first obtaining the positive resolution of each House of Parliament.

[54] Turning to the proposition that there should have been targeted consultation, counsel rejected the proposition that the Omagh plaintiffs had been consulted in any way about the relevant legislation. He drew attention to the Andrews' affidavit of 13 March 2007 at paragraph 69 which stated:

> "None of the Omagh plaintiffs or their legal representatives were consulted by the Government on the introduction of the Article 12(8) power in the 2003 Order in this transitional form or the 2005 Order. I can make this statement from my own dealings in this matter as a senior relevant official in the public legal services of the NICtS and also, having for the purpose of making this affidavit, made further specific enquiries myself and through officials with senior officials in the other relevant sections of the NICtS, the Department for Constitutional Affairs, the Northern Ireland Office, the Lord Chancellor's Private Office and the Prime Minister's Private Office. The meetings of the Lord Chancellor and others within Government did take place with the Omagh plaintiffs reiterated a commitment to make funding available for their case and explained that in the light of the McKevitt judgment a new and lawful legislative mechanism would need to be found, if necessary primary legislation."

[55] However Mr Andrews asserted at paragraph 32 'Such meetings and exchanges of views did not , however, at any point, involve consultation on the form of the 2005 Order.'

[56] Article 10A grants the exceptional power in a range of cases other than the Omagh action. It is not confined solely to the Omagh plaintiffs. Counsel asserted that that was one reason why, as a matter of principle, the approach to the obligation of fairness in an ordinary administrative context does not apply to the making of legislation and why accordingly no individual has any implied right to be consulted in any piece of legislation absent a statutory duty to consult.

[57] Counsel went further and submitted that even if the Government had consulted with the Omagh plaintiffs on the 2005 Order, that would not operate to impose a duty in fairness to consult with the applicants. To hold otherwise would be in substance to hold that the Government was under a duty to consult with every other litigant actually or potentially affected by the Order – which would include for example all those parties to other actions in which exceptional grant funding was made available under the impugned

Article 12(8) of the 2003 Order and whose funding was renewed under Article 10A of the 1981 Order.

[58] Mr Sales dismissed the suggestion that authorising funding for the Omagh plaintiffs would reduce the size of the legal aid budget available on the simple basis that every decision to award legal aid inevitably has an impact on the legal aid fund and thus indirectly on others who might be prospective recipients of legal aid. Such a duty would be wholly unworkable. In any event Mr Sales submitted that this was a new claim which did not appear in the amended statement at paragraph 4(3)(b).

CONCLUSION

I have concluded that there is no basis for the proposition that the applicants in this case had a legitimate expectation for consultation either generally or on a targeted basis. My reasons for this conclusion are as follows:

[59] By implication this argument attacks the validity of the 2005 Order in so far as it introduced Article 10A. Since the 2005 Order did not impose any obligation to consult, it can only be by challenging the validity of the Order itself – based on an invariable practice found in that type of legislation – that the legitimate expectation could be sustained. Ms Higgins expressly conceded as she would bound to do, that the 2005 Order itself was not under challenge and accordingly on this ground alone I find that there was no basis for the legitimate expectation argument now raised before me.

[60] In the event that this conclusion is wrong in law or on the alternative basis that this argument is raised only to instance the general climate of unfairness or impropriety in the decision making process, I have considered the doctrine of legitimate expectation in the context outside the 2005 Order. The conventional approach to legitimate expectation is that in order to invoke the principle, it is necessary to establish an express promise given on behalf of the public authority or the existence of a regular practice which the claimant can reasonably expect to continue (see Lord Frazer in Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 at 401(b)). I can find neither promise nor practice in this instance. Clearly there was no statutory right expressly enacted. I do not find any implied right to be consulted about the legislation . Mr Sales helpfully drew my attention to a recent authority of R (BAPIO Action Limited) v Secretary of State for the Home Department [2007] EWHC 199 where Burnton J said at paragraph 46 and 47:-

> "46. The judgment of Megarry J in Bates v. Lord Hailsham [1972] 1 WLR 1373 is authority for the proposition that where delegated legislation is concerned, the court cannot impose an obligation to

> consult where Parliament has refrained from doing so . . .
>
> 47. In the field of administrative law, the nearly 35 years since that judgment are a very long time indeed. It appears that the judgment has not been expressly followed. However no case has been cited to me in which delegated legislation or any other statutory measure subject to Parliamentary scrutiny which was not the subject of an express statutory duty to consent has been struck down or otherwise successfully impugned on the ground of a failure to consult."

[61] Ms Higgins did not seek to assert that the legitimate expectation in this case arose out of any express assurance of consultation. I consider there is no evidence of a practice of public consultation on proposed legislative amendments to the legal aid scheme. For the reasons outlined by Mr Sales, I find nothing in the affidavit of Mr Higgins which suggested that the government had engaged in any practice, formal or informal, of consulting on such amendments to legislation at this time. The Andrews' affidavit at paragraph 57 states:

> "There is a general practice within government of consulting with the public and stakeholders in proposals to make major legislative changes. This general practice of consultation applies to major changes to the legal aid system. Thus, when a fundamental change of policy has been considered which will/may impact on litigants, the courts or the legal profession, there has been public consultation. Depending on the extent of the proposed legislative change, however, a targeted consultation only might take place, for example, in relation to legal aid, consultation might be limited to the legal profession and other relevant stakeholders such as the Commission and voluntary sector providers including the Law Centre (NI) and Children's Law Centre. There is, however, no practice of consulting with the public at large or the legal profession/other stakeholders regarding limited and specific as opposed to systemic changes to the legal aid scheme or in relation to the funding available to grant legal aid even though such measures may have an impact on the availability and level of legal aid for individual cases."

[62] At paragraph 59 he went on to say:

> "The majority of extensions to the legal aid scheme are subject specific and are often intended to facilitate the smooth operation of new legislation being brought forward by the Government. Extensions to the scope of legal aid of this kind, which facilitate litigants, have not generally be subject to consultation. Thus for example there was no consultation held in relation to the making of any of the directions 1 to 4 under Article 12(8)(a) of the 2003 Order, nor the direction and generic authorisations under the 2005 Order, ….equally there has been no consultation regarding regulations introduced on an annual basis to increase the financial eligibility limits for civil legal aid.

[63] At paragraph 65 Mr Andrews states:

> "The applicants assert that there is a practice of public consultation on any measure that has impact on the funds available for legal aid. That assertion is not correct. There is no practice of consulting on changes to the financial eligibility limits under the legal aid scheme."

[64] Finally, at paragraph 64 Mr Andrews said:

> "For completeness, I confirm that no consultation took place in relation to the making of any of the five commencement orders which have been made, to date, bringing in to operation various provisions in the 2003 Order – including those made at the time when the statutory exceptional grant scheme under Article 12(8) of the 2003 Order was introduced."

[65] The affidavits of the applicants did not effectively challenge these assertions. Accordingly I find nothing in the evidence of the applicant which demonstrates a practice, invariable or otherwise, to consult on measures such as that contained in Article 10 of the 1981 Order. I reject the argument that this amounted to a major legislative change or a systemic change to the legal aid scheme given the statutory history.

[66] I consider there is merit in Mr Sales' argument that the context of the 2005 Order introduced an element of urgency to replace the exceptional grant power previously contained in Article 12(8) of the 2003 Order which had been impugned in the wake of the McKevitt decision. This urgency in itself militates against an expectation that any particular procedure, particularly that of consultation, would be followed. The draft 2005 Order was fully debated in both House of Parliament and was therefore subject to scrutiny in any event.

[67] Authority for the proposition that the context of urgency may well be invoked to rebut any legitimate expectation of consultation is to be found in R v The Lord Chancellor ex p The Law Society. The Times 25 June 1993 CO/991/93. In that case the Lord chancellor had made changes to the existing legal aid scheme and was challenged by the Law Society, inter alia, on the ground that there had been a failure to consult with the Law Society. At page 18 of his judgment Neill LJ said:-

> "As Lord Diplock explained in CCCSU v. Minister for the Civil Service [1985] 1 AC 374, however, the question of procedural propriety has to be looked at in the light of the particular circumstances in which the relevant decision was made . . . I have come to the conclusion that the correct inference to be drawn from the evidence is that these proposals were put forward in order to meet a situation which had become much more urgent and critical than had been envisaged only a short time before . . . Accordingly I have come to the conclusion that the announcement of the proposals on 12 November did not involve any procedural impropriety nor did it deny the Law Society an opportunity which it *could legitimately expect in the circumstances existing last Autumn* (my emphasis)."

I consider that for the reasons set out in paragraph 53 and 137 of this judgment the urgency of the matter was yet a further factor militating against the consultation proposed by the applicants.

[68] In so far as the applicants' case proposed that targeted consultation should have taken place, I accept the argument put forward by Mr Sales that there is no evidence to contradict the unequivocal statement of Mr Andrews denying any consultation with the Omagh plaintiffs on the form of the 2005 Order. In any event this is self-evidently a provision that would extend beyond the Omagh action, applying to anyone who could come within its ambit and would therefore accord no individual any implied right to be consulted in the absence of a statutory duty to consult.

[69] The argument that the legislation which authorised funding for the Omagh plaintiffs would reduce the size of the legal aid budget available can be quickly dismissed by recognition of the proposition that this would apply to virtually every case where substantial legal aid is awarded. That the Omagh plaintiffs' case might be larger than the norm, does not deflect from the principle that it would be inconceivable to suggest that the grant of substantial legal aid payments somehow triggered an obligation to consult with every other group or person who might therefore be adversely affected by the depletion of the legal aid budget.

[70] I therefore have come to the conclusion that there is no basis for grounds 4(3)(a) and (b) of the Amended Order 53 Application.

[71] PRE-DETERMINATION/UNLAWFUL FETTERING OF DISCRETION AND BIAS

In paragraphs 4(3)(c) and (d) of the grounds set out in the statement under Order 53 Rule 3(2), the applicants alleged that the LC was guilty of procedural impropriety and unfairness in appearing to have or actually having pre-determined the question of whether or not an exceptional grant of legal aid should made to the plaintiffs and thereby was guilty of apparent, if not actual, bias. Further he had been similarly guilty in unlawfully fettering his discretion by determining the issue of whether exceptional legal aid should be granted to the plaintiff.

[72] THE APPLICANTS' CASE

In the course of very lengthy and extremely detailed submissions Ms Higgins made the following points:

[73] The LC had used the 2005 Order as a vehicle to provide funding for the Omagh plaintiffs in line with an unwavering government commitment to fund their case. She asserted that this was not a policy but a decision to fund the case. Once the government had firmly committed itself to this course, and the commitment to the families had been given, it embarked upon a pattern of preferential treatment for them. This was relentlessly followed by the servants and agents of the first named respondent notwithstanding its illegality;

[74] The commitment of the LC and the government to making funding available for the Omagh civil action had been unbending since about 2003 in the following respects:

(a) In August 2003 the Secretary of State for Northern Ireland announced that the government would provide funding for the Omagh civil action. Later that month Lord Filkin met the Omagh families and confirmed that commitment.

(b) In September 2003 the LC met the Omagh families and reaffirmed the decision to make funding available to support their civil action although the funding device had still to be finalised.

(c) In February 2004, the funding mechanism was deployed and funding commenced with a first payment.

(d) In August 2005 the McKevitt decision found that the combined effect of the two transitional instruments which had been brought forward was to create a power which went beyond the powers contained in the Access to Justice (Northern Ireland) Order 2003. That terminated the route created to fund the Omagh civil action. The briefing provided to the LC for a meeting with the families on 5 September 2005 recorded at paragraph 9:

> "Consistent with your indications we have advised representatives of the families, and their legal team, that the judicial review has no impact on the undertaking given. Officials have stressed that the real issue is how to secure a mechanism which will be sufficiently robust to sustain funding despite further challenges."

(e) At the meetings between the Omagh families and the LC on 5 September 2005, he reiterated that he would now need to find a mechanism which would not be found to be unlawful. Mr Michael Gallagher representing the Omagh Self-Group is recorded as saying:

> "Mr Gallagher welcomes the Lord Chancellor's assurance but stressed that there should be no delay in providing alternative funding as this would have an adverse impact on a civil trial. After a short discussion on the likely timing of the trial and the interface with the Hoey criminal proceedings, the Lord Chancellor indicated that if funding requires the equivalent of primary legislation he will take that course of action. The Lord Chancellor indicated that at the remedies hearing on 9 September the current funding direction for Omagh would be removed. However there was a clear commitment to continue to fund the civil action."

[75] Counsel submitted that further meetings had taken place with the prime minister and the Minister Bridget Prentice at which similar undertakings were given.

[76] It was counsel's submission that it was never in any doubt that a grant of exceptional legal aid funding would be made to the Omagh families under the 2005 Order. She submitted that this Order was introduced for the sole purpose of ensuring funding for the families. Article 46(2) of the 2003 Order had prohibited the LC from giving any directions to the LSC under Part II in relation to individual cases. The LC had given an undertaking to Coghlin J in the McKevitt case to commence 46(2) in September 2005. What in fact he did was to introduce legislation to give himself the power to grant an authorisation to the Commission to grant legal aid in an individual case. This was contrary to Articles 8(3) and 12(8) of the 2003 Order which contained prohibitions in relation to his direct interference in individual cases of a type excluded from the legal aid scheme. Moreover Section 76 of the 2002 Act had limited the LC's power to direct the provision of exceptional legal aid in individual cases of a type not covered by the legal aid scheme to situations where this was requested by the legal aid committee. It was counsel's submission that Parliament had been misled into believing that this temporary 2005 Order was similar to legislation in England and Wales whereas in fact it was different in that the 2005 legislation extended the situation so as to enable funding to be provided for in-scope cases which had failed the normal tests. It was a temporary measure meant only to meet the exigencies of the Omagh case and hence was enacted as a temporary measure.

[77] Counsel submitted that the purpose of the legislation was to "judge proof" the funding of the Omagh families in the wake of the McKevitt decision. She drew attention to an exchange of e-mails between Ruth Sloan of the Security and Extradition Unit, Rights and International Relations of the Northern Ireland Office e-mailed to Paul Andrews and Linda Devlin of the LC's Office on the topic of the impending 2005 Order in the wake of the McKevitt decision. Her email included the following paragraph:

> "You mentioned that we cannot talk about the purpose of the Order in Council being to enable us to provide funding for Omagh, as this would fetter the Minister's discretion. On this basis, can we use the justification of 'Omagh families cannot take forward their case without funding' as the basis of the argument for the urgency procedure as I think was suggested at the meeting? And within the constraints are we still likely to be able to say something about the Order which mentions Omagh but is carefully worded like 'the recent ruling in the judicial review has revealed the need for further

> reform; the Govt's commitment to fund the Omagh families remains; this reform will allow such cases as this one to be considered on a case by case basis.'"

[78] Mr Andrew had replied to her on 2 November 2005 in an e-mail which included the following paragraph:

> …As such we are recommending to the Lord Chancellor that he writes to the Secretary of State for Northern Ireland re the making of the order by the accelerated procedure. To this end I attach the latest draft of the Order and a draft letter to the Secretary of State for Northern Ireland which I trust will be helpful in enabling you to prepare advice for the reply.
>
> I hope to issue the submission to the Lord Chancellor tonight with a letter to the Secretary of State for Northern Ireland following directly. We should then be in a position (subject to prompt and helpful replies) to get the draft order laid this day week, which would give four weeks for the necessary debates before being made at the December Privy Council.
>
> Against this background I only need to reply to the second half of your first point – we need to be clear in the speech and lines to take for the debates that the commitment to fund Omagh stands and that there is a mechanism which would accommodate such an application. However any such application would be considered on a case by case basis. We will share lines on this point to ensure that there are no downstream consequences for you."

[79] Ms Higgins relied upon this exchange to found her submission that the 2005 legislation was merely a cloak and a vehicle to meet the commitment to the Omagh families. Accordingly it was her submission that not only had the LC fettered his discretion, but he had exhibited clear bias in his personal commitment to execute this task. The future consideration of the application by the Omagh families was merely, in her words, 'going through the motions' and that the decision had already been long taken. The mind of the LC was therefore "not ajar" on this issue.

[80] Counsel went on to submit that exceptionally favourable terms were accorded to the respondents in the course of the application for exceptional funding. The facts and terms of the eventual agreement gave rise to the appearance of bias. She founded this submission on the following assertions:-

[81] They were advised by the Lord Chancellor's officials in the Northern Ireland Court Service how to apply for exceptional grant funding.

[82] Public funds were granted on uniquely generous terms on foot of applications for ordinary legal aid without the usual conditions of ordinary legal aid being applied e.g. regarding the completion of forms, the provision of information about spouses' means and employers, the financial eligibility and merits thresholds, the payment of costs and prohibition against pursuing defendants who were without means. She drew attention to the fact that in a letter of 17 January 2006 from the lawyers acting on behalf of the Omagh parents, they had included a 37 page final case plan document which set out the steps that they believed were necessary to prepare the case for trial in Belfast in early Autumn 2006 and the costs for so doing;

[83] The terms which ultimately appeared in the LC's authorisation were agreed in advance. The solicitors for the families were paid monthly invoices which was not the normal method of payment, there was no scrutiny of the claims for costs submitted which were on at least one occasion estimated costs and not actual costs and in this context she raised again the retrospective payments. Counsel drew attention to the guidance notes for solicitors for the granting of legal aid published in October 2005 which includes an exhoration never to sue the impecunious defendant. In essence it was her case that corners were cut in order to provide support on the basis that the end justified the means. It was her assertion that the LC had given instructions to this effect and that those who carried out those instructions were aware of the unlawfulness of the matter. Counsel contended that the authorisation briefing paper sent by Mr Andrews to the Minister on 6 February 2006 recommending authorisation for exceptional legal aid had merely paid lip service to the proprieties of the matter for example reminding the minister that the previous direct funding granted by Lord Filkin was no longer a relevant consideration. She drew attention to the fact that the amount of money now authorised was vastly in excess of what had been previously granted ie an increase of £350,000 to approximately £998,000. Paragraph 19 of the minute to the minister had indicated that the detailed case plan had been used to cost the case based on rates which had been agreed with the applicant's legal representatives. This note observed that the solicitor would be paid a blended rate of £186.91 per hour (instead of the previous blended rate of £200.00 per hour).

[84] Finally counsel reminded the court of the fact that the families' legal representatives had indicated that they had sought a comfort letter providing

the families with assurance that if despite their best efforts the action could not be concluded within the terms of the authorisation a Minister would look afresh at the position. A draft comfort letter was therefore approved by the minister. Counsel submitted that the agreement in advance about the letter was highly unusual. All of this pointed towards a biased and preferential approach that fuelled the appearance of lack of impartiality.

[85] Counsel drew my attention to a number of authorities on the question of bias eg Porter v Magill [2002] 1 AER 465 to ground the proposition that the question for a court on the issue of bias is whether a fair minded and informed observer would be led to conclude that there was a real possibility that the decision maker had been biased or that there was a legitimate reason to fear a lack of impartiality. Additionally Gillies v SOS [2006] 1 AER 7317 grounded the proposition that prior knowledge of the facts giving rise to the applications for exceptional grant funding in the Omagh case give rise to an appearance of bias in so far as the LC and his minister Bridget Prentice had meetings with representatives of the Omagh families before the funding was granted. (See also R (Al – Hasan) v SOS for the Home Department [2005] 1 AER 927).

[86] On the issue of the unlawful unfettering of the LC's discretion, she drew my attention to R v SOS for the Environment ex p Lancashire CC [1994] 4 AER 165 and R v Chief Constable of South Wales ex p Merrick [1994] 1 WLR 663 to ground the proposition that the primary constraints upon policy adoption come from the inalienability of duties and discretions and that a chosen policy must not conflict with a duty nor constitute the surrender of a discretion. The decision maker should retain an open mind and the capacity to change his mind. In a wide ranging argument Ms Higgins suggested, inter alia, that legislation permitting the LC to authorise funding in an individual case when requested to do so by the Commission offended against the principle that he should not be involved in individual cases and further that Mr Andrews was much too close to the policy of ensuring payment to the Omagh plaintiffs and should not have been the person to have advised the minister.

[87] **THE FIRST NAMED RESPONDENT'S CASE**

Mr Sales made the following arguments:

[88] There was no evidential basis of actual bias. He relied on the evidence of Mr Andrews and in particular his briefing to the Parliamentary Under Secretary of State for Constitutional Affairs, Bridget Prentice. In addition her statements to the House of Commons on 29 November 2005 made clear that any request for authorisation would be dealt with on the merits of the case and against the general principles set out in the draft guidance by the LC.

[89] As to apparent bias, Mr Sales submitted that the public commitment which the Government had made, as a matter of policy, to provide public funding to assist the Omagh plaintiffs was perfectly appropriate and unobjectionable. The formulation of legislation to meet that policy requirement was a normal function of government.

[90] Article 10A was not brought into operation solely to provide a statutory basis for funding the Omagh families but to make exceptional funding available in other cases, including cases where the lack of public funding could lead to a finding that the UK was in breach of international obligations.

[91] The implementation of policy does not lead to a disqualification on grounds of bias. He supported his propositions with an array of references from academic commentaries including extracts from Wade and Forsythe Administrative Law (9th Edition), and D Smith Woolf and Jowell Judicial Review of Administration Action (5th Edition) at 12-048 and case law authorities including R (Alconbury) v. Secretary of State for the Environment [2003] 2 AC 295 (" Alconbury case"), R (Island Farm Development Limited) v. Bridgend County Borough Council [2006] EWHC 2189 and National Assembly for Wales v. Condron [2006] EWCA Civ 1573.

[92] Counsel denied any favourable treatment had been accorded to the Omagh plaintiffs in the terms and amounts on which funding was provided. He drew attention to the fact that the applicants had been refused leave to rely on this very issue i.e. refusal of leave to challenge the decision of the LC on the ground that he acted in an arbitrary, unreasonable and discriminatory way in the terms in which he directed the plaintiff should be remunerated under the 2006 authorisation without providing for any mechanism for scrutinising the level of costs or ensuring value for money. In any event he submitted that careful scrutiny had been carried out by Mr Andrews and that the amount of funding paid will depend on how the case in fact progresses and the costs incurred with the Commission scrutinising any invoices.

[93] He carefully took the court through the history of the legislation leading up to the 2005 Order, seeking to illustrate that the charges of subterfuge in the introduction of this legislation were entirely misconceived. The exceptional funding provisions of Article 10A were not limited to the Omagh plaintiffs and was a temporary measure because it allowed a period of grace for the legislation under the 2003 legislation to be put on a proper footing - a task which has still not been completed.

[94] Relying principally on the authority of Porter v Magill [2002] 1 AER 465 counsel argued that Article 6 of the European Convention on Human Rights and Fundamental Freedoms was not the standard to be applied to administrative bodies as opposed to judicial bodies on the issue of bias. The

common law rules made due allowance for context and it was the common law standard of bias that ought to be applied in dealing with administrative officers such as in this instance.

[95] Counsel concluded that there was no basis for any allegation of pre determination or bias whether apparent or actual.

LEGAL PRINCIPLES GOVERNING THE CONCEPTS OF BIAS

[96] The approach to bias now generally adopted by the courts is informed by the words of Lord Hope in Porter v Magill [2002] 2 AC 357 ("Porter's case") as paragraph 102:

> "The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility … that the tribunal was biased."

[97] In Gillies v Secretary of State for Works and Pensions [2006] UK HL 2 (Gillies' case) – a case involving alleged bias in the make up of a disability tribunal – Baroness Hale of Richmond at paragraph 39 added:

> "The 'fair-minded and informed observer' is probably not an insider (ie another member of the same tribunal system). Otherwise she would run the risk of having the insider's blindness to the faults that outsiders can so easily see. But she is informed. She knows the relevant facts. And she is fair-minded. She is, as Kirby J put it in Johnson v Johnson [200] 5 LRC 223 at 243 (para. 53), 'Neither complacent nor unduly sensitive or suspicious'.

[98] The domestic test for bias namely the real possibility test is thus now said to mirror the Article 6 test under the European Convention on Human Rights and Fundamental Freedoms. (See Davidson v Scottish Ministers [2004] UK HL).

[99] However it is necessary to distinguish between the standards of impartiality applied in an adjudicative setting (such as the Gillies' Case) and an administrative setting where the body concerned is entitled to initiate a proposal and then to decide whether to proceed with it in the face of objections (see De Smith, Woolf and Jowell Judicial Review of Administrative Action (5th Edition) at 12 – 048). In Porter's case, Lord Hope confronted the problem in the case of an auditor appointed under the local Government

Finance Act 1982. That auditor had conducted an inquiry in which he pursued large quantities of documents and accepted representations from the parties. He then held a press conference in which he stated, in florid terms, his provisional view as to the culpability of the respondents. Thereafter he made his final decision concluding that the designated sales policy of the respondents had been unlawful. Of his position Lord Hope said at paragraph 91:

> "In my opinion the conduct of the auditor requires to be looked at as whole and in the context of the procedure which is laid down in the statute. …..The Act does not enable him to pass his responsibility to someone else. It is his duty, as the person in charge of the audit within the context of which the objections are made, to deal with them himself and, if they are well founded, to take such action as he is required to take on them by statute."

[100] It is a not uncommon occurrence that someone, such as the Minister in this case, is under a duty to make a decision in circumstances where potentially a conflict will arise between the interests of the minister as a member of the government and the interest of others which have to be taken into account. The fact of the matter is that the decision will not be liable to be impugned on account of bias provided that the decision maker potentially affected by bias has used his/her best endeavours to avoid the effect of bias and, consistently with a purpose for which the decision has to be made, takes reasonable steps to minimise the risk of bias affecting them. In R v Secretary of State for the Environment ex p Kirkstill Valley Campaign Ltd [1996] 3 AER 304 at 319 Sedley J, (as he then was) addressing the issue as to whether a planning officer had surrendered his judgment on foot of such "structural bias", said as follows:-

> "(It is) jurisprudentially a different thing from a disqualifying interest held by a participant in the process. There may well be facets of the statutory setup which contemplate dealings at less than arms length between a planning authority and a developer, and these may in turn qualify the questions about which independent judgment must be brought to bear, and so preserve a decision in which the planning authority has a pecuniary or other interest. But there is a difference of kind and not merely of degree between this situation and the situation of a participant member of a decision making body who has something personally to gain or lose by the outcome."

[101] I consider that such an approach, and the one to be followed in this case, is echoed by the comments of Lord Slynn of Hadley in Alconbury's Case when, in the context of a challenge to the role of the Environment Secretary in the planning context he said at paragraph 48:

> "The adoption of planning policy and its application to particular facts is quite different from the judicial function. It is for elected members of Parliament and ministers to decide what are the objectives of planning policy, objectives which may be of national, environmental, social or political significance and for these objectives to be set out in legislation, primary and secondary, in ministerial directions and in planning policy guidelines. Local authorities, inspectors and the Secretary of State are all required to have regard to policy in taking a particular planning decision and it is easy to overstate the difference between the application of a policy and decisions taken by the Secretary of State and his inspector. As to the making of policy, Wade and Forsyth, Administrative Law, (*9th Edition at 472)* says:
>
> > "It is self-evident that ministerial or departmental policy cannot be regarded as disqualifying bias. One of the commonest administrative mechanisms is to give a minister power to make or confirm an order after hearing objections to it. The procedure for the hearing of objections is subject to the rules of natural justice in so far as they require a fair hearing and a fair procedure generally. But the minister's decision cannot be impugned on the ground that he has advocated the scheme or that he is known to support it as a matter of policy. The whole object of putting the power into his hands is that he may exercise it according to Government policy."

[102] Undoubtedly there are limits. The policy must not fetter the exercise of the discretion and the particular circumstances in each case must be scrutinised. The minister must still retain and exercise a free discretion. He

must have due regard for the substantive and procedural norms explicit in the legislation. An example of where a local authority's interest in a planning decision may in certain circumstances be so great as to amount to pre-determination is clearly illustrated in a New Zealand case in Anderton v Auckland City Council [1978] 1 NZLR 657. This involved a case where a local council had become so closely associated with the relevant company's attempt to secure planning permission for its project over the six years preceding the hearing of his application that it had rendered its decision invalid. At page 692 Mahon J said:

> "On my view of the evidence, the council had become so closely associated with the company in attempts to secure planning permission for the company's project that by 1975 it had completely surrendered its powers of independent judgment as a judicial tribunal. I think it is not open to doubt that the council, and its delegated committee, convened this meeting with a closed mind, impervious to whatever evidence the objectors might submit and determined to uphold the validity of this commercial development which it had laboured so long to create. "

[103] In considering the proposition put forward by Ms Higgins that Mr Andrews ought to have assigned his task in advising the Minister to some other person in some other department unconnected with the policy in question, I found assistance in the Alconbury case in the speech of Lord Hoffmann at paragraph 70 where he said:

> "The protection of these basic (*human)* rights from majority decision requires that independent and impartial tribunals should have the power to decide whether legislation infringes them and either (as in the United States) to declare such legislation invalid or (as in the United Kingdom) to declare that it is incompatible with the governing human rights instrument. But outside these basic rights, there are many decisions which have to be made every day (for example, about the allocation of resources) in which the only fair method of decision is by some person or body accountable to the electorate".

[104] **CONCLUSION**

I have come to the conclusion that there is no substance in the allegations of procedural impropriety and unfairness of the LC set out at grounds 3(c) and (d) of the Order 53 statement for the following reasons:

[105] I find nothing improper or unlawful in the policy which the first named respondent and other representatives of the LC's office adopted in seeking to bring about a means, including legislation, which would enable public funding to be made available for the Omagh action. The formulation of such a policy is in my opinion a perfectly proper course for the government and its ministers to have adopted.Once arrived at , it would have been expected that ministers and officials would seek to honour it. In my view the LC would have been subject to justifiable criticism had he failed to make public that commitment or attempted to cover it with a veil of secrecy. The government commitment to implement that policy cannot be regarded as a disqualifying bias provided there is no evidence that that policy has not fettered the exercise of ministerial discretion in the granting of exceptional legal aid funding and that the Minister still exercised appropriate discretion in coming to a conclusion as to the grant in any particular instance. The concept of Ministers or local authorities devising and implementing policies of their own is a vital ingredient of administrative functioning which, if it were to disqualify Ministers or local councillors from carrying out their responsibilities would result in a complete administrative impasse. The combination of devising a strategy and of applying the policies to implement it does not connote unfairness. The formulation of policies is a proper course for the provision of guidance in the exercise of any administrative discretion. Hence in this case I am satisfied that the LC's guidance for exceptional legal aid funding under Article 10A of the 1981 Order is a locus classicus of such a function and practice. That guidance, in its final draft form, is cast in general terms not specifically related to the Omagh case and sets out the manner in which the LC exercises his powers and advises the Commission . It is intended that the Legal Services Commission will ultimately also have its own guidance which currently exists only in draft form. It is but one example of the procedural norm to which reference will be made when ascertaining whether blanket decisions are being taken or a discretion is being unreasonably fettered.

[106] An illustration of this is found in paragraph 34 of the LC's guidance which is cast in the following terms:-

> "Before requesting an authorisation to fund representation in an individual case in connection with non excluded proceedings, I would expect the Commission to be satisfied that the case:
>
> (a) would establish or uphold and develop new and important legal principles;
>
> (b) would have an unprecedented impact in its consequences for the applicant and be of direct benefit to society at large; and

(c) is, in terms of its complexity and expected duration, distinct from other cases having regard to the applicant's capacity to represent him or herself effectively."

[107] I find no evidence to suggest that the Minister, in granting the authorisation in this case, surrendered her powers of independent judgment, approached her task with a closed mind or was impervious to any indicators which might have suggested that the terms of the legislation or the guidance had been contravened.

[108] I am satisfied there was nothing unfair or improper about the decision maker or any member of government or official having met the Omagh relatives in the context of paragraph 105 above.

[109] Similarly, following the comments of Lord Hoffmann in Alconbury's case I find nothing objectionable in the fact that Mr Andrews or any other official in the LC's office was responsible for advising the Minister on these issues of resources. The commitment to finding a vehicle to provide the Omagh plaintiffs with funds was a declared government policy. Hence literally anyone within the framework of government would have been committed to that policy as much as Mr Andrews was .

[110] Public funds were being allocated and I believe that it is a fair method of decision that a person accountable to the electorate, namely the Minister should have been the person taking that decision after being carefully advised by a well informed civil servant. The Minister quite obviously does not have time to carry out all this research herself and necessarily depends on senior civil servants around her.

[111] The Parliamentary Under Secretary of State for Constitional Affairs, Bridget Prentice, in the course of a debate in the House of Commons on the topic of the introduction of the draft 2005 Order had committed herself to appropriate scrutiny when she had said to Parliament:

"The Committee may wonder whether the power would enable further funding to be made available for the Omagh civil action. In theory that would be possible but as the Committee will appreciate from the text of the Order and from the draft guidance, funding for the Omagh civil action is a matter in the first instance for the Commission to determine; it become relevant only if the Commission requests authority to fund the action. Any Minister who

> receives such as request would have to consider it in the same way as any other request – on the merits of the case and against the general principles set out in draft guidance".

I find that to be an impeccable statement of the duties cast on a Minister in such circumstances.

[112] What then of the procedure and scrutiny leading up to the authorisation by the Minister? At one stage I contemplated not permitting this issue to be ventilated because the applicants had already been refused leave to challenge the LC as to the terms on which he directed the Omagh plaintiffs be remunerated. However in the absence of objection from the respondents and, more importantly, in light of the seriousness of the allegations I considered I should rule on them . The guidance to the Order had come into effect on 15 December 2005. On that date the guidance to the Commission under Article 8 to the 2003 Order was also issued. Under a covering letter of 20 December 2005 H2O, the firm of solicitors acting for the plaintiff in the Omagh civil action submitted an application for ordinary civil legal aid. The evidence before me was contained in the letter of 10 December 2006 sent by the Chief Executive of the Commission to the Northern Ireland Court Service. That correspondence made clear that the Commission had considered these applications for legal aid by the Omagh plaintiffs and concluded that, as funding was being sought for a group action and having regard to the financial circumstances of the applicants, funding could not be provided under the ordinary legal aid scheme. The Commission then considered the new exceptional grant provision inserted into the 1981 Order by the 2005 Order together with the criteria set out in the LC's associated guidance and concluded it would be appropriate to request funding for the plaintiffs in the Omagh civil action under the new exceptional grant power. That request was made to the Northern Ireland Court Service by way of letter of 10 January 2006. The Commission enclosed the application from H2O. Mr Andrews then considered the Commission's request on behalf of the Northern Ireland Court Service. According to his affidavit of 13 March 2007, he made further contact with H2O by way of emails and telephone calls to obtain the necessary information in relation to detailed costings of the funding sought. At paragraph 84 of that affidavit he indicates that he made it clear to H2O that these details were being sought without prejudice to the Minister's consideration of the merits of the application and whether or not it satisfied the necessary criteria for funding set out in the Lord Chancellor's guidance. As part of this process he received the 37 page case plan setting out the detailed stages and the work which the solicitors , and the counsel instructed by them to represent the Omagh plaintiffs were proposing to undertake. That plan included a costed breakdown for the various stages of work involved.

[113] At paragraph 85 of this affidavit Mr Andrews states:

> "As one aspect of my consideration of the case and my preparation of the submission to the Minister, the case plan (and associated costings) which formed part of the Omagh plaintiffs' application for funding was scrutinised"

[114] I pause to observe that I find absolutely nothing improper or objectionable about such steps. On the contrary, I found distinctly unattractive the proposition by Ms Higgins that this senior official should not have scrutinised these figures before presenting them to the Minister but should have left that entirely to the Legal Services Commission. In my opinion any senior civil servant advising the Minister on such an important matter as the grant of exceptional funding, particularly in the initial stages of the whole policy, and making a recommendation that she should authorise such funding, would be failing fundamentally in his duty if he failed to scrutinise not only the case plan but in particular the associated costing.Understandably he wished to ensure all the relevant material was available and took direct steps to ascertain if it existed . How else could he properly advise the Minister that in his opinion she should recommend such authorisation?

[115] In this context I find equally unappealing, the criticisms made of the funding provided. By its very nature, this was exceptional litigation which seemed to have little precedent by way of guidance. It is clear that Mr Andrews did negotiate in order to drive down the rates claimed and I found no evidence whatsoever in the course of the affidavit of Mr Higgins or of Mr Murphy which suggested that these final rates or the method of payment were not appropriate for the job simply because they were not the rates commonly charged or the conventional method of payment .

[116] I reject Ms Higgins suggested comparison between financing an inquest and financing litigation of this kind. The two kinds of litigation are quite separate and unlikely to bear comparison. The fact of the matter is that this exceptional litigation and funding was breaking new ground. In such circumstances novel steps may have to be considered.

[117] In this context I find nothing suspicious or objectionable about the fact that a letter of comfort was given since it seems to me perfectly logical that any solicitor will wish to be assured that on taking on a venture of this size and complexity both factually and economically, he will be afforded some measure of reassurance about future money in the event that more work was required than had been anticipated. Obviously such future payments would be subject to the usual scrutiny. Granting the letter of comfort did not grant a guarantee of the fees if they were not justified.

[118] Similarly Ms Higgins attacked the approach to exceptional funding in that it was not a merit based exercise. The LC's guidance at paragraph 34 had set out the criteria for satisfaction by the Commission (see para 106 of this judgment). The public interest aspect clearly took precedence over a merits based test. It recognised that there would be cases where there was a sufficiently strong public interest to merit the case being ventilated without being subject to a merits based scrutiny. Exceptional cases by definition cannot be dealt with on the same approach as ordinary cases which quite clearly merit public funds being expended only on meritorious claims. It is a different balance to be considered in exceptional funding cases.

[119] I therefore conclude that there is nothing exceptionally generous in the terms of the authorisation, no justification in the claim that there was inadequate scrutiny ,no basis for suggestion that a carte blanche had been given to the solicitors for the families or that preferential treatment had been given to them. All of these points fail to recognise the exceptional nature of the funding which Parliament had approved.

[120] The briefing to the Minister by Mr Andrews in my view is the very antithesis of any attempt to fetter the discretion of the Minister or to deflect her from the necessary guidance and criteria to which she should have paid attention before making such an authorisation. In particular she was specifically advised that another Minister had previously directed funding for the Omagh plaintiffs but that this was not to be a relevant consideration. She was informed that the request must be determined against the background of the new exceptional grant power established by the 2005 Order and the accompanying guidance issued by the LC. It is couched in precisely the terms I would have expected from a conscientious and well informed senior civil servant. Thereafter the Minister accepted the recommendation and on 11 February 2006 authorised funding. She specifically invited the Commission to publish her authorisation.

[121] At paragraph 88 of Mr Andrews affidavit, he indicates that he confirmed with the Minister that she assessed the application for funding purely on the basis of the 2005 Order, the L C's guidance and the materials to make up the application itself on which she was briefed. I have no reason to believe that she did not approach this matter with an open mind in precisely the same manner as she would with any other similar application for exceptional funding.

[122] The email exchange between Ms Sloan on the one hand and Mr Andrews and Ms Devlin on the other was argued by Ms Higgins to be part of the "judicial review proofing" to which she took exception (see paragraphs 77 and 78 of this judgment). She asserted that this correspondence really indicated that the Minister was simply to be seen going through the motions so that it did not look as if the discretion had been fettered. I find that argument to be

implausible and unrealistic. I find nothing objectionable about government officers taking steps to ensure as best they can that a legislative framework is in place to meet a policy commitment and that in furtherance of that object, consideration is given to what steps are necessary to protect it against successful challenge in court. What other course would any conscientious parliamentary draughtsman adopt? The McKevitt decision had already properly frustrated one attempt to implement that policy on a legislative basis and I therefore would have expected government officers and lawyers to take legitimate steps to ensure that future legislation was not similarly flawed or challengeable if at all possible .

[123] I will shortly deal with the argument that the amendment to the 1981 legislation by the 2005 Order was intended solely to provide a statutory basis for funding to the Omagh plaintiffs, a proposition which I reject, but even if that had been the intent of the legislation I see nothing objectionable in that. The correspondence in this email exchange in my view amounts to no more than an explanation to Ms Sloan, who was acting closely with the Minister for Victims, that the Omagh funding was not the sole purpose of the legislation and that this had to be made clear albeit in a context where a clear commitment had been given to fund the Omagh Action Group. It had to be clear to all concerned that whilst the commitment to the families stood it was also necessary to recognise that this legislation needed to be approached with an open mind on a case by case basis. The Omagh families were to be left in no doubt about this notwithstanding Ms Sloan's close connections with them .

[124] I find no basis for the suggestion, which took up a great deal of time in this court, that the introduction of Article 10A into the 1981 Order by the 2005 Order was unnecessary and was solely geared to dealing with the Omagh plaintiffs. The case was made that Article 12(8) of the 2003 legislation rendered Article 10A unnecessary. In my view this argument betrays a fundamental misunderstanding of the nature of the legislation prior to the 2005 Order. I shall clarify the matter and my findings in some detail because it took up so much time of the court hearings as follows:

[125] The 1981 Order, throughout the relevant period for this judicial review, provided the statutory basis for the provision of ordinary legal aid in Northern Ireland.

[126] The 2003 Order, apart from a number of ancillary provisions, has not yet been brought into operation. It is obviously a wide ranging Order and does not readily admit of expedition in terms of implementation.

[127] Under the 1981 Order, entitlement to ordinary civil legal aid for proceedings which fall within Part 1 of Schedule 1 is dependent upon an applicant's satisfying a financial eligibility test (Article 9(1)) – and a merits test

(Article 10(4) and (5)). Certain categories of proceedings are not available for legal aid e.g. proceedings before a coroner or most tribunal proceedings.

[128] The government recognised that an exceptional grant power is required to allow funding for "exceptional cases" which fall within a class of generally excluded proceedings from the 1981 Order. According to Mr Andrews at paragraph 14 of his first affidavit, "the Government has recognised that there may be exceptional cases where it is necessary for the ordinary financial eligibility and/or merits test to be modified or disapplied". That is necessary to meet obligations under the European Convention on Human Rights and Fundamental Freedoms (the Convention) and in particular the Article 6 right to a fair trial. It is also necessary to comply with certain provisions of domestic and European community law. In England and Wales this power is contained in Section 6(8) of the Access to Justice Act 1999. Prior to November 2003 no such statutory exceptional grant power was available in Northern Ireland under the 1981 Order.

[129] Initially in the absence of a statutory exceptional power in Northern Ireland in July 2000 the LC established an extra statutory ex gratia scheme for public funding in exceptional cases involving inquests in Northern Ireland.

[130] Section 76 of the 2002 Act was intended to address this in some measure with out of scope cases. However before the 2002 Act was enacted, the 2003 Order was introduced. At Article 12(8) of the 2003 Order an exceptional grant power was envisaged corresponding to Section 6(8) of the 1999 Act in England and Wales. This permitted the LC to direct the Commission to fund the provision of excluded services, to authorise the Commission to fund such services on terms set out in the authorisation and to authorise the Commission to fund such services in an individual case if requested by the Commission to do so. Article 46(2) contained an express prohibition on the Lord Chancellor making any direction to the Commission in relation to individual cases. Thereafter the LC established a statutory exceptional grant scheme based on a transitional commencement of Article 12(8) of the 2003 Order. This was done because Section 76 of the 2002 Act combined with the 1981 Order were considered insufficiently flexible. In particular Section 76 did not permit funding to be granted in an exceptional in-scope case. This meant that exceptional funding could not be provided for either the Omagh families' civil action under Section 76 (because their action was not an excluded proceeding under the 1981 Order) or for any other exceptional in-scope case for which funding was not otherwise available. In addition Section 76 read together with the 1981 Order did not meet the need to transpose the EU Cross Border Directive 2002/8/EC into domestic law in Northern Ireland. Pending the full commencement of the 2003 Order, it was considered that commencing Article 12(8) in a transitional form would provide that flexibility. The relevant commencement order was the Access to Justice (Northern Ireland) Order 2003 (Commencement No 2) Order (Northern Ireland) 2003. This permitted the

exceptional grant provision to work within the context of Part II of the 1981 Order. In particular it enabled the LC to direct the exceptional grant funding to be provided in relation to in-scope as well as out of out of scope proceedings. At the same time the LC also made the Access to Justice (Northern Ireland) Order 2003 (Commencement No 1) (Amendment) Order (Northern Ireland) 2003 which postponed the coming into effect of the prohibition in Article 46(2) of the 2003 Order preventing the LC making a direction under 12(8) in individual cases.

[131] The LC gave four generic directions to the Commission under Article 12(8)(a) of the 2003 Order dealing with such matters as representation at inquests, statutory reviews, EU Directive 2002/8/EC and control over proceedings relating to the funding of proceedings concerning control orders and the Prevention of Terrorism Act 2005. At the same time he made a direction under Article 12(8) in relation to an individual case namely the Omagh Family civil action. He directed that part funding be provided to the plaintiffs in that action.

[132] The Judicial Review challenge in the McKevitt case determined that the LC had acted beyond his powers in the way in which he had exercised his discretionary commencement power to introduce Article 12(8) of the 2003 Order in a transitional form. Accordingly on a remedies hearing on 9 September 2005, the LC through counsel undertook to revoke the Omagh direction, to repeal Commencement No 1, to make a Commencement Order bringing Article 46(2) of the 2003 Order into operation and to review Commencement No 2 Order with a view to replacing it in due course. It was necessary for Article 12(8) of the 2003 Order to remain in force so that exceptional grant funding could continue to be provided for cases other than the Omagh action pending introduction of a new statutory exceptional grant power. This ensured compliance with the government's obligations under Articles 2 and 6 of the ECHR and also its obligations under EU law. In effect however the McKevitt judgment meant that the part funding for the Omagh family civil action could not continue to be provided through the Omagh direction and the extant statutory exceptional grant power had to be reviewed with a view to its replacement.

[133] The 2005 Order was subsequently introduced which repealed Article 12(8)-(11) of the 2003 Order and inserted a new exceptional grant power into the 1981 Order, at Article 10A. This provision permits the Lord Chancellor to direct the Commission that Legal Aid be available in connection with excluded (out of scope) proceedings in circumstances specified in the direction but in addition it also enables him, if requested to do so by the Commission, to authorise legal aid in connection with in-scope proceedings both in relation to categories of proceedings and in relation to individual cases.

[134] It is important therefore to appreciate that the 2005 Order inserted into the 1981 Order at Article 10A is a similar exceptional power to that granted in Section 76 of the 2002 Act except that there was now an additional power conferred on the Lord Chancellor, at the request of the Commission, to authorise exceptional grant funding for in-scope cases either on an individual basis or a generic basis. The 2002 Act had been given full consultation and Parliamentary scrutiny as part of the normal legislative process. The 2005 Order was laid before Parliament on 15 November 2005. It was passed through Parliament under the procedure provided in paragraphs 1 and 2 of the Schedule to the 2000 Act. It was debated in the House of Commons on 29 November 2005 and in the House of Lords on 5 December 2005. The Order was made at Privy Council on 14 December 2005.

[135] To summarise the position, the reason for the 2005 Order according to Mr Andrews at paragraph 8 of his second affidavit and which I accept was to ensure that there was in place a lawful statutory power to grant exceptional funding for cases both within and outside the scope of ordinary civil legal aid capable of enabling funding to be provided in the Omagh case and also in other cases where exceptional legal aid was considered necessary.

[136] I wish to make it absolutely clear that I accept the evidence of Mr Andrews that what in fact the 2005 Order did was to provide a power in relation to non excluded proceedings to enable funding to be made available e.g. the Omagh case but also which enabled funding in cross border litigation (in accordance with the EU directive), control order proceedings and also any other exceptional non excluded case that might arise from time to time which would require a more flexible approach to merits and/or financial eligibility tests than the 1981 Order previously allowed. I reject completely the suggestion that the 2005 Order solely dealt with the Omagh case. It was not an option to retain Articles 12(8)-(11) of the 2003 Order because the transitional format chosen had been ruled unlawful by the McKevitt decision. The full introduction of 2003 Order is currently being time-tabled for introduction. I am unpersuaded by any evidence before me that it is being delayed pending completion of the Omagh civil action. This was a completely speculative allegation raised in the course of the hearing without any factual foundation to sustain it and mirrored an approach to which the case of these applicants was prone.

[137] Finally I am satisfied that the need for the new statutory basis for exceptional grant funding was urgent. I accept the evidence of Mr Andrews that the government had to re-establish an effective funding mechanism to replace the Direction 3 - EU Directive 2002/8/EC and also the Direction 4 – Control Order Proceedings Instruments. They were required to ensure compliance with obligations under EU law and under the Convention . It was in recognition of the need for such a power and on account of the undertakings given to the court on behalf of the LC on 9 September 2005 that he would

review Commencement No 2 Order with a view to replacing it, that the Order had not been quashed. The Order was made a temporary Order because the 2003 Order needed to be introduced as a comprehensive measure in a new regime for legal aid together with additional modifications in due course to deal with cases which had now come within the ambit of the pre-existing Article 12(8). The 2003 Order has not been commenced for some time in any event and it was crucial to have an urgent piece of legislation to deal with the lacuna that I have already adverted to. It was necessary to plug the gap as soon as possible.To have waited ,as Ms Higgins advocated ,for the wholescale introduction of the 2003 Order would have created a temporary lacuna which could have caused a breach of international obligations in the interim .

[138] I consider that this detailed analysis provided by Mr Andrews effectively dispenses with any allegation of subterfuge by the first named respondent in the introduction of this legislation.

[139] I have therefore concluded that there is absolutely no evidence of predetermination by or bias, actual or apparent, on the part of the LC in this matter and I find no basis for the grounds set out at paragraph 4(3)(c) and (d) of the Order 53 statement.

LACK OF CANDOUR

[140] Although it did not appear in the course of the pleadings in the grounds set out under the amended order 53 statement on behalf of the applicants, in the course of her skeleton argument and before this court Ms Higgins made a number of very serious allegations of lack of candour on the part of the LC, Mr Andrews, the Minister Bridget Prentice and the Commission, particularly Mr Crossan. The principal allegations were as follows:-

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[141] The affidavit drafted on behalf of the LC by Mr Andrews allegedly did not offer a true and comprehensive account of all of the relevant facts, it was cast in deliberately ambiguous language, the effect of the language was to obscure rather than to clarify, it purported to divert attention away from the small amount of information given and presented an opaque picture of the facts giving rise to the decision to fund the Omagh plaintiffs.

[142] In particular it did not explain how and why the Government commitment to publicly fund the Omagh case came to be made in 2003, it did not explain how the commitment came to be reaffirmed and increased in 2005 and did not explain why the 2005 Order was introduced in a way "that made any sense".

[143] Counsel attacked the reasoning behind the introduction of Article 10A(2)(b) of the 2005 Order as an exercise in subterfuge. It was Ms Higgins' assertion that the 2005 Order was merely a vehicle whose purpose was to provide funding for the Omagh case in line with the government commitment to fund the Omagh plaintiffs. In this context she drew attention to the meeting on 5 September 2005 between the LC and the representatives of the Omagh plaintiffs, the earlier meeting between the Minister Angela Smyth and the Omagh plaintiffs and contrasted this with the "line publicly taken that any application by the Omagh plaintiff would have to be considered on its merits". She also asserted that "it was clear that the Omagh plaintiffs' representatives were consulted about and agreed the proposed terms of the authorisation the Lord Chancellor would approve".

[144] Counsel set out in her skeleton argument a number of specific averments made in the affidavit on behalf of the LC by Mr Andrews which she submitted represented significant breaches of the duty of candour. These included the assertions that the Omagh plaintiffs were not consulted on the proposed form of legislation, that the government had been open and candid in terms of the policy decision to provide funding for the Omagh families civil action, that officials had sought to formulate an alternative lawful mechanism to provide such funding in principle, that there was no pre-determination of the application made for exceptional funding, that the Commission's request for funding in the Omagh families case was in the first instance considered by the Northern Ireland Court Service on its merits, that Mr Andrews had advised the H2O solicitors that the matter would be considered on the appropriate criteria and advised the Minister also in such terms. The skeleton argument further alleged that the statement by the Minister that she assessed the application for funding purely on the basis of the 2005 Order, and the LC's guidance together with the materials making up the application with an open mind amounted to a breach of candour.

[145] Counsel submitted that the LC, his Ministers and officials had sought to do one thing but to be seen to be doing another. They misled the public in the explanatory memorandum to the 2005 Order by suggesting that the powers introduced in the Order did not require to be consulted upon as a new statutory mechanism replaced a statutory provision already in existence. The skeleton argument went on to boldly state:

> "Furthermore the Lord Chancellor must be taken to know, as a lawyer, and through his officials, that what he was doing was unlawful and wrong and that he was unlawfully fettering his discretion. Similarly he must also be taken to know that he was not impartial, that he was acting contrary to Parliament's intention that he should not have a role in granting legal aid in individual cases, that consultation should

> have occurred and that he presented to the court an inaccurate, incomplete and ambiguous account of events".

In addition the skeleton argument asserted:

> "It appears that the Lord Chancellor – with the help of his officials – has not merely been guilty of significant breaches of duty of candour of the court, he has knowingly and deliberately acted unlawfully – at the very least in relation to the fettering of his discretion – and he has sought to mislead the public about what he was doing. The lack of regard for the rule of law and for his duty to the court from the holder of one of the highest offices in the land and the person with overall responsibility for the administration of justice is a matter of considerable concern. It ought to be unthinkable that a Lord Chancellor would not at all times seek to uphold the rule of law and respect his duty to the court".

[146] When I pressed her on these allegations during the course of the hearing, Ms Higgins expressly accepted that she was not alleging that there was a conspiracy on the part of the officials to act unlawfully but rather that the LC's officials were simply following instructions and had lent themselves to the unlawful procedures. Although at one stage she came perilously close to positively alleging that the LC, the Minister and his officials had been lying, she eventually eschewed such a suggestion refining it to suggest that "they had been economical with the truth" and had been lacking in frankness. Counsel variously described the approach of the first named respondent and his Ministers and officials as "saying it with spin", "deliberately misrepresenting the position" and "deliberately creating ambiguities".

[147] In relation to Mr Crossan and the Commission, Ms Higgins submitted that he had failed to explain his understanding of how and why the 2005 Order was introduced and any representations made by the Commission to the LC or his officials about the proposal to introduce the legislation. She found significance in his alleged silence about the meeting he and his chairman had with the LC on 14 December 2005.She asserted he did not answer the applicants' case that the question of funding the Omagh case was likely to have been discussed at this meeting. Counsel also saw significance in his failure to mention receiving an invoice on 17 January 2006 from H20 with a request for payment or how it had come to be in Mr Andrews possession in February 2006, and the fact that allegedly he did not respond to the proposed authorisation when he was invited to do so given the impact this was likely to have upon his budget. Ms Higgins also drew attention to the fact that Mr Crossan did not

explain why he did not make the ex post facto payment in accordance with the terms of the draft Order and only made the payment once he received a letter from Paul Andrews about his payment enclosing the invoice. In particular counsel alleged that Mr Crossan had been "very sparse in his affidavit and he appeared to have been very careful to say very little". While she conceded that there was nothing he had said that was incorrect she accused him of withholding material facts which in itself can misrepresent and mislead by omission.

[148] Counsel relied upon the authority of Brenda Downes (2006) NIQB 77 in which Girvan J (as he then was) reminded public bodies of the duty imposed upon them as respondents in applications for judicial review. The judge in that case had indicated that the duty of good faith and candour lying on a party in relation to both the bringing and defending of a judicial review was well established. Secondly Ms Higgins relied upon Quark Fishing Limited v. Secretary of State for Foreign Affairs [2002] EWCA 149 where Laws LJ at paragraph 50 referred to the "high duty on public authority respondents to assist the court with full and accurate explanations of all the facts relevant to the issue that the court must decide".

[149] **CONCLUSIONS**

Although Mr Sales made it clear that his client took grave exception to what he described as "wild allegations" in respect of this particular aspect of the case, it is unnecessary for me to set out the answer of the first named respondent. By failing to do so I do not underestimate the vigour with which Mr Sales refuted these allegations. Suffice to say, I found these allegations completely groundless and without foundation. I was concerned that they had not materially surfaced until the skeleton argument was presented given the extremely serious nature of their content. It is highly undesirable that any party or any person named in the proceedings – whether it be government ministers, civil servants or anyone else – is not alerted to detailed allegations of this kind well in advance of hearing so as to facilitate a full opportunity to refute them if possible. I consider that allegations of this gravity impose on counsel a clear duty to adopt an approach similar to that of a plea on fraud. Such matters should not be made unless there is clear and sufficient evidence to support them and they should be pleaded with utmost particularity. Such conduct must be distinctly alleged and distinctly proved. It is not permissible to leave such allegations to be inferred from the facts. (See Davy v. Garrett [1878] 7 Ch. D 473 at 489, Behn v. Bloom [1911] 132 LTJ 87 and Claudius Ash Sons and Company Limited v. Invicta Manufacturing Company Limited [1912] 29 RPC 465.

[150] Insofar as it is not already clear from the findings I have made earlier in this judgment, I shall set out in short compass some of the other reasons why I have concluded that there is no substance to these allegations:

[151] I am completely satisfied that the commitment that the government Ministers made to the Omagh families to provide funding for them was open, transparent and consistently made from 2003 onwards. The nature and strength of that commitment could not have been made more public both through the various press cuttings that were made available to me in the hearing and the highly publicised meetings with the Omagh families. Mr Andrews made this abundantly clear at paragraph 75 of his first affidavit when he stated:

> "In or about mid August 2003 the Government made a commitment to provide part funding to support the Omagh families' civil action. Following the ruling in the McKevitt case, in September 2005, the Lord Chancellor reiterated the commitment to make funding available for the civil action. The Government has throughout been open and candid in terms of the policy decision to provide funding for the Omagh families civil action".

[152] As I have already stated I find nothing whatsoever objectionable about such a policy and indeed had legislation been brought forward specifically to deal with funding for the Omagh families' civil action I would have seen no immediate impediment to that. In the event I have found that this was not the case and that the 2005 legislation met other purposes as well. Once again I am absolutely satisfied that Mr Andrews made that clear from an early stage. Paragraph 76 of his affidavit records as follows:

> "Following the McKevitt ruling, officials sought to formulate an alternative lawful mechanism under which such funding could in principle be granted. It was decided that the best mechanism was for legislation to be brought forward in the form of the 2005 Order. That legislation, again as I have explained above, was also brought forward for the purpose of meeting the important policy objective to enable exceptional grant funding to be made available in exceptional cases, both existing cases (for which funding had been granted under the impugned Article 12(8) power) and any future exceptional case where funding would not otherwise be available.
>
> 77. In my experience, there is nothing unusual or untoward about proceeding in this way. It is the task of Government, in whatever sphere of activity is under consideration, when a problem has been identified, to develop a policy to deal with that problem and to bring

> forward legislation to implement the policy. Since part of the policy objective introduced in the 2005 Order was to ensure that funding could be provided on an exceptional basis to cases which could not otherwise attract funding, as highlighted by the Omagh case, it is unsurprising that the powers that are used to promote that policy objective were used (after the requisite request from the Commission and after due consideration of the specific application) for that purpose."

[153] Provided that the legislative content and the appropriate guidance are followed in an open minded manner, no possible objection can be taken to that course. There is no justification for the applicants' continued assertion that no explanation had been given as to how, by whom and why the government commitment to publicly fund the Omagh case came to be made. That sequence was of little relevance to this case in light of my findings. The open commitment by the government was plain for all to see from 2003 onwards. No purpose was to be served by the further exploration demanded by the applicants.

[154] As I have already outlined in paragraphs 124-137 of this judgment, I am satisfied with the reasoning for the introduction of the 2005 Order. The time taken up in this case with an exploration of how this had come about betrayed a fundamental misunderstanding of the content and intention of the pre-existing legislation and the plausible reasoning put forward by Mr Andrews in his affidavits for the introduction and urgency of same. In any event, one has to question why the first respondent would have bothered to go to all this subterfuge when a simple statement that it was necessary to fund the Omagh families civil action by a specific piece of legislation would have been completely unobjectionable if that was the sole purpose. I find nothing in Mr Andrews' account of these events which smacks of spin, misrepresentation, ambiguity or lack of frankness, mendacity or economy with the truth. His two affidavits carefully addressed the issues relevant to these proceedings and did not cause me any concerns of the type raised by counsel.

[155] I find no evidence that the Omagh plaintiffs or their legal representatives were consulted on the proposed form of the legislation. Why would this have happened? The commitment to them was public and clear and therefore it was quite unnecessary for them to have been consulted on the type of legislation. That was entirely a matter for government. The fact that they were told of the legislation is no evidence that they were consulted on it.

[156] I have already found that there was no predetermination of the application for exceptional grant funding. I reject the suggestion that the Minister who made this decision was merely rubber stamping an application

when she had unequivocally made clear to Parliament that she would give is full scrutiny and examination and had received a detailed briefing on the matter. To suggest by inference or otherwise that the Minister was being disingenuous – the clear import of the allegation – required a sounder foundation of fact than existed in this case. I am entirely satisfied on the evidence before me that there is no evidence to suggest that Mr Andrews was being anything other than fully candid in the advice that he gave the Minister prior to the authorisation or in his confirmation that the Minister had assessed the application for funding purely on the basis on 2005 Order, the guidance from the LC and the materials making up the application.

[157] I found no evidence to suggest that the public had been misled at paragraphs 8 and 9 of the explanatory memorandum to the 2005 Order. As I have already indicated earlier in this judgment, there was no duty to carry out consultation on this matter particularly since the essentials of the legislation had already been consulted on fully in the 2002 legislation. The variations that were subsequently made came no where near inviting the significance ascribed to them by counsel and in my view did not constitute a major or even significant change of policy.

[158] I reject the suggestion that the first named respondent must have known as a lawyer that what he was doing was unlawful and wrong or that he sought to mislead the public. The allegations in paragraphs 8.15 and 8.16 of the skeleton argument were without foundation. In my view the approach to this aspect of the case should have been clothed in more measured and less intemperate terms given the lack of evidence to sustain the allegations made. The conduct of Ministers often comes under scrutiny in judicial reviews and counsel must not be fettered in the nature of proper criticism that can be voiced. However there is equally a responsibility to ensure that those criticisms especially when they strike at issue of character and Ministerial suitability, are the product of carefully considered reasoning and couched in terms that reflect the evidence available.There was no evidence in this case to sustain the allegations made.

[159] For the removal of doubt, therefore, I wish to make it clear that I found no lack of candour whatsoever on the part of the LC, the relevant Ministers, Mr Andrews or any other official dealing with this case.

[160] Turning to Mr Crossan, I found the suggestion he had been guilty of a breach of candour to be equally unsustainable. Although counsel was careful in oral submissions to disavow any suggestion that he had been lying it was an extremely serious allegation to suggest that a person in such a senior position had been guilty of withholding material facts from the court. I found not a scintilla of evidence to back up this allegation against him. I consider there was much merit in the point made by Mr O'Hara QC ,who appeared on behalf of the second named respondent with Mr Good, that Mr Crossan had dealt in his

affidavit with the specific grounds on which leave had been granted and had properly confined his affidavit to such issues. Why would it be necessary for him to explain his understanding of how and why the 2005 Order was introduced? His role is to interpret the legislation and act accordingly. Why would it be necessary for him to reveal all the details that he and his chairman had discussed with the LC on 14 December 2005? Is he meant to assume that some as yet unspecified allegation of misconduct is to be made and, guessing what this is to be, attempt to deal with it? What relevance would this have to the issues that he had to determine in relation to the application made before him? His task was to apply the criteria for exceptional funding and I am satisfied he has done that. I therefore dismiss all the suggestions that this deponent has acted in anything other than a completely professional, candid and proper manner in the performance of his duties.

[161] In conclusion therefore I have determined that there was no basis or foundation for the suggestion that there had been a lack of candour in this case.

[162] **THAT THE COMMISSION IN REQUESTING THE ARTICLE 10A(2)(b) AUTHORISATION ACTED UNREASONABLY AND IN BREACH OF THE PRINCIPLES OF FAIRNESS**

[163] **THE APPLICANTS' SUBMISSIONS**

The case made by Ms Higgins was that in deciding to request the Article 10(A(2)(b) authorisation the Commission had acted unreasonably and in breach of the principles of fairness in that it failed to take any account of:

(a) The need to ensure the propriety of the proposed expenditure which included an assessment of the merits of the plaintiffs claims.

(b) The need to ensure value for money.

(c) The need to ensure that there were in place proper financial controls over the expenditure covered by the exceptional grant.

[164] In the course of her submissions Ms Higgins made the following additional points:

[165] Article 7(6) of the 2003 Order, which had not been enacted at that time, made provision for the Commission to have regard, when considering any question as to the remuneration of persons or bodies providing civil legal services or criminal defence services, to a number of matters.These included the need to secure value for money, the time and skill which the provisions of services of the description to which the question relates requires, the number and general level of competence of persons providing those services and the cost to public funds of the remuneration of persons or bodies providing those

services. Relying on McKevitt 's case at paragraph 19 and in Re Friends of the Earth Application (2006) NI 48 Ms Higgins submitted that the matters as set out in Article 7(6) were relevant considerations – albeit implicit – that the Commission ought to have taken into account in considering the request from H2O for exceptional legal aid funding under Article 10A(2)(b).

[166] Counsel also submitted that the Commission should have had regard to the principle of fair remuneration referred to in McCann's application (2004) NI QB 47. She asserted that fairness is contextual and that the fairness of remuneration under the 1981 Order must be judged in the context of remuneration paid under that Order. Ms Higgins argued that the Commission was aware that the remuneration paid to the Omagh plaintiffs was unfair as it was substantially higher than the rate paid to other solicitors whose clients have been legally aided as attested by Mr Higgins in his affidavit. The terms in which remuneration was paid, monthly and without being subjected to any scrutiny were in her submissions inequitable when compared with a normal payment terms.

[167] In the absence of guidance issued by the Commission itself pursuant to the LC's guidance of 15 September 2005, these were relevant considerations in counsel's submission . In failing to take them into account the Commission had acted unreasonably and unlawfully. She drew attention to the fact that Mr Crossan made it clear at paragraph 7/8 of his affidavit of 17 October 2006 that he did not take any of these considerations into account and did not believe that he was required to do so.

[168] Ms Higgins submitted that there was a duty on Mr Crossan to consider the propriety of the claim and that a cost benefit analysis ought to have been necessary. It was his responsibility she submitted to take steps to scrutinise the claim for value for money. That responsibly lies with the Commission. Accordingly his failure to consider the merits and value for money rendered his decision to request the authorisation unreasonable and unfair.

[169] **THE SECOND NAMED RESPONDENT'S CASE**

Mr O'Hara submitted that the obligation on the Commission and Mr Crossan in particular was to follow the guidance that the LC had set out for exceptional legal aid funding under Article 10A of the 1981 Order. In particular, paragraphs 32-36 are as follows:

> "Exceptional funding for representation in non excluded proceedings.
>
> 32. Article 10A(2)(b) of the 1981 Order also empowers me, if the Commission requests me to do so to grant an authorisation to enable it to provide

exceptional legal aid in an individual case in connection with non excluded proceedings, that is proceedings which fall within the scope of ordinary legal aid. However in view of the scope of the statutory scheme, the Commission's request would have to be compelling before I would entertain authorising exceptional legal aid funding for such an individual case which had not satisfied the prescribed tests for ordinary legal aid.

33. Only the Commission can request me to grant an individual authorisation in connection with non excluded proceedings. Such a request can only arise out of the Commission's consideration of an application for ordinary legal aid.

34. I would not expect the Commission to request me to grant such an individual authorisation unless it considered that the circumstances of the case were wholly exceptional. It is only in such wholly exceptional circumstances that the provision in Article 10A(2)(b) of the 1981 Order would be engaged. Accordingly, the Commission will not have to consider invoking this provision in the vast majority of individual cases which fail to meet the proscribed tests in respect of ordinary legal aid as they will not possess the wholly exceptional circumstances which would merit consideration under this power.

35. Before requesting an authorisation to fund representation in an individual case in connection with non excluded proceedings, I would expect the Commission to be satisfied that the case:

(a) would establish or uphold and to develop new and important legal principles.
(b) would have an unprecedented impact in its consequences for the applicant and be of direct benefit to Society at large; and
(c) is, in terms of its complexity and expected duration, distinct from other cases having regard to the applicant's capacity to represent himself effectively."

[170] This guidance is given under the terms of Article 8 of the 2003 Order to explain the purpose and intentions of the Government in respect of Article 10A of the 1981 Order. Hence the Commission is bound to have regard to this.

[171] Mr Crossan made it clear in his affidavit that this is precisely the guidance that he had followed and that, following the criteria, he requested authorisation in this instance. I see no reason to challenge his detailed outline of the steps he took to arrive at this decision.

[172] The argument of the applicants does not recognise that this is legislation dealing with exceptional cases and exceptional measure have to be taken. Equal treatment depends on treating equally comparable circumstances. This is not a situation comparable to normal litigants making an application for ordinary legal aid. Hence when H2O in its written submission made clear that for example some spouses did not want to be involved (a reasonable proposition since some might want to take this particular high profile case into the public arena and others may not), steps were taken to ensure that in such exceptional circumstances a situation did not arise whereby some of the applicants qualified and others in precisely the same circumstances save for their spouse's participation, did not . It was counsel's submission that the Commission would be more vulnerable to legitimate criticism if H2O made a claim for exceptional legal aid and they were subjected to the normal legal aid requirements.

[173] **CONCLUSION**

I find no basis whatsoever for concluding that the Commission and Mr Crossen ought to have acted other than in compliance with the guidelines provided by the LC. This was quite clearly exceptional legislation for which specific criteria had been laid down in the guidelines. I find nothing unreasonable in the Commission adhering to that guidance. Paragraph 7 of Mr Crossan's affidavit made it clear that he had looked at each of the three elements at paragraph 35 of the guidance and had formed a favourable conclusion in relation to each of them. In my view it was not unreasonable to then conclude that he should not apply the normal criteria for legal aid by conducting a detailed analysis of the merits of the claims individually or collectively or impose the usual value for money assessment. To do so might well have frustrated the precise purpose of the legislation and the criteria of the guidance. He concluded that the claims brought by the plaintiffs had the potential to develop and advance a civil law which had not been regularly used to hold individuals personally liable for terrorist acts. In any event, as a failsafe, he recognised, as in the event occurred, that the LC would have to be satisfied as to the rates being charged and the way in which the payments would be monitored. That is precisely what Mr Andrews did. The authorities relied on by Ms Higgins contain no reference to the nature of

exceptional funding contemplated by the legislation now being considered. Normal rates of pay, the frequency of payment, the nature of the scrutiny, and the concept of value for money had all to be revisited in the context of the purpose of exceptional funding and the criteria in the guidelines.

[174] I find absolutely no basis upon which Mr Crossan would have considered that the legislation or the guidance or the authorisation would have been unlawful. In my view both he and the Commission acted reasonably and fairly in requesting the authorisation.

[175] Insofar as by implication, Ms Higgins made allegations that Mr Crossan either did not take the steps which he alleged he had taken in paragraphs 7 and 8 of his affidavit or if he did that it was merely a sham because he had been directed by the LC to do so, I dismiss them entirely. I consider that such serious allegations should never have been made against Mr Crossan either directly or indirectly in the absence of some clear evidence to sustain them and were based on the purest of speculation. Insofar as it was suggested that his affidavit was deliberately sparse to conceal such a course of action, I similarly reject that.

[176] I have come to the conclusion therefore that there is no basis to sustain the grounds set out in paragraph 4(4)(i)-(iii) of the Order 53 statement.

[177]I observe for the sake of completeness that the application for mandamus obliging the LC to repay payments unlawfully authorised ,apart form being entirely unmeritorious in light of my findings,was in any event an inappropriate and unprecedented remedy to be sought in the context of this case .Counsel did not attempt to cite me any case law or other authority for such relief being granted and I therefore found no basis for it being put forward

[178] I therefore dismiss the applicants' claim. I shall invite representations on the question of costs.