

Neutral Citation no. [2004] NIQB 26

Ref: **WEAC4142**

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

Delivered: **26/04/2004**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY COLETTE HEMSWORTH
FOR JUDICIAL REVIEW (NO 2)**

WEATHERUP J

Legal aid for Inquests

[1] Until recent years Legal Aid has not extended to Inquest proceedings in Northern Ireland. In *Jordan v United Kingdom* [2001] 37 EHRR 52 the European Court of Human Rights identified the absence of legal aid for the representation of the victim's family at an Inquest as one of the shortcomings of the Inquest system which contributed to a breach of the procedural requirements of Article 2 of the European Convention on Human Rights.

[2] Two legal aid schemes have been developed in relation to the provision of assisted representation for victims' families at Inquests. One is known as the "green form scheme" and has been administered by the Legal Aid Department of the Law Society of Northern Ireland. The other is known as the "extra statutory scheme" and has been administered by the Lord Chancellor through the Northern Ireland Court Service.

[3] This application for Judicial Review concerns the decision of the Legal Aid Department of 11 February 2002 on an application for legal aid under the green form scheme in connection with preparatory legal work for the Inquest into the death of the applicant's husband. This application involves two broad attacks, the first being to the particular decision of 11 February 2002 and the second being to the compatibility of the green form scheme with the procedural requirements of Article 2 of the European Convention.

Hemsworth (No 1)

[4] Re *Hemsworth's Application* [2003] NIQB 5 concerned the present applicant's earlier application for Judicial Review of the decision of the Lord Chancellor not to grant funding for legal services in preparation for the Inquest into the death of this applicant's husband. I shall refer to the application as "Hemsworth (No 1)". The application concerned the operation of the extra statutory scheme. It raised the issue of the relationship between the extra statutory scheme and the green form scheme. Kerr J dismissed the application. An appeal from the decision of Kerr J to the Court of Appeal is pending.

[5] The facts of the case are set out in the judgment of Kerr J. The applicant's husband died on 1 January 1998. On 21 May 2001 the applicant's solicitors applied to the Lord Chancellor for legal representation funding at the Inquest. The Lord Chancellor agreed to funding under the extra statutory scheme for representation at a preliminary hearing and in respect of costs incurred after 4 June 2001. Funding from the extra statutory scheme was not available retrospectively as such work could be covered by the green form scheme. The green form scheme provided a basic two hours of legal advice and assistance and thereafter an extension might be granted for additional advice and assistance. The applicant's solicitor had not applied for assistance under the green form scheme as he was of the view that requests for green form extensions were not granted to the extent required to cover the work carried out on a file and negotiations with the Legal Aid Department were a pointless exercise as it was not cost effective. Further it was the applicant's solicitor's view that Civil Legal Aid was not available for preparatory work carried out for Inquests and much of the work undertaken by the applicant's solicitors before 4 June 2001 would not have been covered. The Lord Chancellor indicated that he could not consider the amount of funding that would be approved under the extra statutory scheme without a breakdown of the costs for preparation and representation at the Inquest.

[6] Miss Hawthorne, the Director of Legal Services in the Legal Aid Department, wrote to the applicant's solicitor on 26 June 2001 in relation to the scope of the green form scheme. She did not agree with the applicant's solicitors view of the green form scheme. She confirmed that a person who was financially eligible could obtain oral or written advice and assistance under the green form scheme and that would include certain preparatory steps in relation to the holding of an Inquest; that extensions of the green form scheme depended entirely on the individual circumstances of each case; that it was possible that counsel's opinion may be authorised where there was some legal complexity; that the green form scheme did not cover representation at any hearing although a solicitor may be covered to hold a watching brief at an Inquest if there was a related civil action. Miss Hawthorne confirmed this position on affidavit in Hemsworth (No 1) and further stated that the applicant had not made any application under the

green form scheme and that each of the items of work set out in the applicant's solicitor's affidavit was in principle covered by the green form scheme.

[7] Kerr J considered that the green form scheme covered the work outlined by the applicant's solicitor. He stated that the provision of "any oral or written advice, given by a solicitor or, if and so far as may be necessary, counsel" under Article 4 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 comprehended all the preparatory work undertaken on behalf of the applicant before the work covered by the extra statutory scheme. He noted that this was also the view of the Director of Legal Services Miss Hawthorne. Accordingly Kerr J concluded that the Lord Chancellor was entitled to have regard to those provisions and the intention of the legislature in devising the extra statutory scheme and that any deficiency in the implementation of the provisions should be the subject of challenge to the Legal Aid Department and not the Lord Chancellor.

The decision of 11 February 2002

[8] The initial hearing of Hemsworth (No 1) took place in January 2002. In view of the approach that was being taken on the scope of the green form scheme the applicant's solicitor made an application to the Legal Aid Department under the green form scheme on 22 January 2002. By letter dated 11 February 2002 from Miss Hawthorne as Director of Legal Services of the Legal Aid Department it was stated -

"The green form scheme will cover you for all necessary preparatory work prior to the instruction of counsel.

If you intend to instruct counsel in regard to this matter, applications should be made to the extra statutory ex-gratia scheme administered by the Northern Ireland Court Service on behalf of the Lord Chancellor, details of which appear in the January 2002 edition of 'The Writ' at pages 20 and 21.

In considering your application for an extension under the green form scheme, the Department is prepared to authorise a maximum of three additional hours for work to be undertaken by the solicitor."

[9] This decision letter of 11 February 2002 is the decision that is the subject of the present application for judicial review. The decision states that

the green form scheme will cover solicitors' "necessary" preparatory work; that counsel will be covered by the extra statutory scheme and not the green form scheme; that the extension for solicitors work would be 3 hours. This approach did not reflect the scope of the green form scheme that had been presented in evidence in Hemsworth (No 1).

[10] After judgment was delivered in Hemsworth (No 1) the applicant's solicitor made a further application under the green form scheme and on 28 March 2003 funding was extended to counsel and additional solicitors hours. More generally the Legal Aid Department issued a notice to all Legal Aid practitioners on 21 May 2003. Under the heading "Sources of funding for steps in controversial/exceptional inquests" it was noted that there had been some confusion in relation to the potential sources of funding of Inquest cases and that to address those issues the Legal Aid Committee had issued guidance on the type of work which might be funded under the green form scheme. There was attached a schedule of 13 steps that might be funded under the green form scheme and these included briefing counsel either generally or on a limited aspect and also the advice and opinions of counsel in connection with any of the funded steps.

[11] So while the Legal Aid Department's decision letter of 11 February 2002 referred applicants to the extra statutory scheme if it was intended to instruct counsel, the decision of 28 March 2003 in respect of the applicant's further application under the green form scheme and the Notice of 21 May 2003 to all Legal Aid practitioners, provided for funding for counsel under the green form scheme. Accordingly in this application for Judicial Review the Legal Aid Department did not seek to stand over the lawfulness of the decision of 11 February 2002. The applicant sought a declaration that the decision of 11 February 2002 was unlawful, save to the extent of the grant of funding. The respondent contended that the making of such a declaration was inappropriate because first of all, the decision of 11 February 2002 was authority for the grant of funding to the applicant's solicitor in connection with the preparation for the Inquest and secondly, the grant of funding for counsel under the green form scheme and for extended solicitors hours had been successful on 28 March 2003. Before determining what, if any, relief would be appropriate in the circumstances it is necessary to consider the further developments that have taken place.

The Hemsworth (No 1) evidence of the operation of the green form scheme.

[12] First of all the applicant raised the issue of the respondent's good faith because of the manner in which they had dealt with the evidence in Hemsworth (No 1) in relation to the operation of the green form scheme. The applicant contended that the Legal Aid Department had misled the court in Hemsworth (No 1) in that Miss Hawthorne had asserted on affidavit that the green form scheme extended to counsel and to the work referred to by the applicant's solicitor; that the Legal Aid Department was no longer adopting

that position in relation to Counsel and was engaged in debate about the proper scope of the green form scheme before the conclusion of Hemsworth (no1); that the Court was not informed about the true position; that Miss Hawthorne's statement of the position under the green form scheme was said to have influenced the decision of Kerr J in Hemsworth (No 1).

[13] Further to the applicant's allegation of bad faith against the Legal Aid Department, discovery of relevant documents was made to the applicant and Miss Hawthorne was cross-examined by counsel for the applicant upon the hearing of the present application for Judicial Review.

[14] There is a wealth of detail in the evidence on this issue and I summarise as follows –

(a) Miss Hawthorne took up the position of Director of Legal Services of the Legal Aid Department on 12 February 2001. She outlined the green form scheme to the applicant's solicitors in the letter of 25 June 2001 after consultation with a senior legal assistant and an official from the Department's green form section. She confirmed her outline of the green form scheme in an affidavit sworn in Hemsworth (No 1) after consultation with counsel for the Lord Chancellor.

(b) After the applicant's solicitors' application under the green form scheme on 22 January 2002 Miss Hawthorne attended a meeting which included the Civil Manager of the Legal Aid Department, who raised for the first time her belief in the existence of a previous Legal Aid Committee decision not to use the green form scheme to brief counsel, to which approach it was said there were exceptions. The Committee Chairman, who was a solicitor and not employed by the Legal Aid Department, requested research into the previous Legal Aid Committee decision and the basis of that decision.

(c) The Civil Aid Manager produced a copy letter of 8 August 1990, which letter was said to reiterate the Department's policy regarding the instruction of counsel. That this was not being treated as an absolute bar on counsel is apparent from the Civil Aid Manager's comment as to the stage and level of complexity, if any, at which it would be reasonable to authorise counsel, and if reasonable, what work should counsel be authorised to undertake and at what level of fees.

(d) There followed exchanges of correspondence and meetings between officials of the Legal Aid Department and the Northern Ireland Court Service in relation to the scope of the extra statutory scheme and the green form scheme. A schedule was drawn up under the heading "Steps which may be necessary in the course of representing the next of kin at a controversial/exceptional inquest". The schedule listed 18 pre-hearing steps and provided columns that

anticipated decisions being taken in relation to whether each step would be funded under the green form scheme or the extra statutory scheme.

(e) The NICS and the Legal Aid Department had different views on responsibility for the funding of some of the steps. At a meeting on 8 February 2002 the Legal Aid Committee Chairman took the view that if there had been an earlier decision by the Legal Aid Committee not to involve counsel in the green form scheme then that position should be maintained. If counsel were to be instructed the funding should be provided under the extra statutory scheme. Accordingly the decision letter of 11 February 2002 directed the applicant's solicitor to the extra statutory scheme if they intended to instruct counsel.

(f) On 11 February 2002, in a letter from the Northern Ireland Court Service to Miss Hawthorne, the NICS view of the schemes was outlined and this included funding for counsel under the green form scheme, and whether there was a need for directions from the Legal Aid Committee in relation to the briefing of counsel, and the Legal Aid Department was to consider further any opinions, advices or directions provided by counsel and to forward views to NICS in due course.

(g) The issue came before the Fees Assessment Committee on 15 March 2002 where consideration was deferred until after the judgment of Kerr J.

(h) Meanwhile Miss Hawthorne had taken seriously ill and was absent from work from 19 February 2002 to 25 April 2002. The issue does not appear to have been considered from the date of its deferral in March 2002 until the judgment of Kerr J on 7 January 2003.

(i) After judgment in Hemsworth (No 1), and upon receipt of counsel's opinion, the Legal Aid Committee and the Northern Ireland Court Service agreed those steps that would be covered by the green form scheme and those steps that would be covered by the extra statutory scheme. This led to the Legal Aid Department's Notice to Legal Aid practitioners of 21 May 2003 setting out the 13 steps covered by the green form scheme, which included funding for Counsel.

[15] Miss Hawthorne was criticised for not correcting the Legal Aid Department's position presented to Kerr J in Hemsworth (No 1). The position in relation to counsel had been changed and the proper scope of the green form scheme was by no means clear, as is evident from the internal deliberations and the exchanges between the Legal Aid Department and the NICS. By letter and affidavit in 2001 Miss Hawthorne set out the operation of the green form scheme, as she believed it to be. When the scope of the green form scheme was considered in January 2002, after the applicant's solicitors'

application, she remained of the same view as to the scope of the green form scheme, although doubts had been raised by others. The change of direction in relation to Counsel occurred from 8 February 2002 when the Chairman took the decision to direct applicants to the extra statutory scheme, as appears in the applicant's case in the decision letter of 11 February 2002. Miss Hawthorne was absent from work from 19 February 2002 to 25 April 2002. There were hearing dates in Hemsworth (No 1) up to April 2002. Kerr J refused an application by the applicants for leave to file further affidavits dealing with the application for funding under the green form scheme.

[16] Affidavits had been filed in Hemsworth (No 1) on behalf of the Legal Aid Department explaining the operation of the green form scheme in a manner that was not consistent with the approach taken in the decision letter of 11 February 2002. The Court should have been informed that a different approach was being taken by the Legal Aid Department to that which appeared in the evidence. That was not done. Miss Hawthorne was absent from the Department when that might have been done. I reject the criticism of Miss Hawthorne. Responsibility for the Court not being informed of the position that had developed lies with the Legal Aid Department.

[17] Decisions on the green form scheme were made by the Legal Aid Committee, with delegation to officials of the Department or the Fees Assessment Committee, and administration by officials of the Department. It appears that, with Miss Hawthorne's illness, the coordinating hand, who had been directly involved with the Judicial Review, was removed. It may be that others who were involved in dealing with the operation of the green form scheme were not fully aware of the position in Hemsworth (No 1), perhaps because it involved a decision of the Lord Chancellor and not the Legal Aid Department. The Committee deferred consideration of the green form scheme pending the judgment of Kerr J. It is not clear that the Committee knew the details of the evidence filed in Hemsworth (No1). When Miss Hawthorne returned further consideration of the issue had been deferred. I received no evidence other than that of Miss Hawthorne, so the point of breakdown in communicating the change of position to the Court is not apparent, but at the very least there was an administrative failure in the Department.

[18] In any event I consider that Kerr J's conclusion on the scope of the green form scheme was based on his interpretation of the legislation, and that while he noted Miss Hawthorne's evidence accorded with his interpretation, it does not appear that the evidence filed on behalf of the Legal Aid Department altered the decision in Hemsworth (No 1). In so stating, it is not intended to diminish in any respect the importance of the evidence placed before the Court being a complete and accurate account of the facts, and the importance of disclosure being made to the Court of any change that occurs after the evidence has been filed, whether or not the party concerned is the respondent in the proceedings.

The Access to Justice (Northern Ireland) Order 2003

[19] The applicant contends that the green form scheme is not compliant with Article 2 of the European Convention. Legal Aid for representation of the victims' families at Inquests must be practical and effective and not theoretical and illusory. The respondent contends that it is inappropriate to embark upon the examination of such an issue because of the developments that have taken place since the decision letter of 11 February 2002. Not only has the particular decision of 11 February 2002 been overtaken by the decision of 28 March 2003 to extend the grant of funding under the green form scheme, and the Notice of 21 May 2003 has set out the general operation of the green form scheme, but also the structure of Legal Aid funding has changed. The Access to Justice (Northern Ireland) Order 2003 established the Northern Ireland Legal Services Commission. Under Article 12(8) of the 2003 Order the Lord Chancellor may by direction require the Legal Services Commission to fund specified services and may authorise the Legal Services Commission to fund those services in specified circumstances or specified cases. The Lord Chancellor has issued directions under Article 12(8) of the 2003 Order requiring the Legal Services Commission to fund representation on behalf of the immediate family of the deceased at an Inquest concerning a death occurring in police or prison custody or during the course of police (or other security services) arrests, pursuit or shooting, where satisfied that funded representation is necessary to assist the Coroner to investigate the case effectively and establish the facts.

[20] The applicant has made no further application for funding under the green form scheme but as the preliminary hearing of the Inquest has not yet taken place there may yet be preparatory work in respect of which a further application for funding under the green form scheme may be made. In November 2003 the applicant's solicitor made a further application under the extra statutory scheme. From 2 November 2003 applications have been transferred to the Legal Services Commission. The Legal Services Commission forwards the applications to the Northern Ireland Court Service, which in turn forwards the applications for a decision by the Minister. Offers of funding made before 2 November 2003 continue to be processed in accordance with the systems in place at the time of the grant of funding. The Legal Aid landscape has changed but there may remain extant with the Legal Aid Department the completion of the earlier grant of funding under the green form scheme.

In re McKerr

[21] Further, the respondent refers to another development, which it is said renders inappropriate any examination of the compatibility of the green form scheme with Article 2. The House of Lords' decision of *In re McKerr* [2004] 1 WLR 807 is to the effect that there is no obligation in domestic law to undertake an Article 2 compliant investigation into deaths occurring before

the introduction of the Human Rights Act 1998 on 2 October 2002. Accordingly the respondent contends that the applicant has no entitlement to a declaration in respect of the alleged breaches of Article 2.

[22] On the other hand the applicant points to the undertakings that are said to have been given on behalf of the State, to the effect that Inquests in Northern Ireland will be Article 2 compliant. It is contended that the House of Lords ruling in *McKerr* does not alter those undertakings. After the European Court of Human Rights delivered judgment in the cases of *Jordan & Ors v United Kingdom* the Government submitted a Package of Measures to the Committee of Ministers which, at paragraph 26, dealt with the absence of Legal Aid for the representation of the victim's family. The Package referred to the scheme established by the Lord Chancellor and stated that in deciding whether to grant Legal Aid under the scheme the Lord Chancellor would be obliged by virtue of the Human Rights Act to act in a manner compatible with the Convention. The respondent contends that the Lord Chancellor complied with that obligation in deciding to "grant" Legal Aid to this applicant and new applications will be dealt with under the statutory scheme.

[23] Further the applicant points to the concession by Counsel on behalf the Secretary of State in October 2003 in *Hugh Jordan's Application* for Judicial Review that, by the Package of Measures, the Government had publicly indicated its reliance upon the Inquest as the means of delivering Article 2 compliant investigations. It might be added that the same position was adopted by Counsel on the hearing of *McCaughey and Grew's Application* [2004] NIQB 2. In addition, and apparently as a result of assurances given by the Secretary of State, HM Coroners have accepted that Inquests will be conducted in an Article 2 compliant manner and an undertaking has been given to that effect by HM Coroner for Greater Belfast on 7 January 2004 in respect of the Inquest into the death of the applicant's husband. However there is some uncertainty as to how the State regards the undertakings that Inquests will be Article 2 compliant, in relation to deaths such as that of the applicant's husband which occurred prior to 2 October 2002, given the decision of the House of Lords in *McKerr*.

The green form scheme and Article 2

[24] It may be that the developments arising from both the 2003 Order and the *McKerr* decision have not rendered academic the outworking of the decision in the present case. I propose to consider the applicant's criticisms of the green form scheme. The applicant's contention that the green form scheme has not been Article 2 compliant relies on four grounds. First the Notice to Legal Aid practitioners of 21 May 2003 has not removed all the obstacles to funding of preparatory work for inquests. Secondly the scheme is not cost effective. Thirdly delay is endemic. Fourthly the victims' families are at a disadvantage when compared to the availability of public funding for other representation at Inquests.

[25] There has been development of the legal aid funding for the preparatory work for Inquests since this applicant first became involved. Prior to the decision letter of 11 February 2002 the operation of funding for preparatory work for Inquests was in its infancy. Between the decision of 11 February 2002 and the further decision of 28 March 2003 the operation of such funding was a matter of debate within and between the Legal Aid Department and NICS, and development of the green form scheme was held in abeyance pending the judgment in Hemsworth (No 1) on 7 January 2003. There followed the agreement on the division of responsibility between the Legal Aid Department and NICS, which led to the notice of 21 May 2003. The green form scheme operates under the Notice of 21 May 2003 and has involved the Legal Services Commission from November 2003.

[26] For the period up to March 2003 the applicant's first three criticisms of the green form scheme are well founded in relation to the limited reach of the scheme, the lack of cost effectiveness and the delay in processing applications. It is only necessary to refer to the above history of the applications for green form funding for the shortcomings of the system to be manifest.

[27] In respect of the further period from the Notice to Legal Aid practitioners in May 2003 until the Legal Services Commission became involved in November 2003 there is no evidence about any application made under the green form scheme. However the applicant's solicitor has maintained his criticisms of the scheme based on previous experience and the belief that the terms of the Notice to Legal Aid practitioners does not suggest that the problems will be remedied. In any event it was contended that the scheme, as operated under the Notice, did not provide retrospective funding, did not identify the criteria by which items of work would be covered and did not identify the criteria by which "controversial/exceptional" inquests would be identified. Miss Hawthorne in reply states that she did not believe there were any outstanding applications for assistance under the green form scheme and that it was likely that, in future, applications would be dealt with more expeditiously and that all necessary items of work would be covered.

[28] In the absence of evidence in relation to the processing of particular applications under the green form scheme after the issue of the Notice of 21 May 2003 I would not be prepared to make any finding in relation to the reach or cost effectiveness or expedition of applications. On the particular issues of the absence of retrospective funding and of criteria for identifying eligible items of work and inquests, the extent to which such points have impacted on a particular application or applications in general has not been established. A further complaint that there was no provision for funding applications for legal aid was addressed eventually in September 2003. In general I would not consider it appropriate on an application for Judicial Review to make findings as to whether particular items should or should not be included in the funding scheme or to make findings in the abstract.

[29] On the applicant's fourth criticism, the applicant contrasts the representation for the victim's family with the representation available for other parties at Inquests. In the present case the other parties are the Chief Constable of the Police Service of Northern Ireland and the individual police officers who were concerned with the deceased. The applicant anticipates that those interested parties will be legally represented at the Inquest and that all aspects of that legal representation will be publicly funded. This is said to be in contrast to those legal representatives who rely on the green form scheme which has operated to inhibit representation by reason of the criticisms made by the applicant about the scheme's limited reach, lack of cost effectiveness and delay. I have been satisfied that such criticisms are well-founded up to the decision of 28 March 2003 but I have not been satisfied that those criticisms are well-founded by the operation of the green form scheme thereafter. In Hemsworth (No 1) the applicant made this same submission in relation to the operation of the extra statutory scheme. At paragraph 45 Kerr J stated -

"I do not accept the applicant will be placed at a disadvantage vis a vis other participants in the inquest by availing of the extra statutory scheme. As Lord Hope of Craighead said in *McClellan v Buchanan* [2001] 1 WLR 2425.2439 (in the context of a claim that a limitation on the availability of legal would create an equality of arms between the defendant and the prosecuting authorities) it is necessary to demonstrate that the other participants 'will enjoy some particular advantage that is not available to the defence or that would otherwise be unfair'. I do not consider that this has demonstrated. The combined effects of the green form scheme and the extra scheme should be sufficient to ensure that the applicant is provided with the services of solicitors and counsel of equal calibre to those who will represent other parties. There is no reason that preparatory work that is properly undertaken will not be adequately remunerated under one or other or both schemes."

[30] At that time, unknown to Kerr J, the Legal Aid Department and the Northern Ireland Court Service had not agreed their respective responsibilities for the necessary steps in representation at Inquests. That agreement has since been reached and there is no evidence that since 21 May 2003 preparatory work that is properly undertaken will not be adequately remunerated under the green form scheme.

[31] As appears above I find that the green form scheme operated up to March 2003 with inadequate reach in view of the statutory scope and in a manner that did not render it cost effective and that the ultimate decision was accomplished after undue delay, which shortcomings rendered the scheme incompatible with the obligation to provide appropriate legal representation for the applicant. Accordingly the applicant has established an entitlement to declaratory relief to that effect. When such entitlement is established the applicant should generally obtain such relief as in the arena of public law it is important that legal entitlements should be clear to the citizen and the public authority and should gain public recognition. In the present case I accept that the issue of legal representation at Inquests is considered to be of such acute public concern that the position of the present applicant should be the subject of a declaration.

[32] There will be a declaration that the decision of 11 February 2002 under the green form scheme was not sufficient to offer practical and effective legal representation for the family of the deceased in relation to the preparatory work for the Inquest, for the purposes of Article 2 of the European Convention. For the reasons appearing above I make no declaration in relation to the decision of 28 March 2003 or the operation of the green form scheme after the issue of the Notice to Legal Aid Practitioners of 21 May 2003.