Neutral Citation: [2014] IEHC 312

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2012/951 JR

BETWEEN:

THE REHAB GROUP

AND

REHAB LOTTERIES LIMITED

Applicants

-AND-

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent

Judgement of Ms Justice Iseult O'Malley delivered the 5th June, 2014.

Introduction

1. In 1997 the Government introduced a non-statutory scheme intended to benefit a number of identified charitable bodies, including the applicants, who claimed that they had been financially disadvantaged by the establishment of the National Lottery. The scheme provided for an annual payment to each of these bodies, upon submission of an application demonstrating compliance with certain criteria.

2. In December, 2012 the respondent communicated a decision that the scheme was to be phased out over a period of three years.

3. There are, apparently, up to 19 charities that will be affected by this, ranging in size from large to very small. The applicants are the most obviously affected in terms of the sums of money they stand to lose, although not perhaps in terms of percentage income.

4. The issues in this case concern the process whereby the respondent came to that decision. The applicants do not contest his legal power to reduce the funding available to the scheme or indeed to abolish it. Nor do they assert in these proceedings that the decision was in the legal sense unreasonable. The claim is that they were denied fair procedures, in that they were not informed or consulted about the respondent's intentions. They say that because of this, they were not able to address the reasons for his decision before it was made. In the circumstances they had no opportunity to make representatives to the respondent on a matter that affected their interests.

5. The applicants also claim that the respondent has mischaracterised the nature of the scheme, on the basis that, they say, it is not a grant scheme but a mechanism for distributing a compensation fund.

6. The respondent says that the nature of the decision is such that the applicants had no entitlement to make such representations before the decision was made and that, in any event, the decision was made in accordance with the principles of fair procedures. It is asserted that in making the decision the respondent had regard to all relevant considerations.

Background

7. The first named applicant is an organisation engaged in the provision of health and social care, training and education, rehabilitation, employment, residential and supported accommodation services for people with disabilities and those who are socially disadvantaged. It provides these services through its subsidiaries RehabCare, National Learning Network and Rehab Enterprises.

8. The second named applicant supports the activities of the first named applicant and its subsidiaries by raising funds from the sale of lottery products, such as scratchcards and bingo games, through a network of 1,400 retail agents nationwide and through the promotion of online games.

9. For the most part this judgment does not distinguish between the two applicants.

10. From about 1952 onwards, the applicant had raised a proportion of its funds by way of a football pools game. Under the terms of the Gaming and Lotteries Acts, the limit that could be paid out in prize money for such games was set from 1956 at £500 per week. It is said by the applicants that by 1986 the football pools product held about 25% of the lottery market in the State.

11. It should perhaps be noted that the Gaming and Lotteries Act, 1956 prohibited most forms of lottery other than those run for charitable purposes.

12. The National Lottery was established under the provisions of the National Lottery Act, 1986 and commenced selling products in March 1987. By virtue of s.32 of that Act, the National Lottery was exempt from the prize cap imposed under the Gaming and Lotteries Acts. The cap continued to apply to the applicant and all other persons or bodies engaged in the running of lotteries within the meaning of those Acts, although it was raised in 1987 to £10,000.

13. The applicants had made an unsuccessful bid for the licence to run the National Lottery. Based, they say, on the experience gained in putting together that bid, a scratch-card product was launched in November 1987. However, they say that its market share fell to 15% in the first year of the National Lottery and to 5% in 1989. They say that the share currently amounts to 1% of the market. The applicants attribute their inability to compete with the National Lottery to "the unfair advantage enjoyed by the National

Lottery which could offer unlimited prizes whereas the other lotteries were subject to a weekly prize cap". The National Lottery prize has been known to be as high as €190m, while the weekly cap for other lotteries is currently €20,000.

14. The applicants also claim that if there was a level playing field for all lottery operators, it is likely that they would have a 15-20% share of the market. This would give them an annual turnover of €150m and net proceeds of €40m.

The Scheme
15. It appears that over the years following 1987 the applicants and certain other charitable bodies who felt that their income had been adversely affected by the operation of the National Lottery made those feelings known to Government. Lobbying and negotiating on the issue seem to have continued for several years.

16. In 1997, the government established a fund of approximately £5m, financed from the National Lottery surplus via the vote of the Department of Finance, to be distributed through a "Scheme to assist private charitable lotteries whose products are in direct competition with similar products being sold by the National Lottery" (hereafter "the scheme", sometimes referred to as "the Charitable Lotteries Fund" or "CLF"). The published criteria provided that the scheme, which was initially to operate for three years with provision for a review, was confined to such lotteries. It included a number of conditions relating to accountability on the part of the recipient charities. The disbursement of the monies was provided for as follows:

> *"Subject to the availability of funds and to the other conditions of the scheme being met, it is intended that eligible charities would be assisted in proportion to the volume of their annual gross lottery turnover in the three most recent years of account as certified by the organisation's auditors. "*

17. The turnover in question was that which related to lottery products which were directly comparable with National Lottery products.

18. The scheme was initially funded entirely out of the National Lottery surplus. However, since about 2005 onwards the amount of Lottery-related funds spent on "good causes" has exceeded the Lottery surplus and has been part-funded by the Central Exchequer. This particular scheme is therefore publicly funded to the extent of 35%.

19. The scheme continued to be administered by the Department of Finance until 2011, when it was transferred to the respondent's Department. It was reviewed and renewed a number of times over the years and the level of the fund was occasionally increased. It was in 2002, following one such review, that the weekly prize cap under the Gaming and Lotteries Acts was raised from £10,000 to €20,000.

20. The applicant is, by a long way, the largest beneficiary under the scheme. In 2011 it received €3.905m out of a total fund of €6m. In 2012 the figure was approximately €3.924 out of €6m. A handful of other charities received six figure sums and the rest received smaller amounts.

The 2004 review
21. The applicants have placed significant reliance on the report of the 2004 review, which was carried out by a committee of officials of the Department of Finance, as providing a "sophisticated and detailed" analysis of the scheme.

22. The report discussed the context in which the scheme was introduced and noted the fact that during the Oireachtas debate about the establishment of the National Lottery the Government had given a commitment

> *"to provide compensation, if necessary, for any adverse impact of the Lottery on the fund-raising incomes of existing private lotteries. "*

23. It may be important to note that the document uses the term "compensation" more than once. However, the objective of the scheme was identified as being

> *"to enable private charitable lotteries whose revenue-earning capability had been adversely affected by the National Lottery to supplement their income with funding from the National Lottery surplus."*

24. The report refers to submissions made by the applicants to the effect that the "*inequitable legislative situation*" had caused them a loss of about €110m, based on the assertion that without the prize cap they would have had at least 10% of the market. The committee noted that it was not in a position to verify this claim and that in 2001 DKM consultants had commented that the applicants' estimate "*that 10% of the revenues of the National Lottery would flow to charities if the lottery did not exist*" appeared to be "*somewhat of an over-estimate*."

25. The committee considered the impact of the National Lottery on charitable fundraising but was of the view that this was difficult to assess with any accuracy. However, it supported retention of the scheme in the following passage:

> *"The Committee does not consider abolition of the Scheme to be a desirable option at the present time. It is evident to the Committee that the Scheme has been generally effective in meeting its primary objective. While it might be argued that the private charitable lotteries who have secured funding from the Scheme no longer directly compete with the National Lottery due to their relative size and position in the marketplace and therefore do not warrant compensation, the fact of the matter is that this compensation is being provided precisely for this reason. The Committee considers that the issue of compensation is still relevant and necessary in the context of the marketplace and the conditions within which these lotteries operate, and that a measure compensation.*
>
> *The Committee believes that the abolition of the Scheme would rekindle the pressures which led to the establishment of the Scheme in 1997."*

26. The committee took the view that if the Scheme was abolished, some other type of compensation mechanism would be necessary and that any other scheme would be likely to be more costly to run and more bureaucratic in nature.

27. The recommendation of the Committee was that the scheme should be continued, subject to a review by an Inter-Departmental committee after a further three years. It advised that account should continue to be taken of relevant developments in relation to increasing expenditure by the State in the health sector, changes in the tax treatment of donations to eligible charities and the possibility that National Lottery sales might by then have "evened out". The scheme was continued and the sum made available to the

fund was increased in 2005.

28. A further review of the scheme took place in 2009. No explicit recommendation was made as to the future of the scheme at this time but a comment was made that it

> *"may have had the unintended effect of encouraging the charities to continue to run a lottery in order to draw down funds. "*

29. Three charities, not including the applicants, were said to be running their lotteries at a loss or for a very small profit. It was also suggested that the charities should, by that time, be expected to have "contended" with the existence of the National Lottery and that the scheme should not run "*for an indefinite period of time.* "

30. In 2011 a further examination of the scheme was carried out by Central Expenditure Evaluation Unit of the Department of Public Expenditure and Reform, under whose aegis the scheme was at that time operating. This was described as a "Focused Policy Assessment". The applicants were not invited to participate or make submissions, and do not appear to have been apprised of the outcome before these proceedings. The report this time came to the conclusion that there were identifiable flaws in relation to "the rationale, objectives and continuing relevance of the scheme" and that

> *"the case for continuing with the scheme appears to be very weak".*

31. In the view of the evaluators, the charities were not in competition with the National Lottery, since the motivation for purchasers of their products was arguably different, and it was "*highly contestable*" that they had been adversely affected. It was considered that the primary effect of the scheme was not to address the market distortion *vis-a-vis* the National Lottery, but to create a real distortion as between its beneficiaries and charities who entered the market after 1997.

32. Meanwhile, in the 2010 Budget the fund had been reduced from €8.61m to €6.0m. The applicants had objected unsuccessfully to the reduction and had continued to correspond with the Minister for Finance on the issue.

Meeting of 21st November, 2011

33. Responsibility for the administration of the scheme was transferred to the respondent's department on the 1st May, 2011 (apparently as part of the general policy area of regulation of charities). The applicants then contacted the respondent with a view to arranging a meeting with him to discuss the scheme.

34. The meeting eventually took place on the 21st November, 2011 and was attended by Ms. Angela Kerins and Mr. John McGuire, respectively CEOs of each of the applicants, and Mr. Frank Flannery, a director of the first named applicant. The respondent was accompanied by an advisor and by an official from the Charities Regulation Unit.

35. According to Ms. Kerins

> *"At the outset the Minister was unfamiliar with the origin and purpose of the Scheme. However following an explanation and overview by the Applicants to the Minister as to the origin and importance of the Scheme, he agreed that the Scheme continued to play an important role and after that meeting we were under the clear impression that the Minister was fully supportive of the Scheme."*

36. In keeping with this impression, Ms. Kerins wrote in late December, 2011 to thank the respondent for the meeting, conveying a "*deep appreciation*" of "*the close and sympathetic*" attention given by him. It was also stated that the result in the recent budget had been "excellent" from the applicants' perspective and that the applicants were very grateful for what was clearly the respondent's "*effective advocacy for the CLF*".

37. The respondent has exhibited a note of the meeting, the relevant parts of which are here set out in full.

> *"The Minister welcomed the Rehab representatives to the meeting and said that he was happy to hear their views in relation to the Charitable Lotteries Association (CLF).*
>
> ***Rehab Group representatives outlined that:***
>
> *The CLF was established as a compensation fund to provide financial assistance to charitable lotteries who could not compete with the National Lottery. The Rehab view was that the National Lottery has prospered largely as a result of eliminating the opposition via prize restrictions etc. As a result, since the National Lottery was established, the market share of the charitable lotteries has dropped from some 10% to 1%.*
>
> *The Department/PER decision to cut funding in 2010 was implemented on a unilateral basis; there was no prior discussion with the affected charitable lotteries. This was unfair.*
>
> *The CLF is not an item of public expenditure- it is sourced from the National Lottery Beneficiary Fund, as opposed to the Exchequer. By cutting the funding on an arbitrary basis, the Government is treating the CLF as an ordinary expenditure line. Rehab representatives considered there had been a change of procedure in D/Finance in 2005/6, which allowed for this switch. However, Rehab did not have documentary evidence of this.*
>
> *The Charitable Lotteries Fund has always operated in retrospect. Therefore, payments under the Fund are always a year behind*
>
> *Mr. Flannery said that the charitable lotteries substantially gave up their ability to earn, in return for the establishment of the CLF. In effect, the State bought off the competition, leaving charitable lotteries as 'zombie ' companies. The National Lottery now dominated the market- the clock cannot be turned back in this regard It would constitute a serious breach of faith if, having decimated the opposition, the Government were to pull the funding. Mr. Flannery was 1000% behind Rehab in their opposition to this.*
>
> ***The Minister raised the following issues:***
>
> *The Minister queried the size of the profits accruing/rom the scratch card product of the Rehab Lottery. Figures*

revealed a profit of only £9,452 based on product scratch card sales of close to £4m. This profit ratio seemed disproportionate. Could that activity become more profitable in terms of administration and other costs?

The Minister queried the number of people employed in the operation: were they full-time or part-time?

Rehab Response:

Rehab finds it difficult to operate economies of scale in relation to lottery products. This affects profitability. Tensions between Rehab and the National Lottery also hinder sales. The sales of radio bingo products are more profitable than the scratch cards.

Rehab employs two permanent employees and some agency personnel for this operation.

Minister's response:

The Minister thanked the Rehab Group representatives for attending the meeting. It was a timely meeting in the context of the Expenditure Review which is currently underway.

The Minister undertook to examine the issues further and revert to Rehab.

Rehab response:

The Rehab representatives thanked Minister Shatter for the meeting. Mr. Flannery reiterated that it would be morally wrong to pull the CLF Scheme. In addition, if the pole position of the National Lottery was successfully challenged in the courts, it would liberalise the field This would allow lotteries from outside the country to compete with the National Lottery. Such outside competition could have much more impact on National Lottery profits than the charitable lotteries. "

The 2012 audit

38. In April 2012 the Internal Audit Unit of Department of Justice and Equality undertook an audit of the first named applicant's use of the funds provided to it under the scheme in 2011. The purpose of the audit was stated to be an analysis of expenditure and value for money of those funds, with an assessment of governance in the organisation.

39. As part of this process, the applicant furnished the auditor with a presentation on the scheme entitled "*The Charitable Lotteries Fund- the origin of the fund and why it should continue*".

40. This document stated that there were "*compelling reasons*" why the scheme should continue. It described the CLF as

> *" a deal negotiated between Rehab and officials in the Department of Finance ...The deal was a good one for the State in that it effectively bought off competition for the National Lottery."*

41. The claim is made that if Rehab had been able to compete with the National Lottery from day one, it could have had a 10% market share by today. That situation was no longer thought to be possible:-

> *"With the passage of time and the extent to which the national Lottery is so established after 25 years of trading, there is no way that Rehab or any other commercial entity could acquire a significant share of the Irish lottery market if the restrictions in the Gaming and Lotteries Act 1956 were relaxed and other operators could compete on an equal basis to the National Lottery. "*
>
> *For the State to abolish the CLF, it would be reneging on an agreed deal knowing that the National Lottery is now protected in perpetuity".*

42. The presentation emphasised the negative publicity that might flow from a decision to abolish the CLF.

43. A draft report by the Internal Audit Unit was sent to the applicants on the 2nd August, 2012 with a request for observations to be forwarded by the 24th of that month. The report is, in large part, favourable to the applicant, finding a sound corporate governance structure and effective application of systems of internal control. However, it was considered that the costs associated with the applicant's lottery represented a significant percentage of overall sales revenue leading to a low profit margin. A recommendation was made that the applicant address this by reducing the costs. Other contentious aspects, as far as the applicants are concerned, related to recommendations that there should be a signed agreement as to the specific use of the funds, and regular reporting thereon. There was also an issue as to whether some portion of the funds had been used for administrative expenses.

44. The applicant took issue with the draft report on a number of grounds but primarily because of what was viewed as a "serious and material misunderstanding" on the part of the auditor. In her response to it, Ms. Kerins said

> *"This fund is a commercial agreement between the Government as owners of the National Lottery and the owners of private charity lotteries. This commercial agreement was the result of the National Lottery operating under vastly more enabling legislation, thereby creating a very uneven commercial playing field. This agreement acknowledged the unequal legislative provisions pertaining to the charity lotteries. The basis for this mechanism of compensation was reiterated in the most recent comprehensive review of the scheme by the Department of Finance [i.e. the 2004 review]. It is generally accepted that the agreement constituted a very favourable arrangement for the Government's lottery. "*

45. Ms. Kerins referred to various extracts from the 2004 report. She then went on:

> *"The funding of the CLF is a first charge on the profits of the National Lottery as it relates to its cost of doing business. It is not an Exchequer grant to organisations to provide services. It is therefore clearly not appropriate for the Department of Justice to seek to influence the operations of a private body by insisting that its earned income be applied to certain areas. "*

46. The application form for the 2012 payment was sent to the applicant during the course of this and the ensuing correspondence, and, based on the recommendations in the draft report, sought a greater level of detail in relation to the proposed spending of the money. The applicants furnished the information required, without prejudice to their position that the respondent was not entitled to it.

The Decision
47. The impugned decision of the respondent was communicated to the applicants by way of a letter dated the 5th October, 2012 to Ms. Kerins. After noting that the applicant had received almost €80m under the scheme since its inception, the respondent referred to the current economic situation and the urgent need to cut Government spending. He continued as follows:

> *"The Charitable Lotteries Scheme has been examined as part of this process. In the broader context of the savings that have to be made, I have concluded that this Scheme cannot be justified in the current circumstances and must be phased out. As you know, assistance under the scheme is apportioned according to the gross annual sales of the lottery products of the applicant organisation without regard to either the profitability of the lottery or the proportion of the revenue it generates that reaches the charitable cause in whose name the products are sold This means that the scheme has not provided any incentive for charities to operate lotteries with a low cost base or to ensure that a high proportion of the revenue generated goes directly to the cause with which the ticket is identified According to the information supplied to my Department in line with the requirements of the scheme, both of these features are relevant in the case of Rehab Lotteries. Information supplied as part of Rehab's 2011 application for assistance under the scheme shows that the percentage of gross sales retained for the benefit of the charitable organisation over the period 2008 to 2010 averaged around 1% for scratch card instant win lotteries and around 15% for draw lotteries. In these circumstances, it is hard not to conclude that some lotteries assisted by the scheme have come to serve as vehicles for leveraging Government funding, rather than as an effective means of fundraising directly from the public for a charitable cause, as originally intended It is not possible to justify expenditure of this nature in the current circumstances.*
>
> *It is intended that the assistance available under the Scheme will begin to reduce next year, that it will reduce gradually for a period of three years, and that no further payments will be made under the scheme after 2015 ...*
>
> *... The scheme is being phased out in this gradual basis in order to give affected organisations as much time as possible to adjust to the change. This is also why I am informing those affected well in advance of the first planned reduction in assistance. In this way, your organisation has an opportunity to examine its current fundraising methods, and, where necessary, to plan and put in place new fundraising practices that can raise funds from the public in a more directly profitable way. In this connection, you may also wish to note that I am considering an increase to the current limits on private lottery prizes and envisage making regulations to this effect under the Gaming and Lotteries Act of 1956 in the coming months. I would appreciate your giving consideration to this and would welcome any submission you may wish to make on this important issue within the next six weeks. I understand that the decision to phase out the Charitable Lotteries Scheme will come as a disappointment to you and would like to emphasise that it has been taken in the context of the urgent need to reduce Government expenditure, and following due consideration of the scheme itself The decision relates solely to this particular scheme and has no bearing on the levels of Government funding received by the Rehab Group each year for a variety of other sources across the Government system. This decision should not be taken in any way as a reflection on the very valuable work carried out by the Rehab Group across many sectors of society. "*

48. The applicants say that this decision, if implemented, will cause irreparable harm to them and to the other charitable lotteries affected.

49. Leave to seek judicial review was granted on the 19th November, 2012.

The respondent's evidence
50. A number of affidavits have been filed on behalf of the respondent.

51. Ms. Una Ni Dhubhghaill, Principal Officer of the Department of Justice and Equality, puts the proposed phasing out of the scheme in the context of the financial position of the State and the need to cut Government spending. She also refers to the various criticisms of the scheme in the reviews since 2009.

52. With specific reference to the applicants, she says that the proportion of funds raised by them through lottery products is low. The percentage of gross sales in 2010 and 2011 was about 1% for scratchcards and about 15% for draw lotteries. It is suggested that the money spent by the applicant in running its lotteries might be better invested in other fundraising activities. Withdrawal of the scheme will amount to a phased withdrawal of about 2% of the applicant's annual turnover.

53. It is stated that the criteria for the scheme has never required applicants to demonstrate that the National Lottery has adversely affected their receipts and that there was never any commitment on the part of the Government to offer compensation for such adverse effects, such that State assistance would be divorced from the activities assisted. The scheme does not meet the description of a compensation scheme in that the fund is not allocated on the basis of losses incurred but on an audited annual turnover of the relevant products.

54. Ms Ni Dhubhghaill says that she believes that the purpose of the meeting on the 21st November, 2011 was to discuss the scheme and its future, and that at that meeting

> *"the applicants were afforded and availed of the opportunity to make their case for the retention of the scheme and to argue against any reduction in the level of assistance under it".*

55. This assertion is "categorically rejected" by Ms. Kerins, who says that the purpose of the meeting was to brief the Minister on the importance of the scheme to the applicants, and that there was no mention by him of an intention to wind it down. The applicants were never invited to make representation on such a proposal.

56. Ms Ni Dhubhghaill refers to what she describes as a "thinly veiled threat" of a legal challenge to any withdrawal of the scheme, which she says is inconsistent with the expression of surprise when the respondent ultimately made the decision. The respondent was, she says, "*at all times non-committal with regard to future payments under the scheme*". She asserts a belief that the applicants were aware that it was in the respondent's contemplation that the scheme would be wound down, and that their representations were "*explicitly sought*" and were furnished, including the threat of legal action should the scheme be wound down.

This could only be explained by an awareness on the part of the applicants that such a possibility was within the contemplation of the respondent. The respondent did refer to the comprehensive review underway at the time in all Government Departments.

57. However, in a supplemental affirmation, while maintaining the view that the applicants had made explicit representations as to the future of the scheme, she says that the respondent was awaiting legal advice as to the possibility of abolition and that it would therefore have been premature to give an explicit indication of any particular intention. Ms Ni Dhubhghaill also says:

> *"The respondent does not accept that he is under an obligation to share all information as [sic] comes into his possession that may influence his thinking on whether to discontinue the scheme or make like decisions. As the applicants are aware, a key informational input into the decision to discontinue the scheme was the State 's budgetary situation and the need to make spending reductions, which inevitably involved a consideration of various factors, such as the respective merits of various projects on which the department expended monies and the balancing of competing interests. It would be unworkable in practical terms for all such information to be made available to parties in positions such as the applicants. "*

58. The respondent was, she says, fully briefed on all aspects of the scheme and the final decision was taken with the approval of the Taoiseach.

59. Ms. Ni Dhubhghaill asserts that the 2004 report was fully considered by the respondent in making his decision.

> *"Other factors considered included the lack of incentive to beneficiaries of the Scheme to operate the lotteries in an efficient and profitable way and, when considered against the backdrop of the catastrophic decline in the economic circumstances of the State, the contents of the 2004 review, now over eight years old, were not found to be persuasive. "*

60. The point is also made that the applicants are incorrect in considering that the money available under the scheme is funded by the National Lottery. Since 2005, 65% comes from that source with the remainder coming from the Exchequer.

61. In summarising the reasons for the decision Ms Ni Dhubhghaill states that they included

> *"(a) The urgent need to generate savings in light of the decline in the economic circumstances of the State.*
>
> *(b) The unacceptable, in the respondent's view, existing criteria for the scheme, which incentivise the running of charitable lotteries at extremely low profit margins or at a loss.*
>
> *(c) The fact that these criteria also contribute to a situation in which the normal business incentive to keep administration costs down for reasons of profitability, does not apply and evidence that some of the lotteries assisted under the scheme, including the applicants, have unacceptably high administration costs.*
>
> *(d) The low proportion of an already low profit margin that actually reaches those whose assistance is the charitable purpose of the applicant.*
>
> *(e) The fact that the consumers of the applicant's lottery products are likely to be unaware of that fact and that they are also likely to be drawn disproportionately from lower socio-economic groups.*
>
> *(f) The fact that some of the lotteries benefiting from the scheme appear to have essentially become mechanisms for leveraging government funding rather than vehicles for raising charitable funding directly from the public as originally intended*
>
> *(g) The reputational risk for the respondent and his department and for the government in general arising from these features of the scheme and of the lotteries it supports. "*

62. Affidavits have also been filed on behalf of the respondent explaining the view of the Department of Finance on the necessity of cutting public expenditure and the particular budgetary position of the Department of Justice. I do not consider it necessary to set these out.

Submissions

63. Mr. Holland SC on behalf of the applicants submitted that the respondent's decision to wind up and ultimately abolish the Scheme was a decision of a type that required him to hear representations from those parties compensated by the Scheme.

64. In summary, it is submitted that the scheme was, not compensation for "wrong done", in the sense of a legal wrong, but compensation for "damage caused". This was, in factual terms, a continuing damage and was acknowledged as such by the State. The income accruing to the applicants was therefore something not to be seen simply as a grant-in-aid. It is argued that because of this, there was a legitimate expectation that the scheme would not be discontinued without consultation.

65. It is said that the decision to abolish the scheme causes damage to the interests of the applicants in relation to both their income and their reputation - the latter primarily because at least some of the reasons given reflect adversely on the applicants- and that both of these considerations give rise to a right to be heard.

66. Mr Holland relies primarily on the case of *Dellway Investments v The National Assets Management Agency* [2011] 4 I.R. 1. In particular he has cited the judgment of Hardiman J and the references therein to passages from De Smith and from Hogan and Morgan. He says that the distinctions previously thought to apply between cases involving definable rights and those involving a broader concept of "interests" are no longer valid. Similarly, the principle that policy decisions do not attract the rules of natural justice must be modified at least to some extent in cases involving identifiable individual persons or entities.

67. The argument that urgent measures were needed because of the national economic situation is rejected on the basis that it appears from the evidence that the decision was under consideration for over a year. In these circumstances there was nothing to prevent consultation with the affected parties and no real practical difficulties.

68. On behalf of the respondent, Mr. Brian Kennedy SC submits that the decision was not of a class that required prior consultation with Rehab. Primarily, he argues that the decision was a policy decision, made in the public interest and based on policy

considerations. In these circumstances there was no obligation on the Minister to accord a hearing to those affected.

69. In characterising the decision as a policy matter, Mr Kennedy points to the State's economic situation, and to concerns that the scheme was not efficient either as a compensation mechanism or as a method of promoting fundraising by the relevant charities. In this context it is important to note that the respondent says that the criticisms made of the scheme were not intended as, and should not be taken to be, criticisms of the applicants. The intended point to be made was that the nature of the scheme gives rise to inefficient lotteries with low, or no, profits. There is thus no damage to the applicants' reputation to be inferred.

70. Like the applicants, the respondents rely on *Dellway*. It is submitted that that case concerned, in effect, one individual and the effects on his rights and interests of the decision in question in the case, whereas the instant case involves broader policy concerns. The issue affects, not just the applicants but the other beneficiaries under the scheme and indeed those charities which have never benefited from it, as well as, potentially, the National Lottery and other relevant Ministers.

71. The respondent denies that the applicants had a legitimate expectation to the continuation of the scheme, on the facts, but says that, even if they did, such expectation or any other entitlement to be consulted was outweighed by the unprecedented economic circumstances surrounding the making of the decision. The respondent further submits that, without prejudice to any of these arguments, the Minister did in fact hear Rehab's representations at the meeting on the 21st November, 2011 where the applicants themselves raised the possibility of a legal challenge in the event that any attempt was made to abolish the Scheme.

Relevant authorities
72. The leading Irish authority relied upon by the applicants is the decision of the Supreme Court in *Dellway Investments v NAMA* [2011] 4 I.R. 1.

73. *Dellway* concerned a decision of the National Asset Management Agency ("NAMA") to acquire certain loans of the applicants pursuant to the provisions of the National Assets Management Act, 2009. The loans in question were considered to be "eligible bank assets" within the meaning of the Act. The statute made it clear that the decision whether or not to acquire was a discretionary one, rather than depending purely on the application of the statutory criteria. An opportunity was to be provided to the bank, whose assets the loans were, to give its views but there was no reference to the position of the borrower.

74. The relevant issue, as far as the instant case is concerned, was whether NAMA was required, in the exercise of its discretion, to act in accordance with the principles of constitutional justice, and to grant to borrowers in a position similar to that of the applicants an opportunity to make representations before the decision to acquire was made.

75. The appellants contended that the decision interfered with rights held by them by virtue of their ownership of the properties securing the loans including their right to deal with the properties as they saw fit; the income stream flowing from the properties, their contractual rights with the banks that made the loans and their reputations (particularly in the case of the individual appellant, Mr. McKillen). They lost in the High Court, essentially because that court considered that the legal rights of borrowers were not interfered with by the acquisition of the loans by NAMA.

76. The Supreme Court held unanimously that NAMA was obliged to hear the appellants' representations before making the decision. It is a feature of the case that it was accepted in each of the six judgments given that the decision was, as a matter of fact, capable of interfering with the legal rights of the appellants - for example, Finnegan J engaged in a close analysis, with which a number of the other judges expressly agreed, of the potential effects on the appellants' equity of redemption with respect to the mortgages. Murray CJ underlined the point that the interests involved in the case were property rights and interests derived from the ownership of property, as well as contractual rights. The application to the appellants of the provisions of the Act would deprive them of their normal entitlement to manage independently their affairs related to those properties. Denham J (as she then was) considered in addition that the acquisition of the loans by NAMA would affect the appellants' business, involving potential loss, expense and damage to reputation.

77. However, the test for holding that the right to make representations arises does not appear to have been necessarily confined to situations where an applicant's legal rights are, or may be, interfered with.

78. Dealing with the question "What triggers the right to a hearing?" Hardiman J quoted and approved as a statement of the position in Irish law the following passage from the 6th edition of De Smith's *Judicial Review of Administrative Action*:-

> *"The term 'natural justice' has largely been replaced by a general duty to act fairly which is a key element of procedural propriety. On occasion, the term 'due process' has been invoked. Whatever term is used, the entitlement to fair procedures no longer depends upon the adjudicative analogy, nor on whether the authority is required or empowered to decide matters analogous to a legal action between two parties. The law has moved on; not to the state where the entitlement to procedural protection can be extracted with certainty from a computer, but to where the courts are able to insist upon some degree of participation in reaching most official decisions by those whom the decisions will affect in widely different situations, subject only to well-established exceptions. "*

79. He considered that this position was in fact well-established in Irish law and cited passages from varying leading textbooks to similar effect.

80. Hardiman J acknowledged the existence of recognised grounds for the exclusion of fair procedures, listed in Hogan and Morgan *Administrative Law in Ireland* under the heading "*The rules do not (usually?) apply".* The categories listed include "*Policy*", (considered below) which Hardiman J viewed as inapplicable to a discretionary decision in relation to defined assets.

81. Macken J agreed with the judgment of Hardiman J, while considering that each of the rights claimed by the applicants in the case was "*a genuinely serious constitutional right which they are justified in invoking for the purpose of asserting a right to be heard*".

82. Fennelly J outlined the issue in the following terms:

> *"The central, and the most difficult, question in the appeal concerns whether the right to be afforded fair procedures in accordance with natural and constitutional justice depends on the contemplated decision amounting to an interference with rights, in the sense of legal rights only, guaranteed by the Constitution. "*

83. He referred to *Haughey v. Moriarty* [1999] 3 I.R. 1, which appeared to him to apply a test based on a person being affected. At para. 460 of the reported judgment he said

"It does not appear to me that it has been established that the right to be heard before a contemplated decision is made depends on establishing interference with a specific and identifiable right. It is difficult to discern a principled basis for restricting the right in that way. The courts have never laid down rigid rules for determining when the need to observe fair procedures applies. Everything depends on the circumstances and the subject-matter. The fundamental underlying is liable to affect my interests in a material way, it is fair and reasonable that I should be allowed to put forward reasons why it should not be made or that it should take a particular form. It would be unjust to exclude me from being heard. For the purposes of being heard, I would not draw a sharp line, what is sometimes called a 'bright line ', of distinction between an effect which modifies the legal content of rights and a substantial effect on the enjoyment or exercise of rights. I would fully endorse the first part of the statement of the High Court, quoted above as follows:-

> *'The court is not satisfied that any mere possibility that there might be an indirect consequence for a party's rights affords the party concerned a right to fair procedures. There must be a real risk that a party's rights will be interfered with in the event that there is an adverse decision. '*

... If the requirement is that there be direct interference with the legal substance of the rights, the statement is too narrow. It should be capable of including material practical effects on the exercise of the rights."

84. It appears to have been accepted by all members of the Court that mere diminution of in the value of an applicant's property would not suffice to bestow a right to be heard.

85. In *Treasury Holdings v. NAMA* [2012] IEHC 66, Finlay Geoghegan J considered the applicability of the principles set out in *Dellway* to a decision by NAMA to demand repayment in respect of facilities of the applicant which were in default and, failing repayment, to appoint receivers to properties which comprised the security for the facilities. Relying on *Dellway*, the applicant made the argument that a decision to enforce had material practical effects on the exercise and enjoyment of its rights and interests.

86. The respondent argued that *Dellway* did not go that far. It was also contended that since the applicant was both insolvent and in default, it had no rights which could be described as being adversely affected; that its indebtedness exceeded the value of the security and it had, therefore, no right to an equity of redemption; that it had no right to such income as it was receiving but rather held it in trust for its creditors; and that it had by entering into the original contract agreed that the loans could be enforced, thereby depriving itself of any rights capable of being adversely affected by the decision.

87. The applicant did not succeed in obtaining the relief sought- however, this was on the basis of an estoppel arising from events subsequent to the making of the impugned decision.

88. In holding that a right to be heard arose in the circumstances, Finlay Geoghegan J said that she considered that the Supreme Court had, in *Dellway*, rejected the argument that an applicant must show that the decision interfered with a legal right. The applicant company had rights and interests, the practical exercise and enjoyment of which were affected by the decision. Its insolvency did not mean that it had no right to such income as it was receiving, rather that the directors had obligations in deciding how that income was to be used. She rejected a floodgates argument to the effect that every NAMA debtor might have to be given a right to be heard, on the basis that the circumstances in which the right arises are always fact-specific. In this case, it was dependent upon the nature of the rights held by the applicant in its property and development business, and the entering into a Memorandum of Understanding between the parties.

89. On the facts of the case, there had been no indication from NAMA that it had the intention of considering taking a decision to enforce - in fact there had been a "deliberate policy" not to disclose the possibility. This was a breach of the obligation to act fairly and reasonably, by reason of the failure to afford an opportunity to be heard.

90. In their treatment of the categories of decisions which may be exempt from the rules of natural justice, Hogan and Morgan make the point that "policy" questions may involve either specific, one-off situations affecting a very limited number of persons; or may concern a potentially unlimited category of interest. In general, they say that the closer a decision is to the second scenario the less likely it is to be construed as attracting the rules.

> *"In regard to policy decisions which affect only individuals (as distinct from quasi-legislative actions) it seems that it is now too late in the day to argue that such decisions do not attract the rules. "*

91. This analysis is supported by reference to decisions in deportation cases, which clearly require the application of the rules of natural justice.

92. However, it is not suggested that the policy exemption is obsolete in its entirety.

93. The "policy' category is closely identified with the category of cases to do with legislation, where the *audi alteram partem* rule is generally considered to be inapplicable for reasons both of principle and practicality. The reasons of principle relate to the fact that the area of legislation is within the domain of the elected representatives of the people, and therefore not generally a matter for the courts.

Discussion and conclusions

94. This is an area of law which appears to be in the process of development. It is indeed difficult to draw what Fennelly J described as "a bright line" between decisions attracting the rules of natural justice and those within the policy exemption. All of the authorities make it clear that the analysis must be based on the facts and circumstances of each individual case.

95. It seems to me to be helpful to begin with an analysis of the nature of the scheme. The applicants concede, correctly in my view, that it was not established to provide compensation in the legal sense of that word - in other words, its existence is not to be taken as an acknowledgement by the State that any legal wrong was done to the relevant charities in the setting up of the National Lottery. It never aimed to measure actual losses suffered, whether or not such a measurement would have been feasible.

96. The argument made in correspondence by Ms Kerins to the effect that the scheme was created on foot of a commercial agreement, and that the fund was a "first charge" on the National Lottery's income, was not pursued.

97. I accept that funding from the scheme was something more than a simple grant, which might be given one year and not the next. It was an effort made by the executive, after years of lobbying by the applicants and others, to ameliorate the difficulties faced by a specific group of charities.

98. In this context, it would certainly have been the case that while the scheme operated, the beneficiary charities would all have had certain rights in respect of its administration. They would have been entitled to demand that it be operated fairly and in accordance with the set criteria. If the responsible Minister at any given time had decided to drop an individual charity from the scheme - for example, because of a perceived deficiency in financial accounting - that body would undoubtedly have been entitled to reasons and to an opportunity to be heard. However, it is accepted that at all times the scheme was to be subjected to periodic review and that the beneficiaries have no legal right to its continuance. There was never a representation, express or implied, that a decision to terminate the scheme would not be taken without consultation.

99. This is therefore, a case where the applicants cannot assert a legal right to the payments, or make a claim that the termination of the payments interferes with any other legal right of theirs other than, perhaps, their right not to be wrongly damaged in their reputation.

100. It seems to me that the decision to establish the scheme was rooted in policy considerations, as were the various decisions in favour of its retention over the years. Unfortunately, the coming of harsher economic times seems to have produced a harsher policy analysis. Whether that analysis is correct or not is not for this court to adjudicate upon in these proceedings. The case made by the applicants is that, if given the chance, they could have made representations on the issues raised, but that does not alter the overall policy setting of the respondent's decision to end the scheme.

101. That policy decision is focused on the scheme as it applies to the entire class of charities affected by the particular situation, and not on individual considerations applicable to any individual organisation.

102. The reasons given for the decision, in the letter of the respondent and in the evidence presented on his behalf, are in my view overwhelmingly policy-oriented. It seems clear that the respondent and his advisors had simply come to the conclusion that this was not a justifiable expenditure of public money. Insofar as the letter contains what might be perceived as criticism of the applicants, it does so by way of illustration of the inefficiency of the scheme. It is understandable that the applicants are disgruntled by this, particularly in circumstances where they had been given the impression that the respondent was favourably disposed to their cause, but this factor does not mean that the decision was specific to them and gave rise to a right to be heard in defence of their reputation.

103. The economic situation of this State over the last number of years does not require to be described. However, I would agree with the applicants in this case that the length of time taken to make the impugned decision does not point to an urgency such as would, on its own, excuse the respondent from undertaking a consultation process if it was otherwise legally required.

104. It is also true that in this particular case a consultation process would not have been obviously impracticable or unduly onerous, given the limited numbers of persons or bodies affected. In this context I would comment that the meeting in November, 2011 cannot realistically be seen as the opportunity for the applicants to put their case, since it is accepted that the respondent did not tell them that he was contemplating the abolition of the scheme or what his potential reasons were. The respondent has in this case stood on the principle that he was not obliged to consult. It is of course the legal entitlement of any litigant to take this approach.

105. In the circumstances of this case I do not consider that *Dellway* is of assistance to the applicants. It is clear that at least some of the members of the Supreme Court adopted a formulation in regard to the right to be heard which does not depend on assertion of a risk of interference with specific, enforceable legal rights. However, the context of that case was such that I do not consider it possible to say that the traditional exemption of policy decisions from the application of the rules of natural justice has been abrogated.

106. I therefore refuse the reliefs sought.