

THE HIGH COURT
JUDICIAL REVIEW

Record No: 2012/916

BETWEEN**OLESJA CERKOVSKA****APPLICANT****-AND-****MINISTER FOR JUSTICE AND EQUALITY, THE ATTORNEY GENERAL, THE LEGAL AID BOARD AND IRELAND****RESPONDENTS****Judgment of Mr Justice Edwards delivered on the 21st day of May 2014****Introduction:**

This is the Court's judgment in respect of preliminary issues raised by the respondents in their Statement of Opposition filed in response to this application for various reliefs by way of judicial review. Before considering the points at issue, and indicating the court's determination, it is necessary to set out the background to these proceedings and in broad brush terms to indicate what the case is about.

Relevant background:

The applicant is the subject matter of two European arrest warrants on foot of which Republic of Latvia seeks her rendition. One warrant seeks her rendition for the purposes of prosecuting her for two theft type offences. The other seeks her rendition for the purposes of executing a sentence of one year's deprivation of liberty imposed upon her by a Court in Latvia in 2009 for nine theft type offences. Both of those warrants were endorsed for execution in this jurisdiction following which the applicant was arrested and brought before the High Court. She is the respondent in those proceedings, which are both entitled "The High Court, between The Minister for Justice and Equality, applicant, and Olesja Cerkovska, respondent", and which bear the record numbers 2011/368 EXT and 2011/369 EXT, respectively. A surrender hearing is currently pending in both matters, and is adjourned pending the outcome of these judicial review proceedings.

At the arrest hearing in both cases the applicant intimated a desire to receive a recommendation from the Court that she be provided with legal representation at state expense in circumstances where it is claimed that she needs it but cannot afford it. At the time that these intimations were given, the Attorney General's Ad Hoc Legal Aid Scheme was still in operation. This scheme initially came into effect on the 1st of May 2000 and up until the 30th of June 2012 it was administered on behalf of the Attorney General by the Courts Policy Division in the Department of Justice and Equality. On the 1st of July 2012 responsibility for administration of the scheme was passed to the Legal Aid Board. The Attorney General's Scheme has since been replaced by the Legal Aid (Custody Issues) Scheme and no issue arises in regard to that. The intimations given by the applicant for the purposes of the Attorney General's Scheme are being treated as applications for the purposes of Article 9(a) of the Legal Aid (Custody Issues) Scheme. As required by Article 9(b) of the Legal Aid (Custody Issues) Scheme the applicant has obtained the Court's acknowledgment of her said applications. Moreover, she has filed a Declaration of Financial Means which is accepted by Legal Aid Board as uncontroversial. Counsel representing the Central Authority in the European Arrest Warrant proceedings has informed this Court that there is no objection to the applicant receiving the recommendations applied for. The Court has in the circumstances confirmed its intention to grant those recommendations. Accordingly, and as required by Article 9(c) of the Legal Aid (Custody Issues) Scheme, the applicant will at the end of the European arrest warrant proceedings receive a recommendation in the final Court Order that the Scheme be applied to the applicant.

In mid 2012 the applicant filed Points of Objection in both sets of European arrest warrant proceedings pleading (*inter alia*) objections to surrender on the basis that the Court is prohibited under s.37 of the European Arrest Warrant Act 2003 from surrendering the respondent in circumstances where to do so would be incompatible with this State's obligations under the European Convention on Human Rights (hereinafter the Convention). Specifically, the respondent sought to make the case that her proposed surrender would be disrespectful of her right to respect for family life as guaranteed under Article 8 of the Convention, and the cognate rights of her children, and in the circumstances disproportionate to any legitimate aim being pursued by the issuing state.

The applicant subsequently evinced a desire to place expert evidence before the High Court in support of her said s. 37 objections, and to that end wished to commission a psychologist's report concerning her children's psychological well being and how they might be affected if the proposed surrender were to proceed. Further, the Attorney General's scheme was still in operation at the time and applicant wished to have the outlays involved in procuring the said psychologist's report paid for under that scheme in circumstances where she maintains that cannot afford to pay for those outlays from her own resources.

On the 20th of July 2012 the applicant's solicitor sent an e-mail to the Chief State Solicitor informing him that it was intended to mention both cases to this Court on the following Tuesday in circumstances where "[w]e wish to obtain reports regarding the impact of the proposed surrender of [the applicant] on her and her family and in particular her son", and for the purpose of "asking the court to certify for such reports under the AG's Scheme".

The Chief State Solicitor replied by e-mail of the 23rd of July 2012, stating (*inter alia*):

"I have been instructed to object in the strongest terms to the application. If the recommendation is made, payment is in no sense guaranteed and only payment for reasonable costs incurred will be forthcoming. I am instructed that this type of report is not within the category of reasonable costs incurred."

The applicant's solicitor then wrote again to the Chief State Solicitor on the 30th of August 2012 stating (*inter alia*):

"The attitude of the Minister appears to be that there is a blanket decision that payment for reports of this nature are[sic] not to be contemplated in cases of this kind. In light of the fundamental importance of the point being litigated, and the direct and unavoidable requirement that to establish such a point of objection reports are required to place evidence before the Court to ground the application, we would ask you to indicate whether this is in fact the case."

The letter went on to threaten judicial review proceedings "[i]f it is the case that there will never be agreement to pay such outlays, even if the High Court recommends same, or the report has been pivotal to the case before the Court".

This in turn elicited the somewhat less absolutist, but from the applicant's perspective still unsatisfactory, further response contained in a letter from the Chief State Solicitor to the applicant's solicitor dated the 12th of October 2012:

"As you are aware recommendations for payment under the Attorney General's Scheme are made by the Judge who hears the case at the conclusion of the case. That being the position, it is not possible to pre-sanction payments under the Scheme in advance of the Attorney General's consideration of the final court order and any recommendation that might be made in relation to the individual case."

In the event that a recommendation is made, payment for reasonable costs incurred will be made. What amounts to "reasonable costs" depends on the circumstances of each particular case. In the normal course, one would not consider it necessary to engage the services of a child psychologist in order to explain to a court how family life is interfered with in the event of a parent's surrender to a foreign jurisdiction. A detailed affidavit completed by a family member would in general achieve that purpose."

However, should the Judge who hears the case make a recommendation at the conclusion of the case that the Attorney General's Scheme should pay for such a report, then the matter will be given due consideration at that stage paying due regard to the terms of the order made by the Court."

In the light of the Chief State Solicitor's said correspondence, on the 5th of November 2012, the applicant applied for, and was successful in obtaining, the leave of the High Court (Peart J) to seek various reliefs against the respondents herein by way of judicial review.

The judicial review proceedings as originally framed were somewhat overtaken by events in that it was announced in January 2013 that the Attorney General's Scheme would be replaced by a new scheme to be administered by the Legal Aid Board and to be known as the Legal Aid (Custody Issues) Scheme. The actual terms of the new scheme were later published in June 2013, together with a guidance document.

Article 13 of the Legal Aid (Custody Issues) Scheme deals with "Expert witnesses / report commissioning costs", and is in the following terms:

"Under the Scheme, the services of an expert witness (eg. a medical expert) or the commissioning of a report should only be sought where it is essential to the proper preparation and conduct of the client's case. It should be noted that reimbursement in respect of such costs is not automatic under the Scheme and a person or their legal representative wishing to obtain from the Court a recommendation that the Scheme would be applied for such costs shall formally notify the Court (personally or through his or her lawyer) at the earliest possible opportunity in the proceedings of the necessity for, and their intention to, seek the services of an expert witness or to commission a report. At the end of the proceedings, if the Court is satisfied that the services of the expert witness(es) or the commissioning of a report(s) were essential to the proper preparation and conduct of the case, the Court shall include in its final Order a recommendation to the Legal Aid Board specifying which witnesses and / or reports were essential and should be covered by the Scheme."

Notwithstanding the terms of the said Article 13, the applicant, has persisted in maintaining that as a matter of justice and fair procedures she is entitled to receive "pre-sanction" for the commissioning of the said report and retention of the services of the said expert. The Legal Aid Board has refused to grant the requested pre-sanction, and its detailed reasons for doing so are set forth in a series of affidavits sworn by Mr Patrick Gilheaney, Assistant Director of the Legal Aid Board, sworn in these proceedings. These reasons, which the Court is not required at the moment to consider in detail or engage with, include, but are by no means confined to, contentions that the scheme makes no provision for any pre-sanction, that the Legal Aid Board is obliged to operate the scheme as laid down in the said Article 13, and that there are good policy and administrative reasons for the way in which the scheme is in fact structured.

The applicant is persisting with her judicial review proceedings in circumstances where she considers that the issues as raised by her in those proceedings have not been resolved by the implementation of the Legal Aid (Custody Issues) Scheme. However, partly on account of the change in circumstances that has occurred since leave to apply for judicial review was obtained on the 5th of November 2012, the applicant sought, and on the 5th of December 2013 was granted, on consent, leave to add the Legal Aid Board as an additional respondent and to amend her Statement of Grounds accordingly. The amended Statement of Grounds upon which the applicant now relies was subsequently filed on the 13th of December 2013.

The leave to apply for judicial review granted by the High Court on the 5th of November 2012 relates to the applicant's claim for the following (relevant) reliefs (as amended by consent):

I. A Declaration that the Applicant is entitled to be told by the Respondents as to whether an item of outlay is going to be paid by the third named respondent under the Legal Aid (Custody Issues) scheme.

II. An order of mandamus requiring the Respondents, their servants or agents to inform the Applicant as to whether an item of outlay reasonably incurred by the Applicant is going to be paid by the third named respondent under the Legal Aid (Custody Issues) scheme.

III. (No longer being proceeded with)

IV. (No longer being proceeded with)

V. An order of mandamus requiring the Respondents to make a decision that the reasonable outlay with regard to the medical and/or psychological reports in relation to the issue of the impact of the proposed surrender of the Applicant on her and her family, and in particular on her two children, as are advised by Counsel as being essential to the preparation

of this case, will be paid by the third named respondent under the Legal Aid (Custody Issues) Scheme.

VI. A declaration that the position adopted by the Respondents, their servants and agents that no decision will be made as to whether outlay involved in the preparation of a case, such as the reports required in the case of the Applicant, will be made until the finalisation of the case, is ultra vires the Legal Aid (Custody Issues) Scheme.

VII. An order of certiorari quashing the decision by the Respondents, their servants and agents that no decision will be made as to whether outlay involved in the preparation of a case, such as the reports required in the case of the Applicant, will be made until the conclusion of the case.

VIII (No longer being proceeded with)

IX. A declaration that the position adopted by the Respondents, their servants and agents s offends against the principle of legal certainty.

X. A declaration that the Applicant is entitled to a stay in relation to the proceedings pending in the High Court in respect of the two European Arrest Warrants before the High Court.

XI. A declaration that it is incompatible with the principles of the right to fair procedures that the administration of the Legal Aid (Custody Issues) Scheme which governs the payment of the reasonable outlay of the costs of the Applicant in preparation for, and running of the case before the High Court, requires the issue of the preparation of an expert report to be considered by the High Court Judge hearing the European Arrest Warrant both at the commencement of the case, when the Applicant is required to notify the Court that the Applicant intends to obtain expert evidence, where no final decision is made at this juncture, and also at the conclusion of the matter, that the Court is required to make a further qualitative decision as to whether the report was essential to the proper preparation and conduct of the case, and that the recommendation that a Court makes at the conclusion of a case further requires approval and a decision to make payment the third named Respondent. The Applicant has now notified the High Court hearing the European Arrest Warrants under Section 13 of the Legal Aid (Custody Issues) Scheme in relation to the preparation of reports, but such notification does not in any way resolve the issue of whether such reports will be covered under the Legal Aid(Custody Issues) Scheme, as such decision is only made at the conclusion of the case, when a Court will only make a recommendation that such reports be covered if the report is then found to be essential as outlined above, and then a further decision has to be made by the Legal Aid Board as to whether it will abide by the recommendation of the High Court Judge.

XII. The costs of, and pursuant to, these proceedings"

The grounds upon which the said reliefs are sought are pleaded in the following terms:

"Relief I and II.

The Applicant is currently awaiting a hearing under Section 16 of the European Arrest Warrant Act, 2003 as amended, in respect of two European Arrest Warrants, from the Latvian issuing authority, wherein the Applicant has raised a point of objection regarding the interference with family rights under Section 37(l)(b) of the European Arrest Warrant Act, 2003 as amended, Article 42 of the Constitution and Article 8 of the European Convention of Human rights, necessitating the assessment of the Court in relation to the potential impact on the Applicant, her family and in particular her children. By e-mail of the 23rd July, 2012 the Chief State Solicitor's Office set out a fixed position wherein the Respondent stated that while it was for the Court to make a consideration of the Attorney Generals scheme only payment of reasonable costs would be forthcoming, and that this type of report is not within the category of reasonable costs incurred. By further letter received on the 12th October, 2012 the Respondent failed to resile fully from this position, which reflected a conflict as between the responses of the Respondent. The Applicant was placed in a position where there has been clear confusion with regard to the approach being adopted by the second named Respondent. The third named Respondent has now taken over the administration of the scheme which commenced on the 13th day of January, 2013 -the Legal Aid (Custody Issues) Scheme and it remains entirely unclear in the context of the Legal Aid (Custody Issues) Scheme that reports will be covered by the scheme until the conclusion of a case. The Applicant is not in a position to incur outlay for reports which are required to ground the point of objection raised, as a result of the said confusion and apparent fixed approach being adopted by the Respondents, their servants and agents. The Applicant requires to engage the services of a professional witness and is not in a position so to do wherein the second named Respondent has expressed views on the nature of "reasonable costs" seeming to prohibit the payment of such outlay, and where the third named Respondents, their servants or agents have not confirmed that there will be any payment to cover the necessary outlay to enable such report to be completed until the case is finalised.

Relief V

The second named Respondent, its servants and agents adopted a fixed policy approach, which approach is further conflicted by the provision of two responses in relation to the issue, but where it was made clear that the issue of what are deemed to be "reasonable costs" was the subject of such fixed policy as to cause immediate difficulty for the Applicant in seeking to procure the said report. The third named Respondent has not remedied the issues raised by the Applicant in the manner in which a decision is not to be made until the conclusion of a case. Further, the Legal Aid (Custody Issues) Scheme now in place requires a number of steps that an Applicant has to go through, but that despite the requirement that the Applicant notify the Court of its intention to seek such expert opinion, (the Applicant now having notified the High Court in accordance with Section 13 of the scheme of such intention) such notification does not constitute a recommendation, and a recommendation is not made until the conclusion of the case, at which time the Court is required to satisfy itself that said reports were essential to the proper preparation and conduct of the case, which recommendation requires further sanction by the third named Respondent.

Relief VI, VII and IX

The conditions of the Attorney Generals scheme (as effective from the 1st May, 2001) contained no requirement as to when the reasonable costs and outlay involved in the preparation of a case will be agreed, and nowhere within said conditions was it stated that such consideration or decision as to the payment of outlay should or will only be considered at the conclusion of a case. The Legal Aid (Custody Issues) Scheme as implemented from the 13th day of January, 2013,

which guidelines were made available in May 2013 has, as its focus, the decision that the scheme will only be recommended at the conclusion of a case, and that the provision of payment for a report of a professional nature will only be sanctioned at the conclusion of a case, and only if such report is deemed to have been required in the hearing of the case

This requirement that the reasonable costs of a case will only be given consideration at the conclusion of such case offends against the principle of legal certainty.

Relief XI

The Applicant in this case wrote to the other party involved in the case, namely the first named Respondent on the 20th day of July, 2012 to indicate that it was the intention of the Applicant to attend at the High Court to ask the learned Judge to indicate that a recommendation would be made with regard to the Attorney Generals Scheme in respect of required outlay to procure a report for a hearing, wherein the issue as set out above were raised. ... In light of the response received by the first named Respondent it was clear that no matter what a Court ordered that the first and second named Respondent would act on the basis of the correspondence received. Further, the current scheme as is in operation under the Legal Aid (Custody Issues) Scheme places an onus on an Applicant to, in effect seek pre-sanction for obtaining a report, by requiring the Applicant to notify the Court of its intention to seek such a report, but which notification does not then sanction in any meaningful way whether any outlay involved in such report will be paid, where the Court is then required to carry out an analysis of the report at the conclusion of the case, with the Court being required to certify that the report was essential for the preparation and conduct of the case prior to making a recommendation, which recommendation then falls for consideration by the third named Respondent."

The applicant has proffered a number of affidavits sworn by her Solicitor as evidence in support of her claim. As the Court is only concerned with a preliminary issue at this time, and not with the substantive issues raised, it will only refer to such evidence to the extent that it bears on the preliminary issue.

The respondents have filed a very detailed Statement of Opposition, dated the 5th of July 2013, joining issue with, and contesting, all of the substantive claims made by the applicant and, as already alluded to, the respondents' case in that regard is supported by the affidavits sworn in these proceedings by Mr Patrick Gilheaney, Assistant Director of the Legal Aid Board. Once again, as the Court is only concerned with a preliminary issue at this time, and not with the substantive issues raised, it will only refer to such affidavits to the extent that the evidence contained therein bears on the preliminary issue.

The respondents' Statement of Opposition also pleaded a number of preliminary objections. These were in the following terms:

- "1. The Applicant is not entitled to the reliefs claimed or any reliefs by reason of the prematurity of the within proceedings which this Honourable Court should decline to adjudicate on at this juncture. The within proceedings and all allegations relating to the operation of the Scheme insofar as it relates to expert reports for the Applicant's case (which are all denied) are entirely speculative, based on supposition and conjecture and thereby non-justiciable and/or premature at this juncture. On that ground alone, this application for discretionary relief by way of an application for Judicial Review should stand refused.
2. Further or in the alternative to the foregoing plea, the within proceedings are premature wherein the Applicant herein has not sought a recommendation from the High Court and/or payment for any expert reports as so commissioned on her behalf for the European Arrest Warrant Act proceedings at the end of such proceedings, which said approach has always been and remains open to her in the European Arrest Warrant proceedings and is operated in all other European Arrest Warrant cases before the High Court on a daily basis.
3. Accordingly and on the basis of the foregoing pleas, this application for discretionary relief by way of an application for Judicial Review should stand refused where the granting of relief would be futile and/or where no legitimate purpose is served by the proceedings at this juncture."

The Court has indicated its view that before engaging with the substantive issues raised in the proceedings it should rule in the first instance on the preliminary issues raised by the respondents. This judgment contains this Court's consideration, and determination, of those preliminary issues.

Submissions on behalf of the respondents

Counsel for the respondents has, both in written and in oral submissions, characterised the applicant's criticisms of the Legal Aid (Custody Issues) Scheme as being in "*the nature of polemic*". He has also submitted that the applicant's contentions are not based on any sound evidence or facts upon which this Court can be asked to adjudicate that some alleged injustice or prejudice arises for the applicant's conduct of the European arrest warrant proceedings. On the contrary, he has characterised the evidence adduced by the applicant, and in particular the evidence contained within the principal affidavit sworn by the applicant's solicitor, as "*nugatory and speculative*".

Counsel for the respondents has submitted that neither the applicant herself, nor her solicitor, contends that she cannot obtain a report from a suitable expert in the state for the purposes of the European Arrest Warrant proceedings. Nor does the applicant contend that she is being deprived of a fair hearing before the High Court arising from the operation of the Legal Aid (Custody Issues) Scheme itself in the sense of being unable to obtain evidence to put before the Court on a matter that is relevant to the European arrest warrant proceedings.

It is pointed out that no contention is made by or on behalf of the applicant that any expert that has been approached by her solicitor has refused to assess the applicant and her family and thereafter report to the applicant's solicitor on potentially relevant issues. It has further been submitted that the applicant has adduced no evidence to suggest that a suitable expert cannot be found in this state (or elsewhere), to carry out the required assessment and prepare the required report, who is happy to be retained on the basis that a recommendation for his remuneration will be sought in accordance with the Legal Aid (Custody Issues) Scheme and that, contingent upon that recommendation being granted, he may expect to receive such payment at the end of the proceedings in accordance with the said scheme.

Counsel for the respondents, in written submissions to this Court dated the 21st of March 2014, makes the following points (inter alia) with regard to the evidential deficit which he highlights:

21. The Applicant's evidence on these matters is of a nugatory and speculative nature wherein Ms. Butler's Affidavit of the 5th November, 2012 refers to getting a quotation for a preliminary report of €360 plus VAT and also states that it is "highly likely" that there would be a need to obtain a full report. Ms. Butler then states that she believes she would have to make that outlay herself to get the report but there is no actual evidence of any nature whatsoever on the matter in any express manner to suggest that the expert or experts in question would not provide reports and accept payment in accordance with the operation of the Scheme at the end of the case. This matter is not addressed at all.

22. Despite appearing to accept the clarifications provided in the letter of the 31st May, 2013 by the Respondents about the Scheme and its operation the Applicant's Solicitor herein has presented no further evidence on what efforts, if any, she has made to secure an expert to conduct an assessment and report of the Applicant's position. The guidance documents for the Scheme have been published since June 2013 and the Applicant's Solicitor has not addressed them in the context of any efforts made to obtain an expert report.

23. These are significant and, it is submitted, fatal deficiencies in the Applicant's evidence in this case as the Applicant's evidence is devoid of any real connection to the issues in the case. The Applicant's Solicitor's assertions about the commissioning of an expert report and all of the assertions made about the alleged deficiencies of the Scheme are of a purely argumentative and speculative nature only, where there is no evidence whatsoever that the Applicant's Solicitor is unable to secure an expert report for the Applicant's EAW proceedings and/or that the conduct of the Applicant's case in the EAW proceedings is going to be hampered or otherwise prejudiced by the operation of the Scheme.

24. Instead, rhetorical arguments are made in the Applicant's papers about the Scheme and its comparisons with the schemes operated for Civil Legal Aid and the Criminal Legal Aid Scheme. The height of the Applicant's Solicitor's case is that it is unfair to impose on her an obligation to obtain such an expert report where there is no guarantee during the proceedings themselves that there will be payment for such a report. It is contended that none of those assertions have any merit whatsoever where there is no evidence presented in this case whatsoever of any prejudice or unfairness to the conduct of the Applicant's EAW proceedings arising from the operation of the Scheme as it is operated at present.

25. The facility of obtaining a report for the Applicant's EAW proceedings is available. Once that report is deemed to be essential for the preparation and conduct of the Applicant's case then it will be recommended for payment by the High Court at the end of those proceedings in its final order. The Legal Aid Board will honour that recommendation once the Applicant's Solicitor has certified the necessity of obtaining the report in the required manner as set out in the Scheme documents.

26. The illusory nature of the Applicant's claims are shown by the fact, as set out in Mr. Gilheaney's Affidavit of the 8th July, 2013, that claims in respect of medical and other expert reports in EAW cases are being made by solicitors pursuant to the Scheme as it is being operated by the Legal Aid Board. Indeed, it is outlined in paragraphs 43 and 45 of Mr. Gilheaney's Affidavit that the Legal Aid Board has made payments in respect of expert reports, including doctor's reports and psychological reports, in respect of EAW proceedings since the Board took over implementation of the Scheme in June, 2012."

In conclusion, counsel for the respondent has submitted that the applicant has adduced no evidence whatever to suggest that the implementation of the Legal Aid (Custody Issues) Scheme deprives the applicant of any access to the High Court in the context of the relevant European arrest warrant proceedings and/or that same is unlawful by reason of prejudicing the applicant's ability to present an argument that she wishes to make in those proceedings. Counsel has urged upon the Court that these are judicial review proceedings and there is an onus on the applicant to establish that she is prejudiced by the matters of which she complains i.e., an alleged unlawfulness in the manner in which the scheme operates, or is operated; alternatively, she must establish that the respondents have fettered their discretion in some unlawful manner that has inured to her prejudice. He submits that the height of the applicant's solicitor's case is a contention that the Scheme could and should have been devised in a different manner.

Submissions on behalf of the applicant

The evidential deficit identified in the respondents' written submissions, and which forms the basis of the respondents' preliminary objection, is simply ignored and not addressed at all in the written submissions filed on behalf of the applicant. However it was briefly addressed by counsel for the applicant in oral submissions. Addressing specifically the objection that *"all allegations relating to the operation of the Scheme insofar as it relates to expert reports for the Applicant's case ... are entirely speculative, based on supposition and conjecture"*, (and in a general way also addressing the other preliminary objections based upon the alleged evidential deficit), counsel for the applicant conceded that his client's case could be characterised as "speculative" in as much as it is based upon the apprehension of a future event. He does not accept that it is fair to also say that it is based upon "supposition and conjecture". However, he has submitted, the respondents in raising these objections are entirely missing the point of the application, which focuses on the structural unfairness of the present scheme, about which the Court does have evidence. He contends that what is ignored by the respondents in making their preliminary objections is that the challenge is based around what he has characterised, in oral submissions, as the *"profoundly disincentivising effect"* that a structure such as the Legal Aid (Custody Issues) Scheme, and Article 13 of that scheme in particular, has on the ability of people to resist extradition or rendition proceedings. He submitted that the Court has evidence concerning the structure complained of, and of the reasonable apprehension of the very experienced solicitor who acts for his client. In the circumstances he submitted to the Court that the application is neither premature nor non-justiciable, and that the Court should proceed to determine the substantive issues that have been raised by the applicant.

The Court's decision

Have reflected upon the arguments presented upon this preliminary issue, and having considered all of the evidence adduced, the Court is disposed to uphold the respondents' preliminary objections, and refuse relief to the applicant. The case put forward on behalf of the applicant represents an elaborate, and at one level it has to be said a superficially attractive, construct. Regrettably, however strong the individual bricks comprising that edifice might be, it cannot stand in circumstances where it is built upon foundations of sand.

The applicant may not like, and may indeed profoundly disagree with, the structure of the Legal Aid (Custody Issues) Scheme and the policy considerations underpinning it, but that is not enough to entitle her to relief. Counsel for the respondent is correct in his submission that she has to establish that she has been, or is being, or will as a matter of probability be (as opposed to possibly may be), actually prejudiced by the matters of which she complains i.e., a fundamental unfairness, to a degree which is unlawful, in the manner in which the scheme is structured and/or operated; alternatively, she must demonstrate that the respondents in making a decision which affects her have fettered their discretion in some unlawful manner that has actually inured to her prejudice.

It was fair comment for counsel for the respondents to remark, as he did in oral submissions, that throughout the proceedings there has hardly been any mention of prejudice or injustice to the applicant herself. The case is strongly made that the scheme, as structured, contains a fundamentally unfair procedure, one that may possibly create a dilemma for any solicitor acting for a person in the applicant's position. It is suggested that in the absence of a pre-sanction mechanism with regard to payment of an expert's professional fees, a conscientious solicitor may feel that he/she has no option but to enter into a binding contractual agreement with an expert, in circumstances where there is no guarantee that the fees of that expert will in fact be recommended for payment under the scheme, and/or actually paid under the scheme, and where the solicitor would then be personally liable for the debt in the event of the request for a recommendation and/or payment being declined for any reason. However, the evidence in this case does not suggest that the applicant's own solicitor has actually been placed in that position, or will as a matter of likelihood be placed in that position.

The extent of the relevant evidence is that contained in paragraph 10 of the affidavit of the applicant's solicitor sworn in these proceedings on the 5th of November 2012. The deponent states there that:

"I further say and believe that I have carried out a number of enquiries and that I have confirmed that there is the possibility of having a preliminary report prepared at a cost of €360.00 plus VAT, but that it is highly likely that there would then require to be a full report, which would involve further outlay. I say and believe that in order to obtain reports I would have to make such outlay myself and that there is, in this case, a very significant likelihood that this outlay could never be recovered by me, in light of the singularly negative pre-judgement of the issue as has been exhibited by the Respondents, their servants or agents."

There is simply no evidence that the respondent has been unable to retain an appropriate expert on account of the terms of the Legal Aid (Custody Issues) Scheme. There is no evidence concerning either the number of experts that were approached or as to their identities. We are not told if such experts as were approached were informed of the terms of the Legal Aid (Custody Issues) Scheme. Neither are we told whether they were requested to provide their services on the basis and understanding that payment for same would be contingent upon, and subject to, a recommendation being obtained in that regard from the Court at the end of the case under Article 13 of the scheme, and authorisation of payment by the third named respondent following such recommendation. There is no indication that any expert approached declined to provide his services on that basis. Moreover, the evidence of the solicitor as to her belief that she will have to personally fund the outlays involved in order to obtain the necessary report(s) is not backed up. She does state any basis for that belief. She provides no evidence to suggest that any expert approached has sought to insist on payment of his or her fees "up front". Moreover, she does not state that she herself has felt compelled to enter a contractual relationship with an expert in the interests of her client and has actually done so. Neither does she state that she has incurred any actual outlays to date on her client's behalf in connection with the obtaining of expert evidence. Finally, although counsel for the applicant has spoken about what he characterises as "*the profoundly disincentivising effect*" of the provision complained of, there is no evidence that the applicant in this case has been disincentivised. There is no suggestion that she does not intend to pursue her Article 8 based s. 37(1)(a) objection on account of any perceived obstacle in her way.

In summary, there is no evidence that the applicant has suffered, is suffering or will as a matter of likelihood suffer, actual prejudice on account of any alleged unlawfulness in either the structure or operation of Legal Aid (Custody Issues) Scheme. Moreover, in circumstances where the applicant has not been refused payment of an expert's fees by the third named respondent, a prior recommendation having been obtained from the Court that such fees should be paid, she cannot make the case that the respondents have fettered their discretion in some unlawful manner. The correspondence from the Chief State Solicitor quoted earlier in this judgment could at most create an apprehension in the mind of the applicant that a problem might conceivably arise at some point in the future if and when a request for payment were to be made on foot of a recommendation obtained from the Court. However, notwithstanding the somewhat infelicitous and strident terms of some of the representations made by the Chief State Solicitor's office, in particular those contained in the e-mail of the 23rd of July 2012, account has to be taken, in assessing the reality of any such apprehension, of the evidence of Mr Gilheaney adduced by the respondents. His evidence is emphatically to the effect that claims for payment of expert's fees are, and will continue to be, assessed by the third named respondent in a fair and open minded manner and that due regard will be had by the Legal Aid Board to any recommendations by the Court including any specific recommendations in relation to any expert reports. These representations and assurances are proffered on behalf of all of the respondents, including the second named respondent who is the senior law officer in the State. Assurances were previously given to the Supreme Court on behalf of the second named respondent in *Minister for Justice, Equality and Law Reform v Olsson* [2011] 1 IR 384 concerning the manner in which the then Attorney General's Scheme operated, and would continue to be operated, and were readily accepted. The Court sees no reason to doubt the sworn representations of Mr Gilheaney, and therefore any apprehended future problem with payment of an expert's fees must be regarded as theoretical at best, and on the evidence presently before the Court that the risk apprehended is more perceived than real.

In conclusion, the Court's view is that the applicant's proceedings are indeed premature in as much as she cannot establish that she has suffered, or will inevitably suffer, or will suffer even as a matter of likelihood, any actual unfairness or breach of her rights in the circumstances that she puts forward. The evidential deficit identified by counsel for the respondents is real and incontrovertible in this Court's determination. In the circumstances the preliminary objections must be upheld and applicant's claim must therefore be dismissed *in limine*. It not necessary, or appropriate, that the Court should proceed with any further examination of the applicant's claims.