

THE HIGH COURT

1999 NO. 6961 P

BETWEEN

MARIE O'DONOGHUE

PLAINTIFF

and

THE LEGAL AID BOARD,
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND
THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Mr. Justice Kelly delivered the 21st day of December, 2004.

Introduction

1. The plaintiff experienced a delay of 24 months between contacting the first defendant (the Board) for legal aid and ultimately obtaining an appointment with a solicitor. A further month elapsed before she was given a legal aid certificate. These undisputed facts are at the heart of these proceedings. As a result of it the plaintiff claims that the defendants are guilty of breaches of statutory duty, negligence, and have denied her certain rights allegedly due to her under the Constitution and the European Convention on Human Rights. She seeks appropriate declarations and damages. A claim for a mandatory injunction was not pursued since she obtained the relevant legal aid prior to this action being brought.

The Plaintiff

2. The plaintiff married her husband, Robert O'Donoghue, on the 17th September, 1976. They had one son, Paul, who was born on the 2nd November, 1984.

3. At the age of 8 months Paul contracted a very serious and rare illness called Reyes Syndrome. He survived the acute stage of that disease but as a result of it he became, and remains, profoundly disabled. Paul's illness added further strain to what was already a very difficult marriage. That difficulty was created by the plaintiff's husband's excessive drinking.

4. Matters became so serious between the plaintiff and her husband on the 13th July, 1986, that she left the family home along with Paul and returned to her mother's home. She stayed there for a little less than a year, at which stage she was provided with a small house of just 500 square feet by Cork City Council. She lived there until 2002 when she was re-housed in a larger dwelling. That became necessary because Paul was getting bigger and additional equipment was required in order to deal with his disability.

5. The family home which she left in 1986 was privately owned having been purchased in the joint names of herself and her husband. The plaintiff contributed towards the repayment of the mortgage on that house.

6. For about a year after she left that family home, no maintenance was paid by her husband. In 1987 he commenced paying £40.00 per week.

7. By 1996 the husband was in a second relationship and the woman involved with him had moved into the former family home of the plaintiff. The plaintiff approached her husband with a view to his buying out her interest in that house.

8. She made contact with a Mr. O'Sullivan, a solicitor in Ernest J. Cantillon and Company, with a view to him, as she put it, "doing the legal arrangements around the paper work involved in the transaction".

9. Eventually the husband agreed to purchase her interest. The value of her half interest ultimately netted down to a figure of £12,000.00. She arranged with Mr. O'Sullivan to carry out the conveyancing transaction.

10. During her meetings with Mr. O'Sullivan, she mentioned to him that she was becoming concerned about her financial situation, particularly having regard to the needs of Paul. Mr. O'Sullivan indicated that he was not in a position to give advice on family law because it was not an area of expertise in his firm. He told her that because she did not have any means to employ a private solicitor her best course would be to go to a law centre run by the Board. At that time, she was not even aware of the existence of such a centre.

11. Her circumstances had become quite straitened at that time. The needs of Paul were increasing. A charitable organisation which had assisted her in the past was no longer able to do so. Her family were helping out. She had borrowed from them but was not in a position to repay. She had no savings and was becoming more and more concerned about Paul's position. I accept that he required a very high level of care involving physiotherapy, special diet, nutritional supplements and other assistance, all of which were expensive. She certainly had no means to be able to retain the services of a solicitor privately.

12. At that stage (1996), she was in receipt of the same sum for maintenance as she had been getting for the preceding 10 years and felt it was not adequate.

13. Her principal concern was to obtain maintenance which would be adequate to Paul's needs.

14. The £12,000.00 nett which she received for her half share in the family home was dissipated quite quickly, both in the repayment of borrowings and in providing for Paul's needs. On many occasions she asked her husband for an increase in the £40.00 weekly maintenance but was refused in no uncertain terms. Refusals were often accompanied with a threat of giving up his work.

The Legal Aid Centre

15. On foot of the suggestion made to her by Mr. O'Sullivan, the plaintiff first attended at the legal aid centre in South Mall, Cork on 2nd February, 1997. She went there without an appointment. After spending some time in a waiting room she was seen by an official to whom she gave some details of her income. She explained her need for maintenance and also expressed an interest in the possibility of obtaining a divorce.

16. Her primary concern was to have maintenance, particularly for Paul, increased. That was her main reason for consulting the law centre. The possibility of applying for a divorce was of secondary importance.

17. The plaintiff believes that she gave all necessary information to the official in the legal aid centre on that occasion and was told that she would be contacted within a few weeks in order to make an appointment to see a solicitor. She was told that if she didn't hear anything from the legal aid centre within six weeks she should telephone.

18. It is not clear whether the plaintiff returned to the legal aid centre on 27th February, 1997, with a view to filling out the formal application for legal services. She doesn't appear to have any recollection of that but the formal application is dated 27th February, 1997, although that date is not in the plaintiff's handwriting. As that was the date on which divorce was introduced, it is likely that her form was so dated having regard to the policy of the Board concerning the preparation of waiting lists for divorce announced in May, 1996 in office notice 24/96. Nothing turns on this since I am quite satisfied that by the end of February, 1997 the plaintiff had taken all necessary steps to apply for legal services from the Board and that the Board was apprised of her situation.

19. After February, 1997, the plaintiff regularly telephoned the legal aid centre at six weekly intervals throughout the remainder of 1997 and well into 1998. A pattern developed. Every six weeks she would telephone and would be told that the centre had no news for her.

20. Towards the middle of 1998, she was advised by whatever official she spoke to that she should put her concerns over the delay she was encountering in writing. She did so in a letter of 1st May, 1998. The letter reads:-

"Dear Sir/Madam

I first made application to the Legal Aid Board in February 1997 having been separated for more than ten years without any legal agreement. I am the mother of a severely handicapped thirteen year old boy and I am not getting adequate maintenance from my husband who has a well paid job. Since 1986, he has been giving me £40.00 per week and refuses to pay any more. I am in receipt of £84.00 per week social welfare payment.

I realise that there is a long waiting list due to the workload in the Law Centre but I would be most grateful if you could give me an appointment in the near future to discuss the possibility of getting a divorce but more importantly to sort out adequate maintenance for my son.

I look forward to hearing from you soon."

21. The plaintiff's letter was responded to by a letter of 18th May, 1998. It reads:-

"Dear Ms. O'Donoghue,

I refer to your application for legal aid in February 1997 and to your letter dated 1st May 1998 received here on 5th May 1998.

Unfortunately, due to limited resources at this Law Centre your place on the Waiting List has not yet been reached. However, once your place has been reached on our Waiting List, we will offer you an appointment."

22. The plaintiff continued to make contact with the legal aid centre throughout the remainder of 1998.

23. The plaintiff's evidence, which I accept, is that, on every occasion that she telephoned the legal aid centre, she told the official who spoke to her of her situation and that the reason why she was phoning was because of concern for her disabled child. She did so in the hope that it would give a sense of urgency to her situation.

24. On 4th December, 1998, the legal aid centre wrote to the plaintiff in the following terms:-

"Dear Ms. O'Donoghue,

I note that your name is on the waiting list for Legal Services at this Law Centre.

*I am now in a position to offer you an appointment to see a Solicitor. **Please telephone this Law Centre immediately for the purpose of making this appointment.***

*In any event, **if you do not contact the Law Centre within ten working days of today's date, I will assume that you are no longer seeking Legal Services at this Centre.***"

25. The plaintiff took up this offer and ultimately got to see a solicitor at the legal aid centre on 17th February, 1999. A detailed attendance was taken of the plaintiff's situation. The application for legal aid was duly processed and on 25th March, 1999, a legal aid certificate was issued in respect of the plaintiff.

26. On 31st March, 1999, the plaintiff was written to and told of the issue of the legal aid certificate. She was asked to sign the necessary form and return it together with £23.00 remittance, being her contribution due on foot of the certificate. She did so.

27. Proceedings were commenced against her husband on her own behalf and on behalf of her son, Paul, in the Cork Circuit Court. Those proceedings were listed for trial on 28th January, 2000, but were not reached on that date. They were heard the following month before His Honour Judge Clifford. The plaintiff was granted a divorce, an order for the custody of Paul and an increase in maintenance of £10.00 per week. That increase was quite small, reflecting a perceived change in the husband's circumstances in that he was believed to be no longer working. At the end of 1999, all maintenance payments had ceased when it was thought the husband became incapable of work. In fact, he was in effect suspended from work from October, 1999 to March, 2000. He returned to work in March, 2000 on full pay but his employment was terminated in May, 2001.

28. Subsequently, the husband was in receipt of a substantial redundancy package. Thanks to the activity of the plaintiff's present solicitor, an application was made to the Circuit Court in respect of this and it resulted in arrears of maintenance of approximately €7,000.00 being discharged, together with a lump sum of some €30,463.00 being paid, with a consequent reduction in the weekly maintenance to some €25.00 per week.

29. It is quite clear that the plaintiff was, at all material times, entitled to legal aid but had to wait for a period in excess of two years before she obtained her legal aid certificate.

30. I must now turn to see why delays of this magnitude were encountered by the plaintiff.

The Legal Aid Board

31. Mr. Frank Brady, the Director of legal aid with the Board has been an employee of it continuously since 1990. He was Assistant Chief Executive of the Board during the period that the plaintiff was waiting for her legal aid certificate from 1997 to 1999.

32. During that time, Mr. Brady had ongoing dealings with the State looking for additional funding for the board.

33. Mr. Brady gave evidence that between 1993 and 1996 the monies which were provided to the Legal Aid Board were adequate for its needs. However, between 1996 and 1999, the funding was inadequate and insufficient. He described the position as follows:-

"Question: Was that a significant inadequacy or an insignificant inadequacy?"

Answer: It was a very significant shortfall in the funding available to the board. The new legislation that came in, particularly in relation to divorce in 1997, was going to result in a significant increase in demand for legal services from the board and the funding was not provided to enable us to meet that demand. To the extent that we were not able to meet the demand that was coming to us, funding was inadequate.

Question: Was the State aware of the inadequacy of the funding?"

Answer: The State was very well aware of the inadequacy of the funding and we were in continuous correspondence with the State from before divorce came into operation, advising the State of the implications of divorce for the board in terms of demand for legal services and of the resources we needed to meet that demand."

34. Mr. Brady went on to describe the way in which he and other officials of the Board communicated the serious position of the Board to the other defendants.

35. On 18th June, 1996, Mr. Goodman, the Chief Executive of the Board, wrote to the Personnel Officer in the Department of Equality and Law Reform (the department then responsible for the Board) setting out details of additional staff required in order to continue to provide an efficient and effective legal aid service.

36. One of the posts sought was the restoration of the Deputy Chief Executive post. The person who formerly held that post was promoted into a position in the Department of Justice and the post had not been filled for years. Mr. Goodman concluded his memorandum pointing out that the staff required in it constituted "the minimum additional staffing requirements to enable the Board to carry out its role effectively". The proposal did not take account of the expansion of the service anticipated in 1997 or the impact which would be made as a result of the introduction of divorce in February, 1997.

37. It is quite clear that the Board was experiencing considerable additional work at that time (June 1996). The Civil Aid Act (which put the Board on a statutory footing) was due to come into force in October, 1996 and that involved a lot of additional work. The Board also had to contend with the Strategic Management Initiative which had been introduced by the Government, requiring each body to prepare a Corporate Plan or a Strategic Plan and have a greater involvement of staff in putting a focus on customer care and the efficient delivery of services to the public.

38. Mr. Brady outlined the work which was necessary in order to implement this Strategic Plan but agreed with me that all of that meant a lot more work to be done by the Board but with no appreciable improvement in the provision of legal services.

39. The Board not merely had to contend with these two developments, both occurring in 1996, but also had to anticipate the impact that divorce would make on the law centre network when it would become available in February, 1997. It clearly anticipated what was likely to occur.

40. Despite all of this, the Deputy Chief Executive post was not sanctioned until July, 1998, two years and one month after it was requested. And the same fate awaited most of the other staff appointments which were sought in the memorandum of 18th June, 1996.

41. Leaving the question of divorce to one side completely, it is clear, that, in June, 1996, the Board identified the administrative staff which it would require in order to provide a reasonable service.

42. There can be no doubt but that the Department of Equality and Law Reform was fully au fait with the position of the Legal Aid Board. In a memorandum of 3rd February, 1997, which was addressed, inter alia, to the secretary of that department and the Minister, a Mr. Donal Costello, of that department, said:-

"The expansion of the Legal Aid Board since 1994 has created an increased demand for the Boards services. Initially the waiting times dropped dramatically and many of the lengthy waiting times were tackled and reduced. However, generally since March, 1996, the average waiting times have been increasing. The average waiting time for December was 3.9 months, (the lowest was Waterford with zero months, the highest was Tralee with 8.5 months). A comparison of waiting times from the 31st July, 1993, 31st January, 1995 and 30th September, 1996 is given at appendix F.

The opening of two new centres at Newbridge and Tullamore may initially slow down the increase in average waiting times, especially in neighbouring centres, but is unlikely to cause an overall reduction (neither Navan when it opened in July, 1996, nor Cavan's when it opened in November, 1996, resulted in a fall of the monthly average).

The Legal Aid Boards grant for 1997 is £8.3 million, the Board argued for a figure in excess of £10 million to meet the increased demands it expected in 1997. The figure of £8.3 million is sufficient for the Board to maintain its current level of service but not any additional work generated by divorce or increase in demand.

Given the number of divorce cases which would be added to the waiting list at the end of February, together with the increasing demand for the services of the Board and both of which when coupled with the general growth in waiting times to date, it is fairly likely that waiting times will continue to increase in 1997 particularly from March onwards. In the circumstances it should be noted that due to expected heavy demand for the Legal Aid Board services, applicants seeking appointments with solicitors at law centres will have to be informed in many cases that appointments will not be available for five months or more (i.e. a number of months more than that shown on the current list of waiting times)."

43. On 19th March, 1997, Mr. Goodman wrote again to the personnel officer in the department in the context of the multi-annual budget framework, 1998 to 2000. He submitted a good deal of data and pointed out that he had already set out the Board's requirements in order to allow for an orderly provision of service for those expected to seek legal aid for divorce. He pointed out that, if approval had been given in 1996, the Board could have recruited the additional full time and temporary staff in a timely fashion and arranged for appropriate training procedures, etc., to be in place by 27th February, 1997. However, as no specific additional resources were provided for divorce, the existing law centres had found an overall increase of 68% in their waiting lists as and from 27th February.

44. The letter went on:-

"In the absence of the additional resources now sought, waiting lists in all law centres will continue to expand and delays will occur in the full range of services provided by the Board. We will, of course, strive to continue to provide the appropriate emergency and priority services for particular legal remedies. You will be aware that even if sanction is obtained for these additional resources, the delay in recruiting staff etc. will not prevent a very undesirable situation developing both for the public seeking the service and the staff of the Board who are being asked to work under very difficult circumstances in relation to increased demand."

45. The final paragraph of the letter acknowledged that the resources of the Board had increased substantially since 1992. However, Mr. Goodman did not think it was appreciated in all quarters that demand for services had increased at the same rate. The figures which he submitted with the letter showed that, as resources increased and more centres were opened, the demand for services grew apace and absorbed the benefit of the additional resources. He also pointed out that the additional resources provided were in the main for new locations and the only real addition to existing locations were twelve solicitors recruited for existing centres in 1993. At that time, there were 39 solicitors in the employment of the Board. By March, 1997, there were, 81. However, except for the twelve mentioned, all of the additional solicitors were located in new centres.

46. As Mr. Brady testified, the relevant departments were fully aware of the Board's position and the level of demand for legal services. They were also aware of the impact that that demand had on the waiting lists. This was so as a result of this correspondence and the communication had between the various officials.

47. On 23rd April, 1997, Mr. Goodman wrote a nine page letter to a Ms. Langford, who was an Assistant Secretary in the Department of Equality and Law Reform. The letter was written following a meeting which had taken place on 10th April, where he was requested to review and restate as appropriate all of the staffing requirements of the Board. He did so in great detail.

48. He pointed out that in a series of submissions references had been made to the lack of management resources within the Board. He pointed out that in a letter of 4th December, 1995, to the Minister, the Chairperson of the Board had set out her concerns in relation to the management resources of the Board. He pointed out six different deficiencies which existed in the Board. They concerned the underdeveloped I.T. systems, which did not provide adequate support to solicitors and other legal staff; the absence of library services or research services within the Board; the inadequate level of administrative support for solicitors and other senior staff; the absence of a provision for time recording or other measurements within law centres, which he said went to the heart of providing a quality service, as well as giving the Board an ability to know whether or not value for money was being provided; the absence of arrangements or resources to undertake any form of quality control within the Board; the absence of any performance measurements which one might expect in an organisation of the Board's size. His letter continued:-

"It would be most undesirable if the Board had to wait for an external body to identify these deficiencies before any effective action is taken."

49. His letter requested the appointment of two Principal Officers to take control of various functions within the head office.

50.. It is not necessary for me to recite in detail the other elements of this comprehensive letter, which set out, in very clear form, the many needs for both staff, equipment and structures which were required by the Board. There is, however, one part of the letter which bears repetition in full. Mr. Goodman said:-

"With the existing staffing levels the implementation of the new arrangements will slow the throughput of applications with inevitable consequences for the Board's capacity to meet its obligation to consider applications for legal aid within a reasonable time. Failure by the Board to meet its obligations, as delineated in the Gannon judgement in the Cosgrave case [1991] IR 43, will leave the Board open to legal actions. Senior Counsel has stated that the Board 'will lose every case in which (an) application to the High Court can show that the Legal Aid Board is refusing or failing to consider (an) entitlement to legal aid within a reasonable period'.

Two Senior Counsel have expressed the view that there may well be a constitutional right to civil legal aid. Such a finding by a Court in a judicial review action against the Board would have major ramifications for the Exchequer in terms of the resources which would have to be provided for civil legal aid. Unless Application Section is adequately staffed to meet the existing demands and the additional demands arising from Divorce, the Private Practitioner Scheme and administrative law developments in relation to procedures, it would appear to be inevitable that it will only be a matter of time before a Court will make an order against the Board directing the provision of legal aid as a matter of constitutional right and duty."

51. Mr. Brady's evidence was that the resources required, particularly in the level of staffing, had been indicated in all the previous correspondence going back to the letter of December, 1995 to the Minister and reiterated in the correspondence of June, 1996. The necessity for these resources was again being pointed out in this letter of 23rd April, 1997. Mr. Brady described, and I accept, the picture painted in Mr. Goodman's letter as being a very accurate one of the situation as it was. He said:-

"It was an extremely stressful and difficult time to be working in the Board and dealing with the pressures of work."

52. I likewise accept his evidence that at no stage did anybody representing any of the Government departments involved indicate that the very serious situation which existed in the Board could be dealt with within its own resources.

53. I was struck by the fact that all of the correspondence from 1995 up to and including the letter of 23rd April, 1997, did not appear to have had any response in writing from any of the addressees to whom it was directed. I asked Mr. Brady about this. The following was his evidence.

"Question: Did you get any response at all? All this letter writing seems to be one way traffic.

Answer: It is all one way traffic, Your Honour.

Question: Not even the courtesy of an acknowledgement?

Answer: No formal written correspondence was received in response to these letters until December, 1997. There were a lot of discussions going on, as well, just for the record, there were discussions going on between officials but there was no response to these letters, no issues raised in relation to the content or the suggestions in the letters.

Question: Did there appear to be any realisation in the Department of Equality or Justice, or whatever it was at the time, that the situation that was presenting to the Legal Aid Board?

Answer: I think there may have been a realisation that there were difficulties but there was no positive action taken to address those difficulties.

Question: Or any realisation that the people at the coalface, as they say, were having to deal with real people who were in distress and whose needs simply could not be met?

Answer: Again, I would think that there was an appreciation that there were difficulties for people in the law centres and for the public, but again there was no question of saying 'we'll do anything to address those difficulties'."

54. Later in his testimony, Mr. Brady dealt with the part of the letter which pointed out the opinion expressed by two senior counsel which I have already reproduced. He was asked if it was his view that that was a strong warning to the State. He said:-

"Yes, because the Board was extremely conscious of its obligations at that time. I have been involved with the Board in the context of the Cosgrave case before that. We were very conscious of the need in terms of resourcing of the Board to make it absolutely clear to the State what would be facing the Board and perhaps the State if we did not have the resources to meet the demand that was there. And that is why that was included in the letter, so there would be no misunderstandings or doubts in terms of the Board's view of the position in relation to resourcing the Board."

55. He was then asked if anyone from the State ever suggested that the views expressed were wrong or that the concerns of the Board were misplaced. Indeed, he was asked if the officials of the State ever came back to him at all about this. He said:-

"No, there was absolutely no suggestion from the State that there was anything incorrect about this, and there was no response from the State in relation to this proposal from the Board and the statement by the Board."

56. On 30th April, 1997, Mr. Goodman again wrote to Ms. Langford, the Assistant Secretary in the Department of Equality and Law Reform. This letter dealt with staffing requirements of the Board. Again, it is a comprehensive letter and I do not propose to reproduce it in full. Some parts of it are however worthy of reproduction.

57. Mr. Goodman said:-

"Unfortunately, while an increasing number of people have been in receipt of legal services, the waiting periods in many of the Board's centres are still unacceptable. By way of information on this point, I am attaching as Appendix 1, a copy of the waiting list as of 31 March 1997. You will be aware that in a number of recent submissions, I have dealt with the question of the particular problems arising for the waiting lists as a result of the introduction of divorce on 27 February. At that time, the waiting list throughout the Board increased by 68% from 1,545 to 2,607. This very substantial once off increase, seriously impedes the ability of the Board's solicitors to provide legal services within a reasonable period. In this regard, you might take note of my remarks in my letter of 23 April 1997 regarding judicial review in the Cosgrave case (1991) IR 43.

In addition to the waiting lists which operate for general legal services, there are also, as you are aware, emergency services for particular categories of cases, particularly those involving physical violence. There are, however, other categories of cases which should receive priority and a typical example of these are 'child care' cases where we represent parents of children whom the Health Boards intend taking into care. In a number of these cases recently, we have been unable to provide legal representation at the appropriate court times and applicants for legal aid have had to attend at the court and seek adjournments on the basis that legal aid applications were awaiting decisions. In some instances, it has been necessary for the applicant to perform this function on more than one occasion. The danger here is that adjournments will be refused and we are also creating a very bad image of the Legal Aid Board with the judiciary."

58. Mr. Brady confirmed the accuracy of all of this in the course of his testimony. Later in the letter, under the heading "Staff", Mr. Goodman said this:-

"A more fundamental problem in relation to staff arises, however, and this relates directly to the pressure of work and lack of resources. In many law centres, where there are extended waiting lists, the staff are under pressure from applicants and third parties, including public representatives, acting on behalf of the applicants, who are continuously seeking explanations for the delay in the provision of the service. It is indeed a fact that the maintenance and management of extended waiting lists has become a block of work in its own right, which detracts from the ability of the staff to provide legal services."

59. Mr. Brady indicated that amongst other things this correspondence pointed out that, because of the shortage of staff, solicitors were acting as their own secretaries, thus preventing them from doing solicitors work, solicitors were under such pressure that managing the list itself became a problem and thirdly, that even in emergency or priority cases where the Board had tried to deal with the situation by the introduction of a rota system, the centres became overwhelmed and could not cope with the demand of the work. He confirmed that, in response to this letter setting out these things, there was no response from the State.

60. The letter also pointed out that the Board was totally dependant on the Departments of Equality and Law Reform and Finance for its resources.

61. The evidence of Mr. Brady indicates that all of this correspondence coming from Mr. Goodman was achieving little or nothing. Correspondence was not responded to and the position in the Board got worse and worse.

62. An interesting insight into the approach of the Department of Finance was provided in a memorandum of 21st November, 1996, which came to Mr. Brady's attention only as a result of it being disclosed in an affidavit of discovery. The memorandum deals with the estimates provisions in 1997 for the Legal Aid Board. It reads as follows:-

"1. The Department of Finance, per telephone message of 21st November, 1996, have offered £7.9 million as an allocation for the Legal Aid Board for 1997 (an increase of £.4 million on the £7.5 million on offer). The Board's minimum requirements in order to stand still in 1997 is £8.345 million.

2. They say that if the offer is rejected it will be withdrawn and the figure to be put to Government will revert to £7.5 million.

3. I advised Finance that it would be necessary to have Ministerial approval for whatever decision is taken.

4. The revised figure of £7.9 million would also be inadequate and would give rise to the sort of problems for the Legal Aid Board that are outlined in the final two paragraphs of the attached memorandum, albeit on a smaller scale.

5. I recommend that the Department continue to press for the full £8.345 million necessary to operate the Legal Aid Board."

63. Mr. Brady's comment on this memorandum was that it gave an insight into what was going on at the time. It indicated that the Department of Finance was not prepared to fund even the basic level of service, never mind the additional resources that were required at the time.

64. Ultimately, the £8.345 million which was what the Board needed in order to stand still was forthcoming, but no more.

65. In June, 1997, the Department of Equality and Law Reform prepared a draft memorandum for the Government. It set out that Department's view of the Board's requirements. It was supportive of the Board's position. It was apparently sent to the Department of Finance who in the same month responded negatively. They said *inter alia*:-

"In these circumstances and in the light of the Government decision of July, 1995 on staff numbers it is not possible to concede additional staffing in any area, no matter how socially desirable it may be, as the entire Government policy on the control of public service numbers would be eroded.

Accordingly, the Minister for Finance considers that the Government should not approve the proposals in the draft memorandum at the present time. Instead he proposes that the request for additional resources for marriage counselling, family mediation service and the Legal Aid Board should be subject to further discussions between his department and the Department of Equality and Law Reform. The request for additional staff would then be considered, in conjunction with other demands for additional staff, in the context of the Government consideration of departments estimates proposals for the period 1998 to 2000 under the multi-annual budgetary framework and any overall review of staffing."

66. At the time that that response was forthcoming, there can be no doubt that all of the concerns of the Board had been communicated to the Department of Equality and Law Reform and by it to the Department of Finance, but with no success.

67. Meanwhile, Mr. Goodman continued to write. In a memorandum of 23rd June, 1997, he again set out the position in a comprehensive way.

68. On 23rd July, 1997, a meeting took place between the Chairperson of the Board and the Minister for Justice, Equality and Law Reform. At this stage, the Department of Equality and Law Reform had been abolished and its functions were brought under the aegis of the Department of Justice. The meeting was followed by a letter of the same date.

69. The Chairperson's letter set out two options to the Minister. The first was based on the draft Memorandum for Government prepared in the Department of Equality and Law Reform, to which I have already referred but which was updated. If, however, that proposal was unacceptable, she set out a second option. The Board considered it essential that this option at least be taken if it were to continue to meet the existing demands in relation to support, control and management. Even that, however, she stressed, would not correct the unsatisfactory situation with law centre waiting lists.

70. In the course of her letter concerning option B, the Chairperson pointed out that she had mentioned the situation that pertained in the Chief State Solicitor's office and indicated that many of the deficiencies identified by consultants in that office were, in her opinion, present in the Board. The additional resources necessary to correct those deficiencies in the Chief State Solicitor's office had been sanctioned by the Department of Finance but only after the publication of a consultant's report and a series of industrial relations disputes. She said the Board considered that it would be most undesirable if it had to wait for a report or a comment from an external body before actions were taken in order to provide the necessary resources to correct problems within the Board. She went on to point out, however, that option B would not correct the unsatisfactory situation concerning law centre waiting lists.

71. On 22nd September, 1997, Mr. Goodman again wrote to the Department of Justice. It is worthwhile remembering that at that stage the requests made in June, 1996 had not been met. In the course of this letter he pointed out:-

"An unacceptable picture in relation to waiting periods is, however, also developing. The figures I provided this morning suggest that the position will continue to deteriorate for the foreseeable future. As a minimum we need to strengthen the resources of existing centres and this is also probably the most economical means of improving the level of service."

72. On the 30th October, 1997, the Personnel Officer of the Board wrote to the Personnel Officer of the Department of Justice and copied the letter to the Assistant Secretary. Amongst other things the letter said:-

"The Board are extremely concerned about the situation which has arisen in a number of Law Centres, where, in addition to the problems with the length of the Waiting Lists (copy enclosed), consequential problems are arising due to a number of Solicitors taking on unacceptably high caseloads in attempting to deal with the demands being placed on their

Law Centre. We are concerned that this situation could give rise to cases where delays or other problems encountered by clients, in the processing of their cases, create the potential for a professional negligence case against the Board.

In the circumstances, I am to request sanction to engage three solicitors and three typists on a temporary contract basis for nine months. It is envisaged that these staff would be used in Tullamore, Cork and as relief in the Dublin general area.

I can confirm that the costs involved in recruiting these temporary staff can be met for 1997 from savings from within our approved Grant- in-Aid and I expect that the costs arising in 1998 will be met from that year's Grant- in-Aid."

73. It is clear that Mr. Brady was very concerned about this latest development. So much so, that he expressed a view to solicitors who were taking on unacceptably high case loads that they were doing too much and that it was inappropriate that they continued to take on cases.

74. In November, 1997, a formal proposal was made for the engagement of three solicitors and three typists on a temporary contract basis for nine months. It received the support of the Minister for Justice, Equality and Law Reform and was responded to positively by the Department of Finance. In December, 1997, the Board were told of the Department of Finance's approval. This was the first extra resource given to the Board over the period 1996 and 1997. Further good news appeared to follow in that the estimates for 1998 incorporated the provision of £450,000.00 for additional staff resources for the Board. The Board was informed of this in December, 1997. This funding included monies to provide an extra staff member for the South Mall Centre in Cork to which Mrs. O'Donoghue had had recourse.

75. Although the commitment to provide the extra staff was given in December, 1997 and was appropriately funded, the Department of Justice has apparently to approve the actual engaging of the particular staff numbers at particular levels. So, while the money was provided, sanction for the additional staff was not forthcoming from the Department of Justice until July, 1998.

76. So, as of December, 1997, the Board had sanction for the spending of the money on additional staff but could not spend it because approval for the recruitment was not forthcoming from the Department of Justice until July, 1998.

77. On 6th May, 1998, Mr. Goodman wrote to the Second Secretary in the Department of Justice, again pointing out the unsatisfactory nature of the waiting lists in the law centres. Statistical information was enclosed but little appeared to happen.

78. The Chairperson of the Board met with the Minister for Justice on 18th June, 1998. She reported the outcome of that meeting to her Board. The following is an extract from the minutes of the relevant board meeting:-

"The Chairperson said that she had informed the Minister that the Board would have to seriously consider closing Law Centres to all new applicants, with the exception of persons seeking assistance in relation to priority matters, unless the requested additional resources were authorised before the July Board meeting. The Chairperson indicated that she had emphasised to the Minister the importance of securing additional staff for Head Office as well as for Law Centres."

79. The prospect of law centres closing brought an immediate reaction from the Minister for Justice. In a memorandum of this meeting of 18th June, 1998, prepared by Mr. Goodman, the following is to be found:-

"The Minister immediately indicated that he did not wish any law centres to be closed and he asked Mr Magner to prepare an immediate note from him to the Minister for Finance regarding the staffing of the Board."

80. The extraordinary thing is that the money had been sanctioned for additional staff the previous December and sanction for the recruitment of the staff was being delayed in the Department of Justice and was not forthcoming until July, 1998.

81. Mr. Brady said that the Board was totally exasperated by the situation and by the way things had gone on. The Chairperson particularly could not understand why there was such a delay in authorising the recruitment. Neither can I. With all of the warnings that had been given from 1995 onward and with the budget allocation made in December, 1997, I simply cannot understand why it took until July, 1998 to get authority to actually employ the persons.

82. By letter dated 8th July, 1998, the Department of Finance finally gave sanction for the creation and filling of 25 additional posts, including five relief solicitors, one of whom was recruited for the South Mall Law Centre in Cork. Upon receipt of this sanction, the Legal Aid Board then had to go through the process of advertising for solicitors and conducting a competition to recruit them. The solicitor in question took up duty in January, 1999 and it was she who eventually saw the plaintiff in February of that year.

Conclusions On The Position Of The Board

83. Mr. Brady's evidence satisfies me that the cause of the delay encountered by the plaintiff was the absence of resources in the law centre to meet demands. Had the Board been provided with the staff which it sought, the plaintiff would have been given an appointment to see a solicitor within a period of about four to five months at most.

84. I accept Mr. Brady's evidence. The Board was acutely aware of the deteriorating situation. It made the position known to the relevant departments and sought the funds and approvals necessary to deal with the problem.

85. The Board's Chief Executive, with uncanny accuracy, predicted what would happen if the situation was not addressed. Whilst I am concerned with the delay encountered by the plaintiff, it is clear that the whole working of the Board and Legal Aid Centres was seriously sub-standard. Working conditions were appalling but nothing much was done about it. The only time any sense of urgency appears to have been manifested was when the threat of closure of law centres was made.

86. There was consistent failure to even respond to the Board's correspondence, never mind considering in any serious way the reasonable requests made by it.

South Mall Centre

87. Insofar as the South Mall Law Centre was concerned, the annual report of the Board presented the average waiting time for an appointment with a solicitor as follows:

1996 - 3.5 months,

1997 - 7 months,

1998 - 16 months.

88. Whilst the Board attempted to ensure that a system for prioritising applicants by reference to the urgency of their case operated, that system did not work well in the case of the plaintiff. It was described by Mr. Brady as being a systems failure because information concerning her case was not recorded and not conveyed to the managing solicitor. I am satisfied that the reason for that was because of the lack of resources which resulted in insufficient support in the law centre in question. That lack of resources was, as Mr. Brady said, made known to the relevant department on many occasions.

89. It is difficult to see what more the Board could have done to deal with the problems. They resulted from the failure on the part of the State to fund the Board properly and an inexplicable delay in the Department of Justice in proceeding to give effect to the recruitment sanctioned in December, 1997 until July, 1998.

The Minister For Justice Equality And Law Reform, Ireland And The Attorney General

90. No witnesses were called to give evidence on behalf of any of these defendants. Neither was any witness called from the Department of Finance.

The Statutory Framework

91. The Board was established by the Civil Legal Aid Act, 1995.

92. Section 5 (1) of that Act sets out the principal function of the Board as follows:-

"The principal function of the Board shall be to provide, within the Board's resources and subject to the other provisions of this Act, legal aid and advice in civil cases to persons who satisfy the requirements of this Act."

93. Section 19 of the Act requires the Board to establish and maintain a fund to be known as the Legal Aid Fund. That fund consists of sums advanced to the Board pursuant to s. 18 of the Act and all other payments made to the fund or the Board, including contributions paid into the fund by persons who have been granted legal aid and advice, together with any costs or damages recovered by such persons and paid into the fund in accordance with the Act. Section 18 of the Act provides as follows:-

"The Minister may in each financial year, with the consent of the Minister for Finance, advance to the Board out of moneys provided by the Oireachtas, such sum or sums as the Minister, after consultation with the Board, may determine for the purposes of expenditure by the Board in the performance of its functions under this Act."

94. Section 28 of the Act sets out the criteria for obtaining legal aid. Insofar as it is relevant, it provides as follows:-

"1. A person shall not be granted legal aid unless the person is granted a legal aid certificate under this section in respect of the legal aid sought.

2. Subject to sections 24 and 29 and the other provisions of this section and to regulations (if any) made under section 37, the Board shall grant a legal aid certificate under this section to a person if, in the opinion of the Board-

(a) the applicant satisfies the criteria in respect of financial eligibility specified in section 29,

(b) the applicant has as a matter of law reasonable grounds for instituting, defending, or, as may be the case, being a party to, the proceedings the subject matter of the application,

(c) the applicant is reasonably likely to be successful in the proceedings, assuming that the facts put forward by him or her in relation to the proceedings are proved before the court or tribunal concerned,

(d) the proceedings the subject matter of the application are the most satisfactory means (having regard to all the circumstances of the case, including the probable cost to the applicant) by which the result sought by the applicant or a more satisfactory one, may be achieved, and

(e) having regard to all the circumstances of the case (including the probable cost to the Board, measured against the likely benefit to the applicant) it is reasonable to grant it.

3. Where the proceedings the subject matter of the application under this section concern the welfare of (including the custody of or access to) a child, paragraphs (c) and (e) of subsection 2 shall not apply."Section 28 (4) sets out various grounds upon which the Board may refuse to grant a legal aid certificate.

95. Section 28 (5) provides as follows:-

"Notwithstanding any other provision of this Act, the Board shall grant a legal aid certificate to a person -

(a) where the State is, by virtue of an international instrument, under an obligation to provide civil legal aid to the person; provided that the person shall, before being granted such certificate, comply with such requirements (if any) as are specified in the international instrument and relate to him or her."

Breach Of Statutory Duty And Negligence

96. The plaintiff contends that the Board has been guilty of a breach of statutory duty because it failed to exercise the function conferred upon it under s. 5 of the 1995 Act within a reasonable time. It did not provide legal aid and advice in a timely fashion and did not carry out the alleged mandatory obligation to grant a legal aid certificate to the plaintiff who was fully qualified for such within a reasonable time.

97. During the course of the oral submissions, counsel on behalf of the Board accepted that the plaintiff had a statutory right to apply

for legal aid and a statutory right to receive it, provided that she met the qualifications. He accepted that she met the qualifications but that her need of legal aid was not met timeously. Notwithstanding that, he contended that there was no breach of statutory obligation because of the saver contained in section 5. That makes carrying out of the principal function of the Board subject to the resources available to it.

98. I am of the view that the Board is correct in this contention. The statutory obligation imposed upon it is not an absolute one. It requires it to carry out its functions within its resources. In the present case there is in my view no doubt but that the delay encountered by the plaintiff was caused exclusively because of the lack of resources made available to the Board. Those lack of resources were directly responsible for the 25 month delay between her first going to the law centre and the grant of the legal aid certificate to which she was undoubtedly entitled.

99. The 1995 Act was considered in *Kavanagh v. The Legal Aid Board & Ors.* (Unreported, High Court, Butler J., 24th October, 2001). In that case, the applicant applied to the Board for legal aid in connection with an application for judicial separation on 23rd September, 1997. By letter of the same date, the Board indicated that on account of the demand for legal services in the Tallaght law centre it was not in a position even to process her application at that time. It was not until almost 20 months later, in May, 1999, that her application was processed and granted. Meantime, in October, 1997, the applicant completed an application for legal services in connection with another matter and was given an appointment with a solicitor under the Board's private practitioner scheme. This scheme was operated by the Board in respect of certain proceedings in the District Court, whereby legal services were provided through private solicitors who were not employees of the Board. In April, 1998, a further similar application was made and both applications were granted.

100 While awaiting the outcome of her application for legal aid in relation to the judicial separation proceedings, the applicant was forced to leave the family home because of a violent incident. The court did not see any connection between the applicant being forced to leave home and the delay in the judicial separation proceedings as legal aid was available to her under the private practitioner scheme. The court found that as a matter of fact what was suffered by the applicant arising out of the delay in the processing of her application for legal aid in connection with the judicial separation proceedings was the ordinary inconvenience caused by any such delay, namely, not having such an important matter dealt with promptly and not having her affairs settled.

101 By the time the matter came before Butler J., the judicial separation proceedings had been disposed of and the only issue remaining for the court was the question of damages. However, in the course of his ruling, Butler J. said that at page 3:-

"The grounds upon which relief is sought in these proceedings are entirely based upon an alleged breach of statutory duty. No question arises as to any rights to which the Applicant may be entitled by virtue of the Constitution or by any international convention. The claim is solely based upon rights and duties arising from the Legal Aid Act, 1995."

102. He then considered s. 5 of the Act. He said at page 4:-

"I am satisfied that the language of section 5 (1)... is plain and obvious and requires no special interpretation. The Board shall provide, within its resources and subject to other provisions of the Act legal aid to persons who satisfy the requirements of the Act. The words simply mean that legal aid shall be provided within the Board's resources and I am fully satisfied on the basis of the Affidavits (and it seems to me that there is no controversy on this aspect of the matter) that that is precisely what the Board did in this case. The Board had a method of dealing with cases in a certain order of priority and within that scheme the Applicant was given equal treatment to all other Applicants."

103. The applicant was refused relief.

104. If the plaintiff here made a claim solely by reference to an alleged breach of statutory duty on the part of the Board (excluding the provisions of s. 28 (5)), she would in my view have to meet a similar fate. The Board in this case did all it could to provide for her and indeed other persons within its resources. The sole cause of the delay encountered by the plaintiff was the lack of resources of the Board. It is hard to think that it could have done any more than it did to acquaint the relevant parties with its precarious position. The failure to address that position was not the fault of the Board.

105. The plaintiff here does not confine herself to a claim for a mere breach of statutory duty against the Board. She says that if the Board's resources were inadequate (as they were), then there was an obligation upon the State to provide adequate resources to the Board.

106. Her claim in negligence against the Board must likewise fail. I am unable to identify any act of negligence on the part of the Board or its officers. They were simply being swamped with work and their cries for assistance went unheeded. The working conditions that they had to experience and the demands being made upon them are evidenced in the lengthy memoranda that were sent regularly by the Board's Chief Executive to the relevant department. The conditions under which the Board's personnel had to operate were woefully substandard and the reason for that was the failure to resource the Board properly.

107. Leaving aside therefore a claim which is made in respect of s. 28 (5) of the Act, I absolve the Board from any liability for either breach of statutory duty or negligence in the way in which it dealt with the plaintiff's claim.

108. As to the claim based on s. 28 (5) of the Act, the following is the position. The plaintiff submits that under the European Convention of Human Rights there is an obligation to provide legal aid to her and therefore, under s. 28 (5), a legal aid certificate should have been granted without regard to the Board's resources because of the phrase "notwithstanding any other provision of this Act". That phrase, it is said, overrides the saver in s. 5 which requires the Board to function within its resources.

109. I am satisfied that this approach is not well founded. Section 28 (5) will only operate where an international instrument expressly requires the State to provide civil legal aid. The instrument may prescribe requirements which have to be met. The European Convention on Human Rights does neither. Accordingly, even if the construction concerning the phrase "notwithstanding any other provision of this Act" operates to override the saver as to resources in s. 5, the section has no application to this case.

Breach Of Constitutional Obligation

110. The plaintiff contends that the State owes obligations to her under the Constitution and the European Convention on Human Rights. She says that if the Board's resources are inadequate then there is an obligation upon the State to provide adequate and appropriate resources to the Board. She argues that it cannot be the position that the State's obligations are met merely by the establishment of a board. The Board must be adequately resourced in order to be effective.

111. Counsel on behalf of the defendants other than the Board made the State's position perfectly clear. He contended that there is no statutory, constitutional or European Convention right to legal aid. Consequently, there can be no right to have her application dealt with expeditiously. On the question of delay, the only concession that he made was that the plaintiff had experienced delay but denied that it was unreasonable. He contended that legal aid was nothing more than a provision in law which the State made but did not confer a right to it. He also submitted that even if there was a right, be it statutory, constitutional or under the European Convention for Human Rights, the court was entirely powerless to give effect to it because to do so would have fiscal implications for the State. Any decision in favour of the plaintiff would contravene the separation of powers. An intervention by the court is off limits it is argued.

Infringement Of Constitutional Rights

114. On 31st July, 2003, the European Court of Human Rights delivered its judgment in the case of *Doran v. Ireland* (no. 50389199, 2003ECHR 417, 31st July, 2003). The plaintiffs in that case commenced High Court proceedings on 17th July, 1991, seeking damages for negligence against their own solicitors and another firm of solicitors who acted for vendors of property to the plaintiffs. It is not necessary to repeat here in any detail the chronology of what occurred thereafter. It is sufficient to record that extraordinary delay was encountered by the Dorans and it was not until February, 1999 that the litigation came to an end save for the question of costs. The costs issue was finally dealt with in December of 1999. As a result of the delays which they encountered, the Dorans litigated before the European Court of Human Rights. The case is of particular interest because of the submissions which were made by the State to that court as to the entitlements of the Dorans to seek redress in respect of the delay encountered by them by reference to the Constitution. The submissions of the Government are set forth at p. 13 of the judgment. They read as follows:-

"50. The Government maintained that the applicants did have an effective domestic remedy. They submitted that it had been open to them to contend that they had a right to a decision within a reasonable time on two constitutional grounds drawn from the unenumerated rights guaranteed by Article 40 (3) (1) of the Constitution. Such grounds could have been invoked by the applicants at any stage of the proceedings (The State [Shatter, Gallagher & Co.] v. de Valera (No. 2) [1987] I.R. 55 at 59 - 60). While the Constitution and other law did not prescribe any particular remedy for the infringement of an individual's constitutional rights, the appropriate remedy would depend on the facts of a particular case and 'may' include an award of damages against the State (Healy v. Minister for Defence, High Court, 7 July, 1994 at p. 10, and Kennedy v. Ireland [1987] I.R. 587, at 593).

51. The first constitutional ground which the applicants could have invoked was the principle of 'constitutional justice'. The Government submitted that courts have recognised that the unenumerated rights guaranteed by Article 40 (3) (1) of the Constitution include principles of constitutional justice and that the latter includes various procedural guarantees including a right to a reasonably prompt decision. In this respect, the Government cited a number of domestic cases (In Re Haughey [1971] I.R. 217; Garvey v. Ireland [1981] I.R. 75; O'Keeffe v. Commissioners of Public Works, Supreme Court, 24 March, 1980; The State (McFadden) v. Governor of Mountjoy Prison (No. 1) [1981] I.L.R.M. 113; Cannon v. Minister for the Marine [1991] 1 I.R. 82; Twomey v. Minister for Tourism and Transport, Supreme Court, 12 February 1993; Bosphorous Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Minister for Transport (No. 2) [1997] 2 I.R. 1; In Re Gallagher (No. 2) [1996] 3 I.R. 10; and McNeal v. Garda Commissioner [1997] 1 I.R. 469).

The Government submitted that constitutional justice had successfully been invoked to augment the specialised code of procedural and evidential law regulating judicial function where the passage of time could have resulted in injustice (O'Domhnaill Merrick [1984] I.R. 151 and Toal v. Duignan (No. 1) [1991] I.L.R.M. 135)

52. The second constitutional ground which the Government suggested the applicants could have invoked was their constitutional right to litigate or their right of access to court to assert and vindicate legal rights (Macauley v. Minister for Posts and Telegraphs [1996] I.R. 345, at 357 - 358). They maintained that the applicants could therefore have argued before the High and Supreme Courts that they had a constitutional right to a decision within a reasonable period of time in order for their right to litigate to be effective, based on the maxim that justice delayed is justice denied and, in particular, they could have argued that their right to litigate extended to the more prompt processing of their case by the court. They could have requested the courts to give effect to this right or, in default, to award them damages for its infringement.

53. Furthermore, the Government submitted that the domestic courts had a positive duty to protect persons against invasion of their constitutional rights. They pointed out that judges take an oath to uphold the Constitution and are therefore under a duty to preserve the individual's constitutional rights. They further argued that the applicants could also have pleaded the judgments of the European Court of Human Rights as persuasive authority in support of their constitutional contentions."

115. The submissions made to this court by the defendants other than the Board are in many respects the polar opposite of what was being said by them to the European Court of Human Rights in *Doran v. Ireland*.

116. The plaintiff here bases her case principally upon Article 40.3 of the Constitution. That provides:-

"1°. The State guarantees in its laws to respect, and, as far as practicable, by its law to defend and vindicate the personal rights of the citizen.

2° The State shall, in particular, by its laws protect as best it may from unjust attack and in the case of injustice done, vindicate the life, person, good name and property rights of each citizen."

117. In *Ryan v. The Attorney General* [1965] I.R. 294, the courts recognised unspecified personal rights enshrined in the Constitution by virtue of Article 40. A constitutional right to have access to the courts was recognised in *Macauley v. The Minister for Posts and Telegraphs* [1966] I.R. 345. In that case, Kenny J. said at page 358:-

"That there is a right to have recourse to the High Court to defend and vindicate a legal right and that it is one of the personal rights of the citizen included in the general guarantee of Article 40, sect. 3, seems to me to be a necessary inference from Article 34.3.1...If the High Court has this full original jurisdiction to determine all matters and questions (and this includes the validity of any law having regard to the provisions of the Constitution) it must follow that the citizens have a right to have recourse to that Court to question the validity of any law having regard to the provisions of the Constitution or for the purpose of asserting or defending a right given by the Constitution for if it did not exist, the guarantees and rights in the Constitution would be worthless."

118. The plaintiff contends that she had no realistic prospect of access to the courts without the assistance of a lawyer. I agree with her. She qualified for such assistance under the relevant statutory provisions and regulations but was denied the necessary help for a period of 25 months.

119. In *M.C. v. The Legal Aid Board & Ors.* [1991] 2 I.R. 43, the applicant sought an order compelling the respondents to provide him with a certificate of free legal aid and, in doing so, relied upon the constitutional right of access to the courts. The State argued that there had been no infringement of any constitutional right of access to the courts as such right only related to the right to initiate proceedings and did not extend to the right to be assisted by the State in the defence of civil litigation.

120. Gannon J. held that an individual citizen did not have a constitutional right to require that the State provide financial support for civil litigation with another citizen. However, he went on to hold that, once a legal aid scheme was in place, there is a constitutional duty on the State to ensure that it is administered fairly and fulfils its purpose. He said:-

"By adopting the scheme for funding legal aid and advice to impecunious litigants the State provides resources to enable such persons to obtain the services of skills adequate to that of an adversary in civil litigation. In my opinion, the adoption of that scheme does not impose any duty on the State or on the Legal Aid Board to any litigant involved in civil litigation other than to ensure that the scheme is implemented fairly to all persons and in a manner which fulfils its declared purpose. I am not convinced that there is any provision in the Constitution which imposes a duty on the State to provide any form of support for civil litigation among citizens. In the absence of such duty I can find no express or implied right in any citizen to require the State to provide financial support for, or to afford free facilities for, civil litigation of a dispute with another citizen."

121. That decision was given in the context of a non-statutory scheme.

122. In *Stevenson v. Landy & Ors.* (unreported 10th February, 1993), Lardner J. had to deal with the topic again. The case concerned wardship proceedings taken by the Eastern Health Board. The Legal Aid Board had refused to grant legal aid to the mother of the child involved to contest the proceedings because she had failed to show that she was reasonably likely to be successful in the proceedings. This was a requirement provided for in the scheme of legal aid and advice. Lardner J. quoted from the judgment of O'Higgins C.J. in *The State (Healy) v. Donoghue* [1976] I.R. 325 where he had said at page 350:-

"The requirements of fairness and justice must be considered in relation to the seriousness of the charge brought against the person and the consequences involved for him. Where a man's liberty is at stake, or where he faces a very severe penalty which may affect his welfare or his livelihood, justice may require more than the application of normal and fair procedures in relation to his trial. Facing as he does, the power of the State which is his accuser, the person charged may be unable to defend himself adequately because of ignorance, lack of education, youth or other incapacity. In such circumstances his plight may require, if justice is to be done, that he should have legal assistance. In such circumstances, if he cannot provide such assistance by reason of lack of means, does justice under the Constitution also require that he be aided in his defence? In my view it does."

123. Having quoted that passage Lardner J. went on:-

"That Statement was made in relation to a criminal prosecution. The present case is of a different nature. Having considered the circumstances of the Applicant and in which the application for legal aid to be represented in the wardship proceedings is made, I have come to the conclusion that the dicta which I have quoted are applicable, mutatis mutandis, to the wardship proceedings."

124. He construed the scheme of civil legal aid and advice in a manner which he found to be more in accordance with the requirements of the Constitution and having regard to the administration of justice. In another case, namely *Kirwan v. Minister for Justice* [1994] 1 I.L.R.M. 444, the same judge in dealing with a complaint about the absence of legal aid for persons seeking review of their detention on foot of guilty but insane verdicts, held that the constitutional requirement of fair procedures applied and obliged the executive to provide legal aid for an appropriate person.

125. Applying the approach of Lardner J. it seems to me that the unfortunate circumstances of the plaintiff in the present case are such that access to the courts and fair procedures under the Constitution would require that she be provided with legal aid. That view is reinforced by the fact that she fell squarely within the entitlements to such under the Act and the regulations but was denied it for a period of 25 months because of the manifest failure of the State. The delay in granting the certificate for legal aid, in my view, amounted to a breach of the constitutional entitlements of the plaintiff and if she can demonstrate loss as a result she is entitled to recover damages in respect thereof.

126. It is not enough to set up a scheme for the provision of legal aid to necessitous persons and then to render it effectively meaningless for a long period of time. The State must per Gannon J. (in *M.C. v. Legal Aid Board*) ensure that the scheme "is implemented fairly to all persons and in a manner which fulfils its declared purpose".

127. The purpose of the 1995 Act is that persons who meet the necessary criteria shall receive legal aid. That carries the implication that the entitlement to legal aid will be effective and of meaning. How can it be if a delay of 25 months is encountered? Equally, how can the scheme be fair if a qualified person cannot get to see a solicitor for such a lengthy period?

128. The Act of 1995 gives substance, in many ways, to the constitutional entitlement to legal aid for appropriate persons. The legislature is entitled to define reasonable limits to that right. But the right cannot be effectively set at naught for years in the manner that it was here. I am of opinion that the rights under the Constitution identified and described in the paragraphs quoted from the State's submission to the European Court of Human Rights in *Doran v. Ireland* are as applicable to this plaintiff as they were, on the State's own case, to the Dorans.

129. It is argued that the court is powerless to intervene in this case regardless of the nature of the right being asserted by the plaintiff whether it be statutory, constitutional, or a right under the European Convention on Human Rights. The reason for such an assertion is that it is said that the court would be trespassing into an area outside its competence under the Constitution. (See *Sinnott v. Minister for Education & Ors.* [2001] 2 I.R. 545 and *T.D. v. Minister for Education & Ors.* [2001] 4 I.R. 259).

130. I do not accept such to be the case. This case is not concerned with a claim for any form of mandatory relief against the State. The court is doing no more than what the courts have been doing since at least *Ryan v. Attorney General* namely, ensuring that a right under the Constitution is protected and given effect. As was stated by Keane C.J. in *Sinnott v. Minister for Education* at page 631:-

*"That is not to say that where a plaintiff successfully claims that his constitutional rights have been violated by the State in the past and will continue to be so violated in the future (**which is not the case here**) unless the court intervenes, the courts are impotent when it comes to the protection of those rights."*

131. Later in the judgment he said that while in principle there is nothing to preclude the granting of mandatory relief against a Minister to meet a constitutional obligation, the courts should "presume that where this court grants a declaration that he or she had failed to meet his or her constitutional obligations the Minister will take the appropriate steps to comply with the law as laid down by the courts".

132. There is no question of a future breach involved here and I see no reason why the court should not be entitled to deal with a past breach by means of an appropriate declaration and/or an award of damages if necessary.

The European Convention On Human Rights

133. In view of the fact that I have come to the conclusion that the plaintiff's rights under the Constitution have been infringed and that she is entitled to a remedy in respect thereof, it is strictly speaking not necessary for me to express any view of her entitlements under the European Convention on Human Rights.

134. It is appropriate to note however, that for many years now and for long before the incorporation of the Convention into Irish law, the courts of this jurisdiction have proceeded on the basis that Irish law is in conformity with the European Convention on Human Rights. There are many examples of this but perhaps one of the most noteworthy is the decision of *Kinlen J. in Hanahoe v. Hussey* [1998] 3 I.R. 69 where at p. 102, he said:-

"The judgment of the European Court of Human Rights is not simply of persuasive authority. It has been accepted that in cases of doubt or where jurisprudence is not settled, the courts should have regard to the Convention for the Protection of Human Rights."

135. This decision antedated the European Convention on Human Rights Act 2003.

136. It appears to me that the view which I have formed as to the plaintiff's entitlements under the Constitution is completely consistent with the provisions of the Convention. In *Airey v. Ireland* (1980) 2 EHRR 305, the European Court of Human Rights confirmed that Article 6 of the Convention implies the right of access to the courts and in the case of Mrs. Airey confirmed that she had an entitlement to have such access in order to petition for judicial separation. The court also pointed out that the Convention was intended to guarantee rights that were practical and effective rather than merely theoretical or illusory. Just as the possibility of Mrs. Airey conducting her own case did not provide her with an effective right of access neither did such a possibility in the case of the plaintiff in suit. Even though the Convention did not provide for civil legal aid the court held that Article 6.1 might sometimes compel the State to provide for the assistance of a lawyer when it proved indispensable.

137. In the light of the circumstances of her case the court found that Mrs. Airey did not enjoy an effective right of access to the High Court and that, therefore, there had been a breach of Article 6.1. It seems to me that the same reasoning applies in the present case. The decision that I have arrived at by virtue of the provisions of the Constitution is therefore, it appears to me, in complete conformity with rights which are applicable under the European Convention on Human Rights.

138. In the light of the declaration which I propose to make, it is not necessary for me to make any determination in respect of the provisions of the European Convention on Human Rights Act 2003. Neither is it appropriate for me to express any view on whether I could do so given that the Act was not on the statute book at the time of the incidents in suit.

Damages

139. The evidence satisfies me that the plaintiff suffered pecuniary loss as a result of the delay encountered by her.

140. Mr. Brady accepted in evidence that the 25 month delay experienced by the plaintiff was unacceptable. The Board's target as of June, 1997 was to provide a service to clients within a two to four month waiting period. There is of course a category of really urgent cases which have to be dealt with in a shorter time scale than that. However, the plaintiff's claim would not fall within such a category.

141. I heard uncontroverted evidence from Mr. Brian Gallagher. He is a solicitor and a partner in the firm of Gallagher, Shatter & Company and has extensive experience in family law cases and litigation. He gave evidence that it would be proper practice for a solicitor to see a new family law client within one to two weeks from when the client sought the appointment initially. He regarded a waiting period of 25 months before obtaining such an appointment as not to be proper practice.

142. I think it is unrealistic to expect the Board ever to be in a position to match the speed of a solicitor in private practice in respect of cases which are not of particular urgency. A client consulting a solicitor in private practice does not have to go through the bureaucratic machinery that must, of necessity apply to the Board. But I see no reason to suggest that the Board's own target of two to four months is unreasonable. Thus, the plaintiff ought to have had a consultation with a solicitor within a period of about two to four months from the time that she first made contact with the Board.

143. The solicitor, a Ms. Honor Bolger, who ultimately saw the plaintiff certainly could not be criticised for the speed with which she moved and I therefore think it likely that the case would have been in court with a hearing on the maintenance payable in respect of Paul by about January, 1998.

144. Whilst there was a claim on paper for maintenance for the plaintiff herself, in fact the matter only proceeded before the circuit judge in respect of maintenance for Paul. I therefore approach this aspect of the case on the basis that the likelihood was that had matters moved with appropriate speed, a claim for an increase in maintenance confined to Paul would have been before the Circuit Court by the month of January, 1998.

145. At that time, there is no doubt but that the plaintiff's husband was fully employed. In such circumstances it is improbable that the increase in maintenance would have been limited to one of IR£10.00 per week. That was the figure which was ultimately awarded but in the belief (mistaken as it turned out to be) that the plaintiff's husband was no longer in employment.

146. I appreciate of course that requests for increases in maintenance had in the past been rebuffed by the plaintiff's husband with threats of giving up his job and that he was in a new relationship.

147. Mr. Gallagher, having been apprised of the earnings of the plaintiff's husband and the plaintiff's finances gave evidence as to what he believed could have been argued for by way of an increase in maintenance for Paul.

148. It is very difficult to know with precision what figure for maintenance the Circuit Court judge would, as a matter of probability, have fixed had the application been before him in January, 1998. I think there can be no doubt but that an increase would have been ordered. On balance I think it likely that the court would have ordered maintenance to be increased by 50% from IR£40.00 to IR£60.00. The measure of the plaintiff's damages is therefore calculated at IR£20.00 per week for a period of two years; that comes to IR£2,080.00. I add to that a sum in respect of the undoubted additional stress and upset over the norm that was caused to the plaintiff (particularly having regard to Paul's position) whilst waiting which I assess at the sum of IR£5,000.00. That gives a grand total of IR£7,080.00 and that is the sum I award by way of damages. It converts to a sum of €8,991.60.

Conclusion

149. There will be a declaration in a form to be discussed with counsel in the light of the findings which I have made in this judgment. There will also be judgment in favour of the plaintiff for the sum of €8,991.60.