THE HIGH COURT

[2016 No. 61 JR]

BETWEEN

CHARLIE WARD

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

THE HIGH COURT

[2016 No. 62 JR]

BETWEEN

PATRICK WARD

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

JUDGMENT of Ms. Justice Baker delivered on the 1st day of November, 2017.

1. This judgment concerns the payment under the Criminal Legal Aid Scheme for a solicitor who is instructed to represent more than one accused at a trial on indictment in the Circuit Court. The current Regulations governing payment provide for the payment of one fee in respect of the trial where the legal aid certificate has issued to the solicitor in respect of more than one accused who are to be tried in a unitary trial. Different arrangements in respect of fees exist in regard to representation in the District Court and a reduced fee is payable in respect of a second or further number of accused persons tried in that court.

Factual background

2. The applicants are father and son and are two of three persons sent forward on 13th July, 2015 for trial on indictment to Galway Circuit Criminal Court on charges contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997, criminal damage contrary to s. 2 of the Criminal Damage Act 1991 and possession of an article contrary to s. 9(5) of the Firearms and Offensive Weapons Act 1990.

3. It is proposed that the trial be conducted as a unitary trial, as there is an alleged element of common design. The prosecuting garda in respect of all matters is Garda Anthony Prender of Galway Garda Station.

4. Each of the three accused persons received a legal aid certificate, on 13th July, 2015, by which each was entitled to the assistance of solicitor and counsel for the conduct of the trial.

5. Each of the applicants sought to instruct Mr. John Shanley, solicitor, to represent them in the Circuit Court and to instruct counsel. Mr. Shanley had already been instructed by Martin Ward, the other co-accused and son of Charlie Ward, and the evidence is that both Charlie Ward and Patrick Ward wished to instruct Mr. Shanley to represent each of them in the trial on account of his familiarity with the case from the perspective of each of the co-accused.

6. No argument is made that any conflict might arise between the three co-accused as to any possible defence. There is therefore, no practical or legal reason why Mr. Shanley may not adequately represent each of the co-accused in the trial.

7. By 8th October, 2015 Mr. Shanley had come on record for all three co-accused, but on 13th January, 2016 he indicated to the two applicants, Charlie Ward and Patrick Ward, that he was unable to continue to act as he had been informed by the Legal Aid Board that, as all three matters would be heard together, he would receive payment in respect of his representation of one accused only.

8. Mr. Shanley was not prepared to represent three separate defendants in three separate, albeit linked, indictments, take separate advices and give instructions to three different, or the same, counsel in the matter. Mr. Shanley was apologetic, saying that as he is a sole practitioner he could not on financial grounds alone justify acting for three persons with all the associated extra work if he was to be paid in respect of representing one defendant only.

9. Mr. Shanley has remained on record for Martin Ward, as he was the first person to instruct Mr. Shanley to represent him.

10. Each of the two applicants contend that they wish to instruct Mr. Shanley and that the Regulations which limit the remuneration of a solicitor who is acting for a co-accused in a unitary trial fail to reflect their right to legal aid in respect of the defence on the charges and do not give effect to the principles of the enabling legislation.

11. Before considering the basis of the application, it is convenient to set out the statutory and regulatory regime in regard to which the relief is sought.

The statutory scheme providing for legal aid in criminal cases

12. Provision for the granting of legal aid to a person facing trial on indictment is made by s. 3 of the Criminal Justice (Legal Aid) Act 1962 ("the Act") the relevant provisions whereof are as follows:

> "3. Legal aid (trial on indictment) certificate

(1) Where—

(a) a person is sent forward for trial for an indictable offence, and

(b) a certificate for free legal aid (in this Act referred to as a legal aid (trial on indictment) certificate) is granted in respect of him by the District Court, upon his being sent forward for trial, or by the judge of the court before which he is to be or is being tried,

the person shall be entitled to free legal aid in the preparation and conduct of his defence at the trial and to have a solicitor and counsel assigned to him for that purpose in such manner as may be prescribed by regulations under section 10 of this Act."

13. Section 10(1) of the Act enables the Minister to make regulations to give effect to these principles, and the regulations may, *inter alia*, prescribe the form of a legal aid certificate or the rate or scales of payment of fees, costs or expenses payable in respect of such certificate.

14. The current Regulations were made by the Criminal Justice (Legal Aid) (Amendment) Regulations 1978 (S.I. No. 33 of 1978), Article 3(1)(g) whereof states as follows:

"(g) Where the same solicitor is assigned in pursuance of two or more certificates for free legal aid to one or more defendants and the cases to which they relate are heard together and are not cases in the District Court or appeals to the Circuit Court, the solicitor so assigned shall be deemed, for the purposes of these Regulations, to have been assigned to the said defendant or defendants, as the case may be, in relation to one case only."

15. The Regulations do not prescribe a decreasing level of payment, or the payment of a smaller fee in respect of a second or third accused where the trial is of more than one person as was found in the Regulations made in 1965 (S.I. No. 12 of 1965) and the Regulations of 1975 (S.I. No. 100 of 1975).

16. The fees of counsel are treated differently and are to be fixed in each case by the Attorney General after consultation with the DPP.

17. The applicants claim that the Article purported to be made pursuant to the power contained in s. 10(1) of the Act is not an implementation of the statutory entitlement, and *de facto* is capable of depriving, and has in the present case actually deprived, them of the benefit of free legal aid and of the right to choose their own legal representative.

The application for judicial review

18. The primary relief sought is that Article 3(1)(g) of the Regulations is *ultra vires*.

19. A declaration is sought that Article 3(1)(g) of the Regulations removes the right to free legal aid or interferes with the implementation of the statutory right to a constitutionally impermissible extent or sets it at nought.

20. A declaration is sought that Article 3(1)(g) of the Regulations has the practical effect of negating the constitutional rights in Articles 38 and 40 of the Constitution or improperly interfering with the same, and accordingly is a breach of the constitutional right of the applicants to due process and to a fair trial. It is pleaded that the Article does not have a rational basis in that it allows another solicitor from within the same office to be fully remunerated for work done to represent the applicants.

21. Leave was granted by Humphreys J. on 1st February, 2016.

Is the application out of time?

22. The application is opposed on the grounds, *inter alia*, that the application was commenced more than three months after the cause of action arose.

23. The application for leave was moved on 1st February, 2016, six months after the legal aid certificate was granted, and four months after Mr. Shanley came on record. In either case the application is outside the three months time limit prescribed by the Rules of the Superior Courts (O. 84 r. 21 (1)).

24. It is argued that the Regulations have been in operation unchallenged for a long number of years and Mr. Shanley ought to be taken to have been aware of the scheme when he came on record for each of the applicants on 8th October, 2015.

25. The applicants claim that time begins to run when they became aware that Mr. Shanley was no longer prepared to act for them. It is argued that although the applicants made a choice to instruct Mr. Shanley at a date before 8th October, 2015, it was not until his phone call on 13th January, 2016, that they became aware that Mr. Shanley was no longer prepared to act for them in the circumstances. By this time Mr. Shanley had, on behalf of all three defendants, written to the State Solicitor for Galway by letter of 12th November, 2015, and had received various documents from the State Solicitors under cover of the letter of 17th November, 2015. He has appeared on behalf of the three accused persons in the callover in the Circuit Court on 8th October, 2015 when Mr. Shanley had instructed counsel, and on 2nd December, 2015.

26. Mr. Shanley had also written to the Garda Superintendent on 7th December, 2015 and advised that two of the accused persons proposed entering a guilty plea. But it seems that between then and late January, 2016, those accused advised Mr. Shanley that they would not plead at the trial.

27. Mr. Shanley continued in correspondence with the State Solicitor, who wrote to him on 27th January, 2016 concerning the disclosure sought, the earlier adjournments of the matter and the decision of some of the accused not to enter a guilty plea.

28. In a letter of 22nd February, 2016, Mr. Shanley notified the State Solicitor that leave had been granted to bring an application for judicial review on 1st February, 2016.

29. Mr. Shanley accordingly had some involvement with the case after he entered an appearance on behalf of the two applicants, and therefore seems not to have been concerned that he would be paid in respect of one of the accused only, either because he took a

view as to the amount of time the three cases taken together might take to conclude, or because he was not alert to the Regulations.

30. Mr. Shanley himself avers in his affidavit sworn on 25th July, 2016, that he is a sole practitioner and that, while he is familiar with the Act and the Regulations concerning representation of accused persons in the District Court, he was not familiar with how they operated in the Circuit Court. He says that it was on account of his lack of familiarity with the Regulations, and because certain more senior colleagues more familiar with the Circuit Court Regulations informed him of their impact, that he contacted the Department of Justice and Equality in January 2016 and was informed that the fee payable to him to represent three accused would be the same as that for representing one or any other number of accused persons.

Decision on time question
31. Knowledge of the operation of the Regulations must be imputed to Mr. Shanley. However, the rights engaged in the present application are the right of the applicants to legal aid and their right to choose their legal representation, not the right of Mr. Shanley to be paid through the legal aid scheme in respect of an identified client.

32. I consider that the plea of the respondent that the application is out of time is not correct. The respondent relies on the judgment of the High Court in *Broe v. DPP & Ors*. [2009] IEHC 549 where the applicant had changed solicitors after he was sent forward for trial and his new solicitor had advised the applicant for the first time that a legal point potentially arose from the Book of Evidence. Ryan J. put the matter thus at para. 41:

> "The explanation that the issue was only discovered when the new solicitor came into the case does not, in my opinion, materially affect the situation. The solicitor should normally be considered as a single entity not dependent on an individual person. As a general rule, a change of solicitor should not make a situation better or worse for a party to litigation. The fact that a party's legal advisor did not think at a particular time of a point that later occurred to him is not an excuse for delay in raising it earlier. I consider the change of solicitor from one who did not, for whatever reason, raise the timing of the charge to one who did so to be essentially similar. I do not therefore find that the change overcomes the delay."

33. In the present case, the basis of the application is that the solicitor chosen by the applicants declined to act once he ascertained the position regarding fees. It was at that point that the applicants were deprived of the right to legal aid to engage the solicitor of their choice. It was when Mr. Shanley himself refused to act that the applicants found themselves in a position where the solicitor of their choice was not available.

34. While I consider it correct to impute to Mr. Shanley knowledge of the operation of the criminal legal aid system, I do not consider that for the purposes of the running of time that the imputed knowledge of their agent is to be presumed against the applicants.

35. If I am wrong in this, it seems to me that the applicants have shown a sufficient basis on which I might extend the time to bring judicial review. The legal aid certificate is an entitlement of the applicants, not of their chosen solicitor. The applicants were not told by Mr. Shanley until after 13th January, 2016 that he had elected to decline to further represent all three co-accused persons. It is then the grounds arose which gave rise to the difficulty of which the applicants complain.

The substantive case: the right to be legally represented
36. There is no real disagreement regarding the fundamental and constitutional nature of the right to be legally represented at a criminal trial and the right to legal aid where a person's financial means so require.

37. The right of a person sent forth for trial to be legally represented has been recognised as long ago as the Supreme Court decision in *The State (Healy) v. Donoghue* [1976] I.R. 325 where O'Higgins C.J. rooted the right in the requirements of fairness and of justice which mandated that a person who:

> "… because of a lack of means, a person facing a serious criminal charge cannot provide a lawyer for his own defence. In my view the concept of justice under the Constitution, or constitutional justice … requires that in such circumstances the person charged must be afforded the opportunity of being represented." (p.350)

38. The Supreme Court confirmed in *Carmody v. Minister for Justice, Equality and Law Reform & Ors*. [2010] 1 I.R. 635 that the right is constitutional in origin:

> "The right is a constitutional right. Everyone has a right to be represented in a criminal trial but justice requires something more than the mere right to be represented when a person, who cannot afford legal representation, is facing a serious criminal charge. Such a person has a constitutional right to be granted legal aid by the State…."

39. O'Higgins C.J. in *The State (Healy) v. Donoghue* considered that the Act "provides for a choice of both solicitors and counsel", albeit from the pool of practitioners who are willing to provide their services under the scheme.

40. In *Mulhall v. O'Donnell* [1989] I.L.R.M. 367 Murphy J. held that the purpose of the legislation was:

> "…to give to the applicant the choice of solicitor to represent him…."

41. Murphy J. described the right to so choose one's legal representation to be a "primary right" and that the decision of the District Judge not to assign the solicitor nominated by the applicant had denied him his constitutional right to a fair trial.

42. The applicants argue that Article 3(1)(g) of the Regulations has had the consequence, albeit not necessarily one intended, of denying them the constitutional right to choose their solicitor, and is ineffective to protect that constitutional rights.

43. The respondent argues that the applicants have not been deprived of legal aid or representation and may choose another solicitor and obtain the benefit of a legal aid certificate for the trial. It is also argued that the right to legal aid is not an absolute right and does not import an entitlement on the part of a person holding such certificate to representation of one's choice in every circumstance.

Discussion
44. A person may elect to choose to instruct a solicitor or counsel not on the Criminal Legal Aid panel, and accordingly the right to have representation of one's choice cannot to be said to be absolute in that one cannot be entitled to have met the fees and costs

of solicitor and counsel who have not opted into the scheme.

45. This restriction on the pool of persons available to be selected does not amount to a denial by the Oireachtas of the right to have the costs of one's legal representatives discharged, but is rather a reflection of the fact that the Oireachtas could not have compelled all solicitors and counsel with the right of audience in courts in the State to opt into the Criminal Legal Aid scheme, and the statutory and constitutional obligation is met by the provision of a panel and by permitting a person to elect to instruct a person from that panel.

46. It cannot in those circumstances be argued that an applicant has been denied the right to avail of solicitor and counsel if a chosen representative either refuses to act or withdraws representation for whatever reason. A solicitor or counsel cannot be compelled to represent a person.

47. For these reasons, I accept the argument of the respondent that the right of a person to instruct legal representatives of his or her choice, and to have their fees discharged from the scheme is not untrammelled, and is limited by the choice of a legal representative not to act in a particular case, or to choose not to participate in the scheme at all.

48. The Act makes provision for a right to legal representation, and as a result of the Act as a matter of law, a person who satisfies the means test prescribed by law, is entitled to legal aid. Because of the way in which the Act has been interpreted, and because the right is constitutional in origin, the State must respect the choice of an individual, albeit the State will do so only when the person chosen has opted to be a member of the panel of legal representatives to whom the scheme applies. Once a solicitor is identified from the panel, the starting point must be that, save in exceptional circumstances, the State may not reject that choice.

49. In *Freeman v. Connellan* [1986] I.R. 433, the circumstances were to an extent the corollary of those arising in the present case. The applicant had been charged with two offences, and had sought that an identified solicitor on the legal aid panel be assigned to represent him. The District Judge refused to assign that solicitor, and indicted a preference to assign a solicitor alphabetically from the legal aid panel. Barr J. granted an order of *certiorari* as the respondent had, without compelling reason, refused to assign the solicitor of the applicant's choice. Barr J. stated as follows:

> "It seems to me that a meaningful operation of the regulation, within the spirit and intention of the Act of 1962 and in the light of the applicant's constitutional rights, requires that in circumstances where the court has any reservation about the assignment to the applicant of a solicitor nominated by him, the judge should ask the defendant why he wishes to have the services of that particular solicitor. The court should then consider the reasons (if any) put forward by the applicant before assigning a solicitor to represent him. I am also of opinion that the court should be very slow indeed to refuse to nominate the applicant's choice of solicitor if the person nominated is duly qualified for assignment and should do so only if in the view of the judge there is good and sufficient reason why the applicant should be deprived of the services of the solicitor nominated by him." (p. 439)

50. While I accept the correctness of that proposition, I consider that the question raised in the present case may not readily be answered by this argument. The present case does not involve the court making a determination to reject or ignore the choice of an applicant, but it raises the question of whether a choice can be made in the first place, a question which is logically prior.

51. Arising from the fact that the courts must respect the choice of an accused entitled to legal aid, it seems to me that a person cannot be deprived for no reason of that person's choice of representation. The right to select from the panel must be a right which has concrete and substantive effect.

52. Once a solicitor has indicated a willingness to be on that panel, that solicitor may be chosen by an accused, and the accused is entitled as an index of the constitutional right, to have his or her right to freely choose from the panel of solicitors vindicated.

53. To answer the question, one must return to first principles found in the seminal decision in *The State (Healy) v. Donoghue*, and the description by Henchy J. of the elements of the right to representation explained as that the Act was "designed to give practical implementation to a constitutional guarantee" and this would be:

> "…incompletely exercised if a bare or perfunctory application of it left the constitutional guarantee unfulfilled." (at p. 354)

54. The right, therefore, is not merely a right to be represented but a right to be represented by a solicitor of one's choice, and if the threshold for qualification is met by the accused person, the right to have the fees of that solicitor paid if he or she has opted into the legal aid panel.

55. Accordingly, I agree with the argument of the applicants that the practical and legal effect of Article 3(1)(g) is to deny an accused the right to legal aid in respect of a solicitor of his or her choice when that solicitor represents a co-accused. For that reason, I consider that the applicants are entitled to a declaration that the Article fails respect their right to be fully and effectively afforded the benefit of legal aid for the conduct of the trial.

Are the Regulations *ultra vires* the Minister?

56. The applicants also argue that the Regulations are *ultra vires* the Minister insofar as they improperly and incompletely implement the legislation. The argument is an argument of vires in the pure sense.

57. The respondent denies that the Regulations are *ultra vires* the Act. The respondent argues that the applicants have not pleaded the matter in such a way that permits me to make a declaration that the Regulations are *ultra vires*.

58. There is an express plea at para. 5(1) of the Statement of Grounds, that Article 3(1)(g) of the Regulations "goes beyond the scope of the Respondent's powers" and is "inconsistent with the and/or contradictory of those principles" provided in the enabling Act of 1962.

59. There is also a plea that Article 3(1)(g) of the Regulations is neither in implementation of or regulation of the entitlement to free legal aid as provided for in s. 3 of the Act.

60. I consider that while the words "*ultra vires*" are not used, the plea is clear, albeit it does not expressly plead that Article 3(1)(g) is not an implementation of the power under s. 10 of the Act and the plea is less focused than the argument that evolved at the hearing. Therefore, I reject the procedural objection.

The purpose of the Regulations

61. The purpose of the Regulations was described by Henchy J. in *The State (Healy) v. Donoghue* at p. 354 as:

> "…designed to give practical implementation to a constitutional guarantee, the judicial function in respect of the Act would be incompletely exercised if a bare or perfunctory application of it left the constitutional guarantee unfulfilled."

62. The relevant part of the enabling section 10 of the Act provides as follows:

> "10 (1) The Minister may make regulations for carrying this Act into effect and the regulations may, in particular, prescribe—
>
> (a) the form of legal aid certificates,
>
> (b) the rates or scales of payment of any fees, costs or other expenses payable out of moneys provided by the Oireachtas pursuant to such certificates,
>
> (c) the manner in which solicitors and counsel are to be assigned pursuant to such certificates."

63. The Minister therefore, may make Regulations for identified purposes, to prescribe the form of the certificate, the rates or scales of payment of any fees, and the manner in which solicitors or counsel are to be assigned etc. The applicants argue that Article 3(1)(g) does not set a "rate or scale".

64. The respondent argues that the Regulation merely sets the "rate or scale" at zero in respect of a co-accused. That argument in my view is artificial and contrived. A rate which is set at zero is equivalent to no rate at all, and a figure of zero is not on a scale that determines the rate or level of fees payable.

65. The practical and legal effect of the Regulation is that in the case where a solicitor represents more than one accused at the same trial, that solicitor is not entitled to be paid any fee. In effect and meaning the Regulation provides not the scale of fee that should be payable to the solicitor, but that no fee at all is payable.

66. If the effect and meaning of a Regulation has an effect not envisaged by the enabling legislation, then the instrument is *ultra vires* and of no effect. This proposition is scarcely contentious and is found in a number of judgments including the leading case of *Cityview Press Limited v. An Chomhairle Oiliúna* [1980] I.R. 381, where O'Higgins C. J. at p. 399 explained the purpose of a statutory instrument as follows:

> "In the view of this Court, the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits - if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body - there is no unauthorised delegation of legislative power."

67. Again, it is scarcely contentious that if secondary legislation does more than is permitted by the statute, or does something different than what is envisaged, the instrument is *ultra vires* and of no effect: *Purcell v. Attorney General* [1996] 2 I.L.R.M. 153.

68. I consider that while the legislation entitles the Minister to make regulations to deal with rates and scales, a provision which entirely excludes any payment is neither a rate nor a scale of payment, but an exclusion of payment in certain circumstances.

69. I consider that the Oireachtas intended by s. 10 of the Act to delegate the power of fixing from time to time the rates payable to solicitor and counsel, and various scales which might be applicable to different kinds of cases. It did not empower the Minister, by regulation, to remove entirely the right to a fee by fixing the scale at zero.

70. The respondent argues that operation of the Act across all courts shows that there is a viable scheme of legal aid and the mere fact that the scheme might have been more flexible, or might have afforded the possibility of being paid in circumstances such as the present, does not amount to sufficient reason for a court to condemn the regulatory scheme.

71. In *Bederev v. Ireland & Ors.* [2016] IESC 34, [2016] 2 I.L.R.M. 340, the Supreme Court restated the relevant principles regarding secondary legislation, and the public policy and practical reasons why delegation is desirable and necessary. However, Charleton J., after explaining the nature of legislation as "a broad instrument for the description of actions that should be taken by the executive through subsidiary instruments", explained that:

> "This allows subsidiary legislation to flexibly address future developments, so long as those developments are kin to the mischief outlawed in the parent act. In this way, no derogation from the constitutional imperative to exercise the democratic function is involved. In *Cityview Press v An Comhairle Oiliuna* [1980] IR 381 O'Higgins CJ at 398 refers to the 'obvious attractions' of subsidiary legislation 'in view of the complex, intricate and ever-changing situations which confront both the Legislature and the Executive in a modern State'." (para. 25)

72. Charleton J. went on to say:

> "…the mere fact that subsidiary legislation allows for a discretion as to how to target a particular mischief regarded as stepping outside the boundaries of what is constitutionally permissible; provided it is a mischief which has itself been sufficiently described in the parent legislation. Every delegation of legislative authority involves, of necessity, a power to do something or to refrain from doing something. The issue is as to whether a particular course is pursued as a matter to be decided by the person or body giving effect to what is in the statute by reference to its objective and to the boundaries which it sets as to what is permissible." (para. 27)

73. It is not, therefore, as Charleton J. said, a question of whether "something may have been done better or more elegantly", but whether the legislative power "has been properly delegated instead of being wrongfully abrogated".

74. For the reasons stated, I do not accept the argument of the respondent that Article 3(1)(g) merely limits the amount of payment. In this regard, I am influenced by the decision of the Supreme Court in *Cooke v. Walshe* [1984] I.R. 710, where the Court was

considering the Regulations made under the Health Act 1970, the scheme of which was to provide free medical services for certain persons. The Supreme Court rejected the argument that the Regulations made under the Act in 1971 by which a person who required treatment for injuries received in a road traffic accident should not be entitled to free medical care. O'Higgins C.J., with whom the other members of the Court agreed, made a declaration that Regulations which purported to excluded the benefit of the scheme to a category of persons "whose exclusion is in no way authorised or contemplated by the Act", and was an impermissible attempt by regulation to amend the enabling legislation.

75. Further, the operation of the criminal legal aid Regulations in the District Court differs from that in the Circuit Court, and a solicitor acting for a co-accused in the District Court is entitled to be paid to represent the second co-accused, albeit at a lower rate. For a reason that is not clear to me, the relevant provisions relating to the Circuit Court are different and admit no payment, not even at a reduced scale. No rational basis for that distinction is identified that might justify the different rules relating to the fees of a solicitor in the Circuit Court.

76. It is not necessarily the case that a rate which provides for a payment of zero would always be considered or treated as if it were no rate at all, but in the present case I am satisfied that the effect of Article 3(1)(g) in practical terms has been to deprive the applicants of representation of their choosing. Accordingly, I consider that Article 3(1)(g) of the Regulations has deprived the applicants of the core right protected by the Constitution and by the Act insofar as it failed to allow for payment of the fees of the solicitor chosen by the applicants to defend them at trial, did not correctly transpose the Act, and is *ultra vires*.

77. I therefore propose making a declaration that the provisions of Article 3(1)(g) of the Criminal Justice (Legal Aid) (Amendment) Regulations 1978 are *ultra vires* the Minister, and a declaration that Article 3(1)(g) fails to respect the right of the applicants to be fully and effectively afforded the benefit of legal aid for the conduct of the trial.