THE HIGH COURT

JUDICIAL REVIEW

2017 No. 822 J.R.

BETWEEN

PAUL O'SHEA

APPLICANT

AND

THE LEGAL AID BOARD

THE MINISTER FOR JUSTICE AND EQUALITY

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr Justice Garrett Simons delivered on 4 June 2019.

INTRODUCTION

1. The within proceedings raise a net issue as to the interpretation of the "Legal Aid – Custody Issues Scheme" ("*the Scheme*"). The Scheme is a non-statutory scheme administered by the Legal Aid Board from funds made available from the Vote of the Department of Justice and Equality. The point of interpretation centres on a question of jurisdiction, namely, does the power to decide whether particular proceedings are eligible for the Scheme reside with the High Court or with the Legal Aid Board.

2. The High Court (Humphreys J.) had made an order in *earlier* proceedings taken by the Applicant herein recommending the payment by the State of the costs incurred by the Applicant in those proceedings in accordance with the Legal Aid – Custody Issues Scheme. This order is dated 6 February 2017, and had been made in circumstances where the Legal Aid Board had had an opportunity to make submissions to the court as to whether or not the Scheme did apply to the proceedings.

3. Notwithstanding the clear terms of the order of 6 February 2017, the Legal Aid Board now maintains the position that it is entitled to disregard the recommendation of the High Court and to decide instead that the Scheme did not apply to the earlier proceedings.

4. For the reasons set out herein, I am satisfied that the position adopted by the Legal Aid Board is in breach of the express terms of the Scheme. It is the High Court—and not the Legal Aid Board—which has jurisdiction to determine eligibility. The function of the Legal Aid Board is confined to one of assessing or measuring the quantum of legal costs to be paid. The issue of principle as to whether an applicant is entitled to legal costs is conclusively determined by the recommendation of the High Court. (This is subject to an exception where it is subsequently found that an applicant has provided misleading or substantially incomplete information in respect of their financial means. See further paragraph 47 below).

FACTUAL BACKGROUND

5. The dispute in the present proceedings concerns the legal costs of an *earlier* set of judicial review proceedings taken by Mr Paul O'Shea, the Applicant herein. (*O'Shea v. Ireland & Ors.*, High Court 2016 No. 276 J.R.). The earlier proceedings had sought to challenge the constitutionality of certain provisions of the Criminal Justice Act 2006. More specifically, the proceedings sought to challenge an aspect of the provisions governing the reactivation of a suspended sentence. In brief, where a person who has received a suspended sentence is subsequently convicted of another offence ("*the triggering offence*"), the court has jurisdiction to reactivate the suspended sentence, in whole or in part. Any sentence imposed in respect of the triggering offence must run consecutively to the earlier sentence. The court does not have discretion to impose a *concurrent* sentence. See Section 99(11) of the Criminal Justice Act 2006 (as it stood in 2016).

> "(a) Where an order under subsection (1) is revoked under subsection (10), a sentence of imprisonment (other than a sentence consisting of imprisonment for life) imposed on the person concerned under subsection (10A) shall not commence until the expiration of any period of imprisonment required to be served by the person under subsection (10).
>
> (b) This subsection shall not affect the operation of section 5 of the Criminal Justice Act 1951."

6. The Applicant had sought to argue that these statutory provisions would result in the imposition of an unconstitutionally excessive and disproportionate sentence.

7. The earlier proceedings were heard by the High Court (Humphreys J.) over the course of two days, and, by reserved judgment dated 19 January 2017, *O'Shea v. Ireland* [2017] IEHC 9, the application for judicial review was dismissed.

8. It seems that a dispute then arose as to whether the proceedings were eligible under the Scheme. As will be explained shortly, this dispute centred on the fact that the principal relief sought in the proceedings had been an injunction rather than an order of prohibition. See further paragraph 54 below. What is relevant for present purposes is that Humphreys J. directed that the Legal Aid Board be put on notice of the application by the Applicant that the court make a recommendation pursuant to the Scheme.

9. The Applicant's solicitors accordingly wrote to the Legal Aid Board on 20 January 2017. Having set out the background to the proceedings, the letter then stated as follows.

> "Senior Counsel applied for a Recommendation under the Scheme, but a question arose as to whether the case fell within the terms of the Scheme, since the case against the [Circuit Court] Judge had been struck out and the Application proceeded only as an Application for a Declaration and an Injunction. Senior Counsel submitted that the Application for an Injunction brought the case within the spirit, if not the letter, of the Scheme.
>
> Mr Justice Humphreys has now listed the matter for mention before him on Monday the 6th of February 2017, in order to enable the Legal Aid Board to consider whether it wishes to make submissions on the question whether the case comes

within the scheme."

10. It seems that, following on from this letter, the junior counsel who had previously been representing Ireland and the Attorney General in the proceedings was then briefed to make limited submissions on behalf of the Legal Aid Board.

11. It appears from the transcript of the hearing before Humphreys J. on 6 February 2017 that counsel for the Legal Aid Board simply drew the court's attention to the fact that the Scheme is confined to reliefs by way of *certiorari*, *mandamus* and prohibition. Counsel for the Board expressly indicated that he did not have instructions to ask the court "to go one way or another" on the question of whether a recommendation under the Scheme should be made.

12. Having heard submissions from both sides, Humphreys J. then made a recommendation pursuant to the Scheme. This recommendation was formally recorded in an order of the High Court dated 6 February 2017.

> "The Court considers it proper in the circumstances of this case to recommend payment by the State of the costs of the Applicant including Junior Counsel in accordance with the Legal Aid – Custody Issues Scheme (Mr. Marc de Blacam SC Ms. Louise Troy BL instructed by Josephine Fitzpatrick & Company Solicitors."

13. The solicitors acting on behalf of the Applicant subsequently submitted a claim for fees pursuant to the Scheme. By letter dated 2 August 2017, the Legal Aid Board notified the solicitors of the Board's determination that the litigation did not fall within the scope of the Scheme.

> "On receipt of all claims submitted for payment under the Scheme, the Legal Aid Board's remit obliges it to, inter alia, determine if the litigation involved in the case is covered by the scope of the Scheme. In making such a determination the Board takes into account the provisions of the Scheme and, in particular, Section 4. In the consideration of the claim submitted by your firm the Board has determined that the litigation involved does not fall within the scope of the Scheme and, accordingly, the Board will not be in a position to process your claim in this instance."

14. This purported determination was made notwithstanding the terms of the High Court order of 6 February 2017. The balance of the letter then sets out the rationale for saying that the proceedings did not fall within the scope of the Scheme. I will return to this aspect of the letter of 2 August 2017 at paragraph 54 below.

15. By letter dated 14 August 2017, the solicitors acting for the Applicant drew the Legal Aid Board's attention to the events leading up to the making of the order of 6 February 2017. The Board responded by letter dated 21 August 2017. The status of the High Court order was addressed as follows.

> "Under the Scheme the Board can only authorise the payment of claims where the proceedings are embraced by Section 4 of the Scheme. You will appreciate that the Scheme cannot be applied by the Board to proceedings of a type which fall outside the Scheme's scope as public funds can only be applied for the purpose for which they have been provided by the Oireachtas.
>
> It is not within the discretion of the Legal Aid Board to apply public funds to other purposes. While a recommendation from the Court must be obtained in order for an application to be considered by the Board, if the litigation involved is not specifically covered by the provisions of the Scheme, the Board is not empowered to process any claims that may arise. The Board must adhere to appropriate governance measures in its administration of the Scheme."

16. The Applicant issued the within judicial review proceedings on 6 November 2017 seeking, *inter alia*, an order of *mandamus* directing the Legal Aid Board to pay the costs and/or fees and expenses incurred in respect of the earlier judicial review proceedings.

17. The Legal Aid Board, in its Statement of Opposition, has sought to characterise the status of a High Court recommendation as follows.

> "10. It is admitted that on or about the 6th February, 2017 Mr Justice Humphreys made a recommendation that the Respondents pay the Applicant's costs in accordance with the Legal Aid – Custody Issues Scheme. It is admitted that in order for the Legal Aid – Custody Issues Scheme to apply the party applying for said scheme must, at the determination of the case, obtain a recommendation from the Court that the provisions of the Scheme applied to their specific case. The [Legal Aid Board] is not bound by the said recommendation nor is the recommendation of the learned High Court Judge sufficient authority for the dispersement (*sic*) of public monies under the scheme. The [Legal Aid Board] must satisfy itself that the provisions of the Legal Aid – Custody Issues Scheme applied to the specific case. A recommendation from the court, though necessary, is not a sufficient condition for the payment of fees and expenses pursuant to the Legal Aid – Custody Issues Scheme.
>
> 11. In conformity with section 9 of the Scheme, the Legal Aid Board does not become involved until the proceedings have been completed and the final court order made.
>
> 12. It is correct that the Legal Aid Board was notified that an application would be made on behalf of the Applicant for a recommendation under the Scheme on 6 February 2017. The Board is neutral on whether a recommendation is made under the Scheme and does not have a role in relation to any recommendation made by the court."

18. The case came on for hearing before me on 7 May 2019.

TIME-LIMIT POINT

19. The Legal Aid Board has raised a procedural objection that the proceedings were not instituted within the three-month time-limit allowed for under Order 84, rule 21 of the Rules of the Superior Courts. This objection is predicated on an argument that time began to run from receipt of the first of the two letters from the Legal Aid Board, namely the letter of 2 August 2017. If the time-limit is instead calculated from the date of the second letter, 21 August 2017, then the proceedings were brought within three months.

20. At the hearing before me, counsel on behalf of the Legal Aid Board indicated that his clients were not pursuing this objection. I think that this concession was well made. It seems to me that the Applicant's solicitors were entitled to pursue the matter by way of correspondence before having recourse to judicial review proceedings, and had, very properly, brought the order of the High Court of 6 February 2017 to the attention of the Legal Aid Board. It was only when the Applicant's solicitor received the second letter wherein the Board indicated that it did not consider itself bound by the recommendation of the High Court that the grounds of challenge

crystallised.

OVERVIEW OF THE LEGAL AID – CUSTODY ISSUES SCHEME

21. The Scheme is a non-statutory scheme. The terms of the scheme have been published by the Legal Aid Board in a document dated June 2013. That document has been exhibited in the proceedings before me, and counsel on both sides made extensive reference to same.

22. As appears therefrom, the Scheme is a revised version of an earlier scheme known as the "Attorney General's Legal Aid Scheme". This is explained as follows at Section 2 of the Scheme.

> "2. Commencement and administration of the Scheme
>
> The Legal Aid – Custody Issues Scheme (formerly known as the Attorney General's Legal Aid Scheme) provides payment for legal representation in the High Court and the Supreme Court for certain types of cases not covered by civil legal aid or the Criminal Legal Aid Scheme. The cases covered include Habeas Corpus (Article 40.4.2) Applications, High / Supreme Court Bail Motions, certain types of Judicial Review, Extradition and European Arrest Warrant Applications (see Section 4 below). It is an ex-gratia scheme set up with funds made available by the Oireachtas.
>
> The Scheme was previously administered on behalf of the Attorney General by the Department of Justice and Equality. However, from 1st June 2012 the remit for the administration of the Scheme was transferred to the Legal Aid Board.
>
> The budgetary responsibility for the Scheme, which formerly rested with the Chief State Solicitor's Office was, with effect from the 1st January 2013, transferred to the Department of Justice and Equality. The Scheme, which was formerly known as the 'Attorney General's Legal Aid Scheme', was renamed by the Department on the 1st January 2013 as the 'Legal Aid – Custody Issues Scheme'."

23. Given that the Scheme is a revised version of the Attorney General's Legal Aid Scheme, it is necessary to consider the circumstances in which that scheme originally arose. The Scheme has its genesis in an undertaking given on behalf of the then Attorney General to the Supreme Court in 1967. The undertaking was given in the context of an application for *habeas corpus* which had been presented by lay litigants in proceedings entitled *Application of Woods* [1970] I.R. 154 ("*Woods*").

24. The nature of the undertaking provided on behalf of the Attorney General was described by Ó Dálaigh C.J. in *Woods* as follows (at page 158 of the report).

> "In the course of his address to the Court, counsel for the Attorney General stated that the Attorney General had authorised him to say that where on an application for habeas corpus by or on behalf of a prisoner who was not, for personal reasons, in a position to procure the services of counsel and solicitor, the High Court or this Court, as the case may be, considers it proper that counsel and solicitor should be assigned on the prisoner's behalf, the Attorney General would defray the cost. In view of this offer, the Court has had to consider whether this was such a case. After a full study of the law and the facts, the Court is satisfied that this is not a case which would warrant the Court assigning counsel. It is all too clear that the matters raised on the complaint on the applicant's behalf are not well founded, with one exception which is irrelevant to the legality of the prisoner's detention."

25. Walsh J. had the following to say about the undertaking (at page 166 of the report).

> "In my opinion the grounds of complaint in these applications were so devoid of substance and difficulty that it was not necessary for this Court to assign counsel to make submissions in support of the applications. I think it right, however, to take this opportunity to mark as a notable contribution to the cause of personal liberty the undertaking on behalf of the Minister for Finance and of the Attorney General, given in respect of this application and of every application for habeas corpus made henceforward, to defray the cost of solicitor and counsel for applicants who are not in a financial position to engage such professional representation whenever the High Court or this Court, as the case may be, considers it proper that solicitor and counsel should be assigned by the court concerned to make submissions in support of the application."

26. As appears, the undertaking given in *Application of Woods* was to the effect that the Attorney General would defray the costs where the court considered that counsel and solicitor should be assigned. It is clear from the terms of the undertaking given in 1967 that the arbiter of whether the then version of the scheme should apply was to be the court hearing the application. There was no suggestion that the court's recommendation in this regard could be second-guessed or overridden by the Attorney General subsequently.

27. The nature of a later iteration of the Scheme was considered in detail by the High Court in *Byrne v. Governor of Mountjoy Prison* [1999] 1 I.L.R.M. 386. The dispute in *Byrne* concerned the applicability of the then version of the scheme to extradition proceedings before the District Court. The written statement of the scheme indicated that it only applied to proceedings before the High Court and the Supreme Court. At a hearing in November 1998, a District Court judge had refused to make a recommendation pursuant to the scheme in circumstances where the judge was not satisfied that the scheme, as recorded in the written statement, applied to proceedings before the District Court. This was so notwithstanding the fact that counsel instructed on behalf of the Attorney General had given to the District Court judge the Attorney General's personal assurance that the scheme did apply to extradition cases in the District Court, and, in particular, would apply to the instant case.

28. The person in respect of whom extradition was being sought then instituted *habeas corpus* proceedings before the High Court. It was contended that there was no effective scheme in place for the payment by the State for legal representation on his behalf and that, as a result, his continued detention was unlawful. The matter came on for hearing before the High Court (Kelly J.).

29. Before turning to a consideration of the circumstances of the case, Kelly J. (as he then was) made the following general observations in respect of the Scheme (at page 389 of the reported judgment).

> "The Scheme in question has no statutory basis. It is not to be construed as a Statute or Statutory Instrument.
>
> Neither does the Scheme have any contractual basis. It is not therefore to be construed as though it were a contract.
>
> The Scheme constitutes a voluntary assurance made by the Attorney General to the Courts that in certain types of litigation needy persons will have their legal representation paid from funds at his disposal. The Scheme came about as a

result of the assurance given to the Supreme Court in the *Woods* case and the Attorney General's assurances in that regard have been accepted by the Courts ever since.

The Scheme is purely administrative and is operated by the Attorney General. As it has been created and administered by him, so may it be expanded or contracted as he thinks fit."

30. Kelly J. went on to hold that the District Court judge was in error in not accepting the Attorney General's undertaking.

"[…] Rather the District Court judge ought to have accepted the personal assurance of the Attorney General as communicated through counsel. It must be borne in mind that this scheme is a voluntary extra statutory one which is administered exclusively by the Attorney General and is within his gift. If he indicated (as he did) that it was to apply to cases of the type in suit, that alone was sufficient to expand the scheme (should it have required such expansion).

The assurance which the District Court judge got was no different in status to that proffered and accepted by the Supreme Court in the *Woods* case. In this case, however, the District Court judge indicated that as far as he was concerned, the Attorney General's assurance and undertaking would apply only to the instant case. That is not the form in which the assurance was proffered and it does not appear to me to have been open to the District Court judge to adopt the course which he did in the absence of exceptional circumstances."

31. Kelly J. did suggest, however, that it would have been preferable had the extension of the Scheme to extradition proceedings been communicated to the relevant authorities in the form of a written notification.

"At whatever time it was decided by the Attorney General that the scheme should apply generally to extradition proceedings in the District Court (at least 15 years ago), it would undoubtedly have been desirable that that decision would have been communicated to the relevant authorities in a form of written notification. That would have solved all of the difficulties which have occurred in this case. Nonetheless, the fact that this was not done should not have resulted in what has occurred here once the assurance of the Attorney General was proffered to the District Court. In any event, this administrative lacuna could not possibly render unlawful the detention of the applicant."

32. The applicability of the Attorney General's Scheme to extradition proceedings has been considered more recently by the Supreme Court in *Minister for Justice Equality and Law Reform v. Olsson* [2011] IESC 1; [2011] 1 I.R. 384. The case concerned a request for surrender pursuant to the European Arrest Warrant Act 2003 ("*the EAW Act*"). One of the principal issues in the case was whether the statutory requirement under section 13 of the EAW Act to inform the arrested person of his or her right to obtain, or be provided with, professional legal advice and representation had been properly discharged.

33. The argument on behalf of the arrested person is summarised as follows in the judgment of the Supreme Court, per O'Donnell J. at page 391 of the report.

"The appellant's point in this respect is narrow, but not necessarily any less effective for that. The Scheme is derived from the assurances given to the Supreme Court in open court, on behalf of the Attorney General, in the case of in *Application of Woods* [1970] I.R. 154. Since that time the Scheme has always operated by the making of a recommendation by the court which the Attorney General almost always follows, although he or she is not obliged to do so. The appellant relies in this regard on the most recent iteration of the Scheme dated the 1st of May, 2000. Clause 8 of that document provides:-

'The Scheme is an administrative, non-statutory arrangement whereby payments are made out of the Vote of the Office of the Chief State Solicitor in respect of certain legal costs in the types of litigation referred to in paragraph 1 of the Scheme in which, for the most part, the State is a party (although the State need not be a party to proceedings which are eligible for the Attorney General's Scheme). The Attorney General is not bound by the recommendation of the Court.'

The appellant contends quite simply that the Scheme here provides that the Attorney General retains a discretion and that therefore, the Scheme cannot amount to the provision of legal aid as a right: instead it is provided ex gratia and as a matter of benevolence. Put less dramatically, it is suggested that the appellant cannot enforce by action any claim to legal aid under the Scheme, and accordingly it cannot be said to be provided as of right."

34. O'Donnell J. then identified a number of flaws in this argument, related to matters such as *locus standi*. For present purposes, the most significant finding of the Supreme Court is in respect of the enforceability of the Scheme in extradition / surrender proceedings. Having referred to affidavit evidence provided by an official in the Chief State Solicitor's Office to the effect that all European Arrest Warrant cases were treated as a special case, and that any residual discretion on the part of the Attorney General is exercised in only one way, i.e. to pay costs pursuant to a recommendation of the court, O'Donnell J. stated as follows.

"In my view, this sworn statement, together with the assurances repeated to this Court, when taken with the provisions of the Scheme itself, amply satisfy any requirement implicit in section 13(4). Since in EAW cases, there is no residual discretion on the part of the Attorney General, the provision of legal services in such cases cannot properly be described as merely a matter of benevolence or discretion. On the contrary, where such services are provided pursuant to the Scheme as so expressed, then such services are in my view properly described as being provided as of right. Accordingly, I would reject this aspect of the appeal."

THE CURRENT VERSION OF THE SCHEME (JUNE 2013)

35. The present case concerns the interpretation of the June 2013 version of the scheme. The terms of the current Scheme are much more elaborate and go well beyond the terms of the undertaking given to the Supreme Court in 1967 in the *Application of Woods* [1970] I.R. 154. In particular, the Scheme is no longer confined to applications for *habeas corpus* but extends to a range of legal proceedings. Notwithstanding these significant differences, I think that it is nevertheless appropriate—in interpreting the Scheme—to have regard to the genesis of the Scheme and to the nature of the undertaking given to the Supreme Court in 1967. There does not appear to have been any suggestion in the undertaking given to the Supreme Court that a recommendation would not be followed by the Attorney General. In more recent iterations of the Scheme, however, it seems that it may have been expressly provided that the Attorney General is not bound by such a recommendation. (See, for example, the version of the Scheme as recited in the judgment in *Olsson*). Even then, however, the Attorney General has conceded that in certain types of proceedings, e.g. extradition / surrender proceedings, any residual discretion can only be exercised in one way, i.e. to make payment pursuant to a recommendation of the

court.

36. If, as contended for by the Legal Aid Board, the Scheme now allows for the recommendation of the court to be overridden by a contrary determination by the Legal Aid Board—as opposed to the Attorney General who holds a high constitutional office—this would represent a fundamental change in the nature of the Scheme. Such a fundamental change would have to be in express terms.

37. Further, in interpreting the Scheme, it is appropriate to have regard to the following practical consideration. The court is in the best position to determine whether or not particular proceedings satisfy the eligibility criteria. The court will have heard and determined the case and will know precisely what issues had been raised.

38. I turn now to consider the detail of the published scheme. The purpose and application of the Scheme is described at Section 3 as follows.

> "3. Purpose and application of the Scheme
>
> The purpose of the Scheme is to provide, in certain circumstances, legal representation for persons who need it but who cannot afford it. It is not an alternative to costs. For this reason it is necessary for the application for access to the Scheme to be made at the outset of the proceedings.
>
> Such access is not automatic and the applicant must satisfy the Court that he or she is not in a position to retain a solicitor (or, where appropriate, counsel) unless he or she receives the benefit of the Scheme. The applicant must receive from the Court a recommendation to the Legal Aid Board that the provisions of the Scheme be applied to their specific case. Members of the public should obtain their own legal advice as to whether the litigation involved falls under the provisions of the Scheme and also as to their entitlement (if any) under the Scheme.
>
> There is no obligation on a person requiring him or her to make an application for access to the Scheme and a person may elect to fund his or her legal representation privately and from personal funds. However, a person who elects to apply for assistance under the Scheme will, if successful with their application, only be provided with legal representation within the provisions of the Scheme.
>
> In addition, legal practitioners who elect to provide representation to the Scheme's applicants will only be reimbursed in accordance with the Scheme's provisions as set out in this document. It is recommended that legal practitioners should by the earliest possible date satisfy themselves that both their client and the litigation involved are encompassed by the provisions of the Scheme."

39. As appears, there is an express requirement that an applicant must receive from the court a recommendation to the Legal Aid Board that the provisions of the Scheme be applied to their specific case.

40. Eligibility under the Scheme and the application procedure are described as follows at Section 9.

> "9. Eligibility under the Scheme and application procedure
>
> The purpose of the Legal Aid – Custody Issues Scheme is to provide, in certain circumstances, legal representation for persons who need it but who cannot afford it. It is not an alternative to costs. It should be noted that access to the Scheme is not automatic and a person wishing to obtain from the Court a recommendation to the Legal Aid Board that the Scheme be applied shall:
>
> (a) make his or her application (personally or through his or her lawyer) at the commencement of the proceedings,
>
> (b) obtain the Court's acknowledgement of such an application at the commencement of such proceedings, and
>
> (c) at the end of the proceedings receive a recommendation in the final Court Order that the Scheme be applied to the applicant.
>
> It is advisable for a person wishing to obtain from the Court a recommendation that the provisions of the Scheme be applied, to make his / her application (personally or through his / her lawyer) at the commencement of the proceedings as legal aid will only be considered for reimbursement from the date of the making of the first Order acknowledging the application (and not for services provided prior to such an Order).
>
> The applicant must receive the above mentioned recommendation from the Court and this will be considered by the Legal Aid Board taking into account the provisions of the Scheme and, where deemed appropriate, the advice of the Chief State Solicitor's Office, the Office of the Director of Public Prosecutions or, as required, the Office of the Attorney General. However, it should be noted that in all instances only reasonable legal and related expenses will be considered for payment and only in circumstances where both the applicant and the litigation involved are specifically covered by the provisions of the Scheme.
>
> The term 'the commencement of the proceedings' refers to the commencement of the proceedings in a particular Court. In other words, an applicant would not be prejudiced from seeking the benefit of the Scheme to be applied to him or her in respect of Supreme Court proceedings by reason of the fact that he or she had not made such an application in relation to the High Court proceedings. However, in these circumstances, the Scheme does not apply retrospectively to persons claiming costs under the Scheme in respect of the High Court proceedings. It should be noted that when a case progresses to a higher Court, a new application must always be made for a recommendation that the provisions of the Scheme be applied.
>
> The applicant must satisfy the Court that he or she is not in a position to retain a solicitor (or, where appropriate, counsel) unless he or she receives the benefit of the Scheme. To assist the Court in considering the applicant's financial means from an informed position the applicant must, when applying for access to the Scheme, submit to the Court a fully completed Form CI 3 Application for Legal Services / Declaration of Financial Means. The information provided by the applicant must be accurate and substantially complete. It should be noted that, in the event of it transpiring that

misleading or substantially incomplete information was submitted by the applicant to the Court, the policy of the Legal Aid Board is that it would not be appropriate to consider payment of the applicant's legal fees etc. In such circumstances, the applicant will be deemed to be responsible for the funding of his / her own legal expenses.

*The Court must be satisfied that the case falls within the scope of the Scheme as set out in Section 4** and also that it warrants the assignment of counsel and / or a solicitor. If the Court considers that the complexity or importance of the case requires it, the recommendation for counsel may also include one senior counsel. In that regard, to enable a payment to be made in respect of senior counsel, the final Court Order must certify that recommendation."

*Emphasis (italics) added.

41. It is evident from the following two features of the Scheme that it is the court—and not the Legal Aid Board—which is the arbiter of whether the Scheme applies to the particular proceedings. First, the final paragraph of Section 9 expressly states that the court must be satisfied that the case falls within the scope of the Scheme as set out in Section 4. Secondly, the court's recommendation is to be included in the final court order.

42. The Scheme thus expressly envisages that the court will have to address its mind to the question of eligibility by reference to Section 4, and that the court's determination in this regard is to be recorded formally as part of the final court order. In contrast to the terms of the Scheme under consideration by the Supreme Court in *Olsson*, there is no express provision to the effect that the Legal Aid Board is not bound by the recommendation of the court. It will be recalled that the 2000 version of the Scheme had provided that the Attorney General was not bound by the recommendation of the court.

43. It would be an affront to the dignity of the court—and inconsistent with the spirit of the original undertaking given to the Supreme Court in 1967—if an administrative body such as the Legal Aid Board could disregard the court's determination, formally recorded in the final order, as to eligibility. It would also be contrary to the principle of legal certainty that the parties, with the benefit of a court order, could not rely on same to recover their costs.

44. It is, of course, correct to say that, on one reading, the reference in the third paragraph of Section 9 (above) to the "recommendation" from the court being "considered" by the Legal Aid Board *might* be understood as allowing the Board to reach a contrary conclusion on the question of whether "the litigation involved is specifically covered by the provisions of the Scheme".

45. Having carefully considered the terms of the Scheme as a whole, I am satisfied that notwithstanding the ambiguity created by the third paragraph of Section 9, the Scheme, on its proper interpretation, envisages that the court will be the final arbiter of eligibility. It seems to me that the third paragraph of Section 9 must be read in conjunction with Section 10, and that the intent of same is that the role of the Legal Aid Board is confined to one of assessing or measuring the quantum of costs. The opening paragraph of section 10 reads as follows.

> "Where the applicant and the litigation involved are encompassed by the Scheme's provisions, appropriate legal fees are payable to a solicitor, junior counsel and / or senior counsel as recommended by the Judge. The exact details of who should be paid under the Scheme will, as recommended by the Judge, be stipulated in the final Court Order. A claim for payment cannot be considered or processed for any legal representative who is not specified on the Court Order. If the final Court Order neglects to mention someone whose costs were in fact recommended by the Judge, the responsibility rests with the relevant solicitor to apply to have the Court Order formally amended to include that person."

46. The first two sentences of Section 10 indicate that not only will the court order determine whether or not legal costs are to be paid, it will also identify the individual lawyers who are to be paid. It is inconsistent with this to suggest that the content of the order should be treated as advisory only.

47. I have also attached some weight to the penultimate paragraph of Section 9. As appears therefrom, the court is required to consider an applicant's financial means. To this end, the applicant must submit to the court a fully completed "Form CI 3 Application for Legal Services / Declaration of Financial Means". Two inferences can be drawn from this paragraph. First, it emphasises the centrality of the role of the court in determining eligibility: the court's assessment is not confined to the legal issues in the case but also requires a consideration of an applicant's financial means. Secondly, it is significant that the paragraph envisages that the Legal Aid Board itself can consider whether the information in respect of financial means submitted to the court was misleading or substantially incomplete, and if so, the policy of the Board is that it would not be appropriate to consider payment of the applicant's legal fees. The fact that express provision is made in this regard suggests that where the Scheme intends that the Legal Aid Board might reach a different conclusion than that of the court on a point, this is stated in terms. (For the sake of completeness, it should be recorded that whereas the Legal Aid Board noted that the Applicant in the present case had not complied with the requirement to submit a fully completed Form CI 3, the board did not rely on this omission for the purposes of defending the within judicial review proceedings).

48. In summary, therefore, I have concluded that, on its proper interpretation, the Scheme does not authorise the Legal Aid Board to disregard the recommendation made by the court. Lest I be incorrect in this conclusion, however, I propose to address next the alternative arguments advanced on behalf of the Applicant.

WERE THE ELIGIBILITY CRITERIA MET?

49. Even if one accepts for the purposes of argument that—contrary to my finding under the previous heading—the Legal Aid Board is entitled to disregard a recommendation by the court, there is no doubt but that the correctness of the Board's decision as to eligibility can be challenged by way of judicial review. It is well established that where a formal scheme is published, the parties to whom the scheme is addressed are entitled, in principle, to enforce compliance with the terms of same by way of judicial review proceedings. See, by analogy, the judgment of the Supreme Court in *Gutrani v. Minister for Justice* [1993] 2 I.R. 427 at 435/6.

50. Even if one allows that the Legal Aid Board has a function in determining eligibility, its decision must be reached in accordance with the terms of the Scheme, and an error on the part of the Board in the interpretation of the Scheme is amenable to judicial review.

51. The eligibility criteria for the Scheme are set out as follows at Section 4 thereof.

> "4. Scope of the Scheme
>
> The Legal Aid – Custody Issues Scheme is an administrative, non-statutory arrangement whereby payments are made

from the Vote of the Department of Justice and Equality in respect of certain legal costs in the types of litigation set out below in which, for the most part, the State is a party (although the State need not be a party to proceedings which are eligible for the Scheme).

The Scheme applies to the following forms of litigation (which are not covered by Civil or Criminal Legal Aid):

(i) Habeas Corpus (Article 40.4.2) Applications (see Part 2).

(ii) Supreme Court Bail Motions (see Part 2).

*(iii) Such Judicial Reviews as consist of or include Certiorari, Mandamus or Prohibition and concerning criminal matters or matters where the liberty of the applicant is at issue (see Part 2).**

(iv) Applications under Section 50 of the Extradition Act 1965, Extradition Applications and European Arrest Warrant Applications (including Bail Applications directly related to these cases) (see Part 2).

(v) High Court Bail Motions related to criminal matters (see Part 3).

The Scheme only applies to proceedings of the type referred to above, conducted in the High Court and the Supreme Court. Where the proceedings are of a type which fall outside the scope of the Scheme, as for example in family law cases, the Scheme cannot be applied to those proceedings because public funds may only be applied for the purpose for which they have been provided by the Oireachtas. It is not within the discretion of the Legal Aid Board to apply public funds to other purposes."

*Emphasis (italics) added.

52. The correct interpretation of Section 4 (iii) has recently been considered by the High Court (Burns J.) in *McDonagh v. Legal Aid Board* [2018] IEHC 558. It had been argued on behalf of the Legal Aid Board in that case that the eligibility criteria had to be interpreted by reference to the *title* of the Scheme, and, accordingly, the terms of the Scheme were confined to proceedings where the liberty of an individual is at stake. On this argument, the Scheme would not apply to earlier proceedings taken by the applicant challenging an order requiring an individual to register as a sex offender pursuant to the Sexual Offences Act 2001.

53. Burns J. rejected this argument as follows.

"22. In relation to the current Scheme, while the title of the Scheme refers to 'custody issues', the plain and ordinary meaning of s. 4 of the Scheme is that Judicial Reviews concerning criminal matters which include a relief sought of certiorari, mandamus or prohibition and Judicial Reviews concerning matters where the liberty of the Applicant is at stake which include a relief sought of certiorari, mandamus or prohibition, are covered by the Scheme. That meaning is absolutely clear.

23. If this is not what was meant by the section, then I fail to see how such an obvious error was not mended since it first appeared in the former Attorney General's Scheme and its continuation into the Scheme the subject matter of these proceedings. Indeed, there is no evidence before the Court that this is an error which was not noted prior to these proceedings. To interpret the section in any other manner would do violence to the words of the section. I do not see that the reference to Custody Issues in the title overrides the very clear and unambiguous words of the section.

24. Accordingly, I am of the view that the section should be interpreted as it reads, namely in a disjunctive manner and that Judicial Review cases concerning criminal matters which include a relief sought of certiorari, mandamus or prohibition and Judicial Reviews cases concerning matters where the liberty of the Applicant is at stake which include a relief sought of certiorari, mandamus or prohibition are covered by the Scheme."

54. Burns J. went on to hold that, even if she was incorrect in interpreting the terms of Section 4 (iii) of the Scheme disjunctively, any judicial review proceedings which concerned themselves with the legality of imposing reporting requirements on an individual, the breach of which is a criminal offence, represented a matter where the liberty of the applicant is at issue for the purpose of Section 4(iii).

55. Returning to the facts of the present case, the Board's finding of non-eligibility is predicated on the legal nicety that the earlier judicial review proceedings had sought an injunction rather than an order of *prohibition*. This is explained as follows in the Board's letter of 2 August 2017 to the Applicant's solicitor.

"In relation to the claim submitted by your firm in respect of the above mentioned case, it is noted that an Order of Prohibition by way of application for Judicial Review was initially sought but leave was not granted to pursue such relief. Importantly, such relief could not have been granted in light of the contents of S.I. No. 345/2015. In this instance, an Order of Prohibition could not have been properly sought against the Judge and it was removed from the amended statement of grounds dated the 4th May 2016, the day after the original ex-parte application for leave to apply for Judicial Review. Accordingly, the proceedings for which you are seeking fees do not fall within the scope of the Legal Aid – Custody Issues Scheme as set out in Section 4 of the Scheme Provisions and Guidance Document.

For these reasons, the Legal Aid – Custody Issues Scheme does not apply in this case and the Board is not in a position to consider your claim for fees."

56. It seems that the judicial review proceedings as originally drafted had named the relevant Circuit Court judge as a respondent. However, the order granting leave to apply for judicial review directed that the title be amended so as to remove any reference to the judge. This direction reflected the requirements of what was then a recent amendment to Order 84, introduced under the Rules of the Superior Courts (Judicial Review) Order 2015 (S.I. No. 345 of 2015). This amendment inserted a new rule, Order 84, rule 22(2A), as follows.

"(2A) Where the application for judicial review relates to any proceedings in or before a court and the object of the application is either to compel that court or an officer of that court to do any act in relation to the proceedings or to

quash them or any order made therein—

(a) the judge of the court concerned shall not be named in the title of the proceedings by way of judicial review, either as a respondent or as a notice party, or served, unless the relief sought in those proceedings is grounded on an allegation of mala fides or other form of personal misconduct by that judge in the con- duct of the proceedings the subject of the application for judicial review such as would deprive that judge of immunity from suit,

(b) the other party or parties to the proceedings in the court concerned shall be named as the respondent or respondents, and

(c) a copy of the notice of motion or summons must also be sent to the Clerk or Registrar of the court concerned."

57. The principal reliefs sought in the (amended) proceedings were a declaration of unconstitutionality in respect of section 99(11) of the Criminal Justice Act 2006, and an injunction restraining the Director of Public Prosecutions from proceeding with the sentencing of the Applicant. (See affidavit of Josephine Fitzpatrick sworn herein on 1 November 2017).

58. Counsel for the Applicant explained that the choice of remedy in the earlier proceedings had been influenced by the consideration that—on the traditional view—an order of prohibition would not lie against a public authority such as the Director of Public Prosecutions. Reference was made in this regard to the Law Reform Commission Working Paper on Judicial Review of Administrative Action: The Problem of Remedies (LRC WP 8-1979) (30 November 1979).

> "3.3 It follows that where the decisions of an administrative body affect rights or impose liabilities, that body may be controlled by prohibition – provided it has a duty to act judicially. As was observed supra in connection with certiorari, this latter requirement is capable of giving rise to difficulties. It is clear that the order would issue to a body such as the Land Commission or the Censorship of Publications Board; but only in respect of a limited range of their activities would it issue to local authorities or Ministers. So far as these institutions are concerned, its availability will depend upon whether, in a particular case, they are under a duty to act judicially. If they are, prohibition will be appropriate; not so if they are acting administratively. Since the distinction between acting "judicially" and acting "administratively" is far from clear, there is a possibility that someone may seek prohibition against a local authority or Minister only to find out that the activity in question is not within the reach of this type of order.
>
> 3.4 This is not to suggest that in such cases local authorities, Ministers and other agencies are immune from judicial control. When they are acting "administratively" their proceedings may be restrained – but not by prohibition. In cases of this kind and injunction is the appropriate remedy. This distinction is founded, not upon reason, but upon historical accident. Prohibition was a common law remedy; the injunction, on the other hand, sprang from the equitable jurisdiction of the Lord Chancellor. Prohibition is a pure public law remedy, with a circumscribed reach. The injunction, by contrast, is infinitely flexible in scope and although it is primarily a private law remedy, this flexibility has enabled it to win a place in public law as well. In fact the injunction is quite capable of discharging all the functions performed by prohibition, and when the common law and equity jurisdictions were fused in the nineteenth century prohibition ought to have been abolished as redundant. But it survived to cause confusion, even today."

Findings of the court

59. As appears from its letter of 2 August 2017 (set out above), the Legal Aid Board's conclusion that the proceedings were ineligible was predicated on the fact that the principal relief sought was an injunction not an order of prohibition. The Applicant has sought to explain his choice of remedy by reference to the traditional distinction between the type of body against whom an order of prohibition does and does not lie.

60. Ironically, the dispute in the present case has arisen as a result of the Applicant and the Legal Aid Board each having taken an overly technical view of the distinction between an injunction and an order of prohibition.

61. The earlier proceedings were proceedings taken by an applicant in custody seeking to challenge criminal legislation which would have the effect of precluding the sentencing judge from imposing a concurrent—as opposed to a *consecutive*—sentence in respect of the offence triggering the reactivation of the suspended sentence. If the Applicant's argument that the relevant statutory provisions were unconstitutional had been well-founded, then a declaration of invalidity could have affected the length of time which the Applicant might otherwise have had to serve in prison. I am satisfied therefore that the earlier proceedings were—to adopt the language of Section 4 of the Scheme—judicial review proceedings "*concerning criminal matters or matters where the liberty of the applicant is at issue*". This interpretation appears to me to be consistent with the approach of the High Court (Burns J.) in *McDonagh v. Legal Aid Board* [2018] IEHC 558. It will be recalled that in McDonagh the court had concluded that a challenge to the validity of an order requiring the applicant to register as a sex offender was a matter concerning the liberty of the applicant. If anything, the connection between the proceedings taken by the Applicant in the present case in respect of the challenge to the sentencing provisions more directly touches upon the issue of his liberty.

62. The question then becomes whether the Legal Aid Board were correct in fixating upon the *form* of the proceedings.

63. I have concluded that the approach taken by the Legal Aid Board to the question of eligibility involves an incorrect interpretation of the Scheme. The distinction sought to be drawn between an injunction and an order of prohibition is overly technical and inconsistent with the spirit of the Scheme. The Scheme is not a piece of legislation, nor is it a document directed exclusively to lawyers. It is clear that the Scheme is also intended to be read and understood by members of the public. Accordingly, it seems that, in determining whether the eligibility criteria apply, one should look to the substance of the proceedings not simply to their form. In substance, the earlier proceedings were judicial review proceedings "*concerning criminal matters or matters where the liberty of the applicant is at issue*". The substantive issues raised in the proceedings are ones which clearly fell within the intended scope of the Scheme.

64. The Legal Aid Board's approach to the interpretation of the Scheme is also inconsistent with the reforms made to the judicial review procedure in 1986. It will be recalled that the Applicant had, in explaining the approach taken to the form of relief in the earlier judicial review proceedings, cited the Law Reform Commission Working Paper on Judicial Review of Administrative Action: The Problem of Remedies. The strict demarcation between an injunction and an order of prohibition was criticised as follows in the report.

> "3.12 The objection to the present duality of remedies is that it allows matters of procedure to dominate issues of

principle. The principle is clear. The courts have authority to restrain any ultra vires act or decision of an administrative authority; and the basic question in any proceedings must be whether the relevant act or decision is or is not ultra vires. The defect of the current procedure is that it can cause unnecessary and expensive delay in having that question determined."

65. Following on from this report, the rules governing judicial review procedure had been amended so as to remove this technical distinction. The matter was dealt with under the 1986 version of Order 84 as follows at rule 18 and 19.

> "18. (1) An application for an order of *certiorari, mandamus*, prohibition or *quo warranto* shall be made by way of an application for judicial review in accordance with the provisions of this Order.
>
> (2) An application for a declaration or an injunction may be made by way of an application for judicial review, and on such an application the Court may grant the declaration or injunction claimed if it considers that, having regard to -
>
> (a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition, certiorari, or quo warranto,
>
> (b) the nature of the persons and bodies against whom relief may be granted by way of such order, and
>
> (c) all the circumstances of the case,
>
> it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.
>
> 19. On an application for judicial review any relief mentioned in rule 18 (1) or (2) may be claimed as an alternative or in addition to any other relief so mentioned if it arises out of or relates to or is connected with the same matter and in any event the Court may grant any relief mentioned in rules 18 (1) or (2) which it considers appropriate notwithstanding that it has not been specifically claimed."

66. The approach adopted by the Legal Aid Board seeks to reintroduce precisely the same technical distinctions which had been deprecated by the Law Reform Commission in its report, and subsequently abolished by the Rules Committee in 1986. It would be unjust if the Applicant was to be denied the benefit of the Scheme on this basis.

67. For the sake of completeness, I should also say that the approach taken by the Applicant to the earlier judicial review proceedings was unnecessarily cautious. It would have been appropriate to seek an order of prohibition as against the Director of Public Prosecutions. The entire purpose of the reforms of 1986 was to do away with the archaic distinctions between an injunction and prohibition.

68. It is clear from the terms of the correspondence in August 2017 that the objection to the form of the proceedings was the sole basis relied upon by the Legal Aid Board for denying eligibility. A second, alternative basis has since been advanced for the first time in the judicial review proceedings. The argument is put as follows in the written legal submissions.

> "6.12 It is further submitted that Paragraph 4(iii) must be read as a whole. Consequently, in order to obtain legal aid pursuant to the Scheme the judicial review proceedings must relate to criminal matters or matters where the immediate liberty of the applicant is at issue. In the instant case the Applicant was serving the reactivated sentence. His judicial review proceedings sought to impugn the constitutionality of section 99(11) of the Criminal Justice Act 2006 and to restrain the DPP's further prosecution of the Applicant (both on an interlocutory and on a final basis). His judicial review proceedings, even if successful, would not have brought about his immediate liberty. Accordingly, if Section 4(iii) is interpreted in conjunction with the rest of Section 4 the Applicant failed to satisfy the second clause of Section (iii)."

69. It must be doubtful whether it is open to a respondent to provide an entirely new justification for its decision *ex post facto*. At all events, there is nothing in the wording of Section 4 (iii) which makes eligibility contingent on the relevant proceedings being directed to the *immediate* release of an applicant. The litmus test for eligibility is whether the proceedings were proceedings "*concerning criminal matters or matters where the liberty of the applicant is at issue".* For the reasons set out at paragraphs 60 to 62 above, I am satisfied that this test was met by the earlier judicial review proceedings.

NO ISSUE ESTOPPEL

70. As explained at paragraphs 9 to 12 above, the Legal Aid Board had been put on notice of the hearing before Humphreys J. on 6 February 2017 on the question of whether a recommendation under the Scheme should be made. The Board was represented by counsel at the hearing. It has been submitted on behalf of the Applicant that the question of whether the Scheme applies to the earlier proceedings has been determined against the Board by the ruling of 6 February 2017, and that the trial judge's decision to make a recommendation gives rise to a form of issue estoppel.

71. Having carefully considered the transcript of the hearing on 6 February 2017, I have concluded that no issue estoppel arises. The principal issue for determination in the judicial review proceedings before me is whether the Legal Aid Board has *jurisdiction* to disregard a recommendation made by the High Court that particular proceedings are eligible under the Scheme. This jurisdictional issue was not addressed at the hearing on 6 February 2017. Counsel on behalf of the Board stated that his instructions were simply to "flag" to the court that the proceedings did not appear to meet the eligibility criteria by virtue of the fact that the relief sought did not include *certiorari, mandamus* or an order of prohibition. Counsel explained, however, that his instructions were not to ask the judge "to go one way or the other" on the question of whether to make a recommendation. It seems that the Board did not instruct its counsel to explain to the court that it (the Board) was reserving onto itself a right to disregard any recommendation which the High Court might make. With the benefit of hindsight, it would have been preferable had this been done. If the jurisdictional issue been raised, then it could have been teased out in the earlier judicial review proceedings, and the parties would not have been put to the trouble and expense of engaging in a second set of proceedings. At all events, it follows from the limited nature of the submissions made on 6 February 2017 that no issue estoppel arises. It is well established that in order for an issue estoppel to arise, the issue must have been argued and adjudicated upon in earlier proceedings. (This is subject to the rule in *Henderson v. Henderson*, but the Applicant did not seek to rely on that rule in this case). The dispute between the parties is principally concerned with a question of jurisdiction, namely whether the Legal Aid Board has *jurisdiction* to disregard the recommendation of the High Court. This issue was not canvassed in any detail at the hearing on 6 February 2017. Accordingly, it cannot be said that the High Court (Humphreys J.) had an opportunity to fully consider and determine that issue.

72. In summary, I have concluded that no issue estoppel rises. However, the somewhat reticent approach taken by the Board at the hearing on 6 February 2017 is something which may be relevant to the issue of legal costs in these proceedings.

IRISH CONSTITUTION / EUROPEAN CONVENTION

73. The Applicant has also raised an argument that the absence of some form of provision for legal costs in respect of proceedings of the type which he had brought in the first judicial review proceedings would represent a breach of his rights under the Irish Constitution and the European Convention.

74. This argument presents a difficult question of law as to the precise parameters of the right to legal aid in criminal proceedings. The nature of the constitutional right in this regard has been summarised as follows by the Supreme Court in *Magee v. Farrell* [2009] IESC 60 [2009] 4 I.R. 70.

> "[13] *The State (Healy) v. Donoghue* [1976] I.R. 325 was concerned exclusively with the criminal jurisdiction of the courts and requires that no person shall be tried on any criminal charge save in due course of law. Article 38 of the Constitution makes it mandatory that every criminal trial should be conducted in accordance with the concept of justice, that the procedures applied shall be fair, and that the person accused will be accorded every opportunity to defend himself and this entails the provision by the State of legal aid. O'Higgins C.J. at p. 350 said:-
>
> > 'However, criminal charges vary in seriousness. There are thousands of trivial charges prosecuted in the District Courts throughout the State every day. In respect of all these there must be fairness and fair procedures, but there may be other cases in which more is required and where justice may be a more exacting task master. The requirements of fairness and of 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 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.'
>
> [14] Again at p. 353 Henchy J. said:-
>
> > 'When the Constitution states that 'no person shall be tried on any criminal charge save in due course of law' - (Article 38. s.1.), that 'the State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen' - (Article 40, s. 3, sub-s.1), that '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 every citizen' - Article 40, s. 3 sub-s. 2), and that 'no citizen shall be deprived of his personal liberty save in accordance with law' - (Article 40, s. 4, sub-s. 1), it necessarily implies, the very least, a guarantee that a citizen shall not be deprived of his liberty as a result of a criminal trial conducted in a manner, or in circumstances, calculated to shut him out from a reasonable opportunity of establishing his innocence; or, where guilt has been established or admitted, of receiving a sentence appropriate to his degree of guilt and his relevant circumstances.'
>
> [20] The foregoing decisions are consistent. There is a constitutional right to State funded legal aid when facing a criminal charge with serious consequences and certainly where there is the possibility of loss of liberty. The right has not extended to proceedings other than those in the criminal courts. Merely because a constitutional right is in issue and there is a right to be heard and to be legally represented it does not follow that there is an obligation on the State to fund legal representation. […]".

75. Whereas it is well accepted that a person without financial means is entitled to legal aid in respect of the trial of a (serious) criminal offence, the earlier judicial proceedings taken by the Applicant were very different. More specifically, the Applicant had sought to challenge the constitutionality of the sentencing provisions enacted under the Criminal Justice Act 2006. There is, in principle, a distinction between the right to defend oneself against criminal proceedings, and the right to challenge the *underlying legislation*. It could certainly be argued that the right to legal aid only applies to the former. On a more careful consideration, however, one could posit a hypothetical scenario whereby a person was being prosecuted pursuant to legislation which was patently unconstitutional. It would seem to be a fine distinction to say that they were entitled to the costs of defending the criminal proceedings, but not the costs of challenging the legislation. The practical outcome would be that a person would have been denied the liberty pursuant to an unconstitutional law.

76. This is, as I say, a difficult question. In circumstances where my findings in relation to the first of the issues identified above is sufficient, on its own, to dispose of the present proceedings, I think that it is preferable not to wade in on this issue in circumstances where it is not necessary to do so. I think that this is an appropriate case to exercise the principle of judicial self-restraint. I think that it is preferable that these difficult issues of law should be determined in a case where they have been more fully argued and where the resolution of same is necessary for the disposition of the proceedings.

CONCLUSION

77. For the reasons set out above, I am satisfied that the Legal Aid Board is not entitled to disregard a recommendation of the court that the Legal Aid – Custody Issue Scheme applies to particular proceedings. I think that the correct interpretation of the Scheme is that the High Court is the arbiter of eligibility. (This is subject to an exception where it is subsequently found that an applicant has provided misleading or substantially incomplete information in respect of their *financial means*. See further paragraph 47 above).

78. If I am mistaken in this, I am nevertheless satisfied that, in the peculiar circumstances of this case, the purported finding by the Legal Aid Board that the proceedings were not covered by the Scheme was incorrect as a matter of law. The litmus test for eligibility is whether the proceedings were proceedings "*concerning criminal matters or matters where the liberty of the applicant is at issue".* For the reasons set out at paragraphs 60 to 62 above, I am satisfied that this test was met by the earlier judicial review proceedings.

79. On the basis of either of these findings, it follows that the Applicant is entitled to recover his costs, as assessed and measured by the Legal Aid Board, in respect of the first set of judicial review proceedings.

80. I will hear counsel as to the precise form of order required in this regard.