

THE HIGH COURT

2006 1190 P

BETWEEN

PAUL WALSH

PLAINTIFF

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, THE MINISTER FOR FINANCE, IRELAND AND THE ATTORNEY
GENERAL

DEFENDANTS

Judgment of Ms. Justice Laffoy delivered on the 18th day of February, 2009.**The proceedings**

In these proceedings the plaintiff, who is a practising Senior Counsel, seeks remedies for the refusal of the first named defendant (the Minister), who has statutory responsibility for the provision of criminal legal aid under the Criminal Justice (Legal Aid) Act 1962, (the Act of 1962) and the regulations made thereunder, to discharge his fees in connection with the representation by him of an accused person, who had the benefit of a certificate for free legal aid which covered representation by senior counsel. The Minister's refusal was on the ground of non-compliance by the plaintiff with the requirements of the Criminal Justice (Legal Aid) (Tax Clearance Certificate) Regulations, 1999 (S.I. No. 135 of 1999) (the 1999 Regulations).

I propose setting out the statutory provisions and regulations which are in issue before outlining the factual circumstances which give rise to the plaintiff's claim and the bases on which it is advanced.

Relevant statutory provisions and regulations.

The substantive provision under which a legal aid certificate was granted to the accused was s. 3 of the Act of 1962. Subsection (2) of s. 3 mandates the granting of a legal aid (trial on indictment) certificate on application therefor, where it appears to the judge that the means of the accused are insufficient to enable him to obtain legal aid (para. (b)), and that, having regard to all of the circumstances of the case, it is essential in the interests of justice that the person should have legal aid in the preparation and conduct of his defence at the trial (para. (c)(ii)). By virtue of subs. (1), such certificate entitled the accused to have a solicitor and counsel assigned to him for the purposes of the preparation and conduct of his defence "in such manner as may be prescribed by regulations under s. 10" of the Act of 1962.

Section 10(1) of the Act of 1962 empowers the Minister to make regulations for carrying the Act into effect and, as originally enacted, itemised certain matters which might be prescribed in the regulations, which were set out in paras. (a) (the form of legal aid certificate), (b) (with the consent of the second defendant, rates or scales of payment of fees, costs and expenses payable out of monies provided by the Oireachtas), and (c) (the manner in which solicitors and counsel are to be assigned) of that subsection. Section 10(1) of the Act of 1962 was amended by s. 132 of the Finance Act, 1998 by the inclusion of additional paragraphs, paragraphs (d), (e) and (f). Paragraph (d), insofar as is relevant for present purposes, empowers the Minister, in sub-para. (ii), to prescribe:-

"a requirement that a barrister, the willingness of whom to act for persons to whom legal aid certificates are granted has been notified to the Minister by the General Council of the Bar of Ireland in accordance with the Criminal Justice (Legal Aid) Regulations, 1965, must, when required to do so by the Minister, furnish to the Minister a certificate issued by the Collector-General ... in respect of that barrister certifying that he has complied with all the obligations imposed on him by the Tax Acts, the Capital Gains Tax Acts and the Value-Added Tax Act 1972, and the enactments amending or extending that Act (and any instruments made under those Acts) in relation to-

(I) the payment or remittance of the taxes, interest and penalties required to be paid or remitted, and

(II) the delivery of returns,"

Paragraph (e) empowers the Minister to prescribe the conditions that must be satisfied before a certificate referred to in paragraph (d) may be issued by the Collector-General. Paragraph (f) empowers the Minister to prescribe:-

"matters consequential on, or incidental to, a requirement or condition prescribed under paragraph (d) or (e) of this subsection (which may include a provision enabling the deletion from any list kept pursuant to regulations under this subsection of the name of a ... barrister who has failed to comply with a requirement prescribed under the said paragraph (d))."

The 1999 Regulations were made by the Minister in exercise of the power conferred by s. 10 of the Act of 1962, as so amended. The 1999 Regulations deal with both the barristers' panel and the solicitors' panel maintained for the purposes of the Regulations made under the Act of 1962 and they deal with the requirement to furnish a tax clearance certificate in relation to being added to the panel (Regulation 4) and being retained on the panel (Regulation 5). Regulation 5(3) provides:-

"A barrister whose name is on the barristers' panel, and who wishes to have his or her name retained on that panel in respect of a panel year, shall annually, not later than the 30th day of November immediately preceding that panel year, furnish to the Minister a tax clearance certificate, and shall, provided all other requirements of the ...

Regulations have been complied with, thereupon be entitled to have his or her name retained on that panel in respect of the panel year concerned."

The expression "panel year" is defined as meaning the period of one year commencing on 1st December in one year and ending on 30th November in the following year.

Regulation 5(4)(a) provides that the requirement to furnish a tax clearance certificate under Regulation 5 shall be satisfied where the barrister furnishes a tax clearance certificate issued by the Collector-General pursuant to s. 1095 of the Taxes Consolidation Act 1997, (the Act of 1997) which has an expiry date that is later than the 30th day of November immediately preceding the panel year concerned. I assume that the rationale of that provision is to obviate the Collector-General having to issue more than one tax clearance certificate to a barrister, for example, a certificate under s. 1095 in relation to retainer by public authorities, as well as a certificate under s. 10 of the Act of 1962 in relation to the criminal legal aid scheme.

Regulations 6 and 7 of the 1999 Regulations deal with an application for a tax clearance certificate and an appeal against a refusal to issue a tax clearance certificate and mirror the provisions of s. 1095, including the provisions of sub-sections (5), (6) and (7) of s. 1094 of the Act of 1997 (the section of the tax code dealing with tax clearance certificates in relation to certain licences), which are incorporated in s. 1095. Sub-section (7) of s. 1095 provides that a tax clearance certificate "shall be valid for the period specified in the certificate".

While pleaded in the defendants' defence, in my view, Regulation 8 has no application to the facts of this case, although it is of relevance in construing the 1999 Regulations as a whole. It regulates retention of a solicitor or barrister on the relevant panel in circumstances where an application for tax clearance certificate has been made not later than 15th October immediately preceding the relevant panel year and the application is pending, or there is an appeal pending against a refusal to issue a tax clearance certificate which has not been finally determined. The retention, which is subject to compliance with certain requirements and formalities, is on a temporary basis for successive periods of three months until the pending application or appeal is dealt with.

Regulation 9 deals with power to delete the name of a solicitor or a barrister from the relevant panel. Regulation 9(2) mandates the Minister, following the expiration of ten days after the 1st December, 1st March, 1st June and 1st September in each year, to review the barristers' panel and, with effect from the first day of the month following such review, that is to say, in the case of a December review,

1st January in the following year, to delete from the panel the name of any barrister in respect of whom a tax clearance certificate has not been furnished or the requirements of Regulation 8 have not been complied with.

Regulation 10 mandates the Minister, following such review and deletion, to send a copy of the list of names remaining on the barristers' panel to the Registrars of the Courts which deal with criminal matters, from the Registrar of the Supreme Court to each District Court clerk, and to furnish a copy thereof to any solicitor who requests it.

The provisions of the 1999 Regulations on which the Minister relies as supporting his entitlement to refuse to discharge the fees claimed by the plaintiff are Regulation 11(4), (5) and (6) which provide as follows:-

"(4) Responsibility for ensuring eligibility for inclusion or retention of a barrister's name on the barristers' panel shall at all times remain the responsibility of the barrister concerned.

(5) No fees under the Criminal Justice (Legal Aid) Regulations shall be payable to a barrister who accepts an assignment to a case if his or her name is not, at the time of assignment, on the barristers' panel.

(6) A barrister shall be entitled to payment of fees under the ... Regulations where at the time the assignment was made the name of the barrister concerned was on the barristers' panel."

The factual basis of the plaintiff's claim

The plaintiff's name was on the barristers' panel for the panel year which ended on 30th November, 2004. Prior to the expiry of that panel year he was notified by the Courts Policy Division of the Minister's department, by letter dated the 18th September, 2004, of the requirement of the 1999 Regulations to submit a tax clearance certificate to the department by 30th November, 2004 with an expiry date after that date and was warned that non-compliance would result in his name being removed from the panel. Although he could not recollect having received that letter, I think it is probable that the plaintiff did receive it. He did not comply with the 1999 Regulations. By a further letter dated the 16th December, 2004 from the Courts Policy Division, having again referred to the requirement of the 1999 Regulations, it was stated that, there being no record of receiving a tax clearance certificate from him, his name would be deleted from the panel with effect from 1st January, 2005, in accordance with the 1999 Regulations. The plaintiff was advised that, from 1st January, 2005, he would not be "eligible to accept assignment to cases" on behalf of persons who had been granted a legal aid certificate, although he would be entitled to continue with and be paid fees for cases which had been assigned to him prior to that date while on the panel. He was also advised that he could re-enter the panel by notifying the Bar Council of his willingness to participate in the criminal legal aid scheme and that the Bar Council in turn would notify the Minister. However, he would be required to provide a tax clearance certificate to the Minister. The plaintiff's name was duly deleted from the panel on 1st January, 2005.

On 18th January, 2005 the plaintiff discharged arrears of Value Added Tax in respect of the year ended 31st July, 2004, which it is only fair to say was in a small amount relative to the outstanding fees, and the VAT thereon, which are the subject of these proceedings. The Collector-General issued a receipt dated 18th January, 2005, which the plaintiff received on or about the 26th January, 2005. On that date he submitted an application for a tax clearance certificate in reliance on the receipt. The initial response he received was a letter dated 29th January, 2005, from the Revenue Commissioners which stated that, according to their records, he had outstanding liabilities. At the time that letter was written the relevant records obviously had not been updated. Following receipt of it, on 8th February, 2005, the plaintiff spoke to an officer of the Revenue Commissioners, who confirmed that his tax affairs were in order and agreed to process his application on that day. A tax clearance certificate dated 8th February, 2005, issued to the plaintiff, which confirmed that his tax affairs were in order. The certificate was stated to be valid until 26th January, 2006 and it was stated that it

might be used in any circumstances where production of a tax clearance certificate was required, apart from the Standards in Public Office Act 2001, for which a separate certificate was used. Although 8th February, 2005, was a Tuesday, by the following Monday, 14th February, 2005, the plaintiff had not received the certificate.

On 14th February, 2005, the plaintiff accepted instructions to represent an accused in criminal proceedings which were due to commence in the Circuit Criminal Court in Wexford on the following day. He accepted the instructions in a context in which the senior counsel who had originally been briefed became aware late in the previous week that a case in which he was appearing, which was at hearing in the Central Criminal Court, was at risk of running beyond its predicted length. As it appeared that he would not be able to appear in Wexford Criminal Court on 15th February, 2005, he asked the plaintiff on Friday, 11th February, 2005, whether he could take a "hand-over" of the brief for Wexford.

The accused whom the plaintiff represented was one of eleven co-accused, one of whom pleaded guilty, whose trial had been fixed for 15th February, 2005 and was expected to last for three weeks. On the first day of the hearing, given the late "hand-over" of the brief, the plaintiff sought an adjournment of the trial in relation to the accused whom he was representing but that was refused. However, the Circuit Court Judge adjourned the trial until the following Thursday, the 17th February, 2005. The trial commenced on that day and continued until 15th March, 2005. The accused whom the plaintiff represented was acquitted.

The plaintiff did not receive the tax clearance certificate dated 8th February, 2005, until he returned from Wexford on 19th February, 2005. On the following Monday, 21st February, 2005, he spoke to an officer in the Revenue Commissioners who issued him with a letter, which was sent to him by fax, which confirmed that his tax clearance certificate was valid from 26th January, 2005, to 26th January, 2006. On the same day the plaintiff applied to the Courts Policy Division of the Minister's department seeking to have his name reinstated on the Criminal Legal Aid panel with effect from 26th January, 2005, or such other date as would enable him to be paid for representing the accused in Wexford from the commencement of the case on 15th February, 2005.

By letter dated 24th February, 2005, the Courts Policy Division acknowledged receipt of the tax clearance certificate and confirmed that the plaintiff's name had been "retained" on the barristers' panel until 31st December, 2005. Subsequently, by letter of 1st March, 2005, the reference to 31st December, 2005, was corrected and it was confirmed that the plaintiff's name was "retained" on the panel until 31st December, 2006. The letter of 1st March, 2005, also confirmed that it was from 20th February, 2005, that the plaintiff's name had been "retained" on the panel, which is puzzling, because the Minister's department could not have received the tax clearance certificate before 21st February, 2005.

In any event, it was obviously clear to the plaintiff by as early as 28th February, 2005, that the position being adopted by the department was that his reinstatement on the panel did not entitle him to be paid for providing legal services at the trial in Wexford which commenced on 15th February, 2005. The position of the department was set out in its letter of 24th March, 2005, in which, having referred to the 1999 Regulations and the requirement, contained in Regulation 5(3), for the furnishing of a tax clearance certificate to the Minister prior to 30th November, and having quoted Regulation 11(4) and (5), it was stated:-

"With regard to the points raised by you in your letter of 21st March regarding your possession of a tax clearance certificate on particular dates; the point here is not whether or not you had a valid certificate at any given point in time but rather whether you were on the Criminal Legal Aid panel when you accepted instruction in a case. In the case in question you were not on the panel when you accepted those instructions."

It was stated that in the circumstances no fees were payable for the case undertaken while the plaintiff was not on the barristers' panel.

It is common case that, if the plaintiff's name had been on the barristers' panel on 14th February, 2005, the fees to which he would have been entitled for representing the accused in the trial at Wexford would have amounted to €38,000.00. Those fees reflect the fact that the trial, which had commenced on 15th February, 2005, did not conclude until 15th March, 2005, that on three days of the trial the court sat beyond the normal sitting time and that counsel, because of the nature of the commitment and complexity involved, were paid enhanced fees.

As a general proposition, there was no conflict on the evidence as to the material facts in respect of which the court needs to make a finding. However, some matters arise from the facts in relation to which it is appropriate to make observations.

First, I am satisfied that the Revenue Commissioners processed the plaintiff's application for a tax clearance certificate with such expedition as might reasonably have been expected, notwithstanding that unanswered questions remain in relation to two elements of the time period involved. The first is why by 29th January, 2005, when the response to the plaintiff's application which erroneously stated that the plaintiff had outstanding arrears was dispatched, the fact that the arrears had been discharged on 18th January, 2005, had not been inputted into the Revenue computer system. The second is why the tax clearance certificate dated 8th February, 2005, had not reached the plaintiff by 14th February, 2005. The evidence was that the Revenue Commissioners treat applications for tax clearance certificates on a priority basis, a policy which, on the evidence, was followed in relation to the plaintiff's application. On the evidence I find that there is no basis for concluding that the time taken to process the plaintiff's application and furnish the tax clearance certificate to him exceeded what might reasonably have been anticipated or that any fault lies at the door of the Revenue Commissioners for the fact that the plaintiff's name was not on the barristers' panel on 14th February, 2005.

Secondly, counsel for the defendants submitted that a key factual component in this case is that, the plaintiff, as he accepted, took no step to contact the Minister's Department for the purposes of having himself reinstated on the barristers' panel before he took instructions in relation to the trial in Wexford on 14th February, 2005. It was also submitted that it was due to the plaintiff's own default that he was not in a position to, and did not, comply with the requirement of Regulation 5(3) to furnish a tax clearance certificate to the Minister, so as to ensure his retention on the barristers' panel for the panel year commencing on the 1st December, 2004. Similarly, it was due to the defendant's own default that he was deleted from the panel with effect from 1st January, 2005. That he had not been restored to the panel when he accepted an instruction to represent the accused in Wexford was also due to his own default. In my view, none of those propositions can be gainsaid.

Thirdly, counsel for the defendants submitted that the plaintiff's case proceeded on the hypothesis that, if the accused had not been represented at the trial in Wexford by the plaintiff, the State would have been in breach of its obligations under the Constitution and under the European Convention on Human Rights (the Convention) to the accused. Understandably, a recurring theme in the plaintiff's case was the importance of the right of an accused person to have legal aid in circumstances where he is unable to pay for his own defence. Counsel for the plaintiff emphasised that in *The State (Healy) v. Donoghue* [1976] I.R. 325, the Supreme Court has given both constitutional and Convention vestiture to such right, referring, in particular, to the judgment of O'Higgins C.J. (at pp. 350 and 351) and the judgment of Henchy J. (at p. 354), where Henchy J. characterised the legal-aid certificate as the shield provided against an unjust attack on the right to liberty of a person who has had to meet a prosecution without legal aid because of his poverty. The plaintiff, it was submitted, provided part of the shield in the trial of the accused in Wexford. That is true. But counsel for the defendants questioned whether, as a matter of fact, the accused would have been at the risk of an unfair trial, if the plaintiff had not taken instructions to represent the accused in Wexford when he did. If representation by senior counsel had not been available to the accused, she asked rhetorically, would the trial Judge have ordered that the trial go ahead? She suggested that there was evidence that he would not have. She also suggested that the senior counsel originally instructed might have handed the brief over to another senior counsel. The evidence was that in 2005 there were 99 senior counsel on the barristers' panel. It is not possible to conclude, as a matter of fact, that, if the accused had not been represented by the plaintiff, it is probable that his trial would have been forced on without him being represented by senior counsel in accordance with his legal aid certificate, so that a case could have been made that the State would have been in breach of the constitutional and Convention rights of the accused.

Finally, any fair-minded consideration of the facts inevitably leads to the conclusion that the decision not to pay the plaintiff the fees to which he would have been entitled had his name been re-entered on the barristers' panel less than a week earlier than it was, was a harsh decision. The plaintiff earned the fees, just as the counsel for the other nine accused who had pleaded not guilty earned their fees. He gave the same commitment to representing his client and had to contend with the same complex case as they did. If he had not taken instructions to represent the client, who had a legal aid certificate, the State would have had to fund his client's representation by some other senior counsel. That said, the question for the court is whether the decision was correct in law. It is not whether by some other yardstick, for example, the scriptural precept that the labourer is worthy of his hire (*Luke 10:7*), the decision was right.

The plaintiff's case in outline

The bases of the plaintiff's claim that the decision of the Minister to refuse to pay him legal aid fees in respect of the representation of the accused in the Wexford trial is wrong in law and the arguments advanced on his behalf in support thereof may be conveniently summarised by reference to the relief which is claimed in his statement of claim as follows:-

(1) The plaintiff seeks declarations that he is entitled to the fees due in respect of the legal services he provided to the accused in the Wexford trial on various grounds, namely:

(a) that the tax clearance certificate issued to him with effect from 26th January, 2005, entitled him to those fees in the circumstances which prevailed, which I understand to mean the late "hand-over" of a brief for a criminal trial;

(b) that he had taken appropriate steps to ensure eligibility for inclusion or retention on the barristers' panel;

(c) that his entitlement to a tax clearance certificate with effect from 26th January, 2005, and confirmed by the Revenue Commissioners on that date gave rise to such entitlement where the time taken to process and furnish the certificate was beyond his control; and

(d) that the 1999 Regulations give rise to such entitlement when the plaintiff is in possession of a tax clearance certificate or is entitled to one when accepting instructions in criminal proceedings.

The plaintiff's case is that, as a matter of the proper construction of the 1999 Regulations in the context of the primary legislation, he is entitled to be paid the fees. The main thrust of the plaintiff's case was that such construction is open either on the basis of the application of-

(i) a purposive interpretation pursuant to the jurisprudence of the Superior Courts, or,

(ii) section 5 the Interpretation Act, 2005 (the Act of 2005) or,

(iii) section 2 of the European Convention on Human Rights Act, 2003 (the Act of 2003).

A variation on the foregoing grounds is a claim that the tax clearance certificate issued to the plaintiff on 8th February, 2005, with effect from 26th January, 2005, and reciting that it might be used in any circumstances where production of a tax clearance certificate is required may be relied on in respect of special damages claimed. In my view, this ground falls to be considered not on the basis that a tax clearance certificate on its own could found a claim for special damages in respect of the services provided by the plaintiff, but on the basis that the other requirements of the criminal legal aid scheme, whether contractual, regulatory or otherwise would have been complied with.

(2) The plaintiff seeks a declaration that the provisions of the Act of 1962, as amended, and the Regulations made thereunder and, in particular, the 1999 Regulations fail to provide for basic fairness of procedures in respect of the tax clearance certificate issued to him, thereby giving rise to an entitlement to special damages, presumably on the basis that there has been a breach of his constitutional right to fair procedures.

(3) The plaintiff claims, if necessary, a declaration that the 1999 Regulations are *ultra vires* and void.

(4) The plaintiff claims, if necessary, a declaration that Regulation 11(4) and (5) of the 1999 Regulations are invalid having regard to the provisions of the Constitution.

(5) The plaintiff seeks, if necessary, a declaration of incompatibility under s. 5 of the Act of 2003 in respect of the 1999 Regulations.

(6) The plaintiff seeks, if necessary, damages pursuant to s. 3 of the Act of 2003.

Although a notice pursuant to Order 60A of the Rules of the Superior Courts, 1986 was served on the Human Rights Commission, the Commission did not participate in the proceedings.

The primary thrust of the plaintiff's case was that on the proper construction of the 1999 Regulations he is entitled to be paid fees in the agreed amount. His challenges to the validity of the 1999 Regulations were advanced as a secondary approach, if his primary argument fails.

After making some general observations on statutory interpretation, I will consider each of the plaintiff's submissions in turn.

Interpretation: general observations

Before considering the submissions made on behalf of the plaintiff urging a purposive and Convention compliant interpretation of Regulation 11(5), it is instructive to construe that regulation in accordance with what might be termed the "traditional" approach, that is to say, in accordance with the long established canons of construction.

The starting point of this exercise is an analysis of the factual position of the plaintiff by reference to the requirements of the 1999 Regulations. He was on the barristers' panel for the panel year which expired on 30th November, 2004. In order to be retained on the panel after the expiry of that panel year, he was required by Regulation 5(3) of the 1999 Regulations to submit a tax clearance certificate having an expiry date later than 30th November, 2004, (para. (d) of the definition of "tax clearance certificate" in Regulation 2) prior to 30th November, 2004. He did not do that, nor did he do so within the one month's grace which is effectively provided for in Regulation 9. Therefore, with effect from 1st January, 2005, his name was deleted from the panel.

In my view, after 1st January, 2005, the position of the plaintiff in relation to payment of fees under the 1999 Regulations was governed by Regulation 11(5). That Regulation states that no fees are payable to a barrister who accepts an assignment if his name is not on the panel at the time of assignment. Its meaning is absolutely clear and free from ambiguity. It is having one's name on the panel at the time of assignment that is a precondition to entitlement to be paid fees; it is not being in possession of, or entitled to, a tax clearance certificate, which are merely steps on the route to being included on the panel.

In order for the plaintiff, in the circumstances which prevailed at the time of his assignment to the Wexford case, to obviate the proscription on payment of fees contained in Regulation 11(5), one would have to imply into it after the words "if his or her name is not, at the time of assignment, on" before the words "the barristers' panel" the words which counsel for the plaintiff suggested should be implied – "or eligible or entitled to be on" – or some similar formulation which recognised the plaintiff's tax compliant status at the material time. On the basis of the plaintiff's suggestion, the relevant portion of Regulation 11(5) would read (the words implied being underlined):-

"No fees ... shall be paid to a barrister ... if his ... name is not, at the time of the assignment, on, or eligible or entitled to be on, the barristers' panel".

That such implication would not be ordinarily permissible is illustrated by the approach adopted by the Supreme Court in *D.B. v. Minister for Health* [2003] 3 I.R. 12. In that case the Supreme Court was concerned with the proper construction of s. 5(9) of the Hepatitis C Compensation Tribunal Act 1997, which contained two paragraphs, which were in the following terms:-

"(a) Subject to subsection 13, where the Tribunal makes an award to a claimant, the claimant shall have a period of one month or such greater period as may be prescribed from the date of receiving notice of the making of the award during which the claimant may decide in writing either to accept or reject the award or to appeal the award under subsection (15).

(b) If a claimant neither accepts nor rejects an award or appeals the award under subsection (15) within the period referred to in paragraph (a), the claimant shall be deemed to have rejected the award."

The question of construction was whether a claimant who wished to appeal an award of the Tribunal was barred from doing so after the time specified in s. 5(9)(a) had passed. Denham J., following a word by word analysis of para. (a), found (at p. 25) the words of s. 5(9)(a) to be clear and unambiguous and that a literal, not a purposive, approach should be taken to their construction. She answered the question in the affirmative.

In her judgment, there is extensive analysis by McGuinness J. (at p. 44 *et seq.*) of what she referred to as the rules of interpretation, or canons of construction, which have been established over time and which have been considered and applied in a number of decisions of the Supreme Court and of this Court. She summed up the judicial *dicta* (at p. 49) as follows:-

"In the interpretation of statutes the starting point should be the literal approach – the plain ordinary meaning of the words used. The purposive approach may also be of considerable assistance, frequently, but not invariably, where the literal approach leads to ambiguity, lack of clarity, self-contradiction, or even absurdity. In the interpretation of a section it is also necessary to consider the Act as a whole".

On the basis of a literal approach, McGuinness J. also answered the question in the affirmative.

In a passage in his judgment (at p. 59), which was relied on by counsel for the defendants, Geoghegan J. referred to the importance of bearing in mind, in interpreting paragraph (a), the terms of paragraph (b), which, he found, "unambiguously provides that, if a claimant neither accepts nor rejects an award or appeals the award within the period set out in the previous paragraph, the claimant shall be deemed to have rejected the award." He commented that nothing could be

plainer, stating that it would be wholly illegitimate to interpret the provision as though it meant something quite different from what it says and that such an approach would directly contravene the principles laid down by the Supreme Court in *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101. He then went on to quote the following passage from *Craies on Statute Law* (1977) (7th ed.) at p. 109, which had been cited with approval by Blayney J. in *Howard*:-

"If the meaning of a statute is not plain, it is permissible in certain cases to have recourse to a construction by implication, and to draw inferences or supply obvious omissions. But the general rule is 'not to import into statutes words which are not to be found there' ... and there are particular purposes for which express language is absolutely indispensable. 'Words plainly should not be added by implication into the language of a statute unless it is necessary to do so to give the paragraph sense and meaning in its context'."

Adopting the words of Geoghegan J., in my view, nothing could be plainer than what Regulation 11(5) means. To imply the words suggested by counsel for the plaintiff into Regulation 11(5) is not necessary to give it sense and meaning in its context. On the contrary, to imply such words would change the meaning of the provision.

As counsel for the defendants submitted, there are good policy reasons for the inclusion of the barrister's name on the panel being the foundation of an entitlement to be paid fees under the scheme set up by the Act of 1962 and the Regulations made thereunder. A barrister who wishes to participate in the scheme does not provide legal services for the State: he is retained by the client through the medium of the instructing solicitor to provide legal services and, subject to compliance with the Regulations, he is entitled to be paid by the State. That being the case, it is wholly appropriate that entitlement to payment for legal services should be controlled by the pre-condition of inclusion on the panel following compliance with the necessary requirements for inclusion. But it goes further than that. The list of barristers which, in effect, is the panel is an official document. Following the reviews which the Minister is mandated to conduct, which take place quarterly, the Minister is obliged to furnish it to certain court officers under Regulation 10 of the 1999 Regulations and to make it public to the extent that the Minister is under an obligation to furnish it free of charge to any solicitor requesting it (Regulation 10(3)). By stipulating that the inclusion of a barrister's name on the panel at the time of taking an assignment is a pre-condition to the payment of fees and putting the onus on the barrister to ensure that his name is on the panel, the 1999 Regulations promote certainty as to who is entitled to be assigned and paid for the provision of legal services and facilitate the efficient and proper administration of the criminal legal aid scheme.

Regulation 11(6), in my view, has no application to the plaintiff. That Regulation is clearly intended to govern the situation in which, when an assignment was made to him, the barrister's name was on the panel but he ceased to be on the panel before the case was completed. Without such a provision the client of the barrister could be prejudiced, if the barrister could not continue to act for him. To imply into Regulation 11(6), in addition to implying into Regulation 11(5), alternative criteria for entitlement to payment of fees, eligibility or entitlement to be on the panel, as suggested on behalf of the plaintiff, is not necessary to avoid such prejudice. To imply the alternative criteria into both Regulation 11(5) and Regulation 11(6) would set at naught the panel structure as the framework of the scheme.

It was suggested on behalf of the plaintiff that there is a *casus omissus* in the 1999 Regulations, insofar as, in contrast to the provisions contained in Regulation 8, there is no provision whereby a tax compliant barrister, who is not in a position to furnish a tax clearance certificate at the particular time he takes instructions to act for a client who has a legal aid certificate, can ensure entitlement to payment of fees under the scheme. I do not agree. Regulation 11(4) places responsibility for getting on to the panel and staying on the panel, which is the schematic basis of the entitlement to be paid, on the barrister. In the situation governed by Regulation 8, the barrister will have applied for a tax clearance certificate more than two weeks prior to the expiry of the relevant panel year and, provided he complies with the requirements and formalities of Regulation 8, he will maintain the *status quo* pending the outcome of his application, the *status quo* being his retention on the panel, which is temporary but renewable at three monthly intervals. The fact that the scheme does not allow the barrister to achieve that status in whatever circumstances and whenever he may wish, does not mean that the scheme is deficient.

Unfortunately, in the implementation of any scheme, situations will arise which, on the strict application of the rules of the scheme, give rise to harsh outcomes, such as, as I have already commented, the Minister's decision on the plaintiff's claim for his fees in this case has resulted in. However, that does not mean that there is a lacuna in the scheme. In my view, there is no lacuna in the 1999 Regulations, which give effect to a clear and rational policy. Nor, as I will explain later, is there a lack of basic fair procedures in the 1999 Regulations.

The conclusion I have come to is that, on the proper construction of the 1999 Regulations, applying ordinary canons of construction, the plaintiff is not entitled to be paid the fees claimed.

Purposive interpretation pursuant to the jurisprudence of the Superior Courts

It was submitted on behalf of the plaintiff that the court should apply the principle of purposive interpretation in construing the provisions of the Act of 1962 and the 1999 Regulations as they apply to the plaintiff's claim. In particular, the approach adopted by Keane J., as he then was, in *Mulcahy v. Minister for the Marine* (Unreported, High Court, 4th November, 1994) was commended to the court.

The *Mulcahy* case concerned the validity of, *inter alia*, a Fish Culture Licence purported to be granted under the Fisheries Acts 1959 to 1991, in particular, s. 15 of the Fisheries (Consolidation) Act, 1959 (the Act of 1959). The licence was challenged by Mr. Mulcahy whose residence overlooked the area of sea in which the salmon farm covered by the licence was to be located. The Fisheries Act, 1980 (the Act of 1980) was in operation at the time of the purported grant. The Act of 1980 provided that the Act of 1959, subsequent amendments, and the Act of 1980 should be construed together as one. Section 54 of the Act of 1980 contained elaborate provisions regulating aquaculture, which had not been invoked or observed when the purported licence was granted by the Minister. Keane J., having examined the relevant statutory provisions, set out his conclusions as follows:-

"It is beyond argument that, if s. 15 of the 1959 Act is construed literally and in isolation from the provisions of the 1980 Act, and in particular s. 54 thereof, the grant of the Fish Culture licence in this case was a lawful exercise of the Minister's powers, as was the grant of the Foreshore Licence under the 1933 Act. I am satisfied, however, that it cannot have been the intention of the Oireachtas that the Minister, by the simple expedient of granting a whole series of fish culture licences and foreshore licences, could effectively render otiose the elaborate structure

provided in s. 54 of the 1980 Act for protecting the rights of the public. While the Court is not, in the absence of a constitutional challenge, entitled to do violence to the plain language of an enactment in order to avoid an unjust or anomalous consequence, that does not preclude the Court from departing from the literal construction of an enactment and adopting in its place a teleological or purposive approach, if that would more faithfully reflect the true legislative intention gathered from the Act as a whole."

Keane J. concluded that, while that approach would not mean distorting the actual language used in s. 15 of the Act of 1959, it would mean attributing to the Oireachtas the intention, in enacting s. 54 of the Act of 1980, of providing exclusive machinery for the granting of aquaculture licences in public waters. He found that such a teleological or purposive construction required to be adopted, if the Court was to give effect to the intention of the Oireachtas. On that basis, he quashed the Fish Culture Licence.

It was submitted on behalf of the plaintiff that, rather than focus on the literal interpretation of Regulation 11(5), as it was suggested the Minister had done, as evidenced by the letter of 24th March, 2005, the court should have regard to the over-arching principle expressed in the long title to the Act of 1962 and the relevant provisions of the Act of 1997 (ss. 1094 and 1095), which it was suggested were incorporated by reference into the Act of 1962, to ascertain the true legislative intent to be gathered from the Act as a whole. Emphasising that, by virtue of s. 1095(7), the tax clearance certificate was "valid for the period specified" in it, it was submitted that if one were to juxtapose the Act of 1962 and s. 1095(7) in a manner similar to the analysis in the *Mulcahy* case, a purposive interpretation would require the legislation, primary and secondary, to be interpreted in a manner so as to ensure the payment to the plaintiff of legal aid fees for the legal services which were provided by him to the client in the Wexford trial in accordance with the best tradition of the Irish Bar during the period covered by the tax clearance certificate.

While I accept the principle set out by Keane J. in the passage quoted above may be applied in an appropriate case, I do not accept that it can be applied in this case to give the result suggested by the plaintiff.

The purpose of the Act of 1962, as the long title suggests, is to make provision for the grant by the State of free legal aid to poor persons in certain criminal cases. The device used in the Act for the grant of free legal aid is the grant of a legal aid certificate to the accused. Section 7 provides that, where a legal aid certificate has been granted, any fees, costs or other expenses properly incurred in preparing and conducting the case to which it relates shall, subject to the regulations under s. 10, be paid out of monies provided by the Oireachtas. The power conferred on the Minister by s. 10, including the amendment thereof, to make regulations was directed to regulating and controlling the burden on the public purse of the cost of providing free legal aid to poor persons. The rationale of the expansion of the power to make regulations provided for in the amendment contained in s. 132 of the Act of 1998 is obviously to encourage tax compliance by ensuring that only tax compliant solicitors and barristers could participate in the criminal legal aid scheme. A similar rationale underlies s. 1095 of the Act of 1997 in relation to payments under public sector contracts. However, there is no reference to s. 1095 in s. 132. It was when the Minister made the regulations he was empowered to make by virtue of the amendment contained in s. 132 that s. 1095 came into the picture, as I have already surmised, so as to avoid multiplicity of forms of tax clearance certificates.

In my view, the manifest purpose of the Oireachtas in enacting s. 10 of the Act of 1962 and the amendment to it contained in s. 132, was to provide for the effective administration of, and the management and control of public expenditure in connection with, the provision of criminal legal aid. I think it is significant that, in enacting s. 132, the Oireachtas expressly comprehended the mechanism of control involving the list or panel of barristers, which had been in existence since 1965, when Regulations were first made under the Act of 1962, and expressly authorised the deletion of a barrister's name from such list for non-compliance with the tax clearance certificate requirement. The 1999 Regulations, taken in conjunction with the other Regulations made under the Act of 1962, contain a comprehensive framework for regulating the provision of legal aid and State expenditure on it. The interpretation which was urged on behalf of the plaintiff, that, in addition to actually being on the barristers' panel, the existence of a tax clearance certificate in the name of the barrister, which is valid for the material period by virtue of s. 1095(7) at the time of assignment to a case, would give an entitlement to fees for legal services, would dilute the regulation and control provided by the 1999 Regulations. Apart from that, in my view, there is nothing whatsoever in the primary legislation, which is confined to the Act of 1962 and the amendments thereof, which points to any such legislative intention. The fact that the Minister, in making the 1999 Regulations, delineated the period of validity of the tax clearance certificate by reference to s. 1095(7) in no way displaces the fundamental requirement, which is clearly and unambiguously expressed in Regulation 11(5), that payment of fees is conditional on the barrister's name being on the panel at the time of assignment.

Application of section 5 of the Act of 2005

As the construction issue relates to secondary legislation, the provision of the Act of 2003 invoked on behalf of the plaintiff is subs. (2) of s. 5, which provides as follows:-

"In construing a provision of a statutory instrument (other than a provision that relates to the imposition of a penal or other sanction) –

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of the instrument as a whole in the context of the enactment (including the Act) under which it was made,

the provision shall be given a construction that reflects the plain intention of the maker of the instrument where that intention can be ascertained from the instrument as a whole in the context of that enactment."

For the reasons I have outlined earlier, in my view, Regulation 11(5) is neither obscure nor ambiguous, nor does a literal interpretation of it provide an absurd result or fail to reflect the plain intention of the 1999 Regulations as a whole in the context of the Act of 1962 as amended.

While it was urged on behalf of the plaintiff that the effect of interpreting Regulation 11(5) as disentitling the plaintiff to be paid fees means that he provided legal services to the legally aided accused in Wexford on a gratuitous basis to his detriment and to the benefit of the State and that this is an absurd result, it has to be recognised that such outcome is attributable to the manner in which the plaintiff conducted his tax affairs and his participation in the criminal legal aid scheme. Where the exigencies of criminal defence work at the Bar result in the late "hand-over" of a brief, counsel should

be aware whether he will be entitled to payment, if he accepts the brief, because he should be aware whether his name is on the barristers' panel. The difficulties to which delay in obtaining a tax clearance certificate from the Collector-General or pursuit of an appeal against a refusal to grant such certificate may give rise should be anticipated. Such difficulties may be avoided by the barrister seeking temporary retention on the panel in accordance with Regulation 8 of the 1999 Regulations.

Therefore, in my view, s. 5(2) cannot be called an aid in the interpretation of Regulation 11(5).

Section 2 of the Act of 2003

Subsection 2(1) of the Act of 2003 provides as follows:-

"In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."

The provision in issue here, Regulation 11(5), concerns the entitlement of the plaintiff, as a barrister who provided legal services for an accused who had the benefit of a legal aid certificate, to be paid fees for such services. Therefore, the first question which must be asked is what obligation does the State have under the Convention in relation to the payment of fees to a barrister who has represented an accused who has had the benefit of a legal aid certificate but whose name is not on the barristers' panel at the time of the assignment of the case to him? To put it another way, as counsel for the defendants did, what right of the plaintiff under the Convention is engaged in the application of Regulation 11(5)? Counsel for the defendants submitted that the answer is none.

In support of his argument that, if necessary, a declaration of incompatibility should be made under s. 5 of the Act of 2003, counsel for the plaintiff submitted that the plaintiff is entitled to rely on the following provisions of the Convention:-

(1) Article 6(3), which provides that everyone charged with a criminal offence has certain minimum rights, including, at sub-paragraph (c), the right-

"to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

(2) Article 1 of the First Protocol, which protects the right to property,

(3) Article 13, which gives the right to an effective remedy,

(4) Article 14, which prohibits discrimination.

The invocation of the provisions at (2) to (4) above can be disposed of peremptorily. There is no evidence of interference with the property or possessions of the plaintiff in this case. The only right of a barrister to be paid fees in relation to the provision of legal services to a client who has the benefit of a legal aid certificate under the Act of 1962 is conditional upon compliance by the barrister with the requirements of the Regulations made under that Act, as amended. The plaintiff does not fulfil the condition stipulated in Regulation 11(5) and has no right to the fees. In relation to Article 13, its applicability is contingent on some substantive right vested in the plaintiff having been violated. In relation to Article 14, there is no evidence of discrimination in this case.

That leaves Article 6(3)(c), which is one element of the right to a fair trial guaranteed by Article 6. In relation to the obligations imposed on the State by that Article, it was properly submitted on behalf of the plaintiff that to meet them, the representation provided by the State must be effective. Reliance was placed on the decision of the European Court of Human Rights in *Artico v. Italy* [1980] 3 E.H.R.R. 1. That decision is undoubtedly the source of the principle that under the third limb of para. (c) of Article 6(3) of the Convention, an accused person is entitled to effective representation, a principle which is well established in the Strasbourg jurisprudence. In paragraph 33 of its judgment in *Artico* the court stated:-

"...sub-paragraph (c) guarantees the right to an adequate defence either in person or through a lawyer, this right being reinforced by an obligation on the part of the State to provide free legal assistance in certain cases.

Mr. Artico claimed to be the victim of a breach of this obligation. The [Italian] Government, on the other hand, regarded the obligation as satisfied by the nomination of a lawyer for legal aid purposes, contending that what occurred thereafter was in no way the concern of the Italian Republic ... In the Government's view, Mr. Artico was, in short, complaining of the failure to appoint a substitute, but this amounted to claiming a right which was not guaranteed.

The Court recalls that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive."

The right guaranteed by Article 6(3)(c) is the right of the accused person and the correlative responsibility of the State is to the accused person. While it is true that counsel play a pivotal role in contributing to an effective system of legal aid, in particular, where counsel commits to representing an accused person in a long and complex trial as a result of a late "hand-over" of the brief, I can see nothing in Article 6(3)(c) which confers a right on counsel and imposes an obligation on the State in relation to the discharge of the fees of legal representation of the accused person, where counsel has failed to comply with the pre-condition to entitlement to be paid fees, that is to say, having his name on the barristers' panel, which is something which can be readily achieved if counsel has his tax affairs in order. In my view, counsel cannot invoke Article 6(3)(c) against the State in support of a claim for fees for representing a person to whom a legal aid

certificate had issued in the circumstances which prevail in this case. While I have found that it is not possible to conclude that, had the plaintiff not represented the accused at the trial in Wexford, it is probable that the trial would have proceeded without the accused being represented, if that had happened, the accused could have sought redress in reliance on the Convention. However, that does not mean that the plaintiff has any entitlement to invoke the Convention because he took it on himself to represent the accused while his name was not on the barristers' panel due to his own default.

On the basis of the foregoing analysis, I have come to the conclusion that s. 2 of the Act of 2003 has no application to the interpretation of Regulation 11(5). I am fortified in that conclusion in that I cannot discern any nexus between the manner in which the plaintiff urged that the court should interpret Regulation 11(5) in accordance with s. 2(1), by reading into the provision the words "or eligible or entitled to be on", and any obligation of the State under the provisions of the Convention on which the plaintiff relied. Such interpretation would merely relax the regulation of the funding of the criminal legal aid scheme in a manner which has not been shown to be necessary to avoid trenching on any rights protected by the Convention.

In the circumstances, I do not consider it necessary to express any view on the meaning of the phrase "in so far as is possible" in s. 2(1), or the extent to which the expression "subject to the rules of law relating to such interpretation and application" limits the courts interpretative mandate under section 2.

Failure to provide for basic fairness of procedures?

The foundation of the plaintiff's contention that the 1999 Regulations fail to provide for basic fairness of procedures, which it was submitted might be resolved by resorting to the double construction principle enunciated by the Supreme Court in *East Donegal Co-operative Livestock Mart Limited v. Attorney General* [1970] I.R. 317, is a perceived lacuna in the Regulations. The perceived lacuna is that there is no provision whereby a barrister whose name has been deleted from the panel, who subsequently puts his tax affairs in order and is entitled to receive a tax clearance certificate, has an entitlement to fees for representing an accused who has the benefit of a legal aid certificate until such time as he furnishes a tax clearance certificate to the Minister and his name is restored to the panel. It is unfair that, in such circumstances, there is no provision which would insulate the barrister from the detriment he may suffer because the time involved in issuing a tax clearance certificate is outside his control, it was submitted.

I have already expressed the view that there is not a *casus omissus* or lacuna in Regulation 11(5) which needs to be supplied by implication. Further, in my view, there is no lack of basic fairness of procedures in the 1999 Regulations nor in the manner in which they were applied to the plaintiff. Under the scheme, responsibility for ensuring eligibility for inclusion or retention on the panel is fairly and squarely imposed on the barrister, as is responsibility for taking the steps to achieve such inclusion or retention. The Regulations explicitly provide that a barrister's name will be deleted for non-compliance with Rule 5(3) after one month's grace and following what is, in effect, a warning to the barrister, if the requirements of Regulation 8 have not been complied with. The Regulations also explicitly state that the barrister's entitlement to fees is conditional on his name being on the panel. If a barrister accepts instructions after his name has been deleted from the panel and before it is reinstated, even if his tax affairs are in order and he is in possession of a tax clearance certificate or it is "in the post", in my view, he cannot sustain an argument that the scheme lacks basic fairness of procedures.

The operation of the scheme in the plaintiff's case bears this out. Despite the warning contained in the letter of 18th September, 2004, he did not address his outstanding tax liability and apply for a tax clearance certificate and fulfil the requirements of Regulation 8, so as to be retained on the panel, until the tax clearance certificate issued, as he might have done. Despite the second warning of 16th December, 2004, in which he was clearly apprised that his name would be deleted from the panel on 1st January, 2005, and of the consequences which would ensue, and that to re-enter on the panel he must provide a tax clearance certificate to the Minister, he accepted an assignment on 14th February, 2005, prior to providing a tax clearance certificate to the Minister. Regrettably, it has to be noted that, in so doing, he was the author of his own misfortune.

Even if, contrary to the finding I have made, there had been unreasonable delay on the part of the Revenue Commissioners in processing his application for a tax clearance certificate, the plaintiff could not sustain an argument that the scheme lacks basic fairness of procedures, because his deletion from the panel was due to his own default and he could have obviated any problems of delay in having his application for a tax clearance certificate processed by availing of the Regulation 8 procedure. In the overall context of the 1999 Regulations, while Regulations 9 and 11 are less favourable to barristers than to the State, in my view, they cannot be said to be unfair or unjust.

Ultra Vires?

It is clear from the submissions made on behalf of the plaintiff that it is Regulation 11(4) or (5), or both, which it is alleged is, or are, *ultra vires*. The plaintiff's contention is based on the assertion that those provisions are not expressly contemplated by s. 10 of the Act of 1962, as amended, citing a passage from the judgment of O'Higgins C.J. in *Cooke v. Walsh* [1984] I.R. 710, at p. 729, in which the Chief Justice stated that s. 72(2) of the Health Act 1970, the provision the constitutionality of which was being impugned, was not -

"... to be interpreted as permitting by regulation the cancelling, repeal or alteration of anything laid down in the Act itself unless such is contemplated by the Act."

The issue being addressed in that passage was whether s. 72(2), which provided that regulations made by the Minister for Health there under might provide for any service under the Act of 1970 being made available only to a particular class of the persons having eligibility for that service, could be given an interpretation which was consistent with the Constitution. It was held that it could, by not being so interpreted. However, the Regulation in issue, which was purported to be made under s. 72(2), and purported to exclude a person who required treatment for injuries received in a road traffic accident from services under the Act of 1970 unless he could establish that he was not entitled to receive damages or compensation from a third party, was held to be *ultra vires*. That Regulation was, in reality, O'Higgins C. J. found, an attempt to amend two sections of the Act of 1970 by ministerial regulation instead of by appropriate legislation, which the Oireachtas could not, and did not, intend the Minister to have power to do. It was on that basis that the Regulation was held to be *ultra vires*.

It was not argued on behalf of the plaintiff in this case that the power conferred on the Minister to make Regulations under s. 10 of the Act of 1962, as amended, was an unauthorised delegation of legislative power, but rather that the

Regulation in issue here was not contemplated by s. 10 and is not within the scope of the power which the Oireachtas intended to confer on the Minister. In my view, that contention is not correct.

Viewed as a whole, s. 10(1) confers on the Minister power to regulate the administration and funding by the State of legal aid for poor persons in certain criminal cases in accordance with the principles and policies set out in the Act. The areas which one would expect needed to be filled out by regulation in order to establish a detailed viable scheme are addressed. In paragraph (c) of s. 10(1), the Minister was expressly authorised to make regulations in relation to "the manner in which solicitors and counsel are to be assigned" pursuant to legal aid certificates, the form of which was also a matter for regulation (para. (a)). I have no doubt that para. (c), read in conjunction with para. (d) and (f), introduced in the Act of 1998, empowered the Minister to make regulations which made it a pre-condition of a barrister's entitlement to fees for representing a legally aided client that the barrister be on a panel established by the Minister at the time of his assignment to represent the client and imposed responsibility for ensuring that his name was on the panel lay with the barrister.

The Constitutional challenge

The plaintiff's case as pleaded is that Regulations 11(4) and 11(5) are invalid having regard to the provisions of Articles 34, 38.1, 40.1 and 40.3 of the Constitution. The focus of the submissions made on behalf of the plaintiff at the hearing was on the obligations of the State under the Constitution and the personal rights of the individual to which practical effect was given by the Supreme Court in *The State (Healy) v. Donoghue*: the requirement that a person facing a serious criminal charge, who, because of lack of means, cannot provide a lawyer for his own defence, be afforded the opportunity of being represented and that that such opportunity be provided by the State (*per* O'Higgins C.J. at p. 350); and the requirement that organs of the State, including the judiciary, exercise their functions in respect of the Act of 1962, which is designed to give practical implementation to a constitutional guarantee, in a manner which does not leave the constitutional guarantee unfulfilled (*per* Henchy J. at p. 354). It was submitted that the court should have regard to the manner in which the criminal legal aid scheme operates in practice for the defence Bar and, in particular, the exigencies which arise in practice in relation to the provision of legal services for the defence in a criminal trial where a brief may be "handed over" at short notice. As I have already indicated in considering the application of s. 5 of the Act of 2005, I consider that those exigencies are amply addressed in the 1999 Regulations.

The obligations of the State to which a practical effect was given in *The State (Healy) v. Donoghue* were owed to the accused person whose personal rights under the Constitution were at issue. Those obligations extended to the accused person who was represented by the plaintiff in Wexford, who had corresponding rights which were protected by the Constitution. If his rights had been violated, the accused would have had *locus standi* to seek a remedy. However, the proposition that a lawyer who represents an accused person, who has the benefit of a legal aid certificate, can "piggy-back" on the constitutional rights of the accused person and assert a constitutional right to be paid for the legal services provided, although not in compliance with the statutory scheme for funding the provision of such legal services, in my view, is wholly untenable. Even if it were open to the court to find that, as a matter of probability, the accused would not have been afforded a fair trial if the plaintiff had not taken on the commitment to represent him, I see no basis on which the plaintiff would have standing to challenge the constitutionality of Regulation 11(5). In short, Regulation 11(5) does not infringe any constitutional right of the plaintiff.

Incompatibility with the State's obligations under the Convention?

In the context of considering whether s. 2 of the Act of 2003 bears on the interpretation of the 1999 Regulations, I have analysed whether the plaintiff is entitled to invoke the Articles of the Convention on which he relies to support his claim in these proceedings. I have found that he is not. While it is true, as the plaintiff contends, that in his representation of the accused person in the Wexford trial, he was participating in giving practical expression to the State's obligations under Article 6(3)(c) of the Convention, the fact is that he would have been remunerated for those services had he complied with the provisions of the 1999 Regulations.

Aside from the fact that the plaintiff has not established that the 1999 Regulations in any way interfere with or attenuate any right guaranteed by the Convention, I would reiterate an observation previously made. In my view, in limiting the entitlement to legal fees for representing a person who has the benefit of a legal aid certificate to a barrister whose name is on the barristers' panel when he takes the assignment, the Minister, in Regulation 11(5), when read in conjunction with the other provisions of the 1999 Regulations, has put in place a coherent, rational framework for administering the provision of criminal legal aid under the Act of 1962. It is a framework which does not infringe the principle of proportionality.

Damages under section 3 of the Act of 2003

The plaintiff has not established any breach by any organ of the State of the obligation to perform its functions in accordance with the State's obligations under the Convention. Accordingly, no entitlement to damages under s. 3(2) of the Act of 2003 has been established.

Order

As the plaintiff has failed to establish his claim on any of the bases advanced, there will be an order dismissing the claim.