AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2019:000165

Clarke C.J.
MacMenamin J.
Dunne J.
Charleton J.
Baker J.

Between/

Paul O'Shea

Applicant/Respondent

- And -

The Legal Aid Board, Ireland, And The Attorney General
And by Order The Minister for Justice And Equality

Respondents/Appellants

JUDGMENT of Ms Justice Baker delivered 31 July, 2020

1. This appeal concerns the operation of the Legal Aid - Custody Issues Scheme ("the Scheme"), formerly and still commonly known as the Attorney General's Scheme, a non-statutory scheme for the payment by the State of legal costs in certain types of cases, and which is now administered by the Legal Aid Board ("the Board"). The central question for determination is whether the Board is bound by a recommendation made by a court under the Scheme that the legal fees of a party be discharged through the Scheme.

2. It is an appeal by the Board and the State appellants pursuant to Article 34.5.4° of the Constitution directly from the order of Simons J. made on 25 July 2019, for the reasons set out in a written judgment, *O'Shea v. Legal Aid Board* [2019] IEHC 385, granting judicial review

of the refusal of the Board to pay the costs and/or fees and expenses incurred by the respondent in accordance with the recommendation made by Humphreys J. by his order of 6 February 2017: *O'Shea v. Ireland* [2017] IEHC 9.

The factual and legal background

3. On 10 May 2011, the respondent, Mr O'Shea, was sentenced to 5 years' imprisonment with the final 3 years suspended under s. 15 of the Misuse of Drugs Act 1977, as amended. On 27 October 2015, Mr O'Shea pleaded guilty to committing during the period of suspension a triggering offence under s. 4 of the Criminal Justice (Theft and Fraud) Act 2001, the effect of which was to reactivate the suspended sentence under s. 99 of the Criminal Justice Act 2006 ("the 2006 Act").

4. On 19 April 2016, Moriarty J. held, in *Moore v. DPP* [2016] IEHC 244, [2018] 2 IR 170, that subsections 9 and 10 of s. 99 of the 2006 Act were unconstitutional.

5. On 3 May 2016, Mr O'Shea initiated judicial review proceedings impugning the constitutionality of s. 99(11) of the 2006 Act on the grounds that the section can, and did in his case, result in excessive and disproportionate sentencing.

6. On 19 January 2017, Humphreys J. dismissed the application for judicial review on the grounds that, when imposing a sentence on the subsequent offence, the sentencing judge can prevent the sentence from becoming disproportionate and excessive by considering the totality of the duration of custody. He did not award costs against Mr O'Shea.

7. An application was made for a recommendation from the court pursuant to the Scheme and Humphreys J. directed that the application be made on notice to the Board.

8. The Board was notified of the making of an application and counsel attended on behalf of the Board at the hearing and informed the court that the Board was neutral as to whether a recommendation was made and that it did not have any role in relation to the decision of the court to grant or refuse a recommendation. After hearing argument from counsel for the

applicant and considering the evidence of the income and means of the applicant, Humphreys J. made the order recommending the payment of Mr O'Shea's legal costs in accordance with the Scheme.

9. The Board refused to discharge the costs on the stated basis that the Scheme did not apply because the proceedings did not come within the class of proceedings to which the Scheme applies.

10. On 6 November 2017, Mr O'Shea commenced the present judicial review proceedings seeking, *inter alia*, an order of *mandamus* directing the Board to pay the costs and/or fees and expenses incurred in respect of the earlier judicial review proceedings in accordance with the recommendations of Humphreys J.

The judgment of the High Court

11. On 4 June 2019, Simons J. gave judgment in favour of Mr O'Shea, holding that he was entitled to be paid his costs from the Scheme. He held that a recommendation given by the court is dispositive in the sense that it determines conclusively whether an applicant is entitled to the benefit of the Scheme, that as the court is the arbiter of whether the Scheme applies to particular proceedings the Board had breached the express terms of the Scheme, which, in his view, restricts the role of the Board to assessing the quantum of costs to be paid.

The evolution of the Scheme

12. The Scheme derives from *Application of Woods* [1970] IR 154, an enquiry pursuant to Article 40 of the Constitution. In the course of the hearing, an undertaking was given by the Attorney General which formed the basis of the Scheme as it evolved. Walsh J. records the undertaking at p. 166:

> "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."

13. As O'Donnell J. said in *Minister for Justice and Equality v. O'Connor* [2017] IESC 21, at para. 15:

> "While the court was careful not to stop short of suggesting that legal aid was required to be available in every case involving the liberty of the citizen, and was not provided in *Woods* case itself, it is difficult to avoid the conclusion that the scheme was understood, at least in part, to be required to meet the State's constitutional obligations. Because the matter arose the way it did, it was itself not the subject of detailed argument and a judgment, and therefore the argument was not fully developed. However, it is difficult to conclude that in some cases at least, the provision of legal aid was more than merely a generous gesture on behalf of the State, but rather was a constitutional obligation."

14. Later in the judgement, O'Donnell J., in a discussion concerning the difference between the provision of legal aid under the statutory civil legal aid scheme in the Criminal Justice (Legal Aid) Act 1962, and the non-statutory administrative scheme said that "[i]n those cases to which the 2013 scheme [the Legal Aid - Custody Issues Scheme] applies, the law is to be found in a detailed administrative scheme and underpinned by the Constitution", and described the Scheme as one that could not be arbitrarily withdrawn, and which was capable of being enforced by action.

15. There followed the adoption and publication of a number of schemes, the history whereof is set out in the judgement of Burns J. in *McDonagh v. Legal Aid Board* [2018] IEHC 558. The statistics advanced by the Board show that the Scheme operates successfully and there have been few problems in its operation. In practice, a recommendation made by a court is almost never queried by the Board. It seems that from 2012 to June 2019, 1,200 applications for legal aid under the Scheme have been received, and access to the Scheme was refused on 11 occasions only, three at least of which have been the subject of successful applications for judicial review. The cost of the Scheme in 2016 was €3.2 million. More up to date figures and costings were not made available.

16. The Scheme currently in operation is dated 6 June 2013 and recites that the Government transferred responsibility for the administration and management of the Scheme and of other related *ad hoc* smaller schemes from the Department of Justice and Equality which had administered it for the Attorney General to the Board. The administration of the Scheme, then known as "the Attorney General's Legal Aid Scheme", was formally transferred to the Board on 1 June 2012 and, with effect from 1 January 2013, the Scheme was renamed "the Legal Aid - Custody Issues Scheme". Budgetary responsibility was transferred from the Chief State Solicitor's Office to the Board on 1 January 2013.

17. The Board published the "Scheme Provisions and Guidance Document" ("the Scheme Guidance") on 6 June 2013 to provide information and clarity on the operation of the Scheme, and produced a number of standardised forms including the form relevant to the present appeal, the CI 3 Form.

18. The explanatory letter published alongside the Scheme Guidance states that no fundamental change was intended to be introduced to the Scheme but that the changes were adopted to provide greater clarity and transparency, and to ensure that payments to legal practitioners would be processed more efficiently.

The Scheme generally

19. The Scheme is non-statutory, and provides what the appellants describe as an *ex gratia* payment to litigants in a defined category of cases. The Scheme is intended to provide payment for legal representation in the High Court, the Court of Appeal, and the Supreme Court for cases within its remit not covered by civil legal aid or the Criminal Justice (Legal Aid) Act 1962.

20. The class of litigation which comes within the scope of Part 1 of the Scheme is described in five numbered paragraphs at Clause 2 of the introductory section to include, *inter alia*, applications for *habeas corpus* and enquiries under Article 40.4.2 of the Constitution, Supreme Court motions for bail, High Court bail motions related to criminal matters, and the category relevant to the present appeal: such judicial reviews "as consist of or include certiorari, mandamus, or provision prohibition and concerning criminal matters or matters for the liberty of the applicant is at issue", and European arrest warrant, extradition, and Supreme Court bail applications.

21. Payment is made from the Vote of the Department of Justice and Equality.

The provisions of the Scheme

22. Two separate administrative systems operate under the Scheme, a system for the payment of costs in bail motions and, the relevant one for present purposes, that set out in Part 2 of the Scheme which deals, *inter alia*, with applications for judicial review and European arrest warrant and extradition matters. It is envisaged that most cases likely to be covered by the Scheme will involve the State as a party, but this is not a necessary precondition to the application of the Scheme.

23. Clause 3 recites that the purpose of the Scheme is to provide legal representation for persons who cannot afford to pay. It expressly states that the Scheme "is not an alternative to costs", and that it is therefore necessary that an application for access to the Scheme be made

at the commencement of proceedings. It goes on to say that that access to the Scheme "is not automatic", and that an 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."

24. A person who elects to apply for assistance under the Scheme may not recover costs outside the Scheme. As to the measure of payment, provision is made for payment of "reasonable legal and related expenses", and both the applicant and the litigation must be qualifying under the provisions of the Scheme.

25. The calculation of the fees is linked to the "parity" mechanism in operation under the Criminal Justice (Legal Aid) Act 1962 and the Regulations made thereunder, and a mechanism is set out for the ascertainment of the relevant fees for the operation of parity.

26. Lengthy provisions are set out in Clauses 11 to 17 inclusive, to deal with the administration of payment and calculation, with the payment of fees for prison visits, for the costs of expert witnesses, and the obtaining of reports from experts, translation, and interpretation costs. Invoices are to be itemised and submitted by the solicitor by use of a specific form provided for this purpose, and provision is made for the raising of, and reply to, queries in relation to payments.

27. It is not possible to pre-sanction payments under the Scheme and that fact was considered and found not to infringe the rights of the applicant in the decision of *Cerkovska v. Minister for Justice and Equality* [2014] IEHC 258, *per* Edwards J.

28. The requirement that an applicant received a recommendation of a court is set out in the second paragraph of Clause 3:

> "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".

29. Clause 9 provides that it is "advisable" for a person wishing to obtain a recommendation from a court that the Scheme be applied to him or her to make the application at the commencement of the proceedings as legal aid under the Scheme "will only be considered for reimbursement" from the date of the order acknowledging that an application be made.

30. It is to be noted that although a previous version of the Scheme dated 1 May 2000 expressly provided that "the Attorney General is not bound by the recommendation of the Court", this disclaimer is not contained in the present Scheme.

The Hearing of the Application for a Recommendation

31. The procedure for the making of an application under the Scheme is set out in Clause 9. Certain mandatory steps are set out in the first part of Clause 9 as follows:

(a) that the applicant for costs under the Scheme make application personally or through lawyers at the commencement of the proceedings;

(b) that the court acknowledge, and presumably record, the application at the commencement of the proceedings; and

(c) at the end of the proceedings, that a recommendation be received from the court and be recited in the final order that the Scheme be applied to the applicant.

32. Later, in the third paragraph of Clause 9, the recommendation is described as mandatory, and it is said that the Board will thereafter "consider" the recommendation taking into account the provisions of the Scheme and, where appropriate, the advice of the Chief State Solicitor's Office, the Office of the Attorney General, or the Office of the DPP.

33. No rules of court exist for the making of an application for a recommendation, and therefore, an applicant will seek a recommendation in accordance with the steps set out in the second last paragraph of Clause 9 which encompasses the following:

(a) the applicant must satisfy the court that he or she does not have legal means to retain legal representation unless he or she receives the benefit of the Scheme;

(b) the applicant must submit to the court a fully completed CI 3 Form which contains a declaration of financial means, income, assets, expenditure, and liabilities of an applicant.

34. That procedure is thus formulated to enable the court to make an assessment as to whether an applicant should, by reason of his or her financial circumstances, be given the benefit of a recommendation. It is said that the accuracy in the financial declaration is important as the Board would not consider it appropriate to pay the legal fees of an applicant where it transpires that the information contained was misleading or substantially incomplete.

35. The last paragraph of Clause 9 seems to set out the scope and purpose of the jurisdiction of the court to make a recommendation, and I will quote it in full:

> "The Court must be satisfied that the case falls within the scope of the Scheme as set out in s. 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."

36. The court, then, must be satisfied as to two matters identified in the last paragraph of Clause 9: that the case falls within the scope of the Scheme and that it warrants the assignment of counsel and/or solicitor, and, in some cases, senior counsel, payment for whose services must be specifically recommended.

37. The recommendation of the court is required to be included in a final order of the court. Clause 10 of the Scheme provides that:

> "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".

38. The fact that a determination and recommendation are made by the court and recorded in a formal final order was regarded by Simons J. as an index of its solemnity, and that legal certainty required that a party would be able to rely on the court order to recover costs. That the Board would thereafter ignore the recommendation amounted, in his view to "an affront to the dignity of the court". The trial judge took the view that the undertaking provided on behalf of the Attorney General in *Application of Woods*, in its terms, envisaged that the court is the final arbiter of the entitlement and that there was no suggestion that the decision of the court to grant a recommendation could be "second-guessed or overridden" by the Attorney General subsequently.

39. Simons J., therefore, found that notwithstanding some ambiguity in the third paragraph of Clause 9, which suggested that the Board would "consider" a recommendation from the court, and therefore, that the order of the court would be advisory only, the Scheme as a whole envisaged the court being the final arbiter of eligibility when Clauses 9 and 10 are read together. The Board, therefore, in his view, is to be treated as administrator of the Scheme with the role of assessing or measuring the quantum of costs, but not of assessing entitlement.

40. The trial judge correctly noted that the terms of the current Scheme are more elaborate than the terms of the undertaking given to the Supreme Court in 1967 in *Application of Woods* and, in particular, that it covers a number of classes of cases and not just applications for *habeas corpus* and enquiries under Article 40 of the Constitution. Nonetheless, the trial judge regarded the genesis of the Scheme as relevant to its interpretation and noted in particular that there did not seem to have been any suggestion contained in the undertaking given to the Supreme Court that a recommendation would not be followed by the Attorney General.

The questions in the appeal

41. After the making of the recommendation by Humphreys J. the solicitors for Mr O'Shea submitted a claim for their fees under the standard Form CI 1, with attachments. The first response by the Board came by letter of 2 August 2017, in which the claim was rejected on the grounds that the litigation did not fall within the scope of the Scheme because the judicial review as initially framed sought an order for prohibition against the District Court judge which required to be amended in the light of the Rules of the Superior Courts (Judicial Review) 2015 (S.I. No. 345/2015), and the prayer for relief of prohibition was removed and amended statement of grounds delivered. The proceedings had thereafter continued as an application was made for a declaration of unconstitutionality in respect of s. 99(11) of the Criminal Justice Act 2006 and for an injunction restraining the Director of Public Prosecution from proceeding with the sentencing of the applicant in respect of the triggering offences.

42. The Board therefore took the view that the judicial review did not consist of or include a claim for *certiorari*, *mandamus*, or prohibition, the three categories of judicial review identified in the Scheme.

43. Whilst in the proceedings before the trial judge two issues arose for consideration, the Board does not, on this appeal, challenge the primary matter for consideration before the trial judge, whether the claim comes within the ambit of the Scheme, and accordingly, one element only of the judgment falls for consideration, *i.e.* that of how the Scheme is to be administered.

44. The point for determination in the appeal therefore is a net one: whether it is the court or the Board that has the jurisdiction to determine whether an applicant is to be paid under the Scheme, and whether a recommendation binds the Board, and, taken alone, is a sufficient condition to trigger an entitlement to payment.

Submissions

45. The appellants submit that the trial judge erred in law in finding that the Board is bound by a recommendation made by a court. They submit that prior to the judgment of Simons J., it was understood that, although the recommendation from the court was a prerequisite for consideration by the Board of an application for payment under the Scheme, the final determination laid with the Board, although, in practice, payment in accordance with the recommendation almost always follows.

46. It is argued that the decision of the trial judge represents "a fundamental change in the nature of the Scheme" and is not consistent with its express terms, and the current iteration of the Scheme does not contain any provision such as that found in the version considered in *Byrne v. Governor of Mountjoy Prison* [1999] 1 ILRM 386, that the Attorney General was not bound by the recommendation of the court.

47. The Board argues that its role commences after a final court order is made to reflect the recommendation and when an application for payment is made.

48. The respondent submits that the trial judge did not err, that the Scheme confers no power on the Board to override the court's recommendation, and that the role of the Board is limited to the "administration of the Scheme", as provided for in Clause 2, which has the effect of confining the powers of the Board to the determination of the amounts to be paid.

49. The respondent refers to the fact that the Scheme is a continuation of the Attorney General's Scheme, which originated in *Application of Woods*, where the Attorney General undertook unconditionally to abide by the court's recommendation regarding the payment of costs. The respondent claims that the Scheme has operated for years on the basis that the Attorney General, and now the Board, would abide by the recommendation of a court.

50. The respondent relies on the language of the Scheme, Clause 9 of which requires that the judge "be satisfied that the case falls within the scope of the Scheme" and Clause 10, which

refers to a final court order. It is argued that the clear terms of the Scheme do not envisage that the Board can disregard a recommendation by a judge.

51. The questions for consideration, therefore, are as follows:

(a) what tools of interpretation are to be applied in construing the language of the Scheme?

(b) what is the effect of the making by a court of a recommendation that costs be paid under the Scheme?

(c) what is the role of the Board in the administration of the Scheme?

(d) what, if any, relevance is to be afforded to the fact that the Scheme derived from an undertaking given by the then Attorney General, acting in high constitutional office, that costs would be paid to classes of litigants provided the High Court made a recommendation that those costs be paid?

Interpretative approach

52. Kelly J., as he then was, in *Byrne v. Governor of Mountjoy Prison*, at p. 393, described the Scheme as a "voluntary assurance" that needy persons would have their legal representations paid from funds at the disposal of the State.

53. On the question of the interpretation of the Scheme, Kelly J. noted that it had no statutory basis and was not, therefore, to be construed as an instrument with statutory effect. He also noted that it had no contractual basis, and was not to be construed as if it was a contract, but was rather to be treated as a "voluntary assurance" given by the Attorney General. I am satisfied that the approach of Kelly J. that the Scheme cannot be interpreted as if it were statutory in origin is correct. The Scheme is a formal administrative scheme contained in the documents described above at paras. 17 and 18 of the judgment. It does not use language found in a statute and has none of the interpretative or formal provisions one would find in a statute or in a commercial contract. It seems to intend to be readily understood, as is exemplified by

its description as "guidance". As will appear, I do not consider it to be always clear and it leaves unanswered questions regarding its operation for the reasons I presently set out, I also consider that the Scheme must be seen in the contest of its history and origin. In my view, the Scheme must be read as a whole and not by a textual analysis of language in the way that one might approach provisions in a statute.

Is it correct to describe the Scheme as "voluntary"?

54. It must be important that the Scheme does not have a statutory basis, but equally one must balance against that the fact that the Scheme, as its genesis, is a solemn undertaking given by the Attorney General to the Supreme Court in the context of an argument where the constitutional right to legal representation was at least under consideration. The Attorney General's undertaking must be seen in that context as solemn and binding on his Office, not least because the Attorney General holds high office in the State and his undertaking unlocked or resolved, for the purposes of the proceedings in *Application of Woods,* an issue that needed to be resolved, and provided a practical although not entirely clear solution with consequences for the rights of litigants and the obligations of the State.

55. In *Byrne v. Governor of Mountjoy Prison* Kelly J. usefully went on to consider the relationship between the Attorney General and the courts, and noted that, in addition to his constitutional status under Article 30 of the Constitution, he is the leader of the Bar.

56. For that reason, Kelly J. expressed the view, at p. 394, that:

> "An assurance expressly given by Counsel upon the instructions of the Attorney General on a matter of the type in suit here ought to be accepted without question save in truly exceptional cases of which this was not one."

57. Later, he noted that the Scheme was administered exclusively by the Attorney General and was "within his gift", and that notwithstanding that it had been written and notified to the

interested parties, the Scheme was "nothing more than an assurance given to the Courts by the Attorney General".

58. The description of the Scheme as "voluntary" or "within the gift" of the Attorney General or, in the current iteration, the Board, must be tempered to some extent by the conclusions of this Court in *Minister for Justice v. Olsson* [2011] IESC 1, [2011] 1 IR 384. There, as in *Minister for Justice and Equality v. O'Connor* [2017] IESC 21, the court was dealing with an assertion that the provision of legal costs under the Scheme fell short of what is required by law for a person whose return is requested pursuant to a European Arrest Warrant. The appeal proceeded on the assumption that there was some right to have legal assistance provided in an appropriate case, and the net question for determination was whether the availability of legal assistance under the Scheme amounted to the provision of legal assistance as of right. The Scheme under consideration in that case expressly provided, in its Clause 8, that the Attorney General was not bound by the recommendation of the court, and the appellant contended that the fact that the Attorney General retained a discretion meant that the provision of legal aid under the Scheme was not the provision as of right, but amounted to an *ex gratia* payment and a matter "of benevolence", or meant that the appellant could not enforce by action a claim to legal aid under the Scheme.

59. O'Donnell J., at p. 394, 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 s. 13(4). Since in European arrest warrant 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."

60. The question was resolved by the fact that a solicitor instructed on behalf of the Attorney General informed the court that in all European arrest warrant cases the discretion of the Attorney General under the Scheme is always exercised in favour of an applicant, and that statement was contained in affidavit evidence and repeated in written and oral submission made to the court. The Court was satisfied therefore that no residual discretion remained in Attorney General such that the provision of legal services could not properly be described as merely a matter of benevolence or discretion, and therefore legal aid could be properly described as being provided as of right.

61. I do not therefore accept the characterisation of the Scheme as "purely administrative" or "purely voluntary". It fills a gap, and might be seen as supplementing the Criminal Justice (Legal Aid) Act 1962. It does so in a solemn and structured way, albeit the structure is somewhat less than clear.

62. It is less clear that the same absolute assurance can be said to exist outside European arrest warrant and Article 40/*habeas corpus* cases. I return to this question later in this judgment.

Clause 9: is the recommendation akin to an order?

63. In the appeal no question arises as to whether another means of providing legal aid would be more convenient, less cumbersome or whether any question of unequal treatment arises as fell for consideration in *Minister for Justice and Equality v. O'Connor*, or whether there exists under the circumstances the Constitution, the Convention or otherwise a right to legal aid in these cases.

64. Some elements of the operation of the Scheme bear analysis. It seems clear that the Board has no involvement in the application for payment under the Scheme until after the judge

has made a recommendation. As a corollary, an applicant may not seek payment from the Scheme unless a recommendation has been made.

65. The assessment of the court making the recommendation is not done on a *pro forma* basis, but on an analysis of the financial information and after the judge has been satisfied that the litigation comes within the Scheme.

66. Given therefore that the Scheme has been considered in two recent judgments of this Court as being capable of creating an actionable right, it needs to be considered whether that means that the recommendation of the court must be regarded as having the status of an order which binds the Board in all cases. I consider that it is not necessary or correct to read the Scheme in that way. That payment under the Scheme may be enforced by any person who can show that he or she is entitled to the benefit of the Scheme does not mean that an action will succeed merely on account of the fact that some steps required by the structure established by the Scheme can be shown to have been satisfied. One of those steps or conditions is the making of a recommendation by the court. The recommendation sets in train a process which brings the applicant to the next stage, the processing of payment through the Board.

67. Some degree of obscurity arises as a consequence of the fact that the judge who makes the recommendation does so by means of making an order for a recommendation, and the recommendation is reflected in an order as the Scheme requires. On that reading, the recommendation is to be seen as a condition precedent to the making of payment by the Board, but it alone is not sufficient.

68. Whether and in what circumstances the Board may disregard the recommendation made by a judge on an application to be granted the benefit of the Scheme or whether, on a plain reading of the Scheme, the recommendation made by a judge must be seen as just that not an order that payment be made from the Scheme, but a recommendation that that be so, is less clear.

69. Certain difficulties present. Counsel for the Board accepts that judicial review lies if the Board acts *ultra vires* in excluding proceedings from the Scheme without reason, and this happened in the case of *McDonagh v. Legal Aid Board* [2018] IEHC 558, and indeed in the present case, as the Board has now conceded that Mr O'Shea's proceedings do merit inclusion within the Scheme, although the Board asserts that it retains the discretion, however limited and constrained by law, to refuse to meet his legal costs.

70. Some assistance is found again with regard to this in the judgment of O'Donnell J. in *Minister for Justice and Equality v. O'Connor*, at para. 17, where he noted that a claim to legal aid pursuant to the Scheme could be enforced by action in the same way as an entitlement under the Criminal Justice (Legal Aid) Act 1962 could be enforced by proceedings in European arrest warrant cases at least.

71. It is useful to consider the difference between an order for costs in *inter partes* litigation and a recommendation made under the Scheme. An order for costs in *inter partes* litigation is an order directed to the other party to pay such amount as may be found or agreed to be due in respect of costs. It is a determination which, of itself and without more, and subject only to the question of quantum, amounts to an adjudication of rights and obligations, and is properly speaking, in its own terms, an enforceable court order.

72. The making of a recommendation is not done on an *inter partes* basis, and that is highlighted by the fact that although the Board was put on notice by Humphreys J. of the making of the application for a recommendation under the Scheme, counsel who appeared for the Board said that his instructions were that the Board had no part to play at that stage of the Scheme. The recommendation then did not result from an *inter partes* application and could not therefore be said to be the making of an order or determination of rights or obligations. It was the making of a recommendation and had the effect that one step along the process was met.

73. The recommendation in the present case in its terms was not an order to pay. The precise words used in the order of Humphries J of 6 of February 2017 reflect that fact:

> "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 Mark deBlacam SC, Ms Louise Troy BL, instructed by Josephine Fitzpatrick and Company Solicitors)."

74. On no reading of that order could it, taken alone, be seen as an order directed to the Board to pay. It is, in fact, an order entirely consistent with the language of the Scheme and records a recommendation made by the Court, and supports the claim for payment by providing the applicant with one of the essential proofs.

75. It must be said that the order does something more than merely record the recommendation of the court, and it reflects a finding by the judge that the litigation fell within the scope of the Scheme. This is consistent with the provisions of Clause 3 that an 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."

76. Counsel for the Board, in answer to questions from the Court, accepted that were a judge, for example, to make a recommendation under the Scheme in an action claiming damages for personal injuries, then, at least *prima facie*, the recommendation would appear to be wrong as the litigation would fall outside the Scheme. The Scheme provides no means by which the order of the judge could be challenged, and there seems in principle to be no reason why the order could not be appealed, or perhaps, in exceptional cases, judicially refused. The difference between the parties is subtle, counsel for the Board arguing that the judge's decision is not dispositive, and counsel for the respondent arguing that once the court finds that the litigation falls within the scope of the Scheme, the Board may not come to a different view.

77. Part of the difficulty stems from the fact that there is under the Scheme no clear administrative or straightforward way by which a judge can be asked to revisit a recommendation, other than an application for judicial review which must be seen as fairly blunt, cumbersome and expensive. The application for a recommendation is made *ex parte* or, at least, is an application in which the Board, even if it is on notice, may claim no meaningful role and such that it would seem, at least at the level of principle, that it should be possible to provide a means by which the court could be asked to revisit or further consider the making of a recommendation, a process not at all familiar in other cases where an order is made *ex parte*. The present formulation of the Scheme does not appear to admit such a process. It is well established and obvious to a large extent that a judge who heard a case is best placed to decide matters of costs, and although it could be said that the making of a recommendation is not akin to the making of an order in *inter partes* litigation as to who should bear the costs of that litigation with that in mind, it does seem sensible.

78. It cannot, as I noted above, be said that the recommendation made by the court has the force of an order, but that does not mean that it is without effect, or indeed that it is not to be afforded a degree of deference or respect. I would not go so far as the trial judge in saying that to ignore the order could amount to an affront to the dignity of the Court, at para. 43, although I do agree with him to an extent that any understanding of the effect of the making of a recommendation must recognise the genesis of the Scheme, and that it derives from a practical solution to what might have been a constitutional dilemma and that the undertaking given by the Attorney General in *Application of Woods* affords the Scheme and the steps taken under it a degree of solemnity which gives it weight. Added to that is the now clear fact that a litigant has a right, if necessary, to enforce by action the payment of costs if the criteria under the Scheme are met or in the rare case the discretion left to the Board to discharge costs under the Scheme is exercised in a manner that is unlawful.

79. The undertaking given by the Attorney General in the course of the litigation in *Application of Woods* might have resulted in litigation, but I see no frailty in the means by which the undertaking was given practical administrative effect and the administrative arrangements now in place have been regarded as sufficiently constitutionally robust in recent litigation. The Scheme now in operation extends beyond the undertaking given by the Attorney General which was given in regard to applications for an inquiry under Article 40.3.1 of the Constitution or an application for *habeas corpus*. Other classes of litigation in which the right to liberty of a litigant is broadly in issue are now covered by the Scheme.

Range of the undertaking

80. I return briefly to the decision of this Court in *Minister for Justice v. Olsson*, in the light of the assurances given to the court in that European arrest warrant case, O'Donnell J. was in a position to say that there was no residual discretion left in the Attorney General as to whether to discharge the costs of legal representation, and that therefore payment under the Scheme is properly to be treated as a right. No such assurances were given in the present case, but nonetheless it seems to me that the Scheme affords a high degree of protection to a litigant who has the benefit of a recommendation from a court, and who therefore can be said to have a right to have his or her application considered and determined lawfully, and to describe the Scheme as either discretionary or voluntary in that context fails to have regard to its intrinsic purpose of protecting the liberty of the citizen and decisions made by the Board in the administration of the Scheme must be made in the light of that purpose, and in view of the broad general requirement that discretionary powers be exercised in a rational and lawful manner.

81. In the course of written submissions and replies to a request for clarification issued before the hearing by the Court, the Board made it clear that it did not envisage any circumstances arising in which payment under the Scheme in *habeas corpus* applications or those under Article 40 of the Constitution would be refused. It did not go that far regarding

other classes of proceedings to which the Scheme applies. That approach is consistent with the undertaking given by the Attorney General in *Application of Woods,* and indeed consistent with the approach adopted by or on behalf of the Attorney General in *Minister for Justice and Equality v. O'Connor* and *Cerkovska v. Minister for Justice and Equality*. It can, however, lead to a narrow reading of the effect of the undertaking given in *Application of Woods*, that I do not consider to be justified, nor indeed do I read counsel for the Board to be making the argument in the present case, that the Board considers itself to have a broad discretion to refuse to pay the costs and expenses of litigants whose proceedings fall clearly within the range of eligible proceedings set out in Clause 4 of the Scheme.

82. My reading of the Scheme in conjunction with that explained, in particular by O'Donnell J. in *Minister for Justice and Equality v. O'Connor*, leads me to the view that while the Scheme is administrative, it could not be described as wholly voluntary or *ex gratia*, because it derives from a solemn undertaking given by a senior office of the State to the Supreme Court in the context of litigation, and is a desirable and constitutionally appropriate Scheme to fill any gaps in the protection of those persons who cannot afford legal representation to support their right to liberty.

83. That does not, in my view, mean, however, that the interpretation of the Scheme for which the respondent contends which gives the court the sole jurisdiction of determining entitlement, is correct. I am far from saying that the Scheme is elegantly drawn, and a reading of Clause 9 in particular does not afford much clarity as to the processes to be engaged, the precise purpose of the recommendation of the court, the precise degree of scrutiny that the court engages in coming to a decision that the proceedings come within the Scheme and the litigant qualifies on account of his or her means. That said, the recommendation cannot, in my view, even were one to give it a degree of solemnity, be more than a recommendation and, of

itself, does not mean that without more a litigant may say that he or she has an entitlement to be paid.

84. The appellant expressly is not saying that it has the final decision as to whether costs are to be discharged from the Scheme. Its answer that question by saying the Board does not "second guess" the recommendation of the court, and will in most cases respect that recommendation. It is accepted that the recommendation has both substance and purpose, and that the decision by the Court is not one which the Board regards itself as competent to ignore. It says simply that it has the power to question whether the Court's recommendation is correctly made in all the circumstances. It does not envisage doing that by appealing a recommendation. It has not made a firm commitment that the Scheme will be applied and paid in all cases within its remit, other than EAW and Article 40/*habeus corpus* applications, but that the statistics show payment is made in the great majority of cases.

85. If the recommendation by the court is one which the Board does not often or usually query, and if the Board recognises that the court plays a significant role in the scheme in that the Court records the name of the lawyers, records that the applicant sought the scheme at the commencement of the proceedings and that he lacked the financial means to retain legal representation, and records the facts that the court having taken those facts into account has come to a view, it is difficult to see the basis on which the Board could refuse payment. The present case is one such, as was the refusal dealt with in the judgment of Burns J. Both have resulted in an order on judicial review that the view of the Board as to whether proceedings come within the Scheme was incorrect.

86. All this leaves one with the sense that there may be relatively little purpose in the State continuing to operate a formal statutory scheme under the Criminal Justice (Legal Aid) Act 1962 and this separate scheme operated by the Board in regard to a specific type of action which is more civil than criminal.

87. In this I echo the comment of O'Donnell J. in *Minister for Justice and Equality v. O'Connor*, O'Donnell J. that it might perhaps be difficult to see why the separate administrative arrangement is maintained at all.

Practical difficulties

88. The facts of the present case provide a useful illustration of the practical difficulties apparent in the operation of the Scheme. A recommendation was made by Humphreys J. that the applicant be entitled to the benefit of the scheme, but the Board refused to pay on account of the fact that it did not consider that the proceedings came within the ambit of the Scheme. Humphreys J. had clearly decided otherwise. He did so on what was in effect an *ex parte* hearing, although presumably recognising the difficulty that might later emerge, he did put the Board on notice. The decision not having been made *inter partes*, it cannot be said in a strict legal sense to bind the Board, but the system by which a recommendation is made by a court on an essentially *ex parte* basis leaves the Board in the difficult position that it must on the one hand undoubtedly respect the solemnity and importance of the fact that a judge has made a recommendation, but equally it must be satisfied before paying out from State funds that an applicant meets the various eligibility requirements in the Scheme.

89. Clause 17 of the scheme provides that solicitor firms should "direct any queries they have in relation to the claim directly to the Legal Aid Board". It is said that if an applicant believes that the Board is acting *ultra vires* in failing to make a payment, that applicant can seek a judicial review of the decision to refuse, and that the Board is not a party to the original proceedings and not a party to the application for a recommendation.

90. As Kelly J. said in *Byrne v. Governor of Mountjoy Prison*, the Scheme is not contractual in nature and a litigant who has obtained a recommendation may not enforce the court order as such, and has no statutory basis on which to bring an action. The action would be action to

compel the Board to consider the application in the light of the recommendation, and an action against the Board should it fail to do so either rationally or lawfully, or fail entirely.

91. To say that judicial review is available on account of the refusal to discharge costs following a recommendation shows that the Scheme lacks an essential practical element, procedures to resolve a dispute, and by which the Board could make submissions on the application for a recommendation or seek to revisit that decision in a suitable case. That is the advantage that the judge hearing the application for the recommendation in turn comes to hear the application to revisit the order, an advantage which is clearly not available to the different judge who comes to hear the judicial review.

Conclusion and summary

92. This appeal concerns only the question of the interpretation of a discrete element of the Scheme and the proper exercise of the administrative function of the Board in that context. The text of the Scheme is less than clear, and provides no obvious means for the resolution of any dispute between an applicant and the Board regarding especially whether the proceedings come within the Scheme, or whether an applicant's means as disclosed in the CI 3 Form are accurate and justify payment.

93. The trial judge was correct, and is now accepted as being correct, in the main part of his judgment, that the proceedings did come within the Scheme and granted an order for judicial review on that basis. I consider that his more broad statements regarding the effect of the making of a recommendation by the court that a person be entitled to the benefit of the Scheme do not correctly reflect the meaning of the Scheme and that the recommendation made by the Court must be seen as a recommendation and not as an order of court which of itself triggers an entitlement to payment and of itself and without more entitles a party to sue to recover those costs.

94. The Scheme as established permits and requires the Board to consider whether the proceedings are properly within the Scheme and whether an applicant satisfies the financial eligibility requirements. The Board is not in a true sense bound by the recommendation of the court, but it is hard to envisage circumstances in which the recommendation of the court would not bear very significant weight in the decision, and may be in most cases dispositive. The reason why the difficulty arises in this case as presented is that the Scheme offers no method by which a party may return to the Court, either to the judge who originally made the recommendation or to another judge, for a determination *inter partes* on the question of eligibility. The two-stage process can lead to, and has in this case led to, an impasse which has resulted in the incurring of additional costs in the bringing of proceedings for judicial review. The resolution of the issue by that means seems to be necessary in the circumstances as no other means was provided in the Scheme, but that answer does not mean that the recommendation of the court is the final step in the process.

95. In short, the recommendation of the court is a condition precedent to the making of payment by the Board under this Scheme, but the Board retains a role, albeit a role it must respect the fact that a recommendation was made a competent court.

96. While I am satisfied that the recommendation made by the court is not in a true sense an order of the court, and it does strain language to treat it as such, both on account of the terms of the order itself, and the terms of the Scheme, a number of factors suggest that the recommendation is a weighty and valuable matter, one not to be likely disregarded, and one which carries with it a right on the part of the person holding the recommendation to have his or her application duly considered in a rational and lawful manner.

97. In the circumstances I would allow the appeal in part and set aside that part of the order of Simmons J that granted an order of *mandamus* directing the Board to pay the costs for which the recommendation of Humphreys J. had made provision. The trial judge was correct in his

characterisation of those proceedings as properly coming within the Scheme, but it was not appropriate to make an order of *mandamus* to direct the Board to pay out under the Scheme merely on account of the fact that a recommendation was made, and the Board was entitled to, and did come to, a decision as to the eligibility of the applicant to be considered under the Scheme, and an order of *mandamus* was not an appropriate response to the failure by the Board to pay out under the Scheme although the Board had made an error concluding that the proceedings were not eligible under the Scheme.