Case No: A2/2003/1250

Neutral Citation Number: [2004] EWCA Civ 234

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEENS BENCH DIVISION

MR JUSTICE MITTING

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 3 March 2004

Before :

THE PRESIDENT

LORD JUSTICE CLARKE

and

LORD JUSTICE SEDLEY

- -

Between :

'C'	**Appellant/ Claimant**
- and -	
1. **THE HOME OFFICE and** 2. **THE CRIMINAL INJURIES COMPENSATION AUTHORITY**	**Respondents /Defendants**

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Tim Lamb QC and **Guy Opperman** (instructed by FDC Law) for the Appellant

Jonathan Crow and **Ruth Downing** (instructed by the Treasury Solicitor) for the Respondent

Hearing date: 11 February 2004

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JUDGMENT : APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

Lord Justice Sedley :

The issue

1. C, who is ten years old this month, was viciously assaulted when she was 11 months old by her mother's boyfriend. A blow or blows to the side of her head (the hand-mark was still visible days later) left her hemiplegic, doubly incontinent, almost blind and severely disabled intellectually and developmentally. She has been devotedly cared for by her maternal grandparents, and she will be totally dependent on them and on others for the rest of her life, of which she has a normal expectancy.
2. The grandparents, Mrs and Mrs B, have since 1997 had a residence order in their favour, the effect of which has been to vest in them parental responsibility for C: see the Children Act 1989, sections 8(1) and 12(2). In October 1997 they submitted a claim on C's behalf to the Criminal Injuries Compensation Authority. They did so through local solicitors, Daniel and Crutwell, who had handled the making of the residence order. The application was submitted on 16 October 1997.
3. On 28 February 2003 the CICA made a final award of £406,246. On review in June that year this was increased to the statutory maximum of £500,000 on the footing that the severity of the injuries warranted the full tariff award of £250,000 and that the non-tariff amounts on any view reached a further £250,000.
4. The tariff award, in the Scheme, is a fixed sum depending upon the kind of injury sustained by the claimant; the non-tariff award represents the claimant's consequential loss of earnings or of earning capacity, the cost of care where the claimant is chronically incapacitated, and other specified expenses. The tariff award cannot exceed £250,000; the total cannot exceed £500,000. It will not surprise anyone familiar with conventional personal

injury awards that counsel had calculated the common law value of C's claim at between £2.2 and £3.5 million.

5. In order to establish the claim the solicitors had bespoken a number of expert reports. They had incurred costs both in doing this and in advising the grandparents and representing C's interest in the handling of the eventual lump sum. The CICA declined to pay for any of these.

The Scheme

6. In contrast to the original Scheme, which was an exercise of the Royal Prerogative, the modern Scheme is set up under the Criminal Injuries Compensation Act 1995. By s.11(2) the draft must first have been approved by resolution of each House.
7. The Criminal Injuries Compensation Scheme 1995, which was so approved, has now been superseded by the Criminal Injuries Compensation Scheme 2001. While this appeal concerns the former, the latter reproduces it in its material provisions.
8. The 1995 Scheme (to which all the references which follow relate) provides by paragraph 18:

   It will be for the applicant to make out his case…. Where an applicant is represented, the costs of representation will not be met by the Authority.

9. Decisions are initially to be made by a claims officer. On application, such decisions are subject to review by a more senior claims officer (paragraphs 58-60), whose decisions are in turn subject to appeal to a panel of adjudicators appointed by the Home Secretary (paragraphs 61-82).
10. By paragraph 19:

    A claims officer may make such directions and arrangements for the conduct of an application, including the imposition of conditions, as he considers appropriate in all the circumstances. The standard of proof to be applied by a claims officer in all matters before him will be the balance of probabilities.

11. By paragraph 20:

    Where a claims officer considers that an examination of the injury is required before a decision can be reached, the Authority will make arrangements for such an examination by a duly qualified medical practitioner. Reasonable expenses incurred by the applicant in that connection will be met by the Authority.

12. Paragraph 52 recognises that applicants may be represented, and provides for awards to be annuitised by prior agreement with the applicant or his representative. It continues

    Once that agreement is reached, the Authority will take the instructions of the applicant or his representative as to which annuity or annuities should be purchased. Any expenses incurred will be met from the award.

13. On the hearing of appeals, paragraph 74 provides:

    It will be open to the appellant to bring a friend or legal adviser to assist in presenting his case at the hearing, but the costs of representation will not be met by the Authority or the Panel. The adjudicators may, however, direct the Panel to meet reasonable expenses incurred by the appellant and any person who attends to give evidence at the hearing.

14. The amount of an award, summarised in paragraph 3 above, is provided for in paragraphs 22-4 and is amplified in a tariff scheduled to the Scheme.
15. Thus the Scheme unambiguously excludes the cost of representation in "making out" a claimant's case and in presenting an appeal. It explicitly accepts the cost of representation in purchasing an annuity by agreement. Two things are unspecified:
    a. what is involved in "making out" a claim for the purposes of paragraph 18;
    b. how much discretion a claims officer possesses in deciding whether a medical examination is required.

16. What seems to me plain, however, is that once a claimant has advanced a tenable claim under paragraph 18, the claims officer has to decide whether a medical examination is needed before a decision can be reached *either* on causation *or* on quantum. In other words, paragraph 20 is comprehensive: it covers those cases where there is a factual question about the occurrence of an injury, those where there is an aetiological question about the attributability of an injury to a particular crime and those cases where the only question is the extent of attributable injury. It is also plain that the discretion of the claims officer is limited by the material before him: he cannot lawfully elect not to arrange a medical examination if, objectively, the decision he has to make requires one. That is not to say that there will not be marginal cases where his decision can legitimately go either way; but the margin is likely to be a slim one.

The challenge

17. The present challenge is to the compatibility of these provisions with the European Convention on Human Rights. What is said, in short, is that compensation under the 1995 Act and Scheme being a right, the state is obliged to fund access to it for those who are otherwise incapable of establishing their claim, and that the limited provision in the Scheme for the costs of examination and representation fails to meet this obligation.
18. When the Part 8 claim came before Mr Justice Mitting the CICA was refusing to pay not only C's legal costs but the cost of a number of expert reports obtained on her behalf to demonstrate the extent of her incapacity and her needs. The judge held - as I too would hold - that paragraph 20 of the Scheme means that where a claims officer considers an examination to be necessary, it becomes the duty of the Authority to arrange it. It follows - and the CICA has now accepted this - that it is not lawful for the Authority to displace the function or the cost of arranging such examinations on to the claimant as part of the obligation to make out her case, though it may lawfully delegate it to her or her representatives as part of its own functions. As the judge also held, such costs are not costs of representation. The Authority has accordingly accepted that it is required to reimburse to the solicitors the costs of some but not all of the reports obtained and provided by them on C's behalf. It is unclear whether this includes the cost of using the solicitors to obtain the reports.
19. It is useful to pause here and take stock. The claim was from its inception one which had been made out: the injury could only have been maliciously and unlawfully inflicted. The single question was what therefore the award should be. However it was computed, C's non-tariff award was plainly going to exceed £250,000. Her injury fell within the tariff category "Brain damage: permanent - extremely serious (no effective control of functions)", rated at the highest level (25) and matched to an automatic award of £250,000. It is difficult in these circumstances to see why the Authority had not made a full award within a few months of receiving the claim - difficult, but not impossible, because the tariff also provides discretely for blindness, hemiplegia and serious brain damage and, in aggregating the awards for these, discounts the second by 90% and the third by 95%.
20. The claims officer arrived by this means at a tariff award for C of £82,000. Adding to it £66,854 for loss of earning capacity, a total of £222,392 for care and equipment and £35,000 for administration of the award through the Court of Protection, the full proposed award came to £406,246. The decision was contained in a letter dated 28 February 2003 - nearly six and a half years after the claim was submitted. On review, in June 2003, this sum was increased to the maximum on the straightforward footing that the correct tariff award was £250,000 for a level 25 injury. This was not simply a different choice of available tariff levels. Paragraph 26 of the Scheme segregates "minor multiple injuries" and then provides for the aggregation and discounting of awards for "more serious but separate multiple injuries". C's injuries were not separate multiple injuries: her diagnosed conditions were separate sequelae of a single major injury to the brain. The initial tariff award was plainly wrong and the review decision was plainly right. It is incomprehensible that it should have taken the CICA over six years to reach this obvious conclusion and make a full award.
21. Whatever the outcome of the legal issue now before the court, and despite the fact that the solicitors do not seem to have pointed out to the CICA that it was going to Bannockburn by way of Brighton Pier, the suggestion of

maladministration cannot be lightly dismissed. An account of the stages by which the claim proceeded from March 1999 is set out in the judgment of Mitting J [2003] EWHC 1295 (QB), paragraphs 24 to 39. It seems to have been principally because of the Authority's dilatoriness that C's solicitors became engaged in establishing each element of her claim and bespoke specialist reports and counsel's advice in order to do so.

22. The issue before us is whether the express exclusion of legal costs from the Scheme is compatible with C's Convention rights. Lord Justice Longmore initially refused permission to appeal on this issue, taking the view that the provision of legal aid by the state was not a Convention issue except where in its absence access to the court was effectively impossible. On renewal, and with the help of a further skeleton argument, he agreed with Lord Justice Brooke that the effect of the Human Rights Act on the Scheme was a compelling reason for this court to consider the case.

23. At the outset of the appeal Jonathan Crow, appearing with Ruth Downing for the Home Office (which is the name in which the list issued under s.17 of the Crown Proceedings Act 1947 requires the Home Secretary in right of the Crown to be impleaded: see CPR 19 PD 7-8) asked for the CICA, for whom he and Miss Downing were also instructed, to be added as a second respondent. This was clearly appropriate and was done without opposition. The title of the proceedings accordingly stands amended in both respects.

The law

24. The Convention rights protected by the Human Rights Act 1998 include the following:

Article 6

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair trial and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and the public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Article 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 14

Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status

First Protocol

Article 1

Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

25. Section 4 of the Human Rights Act provides, in summary, that named superior courts, including this court, may determine whether a provision of primary legislation is incompatible with a Convention right. The present is not such a case: see the definition of 'primary legislation' in s.21 of the Human Rights Act. Section 1 of the Criminal Injuries Compensation Act 1995 does no more than require the Secretary of State to make arrangements for paying

compensation to people who have sustained criminal injuries, including a scheme providing for the circumstances in which awards may be made and the categories of person to whom they may be made. The mischief at which this appeal is directed is a provision of delegated legislation, paragraph 18 of the Scheme.

26. If the list in s.2 of the 1995 Act of things for which provision is to be made were exhaustive (standard compensation for injury; a computed sum for lost earnings; specified special expenses; awards where death has resulted), the absence of any provision for costs in the Scheme would be required by statute and a true declaration of incompatibility would be in issue. But it has not been suggested by either side that the effect of section s.2 is to preclude the Home Secretary from providing in the Scheme for the payment of claimants' costs. Mr Crow's case for the respondents is that neither the Act nor the Convention requires him to do so.

27. The approach of the Human Rights Act to delegated legislation is to include it in the primary obligation, set out in s.3, to read it and give it effect so far as possible in a way which is compatible with the Convention rights; but unless its content is mandated by primary legislation (see s.4(3)), delegated legislation which cannot be so read has to be assaulted on traditional ultra vires grounds. The basis of the assault will be that such measures are - almost by definition - made by a public authority, and that by s.6(1) it is unlawful for a public authority to act in a way which is incompatible with a Convention right. This must include making incompatible regulations under statutory powers, even where the regulations have secured the approval of Parliament. By s.10(3) and (4) ministers are given what are in effect emergency powers to respond to such decisions of the courts.

28. Although this case was launched as a Part 8 application seeking a statutory declaration of incompatibility, it is only on the foregoing footing that it has life, and it is on that footing that it has been argued in this court.

29. The Scheme was made in 1995. Can it now be attacked for incompatibility with a right which at the time public authorities were expected but not obliged to respect? Section 22(4) of the Human Rights Act has the effect that proceedings by an alleged victim cannot be brought against a public authority in relation to "an act taking place before" 2 October 2000, the date when the Act came into force. If the act in question here is the recent denial of costs to C by the CICA, there is no problem of retroactivity. If, however, it were the making of the Scheme which was the act in question, these proceedings would be incompetent. They would also fall foul of the 12-month time limit set by s.7(5)(a). In addition Mr Crow has reminded us that the effect of s.6(6) is that the injunction in s.6(1) against public authorities acting incompatibly with Convention rights does not include a minister's failure to put compliant or remedial legislation before Parliament. On the other hand, the opening provision of s.6(6) - "'an act' includes a failure to act" - confirms what has always been understood to be one of the Act's purposes outside the area of Parliamentary sovereignty, namely that from the time when it came into effect there was to be an ongoing duty on public authorities to bring delegated legislation for which they were responsible, whenever enacted, into conformity with the Convention. In the event, these questions are not going to be dispositive of the appeal; but they are not unproblematical.

30. There is a further problem in relation to incompatibility. Where this is found to exist in primary legislation, the courts cannot disapply the legislation: it falls to ministers to use the legislative process to remove the incompatibility, a

process which may well require attention to more than the offending provision. No such powers are available to the court which finds an element of delegated legislation to be ultra vires and incapable of being read down under s.3: it can dismantle but it cannot rebuild, and it knows that to remove a brick may destabilise the wall. More attention than in the past ought perhaps to be given to the use of declaratory judgments in relation to delegated legislation which fails to respect Convention rights. That in essence is the form of relief which Tim Lamb QC has sought here, albeit his claim cannot be for a declaration of incompatibility in the statutory sense.

The decision of Mitting J

31. The upshot of the judgment below, despite criticisms levelled at it, is in my judgment clear. It is that the cost of obtaining material which the Scheme requires the CICA to obtain must be defrayed by the CICA to the extent that the CICA calls or relies upon the claimant to provide it. Where the claimant is represented, this must ordinarily include the costs properly incurred by the representative in furnishing the material. Beyond this, the judge holds, the Scheme leaves costs to lie where they fall.
32. As to whether this is compatible with C's Convention rights, the judge held that it is compatible, both because of the duty of inquiry placed upon the CICA itself and because, for the rest, C's claim was being conducted on her behalf by carers who "can make for her all decisions which an adult could make".

The arguments

33. What was initially submitted on C's behalf is that, as a child too young, and as a person too disabled, to present her own case, she was discriminated against by virtue of paragraph 18 of the Scheme. It will force her, in contrast to a competent adult, to pay out of her already restricted award of compensation for the services of the lawyers without which she had no hope of establishing her claim. In Convention terms, it was argued, this was discrimination contrary to article 14 in the enjoyment of the rights vouchsafed to C by articles 6 and 8 of the Convention and article 1 of its First Protocol as well as a direct violation of those articles.
34. For the Home Secretary it was submitted that the judge was right to conclude that the entire argument failed, at least in the present case, because C's claim was presented by legally competent adults on her behalf, obviating the twin disabilities on which the charge of discrimination is founded. For the rest, it was submitted that a claim made to the CICA, although a claim of right, is not litigation but an application for payment of limited amounts of money by way of compensation, not of redress, following the Authority's own inquiries; so that no question arises either of an entitlement to legal aid or of striking off the cap on the total award to make up for the want of legal aid.
35. The Scheme has to be read, so far as possible, compatibly with C's Convention rights: Human Rights Act, s.3(1). It is accepted by the

respondents that the 1995 Act gives C a legal right, with the result that article 6(1) entitles her, through its guarantee of a fair trial of that right, not to have her access to the CICA's procedures unreasonably or improperly impeded; but any breach of article 6(1) is denied. The respondents contest whether the article 8 guarantee has anything to do with the present case, and they submit that nothing in the Scheme transgresses article 1 of the First Protocol. They also challenge the proposition that forcing C to part with a substantial element of her award of compensation in order to secure it amounts to discrimination contrary to article 14.

Discussion

Article 14

36. Mr Lamb's argument on discrimination under article 14 quickly ran into difficulties. He tentatively submitted that the disadvantaged class to which C belonged was children; but this would not do because a competent teenager would not necessarily be disadvantaged in making a claim, while a legally incompetent adult would be among the comparators and outside the class. He next, therefore, submitted that the material class consisted of persons under a legal disability; but to the extent that such persons may have a competent adult to act for them, they too cannot be said to be disadvantaged. In the alternative he therefore submitted that the material class was persons with complex claims; but it is impossible, to my mind, to fit such a class into the taxonomy of article 14, which has to do with who people are, not with what their problem is. It became no easier when Mr Lamb elided his arguments and fell back on a class of persons under a disability with complex claims. Such a class, far from escaping the problems I have mentioned, encounters them all.
37. I can appreciate that article 14, by focusing on classes rather than on individuals, may give Mr Lamb help which the other articles do not offer. Even so, if he has a sound case under articles 6(1) or 8 or article 1 of the First Protocol, he can still hope to impugn the Scheme. This has historically been how the European Court of Human Rights and the Commission have approached questions of access to justice.

Article 8

38. Article 8, however, has in my judgment no bearing on the present issue. Mr Lamb founds on a dictum of Moses J:

"Financial planning seems to me to be a significant aspect of family life."

This passage, in its larger context, was cited by the European Court of Human Rights when the case reached it: *Willis v United Kingdom* (2002) 28 EHRR CD 166, but in the event the article 8 point did not fall for decision by the Court. It was an entirely relevant remark in relation to the issue before Moses J, which was whether widows' payment and widows' pension in the social security system should be available to widowers. But it cannot be generalised into a proposition of law, much less an exegesis of article 8. To the ant, no

doubt, private and family life without planning is unthinkable; but the world contains plenty of grasshoppers, and I see no reason to let article 8 become the possession of the ants. Nor, in any event, do I accept that the need to incur legal costs and pay them out of the award does more than require the plans for C to be modified.

Article 1 of the First Protocol

39. Article 1 of the First Protocol protects possessions from defalcation by the state otherwise than in the public interest and as provided by law. I can accept that, at least where a claim is manifestly well-founded, the eventual award is a possession even before it has been quantified. What I am unable to accept is that to be compelled to charge such a fund with the cost of securing it is to be deprived by the state of part of the fund.
40. If this were wrong I would be disposed to accept Mr Crow's alternative submission that capping awards without any uplift for legal costs would be a deprivation made in the public interest (viz to limit public expenditure) and subject to conditions provided by law.

Article 6

41. The Home Secretary and the CICA accept that a claim made to the CICA under the 1995 Act and Scheme involves a determination of the claimant's civil rights and so attracts the protection of article 6(1). Given this, Mr Lamb submits that C had no realistic possibility of a fair hearing (or trial, to use the noun in the caption of the article) unless she was legally represented.
42. Assuming this for the moment to be right, it does not directly impugn the Scheme in C's case, since there was never any question but that she was going to receive a substantial award of compensation out of which her lawyers' fees could be paid. The argument is, as it has to be, that to compel C to expend a significant part of her already limited compensation in order to obtain it is to deny her a fair hearing. This is not the same as a submission that C, for want of funds, was denied access to justice before the CICA. That could arise, no doubt, in the case of a claimant whose eligibility was in issue and who needed lawyers at a point where there was no assurance of eventual funds to pay them. Mr Crow accordingly answers that C has had full access to justice before the CICA, albeit at the expense of the fund which will come into being for her benefit. This, he submits, results from a policy choice open to the Home Secretary in discharging his functions under the 1995 Act. Any unfairness or error in the initial decision is able to be cured first by internal review, then by appeal and if necessary by judicial review.
43. Mr Lamb's response is that this does not cure the vice, which is that the Scheme, by not providing separately for properly incurred legal costs, purports to compensate C up to a set maximum but in reality drives the award down by forcing her to find the costs out of the award. He relies on the decision of the European Court of Human Rights in *Airey v Ireland* (1979) 2 EHRR 305, a successful claim that the total absence of legal aid for complex legal separation proceedings violated the applicant's article 6(1) right of

access to a court. He founds upon what the Court said in paragraphs 24 and 26 of its judgment:

24. The Government contend that the application does enjoy access to the High Court since she is free to go before that court without the assistance of a lawyer.

The Court does not regard this possibility, of itself, as conclusive of the matter. The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective….

It must therefore be ascertained whether Mrs. Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily.

…. litigation of this kind, in addition to involving complicated points of law, necessitates proof of adultery, unnatural practices or, as in the present case, cruelty; to establish the fact expert evidence may have to be tendered and witnesses may have to be found, called and examined. What is more, marital disputes often entail an emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court.

For these reasons, the Court considers it most improbable that a person in Mrs. Airey's position (see paragraph 8 above) can effectively present his or her own case. This view is corroborated the Government's replies to the questions put by the Court, replies which reveal that in each of the 255 judicial separation proceedings initiated in Ireland in the period from January 1972 to December 1978 without exception, the petitioner was represented by a lawyer (see paragraph 11 above).

The Court concludes from the foregoing that the possibility to appear in person before the High Court does not provide the applicant with effective right of access and, hence, that it also does not constitute a domestic remedy whose use is demanded by Article 26 (art. 26) (see paragraph 19 (b) above).

26. ….

The conclusion appearing at the end of the paragraph 24 above does not therefore imply that the State must provide free legal aid for every dispute relating to a "civil right".

To hold that so far-reaching an obligation exists would, the Court agrees, sit ill with the fact that the Convention contains no provision on legal aid for those disputes, Article 6 para. 3 (c) (art. 6-3-c) dealing only with criminal proceedings. However, despite the absence of a similar clause for civil litigation, Article 6 para. (art. 6-1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as it done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.

44. The subsequent history of the issue in Strasbourg has been of consistently contrary decisions. Thus in *S and M v United Kingdom* (1993) 18 EHRR CD172 the Commission, and in *A v United Kingdom* (2003) 13 BHRC 623 the Court held that there was no breach of article 6(1) in the United Kingdom's failure to provide legal aid for bringing and for defending libel actions. In *Webb v United Kingdom* (1983) 33 DR 133 it was held sufficient if, without legal aid, taking the proceedings as a whole the applicant had had reasonable access and a fair hearing. None of this means that *Airey v Ireland* is a dead letter: only that the obligation is limited, as the Court put it in *A v United Kingdom* (para.96), to cases where "such assistance proves indispensable for effective access to the court, either because legal representation is rendered compulsory or by reason of the complexity of the procedure or of the case". Earlier (para. 74) the Court had summarised the obligation as arising where otherwise "the very essence of the right is impaired". These are the tests which we should apply here.

45. If, on the one hand, the Scheme threw the entire burden of establishing both entitlement and quantum on to the claimant, there would be much to be said for Mr Lamb's argument that the state is taking away with one hand what it gives with the other, and something to be said for the argument that by forcing this invidious choice on a disabled claimant the Scheme denied her a fair hearing of her true claim. If, on the other hand, the Scheme reasonably distributes the work needed to establish and quantify a claim, so as not to place an unfair burden on a claimant in C's situation, the answer is likely to be different. Everything, in other words, depends on the true interpretation and proper application of the Scheme.

The Scheme

46. It is for these reasons that the relationship between paragraphs 18 and 20 of the Scheme is critical. One practical effect of paragraph 18, which I find troubling in relation to article 6(1), is to require an impecunious claimant to demonstrate to the Authority without the help of a lawyer not only that he has been criminally injured but that he is not disqualified from receiving some or all of the appropriate award. One can readily visualise cases in which these gateway issues require the assembly of facts and the deployment of legal argument far beyond the capacity of an average person, let alone one under a disability. For my part I would wish to reserve such a case for decision in relation to article 6(1) if and when it arises.
47. The present case is different because the CICA has always accepted C's entitlement to compensation. This would not matter if paragraph 20 were not in the Scheme; but paragraph 20 is there precisely to relieve the claimant of the work and cost of obtaining medical evidence in support of her claim. As I have already said, it is not an optional measure which the claims officer can deploy or not deploy at will. It requires the Authority to call for a medical examination whenever, in the course of a claim, one is needed. I would support the broad view which the CICA clearly takes of what examination "by

a duly qualified medical practitioner" may include. The provision that reasonable expenses incurred by the applicant in connection with the examination will be met by the Authority is principally intended, no doubt, to cover the claimant's travel and subsistence and any loss of earnings in attending the examination. But it is also apt to include reasonable legal costs incurred by the claimant where, as here, her lawyers have in effect been called upon to act as proxies for the Authority.

48. This is not to suggest that claimants' solicitors can make their own medical inquiries and assume that they can pass the cost on to the CICA. They would be most unwise to do so. But in the peculiar circumstances of this case the Authority cannot, in my view, refuse to pay the cost of examinations which were objectively required in order to obtain a decision and which its claims officer had failed to bespeak. We have not been asked to determine item by item what this includes. The CICA has so far paid a sum which appears to include the reports obtained by the solicitors from an occupational therapist (Miss Ho), a nursing consultant (Ms Sargent) and specialist surveyors (Murdoch Green Kensall); but not those of a neurosurgeon (Mr Pople) and a paediatrician (Dr Kennaird). All that this court can say is that the remainder of the dispute falls to be resolved according to our construction of the Scheme.

49. This, however, leaves unanswered the larger question: ought the Scheme, in order to comply with C's article 6(1) right to a fair hearing, to provide for the reimbursement of her solicitors' full bill of costs? This now exceeds £28,500; it covers a wide range of inquiries and the fees of leading and junior counsel. C has never faced the prospect of being unable to pay these costs, and because of the willingness of her solicitors to defer payment her lack of funds, and that of her grandparents, has not impeded her access to the CICA. I am less impressed by Mr Crow's argument (though it found favour with Mitting J) that, so long as she has competent adults to act for her, C is at no disadvantage at all. Given the unnecessarily complex course taken by the CICA, the grandparents were as much in need of advice and representation as C was.

50. But C's situation, even so, is not analogous with Mrs Airey's, nor with that of an impecunious claimant needing to establish a primary entitlement. Her situation is that of a person whose right of access to the CICA is recognised and effective (though impeded by prevarication) but whose carers, very reasonably, want to ensure that the award she obtains is as full as it should be. To that end they have committed a part of the eventual fund to obtaining representation. It is the intent of the Scheme that where this happens it is not to be at the CICA's expense. That the Scheme could have provided otherwise is clear; but it does not follow that it was bound to provide otherwise in order to give effect to C's Convention right under article 6(1).

51. In my judgment it has not been shown that the Scheme invades C's human rights in this regard. It diminishes her award by the cost of her representation; but, while many people would regard this as unfair, it does not deprive her of the possibility of a fair hearing within the meaning of article 6(1).
52. I would dismiss the appeal.

Lord Justice Clarke:

53. I agree.

Dame Elizabeth Butler-Sloss P.:

54. I also agree.