THE HIGH COURT
JUDICIAL REVIEW

RECORD NO. 2021/903/JR

Between

PHILIP BOWES

Applicant

And

THE CRIMINAL INJUIRES COMPENSATION TRIBUNAL,
THE MINISTER FOR JUSTICE,
IRELAND AND THE ATTORNEY GENERAL

Respondents

AND

THE HIGH COURT
JUDICIAL REVIEW

RECORD NO. 2022/2/JR

Between

JASON BROPHY

Applicant

And

THE CRIMINAL INJURIES COMPENSATION TRIBUNAL,
THE MINISTER FOR JUSTICE,
IRELAND AND THE ATTORNEY GENERAL

Respondents

Judgment of Mr Justice David Holland delivered the 20TH of December 2022

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INTRODUCTION & THE FACTS

1. The essential question is the same in both these cases: does the two-year "backstop"[1] time-limit from the date of the violent criminal event causing injury, within which compensation claims may be made to the First Respondent ("the CICT") pursuant to the Criminal Injuries Compensation Scheme 2021[2] ("the 2021 Scheme"), shut out the claims of Mr Bowes and Mr Brophy, whose injuries predate the adoption of the 2021 Scheme by the Government and who had not made claims under the predecessor Criminal Injuries Compensation Scheme 1986 ("the 1986 Scheme"). If the backstop applies, and given the chronology in each case, both claims were shut out immediately on the adoption of the 2021 Scheme.

2. Though nothing relevant to my decision turns on the fact, I am told that these two are test cases for other similar cases.

1 My word.
2 Properly "The Scheme of Compensation for Personal Injuries Criminally Inflicted"

3. The proceedings take the form of judicial reviews seeking to quash the respective decisions of the CICT to reject the Applicants' compensation claims *in limine* as made outside the two-year backstop time limit set by §20 of the 2021 Scheme, and various other declaratory reliefs. The Respondents (collectively "the State") raise a number of preliminary issues – as to justiciability, standing and the form of the proceedings.

4. On the substantive issues, the Applicants argue that

- the right to compensation is an EU law right derived from Directive 2004/80/EC ("the Compensation Directive") and
- its implementation by the 2021 Scheme, in exercise of the State's procedural autonomy at EU law, in particular by §20 of the 2021 Scheme which stipulates the two-year "backstop" time-limit, breaches the principles of Equivalence and Effectiveness – both general principles of EU law - such that the CICT is obliged to disapply the §20 time-limit imposed by the 2021 Scheme.

The Applicants also argue that the 2021 Scheme is unconstitutional by reason of the retrospective application of the backstop time limit.

5. The Applicants do not in these proceedings challenge the absence in the 2021 Scheme of provision for the award of compensation equivalent, in form and/or in quantum, to general damages for pain and suffering. They cite **Doyle & Kelly**[3], **Chakari**[4] and **Keogh**[5] – I think correctly – to the effect that it would be premature to do so until a compensation award has been made refusing them such compensation. They intend to mount such a challenge if they succeed in getting their present applications before the CICT and fail in seeking such compensation from the CICT.

Chronology – The Schemes, The Compensation Directive, BV, Doyle & Kelly & The Facts & Comment thereon.

6. As the facts are relatively simple and not in dispute in both cases and as their chronological sequence is relevant, I will combine the facts of the Bowes and Brophy cases and the evolution of the Schemes[6] and the legal framework in which they sit, in a single chronology. The entries will require elaboration in due course but will serve as a general introduction.

3 Infra
4 Chakari v. Criminal Injuries Tribunal, the Minister for Justice and Equality, Ireland and the Attorney General [2018] IEHC 527
5 Keogh v The Criminal Injuries Tribunal, The Minister For Justice And Equality, Ireland And The Attorney General, MacGrath J, 9 July 2021
6 For much of which I am indebted to the Law Reform Commission Consultation Paper Compensating Victims of Crime (LRC CP 67 – 2022) and to Doyle & Kelly v CICT [2020] IECA 342 (Court of Appeal (civil), 4 December 2020)

Date	Event
1974	**The 1974 Scheme** The first iteration of the Scheme is adopted[7]. It was an administrative (i.e. non-statutory) scheme offering ex gratia compensation to victims personally injured in Ireland as a direct result of violent crime. Compensation included general damages/damages for pain and suffering.[8]
Comment	• I have not seen a copy of the 1974 Scheme. • What is meant by ex gratia compensation is that there was no legally enforceable right to this compensation[9]. • The Law Reform Commission ("LRC") says[10] that awards under the 1974 Scheme were intended to mirror those in civil tort claims.

1986	**The 1986 Scheme**
	The second iteration[11] of the Scheme is adopted[12]. It provided, inter alia, as follows:
	• §6. Compensation is payable on the basis of damages awarded under the Civil Liabilities Acts[13] – subject to listed exceptions, including
	  ○ (a) exemplary, vindictive, or aggravated damages
	  ○ (e) for pain and suffering from injuries sustained on or after 1st April 1986
	• §16. The Tribunal will deduct from the amount of an award under this Scheme any sums paid to .. the victim … by way of compensation or damages from the offender or any person on the offender's behalf following the injury.
	• §21. Applications should be made as soon as possible but, except in circumstances determined by the Tribunal to justify exceptional treatment, not later than three months after the event giving rise to the injury.
	In the case of an injury arising out of an event which took place before the commencement of the Scheme, the application must be made not later than three months from the date of the commencement (subject, also, to the foregoing exception).
	• §24. The Tribunal's staff will process applications in the first instance …

Comment	The Scheme remained administrative (i.e. non-statutory) and compensation remained ex gratia. Though, save in the case of fatal injury, no damages are, strictly, "*awarded under the Civil Liabilities Acts*"[14], it is generally considered that the phrase encompasses tortious liability for personal injury.

7 See generally Law Reform Commission Consultation Paper Compensating Victims of Crime (LRC CP 67 – 2022) §1.22 et seq
8 Law Reform Commission Consultation Paper Compensating Victims of Crime (LRC CP 67 – 2022) §1.19
9 Law Reform Commission Consultation Paper Compensating Victims of Crime (LRC CP 67 – 2022) §1.23; "ex gratia means "as a favour".
10 Law Reform Commission Consultation Paper Compensating Victims of Crime (LRC CP 67 – 2022) §1.24
11 The LRC refer to it as the 1974 Scheme as amended – nothing turns on the point.
12 See generally Law Reform Commission Consultation Paper Compensating Victims of Crime (LRC CP 67 – 2022) §1.32 et seq
13 sic
14 sic

Date	Event
	The major practical change wrought by the 1986 Scheme was its exclusion, by way of exception to the general principle of compensation on the basis of damages awarded under the Civil Liability Acts, of compensation for general damages/ damages for pain and suffering.[15] It will be noted that in §21: • The possibility of extension in exceptional circumstances of the three-month time limit was not subject to any backstop time-limit. • Transitional provision was made for the application of the time-limit as to claims arising out of events which preceded the commencement of the Scheme. The Tribunal's staff are Department of Justice officials assigned to the task[16]. The LRC record[17] criticism of the 1986 Scheme – inter alia: • on the basis that lack of awareness of the Scheme hindered its accessibility • for its removal of compensation for "pain and suffering".
To 2004	The adoption of the Compensation Directive was preceded by developments on the European stage over several decades as described in **Doyle & Kelly**[18] and which I need not repeat here.
2004	**The Compensation Directive** was adopted. • Recital (1) says that measures to facilitate compensation to victims of crimes should form part of the realisation of the protection from harm of persons exercising their EU Law right of freedom of movement. • Recital (3) describes its purpose as to set minimum standards for crime victims' access to justice and rights to compensation. • Recital (6) states that crime victims should be entitled to fair and appropriate compensation for their injuries. • Recital (7) states that all Member States should have a compensation mechanism. • Recital (10) notes that crime victims will often not be able to obtain compensation from the offender, since the offender may lack the means to satisfy a judgment or may not be identified or prosecuted. • Recital (13) states that the system should provide for allowing the victim to find the information needed to make the application. • Article 12(1) provides that "*The rules on access to compensation in cross-border situations drawn up by this Directive shall operate on the basis of Member*

15 Law Reform Commission Consultation Paper Compensating Victims of Crime (LRC CP 67 – 2022) §1.20
16 Affidavit of Anne-Marie Treacy 8 April 2022
17 Law Reform Commission Consultation Paper Compensating Victims of Crime (LRC CP 67 – 2022) §1.20
18 Doyle & Kelly v CICT [2020] IECA 342 (Court of Appeal (civil), 4 December 2020) – see below.

Date	Event
	States' schemes on compensation to victims of violent intentional crime committed in their respective territories." • Article 12(2) provides that "*All Member States shall ensure that their national rules provide for the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories, which guarantees fair and appropriate compensation to victims*." • Article 18 requires implementation of the Directive by 1 January 2006. • Article 4 requires that "*Member States ensure that potential applicants for compensation have access to essential information on the possibilities to apply for compensation, by any means Member States deem appropriate*."
Comment	• As will be seen, and while the Compensation Directive is in terms addressed to the abolition of obstacles to free movement of persons between Member States, subsequent case law has rendered it applicable to injury to persons occurring in their home States. • The LRC comments that o The Compensation Directive "frames access to compensation as an entitlement of all crime victims in the European Union."[19] o It obliges Member States to establish compensation schemes in their domestic legal systems which provide "*fair and appropriate compensation*" for victims of violent intentional crime.[20] o Citing, inter alia, the Compensation Directive, "the contextual shift at a European level marks an important foundational shift in which compensation is a legal right rather than merely being a token of solidarity and acknowledgement"[21]. o The Directive does not harmonise the substantive law as to victim compensation or prescribe the process for determining compensation. The obligations imposed are minima - much is left to the discretion of Member States in giving effect to them.[22] • Recital (10) places the criminal injury compensation system in the context of the frequent practical ineffectiveness of legal provisions to facilitate adequate compensation of victims by offenders. While provision for compensation need not necessarily be in in the law of tort, the recital does seem to encompass reference to such provision by means of the law of tort – such as assault and battery[23]. • The Directive prescribes results, not methods, and leaves considerable discretion to Member States, subject, inter alia to the principle of effectiveness.

19 Law Reform Commission Consultation Paper Compensating Victims of Crime (LRC CP 67 – 2022) §1.53
20 Law Reform Commission Consultation Paper Compensating Victims of Crime (LRC CP 67 – 2022) §2.35
21 Law Reform Commission Consultation Paper Compensating Victims of Crime (LRC CP 67 – 2022) §1.53
22 Law Reform Commission Consultation Paper Compensating Victims of Crime (LRC CP 67 – 2022) §2.21
23 Though assault and battery are separate torts, I will adopt common usage in using the word "assault" to encompass both.

Date	Event
	That principle no doubt applies to Article 4 obligations of access to information as to all other obligations.
July 2005 & January 2006	Deadlines set by Article 18(1) for implementation of the Compensation Directive. The earlier was for implementation of Article 12(2) – the obligation to have a compensation scheme in place. In July 2005 Ireland, in compliance with Article 18(1), informed the EU Commission that it had complied.[24] It is clear that this notification relied on the 1986 Scheme as Ireland's implementation of the Compensation Directive – albeit that the 1986 Scheme was explicitly ex gratia and, at that time, it was generally believed that the Directive applied only to cross-border situations.[25]
27 December 2018	Mr Bowes says: • He was assaulted by an unknown and unidentified attacker and suffered serious injury. • Thereby he was the victim of a violent intentional crime for the purpose of Directive 2004/80/EC and the 1986 Scheme.
Comment	For present purposes, these assertions are not disputed.
26 April 2019	Mr Brophy says: • He was assaulted by an unknown and unidentified attacker and suffered serious injury. • Thereby he was the victim of a violent intentional crime for the purpose of Directive 2004/80/EC and the 1986 Scheme.
Comment	For present purposes, these assertions are not disputed.
16 July 2020	**CJEU judgment in Case C-129/19 ("BV")**[26] An Italian citizen residing in Italy had been the victim of violent sexual crimes committed in Italy. The perpetrators were convicted and ordered to pay €50,000 damages. Since their whereabouts was unknown, the damages could not be recovered. The Italian compensation scheme for purposes of the Compensation Directive fixed compensation at €4,800 for victims of sexual violence. It also was limited to victims in cross-border situations[27]. BV sued Italy, in Italy, for failure to fully and correctly implement the Directive - in particular Article 12(2). The Court of Cassation referred two questions to the CJEU. Italy unsuccessfully argued that Italian nationals assaulted in Italy could not rely on Article 12 of the Compensation Directive to establish a right to compensation. The Court held that Article 12(2) of the Directive obliges Member States to provide for a

24 As stipulated by Article 19 of the Compensation Directive, the EU Commission reported to the Council, the European Parliament and the European Economic and Social Committee that, inter alia, Ireland had a compensation scheme in place before the Article 18 deadline. Commission report 20.4.2009 COM(2009) 170 final. This account is taken from Doyle & Kelly v. Criminal Injuries Tribunal [2020] IECA 342 (Court of Appeal (civil), Ireland - Court of Appeal, 4 December 2020) §65

25 Affidavit of Una Dixon 7 April 2022 §15

26 Case C-129/19 Presidenza del Consiglio dei Ministri v BV EU:C:2020:566

27 Victims of a violent intentional crime committed in a Member State other than the Member State where the applicant for compensation is habitually resident.

Date	Event
	scheme of compensation covering all victims of violent intentional crime committed on their territory - not only victims in cross-border situations.[28] As to quantum, the Court: • Held that the Art. 12(2), requirement fair and appropriate compensation allows Member States a discretion in that regard. • Observed[29] that o compensation is paid, not by the violent offender, but by the State, which must ensure the financial viability of the compensation scheme "*in order to guarantee fair and appropriate compensation to any victim*". o Therefore, 'fair and appropriate' compensation, under Art. 12(2) need not correspond to the damages and interest that may be awarded to the victim of a violent intentional crime as to be paid by the perpetrator.[30] o Compensation need not ensure the complete reparation of material and non-material loss. • Nonetheless set criteria to enable national courts to discern whether compensation was purely symbolic or manifestly insufficient having regard to the seriousness of the consequences of the crime for the victim. • Observed[31] that o Contribution may be regarded as 'fair and appropriate' if it compensates, to an appropriate extent, the suffering to which the victim was exposed.[32] o If fixed without taking into account the seriousness of the consequences of the crime for the victim, compensation is not 'fair and appropriate', and is not an appropriate contribution to the reparation of the material and non-material harm. o While it is for the national court to decide, €4,800 compensation for a victim of sexual violence did not appear, at first sight, to be 'fair and appropriate compensation'. Advocate General Bobek opined[33], as expressly approved by the CJEU[34],

28 §52 & 55
29 §59 & 60
30 As the Advocate General stated in §§137 to 139 of his Opinion.
31 §59 & 60
32 The Court went on to find that fixed-rate compensation was not prohibited if it was capable of being varied in accordance with the nature of the violence suffered in accordance with a scale sufficiently detailed so as to avoid the possibility that, in a particular case, the fixed rate of compensation provided for a specific type of violence proves to be manifestly insufficient.
33 In points 137 to 139 of his Opinion.
34 §60

Date	Event
	• That the Compensation Directive 2004/80 does not require that compensation equate to damages that the perpetrator would be obliged to pay to the victim of the crime under national tort law. "*The rationale and the logic for both types of payment is different.*" ○ On the one hand, the damages that a perpetrator is to pay tend to follow the logic of full reparation or restitution. The sum awarded ought to mirror, as closely as possible, the full compensation of loss, injury and harm suffered by the victim. ○ On the other hand, as far as it might be inferred from the minimalist rules adopted in the Directive, its logic is one of a generalised public monetary assistance to crime victims. Its basis does not lie in fault by the Member States[35]. In some language-versions of the Directive[36], compensation is referred to as an 'indemnity' – a term associated in many countries with a fixed or flat-rate type of compensation or a form of reparation that does not necessarily correspond with full damages in private law.
Comment	• The LRC describes[37] this case as confirming that Art. 12(2), requires fair and appropriate compensation to be paid to victims of violent intentional crime not only in cross-border cases, but in domestic cases also. Accordingly, there is a right to compensation - as an EU Law right. • It is fair to say that the view that Art. 12(2) requires compensation of victims of in domestic cases had not been orthodox until **BV**[38]. • The LRC notes[39] that **BV** describes the purpose of state-paid compensation as being to contribute to the reparation of material and non-material losses. So, compensation must have regard to the seriousness of the consequences of the crime for the victim. The CJEU indicated certain requirements for compensation to be considered "*fair and appropriate*". • While Member States have considerable discretion as to quantum, the CJEU required that compensation not be "*manifestly insufficient*" in each individual case. • Read in isolation, §59 of the judgment (as to the financial viability of compensation schemes) could be read as expressing the anxiety that Member States amply fund their schemes - as opposed to their relying on financial

35 Such as, for example, in identifying or prosecuting the offenders.
36 AG Bobek cites as examples, at fn67, the German, Spanish, French, Italian, Portuguese and Slovak versions.
37 Law Reform Commission Consultation Paper Compensating Victims of Crime (LRC CP 67 – 2022) Glossary Page xi, §1.38 - 40
38 The Opinion of AG Bobek is eloquent on the difficulties of interpretation which he saw as arising – going so far as to describe himself at one point as "lost". He did however draw the conclusion later upheld by the CJEU.
39 Law Reform Commission Consultation Paper Compensating Victims of Crime (LRC CP 67 – 2022) §1.40

Date	Event
	viability as a basis for limiting quantum of compensation. However, §60 and its citation of the Advocate General's opinion make clear that the Member States' discretion to not award compensation equal to the full damages which would be awarded against a perpetrator is a discretion that is permitted, inter alia, with a view to preserving the financial viability of compensation schemes. • As to the Advocate General's opinion, I observe that the word "indemnity" may often, in English and Irish usage, connote full damages. But this does not seem to me to undermine this observation by the Advocate General. In particular, compensation under the Directive must be an autonomous concept of EU Law - albeit one which affords considerable discretion to Member States as to quantum of compensation. • The Court of Appeal has analysed **BV** in detail in **Doyle & Kelly v CICT**[40].
4 December 2020	**Doyle & Kelly v CICT**[41] The Court of Appeal analysed the Compensation Directive and **BV** in detail in this case and, in that light, set aside the High Court decision under appeal[42] that there was no EU law right to fair and appropriate compensation for victims of violent intentional crime in domestic cases[43]. The Court of Appeal said: • Given the "clear and unambiguous language" of BV, "*There is no longer any doubt that the Directive does indeed confer an EU law right to compensation from the State upon the victim of a violent intentional crime in a wholly domestic situation*."[44] • "*The first and central point emerging from the B.V. case is that it confirms that Article 12(2) of the Directive confers a right to fair and appropriate compensation upon a victim of a violent intention crime even if the injuries have been sustained in a wholly Irish context without any cross-border aspect. Insofar as it may have been previously thought that the scope of any EU law right was confined to the victim in a cross-border situation, this view has now been established as incorrect*."[45]

40 infra
41 [2020] IECA 342 (Court of Appeal (civil), 4 December 2020) §81 & 82
42 BV was decided in the interim between the High Court and Court of Appeal decisions in Doyle & Kelly. The High Court's decision that that there was no right to compensation for victims in domestic cases was thought orthodox when made but had, in effect, been reversed by BV by the time of the Court of Appeal decision.
43 §82
44 §§77 & 69
45 §79

Date	Event
	• "*One of the effects of [BV] must be that while the Irish Scheme was previously conceptualised in domestic legal terms as a mere non-statutory ex gratia scheme (and indeed so describes itself on its face), which was introduced by the executive as a matter of policy choice (at least insofar as "purely domestic" crimes with no cross-border element were involved), its character must now be conceived of differently; it must now be seen as the means by which the State gives effect to its obligations under the Directive both as regards cross-border and purely domestic scenarios."*[46] The Court of Appeal considered[47] that **BV** gave guidance as to the nature and scope of compensation required by the Directive, which guidance it summarised. As quantum is not at issue here, and as I have already considered BV, I need not set out that summary here. However, the Court of Appeal recorded that the CJEU in BV had considered the financial viability of a domestic scheme to be a relevant consideration. In considering Mr Kelly's arguments that the non-availability of legal aid and of legal costs in the Scheme were obstacles to his right of access to justice, the Court of Appeal noted[48], as to proportionality, that the legitimate aim *"pursued by having a simple, non-adversarial claims process before the Tribunal is to make it easy to make a claim and to keep the costs down, in order to ensure the financial viability of the scheme".* The Court of Appeal noted[49] and clearly agreed with State submissions that the CJEU in BV acknowledged that the financial viability of schemes was important and that it was not expected that member states would provide full compensation to victims. **Doyle & Kelly** concerned issues not raised here[50]. But in doing so it considered and applied the EU law principle of effectiveness.
Comment	The decision in **Doyle & Kelly,** that the 1986 Scheme was to be regarded as the transposition of the Compensation Directive, is consistent with the State's own notification to that effect in 2005 - as to which see above.

46 §81
47 §80
48 §117
49 §127
50 (1) the issue of legal aid and/or costs: The Applicants failed on the substance of their arguments, inter alia as to the principle of effectiveness.
(2) the exclusion of pain and suffering from the Scheme: The Applicants failed on the basis that their argument was premature in the absence of an actual award by the Tribunal
(3) the question of character, conduct and way of life as a reason for refusing or reducing an award: The Applicants failed on the substance of their arguments on the basis that the Court considered it inconceivable that the Directive does not give discretion to member states to giver the decision-maker a discretion to reduce or refuse an award on the basis of such matters.
(4) the question of access to previous decisions of the Tribunal: The Applicants succeeded on the basis that decisions of the CICT on the question of character, conduct and way of life should be characterised by some measure of consistency and known to claimants so they could present their claims accordingly. Lack of access to such decisions was in breach of constitutional fair procedures and a failure to protect, effectively, the exercise of an EU right.

Date	Event
30 March 2021	**The 2021 Scheme** The Government approved the 2021 Scheme.
20 April 2021	The Minister for Justice published the 2021 Scheme and laid it before the Houses of the Oireachtas. • Importantly, it came immediately into operation. As relevant, it provided as follows: • 5. *"If ……. any person would be entitled to claim compensation (.. statutory or non-statutory) otherwise than under the Scheme for the injury, he will not be prohibited from also claiming compensation under the Scheme but the Tribunal will decide the claim on the basis that no payment under the Scheme should result in compensation being duplicated and may accordingly decide either to make no award or to make a reduced award and may, moreover, decide that an award will be subject to conditions as to its repayment in whole or in part in the event of compensation being subsequently received from another source*." • 6. *"…. compensation … will be on the basis of damages awarded under the Civil Liabilities Acts except that compensation will not be payable:* o by way of exemplary, vindictive or aggravated damages o …. o in respect of loss or diminution of expectation of life o where the victim has died, for the benefit of the victim's estate, or" o […as to fatal injuries – see comment below]. • 15. *"The Tribunal will deduct from the compensation sums paid to .. the victim … by way of compensation or damages from the offender or any person on the offender's behalf …"* • "*20. Applications should be made as soon as possible but, except in circumstances determined by the Tribunal to justify exceptional treatment, not later than three months after the event giving rise to the injury.* ***No applications may be accepted by the Tribunal where the event giving rise to the injury took place more than two years prior to the date of application***."[51] • 23. "*The Tribunal's staff will process applications in the first instance …"* • 24. "*A decision by the Tribunal on a claim may, in the first instance, be taken by a duly authorised officer of the Tribunal where the amount claimed does not exceed €3,000. …"* Annex

51 Emphasis added.

Date	Event
	• The Scheme is "cash-limited" such that the Tribunal cannot pay out more in a year than has been voted by the Oireachtas. This may delay payment of compensation.
Comment	The Scheme remained administrative (i.e. non-statutory). The significance of its being laid before the Houses of the Oireachtas is not stated. The LRC notes[52], inter alia: • (a) Removal of references to compensation being *ex gratia.* • (b) Re-introduction of compensation for pain and suffering but only for fatal injuries sustained after 1 January 2006 and subject to the maximum amount set in pursuant to s.49(1A) of the Civil Liability Act 1961[53]. • (f) The time limit to apply remains 3 months but the discretion to waive it in exceptional circumstances was restricted to a 2-year period. The 2021 Scheme contained no transitional provision, similar to that which had appeared in §21 of the 1986 Scheme preserving the rights of persons entitled to make claims under the 1974 Scheme. The State say that immediately it came into operation §20 shut out • any possibility of suit by Mr Bowes as the two-year time limit had expired in December 2020 • Mr Brophy from suit on 25 April 2021 – five days after the Scheme was adopted.
20 April 2021	The **Ministerial Press Release** which accompanied the publication of the Scheme: • Stated that its removal of reference to awards being ex gratia was because the 2021 Scheme is the means whereby the State gives effect to the Compensation Directive. • Described the 2021 Scheme as the first step in needed reforms and stated that Government has agreed in principle that the Scheme be put on a statutory basis. • Cited the CJEU observation that States must ensure the financial viability of the compensation scheme and so the Government intends to analyse "*appropriate upper limits*" as to compensation. • Stated that the two-year backstop for applications based on exceptional circumstances *"… mirrors the statute of limitations in personal injury claims and takes account of the fact that most EU Member States have time limits on their Schemes.*"

52 Law Reform Commission Consultation Paper Compensating Victims of Crime (LRC CP 67 – 2022) §1.36
53 Currently €35,000.

Date	Event
Comment	• Whatever might otherwise be its evidential status, it was the Minister who invoked the press release in these proceedings. • In this press release we see the Government's intention to analyse "*appropriate upper limits*" as to compensation as grounded in the CJEU observation in **BV** as to the need to ensure the financial viability of the compensation scheme. That question of limiting the quantum of compensation is not at issue in these proceedings. • The State in these proceedings also relies on the reference in **BV** to the need to ensure the financial viability of the Scheme. In its submissions, the State states that "*the imposition of a time limit for applications to the Scheme is an entirely appropriate exercise of discretion by the State and is a prudent step to safeguard the financial viability of the Scheme*." The State's primary affidavit[54] makes a similar assertion – that the amendments to the Scheme were to ensure that the dicta of the CJEU that Member States must ensure the financial viability of such Schemes, was taken into account. That observation is made in the context of the introduction of the two-year backstop. • However nowhere in the papers does the State assert that, or explain why or how, the financial viability of the Scheme required that all those with potential claims to an "exceptional circumstances" extension of time be, on its adoption, immediately shut out by the Scheme, if the event which gave rise to a compensation claim occurred more than 2 years before the adoption of the Scheme – or that such an exclusion (in its own terms or as opposed, for example, to a limitation of quantum) was a proportionate exercise of the discretion ensure to financial viability of the Scheme. Nor is any evidence of that requirement adduced beyond mere assertion. • The press release, that submission and the affidavit all, and surprisingly, omit important words from the decision of the CJEU in **BV** – which refers to "*a national scheme for compensation whose financial viability must be ensured <u>in order to guarantee fair and appropriate compensation to any victim</u>"*[55] • The State undoubtedly has considerable discretion as to the overall amount of compensation which should be paid from the Scheme with a view to ensuring the financial viability of the scheme[56]. **BV** states from an EU law perspective that capped or tariff schemes are in principle permissible – as does the LRC from a constitutional law perspective. But the burden on the State is not the only perspective from which the financial viability of the scheme must be

54 Affidavit of Una Dixon 7th April 2022.
55 Emphasis added
56 Law Reform Commission Consultation Paper Compensating Victims of Crime (LRC CP 67 – 2022) §4.73 et seq

Date	Event
	considered. The reference in **BV** to ensuring the financial viability of the scheme was not concerned, not only with the burden of compensation on the State, but with ensuring funding of the scheme adequate to guarantee fair and appropriate compensation. • The State in these proceedings comments[57] that the press release does not state that the Scheme would mirror personal injury awards or that it would place the State in the position of Defendant in a civil case for assault. That is true as far as it goes but: o Neither the press release, nor the deponent for the State, nor the State's written submissions similarly comment on the fact that the Scheme does state that, subject to listed exceptions, "*compensation … will be on the basis of damages awarded under the Civil Liabilities Acts".* o The observation does not address the fact that the Minister did say that the Scheme would mirror *"the statute of limitations in personal injury claims".* While one should not construe a press release too technically, to "mirror" something implies a very considerable correlation. The Applicants assert that the Minister's analogising the limitation period in personal injury claims as two years is incorrect – that limitation period is, as they put it, *"two years plus date of discoverability*." To my mind, the Scheme clearly does not "mirror" *"the statute of limitations in personal injury claims"* as to extension of time for reasons such as disability or date of discoverability. In truth, the analogy is by no means untenable but it falls considerably short of mirroring. • However, the Minister's explicit analogising of "*personal injury claims*" is in a general sense consistent with the Scheme's provision that *"compensation … will be on the basis of damages awarded under the Civil Liabilities Acts".*
15 June 2021	Mr Bowes made a compensation claim to the CICT.
Comment	Mr Bowes says he had been, until in or about this time, unaware of the Scheme or the CICT or the possibility of an application for compensation under the Scheme.
12 July 2021	The CICT refused Mr Bowes' application *in limine* as it was received over two years after the assault. • The letter is on the headed paper of the CICT and is signed by the CICT secretariat. • Its operative part states: "*In line with the Scheme of Compensation for Personal Injuries Criminally Inflicted, effective from 20 April 2021, the Tribunal can no longer accept an application where the incident took place more than two years prior to the date of application*."
Comment	• This is an Impugned Decision of which certiorari is sought.

57 Affidavit of Una Dixon 7th April 2022.

Date	Event
	• It is clear that this decision was made by CICT staff and not by a member of the CICT.[58] • The State disputes that this is a justiciable decision.
23 October 2021	Mr Brophy made a compensation claim to the CICT.
Comment	Mr Brophy says he had been, until in or about this time, unaware of the Scheme or the CICT or the possibility of an application for compensation under the Scheme.
26 October 2021	The CICT refused Mr Brophy's application *in limine* as it was received over two years after the assault. • The letter is on the headed paper of the CICT and is signed by the CICT secretariat. • Its operative part states: "*In line with the Scheme of Compensation for Personal Injuries Criminally Inflicted, effective from 20 April 2021, the Tribunal can no longer accept an application where the incident took place more than two years prior to the date of application*."
Comment	• This is an Impugned Decision of which certiorari is sought. • It is clear that this decision was made by CICT staff and not by a member of the CICT.[59] • The State disputes that this is a justiciable decision.
9 November 2021	Order granting leave to seek Judicial Review – Mr Bowes' proceedings. (Barr J)
24 January 2022	Order granting leave to seek Judicial Review – Mr Brophy's proceedings. (Meenan J)

The Assaults & Injuries

7. For the purposes of these proceedings there is no dispute as to the occurrence of the assaults, their criminal nature or the injuries resulting.

8. Mr Bowes, of Oliver Bond Flats, Dublin 8, says[60] that on 27 December 2018 he was approached by an unknown man in the flat complex where he resides and was chatting with him when "out of nowhere" the man stabbed him three times with a knife. Mr Bowes was seriously injured. He was taken to St. James's Hospital, Dublin, where he remained for about two weeks. He took some considerable time to recover, was immobile for long periods of time and had bouts of depression. In his claim form he said that he still had some pain and mental health problems due to

58 Affidavit of Anne-Marie Treacy 8 April 2022.
59 Affidavit of Anne-Marie Treacy 8 April 2022.
60 In his affidavits sworn 27 October 2021 and 30 May 2022 and his exhibited claim form dated 15 June 2021 sent to the CICT.

the assault. In his affidavit he said he was still recovering from the physical and mental sequelae of this assault.

9. Mr Brophy[61] was born on the 21st of December 1974. Prior to the assault he had a very complex and serious medical history of illness and was on Disability Allowance. There is no doubt but that he was a very poor subject for injury. On 26 April 2019 one Valerian Burcovsehi, who was unknown to Mr Brophy, assaulted him in Temple Bar, Dublin. The assault was clearly vicious and Gardaí testified at the criminal trial that Mr Brophy was barely conscious when they reached him. Mr Burcovsehi was convicted of assault causing harm and was sentenced to 32 months in prison. Mr Brophy has no memory of the assault – he woke up in hospital having been admitted to the ICU, where he was intubated to protect his airway and ultimately underwent a tracheostomy. His injuries post-assault included skull fractures (minimally displaced), bilateral subdural haemorrhages, subarachnoid haemorrhage and spinal, mandibular (comminuted and displaced), rib, clavicular and scapular fractures. The multiple fractures and their extensive distribution were consistent with an assault by multiple punches and or kicks to the body affecting the skull, facial bones, neck and ribs. The injuries were certified to the Gardaí as having created a substantial risk of death, caused serious disfigurement and substantial loss or impairment of mobility of the body and loss of function of a body member or organ.

10. The mandibular fractures required surgery. He developed pneumonia in hospital. His claim form records that he was in hospital for three months after the assault and was discharged to the care of his sister - who moved into his house as his carer and from whom he needed a lot of care. His mandibular fracture affected his speech. After the assault, he forgot his brother had died in 2018 and had to re-live being told over and over that he was dead. He was still afraid to be on his own and afraid to leave his house due to memory loss, anxiety and panic attacks. The COVID-19 lockdown complicated that picture. On hospital admission in November 2000 for collapse and hypothermia, he was assessed as having evidence of moderate cognitive impairment with primary deficits in executive function, attention and recall. He was deemed to have evidence of reduced abstract thinking and safety awareness. A social work report of August 2001 supported his sister's appeal of a decision discontinuing carers allowance. It records that she supports Mr Brophy in activities of daily living such as preparing meals, domestic tasks and assists with personal care such as washing and dressing. She stays in his home overnight. He says his life is totally different as a result of the assault.

11. An additional undated statement by Mr Brophy to the Gardaí, apparently a victim impact statement made in 2020, bears extensive quotation. He says:

> *"I am nervous and edgy all of the time and have trouble sleeping. I have nightmares most times waking up after playing the incident over and over in my head. I am awake if I hear a noise fearing somebody is going to come in and attack me in my own home.*

61 Sources for this paragraph are his affidavits sworn 4 January 2022 and 10 June 2022, and exhibits thereto including medical and social work reports and his claim form dated 20 October 2021 sent to the CICT, his statements to the Garda, Garda Medical certificate/reports 9 August 2019.

My concentration is very bad since and I get very confused a lot of the time because of the damage to my brain. It has left me with long term effects of not been able to work properly because my balance is causing me to trip and fall a lot. My grip and motor skills are getting worse. I let cups and plates fall from my hand and I have nearly scalded myself on many occasions. I cannot do a lot of personal stuff and need help tying my shoes and buttoning clothes. As a result I am wearing clothes with elastic bands and Velcro shoes with no laces.
I am eating mostly liquidised foods because of the injury to my face and Jaw. I am in pain chewing and trying to swallow and have lost weight. I need help washing and showering myself. My ribs and breathing are still affected and this causes me distress and makes me think I can't breathe. I find myself in a lot pain sitting in a chair for periods of time because of the neck injury. I am uncomfortable most days with pain as a result of having most of my muscles and bones been stood on or broke.
I suffer from bad panic attacks and anxiety on a daily basis and have become a recluse. I have no self-esteem or confidence and am depressed all the time. I feel I have become dependent and a burden and I am in a bad place in my life as a result of the attack. My life Is not and will never be the same again. I am living a nightmare and It feels like I am living through a death sentence that feels like it is never going to end.
The headaches are getting worse too and they are on a daily basis. I have to take painkillers and medication for the rest of my life. My body has permanent scars from the stitches. I hate seeing myself like this and hate feeling like this too and this is because this man unprovokingly decided for reasons I will never know, decided to attack me that evening and changed my life forever. He has forced on me a life of pain and hurt and damage that can never be repaired or reversed."

12. It seems that there was some misplaced concern about Mr Brophy's ability to manage his affairs. His sister signed the CICT Application form on his behalf and with his authority. The possibility of his prosecuting these proceedings by her as next friend was considered. However, she was clear, and has deposed that, although she was his carer, Mr Brophy fully understood the application submitted to the CICT and why judicial review was being sought as well as the content of the relevant documents, which his solicitor also explained to him. She considered that he has capacity to understand and prosecute the proceedings and fully understands the application made to the CICT and the nature of these proceedings. His solicitor has deposed to similar effect and that his impression to the contrary derived from a misunderstanding between them as the difference between requiring care/a carer and the question of capacity.

THE RELIEFS SOUGHT

13. Mr Bowes' Statement of Grounds seeks the following reliefs:

- i. Certiorari quashing the CICT decision of 12 July 2021 refusing to consider the Applicant's application for compensation under the 2021 Scheme.
- ii. A declaration that in adopting the 2021 Scheme and its absolute two-year time limit for applications contained therein, the CICT unlawfully fettered its discretion to extend time.

- iii. A declaration that the 2021 is non-retroactive in its application to the Applicant's application.
- iv. A declaration that the manner in which the CICT has administered the Scheme is, in the instant case, in breach of the principle of equivalence;
- v. A declaration that the manner in which the CICT has administered the Scheme is, in the instant case, in breach of the principle of effectiveness.
- vi. A declaration that the Respondents have failed to provide the Applicant with an effective remedy.

14. Mr Brophy's Statement of Grounds seeks the following reliefs:

- i. Certiorari quashing the CICT decision of 26 October 2021 refusing to consider the Applicant's application for compensation under the 2021 Scheme as out of time.
- ii. A declaration that the absolute and retrospective time limit at §20 of the 2021 Scheme is unlawful and contrary to EU Law principles of equivalence and effectiveness.
- iii. A declaration that the §20 of the 2021 Scheme is invalid as contrary to the Constitution.
- v. If necessary, an injunction requiring the CICT to disapply the absolute and retrospective time limit at §20 of the 2021 Scheme.
- vi. If necessary, mandamus directing the CCT to accept for consideration the Applicant's application for compensation under the 2021 Scheme.

EFFECT OF THE 2021 SCHEME ON THE 1986 SCHEME

15. The general effect of the 2021 Scheme on the 1986 Scheme was more or less assumed rather than argued. The 2021 Scheme does not, in terms, mention the 1986 Scheme – much less explicitly amend, revoke or replace it. Of course, it should have made its effect on the 1986 Scheme explicit. Theoretically they could co-exist. But, allowing that they are administrative documents rather than statutes, it does seem to me clear enough, on a consideration and comparison of the 2021 and 1986 Schemes as a whole, that the former replaces the latter. Not least, the move from an ex gratia basis of compensation to a basis of legal entitlement – no doubt in light of **BV** and **Doyle & Kelly** – suggests replacement and that the 1986 Scheme has been discontinued.

16. This implies that, at the point at which the Applicants applied for compensation, they did so under the 2021 Scheme and the 1986 Scheme no longer existed – and no longer exists. While I do not suggest such reliefs could have been granted, the reliefs sought do not include quashing the 2021 Scheme itself or the reinstatement of the 1986 Scheme. Accordingly, if the present proceedings succeed, the result will not include a direction to consider the Applicants' compensation applications under the 1986 Scheme.

BOWES – AMENDMENT OF GROUNDS - FETTERING DISCRETION

17. As has been seen, Mr Bowes pleaded that the CICT unlawfully fettered its discretion by adopting the 2021 Scheme in terms of the absolute time limit imposed by §20. However, and correctly, counsel for Mr Bowes volunteered at trial that this plea was based on a misconception that the 2021 Scheme had been adopted by the CICT whereas, in fact, it was adopted by the Government. Accordingly, the limits on the discretion of the CICT had been set by the Government.

18. During the trial Mr Bowes sought to amend his Grounds to plead, in short, that the Government had unlawfully fettered the CICT's discretion to extend time. The only explanation for the necessity of this amendment was the misconception I have described. The nature of the amendment is apparent from the proposed amended relief as follows:

> *"A declaration that in adopting the Scheme of Compensation for Personal Injuries Criminally Inflicted dated the 20th April, 2021 and the absolute two-year time period for applications contained therein, the ~~first~~ second and/or third Respondent unlawfully fettered the first Respondent's ~~its~~ discretion to extend time;"*[62]

19. The State objected to the proposed amendment on the basis that it is not within the scope of the leave to seek judicial review which was granted and would circumvent the time limits for commencing judicial review. They cite **Shields v Central Bank**[63]. Mr Shields had paid his solicitor's fees in cash consisting of damaged banknotes. The solicitor asked the Central Bank to change them in accordance with a Decision of the European Central Bank[64]. The Central Bank refused saying it would keep, and investigate the source of, the cash. Though the solicitor had made the application to the Central Bank and been refused, Mr Shields was the applicant in judicial review on the basis that he remained "on the hook" to pay his solicitor's fees. Mr Shields was found to lack locus standi as the cash was not his, he had not made the application to the Central Bank and the refusal was not addressed to him. A year after the impugned refusal, the solicitor applied to be joined as a co-applicant in the judicial review.

20. In Shields, Faherty J pointed out that an application under Order 84 RSC, seeking leave to apply for judicial review, must be made within three months from the date when grounds for the application first arose.[65] Time may be extended for good and sufficient reason if the circumstances which resulted in the failure to make the application within three months were either a) outside the control of or b) could not have been reasonably anticipated by the applicant. No explanation had been given for the Solicitor's failure to seek leave in his own name within the allowed time. Faherty J refused the application – holding that that the solicitor was impermissibly seeking to circumvent the

62 The deleted content is struck through. The added content is underlined.
63 [2022] IECA 250
64 ECB/2013/10
65 Order 84 r21(1)

time limit by, in effect, "piggybacking"[66] the solicitor's application onto Mr Shield's to benefit from his compliance with the time limit.

21. In my view, the State's analogy with Shields is good. What is sought by way of amendment is, in effect, to impugn, for the first time at trial and out of time, the adoption of the 2021 Scheme by a different party (at least nominally[67]) to the party identified in the grounds on which leave was granted as having made the scheme. I consider that the proposed amendment falls within the observation of Fennelly J in **Keegan**[68], recently cited by Collins J in **NWTAG**[69] that the "*cases show that the courts are reluctant to admit new grounds which amount to advancing an entirely new cause of action*[70]*, …… or a challenge to a different decision*[71]."

22. I have borne in mind the observations by Collins J in **NWTAG**[72], again citing **Keegan**, that the touchstone for determining whether to permit an amendment is the interests of justice and that an amendment was permitted in Keegan to raise an entirely new ground in law. While it may not be quite a term of art, the assertion that a public body has "*fettered its discretion*" is one well-understood in judicial review. It conveys that the body on which a discretionary power has been conferred has itself so acted as to unlawfully limit the scope and extent of that discretion. It is a fundamentally different allegation to say that the Government has fettered the discretion of a body to which it has delegated powers. While transposition of EU law may affect the position, in general, the Government always and inevitably must fetter (using the word in a non-pejorative sense) the discretionary power of the public body to whom it delegates that power. It is in the nature of the limited power of Government to delegate discretionary powers that it must define and limit the scope and extent of the delegated discretionary power. That being so, it is difficult to see that, by reference to a factor identified in **Keegan** and cited in **NWTAG**, by refusal of the amendment the Applicants would be "*deprived of a serious argument*." Or, to put it another way, it is difficult to see that had this plea originally been in the Grounds they would have obtained leave on it. Also, the Executive is situated in an entirely different place from the CICT in the Constitutional and legal order and hierarchy. So the allegation that the Executive has unlawfully fettered the powers of the CICT is an entirely different allegation to the allegation that the CICT has unlawfully fettered its own powers and each raises quite different legal considerations. The State was entitled to proper and timely notice of such an allegation - which the amendment at trial would render impossible. In my view, the nature and legal significance of the proposed amendment would be quite different to the "*essentially formal or technical amendment*" permitted in **NWTAG** to amend the grounds to add declaratory relief against the State based on grounds already pleaded – of which the State Respondents had been on notice from the start of the proceedings.

66 Though Faherty J did not use the word.
67 See below as to the legal status of the CICT.
68 Keegan v Garda Síochána Ombudsman Commission [2012] 2 IR 570
69 North Westmeath Turbine Action Group v. An Bord Pleanála [2022] IECA 126 (Court of Appeal (civil), Collins J, 1 June 2022)
70 As in Ní Eílí v Environmental Protection Agency [1997] 2 ILRM 458.
71 As in Muresan v Minister for Justice, Equality, and Law Reform [2004] 2 ILRM 364.
72 North Westmeath Turbine Action Group v. An Bord Pleanála [2022] IECA 126 (Court of Appeal (civil), Collins J, 1 June 2022)

23. I therefore refuse leave to amend the Statement of Grounds in the terms sought.

AWARENESS OF THE SCHEME & AFFIDAVIT OF NIALL CULLEN SWORN 9 NOVEMBER 2011

24. As stated above, Mr Bowes says he was unaware of the Scheme or the CICT until shortly before he applied to the CICT for compensation in October 2021. His Grounds allege breach of Article 4 of the Compensation Directive in failing to inform him adequately or at all of the existence or purpose of the Scheme or of the CICT. Article 4, headed "*Information to potential applicants*" reads as follows:

> *"Member States shall ensure that potential applicants for compensation have access to essential information on the possibilities to apply for compensation, by any means Member States deem appropriate."*

25. In response to the State's exhibition of documents alleged to demonstrate the steps taken by the State to publicise the Scheme, Mr Bowes observes, by Affidavit sworn 3 June 2022, that the Victims' Charter was, according to the State, published in "*early 2020*" whereas he was stabbed in December 2018. Likewise, the Garda Information Booklet appears to have been published in July 2021. Essentially, he said that the materials exhibited by the State, as evidence of the publicity given to the 2021 Scheme, were anachronistic.

26. Mr Bowes cites the observations of the LRC[73] recording criticism of the lack of awareness of the 1986 Scheme which hindered its accessibility. The accompanying footnote reads:

> *"As Osborough remarked, "[a] continuing concern of the Tribunal has been ignorance within the community at large as to its very existence." Osborough, "The Work of the Criminal Injuries Tribunal" (1978) 13 Irish Jurist (NS) 320 at page 321. The low profile of the Scheme has been maintained in the intervening decades."*

Mr Bowes further cites the LRC report which reads in relevant part as follows:

> *"From the Commission's preliminary research ……. it seems that the existence of the Scheme and of the Tribunal are not widely known. Various politicians believed at various stages of its existence that the Tribunal had been abolished and in 2007, the Government committed to re-instating it in their Programme for Government. This belief was perhaps strengthened by fact that the Tribunal sits in private, as well as by its former practice of not publishing its annual reports to the Minister for Justice. As the Tribunal does not advertise its existence, it rarely attracts media attention. There is useful information on the Scheme on the Department of Justice's website. Nevertheless, it appears to the Commission that establishing the Scheme on*

73 Consultation Paper on the law of limitation of actions arising from non-sexual abuse of children LRC-CP16-2000

a statutory footing would improve public awareness of the possibility of seeking compensation for criminal injuries and therefore aid victims in accessing compensation."

27. Mr Bowes' solicitor deposes that his *"own experience with various clients corresponds with the view of the Law Reform Commission that the existence of the scheme and the [CICT] are not widely known."*

28. I confess to having expressed some surprise that the State had not responded to this affidavit of Mr Bowes. Perhaps in consequence, during the trial the State tendered the Affidavit of Niall Cullen sworn 9 November 2022. I received and considered it *de bene esse* pending my decision as to whether to admit it in evidence. It asserted that the 1986 Scheme was available to view on the Department of Justice Website throughout 2018, 2019 and 2020 and exhibited screenshots of archived webpages of 12 June 2008 and 26 January 2013 to that effect. He also asserts that information on the Scheme was available on the Citizens' Information website "prior to 2021".

29. Mr Bowes did not oppose admission of this affidavit with any great vigour. I think correctly. The provision of this information, if belatedly, relates to matters live on the pleadings and, fairly, there is no suggestion by Mr Bowes that he is unfairly surprised by its content. It essentially consists in demonstration that the information to hand later was also to hand prior to the assault on Mr Bowes. I therefore will admit the affidavit in evidence.

30. I accept the contents of Mr Cullen's affidavit as true. I also accept that Mr Bowes' solicitor is accurate in fact when he deposes that his *"own experience with various clients corresponds with the view of the Law Reform Commission that the existence of the scheme and the [CICT] are not widely known."*. I further accept Mr Bowes' assertion that he did not know of the scheme until he consulted his solicitor on the day he signed his application to the CICT.

31. I was not directed to any material difference between the positions of Mr Bowe and Mr Brophy as to awareness of the Scheme not do I see any.

LEGAL STATUS OF THE CRIMINAL INJURIES COMPENSATION SCHEMES & TRIBUNAL

32. The 1974, 1986 and 2021 Schemes are merely administrative. They are not statutes or statutory instruments. They are promulgated by decision of Government and laid before the Oireachtas. Non-statutory documents are laid before the Oireachtas as information to which its members may have access in support of the democratic process. It was not suggested that such laying gave the Schemes any particular legal significance.

33. An oddity of the 1986 and 2021 Schemes is that since 2005, despite their merely administrative status, they have been notified to the EU as constituting Ireland's compliance with the Compensation Directive. The LRC has recommended a statutory footing for the Scheme in order to fully give effect to Ireland's international law obligations, and the Government has, in publishing the 2021 Scheme, stated its intention to put the Scheme on a statutory footing in early course. In that sense the 2021 Scheme is a temporary measure. I will address below the principles of interpretation of the 2021 Scheme in light of the fact that it is merely administrative and yet the State's means of effecting the Compensation Directive.

34. While the Government may issue non-statutory executive schemes in the absence of legislation[74], **Hogan & Morgan** have for many years[75] adverted to the lack of clarity as to legal status generated by the use of administrative schemes, circulars and the like. A question arises as to the legal personality and juristic status of the CICT – which has been described as anomalous.[76] However it is clear that its acts and omissions are justiciable in judicial review[77]. Actions against it have a long pedigree.

35. Mr Brophy relied on Article 47 CFEU[78] as requiring that the CICT be "established by law". It provides, inter alia, that:

> *"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*
> *Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented."*

36. The issue was not really argued and I decline to decide it. That said, I respectfully but tentatively suggest that this reliance was misconceived: the right alleged is to compensation and the violation asserted by the Applicants was by the CICT and the fair and public hearing by a tribunal established by law and, if needs be, the "effective remedy" is provided by this court.

37. At least, the anomalous status of the CICT and the Scheme does throw into some light an argument by the State that the "jurisdiction" of the CICT is strictly limited by the 2021 Scheme. It seems odd to speak of the "jurisdiction" of a supposed body which may well lack legal personality. It seems likely that "members" of the CICT are properly to be seen as delegates performing a task of Government – though, as the point was not argued, I make no finding to that effect. It seems to me,

[74] Mr Brophy cites Casey, Under-Explored Corners: Inherent Executive Power in the Irish Constitutional Order, 2017 40(1) DULJ 1 at 31-32
[75] Administrative Law – most recently 5th Ed'n 2019 §2-419 et seq
[76] Hogan & Morgan, Administrative Law, 5th Ed'n 2019 §6-05
[77] Hogan & Morgan, Administrative Law, 5th Ed'n 2019 §6-05
[78] Charter of Fundamental Rights of the European Union

on the authority of **Crawford v Centime**[79], upon which Mr Brophy relied in asserting that the Scheme is not a law, that such members would not be bound to act in accordance with the Scheme if to do so was unlawful. In that case, Clarke J said, of non-statutory guidelines issued by the Revenue Commissioners, that "*the elevation of any such guidelines to matters which are applied as if they have the force of law that is open to serious question."*

PRELIMINARY ISSUES

38. The State raises a number of preliminary issues as follows.

Justiciability

39. The State says that the Impugned Decisions rejecting the claims are not impugnable "decisions" in the sense understood in the law of judicial review – that they are not justiciable. It says that the CICT was prohibited by §20 of the 2021 Scheme from accepting, and therefore from deciding, the application given it was made outside the two-year time limit. It was simply applying the Scheme as it had to and *"The act complained of is not capable of being judicially reviewed as is not a decision."*

40. The State relies on **Chakari**[80]. That judgment records that "*Mr Chakari submitted a non-fatal injury application to the Criminal Injuries Compensation Tribunal on 22nd July, 2016. As of the date of hearing, the Tribunal does not have sufficient information from Mr Chakari to make a decision on the substantive application. ….Mr Chakari's application to the Tribunal is incomplete and cannot be processed. As a result, Mr Chakari's application, at his election, remains pending. Yet Mr Chakari comes now to court with this judicial review application seeking certain declaratory reliefs concerning the lawfulness of the Scheme ….*". Mr Chakari's solicitor wrote to the CICT noting that neither (a) general damages in respect of pain and suffering nor (b) any (if any) costs of legal representation are payable under the Scheme and asked the CICT to agree to dis-apply those provisions of the Scheme which exclude the payment of general damages in respect of pain and suffering. The CICT replied, inter alia, that all applications made under the Scheme are processed within the parameters of the Scheme.

41. The State rely on the view of Barrett J: "*That, however, is not a decision susceptible to judicial review. Why so? Because in a system based on the rule of law, the Tribunal is not free to act other than in accordance with the Scheme pursuant to which it was established and in accordance with which it is required to operate. The Tribunal has not 'decided' to act in accordance with that Scheme; it must do so.*" And later: "*If Mr Chakari wishes to challenge the Criminal Injuries Compensation Scheme, the correct course of action is to commence plenary proceedings. If he wishes to challenge a decision of the Tribunal, then he must progress his application to the point where*

[79] [2005] IEHC at 328

80 Chakari v The Criminal Injuries Tribunal [2018] IEHC 527 (High Court, Barrett J, 1 October 2018)

there is a decision that is susceptible to judicial review. Order 84 (RSC) has no application in respect of decisions that have yet to be taken."

42. **Chakari** seems to me a decision in the vein of **Van Eeden**[81] and, could as well be explained in terms of prematurity of judicial review. In any event, in my view, **Chakari** must be understood in its context: the primary aspect of which was that his application for compensation remained pending and undecided before the CICT. I cannot see that it has any application where, as here, the Applicants' applications have been definitively refused.

43. In my view a similar observation can be made as to **Keogh**[82], in which **Chakari** was followed in respect of judicial review proceedings relating to a still-pending application to the CICT.

44. Whether one says rejected or returned, or not admitted to the process, it amounts to the same thing: the Applicants have been, as far as the CICT is concerned and by means of the Impugned Decisions, finally denied the compensation they seek. Whether they have been unlawfully denied, by reference to the terms of the Scheme or to other legal principles, is another matter but is not the issue where justiciability is concerned. A decision is no less a decision because the decision-maker decides what it thinks to be obvious or inevitable. I cannot see that, by reference to the oft-quoted words of Costello J. in **Goodman (No. 1)**[83], the Impugned Decisions are "*devoid of legal consequences*" or "*sterile of legal effect*". They finally decide, against the Applicants, their applications for compensation. I reject the State's argument in this regard and find that the Impugned decisions are justiciable in judicial review.

Judicial Review or Plenary Proceedings?

45. The State says these judicial review proceedings are misconceived and the Applicants should have launched plenary proceedings. The State's point is closely linked to its assertion of the absence of a justiciable decision – as to which I have held against the State. Essentially, the decision in **Chakari** that there had been no justiciable decision and the decision in **Doyle & Kelly** that impugning the lack of provision in the Scheme for compensation akin to general damages for pain and suffering was premature pending an award by the CICT, were to the same effect in this regard. And they were followed in this respect in **Keogh**, in which the application to the CICT remained pending. In my view, once, as I have found, the Applicants in judicial review impugn a justiciable decision, this point as to the form of proceedings falls away. To seek declaratory reliefs ancillary to a claim for judicial review is commonplace. I also note that in **Galvin**[84], Ní Raifeartaigh J said that a challenge to the constitutionality of legislation might be mounted by way of Judicial Review when there is an

81 Van Eeden v Fitness to Practice Committee and Medical Council [2017] IEHC 632 (High Court, Faherty J, 11 October 2017)
82 Keogh V CICT & Ors - 2016 896 J.R. – The High Court, Unreported, Judgment Of Mr. Justice Michael MacGrath delivered on 9 July, 2021
83 Goodman International v. Hamilton (No. 1) [1992] 2 IR 542
84 Galvin v DPP [2020] IECA 217 §49

underlying administrative decision which is being attacked and the constitutionality of legislation was successfully challenged in judicial review proceedings in **Zalewski**[85].

Standing

46. The State denies the Applicants' standing to make some of the arguments deployed. They say that, because the Applicants do not claim to have suffered any such incapacity, the Applicants can't argue that §20 is unfair to those suffering legal incapacity by infancy or disability – which would suspend limitation periods – because the two years is not extended in their favour. As to that alleged unfairness, the LRC provides some support[86].

47. The State says that the Applicants assert a right, as provided in the 1986 Scheme, to argue before the CICT for the disapplication of the ordinary three-month time limit on the basis that the CICT should consider their circumstances exceptional. All agree that I cannot determine whether their circumstances are exceptional. But, the State says, I must determine whether the Applicants have an arguable case to make to the CICT that their circumstances are exceptional. If they do not, the State says, the Applicants ask me to determine an entirely theoretical issue with no basis in fact.

Standing generally

48. As to standing, the starting point is **Cahill v Sutton**[87]. It governs the *locus standi* necessary to challenge the constitutionality of an enactment. Henchy J adopted a "*general, but not absolute, rule of judicial self-restraint*" to require the challenger *"to show either that he has been personally affected injuriously by it or that he is in imminent danger of becoming the victim of it. This general rule means that the challenger must adduce circumstances showing that the impugned provision is operating, or is poised to operate, in such a way as to deprive him personally of the benefit of a particular constitutional right*." He considered that *"To allow one litigant to present and argue what is essentially another person's case would not be conducive to the administration of justice as a general rule. Without concrete personal circumstances pointing to a wrong suffered or threatened, a case tends to lack the force and urgency of reality."*

49. The State cites **Kelly**[88] to the effect that *"*[t]*he interest of the plaintiff must be real and legitimate and cannot be manufactured."* I agree. But in **Christian**[89], on reviewing the authorities,

[85] Zalewski v Adjudication Officer (2019] IESC 17 and [2021] IESC 24
86 Law Reform Commission Consultation Paper Compensating Victims of Crime (LRC CP 67 – 2022) §6.22: "… the time limit might result in harsh treatment if an applicant was incapacitated (physically or mentally) for more than two years and did not have an application made on their behalf within that timeframe."
87 [1980] IR 269
88 The Irish Constitution, (5th edition) §6.2.141
89 Christian et al v Dublin City Council [2012] 2 IR 506

Clarke J observed that *"it is clear that standing is far from a rigid settled concept. There are numerous examples in the case law where the courts have adopted a flexible approach which is based on the circumstances of the individual case and the interests of justice generally."*

50. The State cites **McDermott**[90] - in which the challenge to the Attorney General's legal aid scheme was by an applicant who had withdrawn his application to that scheme. He was held to lack standing *"… where there is no prospect of him applying for it. Such would clearly be a jus tertii."* The State says that where Mr Bowes "*elected not to pursue his right to lodge an application with the Scheme until June 2021 when there was no prospect of him being eligible for an award, his situation is analogous to"* the plaintiff in **McDermott**.

51. That "election" point is easily disposed of: the Applicants cannot have "elected" not to apply for a scheme of which they knew nothing. They applied once they knew and never withdrew their claims. And they remained entitled to apply under the 1986 Scheme, albeit at risk by reason of delay of refusal of compensation, until that entitlement was withdrawn, without prior warning or transitional provision, on the publication of the 2021 Scheme.

Must the Applicants show an arguable case to make to the CICT that their circumstances are exceptional?

52. The Applicants say that they need not show an arguable case to make to the CICT that their circumstances are exceptional. They say that it would be premature to do so. They cite **Chakari**[91] and **Keogh**[92] for their prematurity point – I think correctly. Therefore, and having regard to the undoubted status of the Applicants as injured victims of violent crime within the meaning of the Compensation Directive and the 2021 Scheme and to the flexible approach to standing based on the circumstances of the individual case and the interests of justice generally identified in **Christian**, I would not shut out the Applicants for failure to show an arguable case to make to the CICT that their circumstances are exceptional. In my view their interest is *"real, legitimate and not manufactured."*

1986 Scheme - Exceptional Circumstances

53. Lest I am wrong in that conclusion, I will consider the Applicants' argument in the alternative that they have in fact shown an arguable case that exceptional circumstances justify extensions of time in their favour.

90 McDermott v. Governor of Clover Hill [2010] IEHC 324, McKechnie J
91 Chakari v. Criminal Injuries Tribunal, the Minister for Justice and Equality, Ireland and the Attorney General [2018] IEHC 527
92 Keogh v The Criminal Injuries Tribunal, The Minister For Justice And Equality, Ireland And The Attorney General, MacGrath J, 9 July 2021

54. The circumstances to be considered exceptional are not described in the 1986 Scheme beyond the word "exceptional". I will consider later the practice of the CICT in applying that criterion.

55. Neither scheme is a statute. But the 1986 Scheme to April 2021 served, and the 2021 Scheme serves at least for now, the function of transposing to Irish law the rights to compensation contained in the Compensation Directive. Accordingly in my view it is, at least in general terms, appropriate to construe the Schemes on broadly similar bases to the bases upon which statutes are interpreted. The sole purpose of statutory interpretation is to determine the objective intention of the legislature by the enactment of the provision or provisions which are called into question. - **A.D.L.R.**[93] and **Crilly**[94]**.**

56. The meaning of the phrase "*exceptional circumstances*" has been considered in a number of cases. In **O'G**[95] the Supreme Court considered S.8(2) of the Residential Institutions Redress Board Act 2002 ("RIRB Act") which imposed a time limit on the making of applications to the Board but allowed for such an extension of time where the RIRB found "*exceptional circumstances*". Ms O'G sought and was refused an extension. She had provided a medical report as to her personal and family situation, her psychological distress suffered as a consequence of her childhood in certain institutions, her active suppression for many years of memories of her life in those institutions and the fact that she could not cope with her memories until she received counselling.

57. The Supreme Court adverted to the purpose of the Act, as stated in its Long Title, to make financial awards to assist in the recovery of persons injured by abuse as children while resident in certain institutions of the State. S.5 of the RIRB Act obliged the RIRB *"to make all reasonable efforts, through public advertisements, direct correspondence with persons who were residents of an institution, and otherwise, to ensure that persons who were residents of an institution were made aware of the function of the Board".* The Court considered it important that S.8 of the RIRB Act prohibited the RIRB from considering issues of fault or negligence. Inter alia, in refusing to extend time the RIRB observed that:

> *"…… ignorance of the existence of the redress scheme and/or closing date, in and of itself, does not constitute exceptional circumstances. A substantial majority of late applicants state that their applications were late because they did not know about the redress scheme in time. However, if the Oireachtas intended that all such applications be accepted, the Board considers that it would have employed a state of knowledge test in Section 8(2) rather than the test of exceptional circumstances. However, lack of knowledge may have arisen in the context of other factors such as those described above, and in that sense, exceptional circumstances may arise."*

93 A.D.L.R. v. Minister for Health [2021] IEHC 130 (High Court (General), Barton J, 23 February 2021);
94 Crilly v. T & J. Farrington Ltd [2001] IESC 60; [2001] 3 IR 251
95 O'G v Residential Institutions Redress Board [2015] IESC 41

58. The Supreme Court stated, without elaboration or explanation, that the RIRB Act was a remedial act and "*has to be interpreted accordingly*". This implies that its character as remedial was obvious from its purpose. On the evidence before it, there was only one conclusion to which the RIRB could arrive. The RIRB's decision was quashed for irrationality.

59. **McE**[96] also concerned the RIRB's refusal to extend time – for want of exceptional circumstances where, as the Board found, *"he was not so afflicted by alcohol difficulties that the existence of the Redress Board was prevented from coming to his attention during the relevant period, and it is noteworthy that he gave sworn testimony that throughout that period he watched either the six o'clock news or the nine o'clock news on most days".* Moriarty J, in the High Court, noted that a "*state of knowledge*" test, as the sole criterion of exceptional circumstances, did not apply[97]. Accordingly, all relevant matters, including access to publicity regarding the existence and purpose of the RIRB, and such matters as the Applicant's education, health and work record, and length of delay in applying, were to be assessed in the round to enable a balanced assessment. Kearns P in **MG***[98]* had upheld a refusal of extension where *"There were ample means of acquiring knowledge available to this applicant, and indeed any other applicant living in this jurisdiction over the relevant period of time. Not only was there a national furore taking place on an almost daily basis in the print, radio and television media, there were also extensive advertisements placed by the respondent body on a nationwide basis."* Moriarty J upheld the RIRB's refusal.

60. In **McE** Hogan J in the Court of Appeal quashed the RIRB's refusal to extend time. He cited **O'G***[99]* to the effect that the RIRB Act was a remedial statute. It followed that it should be interpreted "*as widely and liberally as can fairly be done*"[100]. He considered it clear that the RIRB had considered that the words "*exceptional circumstances*" as meaning exceptional circumstances *"which might have prevented the existence of the Redress Board from coming to the attention of the applicant during the relevant period."* Hogan J considered this the wrong test. He considered that the Oireachtas had left the RIRB with the greatest possible flexibility to deal with the wide variety of possible circumstances in which late applications might be made. He held that the RIRB had:

> *"…….the widest possible discretion to extend time once it is satisfied that there exceptional circumstances such as would make it just and equitable that time should be extended"*

and

> *"…. an applicant seeking an extension of time need only demonstrate the existence of exceptional circumstances simpliciter, with the standard of exceptionality measured by reference to contemporary standards prevailing within the general public, as distinct from the more limited class of persons who might have applied under the 2002 Act. It is not necessary for the applicant to go further and show that such circumstances impeded or prevented him or*

96 McE v. Residential Institutions Redress Board [2016] IECA 17 (Court of Appeal, Hogan J, Ireland - Court of Appeal, 3 February 2016)
97 Citing Kearns P. in MG v. Residential Institutions Redress Board [2011] IEHC 332
98 MG v. Residential Institutions Redress Board [2011] IEHC 332
99 O'G v. Residential Institutions Redress Board [2015] IESC 41
100 Citing the comments of Walsh J. in Bank of Ireland v. Purcell [1989] I.R. 327, 333.

> *her from making an application to the Board within the original three year period or that such circumstances contributed to a lack of knowledge regarding the existence of either the redress scheme or the Board itself."*

61. In **PB**[101], the appellant's lack of knowledge or ignorance of the existence of the Scheme administered by the Hepatitis C Tribunal sufficed in the Court of Appeal as exceptional circumstances justifying the disapplication in his favour of the time limit set by that Scheme for making applications to it[102]. The appellant lived a reclusive lifestyle and did not engage with newspapers, television or politics regarding current affairs. Ryan P endorsed the views of Hogan J in **McE** as to *"the necessary generosity of meaning that has to be ascribed to something like exceptional circumstances."* And *"It is not just that the [tribunal] has a wide discretion; it is that the factual matrix to which this statutory criterion is to be applied is extremely broad. Nobody can say just what exceptional circumstances amount to, in the sense of saying what they do not amount to. One has to say, it all depends. .. all of these cases about knowledge and exceptional circumstances are extremely fact-specific. This is a feature that cannot be ignored".* Ryan P held that lack of knowledge of the existence of the scheme did not, per se, amount to exceptional circumstances but such lack of knowledge could not be excluded from possibly constituting exceptional circumstances. He noted that Kearns P had held that there are circumstances or could be a case in which a lack of knowledge could be considered exceptional circumstances[103]. Ryan P cited **Hicks**[104] to the effect that an "*exceptional circumstances*" criterion "*postulates a criterion which is both vague and subjective*" and that "*like beauty, exceptional circumstances lie in the eye of the beholder*". He noted that the court in **Hicks** also observed that "*Every case is different, so that there are always some aspects of a case which may be regarded as exceptional. The question inevitably arises: exceptional compared with what?"*

62. Ryan P held: *"This is redress legislation, … but I do not think that one needs to go beyond interpretation of the legislation. The scheme which we are addressing here is a mode of providing compensation to persons injured by a great national disaster that was being put right. So, it is reasonable to say that if there were to be a choice between a narrow and a broad interpretation, then the latter would be the appropriate one. I do not find it necessary to embark on any special construction as opposed to interpretation of the meaning of the provision."*

Ryan P concluded that

> *"lack of knowledge or ignorance of the existence of the scheme cannot be excluded as being relevant. When I come to the second question, it seems to me that the appellant's lack of knowledge or ignorance of the existence of the Hepatitis Scheme is, in all the relevant circumstances, sufficient to constitute exceptional circumstances."*

101 PB v. The Minister for Health [2018] IECA 81 (Court of Appeal, Ryan (President), 23 January 2018
102 S.4(15) of the applicable Act read: "The Tribunal may, at its discretion and where it considers there are exceptional circumstances, extend the periods referred to in subsection (14)."
103 I presume this to be a reference to MG (supra).
104 Hicks v. Aboriginal & Torres Strait Islander Commission [2001] FCA 586 (21 May 2001)

63. Peart J, concurring with Ryan P, referred to the "*extensive breadth of the discretion*". He answered in the negative the question whether lack of knowledge or ignorance of the scheme is incapable of amounting to exceptional circumstances. Hogan J also concurred – citing **McE** to the effect that "*legislation to redress a social wrong ... must … be construed with a significant degree of liberality".* He held that the category of exceptional circumstances is never closed.

64. More recently, in **ELG**[105], the Supreme Court considered the Disability Act 2005, enacted to enable assessment of the health and education needs of persons with disabilities and to provide means to meet them, *"a remedial social statute, and therefore should be construed as widely and as liberally as can be done fairly within the constitutional limits of the court's interpretative role"* – not going beyond "*an interpretation which can be said fairly to arise on the wording of the legislation".* As a remedial statute, its "*correct interpretation requires a consideration of the purpose of the legislation and the category of persons to whom it is directed.*" – though "*a purposive approach in the context of a remedial social statute cannot mean drawing a conclusion that is plainly contrary to the legislation*". Baker J cited **J.G.H.**[106] to the effect that the Oireachtas:

> *"having decided it is appropriate to apply public funds to compensate a particular category of persons, did not intend that potentially qualifying applicants would be excluded on narrow or technical grounds, for that would be wholly inconsistent with the purpose of the legislation."*

A.D.L.R.[107] is to generally similar effect as **ELG.**

65. The foregoing caselaw prompts the question – are the Criminal Injury Compensation Schemes remedial in nature? In my view they are. They are intended to remedy, at least to some extent, the injuries visited on victims of crime. The Compensation Directive recites that crime victims should be entitled to fair and appropriate compensation for the injuries they have suffered and that they will often not be able to obtain compensation from the offender, such that a compensation mechanism is required in all Member States. Measures to facilitate compensation to victims of crimes should form part of the realisation of the objective to protect natural persons from harm. It recites its purpose as to set minimum standards on crime victims' access to justice and their rights to compensation for damages.

66. The "Victims Charter" published by the Government is exhibited. Like far too many documents of this and many other kinds published by the Government, it does not bear the date of its publication. As a result, it is often difficult to be sure when a document was published or whether, as to a given subject of inquiry, it was the applicable document at the relevant time. I respectfully observe that as a matter of good public administration and as a matter of course, save for particular reason, all documents published by the Government should bear their date of publication.

105 ELG v HSE, Supreme Court, Baker J, 11 March 2022
106 J.G.H. v. Residential Institutions Review Committee [2017] IESC 69, [2018] 3 I.R. 68
107 A.D.L.R. v. Minister for Health [2021] IEHC 130 (High Court (General), Barton J, 23 February 2021)

67. In any event, it appears that this Victims Charter was published in 2020. It recognises the victims of crime as an identifiable cohort of society for whom particular provision, and various types of provision, should be made. Consistent with that recognition, it deals with many subject-matters other than criminal injury compensation. For example, the Crime Victims Helpline is to "*support everyone who is affected by crime*" and "*to help you so that you do not feel alone*". An Garda Síochána is described as *"a victim-centred police service, focussed on keeping people safe, protecting the most vulnerable and providing a consistently high standard of service. We will be responsive to the needs of victims… As a victim, we understand that you might need help and support."* They, also and inter alia, will "*explain the compensation schemes available".* Also described is the Criminal Justice (Victims of Crime) Act, 2017 which sets out legal rights of victims – including to information about the services and entitlements they can access – in turn including any scheme relating to compensation for injuries suffered as a result of a crime.[108] Section 16 states "*As a victim of crime, you have the right to receive support services free of charge*." and lists those support services. Section 13 describes the CICT – inter alia briefly stating the time limit for application.

68. In addressing the question "Why Compensate Victims of Crime?", the LRC[109] observes that almost all liberal democracies do so. It notes that these schemes – some taxpayer-funded, others offender-funded – have been developed in response to "*a perceived secondary victimization that victims suffered at the hands of criminal justice systems whose objectives and values were focused upon offenders*." It states that, while victim compensation schemes were once controversial, they have "*come to be acknowledged as an important aspect of the State's general duties to enforce the criminal law and to protect and vindicate individual rights*" and are justified on various rationales:

> *"The purpose of financial compensation, or "reparation", for victims of crime is both symbolic and practical. It is symbolic as the offender, or the State, is acknowledging the harm caused to the individual and to society by crime. Compensation is practical in its attempt to restore the victim to the financial position they would have been in if the crime had never been committed."*
>
> *"Victim compensation schemes have, over time, come to be acknowledged as an important aspect of the State's general duties to enforce the criminal law and to protect and vindicate individual rights."*
>
> *"…….. rights to respectful and sympathetic treatment, to support and help in the aftermath of the offence, to information, appropriate facilities and to compensation either from the offender or from the State are now firmly established and recognised as an important element of social provision for those harmed by crime. ….. State compensation is now widely accepted as a proper response to victims of violent crime."*

108 S.7(1)(i)
109 Law Reform Commission Consultation Paper Compensating Victims of Crime (LRC CP 67 – 2022) §1.45 et seq

"The Victims Directive[110] provides that Crime is a wrong against society as well as a violation of the individual rights of victims. As such, victims of crime should be recognised and treated in a respectful, sensitive and professional manner …. Victims of crime … should receive appropriate support to facilitate their recovery and should be provided with sufficient access to justice."

"… state funded victim compensation …….. is now conceptually considered as a benefit which should be available to victims as of right to meet their needs in the aftermath of a crime."

69. In my view, the terms of the 2021 Scheme, those of the Compensation Directive and of the Victims' Charter, as well as the views of the LRC (all of which set and describe the context in which the 2021 Scheme exists), amply demonstrate its remedial nature. Further, the CICT and the 2021 Scheme seem to me closely analogous to, if not as narrowly focussed as and if providing lesser compensation than, the RIRB and its scheme and they are at least broadly analogous to the Hepatitis C Tribunal in addressing the needs of a vulnerable, disadvantaged, wronged[111] and identifiable cohort.

70. Accordingly, and given the position as to locus standi taken by the State - that the Applicants have shown no arguable case that they would have shown exceptional circumstances to the CICT - in my view it is necessary to find that the criterion of exceptional circumstances in both the 1986 Scheme and the 2021 Scheme is to be interpreted in a broad, liberal and generous manner responsive to the particular circumstances of the victim of crime in each case. While ignorance of the Scheme will not automatically constitute exceptional circumstances, it cannot be excluded that it may do depending on the circumstances. This finding seems to me consistent with the caselaw cited above.

71. In addition, this finding - that the criterion of exceptional circumstances is to be interpreted broadly, liberally and generously and responsively to the particular circumstances of the victim - seems to me consistent with the view of the LRC[112] that as far back as 1977 the CICT had recognised[113] the difficulties applicants had with the three-month time limit. The CICT considered at that time that a longer time limit would relieve applicants of the additional trouble of having to make a special case for the time limit to be extended. The LRC[114] considered it striking that the time limit remained so short and strict, given that the difficulty it posed for applicants had been acknowledged by the CICT itself since the earliest days of its operation. The LRC[115] noted that Victim Support Europe has asked what benefits there are in imposing such short deadlines "*beyond the arbitrary exclusion of the victims themselves*". The LRC provisionally[116] opined that three months was

110 Directive 2012/29/EU establishing minimum standards on the rights, support, and protection of victims of crime - given effect in Irish law by the Criminal Justice (Victims of Crime) Act 2017
111 I use the word in its colloquial rather than in its strict legal sense.
112 Law Reform Commission Consultation Paper Compensating Victims of Crime (LRC CP 67 – 2022) §6.28
113 In its Second Annual Report.
114 Law Reform Commission Consultation Paper Compensating Victims of Crime (LRC CP 67 – 2022) §6.28
115 Law Reform Commission Consultation Paper Compensating Victims of Crime (LRC CP 67 – 2022) §6.28
116 Given the status of a Consultation Paper.

an excessively restrictive time limit and in doing so noted that a victim's injury might affect their ability to apply (whether through physical or psychological barriers) and that the extent of a victim's injuries and expenses may not become known for many years after a crime. I should say that I make these observations not as directly impugning the three-month time limit, but as illuminating the view I take of the criterion of exceptional circumstances for extending that time.

CICT Practice as to Extension of Time under the 1986 Scheme – is it Relevant?

72. I had no evidence from the State as to the practice of the CICT in their exercise of the discretion to extend time under §21 of the 1986 Scheme. The State simply asserted that, on the facts of the Applicants' cases, any claim for an extension would be unstateable. That said, I note the observation of the LRC[117] that a small number of past CICT decisions publicly available give some indication as to how the discretion was applied in practice. From which, it appears that:

- the discretion was strictly interpreted,
- detailed reasons were required to explain why the application was late.
- Applications received outside the time limit were refused where the following reasons were given:
    - ignorance of the existence of the Scheme;
    - grief or trauma following the crime;
    - ongoing or pending criminal or civil proceedings;
    - ongoing Gardaí investigations.
- Nonetheless, there were inconsistencies in the approach of the CICT. For example,
    - application 51140 was refused as "awaiting the outcome of an ongoing Garda investigation has never been accepted as a justifying excuse"
    - yet application 52553 was accepted for just that reason
- An applicant with serious head injuries, severe depression, and post-traumatic stress disorder as a result of the crime got an extension. The garda statement was also received outside the time limit.

73. However, and leaving aside the paucity of evidence on the practice of the CICT as to extending time prior to the adoption of the 2021 Scheme, and leaving aside also that such evidence as the LRC recites suggests the unpredictability of the CICT in this respect, in deciding the issue of standing in this case it does not seem to me that its practise is relevant. The relevant question is not whether the CICT would, as a matter of probable fact, have extended time. It is rather a question of what legal principles it ought to have applied in deciding an application for an extension of time and whether, by reference to those principles, the Applicants in these proceedings had statable cases for extensions.

117 Law Reform Commission Consultation Paper Compensating Victims of Crime (LRC CP 67 – 2022) §6.23 et seq

Application of the foregoing to the Applicants

74. I refer here to the account set out earlier in this judgment of the assaults on the respective Applicants and the injuries resulting. The present question is whether, in light of those facts, it can be said at this point that, had they applied for compensation under the 1986 Scheme immediately prior to or immediately after the adoption of the 2021 Scheme, they would, in law, have had an arguable case for an extension of time. If so, it appears to follow that, by the adoption of the 2021 Scheme, they were immediately deprived of such arguable cases for extensions of time to make their claims for compensation.

75. It appears to me that the following observations are especially applicable here:

- First, the necessity of demonstrating an arguable case is a low bar. I need not and do not find, for example, that the Applicants would as a matter of probability have been entitled in law to, or in fact received, an extension of time from the CICT.

- Second, I note the view expressed in **Christian** that issues of standing should be addressed with flexibility in the circumstances of the individual case and the interests of justice generally.

- Third, it appears to me that the decisions cited above clearly imply, and I find, that the Scheme is remedial and that, therefore, its provision as to exceptional circumstances must be interpreted generously and "*as widely and liberally as can fairly be done"* in favour of applicants.

- Fourth, I refer to the obligations of Article 4 of the Directive as to access to information. The transposition of this obligation leaves great discretion to the member states as to method but is subject to the principle of effectiveness. In this context, there is a credible view that there has historically been limited public awareness of the Scheme.

76. Adopting the criterion as to standing indicated in **Kelly,** it appears to me that the Applicants' cases are real, legitimate and not manufactured. As to Mr Brophy, the severity, sequelae and duration of his injuries to my mind readily disclose that he had, immediately prior to the adoption of the 2021 Scheme, an arguable case under the 1986 Scheme for an extension of time. Given the account of those injuries set out above, I do not think it necessary to elaborate further. As to Mr Bowes, I draw the same conclusion. The evidence of his injuries is not as graphic but I do not think it can be said that his case for an extension would have been unstable.

77. In any event, both Applicants assert their respective ignorance of the Scheme until shortly prior to the date on which each made his application for compensation. I note that, while such ignorance is not generally of itself a basis for an extension of time, neither can it be ruled out that such ignorance will afford a basis for an extension of time either of itself or in combination with other factors such as the nature and extent of the injuries and their sequelae. In this regard, the

requirement set in **McE**[118] seems relevant - that all relevant matters such as education, health and work record, and length of delay in applying, are to be assessed in the round to enable a balanced assessment included paucity of access to publicity regarding the existence and purpose of the respondent. And Ryan P in **PB** held that *"lack of knowledge or ignorance of the existence of the scheme cannot be excluded as being relevant"* and held that it sufficed as exceptional circumstances in the particular circumstances of that case. There is no suggestion that there was ever as to the 1986 and 2021 Schemes anything approaching the "*national furore taking place on an almost daily basis in the print, radio and television media"* found to have occurred in **MG.** Nor is there any suggestion that there was ever anything like the "*extensive advertisements placed by the respondent body on a nationwide basis"* cited in **MG**. And as I have noted, the LRC has noted reputable views that lack of awareness of the Scheme has in practice hindered its accessibility. I do not consider that the presence only of the 1986 Scheme on the Department of Justice website – beyond which there is no evidence of publication of the Schemes in the three months after the Applicants' respective injuries' - means the Applicants fail here to surmount the low bar of demonstrating that they had arguable cases for an extensions of time under the 1986 Scheme.

78. Accordingly, I find that the Applicants have standing to prosecute these proceedings.

THE SUBSTANTIVE ISSUES

79. The Applicants accept the basic proposition that the State may impose a time limits on the making of applications pursuant to the 2021 Scheme.

Interpretation of The 2021 Scheme – Retroactivity & Retrospectivity - Limitations

80. The Applicants submit that by interpreting the 2021 Scheme and applying §20 of it to the Applicants' applications, the CICT acted contrary to the common law presumption against the retrospective operation of law. In other words they argued that the 2021 Scheme could, and therefore should, be interpreted as not applying the §20 time-limit to their compensation claims.

81. The CICT Scheme is not a statute. It is not even a statutory instrument in the narrow sense of that phrase – for example as used in the Statutory Instruments Act 1947[119]. That was understandable in what was originally an ex gratia scheme. But, since the notification in 2005 and, not least, the decision in **Doyle & Kelly**[120], the 1986 CICT Scheme is understood as the transposition to Irish law, at least pending legislation to that end, of obligation on the State to vindicate the legal right of victims to compensation for which the Compensation Directive provides. In those circumstances it seems to

118 McE v. Residential Institutions Redress Board [2016] IECA 17 (Court of Appeal, Hogan J, Ireland - Court of Appeal, 3 February 2016)
119 See generally Dodd on Interpretation of Statutes §1.10 et seq
120 Doyle & Kelly v CICT [2020] IECA 342 (Court of Appeal (civil), 4 December 2020)

me that principles of statutory interpretation are at least useful, if only by analogy, in interpreting the Scheme. I am encouraged in this view by the wider definition of statutory instrument adopted by S.2 of the Statutory Interpretation Act 2005 as including *"an order, regulation, rule, bye-law, warrant, licence, certificate, direction, notice, guideline or other like document made, issued, granted or otherwise created by or under an Act."* And, viewing the Scheme as the transposition of the Compensation Directive it should be interpreted purposively to that end of transposition.

82. As to limitations generally, it was said in **Tuohy v Courtney**[121] and approved in **Brandley v Deane**[122] that it is "*for the State to ensure that such time limits do not unreasonably or unjustly impose hardship. Any time limit statutorily imposed upon the bringing of actions is potentially going to impose some hardship on some individual."* Viewing the matter broadly, it does not seem to me "*offensive to justice*" that a claim to compensation be barred after two years. Certainly, that deprives a potential claimant of compensation, but the premise of all limitations is that they bar otherwise valid claims.

Retrospective/Retroactive

83. **Murdoch & Hunt**[123] adopt **Craies'**[124] understanding of "*retrospective legislation*" as:

> *"Legislation which takes away or impairs any vested right acquired under existing laws or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past"*

Notably, for "retroactive legislation" Murdoch and Hunt say, "see retrospective legislation".

Murdoch & Hunt observe that "*Generally the courts lean against injurious retrospection of legislation, holding that the position in which a person already finds himself at the time when the new law is actually passed should not be affected for the worse*". However, this principle relates to substantive rather than procedural positions and rights and the word "generally" is important – what is at issue is a presumption which yields to clear wording to the contrary.

84. It seems to me that Murdoch & Hunt's phrase "*the position in which a person already finds himself at the time when the new law is actually passed"* usefully illuminates that retrospectivity/ retroactivity, operate, as it were, on the instant. That Mr Brophy and Mr Bowes could arguably have applied under the 1986 Scheme at any time prior to the adoption of the 2021 Scheme and that in such circumstances (I presume for argument's sake) their applications would not have been invalidated by the 2021 Scheme's instant termination of their entitlements to make such an

121 [1994] 3 IR 1
122 [2018] 2 IR 741
123 Murdoch and Hunt's Encyclopaedia of Irish Law
124 Craies on Statute Law - Murdoch and Hunt say it was cited with approval in many Irish cases e.g. Dublin Heating Co Ltd v Heffernan Kearns Ltd [1992] ILRM 51 at 56; Alba Radio Ltd v Haltone (Cork) Ltd [1995 HC] 2 ILRM 466 at 469

application, does not mean that their position was not retrospectively affected by the 2021 Scheme. Or if, as a matter of language, it does mean that their position was not retrospectively affected, that makes no difference as the same injustice arises and the same presumption applies. Any such distinction would seem to border on the metaphysical and in any event is discounted by the example of **Re The Health Amendment Bill 2004**[125].

85. For the presumption against retrospectivity, the Applicants cite **Fennell**[126] and **Tobin #2**[127]. In truth there was little dispute as to the existence of the presumption: the real issues were

- Whether any retrospective effect was on a substantive right or was merely procedural, such that the presumption did not apply.
- Whether the State's primary argument was correct that if the presumption applied it was displaced by the clear words of the Scheme.

Procedural/Substantive

86. In **Toss**[128] Blayney J (approving the use of a form of summons for which statute had first provided after the date of the alleged offence) said it was well-settled that statutes which deal with procedure only are retrospective in effect, citing **Rex v Chandra Dharma**[129] in which Lord Alverstone CJ said:

> *"The rule is clearly established that, apart from any special circumstances appearing on the face of the statute in question, statutes which makes alterations in procedure are retrospective. It has been held that a statute shortening the time within which proceedings can be taken is retrospective, and it seems to me that it is impossible to give any good reason why a statute extending the time within which proceedings may be taken should not also be held to be retrospective."*

87. For the proposition that "*a statute shortening the time within which proceedings can be taken is retrospective*", Lord Alverstone cited **The Ydun**[130]. In that case the plaintiff's barque grounded and was damaged in Preston Harbour in September 1893. With effect from 1 January 1894 the relevant limitation period was, by statute, reduced from 6 years to 6 months. So, at the date of the accident the owners had until September 1899 to sue; but on January 1, 1894, if the Act applied, they had only until March 1894. In November 1898 they sued the harbour authority for negligence in inviting the vessel to come up when there was insufficient water in the channel leading to the docks. The defendants relied on the 6-month limitation period. The plaintiffs replied that the statute did

[125] See below.
126 Dublin City Council v. Fennell [2005] 1 I.R. 604
127 Minister for Justice, Equality and Law Reform v. Tobin (No. 2) [2012] IESC 37
128 Toss Limited v The District Court Justice Presiding in Court No 1 Morgan Place, The Director of Public Prosecutions And The Attorney General; High Court, Blayney J, 24 November 1987; [1987] Lexis Citation 2520
129 [1905] 2 KB 335 [1904-07] All ER Rep 570
130 [1899] P. 236

not operate retrospectively. The Court of Appeal held for the defendants – the action was barred 6 months after the accident. A.L. Smith LJ said

> *"….. when a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act. The Act of 1893 is an Act dealing with procedure only."*

88. Lest it be thought that I am dredging obsolete authority, I should say that the Law Reform Commission in 2000 cited **Chandra Dharma'**s citation of **The Ydun** as to retrospectivity of statutes of limitation in its Consultation Paper on limitation of actions for non-sexual abuse of children[131]. The LRC pointed out that the presumption against retrospectivity did not generally apply to statutes of limitation for reasons explained, inter alia, by the Law Reform Commission of Tasmania as follows:

> *"… limitation statutes do not confer any specific rights or liabilities of themselves. Limitation statutes do not declare actions to be void but merely unenforceable. They are, in essence, procedural, allowing a plaintiff to proceed to a resolution of the substantive claim."*

89. However, the LRC cited Lord Brightman in **Yew Bon Tew**[132] to the effect that the distinction between substantive and procedural laws was not always decisive and that a right to plead a time bar was "*in every sense a right, even though it arises under an Act which is procedural*". Thus, the LRC said, there was some divergence as to whether limitation acts are procedural or substantive, and as to the implications this has for the question of retrospectivity.

90. Lord Brightman in **Yew Bon Tew** considered both **Chandra Dharma** and **The Ydun.** In **Yew Bon Tew** the cause of action was barred but thereafter a new statute allowed a longer limitation period of which the plaintiff sought to avail. The defendant objected that it had an accrued right to rely on the earlier time-bar. The court agreed. Lord Brightman identified the two propositions at the root of the plaintiffs' case: that

- a Limitation Act which is not expressed to extinguish a cause of action is procedural
- a merely procedural statute is prima facie retrospective.

Lord Brightman said

> *"A statute of limitations may be described either as procedural or as substantive. For example, in English law, at the expiration of the period prescribed for any person to bring an action to recover land, the title of that person to the land is extinguished. Such a limitation therefore goes to the cause of action itself. In most cases however the English Limitation Act only takes away the remedies by action or by set-off; it goes only to the conduct of the suit; it leaves the*

131 Consultation Paper on the law of limitation of actions arising from non-sexual abuse of children LRC-CP16-2000
132 Yew Bon Tew v. Kenderaan Bas Mara [1982] 3 WLR 1026 (UKPC)

claimant's right otherwise untouched in theory so that, in the case of a debt, if the statute-barred creditor has any means of enforcing his claim other than by action or set-off, the Act does not prevent his recovering by those means."

"…….. there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. There is however, said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.

But these expressions "retrospective" and "procedural," though useful in a particular context, are equivocal and therefore can be misleading. A statute which is retrospective in relation to one aspect of a case (e.g., because it applies to a pre-statute cause of action) may at the same time be prospective in relation to another aspect of the same case (e.g., because it applies only to the post-statute commencement of proceedings to enforce that cause of action); and an Act which is procedural in one sense may in particular circumstances do far more than regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself.

Whether a statute is to be construed in a retrospective sense, and if so to what extent, depends on the intention of the legislature as expressed in the wording of the statute, having regard to the normal canons of construction and to the relevant provisions of any interpretation statute."

91. Lord Brightman cited **Maxwell v Murphy**[133] in which the following was said:

"Statutes of limitation are often classed as procedural statutes. But it would be unwise to attribute a prima facie retrospective effect to all statutes of limitation. Two classes of case can be considered. An existing statute of limitation may be altered by enlarging or abridging the time within which proceedings may be instituted. If the time is enlarged whilst a person is still within time under the existing law to institute a cause of action the statute might well be classed as procedural. Similarly if the time is abridged whilst such person is still left with time within which to institute a cause of action, the abridgement might again be classed as procedural. But if the time is enlarged when a person is out of time to institute a cause of action so as to enable the action to be brought within the new time or is abridged so as to deprive him of time within which to institute it whilst he still has time to do so, very different considerations could arise. A cause of action which can be enforced is a very different thing to a cause of action the remedy for which is barred by lapse of time. Statutes which enable a person to enforce

133(1957) 96 C.L.R. 261. High Court of Australia (note: the High Court of Australia is the apex court of Australia, the equivalent of our Supreme Court)

a cause of action which was then barred or provide a bar to an existing cause of action by abridging the time for its institution could hardly be described as merely procedural. They would affect substantive rights."

92. Lord Brightman also observed that whether a statute has a retrospective effect cannot in all cases safely be decided by classifying the statute as procedural or substantive. He gave the following example. He assumed – without so finding – that **The Ydun** was, on its facts, correctly decided.

"……. the barque might have grounded on May 13 instead of September 13, 1893, and the Act might have come into force on December 5, 1893, when it received the Royal Assent, instead of 27 days later. Had those been the facts the Act would, if its procedural character were the true criterion of its effect, have deprived the owners of their ability to pursue their cause of action on the day the Act reached the statute book. A limitation Act which had such a decisive effect on an existing cause of action would not be "merely procedural" in any ordinary sense of that expression."

Though not explicitly stated, his point seems to have been that, whereas in fact and from Royal Assent the owners of the **Ydun** at least had from early December to mid-March to sue, in his hypothetical example the action would have been barred immediately the Act reached the statute book. That example seems to me analogous to the position in Mr Bowes' case - in which, effectively - the State says he was shut out immediately the scheme was adopted.

93. Lord Brightman therefore considered that the proper approach was not to decide whether the Act should be labelled

"procedural or otherwise, but to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights and obligations. The plaintiffs assert that a limitation act does not impair existing rights because the cause of action remains, on the basis that all that is affected is the remedy. There is logic in the distinction on the particular facts of The Ydun because the right to sue remained, for a while, totally unimpaired. But in most cases the loss, as distinct from curtailment, of the right to sue is equivalent to the loss of the cause of action. The Public Authorities Protection Act 1893 can be regarded as procedural on the facts of The Ydun case, but a slight alteration to those facts would have made it substantive. A limitation act may therefore be procedural in the context of one set of facts, but substantive in the context of a different set of facts."

"……. an accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a right, even though it arises under an act which is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable."

94. In **The People (DPP) v Rattigan**[134], after the alleged murder and before the accused was charged with it, s.16 of the Criminal Justice Act 2006 allowed for the admission in evidence of certain witness statements. Such statements were admitted at his trial. He was convicted and sought leave to appeal – inter alia asserting that s.16 had been erroneously applied retrospectively and the statements should not have been admitted. In refusing leave, O'Donnell J held:

- S.16 did not retroactively penalise. Rather, it acted prospectively as it could only apply at a trial taking place after the coming into force of the provision. The triggering event could not occur before the statute came into force.
- To whatever extent s.16 could be characterised as having a retrospective effect, in the sense that it altered the legal characteristics of statements made prior to the coming into force of the Act, such a change was a consequence of the clear language of the Act and no other interpretation of the section was plausible.

95. Here, we see the presumption against retrospective substantive effect yielding to the clear terms of the statute in favour of such effect. Indeed, Mr Rhattigan put his case in those terms: he relied on *"the common law principle of interpretation that a statute is presumed not to act retrospectively unless the contrary intention is clearly apparent."* citing **Maxwell's**[135] statement of the principle:

> *"Upon the presumption that the legislature does not intend what is unjust rests leaning against giving certain statutes a retrospective operation. They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect is clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication."*

96. O'Donnell J observed that, as between "*retrospective*" and "*retroactive*", the nomenclature is neither clear nor consistently applied and no consistent usage has emerged. Nor was it clear that *"the sometimes difficult distinction between procedural and evidential matters on the one hand, and substantive matters on the other, can be usefully illuminated by seeking to apply to them the terms "retrospective" and "retroactive" respectively, although there may be a significant degree of overlap between the concepts."* However the authorities have in common that matters "*procedural or evidential only*" are not subject to the presumption. O'Donnell J rejected, as not a useful guide, an argument that "*the more serious the right that is affected, the more reluctant the court should be to categorise the legislation as merely procedural or evidential*". He considered that *"Apart from the inherent vagueness and lack of predictability of such a test, there is no basis for allowing the nature of a change to be determined by reference to its impact. Any change in the law, however apparently trivial, can be critical in a particular case."* He stated that:

134 [2013] 2 IR 221

135 Maxwell, Interpretation of Statutes (12th ed, Sweet and Maxwell, London, 1969), at p 215; Counsel also cited Bennion, Statutory Interpretation (5th ed, Lexis Nexis, Edinburgh, 2008), at p 315 & 316

> *"…….. even though a matter is characterised as procedural, it may in any particular case prove critical to the outcome but that is no reason to avoid the distinction between procedural and evidential matters on the one hand and substantive matters on the other. Accordingly the court does not accept that the approach suggested is valid. It is perhaps true to say however, that the categorisation of matters as procedural and evidential and not within the presumption, is itself a recognition that not all matters which can be said to be retrospective, in any sense of the word, are offensive to justice, which, as the extract from Maxwell shows, is at the heart of the presumption."*

And as O'Donnell J pointed out, the principle is a presumption of interpretation and it was necessary to proffer some interpretation of the words of the statute to accord with the asserted presumption – which presumption can be displaced by the use of clear words.

97. It is important to add that, as the foregoing suggests and despite "*the sometimes difficult distinction",* O'Donnell J accepted that the presumption against retrospective effect did not apply to procedural and evidential changes – which changes are normally thought to apply from commencement of the statute in proceedings already pending at that time. Lord Hailsham's view, that; "*purely procedural and evidential changes should apply as from the moment when the law is enacted to the proceedings which are currently pending before the courts*", according to O'Donnell J, appear applicable in Ireland.

98. In **Gangar v Espinet**[136] the facts were very different to the present and need not detain us. For that reason I merely note that the Privy Council, for reasons not here relevant, rejected arguments based on **The Ydun, Chandra Darma** and **Yew Bon Tew.** The case seems to me notable for their Lordships confession:

> *"to some difficulty in the concept of construing legislation ….., so as to decide whether it operates retrospectively or not, by reference to the particular facts of the case and some further consideration may need to be given to this in future. …."*

99. Attempting to apply the foregoing to the 2021 Scheme by analogy, I note

- the State's emphasis that the CICT was bound by the Scheme and could not have disapplied the §20 time limit.
- that there is no one in the CICT process to decide to "plead" §20 or not as one might plead a limitation period in a tort action as matter of defence. If applicable, §20 inevitably applies. There is in §20 no analogy to the observation cited in **Morris**[137] *"A defendant does not invariably wish to rely on a defence of limitation and it may prefer to contest the issue on the merits".*
- that there is no other way of exercising the right to compensation other than via the Scheme. and

136 [2009] 4 LRC 260
137 Morris v. Ryan [2019] IECA 86 (Court of Appeal, Whelan J, 22 March 2019) citing Ketteman v. Hansel Properties Ltd. [1987] A.C. 189

- that in the case of Mr Bowes. the 2021 Scheme shut him out of any possibility of compensation immediately on its adoption. Mr Brophy had 5 days to apply but I would not distinguish him from Mr Bowes on that account.

100. It seems to me that §20 of the 2021 Scheme, to adopt the language of limitations law and a distinction drawn by Lord Brightman, extinguishes the right to compensation and does not merely bar the remedy of application to the CICT – it does both. In that sense, §20 is substantive not procedural. The consequence of that analysis to this point of the argument is that the presumption against retrospective effect would apply and such that, if that end could be achieved as a matter of interpretation, §20 would not apply to either of the present cases.

Vested Rights

101. **Hogan & Morgan**[138], in considering statutory interpretation, state that "*A particularly strong case of the presumption against interference with vested rights is the case of interference with property or other proprietary rights."* They place this in the context of the constitutional necessity of proportionality of such interference.

102. It is presumed that legislation does not operate retrospectively. The State says that the right which accrues to an Applicant by virtue of the Compensation Directive 2004/80/EC is merely a procedural right to apply for compensation and such an Applicant has no vested right to compensation unless and until awarded compensation.

Wood

103. The State cites **Wood**[139] for the proposition that the Court answered "*firmly in the negative*" a question whether any right vested when a landowner applied for compensation arising from the refusal of planning permission. Costello J answered the question, the State says, to the effect that *"*[u]*ntil a decision is made no statutory right to compensation could arise."* The State clearly understands that the "*decision*" referred to in that phrase is the decision whether or not to award compensation. That is not at all how I read the case. The submission illustrates the dangers of taking a quotation out of its context.

138 Administrative Law, 5th Ed'n §12-35
139 J. Wood & Co Ltd v. Wicklow County Council [1995] 1 I.L.R.M. 51

104. The sequence of events[140] is instructive. The planning application was made in June 1989; in June 1990 the 1990 Act[141] came into operation; in July 1990 the Council decided to grant planning permission; in July 1991 An Bord Pleanála, on appeal, refused planning permission; in October 1991 the landowner claimed compensation. The question was whether the 1990 Act applied. As Costello J observed, "*when the Act came into force an application for development permission existed but no decision on it had been made*."[142]

105. Costello J held that:

> *"…… when the new Act came into operation on 10 June 1990 any decision made after that date refusing permission to develop[143] …. would be subject to the new compensation provisions of the 1990 Act. And this is so whether the application to which the decision related had been made before or after the new Act had come into force, the relevant law being the law in force when the decision was made. Until a decision is made no statutory right to compensation could arise."*
>
> *"……. S.21(1)(c) of the 1937 Act[144] provides that when the Oireachtas repeals a portion of a previous statute then, unless the contrary intention appears, such repeal shall not affect any right acquired under the portion of the statute so repealed. As I have said, an applicant who has applied for development permission under Part IV of the 1963 Act …. had acquired no right to compensation under the 1963 Act until a decision on the application had been made. It follows, therefore, that an applicant who had on 10 June 1990 applied for development permission but in respect of whose application no decision had yet been made had acquired on that date no right to compensation under the 1963 Act. Its right to compensation only arose when the decision to refuse permission was made, at which time Part VI of the 1963 Act was repealed and the 1990 Act was in force."*

106. The decision to which Costello J referred as being that on which the right to compensation would arise was not the decision on the compensation claim but the decision refusing planning permission. There is no analogy between **Wood** and the present case - unless it is that the Applicants' rights to compensation vested when they were assaulted. Such a conclusion is consistent with the purpose of, and the right afforded by, the Directive. That is a substantive right to compensation, not merely a procedural right to apply for it. Though there is such a procedural right to apply, it has no purpose other than to enable the vindication of the substantive right to compensation and without that purpose it would be pointless. That the right is substantive is reflected in the fact that, following **Doyle & Kelly**, the 2021 Scheme is not ex gratia as the 1986 Scheme purported to be.[145] If the right afforded by the Directive was procedural only, the State could refuse deserved compensation pursuant to an ex gratia scheme and without fear of

140 Simplified a little
141 The Local Government (Planning and Development) Act 1990
142 Emphasis in original
143 Emphasis added
144 Interpretation Act 1937
145 In reality the 1986 Act was no longer ex gratia from the State's notification to the Commission that it had implemented the Directive.

contravening the Directive, merely on the basis that it had respected the right to apply for compensation and was not obliged by the Directive to actually award it.

107. To put it another way, many legal rights vest when circumstances vest them: a later judgment is merely declaratory of the right and if appropriate, quantifies the remedy. The right to compensation under the scheme may, indeed, be a particularly good example of such a right as the State emphasises that the applicant need not prove liability. Though in my view that submission understates the applicant's task under the Scheme that observation does not undermine the essential point: the right to compensation vests with the assault and injury.

Delaney & Re The Health Amendment Bill 2004

108. The State cites **Delaney**[146]. Ms Delaney had an accident and was injured in April 2019. She was advised that, based on the then-applicable Book of Quantum, her injuries would attract general damages in the region of €18,000 - €34,000. In June 2019 she applied to PIAB for an assessment of her claim. For various reasons the assessment was delayed. The Personal Injury Guidelines as to damages took effect on 24 April 2021 and replaced the Book of Quantum. As to many types of injury, the Personal Injury Guidelines recommended general damages appreciably lower than those guided in the Book of Quantum. PIAB did not assess the claim until May 2021 when, having regard to the Personal Injury Guidelines, it assessed it at €3,000. As Meenan J notes, this significant reduction in the value of the applicant's claim was due to the fact that the Book of Quantum no longer applied, and the Personal Injury Guidelines did. Meenan J upheld the PIAB Assessment on a construction of the relevant statutes[147].

109. Meenan J considered[148] that, upon her injury, Ms Delaney she had a property right of action. Assuming she won her action, that right was, and always was[149], to have damages assessed in accordance with the law as it stood at the date of their assessment. This view he described[150] as in accordance with well-established legal principles. The effect of those principles is that the level of damages varies over time as general damages are assessed on the basis of pain and suffering to date (of assessment) and into the future depending, in part, on the prevailing economic conditions, not those on the particular date of the accident. Whatever assessment PIAB made, that right to sue subsisted and was not extinguished by the PIAB assessment or by the consideration that if she sued and won the Court would assess her damages having regard to the Personal Injury Guidelines.

146 Delaney v. Personal Injuries Assessment Board [2022] IEHC 321 (High Court (Judicial Review), Meenan J, 2 June 2022). I am informed that decision is under appeal but unless and until overturned its ratio represents the law.
147 The Personal Injuries Assessment Board Act 2003 and s.99 of the Judicial Council Act 2019
148 §45
149 This phrase is my gloss for emphasis.
150 §§48 & 81

110. Significantly, Meenan J considered **Re The Health (Amendment) (No. 2) Bill 2004**[151], which has been cited to me. That bill was passed against a background in which charges to the recipients of certain in-patient services had been levied unlawfully. The bill purported to retrospectively deem those charges lawful – thus, indeed for the purpose of, extinguishing the cause of action for restitution of those who had paid them. The Supreme Court found that retrospective provision repugnant to the Constitution. The right to recover charges unlawfully imposed was a chose in action and property right of the persons concerned ('*a species of personal property known as a chose in action'*) and was protected by Articles 43 and 40.3.2 of the Constitution from, *inter alia*, unjust attack by the State[152].

111. As I have said, Meenan J found that Ms Delaney's vested cause of action survived the PIAB assessment unscathed. Notably, he distinguished the claims of those unlawfully charged patients from Ms Delaney's claim. He quoted the Supreme Court:

> *"In considering that argument[153], it is of prime importance to consider the extent of the interference with property rights proposed by the Bill. What it proposes is the extinction of the rights in question. All patients, from whom charges have been unlawfully collected, regardless of their circumstances, are simply to be deprived of any right to recover sums lawfully due to them. ..."*

Meenan J said:

> *"This is not the situation here. I cannot see any right the applicant enjoys being extinguished either by the Guidelines or the implementing legislation."*

112. In my view the State argues for an interpretation of the 2021 Scheme which does extinguish the vested rights of Mr Bowes and Mr Brophy – that right being a chose in action in the form of a cause of action or the equivalent to a cause of action or in any event a legal right to claim compensation under the 1986 Scheme as it existed immediately prior to the adoption of the 2021 Scheme. That Mr Bowes and Mr Brophy would have to prove exceptional circumstances to succeed does not, in my view, imply that they had no right to apply. A cause of action contingent or defeasible is nonetheless a cause of action for this purpose.

113. It is important also to note that the "argument" being considered in the excerpt cited above from the judgment of the Supreme Court was the State's argument that *"the Oireachtas, in enacting the Bill, was engaged in balancing complex economic and social considerations, a matter classically within legislative rather than judicial competence. Accordingly, the court should be extremely slow to intervene."*

151 Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill 2004 [2005] 1 I.R. 105.
152 See also and generally Kelly, The Irish Constitution, 5th Edition §§7.8.37 to 7.8.40
153 See below

114. First, in the present case and unlike in the case of the Health (Amendment) Bill, the Oireachtas has not sanctioned the extinction of the rights of action in this case. It is unclear by what right the Government claims to have done so and claims to have done so by a merely administrative scheme. For that reason, it is difficult to avoid the impression that the Government has not fully acclimatised itself to the legal fact that, as was made clear in **Doyle & Kelly**, criminal injuries compensation is a legal right of victims of violent crime – it is not an ex gratia phenomenon.

115. Leaving that issue aside, and in light of its identification of the presumption that retrospective legislation which affects vested rights is *prima facie* unjust[154] the Supreme Court in the Health Bill case, considering that it fell to the State to justify such a retrospective effect, held that:

> *"Where a statutory measure abrogates a property right, as this Bill does, and the State seeks to justify it by reference to the interests of the common good or those of general public policy involving matters of finance alone, such a measure, if capable of justification, could only be justified as an objective imperative for the purpose of avoiding an extreme financial crisis or a fundamental disequilibrium in public finances."*

116. The Supreme Court held that, while delimitation of property rights in the interests of general public policy was possible, the invocation of Article 43 of the Constitution as to "*the principles of social justice*" in circumstances where rights enjoyed largely by persons of modest means were to be extinguished in the sole interests of the State's finances would require extraordinary circumstances. In a finding with some resonance in the present case in the Supreme Court accepted that, on discovery of an unforeseen liability to reimburse patients, the State may find itself faced with a substantial additional financial burden. However, it was by no means clear that it was anything like catastrophic or beyond the means of the State to make provision for this liability within the scope of normal budgetary management.

117. No doubt, in greater or lesser degree, the extinguishment of the claims of those, such as Mr Bowes and Mr Brophy, who were entitled to make a claim for compensation under the 1986 Scheme based on an argument of exceptional circumstances, would save the State money. But there is no evidence in the present case that that the financial viability of the 2021 Scheme required the extinguishment of such claims. Indeed, that such extinguishment is necessary to the financial viability of the Scheme is a proposition greatly undermined by the fact that the 1974 and 1986 Schemes managed to survive as long as they did – including some far more impoverished times - without extinguishing such rights.

118. No assertions that the extinguishment of such rights is necessary to the financial viability of the 2021 Scheme are to be found in the Minister's press release. Perhaps that is in the nature of

154 Citing Hamilton v. Hamilton [1982] I.R. 466

press releases but this one was volunteered by way of exhibition by the State – presumably as persuasive.

119. A deponent for the State asserts that *"The amendments to the Scheme were to ensure that the dicta of the Court of Justice of the European Union that Member States must ensure the financial viability of such Schemes, was taken into account."* This mere, vague, bland, uninformative and conclusionary assertion, of which the deponent does not state her means of knowledge, is not backed up by any account of the decision-making process which lead to the adoption of the 2021 Scheme or the particular aspects of it impugned in these proceedings. Nor are there adduced any exhibits or any assessment of the financial viability of the Scheme or of threats to that viability. Neither is there any assertion of, much less objective evidence of, the necessity of extinguishment, immediately on the adoption of the Scheme without any transitional provision, of claims of the victims of violent crime such as those of Mr Brophy and Mr Bowes. Even less is there any evidence, or even suggestion, that the quantum of claims which would result from a suitable transitional arrangement would threaten the financial viability of the 2021 Scheme. No attempt is made at justification by reference to a criterion of proportionality of interference with property rights – much less by reference to the constitutional status of such rights.

120. The state of the evidence adduced by the State in this respect is no more impressive than whatever lead the Supreme Court in Re the Health Amendment Bill to observe that it was by no means clear that it was anything like catastrophic or beyond the means of the State to make provision for this liability within the scope of normal budgetary management.

Sloan & Magee v Culligan

121. **Sloan & Magee v Culligan**[155] was cited to me. I do not think it adds a lot in this case. The plaintiffs in those cases had escaped the Crumlin Road Prison, Belfast and resisted extradition to Northern Ireland to serve their sentences. The Supreme Court found that Art 15.5 of the Constitution prohibits statutes retrospectively deeming acts or omissions, innocent at the time of their commission, to be an infringement of civil or the criminal law but does not otherwise generally prohibit retrospective statutes. As to Art 15.5 the former proposition does not arise in the case before me and the latter was not argued.

122. Mr Magee also argued, relying on Art 40.3 of the Constitution, that his vested right not to be extradited to serve a sentence for an offence deemed political when committed could not be abrogated by a later statute[156]. However the Supreme Court found that he had no such vested right – his right was a right to proper, due and fair procedures at any given time concerning an investigation of the validity of the extradition warrant and to a fair, proper and due inquiry into the

[155] [1992] 1 IR 223

156 Extradition (European Convention on the Suppression of Terrorism) Act, 1987

protections applicable in law at the time of the application for his extradition, which may afford him a protection arising from the concept of a political offence or from any other of the concepts appropriate to prevent such extradition. The significance of this case to the present case seems to me to be limited to its pointing up the necessity of carefully identifying any right alleged to have been vested before considering whether a particular interpretation of a statute would retrospectively and unjustly attack that right, for the purpose of informing that interpretation.

Literal Meaning of §20 of the 2021 Scheme

123. Murray J has recently and extensively addressed the principles of statutory interpretation in **Heather Hill #1**[157]. The text of law to be interpreted, considered in its context, is the first and most important port of call. Inter alia, that context includes the state of the law immediately prior to the adoption of the law under interpretation. In this case, treating the 2021 Scheme as law[158], §20 is for interpretation and the context includes both the 2021 Scheme as a whole and the 1986 Scheme which it replaced.

124. §20 of the 2021 Scheme reads as follows:

> *"Applications should be made as soon as possible but, except in circumstances determined by the Tribunal to justify exceptional treatment, not later than three months after the event giving rise to the injury.* ***No applications may be accepted by the Tribunal where the event giving rise to the injury took place more than two years prior to the date of application****."*[159]

125. §21 of the 1986 Scheme reads as follows:

> *"Applications should be made as soon as possible but, except in circumstances determined by the Tribunal to justify exceptional treatment, not later than three months after the event giving rise to the injury. In the case of an injury arising out of an event which took place before the commencement of the Scheme, the application must be made not later than three months from the date of the commencement (subject, also, to the foregoing exception)."*

126. Comparing §20 of the 2021 Scheme and §21 of the 1986 Scheme:

- in exceptional circumstances §21 of the 1986 Scheme allowed unlimited extension of time whereas §20 of the 2021 Scheme set a backstop of two years from the event which caused injury.

157 Heather Hill Management Company Clg & McGoldrick V An Bord Pleanála & Burkeway Homes Limited; Supreme Court, Brian Murray J - 10th November 2022
158 As to which, see above.
159 Emphasis added

- whereas §21 of the 1986 Scheme made special transitional provision as to the time limit for applications arising out of events which caused injury which took place before the commencement of the Scheme (3 months from the commencement of the 1986 Scheme with the same possibility of unlimited extension of time in exceptional circumstances), §20 of the 2021 Scheme made no such provision. This comparison strongly suggests that the absence from the 2021 Scheme of a transitional provision as to claims based on events which caused injury which took place before the commencement of the 2021 Scheme was deliberate.

127. §1 of the 2021 Scheme reads, in part: "*The injury must have been sustained within the State or aboard an Irish ship or aircraft.*" In contrast, §1 of the 1986 Scheme reads, in part: "*The injury must have been sustained within the State or aboard an Irish ship or aircraft on or after 1st October 1972.*" This difference is explicable by reference to the move from a discretion to extend time under the 1986 Scheme subject to no backstop time limitation to the position under the 2021 Scheme in which a two-year backstop was imposed.

128. In my view, the literal meaning – the plain words - of §20 the 2021 Scheme, which set the time limit by reference to the date of application, taken in its context of the 1986 Scheme suggests the State's interpretation is correct. On that view, which I consider correct, the effect of §20 was that, immediately on the adoption of the 2021 Scheme, all claims arising from events which preceded its adoption by more than two years were ipso facto, excluded from the Scheme. In circumstances in which under the 1986 Scheme and immediately before the adoption of the 2021 Scheme, all such claims could have been made in hope of successful reliance on an "extraordinary circumstances" extension under §21 of the 1986 Scheme, that interpretation implies an immediate guillotining of such claims.

129. To summarise, immediately prior to the adoption of the 2021 Scheme, Mr Brophy and Mr Bowes had vested substantive rights such that the presumption against retrospective effect applied to the 2021 Scheme which presumption is displaced by the clear words of that Scheme on a literal interpretation thereof. Were the matter to turn solely on domestic law, that would be the end of the matter and the present application would fail. But the matter does not turn solely on domestic law.

Equivalence & Effectiveness

130. As I have said, the 2021 Scheme, is the transposition of the Compensation Directive. Mr Brophy and Mr Bowes say that the CICT is obliged as a matter of EU Law to disapply elements of the Scheme which are contrary to EU law principles of equivalence and effectiveness. While equivalence and effectiveness are distinct general principles of EU Law they are often cited together and it is convenient to introduce them together. As Murray J said in **TD**[160], *"The requirements of equivalence*

160 T.D. -v- Minister for Justice Equality and Law Reform [2014] 4 IR 91

and effectiveness embody the general obligation on the Member States to ensure judicial protection of an individual's rights derived from the law of the European Union."[161] General principles of EU Law apply to national interpretation and implementation of EU law - **Marks & Spencer**[162]. Indeed, in **TD**[163] it was held that a national court must, of its own motion, set aside any provision of national law that conflicts with either of the principle of equivalence and the principle of effectiveness. Fennelly J said:

> *"The principles of effectiveness and equivalence being rules designed to protect the rights of individuals who pursue claims based on EU Law in the national court will necessarily, as the occasion arises, impose on the national court the obligation to set aside any conflicting rules of national Law."*[164]

131. Put simply, and by reference to the principles of equivalence and effectiveness, Mr Brophy and Mr Bowes say that:

- The principle of effectiveness required the Government to allow, in the 2021 Scheme, a transitional period within which historic claims could be made after the commencement of the 2021 Scheme so that such claims were not immediately guillotined on the adoption of the scheme.

- The principle of equivalence required that the 2021 Scheme ought to have had a six-year time limit as applied in assault actions in tort.

132. Mr Brophy and Mr Bowes cite **Levez**[165] as an example of the operation of both principles. The CJEU noted[166] that, absent EU rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, provided, however, that

- do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness).
- such rules are not less favourable than those governing similar domestic actions (the principle of equivalence).

161 Pontin v T- Comalux SA (Case C-63/08) [2009] ECR I-10467
162 Marks and Spencer plc v Customs and Excise Commissioners - Case C-62/00 - [2002] STC 1036; AG Geelhoed §67
163 TD et al v The Minister for Justice, Equality and Law Reform, The Attorney General and Ireland, [2014] 4 IR 91
164 §217
165 B.S. Levez V T.H. Jennings (Harlow Pools) Ltd. Case C-326/96
166 Citing Case 33/76 Rewe v Landwirtschaftskammer Saarland [1976] ECR 1989, §5; Case 45/76 Comet v Produktschap voor Siergewassen [1976] ECR 2043, §§13 and 16; Joined Cases C-430/93 and C-431/93 Van Schijndel and Van Veen v SPF [1995] ECR I-4705, §17; Case C-261/95 Palmisani v INPS [1997] ECR I-4025, §27; Case C-246/96 Magorrian and Cunningham [1997] ECR I-7153, §37; Joined Cases C-279/96, C-280/96 and C-281/96 Ansaldo Energia and Others [1998] ECR I-5025 §16

133. It is useful to start with the recent and general observation of Hogan J in **Krikke**[167] that it is perfectly clear from a multitude of decisions of the Court of Justice that domestic time limitation periods are in principle consistent with EU law, provided the time periods in question comply with the principles of equivalence and effectiveness. Indeed **Rewe-Zentralfinanz**[168], cited in this case for other purposes, establishes that proposition.

Effectiveness

134. The particular form of lack of effectiveness alleged by the Applicants here is that they were deprived of their right under the Compensation Directive to seek compensation. The State submits that the phrase "*virtually impossible or excessively difficult*" is not to be interpreted on the footing merely that "*excessively difficult*", being the less demanding, is the effective standard for purposes of application of the principle of effectiveness. Clearly, "*virtually impossible*" conveys something short of "*absolutely impossible*" or even "*impossible*". Possibly, glossing the phrase does not add value but perhaps "*more or less impossible*" conveys the same idea.

135. The State submits that the phrase must be considered as a whole and, broadly speaking, in accordance with the principle *noscitur a sociis*. I generally agree. But the principle *noscitur a sociis* is bidirectional. Just as the words "*virtually impossible*" inform the interpretation of the words "*excessively difficult*", the words "*excessively difficult*" inform the interpretation of the words "*virtually impossible*". **Adeneler**[169] does provide a useful gloss**.** It states that the obligation to ensure that provisions of EU law take "*full effect*" requires that Member States must refrain as far as possible from interpreting domestic law in a manner which "*might seriously compromise*" the attainment of the objective of the directive. This seems to me a phrase which tends to dilute rather than concentrate the words "*virtually impossible or excessively difficult*" and thereby to amplify the requirements imposed by the principle of effectiveness on Member States.

136. All that said, it is clear, at least broadly, that the principle of effectiveness affords the State a considerable margin of discretion as to its choice of requirements such as limitation periods, which it may impose on the vindication of substantive rights derived from EU law, which requirements may interpose difficulties for applicants for compensation which, in particular cases, result in the failure of attempts to vindicate those rights.

137. I accept the State's submission that in principle imposition of limitation periods or similar time periods within which litigation must be commenced does not breach the EU law principle of effectiveness. Indeed that is not disputed by Mr Brophy and Mr Bowes.

167 Krikke v. Barranafaddock Sustainable Electricity Ltd [2022] IESC 41 (Supreme Court, Hogan J, 3 November 2022)
168 Rewe-Zentralfinanz and Others v Landwirtschaftskemmer fur das Saarland, case 33/76 EU:C 1976:188
169 Case C-212/04 – Adeneler et al v ELOG; Judgment of the Grand Chamber given 4 July 2006 §123

Levez - 1998

138. **Levez** held that it was compatible with EU law for national rules to prescribe, in the interests of legal certainty, reasonable limitation periods for bringing proceedings. It could not be said that this makes the exercise of EU Law rights excessively difficult, even though the expiry of such limitation periods entails by definition the rejection of the action, wholly or in part.[170]

139. In breach of the Equal Pay Directive[171] and the UK Equal Pay Act 1970 Ms Levez, a betting shop manager, was paid less than her male predecessor. Her then-manager, Jennings, had deceived to her as to what her male predecessor had been earning. On leaving her job, she discovered the true position and made a claim to the Industrial Tribunal, which found in her favour. But the Tribunal was limited by the 1970 Act to awarding salary underpaid only for two years prior to the date she made her claim. It had no discretion to extend the period. That excluded recovery for an appreciable earlier period during which she had been underpaid.

140. Given the entitlement to impose limitation periods, the CJEU held that the *"national rule under which entitlement to arrears of remuneration is restricted to the two years preceding the date on which the proceedings were instituted is not in itself open to criticism."*

141. However the CJEU held that where an employer provides an employee with inaccurate information as to the level of remuneration received by employees of the opposite sex performing like work, the employee so informed has no way of determining whether he is being discriminated against or, if so, to what extent. In that circumstance, to allow the employer to rely on the limitation provision would be manifestly incompatible with the principle of effectiveness. It would make it virtually impossible or excessively difficult to obtain arrears of remuneration in respect of sex discrimination by facilitating the breach of EU law by an employer whose deceit caused the employee's delay in bringing proceedings.

Marks & Spencer - 2002

142. **Marks & Spencer**[172] makes clear that transposition is only part of the implementation of a Directive. Directives do not prescribe means but do prescribe results. Accordingly, implementation of the transposition must accord with the required results. Even after its transposition, a litigant may

170 Citing Palmisani, §28; Case C-188/95 Fantask and Others [1997] ECR I-6783, §48; and Ansaldo Energia, §17 and 18
171 Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19)
172 Marks and Spencer plc v Customs and Excise Commissioners - Case C-62/00 - [2002] STC 1036

rely on a directive as to both the interpretation of the transposing measure and the adequacy of the resulting implementation.

143. The sequence of events in **Marks & Spencer** is instructive.

- On 18 July 1996, the UK Government announced in Parliament that, given increasing amounts of revenue at risk of retrospective claims for the refund of tax collected in error, it would shorten the relevant limitation period from six to three years. This would be with retroactive effect from 18 July 1996 in that it would apply to claims already made on the date of the announcement.
- The announced effective date was intended to prevent the change from being deprived of its effect by the passage of time before legislative enactment of the change.
- In October 1996 the CJEU declared certain VAT levies invalid[173] and a few days later M&S claimed repayment accordingly in respect of a period of five years and three months.
- In March 1997 the UK enacted the change of limitation period from six to three years with the retroactive effect described above. Thus, it applied to and diminished the quantum of the M&S claim for repayment of VAT invalidly levied.

144. M&S contended that this change rendered it virtually impossible to exercise rights conferred by EU law, contrary to the principle of effectiveness. AG Geelhoed noted[174], and the CJEU agreed[175], that reasonable limitation periods are compatible with EU law and don't render impossible in practice or excessively difficult the exercise of rights conferred by EU law, even if the expiry of those periods necessarily entails the dismissal, in whole or in part, of the action. Nor, in principle, does shortening a limitation period offend that principle of effectiveness – again provided it does not make it impossible or excessively difficult to exercise the right to repayment. And of itself a three-year limitation period was reasonable.

145. AG Geelhoed observed[176] that the UK's shortening of the limitation period affected not only those who expected under the pre-existing rules to have ample time to make their claims but even those who, before the announcement (in July 1996) or the enactment (in March 1997) of the reduction in the limitation period, had made claims for repayment of unduly levied tax.

146. On those facts, AG Geelhoed saw[177] an unmistakable analogy with **Barra**[178] in which Belgium retroactively limited claims for repayment of unduly paid vocational training enrolment fees to those persons who had already claimed repayment before delivery of the CJEU judgment in **Gravier**[179]

173 The UK Treasury had levied VAT on the face value of M&S gift vouchers sold by M&S to corporate purchasers at a price less than face value. Those corporate purchasers sold or gave them to third parties who could redeem them from M&S at face value. The CJEU decided in Argos Distributors Ltd v Customs and Excise Comrs (Case C-288/94) [1996] STC 1359, [1997] QB 499, in effect, that VAT should have been levied on the price at which M&S sold to the corporate purchasers.
174 §56 & 57
175 §35 & 36 & 38
176 §58
177 §59
178 Barra v Belgium and City of Liège [1988] ECR 355
179 Gravier v City of Liège (Case 293/83) [1985] ECR 593

which had held those fees unlawful. The CJEU held in **Barra** that this entirely negated the right to repayment in the case of those who had not claimed before the judgment in **Gravier** - thereby rendering impossible the exercise of their EU law rights. **Barra** was applied in **Deville**[180] to the effect that a state may not, after a CJEU judgment holding that certain legislation is incompatible with the Treaty, adopt a procedural rule which specifically reduces the possibility of bringing proceedings for recovery of taxes wrongly levied under that legislation.

147. AG Geelhoed considered[181] that the ratio of **Barra** and **Deville** is that retroactive national law which makes the bringing of claims under EU law for repayment of charges levied in breach of that law subject to stricter conditions, renders it wholly or in part impossible in practice for taxpayers to exercise their rights to repayment – whereby their EU Law rights lose their effectiveness. Notably, AG Geelhoed considered[182] that the principle of effectiveness does not merely preclude retroactive limitation of claims for recovery by those who under the previously applicable rules had already made a claim for repayment, as in the case of M&S, but also of claims which could still validly have been made under the terms of the previously applicable rules.[183] The claims which it had been open to them to assert by diligent use of the possibilities of the 'old' rules are rendered ineffective in advance under the more restrictive rules introduced with retroactive effect. In **Barra** the CJEU expressly protected the rights of persons who until then had not made any claim for repayment of amounts unduly paid.[184] AG Geelhoed considered in **Marks & Spencer**, that there was every reason for doing so on the same grounds, and that such reasoning applied *mutatis mutandis* to repayment claims, where a directive had been transposed correctly but applied inconsistently with the directive[185].

148. AG Geelhoed in **Marks & Spencer** is also instructive as to the general principle of protection of legitimate expectations[186], which is closely connected with those of equivalence and effectiveness. Mr Brophy and Mr Bowes did not rely on this principle, but the State made the point that laws having detrimental effects on individuals are a commonplace – as indeed they are. AG Geelhoed considered that the principal features of legitimate expectation included that

- First, legal rules be precise and legal situations and relationships governed by EU law be foreseeable.
- Second, individuals cannot legitimately expect that legal rules applicable to them will not be amended – for example, due to altered economic circumstances and political, policy and social views. Though it did not articulate it by reference to the principle of legitimate expectation, the State in effect invoked and relied on this aspect of the principle.
- However, a third principle feature of legitimate expectation identified by AG Geelhoed is that only in very exceptional cases, such as overriding economic necessity or overriding public

180 Deville v Administration des Impôts (Case 240/87) [1988] ECR 3513
181 §61
182 §62
183 Emphasis added.
184 Emphasis added.
185 §62 & 63
186 It is important to note that the EU Law general principle of protection of legitimate expectations is an autonomous EU law concept not formally related to the common law concept of the same name.

interest, can the state derogate from the general principle that individuals may legitimately expect that rights created under existing rules will not be retroactively abridged.

AG Geelhoed considered that the retroactive effect at issue in **Marks & Spencer** was incompatible with the principle of protection of legitimate expectations.

149. The CJEU[187] in **Marks & Spencer** considered it plain that the condition of effectiveness was not satisfied by reducing the limitation period such that the reduced period applies immediately to all claims made

- after enactment of the legislation reducing the period,
- between enactment of that legislation and an earlier date, being that of the entry into force of the legislation,
- before the date of entry into force which are still pending on that date.

The CJEU held[188] specifically that effectiveness required that the new legislation include:

> *"transitional arrangements allowing an adequate period after the enactment of the legislation for lodging the claims for repayment which persons were entitled to submit under the original legislation. Such transitional arrangements are necessary where the immediate application to those claims of a limitation period shorter than that which was previously in force would have the effect of retroactively depriving some individuals of their right to repayment, or of allowing them too short a period for asserting that right."*

In my view these findings, and this passage in particular, have significant implications in the present case.

<u>Marks & Spencer – application to the present case.</u>

150. Mr Brophy and Mr Bowes cited **Marks & Spencer** as "key" to their case. I should first say that while **Marks & Spencer** concerned repayment of invalidly levied VAT and this case concerns compensation for criminal injuries, I see no relevant difference between them as to the application of the principles set down in **Marks & Spencer**. Both cases concern the vindication of an EU law right to a monetary benefit payable by the State.

151. I confess to finding unconvincing the State's posted distinction of **Marks & Spencer** as a case in which a readily calculable amount was due and owing to persons seeking repayment, whereas no entitlement to any amount of specific amount of compensation accrues under the 2021 Scheme. The State offers no reasoning to explain why that distinction should make a difference.

187 §37
188 §38

152. In written submissions and oral argument, the Applicants pointed up the absence of transitional provisions in the 2021 Scheme. In my view their reliance on **Marks & Spencer** to this end was justified.

TD - 2014

153. **TD**[189] was an application for leave to seek judicial review of deportation orders made after refusal of refugee status. The action included a challenge to the statutory[190] 14-day time limit for the commencement of a judicial review challenging a refusal to grant refugee status or a deportation order (of which time limit the applicants were in breach) as the applicants relied on rights conferred by the "Procedures" Directive 2005/85/EC[191]. Hogan J granted leave to seek judicial review holding that the time limit breached EU Law principles of equivalence and effectiveness. The Supreme Court allowed the appeal.

154. As to effectiveness, Murray J spoke for the Court[192]. He cited **Rewe-Zentralfinanz**[193], for the "classic" statement that

> *"… Applying the principle of cooperation laid down in Article 5 of the Treaty, it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community Law.*
>
> *Accordingly, in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at Law intended to ensure the protection of the rights which citizens have from the direct effect of Community Law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature.*
>
> *In the absence of such measures of harmonization the right conferred by Community Law must be exercised before the national courts in accordance with the conditions laid down by national rules.*
>
> *The position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect.*
>
> *This is not the case where reasonable periods of limitation of actions are fixed.*

189 TD et al v The Minister for Justice, Equality and Law Reform, The Attorney General and Ireland, [2014] 4 IR 91
190 S.5(2) of the Illegal Immigrants (Trafficking) Act 2000
191 Council Directive 2005/85/EC on minimum standards on procedures in member states for granting and withdrawing refugee status, OJ L 326/34, 13th December, 2005 ("the Procedures Directive")
192 He dissented as to equivalence.
193 Rewe-Zentralfinanz and Others v Landwirtschaftskemmer fur das Saarland, case 33/76 EU:C 1976:188

The laying down of such time-limits with regard to actions of a fiscal nature is an application of the fundamental principle of legal certainty protecting both the tax-payer and the administration concerned"[194]

155. Murray J observed that later case law of the CJEU had consistently made clear that the procedural autonomy of national law and national courts is qualified by the two important principles of equivalence and effectiveness. These principles embody the general obligation on the member states to ensure judicial protection of an individual's rights derived from EU Law.

156. As to effectiveness, Murray J said it meant that even where national procedural rules are compatible with the principle of equivalence, they must nonetheless not be such as to render it practically impossible or excessively difficult to assert rights derived from EU Law before the national courts. Murray J cited **Bulicke**[195] to the effect that, in applying the principle of effectiveness, the question

"whether a national procedural provision makes the application of European Union Law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies. For those purposes, account must be taken, where appropriate, of the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure …

……. the laying down of reasonable limitation periods for bringing proceedings satisfies, in principle, the requirement for effectiveness inasmuch as it constitutes an application of the fundamental principle of legal certainty ….. Such time-limits are not liable to render practically impossible or excessively difficult the exercise of rights conferred by European Union Law ….. With that reservation, the Member States remain at liberty to fix longer or shorter limitation periods …… it is for the Member States to establish those periods in the light of, inter alia, the significance for the parties concerned of the decisions to be taken, the complexities of the procedures and of the legislation to be applied, the number of persons who may be affected and any other public or private interests which must be taken into."

157. Murray J considered that "*the primary consideration is not so much the length of time of the limitation period, but rather the practical question of how the limitation period actually operates or functions in practice*" as opposed to the more abstract approach of Hogan J in the High Court. The question was whether the right in question was "*deprived of its practical effectiveness"* and he noted that the respondents had not claimed that the limitation period inhibited or restricted their ability to initiate proceedings in a more timely fashion or explained their considerable delay in doing so. They had been involved in the process over time (very nearly a year before they were notified of the

194 Emphases in original
195 Bulicke v Deutsche Büro Service GmbH (Case C- 246/09) [2010] ECR I-7003

deportation order) had had legal advice from the outset and had had about 7 months advance notice of the proposal to make a deportation order. Murray J said:

> *"Accordingly, from a practical point of view, the respondents and their legal advisors had been aware for a considerable period of time of decisions adverse to their claim for asylum and of the basis on which such decisions were made, and, in particular, from the 29th August, 2009, when the Minister informed them that he was refusing their application and that he proposed to make deportation orders. Thus, the respondents and their legal advisors were in a position to identify any legal issues arising from, and in, that process which could be a ground for a possible challenge to the validity of the relevant decision."*
>
> *In the foregoing context and in the absence of any evidence, or even assertion, by the respondents that there was any particular difficulty in complying with the period laid down in s 5 of the Act of 2000, one cannot conclude as a fact that the limitation period in this case rendered the respondents' access to a judicial remedy practically impossible or excessively difficult.*

158. Without deciding any issue of exceptional circumstances, I observe that these circumstances described by Murray J in TD contrast markedly with those of Mr Brophy and Mr Bowes.

159. It does seem also that TD must be considered now in light of the Supreme Court's recent decision in **Krikke** and the judgment of the CJEU in **Danqua**[196].

Danqua 2016, Krikke 2022 & Heaney 2022

160. In **Krikke**[197], Hogan J recently, in rejecting a challenge to the eight-week time limit set by s.50(6) of the Planning and Development Act 2000, commended the judgment of the CJEU in **Danqua**[198] holding in breach of the principle of effectiveness a 15-day time limit to apply for subsidiary protection[199]. Hogan J quotes **Danqua** at length, and I need not do so here. Suffice it to record that the CJEU held that that time limit did not ensure, in practice and to all applicants, a genuine opportunity to apply for subsidiary protection. The phrase "*genuine opportunity*" seems to me to be a further and useful and diluting gloss on the phrase "*practically impossible or excessively difficult*" and suggests that the hurdle for a litigant asserting breach of the principle of effectiveness may not be as high as otherwise might appear or as had appeared in **TD**.

196 Case C-429/15; Danqua v The Minister for Justice and Equality, Ireland, Attorney General, CJEU 20 October 2016; (EU:C: 2016: 789)
197 Krikke v. Barranafaddock Sustainable Electricity Ltd [2022] IESC 41 (Supreme Court, Hogan J, 3 November 2022)
198 Case C-429/15; Danqua v The Minister for Justice and Equality, Ireland, Attorney General, CJEU 20 October 2016; (EU:C: 2016: 789)
199 Under Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

161. It cannot necessarily be said in the present case that Mr Bowes and Mr Brophy never had a "*genuine opportunity*" to apply to the CICT for compensation. However, it seems to me that, considering **Danqua** in light of **Marks & Spencer**, the concept of genuine opportunity must include opportunity, via transitional provisions, to adapt to new legal circumstances in which a limitation period which previously governed a potential applicant's application for compensation is shortened.

162. **Heaney**[200] was also a challenge to the eight-week time limit set by s.50(6) PDA 2000 as in breach of the principle of effectiveness. It failed as for want of evidence of ineffectiveness of the remedy of judicial review by reason of such time limits. Particularly in circumstances in which, as a participant in the planning process, the applicant had received notification of the planning decision and was well aware from an early stage that development consent had been given and she had given no explanation why she did not apply in time. On their facts, the present cases are quite different – in much the same way as they differ from the facts in TD.

Effectiveness – Conclusion

163. There can be no doubt but that the principle of effectiveness may not invalidate even short limitation periods. However, here, as I have held, Mr Brophy and Mr Bowes had, immediately prior to the adoption of the 2021 Scheme, an arguable case for an extension of time in their favour such that they could prosecute under the 1986 Scheme their claims for compensation to which EU law presumptively entitled them. As with any right, it is subject to defeasance by conditions on its exercise. That it is contingent does not make it the less a vested right. Immediately upon the adoption of the 2021 Scheme and without notice, Mr Brophy and Mr Bowes were, by the 2021 Scheme, purportedly deprived of that right.

164. It appears to me to follow from the combined requirements of genuine opportunity identified in **Danqua** and transitional arrangements identified in **Marks & Spencer** that the 2021 Scheme, in purporting to immediately deprive them of those arguable cases, breached the principle of effectiveness. It made it immediately and absolutely impossible for Mr Bowes to claim compensation when immediately prior to adoption of the 2021 Scheme he could have done so - if at risk of failure. In this regard, I do not see that the 5 days during which Mr Brophy might have made his claim after the announcement of the 2021 Scheme makes any difference. Clearly, no reasonable transitional provision could have been limited to such a short period. If Mr Bowes' position became absolutely impossible, Mr Brophy's became at least virtually so. I will make a declaration accordingly.

165. In light of the foregoing findings I do not consider it necessary to decide the question of effectiveness by reference to the State's assertion of impossibility of an extension of time pursuant to the 2021 Scheme beyond the 2-year backstop in favour of other potential claimants, such as those

200 Heaney v An Bord Pleanála [2022] IECA 123 (Court of Appeal (civil), Donnelly J, 31 May 2022) §76 & 90

under a disability. Nor need I decide whether, as the State say, the Applicants may not argue a *jus tertii* in that regard. I simply note the point seems arguable given that, in **Levez** and **Preston**[201], as to equivalence rather than as to effectiveness, the CJEU said that the various aspects of the procedural rules as between the compared remedies, cannot be examined in isolation but must be placed in their general context and compared objectively in the abstract – not subjectively by reference to circumstances of the case.

166. While, strictly, I need proceed no further, for completeness I will also consider the issue by reference to the principle of equivalence.

Equivalence

167. The Applicants say that the 2-year limitation period prescribed by the 2021 Scheme is less favourable than the limitation period applicable to an action in assault and/or battery – which is 6 years from the assault and/or battery.[202]

168. As stated, in **Levez** the CJEU noted[203] that, absent EU rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, however, that such rules are not less favourable than those governing similar domestic actions. That is the principle of equivalence.

169. It may help to note that determining the similarity or otherwise of the actions to vindicate EU law rights and putatively similar comparator actions to vindicate domestic law rights turns on a comparison of their substance. In contrast the breach or otherwise of the principle of equivalence turns on a comparison of their procedural characteristics.

Commission Proposal for a Council Directive on Compensation to Crime Victims

170. As to the common underlying legal basis of the right to compensation under the 2021 Scheme and the tortious action in assault, Mr Brophy cites the Commission proposal which resulted in the Compensation Directive[204] ("the Commission Proposal"). Such a proposal is one of the travaux

[201] See below

202 section 11(2)(a) of the Statute of Limitations, 1957 (as amended); Devlin v Roche [2002] 2 IR 360 and Canny, Limitation of Actions, Second Edition, 2016 at paragraph 13-09

203 [1999] All ER (EC) 1 (Case C-326/96) Citing Case 33/76 Rewe v Landwirtschaftskammer Saarland [1976] ECR 1989, §5; Case 45/76 Comet v Produktschap voor Siergewassen [1976] ECR 2043, §§13 and 16; Joined Cases C-430/93 and C-431/93 Van Schijndel and Van Veen v SPF [1995] ECR I-4705, §17; Case C-261/95 Palmisani v INPS [1997] ECR I-4025, §27; Case C-246/96 Magorrian and Cunningham [1997] ECR I-7153, §37; Joined Cases C-279/96, C-280/96 and C-281/96 Ansaldo Energia and Others [1998] ECR I-5025 §16

[204] Proposal for a Council Directive on compensation to crime victims (2003/C 45 E/08)vCOM(2002) 562 final — 2002/0247(CNS)

preparatoire to a directive and hence is a legitimate aid to its interpretation - albeit to be used with care given its expectations may not be realised in the ensuing directive[205]. The Compensation Directive specifically recites regard to the proposal. That proposal was not entirely accepted by the Council – as AG Bobek records in BV. Nonetheless, it is notable that the proposal states, as to the relationship between State compensation and the civil liability of the perpetrator of violent crime:

> *"The very basis for state compensation to victims is the existence of a civil claim. This claim may have materialised but proved impossible to satisfy, in view of the inability of the offender to pay any damages awarded to the victim. It may not have materialised in cases where the offender remains unknown. Regardless of which, it is the underlying civil liability of the offender that provides the justification and the need for compensating the victim. This proposal for a Directive is based on a close link with the material laws on civil liability and torts in each Member State, in turn the same model that all existing compensation schemes are based on today.*
>
> *The civil nature of state compensation is clear from that it serves to confer a pecuniary benefit on individuals, without seeking to achieve any objective related to sanctioning the behaviour of them offender or providing any direct benefit for the public good."*[206]

This passage does provide appreciable support for the tortious action in assault as a comparator to compensation under the 2021 Scheme.

Levez – CJEU - 1998

171. In **Levez**, as to equivalence, the question posed was - how is the phrase "*similar domestic actions*" to be interpreted? The CJEU held that the principle of equivalence requires that the (procedural) rule at issue (i.e., in that case, the two-year limitation on recovery) be applied without distinction, whether the infringement alleged is of EU law or national law, where the purpose and cause of action are similar.[207]

172. When it falls to be determined whether a procedural rule of national law (governing the assertion of an EU Law right) is less favourable than those governing similar domestic actions;

- In considering whether the actions are similar, the national Court must consider "*both the purpose and the essential characteristics of allegedly similar domestic actions"*[208].
- However, that principle is not to be interpreted as requiring member states to extend their most favourable rules to all actions brought in a certain field of law.

[205] E.g. see the Opinion of AG Bobek in the BV case cited below. Also Case C–307/98 Commission v Belgium [2000] ECR I–3933, para 40 cited in Dodd on Statutory Interpretation §14.49 fn92
[206] §5.1
207 Citing, mutatis mutandis, Case C-231/96 Edis [1998] ECR I-4951 §36
208 Palmisani, §§34 to 38

- In considering whether the procedural rule is less favourable, the Court must take into account the role played by that rule in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts[209].

173. As is its general practice, the CJEU remitted to the national court the determination whether on the facts the principle of equivalence had been breached.

174. Given subsequent observations as to the paucity of practical assistance as to the application of the principle of equivalence[210], Advocate General Léger may well have been stating a reality when he stated in Levez:-

> *"Although in some cases there is no difficulty in identifying 'similar' forms of domestic action, in other cases it is clearly necessary to determine the ground of comparison, which in practice involves a policy decision.*
>
> *The greater the desire to facilitate exercise of a Community right, the wider the range of domestic actions accepted as valid comparators."*

175. In **TD** Fennelly J says that the "core" of *Levez* is that the UK government's argument, that the time limit laid down by the Equal Pay Act 1970 applied to all equal pay claims, whether based on UK or EU Law, was deeply flawed. The 1970 Act was the Law by which the UK gave effect to the principle of equal pay laid down by Article 119 of the E.C. Treaty. Thus there was nothing to compare. As the Advocate General put it, the claims were "one and the same".

<u>Levez – UK EAT - 1999</u>

176. On its return from the CJEU, the UK EAT in Levez decided that the principle of equivalence had been breached by the rule laid down by the Equal Pay Act 1970 limiting recovery of arrears of remuneration to two years before the date on which the proceedings were instituted. It chose as comparators claims under the Race Relations or Disability Discrimination Acts and claims in breach of contract for unlawful deduction from wages – to all of which a 6-year limitation period applied. It held that

- Claims under the Equal Pay Act on the one hand, and under the Race Relations or Disability Discrimination Acts on the other, are effectively identical. In each case, the complainant is relying on a statute which gives the tribunal primary jurisdiction. In each case, the statute imposes upon the parties a requirement that the contract of employment should not discriminate on grounds

209 Citing mutatis mutandis Van Schijndel and Van Veen, § 19
210 See below

of sex or race or disability. In each case, apart from discrimination on grounds of gender, any loss attributable to failure by the employer to pay in accordance with the agreed or imposed terms and conditions can lead to an award for a period of six years.

- A claim for unlawful deduction from wages is also juridically the same as a claim for breach of the equality clause, in that the claimant in each case is asserting that he or she has been paid less than their contractual entitlement.

I observe that all the actions compared would have been against the wrongdoing employer.

Preston – 2000 & 2001

177. **Preston**[211] concerned a time limit affecting EU law claims under the Equal Pay Act 1970 (which effected the then Art. 119 of the EC Treaty as to equal treatment) by part-time female workers to gain access to occupational pension schemes. The House of Lords asked the CJEU to specify the criteria for determining, for the purpose of the application of the principle of equivalence, whether a domestic action to vindicate an EU law right is similar to another domestic action to vindicate a domestic law right.

178. The CJEU restated its ruling in **Levez** – including that it is for the national court, which alone has direct knowledge of the procedural rules governing actions in the field of domestic law, to determine similarity and thereafter equivalence. The national court must consider whether the actions concerned are similar as regards their purpose, cause of action and essential characteristics.

179. As to criteria for determining whether the procedural rules governing any action to vindicate a domestic law right which it may have identified as similar, are more favourable than those governing the action to vindicate the EU law right, the CJEU restated its ruling in **Levez** and observed that the various aspects of the procedural rules cannot be examined in isolation but must be placed in their general context and compared objectively in the abstract – not subjectively by reference to circumstances of the case.

180. When Preston came back to the House of Lords[212] they unanimously found that the principles of effectiveness and equivalence had not been breached. Lord Clyde gave the majority judgment, first observing that "similar" does not mean "identical" and that similarity or comparability is an inexact requirement and on the facts in that case it was not immediately easy to identify the candidate for comparison, if it existed. The sole candidate comparator suggested by the applicants was an action for breach of contract. The respondents replied that the action based on EU law is *sui generis* and that there is no comparable action. Lord Clyde strongly tended to agree but

211 Case C-78/98 Preston et al v Wolverhampton Healthcare NHS Trust et al; judgment of 16 May 2000.
[212] Preston v Wolverhampton Healthcare NHS Trust [2001] 3 All ER 947

was concerned that to do so was to apply too strict or precise a standard for the comparison. He said that on a broad view an action for breach of contract might well be accepted as an appropriate comparator – as "sufficiently" similar. But even if that view was taken, he agreed with Lord Slynn that the rules of procedure in the EU Law claim were not less favourable than those applicable to a claim for breach of contract.

181. As to similarity, Lord Slynn noted that there may be no similar action - the court is not "*driven to find the nearest comparison but to decide whether there really is a similar action*". He considered some examples and observed the *"force in the respondents' arguments and that one should be careful not to accept superficial similarity as being sufficient. It is not enough to say that both sets of claims arise in the field of employment law, nor is it enough to say of every claim under art 119 that somehow or other a claim could be framed in contract. I have, however, come to the conclusion that these arguments should not prevail."* He found that the action for breach of contract "*may provide a sufficiently similar comparator*" as "*the essential matter here is that moneys have not been paid to the trustees of a pension fund to purchase pension rights on eventual retirement or on reaching the prescribed age."*

182. The applicants in Preston contended that the six-year limitation period for bringing a claim for breach of contract was plainly more favourable than the six months from termination of employment under the 1970 Act. Lord Slynn disagreed. Time ran in contract from each repeated breach (during the employment) of the obligation to admit the workers to the pension scheme and not from termination of employment. And "*Merely to look at the limitation periods is not sufficient. It is necessary to have regard 'to the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts'"* For example, questions of lower cost before the Industrial Tribunal and delay arose as factors to be set against the difference in limitation periods. And once the claim under the 1970 Act was made inside the six months it could go back to the beginning of the employment – not just six years. Also, the claimant could wait until the employment was over before claiming under the 1970 Act, avoiding the possibility of friction with the employer. But, since the six-year limitation runs from the accrual of a completed cause of action, she would have had to sue in contract during her employment. It was also relevant to have regard to the lower costs and the shorter time scale involved. The informality of the 1970 Act procedure was also a relevant factor. Lord Slynn was not satisfied that the procedures for a claim under the 1970 Act were less favourable than those in a claim in contract and so held that the 1970 Act procedure did not breach the principle of equivalence.

<u>Byrne – 2007 & 2008</u>

183. In **Byrne v MIB**[213] the Plaintiff, had been injured in a road traffic accident when he was three years old. The driver was untraced. Eight years later he applied to the MIB for compensation but was

213 Byrne v Motor Insurers' Bureau [2007] EWHC 1268 (QB); [2008] EWCA Civ 574; [2009] QB 66

refused as his application was made outside the three-year time limit imposed by the MIB agreement. In contrast, his action against the driver would have been statute barred only when he reached the age of 21. He relied on the principle of equivalence as the MIB agreement represented the implementation of Directive 84/5/EEC in claiming Francovich damages.

184. As to preliminary issues, he succeeded both at first instance and on appeal on the basis that the claim on the MIB agreement as to an untraced driver was similar to that in tort against an identified and insured driver. And as the limitation period provided by the MIB agreement was less favourable than that in proceedings for personal injury in tort against a traced driver, the UK had failed to implement the Directive correctly.

185. The MIB agreement provided compensation in *"an amount which shall be assessed in like manner as a court, applying English law … would assess the damages which the applicant would have been entitled to recover from the untraced person in respect of that death or injury if proceedings to enforce a claim for damages in respect thereof were successfully brought by the applicant against the untraced person."*

186. Though various cases, including **Levez**, had been cited to him, Flaux J in the High Court considered it fair to say of the CJEU that there was "*little guidance in the decisions of the court*[214] *as to how the principle of equivalence is to be applied in practice".* I sympathise with that view.

187. The plaintiff in Byrne cited Lord Slynn in Preston to the effect that the actions to be compared need not be identical but only similar. The plaintiff submitted that Lord Slynn was looking at the end result - at what the two procedures being compared achieve. The plaintiff submitted that sufficient similarity consisted in the fact that the objective of the claim to the MIB and of the action in tort is the same: to recover for the victim compensation to be calculated in exactly the same way in relation to an identical event, an accident.

188. In holding for the plaintiff, Flaux J rejected submissions that, the claim in tort was not a "similar domestic action" to that against the MIB. Those submissions as regards the criteria to be considered in deciding what is a "similar domestic action", although "attractively" argued, were unduly narrow and unduly formulaic, tended to elide similarity with identity and did not accord with the overall purpose of the relevant Directives. Those rejected submissions were that:

- The purpose of the two "claims", differed as the purpose of a claim against an insured driver was to secure a finding of liability in tort, whereas the purpose of an application under the MIB was to seek to enforce a contractual liability of the MIB to the Secretary of State.

214 i.e., the CJEU.

- The causes of action differed in that, whereas a victim of an accident has a cause of action in tort against an insured driver – a named person served with court process - under the MIB agreement the victim has no cause of action at all. Rather, he has access to a contract between the MIB and the Secretary of State that, on certain conditions, the MIB will pay compensation in satisfaction of its contractual obligation to the Secretary of State. At most, a refusal by the Secretary of State to take action compelling the MIB to comply would be susceptible to judicial review.

- The essential characteristics of the two "claims" were very different. The claim against an insured driver involves an adversarial and judicial process, whereas the MIB procedure is essentially inquisitorial. The MIB investigates the claim, obtains statements, police reports and medical reports and makes an award. And whilst it is the date of issue of proceedings in that is relevant for the purposes of limitation, there are no proceedings before the MIB. The agreement simply required that an application be made within three years of the accident.

- Even assuming similarity, and looking at the question of limitation in the context of the MIB procedure as a whole, it is a one-sided procedure. It is without an opponent which benefits the applicant, in contrast to court proceedings. It is relatively cheap, speedy and informal, so that overall it does not involve less favourable treatment than an action in tort.

189. In rejecting those arguments as to similarity of remedies, Flaux J took the following views:

- National rules on compulsory motor insurance had to be harmonised and compensation for the victim of uninsured drivers were the quid pro quo for abolition of “green card” barriers to free movement of vehicles based in EU territory. That EU interest would not be achieved unless the victim of an uninsured driver could obtain from the MIB protection equivalent to the protection he would obtain in if he claimed in tort against an insured driver.

- **Evans**[215] was authority that the relevant Directives required that protection provided by the MIB must be equivalent to and as effective as the protection available under the national legal system to victims of insured drivers. Also, **Evans** holds that what is required by the Directive is equivalence not identity, hence the reference to the national body not having to be placed on the same footing so far as civil liability is concerned as a defendant in a claim against an insured driver.

- **Preston** adopts a broader conception of purpose and essential characteristics than that for which the defendants contended. Lord Slynn looked at the end result, what each "claim" achieves in terms of the eventual benefit to the claimant. It was because that end result was sufficiently similar in substance that he concluded that the claim for damages for breach of contract was a similar domestic action to the claim under Article 119 of the EC Treaty.

- Flaux J rejected the argument that the claim in tort is not a similar domestic action merely because the claim on the MIB does not give a cause of action against the MIB under English law.

215 Evans v Secretary of State for the Environment, Transport and the Regions (Case C-63/01) [2005] All ER (EC) 763

The context in which the principle of equivalence has to be considered is Article 1(4) of Directive 84/5 which, does not require that the law of the relevant member state provides a cause of action to the claimant against the body set up to provide compensation[216].

190. As to less favourable treatment, Flaux J considered that Lord Slynn's consideration in Preston of the comparative limitation periods assisted the defendants:

> *"That was a case where, although the one limitation period was prima facie shorter than the other, in fact it had various advantages for a claimant in relation to the time after which a claim could be made. In contrast, compared with the extended limitation period under section 28 of the 1980 Act, as amended, the three-year period under clause 1(1)(f) of the untraced drivers agreement holds no advantages for a claimant and is plainly less favourable."*

191. Flaux J also rejected the MIB submission that the MIB agreement was not less favourable when viewed in the context of its other supposed advantages. He did not see how those advantages, even if established, could be prayed in aid against a claimant who by virtue the time bar was deprived of access to that procedure. *"Since compliance with clause 1(1)(f) was a condition precedent to the invocation by the claimant of the procedure laid down by the remainder of the agreement, that quick, cheap and easy procedure (even assuming that is a correct characterisation of the procedure) can hardly be used to justify the much shorter time limit under clause 1(1)(f) than under the 1980 Act if, as a consequence of clause 1(1)(f), it is said by the defendants that the claimant cannot even begin to invoke the procedure".*

192. Flaux J therefore held that on a true construction of Directive 84/5 and/or by virtue of the principle of equivalence the MIB procedure should be subject to a limitation period no less favourable than that applicable to the commencement of proceedings by minors for personal injury in tort against a traced driver.

193. In the Court of Appeal, Carnworth LJ agreed with Flaux J generally, including as to the paucity of guidance from the CJEU as to how the principle of equivalence is to be applied in practice.

194. Carnworth LJ noted that in **Preston** the majority had taken a more cautious view than Lord Slynn but still did not think it is helpful to argue that the claim against the MIB *"has a different "juristic structure" to a claim in tort. That fact is simply the consequence of the way in which the United Kingdom has chosen to fulfil its Community law obligation. It cannot be used to define the nature of the obligation".*

216 As was essentially decided in Evans v Secretary of State for the Environment, Transport and the Regions (Case C-63/01) [2005] All ER (EC) 763

195. Carnworth LJ was "*unpersuaded that it makes any material difference that there are other procedural advantages to the MIB scheme. I can accept that, as a general proposition, the competing procedures need to be looked as a whole. The test is equivalence, not identicality; not every procedural difference is significant. However, we are here concerned with a special limitation regime .. for the benefit of minors and others under a disability, … That group is clearly and distinctly disadvantaged by the failure of the MIB scheme to provide equivalent protection, in a way that can drastically affect their substantive rights, as this case shows."*

Commission Proposal - MIB analogy

196. In relying on Byrne by analogy to argue that the proper comparator with the remedy of compensation under the 2021 Scheme for purposes of assessing compliance with the principle of equivalence as it relates to limitation periods, is an action in assault in tort, Mr Brophy cites the Commission Proposal. It says of the Directives which now underlie the MIBI,

> *"The Community has already adopted wide-ranging measures to ensure compensation to victims of road accidents through the four motor insurance Directives, ……. The current proposal will ensure that victims of crime do not find themselves in a less fortunate situation than victims of road accidents, by introducing provisions based on - to a large extent - similar principles as these Directives."*

Pontin 2009

197. In **Pontin**[217] the CJEU considered a context in which, in Luxembourg a female employee dismissed during pregnancy had:

- A right derived from EU law[218] to apply within 15 days for an order annulling her dismissal.
- A right at domestic law to claim compensation for wrongful dismissal within three months.

As to the principle of equivalence, the CJEU stated as to the proposed comparators "*an action for damages and an action available in the event of dismissal on account of marriage appear at first sight to be comparable*". The CJEU noted that the 15-day limitation period applying to the action to vindicate EU law was substantially shorter than the three-month limitation period applying to an action for damages. For that, and other reasons, it did not at first sight appear that procedural rules complied with the principle of equivalence. But, it held, *"it is for the national court to determine whether this is so as regards their purpose, cause of action and essential characteristics".*

217 Case C-63/08, Pontin v T-Comalux SA [2009] All ER (D) 13 (Dec)

218 Council Directive (EC) 92/85 (on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding) and art 2 of Council Directive (EC) 76/207 (on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions).

198. Fennelly J in **TD** considered this a "*helpful observation on the question of what should be regarded as a similar action*".[219]

Bulicke

199. **Bulicke**[220] was not directly cited to me but is considered in **TD**, which was. The CJEU repeated the principles of equivalence set out in its earlier cases. Ms Bulicke complained of a 2-month time limit for bringing an EU law-based claim for compensation for discrimination in recruitment for employment on grounds of age. The possibility of compensation for breach of the prohibition of discrimination on grounds of race, ethnic origin, religion or belief, disability, age or sexual identity was introduced by the statute[221] which had transposed the relevant directive[222] and that, strictly speaking, there were no equivalent procedures before the adoption of that statute.

200. The referring court had indicated that the general limitation period in German law was 3 years and was generally applicable in employment law matters. However, and it seems to me importantly, certain other situations existed

> *" in which workers are required to assert their rights within short time-limits. That is the case with actions seeking protection against wrongful dismissal, which must be brought within three weeks of the dismissal. Similarly, actions to have a fixed-term employment contract declared invalid must be brought within three weeks of the contractual end of the fixed term. Finally, collective agreements frequently contain limitation period clauses under which entitlement to bring an action lapses if not exercised within a short period."*[223]

201. It seems to me that this observation informed the view of the CJEU[224] that *"it did not appear"* that the impugned 2-month time limit *"is less favourable than provisions concerning similar domestic actions in employment law"* but it was for the national court to determine if those other short time limits or even time limits for other national remedies that had not been put before the CJEU were comparable and, if so, whether they involved more favourable procedural rules.

TD - 2014

202. I have referred to TD above as to effectiveness. The State argued that the principle of equivalence was not breached where

219 §238
220 Bulicke v Deutsche Büro Service GmbH, Case C-246/09, Judgment of 8 July 2010
221 The General Law on Equal Treatment 2006
222 Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.
223 §31
224 §34

- the High Court had selected an incorrect comparator - the eight week time limit which applies to a judicial review in planning and environmental matters.
- the time limit applied both to challenges to asylum and immigration decisions which are based on European Law, and to all such challenges based on national Law.

203. Fennelly J for the majority agreed with the account given by Murray J of CJEU case law on equivalence – including **Rewe-Zentralfinanz, Levez, Preston, Pontin** and **Bulicke** - and disagreed with him only as to the interpretation of the scope of s 5(1) of the Act of 2000[225] and the range of proceedings to which it applies. S.5(1) provided that, save by judicial review, a person shall not question the validity of a range of listed decisions under the Immigration Act 1999 and the Refugee Act 1996[226].

204. Fennelly J cited **Edis**[227] - a case as to the time-limit for an action to recover from the State indirect taxes on the raising of capital levied in breach of EU Law. The CJEU held that the principle of equivalence

> *"…. does not preclude … alongside a limitation period applicable under the ordinary law to actions between private individuals for the recovery of sums paid but not due, special detailed rules, which are less favourable, governing claims and legal proceedings to challenge the imposition of charges and other levies. The position would be different only if those detailed rules applied solely to actions based on Community Law for the repayment of such charges or levies."*

Fennelly J commented on Edis that the CJEU,

> *".. saw the essence of equivalence in being whether similar claims based on national Law were treated more favourably than claims based on what was then Community Law. <u>There was no lack of equivalence in making a distinction between claims against private individuals or entities, on the one hand, and claims against the State, on the other</u>.[228]"*

Fennelly J continued to the effect that "*the time limit for claims against the State must not offend the principle of equivalence",* in which regard the CJEU had noted the position in Italian Law as being:-

> *"… the time-limit at issue applies not only to repayment of the contested registration charge but also to that of all governmental charges of that kind. Moreover, according to information provided by the Italian Government and not disputed, a similar time-limit also applies to actions for repayment of certain indirect taxes. Nor does it appear from the wording of the provision at issue that it applies only to actions based on Community Law."*

225 Illegal Immigrants (Trafficking) Act 2000
226 Also a refusal under Article 5 of the Aliens (Amendment) (No. 2) Order, 1999
227 Edis v Ministero delle Finanze (Case 231/96) [1998] ECR I-4951
228 Emphasis added

205. Fennelly J "*finally, and importantly*" noted that the CJEU had indicated that the assessment of equivalence was to be considered "*with regard to the same kind of charges or dues*". He cited the *"need to have regard to the actual subject matter of a claim".* The court was required "*to consider the matter in the light of the "purpose", the "cause of action" and the "essential characteristics" of the claim at issue and, in that light, to consider any equivalent claims or cause of action."* But the CJEU *"has tended to look for a broad definition of the subject matter."* And he said that **Preston** demonstrates the distinction to between the nature of the claim, in the sense of its subject matter, on the one hand, and the characteristics of the legal remedy or cause of action, on the other. One looks at the first to determine what are similar claims or causes of action. *"……. the court must consider the substantive area of law concerned, the nature and scope of the relief claimed and the grounds of the claim. This enables a similar claim or cause of action to be identified. Having done so, the court carries out the comparison exercise, in order to decide whether there is a lack of equivalence" For that purpose, the court must consider the nature and effectiveness of the remedy provided, any limitation period, the expense of the procedure and any other procedural rules. In other words, the similarity of causes of action is not determined by the nature of the remedy claimed.* Fennelly J cited Levez to the effect that *"national law is not required to accord its most favourable time limits to EU Law claims. Regard must be had to the essential nature of the subject matter of the claim."*

206. Fennelly J disagreed with Hogan J's view that the comparison must be made with other broadly similar actions in the sphere of judicial review as he considered that it concentrated on the nature of the cause of action itself, judicial review, rather than the underlying subject matter of the claim. He considered that essential subject matter of the causes of action listed in s 5(1) of the Act of 2000 is the control by the State of entry into or remaining on its territory by persons from other countries. S.5(1) applied to decisions within the scope of EU law and decisions concerning only issues of purely national law. S.5(1) covered all decisions related to immigration and the entry or refusal of entry of non-nationals into the national territory of the State, whether those decisions are based on EU Law or not and applied the same time limit to all without distinction. So, it did not infringe the principle of equivalence.

<u>Transportes Urbanos - 2010</u>

207. **Transportes Urbanos**[229] concerned a time-barred right to rectify self-assessments for VAT to correct overpayments. The action was against Spain for Francovich damages, corresponding to the overpaid VAT, on the basis that the time-bar breached EU Law. The Tribunal Supremo referred a question to the CJEU. It asked whether it was contrary to the principles of equivalence and effectiveness to apply differing legal principles to actions to establish the financial liability of the State in respect of, on the one hand, administrative measures enacted pursuant to legislation

229 Transportes Urbanos y Servicios Generales SAL v Administración del Estado - [2011] All ER (EC) 467

declared contrary to the Spanish constitution and, on the other hand, administrative measures enacted pursuant to a rule contrary to EU law? In the latter case, but not the former, an exhaustion of remedies rule applied. The CJEU repeated the principle of equivalence set out in the cases I have cited above.

208. In applying the principle of equivalence, the CJEU noted that the compared actions had exactly the same purpose, namely compensation for the loss suffered by the person harmed as a result of an act or an omission of the State. The only difference between the two actions was the fact that the breaches of law on which they are based were, as to one, a breach of EU law established by a judgment of the CJEU and as to the other, a breach of the Spanish Constitution established by a judgment of the Tribunal Constitucional. That fact alone could not render them dissimilar for the purpose of applying the principle of equivalence. They were held to be similar. As to their essential characteristics, the CJEU noted that the compared actions differed as to the requirement of exhaustion of remedies and the principle of equivalence was breached.

209. Given the differentiation by Fennelly J of actions against the State from actions against private citizens, it is notable that both compared remedies in Transportes Urbanos were against the State. Of course that is a function of the facts of that case and does not establish a necessity that the compared actions both be against the State. But it does mean the case does not assist the applicants in diluting the significance of Fennelly J's differentiation.

Commission v Italy C-601/14 – 2016

210. In **Commission v Italy**[230] the CJEU found that Italy had failed to implement the Compensation Directive as its scheme limited compensation to victims of only some violent crimes the perpetrator of which was insolvent or unknown. The Directive required compensation of victims of all violent crimes Advocate General Bot stated:

> *"The justification for such a compensation scheme for the victims of all violent intentional crimes is based to a greater extent on the idea that the commission of the crime and the occurrence of the damage it causes are the consequence of the State's failure to fulfil its protective role, than on a notion of solidarity. As the European Parliament explains in its report on the Proposal for a Directive on compensation to crime victims, 'compensation for the victim must be guaranteed, not only to alleviate the harm and suffering caused as far as this can be done, but also to deal with the social conflict produced by the crime and facilitate the application of a properly rational criminal policy'.*

[230] C-601/14

AG Bot adds[231] that "*The Parliament, here, is, in effect, reproducing the terms of the Explanatory Report to the European Convention on the Compensation of Victims of Violent Crimes*[232]"

211. This observation by AG Bot implies that the purposes of, respectively, criminal injuries compensation and damages in tort are overlapping but significantly non-coterminous.

Equivalence - Present case - Comparator

212. The Applicants propose that an action in assault, to which a 6-year limitation period applies, is similar, for purposes of the application of the principle of equivalence, to a claim under the 2021 Scheme.

213. The State submitted a table comparing a claim on the CICT with one in Assault[233]. I have reordered and slightly reworded the list for convenience.

CICT	**Assault**	**Comment**
Administrative scheme set up by the executive.	Administration of justice through independent courts.	I do not see this as a relevant difference given the scheme is the means of transposition of the Compensation Directive and vindication of a right to compensation conferred by EU law. In passing I note that it is intended to put the scheme on a statutory basis. The difference does not differentiate the claims as to their "essential subject matter".
Inquisitorial process[234]	Adversarial process	These are procedural, not substantive, issues and do not differentiate the claims as to their "essential subject matter".
Informal[235]	Formal	
Private hearings.	Public hearings.	
No appeal	Appeal	
No legal costs allowed.	Legal costs allowed.	This does not differentiate the claims as to their "essential subject matter".

[231] Fn 35
[232] §7
233 Including battery
[234] In Doyle & Kelly, Ní Raifeartaigh J said "the precise nature of an application to the Tribunal. The first and obvious point is that it is not a court proceeding. It is not an adversarial procedure. Nor is it a proceeding in which the EU right to fair and appropriate compensation is itself in dispute. Rather it is a proceeding in which the claimant seeks to establish that he falls within the conditions for entitlement to compensation defined by EU law i.e. (i) that he suffered injury; (ii) that the injury was caused by a violent intentional crime."
235 Citing Rule 19 of the 2021 Scheme

CICT	Assault	Comment
No immunity on grounds of mental health or age.[236]	Factors and immunities of perpetrator taken into account.	This difference applies also to the MIB agreement considered in Byrne.
No compensation for pain and suffering[237]	Damages for pain and suffering awarded.	This is a significant difference between the reliefs. It remains to be seen if it will survive challenge by reference to the requirements of the Directive. However, on the assumption it does, it seems to me nonetheless that the exclusion is by way of exception to the explicit and general premise of the Scheme that, albeit subject to significant exceptions, compensation under the Scheme will be "*on the basis of damages awarded under the Civil Liabilities Acts*".[238] Also, this factor relates to the remedy, not to the "essential subject matter" of the claim. As Fennelly J said in **TD**, *"the similarity of causes of action is not determined by the nature of the remedy claimed."*
No exemplary damages[239]	Exemplary damages.	Exemplary damages in tort are rare and modest. I do not see this as a significant difference. Also this factor relates to remedy - see above.
Scheme also compensates injuries incurred in prevention of crime and saving life[240].	No claim for preventing crime or saving a life.	That the range of possible claimants is larger under the Scheme does not undermine any similarity as it relates to the direct victims of crime.
No liability need be established.	Must establish liability of the offender.	• These posited distinctions seems to me illusory as violent crime is a prerequisite to compensation under the Scheme and battery is a prerequisite to damages in tort.
The violent crime must have been reported to	Not necessary.	

236 See Rule 1 of the 2021 Scheme
237 Rule 6 of the 2021 Scheme
238 Rule 6 of the 2021 Scheme
239 Citing Rule 6 of the 2021 Scheme
240 Citing Rule 4(a) of the 2021 Scheme

CICT	Assault	Comment
the gardai or been the subject of criminal proceedings.		• They really address the acceptability of different evidence/methods of proof of essentially the same thing – assault. • As the LRC observes[241], while criminal and civil law serve different purposes, *"Violent criminal acts usually amount to torts (civil wrongs) also*". • These seem to me to be differences of procedure, not of "essential subject matter". • I do not think this view is undermined by the observation, in **Doyle & Kelly**, of Ní Raifeartaigh J as to the nature of the application to the Tribunal.[242] • Also, §25 of the Scheme states that *"the proceedings at the hearing of the Tribunal will be by way of a presentation of his case by the applicant who will be entitled to call, examine and cross examine witnesses. It will be for the claimant to establish his case."*
Carers responsible for the maintenance of victims can make a claim.[243]	Such carers can't take an action.	That the range of claimants is larger under the Scheme does not undermine any similarity as it relates to the direct victims of crime. Also, in an action in assault, costs of care can be claimed as special damages.
Duplication not permitted[244]	Duplication permitted	Rules 5 and 15 require that damages in tort which have been paid, be deducted from compensation under the Scheme. The LRC says that, internationally, all compensation systems surveyed will not compensate a victim twice for the same injuries, regardless of the source of that compensation. The justification for such deduction would seem to me to be that both remedies address the same "essential subject matter".

241 Law Reform Commission Consultation Paper Compensating Victims of Crime (LRC CP 67 – 2022) §1.48
[242] See footnote above
243 Citing Rule 3 of the 2021 Scheme
[244] Citing Rules 5 and 15 of the 2021 Scheme

CICT	Assault	Comment
		That the offender should not benefit in a tort action from a deduction from damages by reference to compensation payable under the scheme is hardly surprising and does not undermine the proposition that both remedies address the same "essential subject matter".

214. It must be remembered that the criterion for choosing a comparator is similarity, not identicality – **Preston** – and by reference to "*the essential subject matter*" *in the light of the "purpose", the "cause of action" and the "essential characteristics"* of the claim at issue the CJEU *"has tended to look for a broad definition of the subject matter".* It bears recollection that the Directive is for "compensation" of the victims of crime – as is, essentially, an action in assault. I am particularly struck by Recital 10 of the Directive, to the effect that *"Crime victims will often not be able to obtain compensation from the offender, since the offender may lack the necessary means to satisfy a judgment on damages or because the offender cannot be identified or prosecuted."* This suggests that compensation under the Directive is intended to be, whether in whole or in part, a substitute for, and hence to serve at least a similar purpose as an award of damages against the offender. I disagree with counsel for the State in his assertion that Recital 10 illustrates the difference between the remedies. That said, Advocate General Bobek in **BV** explains this position by saying that *"The rationale and the logic for both types of payment is different."* His view was expressly approved by the CJEU[245]. And **BV** makes clear that the State's obligation to provide for *"fair and reasonable compensation"* for victims of violent crime does not require such compensation to be equivalent to the compensation that would be available in an action against the wrongdoer[246].

215. It will have been seen that there are weighty reasons to consider the action in assault an appropriate comparator against which to measure the time limit under the 2021 Scheme for purposes of the application of the EU law principle of equivalence. Inter alia, **Byrne**, by which I am not bound, in its comparison of relief against the MIB with a remedy in tort against the driver of a vehicle, provides a considerable analogy in support of the comparison posited by the Applicants. The Commissions' Proposal supports that analogy. Many of the posited arguments to the contrary are unconvincing – as I have sought to demonstrate.

216. But, In the end I am struck by the view of Fennelly J in **TD** that actions against the State can be regarded separately to actions against private persons and the view of Advocate General Bobek in **BV**, as expressly approved by the CJEU[247], that *"The rationale and the logic for both types of payment is different"* for reasons which I have recorded above. The observations of AG Bot in **Commission v Italy** are in very similar vein. On primarily those bases, I hold that the posited

[245] §60
246 Law Reform Commission Consultation Paper Compensating Victims of Crime (LRC CP 67 – 2022) §4.55
[247] §60

comparison of the time limit set by the 2021 Scheme with the limitation period applicable to the torts of assault and battery is not an appropriate comparison for purposes of the EU law principle of equivalence.

217. Accordingly I need not proceed with a comparison of the procedural characteristics, including the time limits, applicable in the 2021 Scheme and the torts of assault and battery.

Purposive Interpretation

218. As I have said, the 2021 Scheme, as the transposition of the Directive, is to be interpreted purposively in light of the aims of the Directive. In light of my views as expressed above, I consider that, on a literal interpretation, the Scheme is flawed in that transposition. However, to purposively interpret it to avoid the flaw would be, I think, in effect rewrite it. Purposive interpretation does not permit interpretation *contra legem* (assuming for the purpose that the Scheme is a law). I do not think that would be proper to the Court. Although I have thought it necessary to address the interpretation issue as it elucidates many relevant principles, in fairness, Counsel for the Applicant did not overly press the argument. For example, I do not see that I could infer a specific transitional provision, as to the details of which the State may have considerable margin of appreciation.

Conclusion – Interpretation & Effectiveness

219. In my view the 2021 Scheme must be interpreted as the State contends. In its terms it abolished without notice the arguable cases, which Messrs Bowes and Brophy had, for compensation under the 1986 Scheme and by virtue of the Compensation Directive on the basis that exceptional circumstances justified extensions of time in their favour. In doing so without transitional arrangements affording potential claimants in the position of Messrs Bowes and Brophy a reasonable opportunity to make their claims, the 2021 Scheme transgresses the principle of effectiveness. I intend to make declarations to that effect.

220. I find that the Applicants have failed to demonstrate that the 2021 Scheme transgresses the principle of equivalence. It is also important to note, for the avoidance of doubt, that this judgment does not find that State may not impose time limits – even relatively short time limits – on the Scheme.

Disapplication

221. The Applicants call in aid **Factortame**[248] for a proposition that the CICT should disapply §20 of the 2021 Scheme as in breach of EU Law. This seems to be a particularly complex issue on which I will hear further argument if needs be.

222. It is complex first because the juristic status of the CICT is unclear and the idea of it having a "jurisdiction" seems problematic – as to which see above. If it, to the extent it has independent legal personality, is merely the delegate of the Executive, then the reality is that the State itself can, and is the body responsible to, disapply the offending elements of the Scheme – if only by a simple direction to its delegates in the CICT. In any event, for the very reason that it is administrative, it can amend the Scheme without difficulty or delay.

223. Second, disapplication may prove difficult as to a Directive not directly effective. The Applicants argue, I think probably correctly, that **BV** establishes a right in the citizen to rely on the Directive for his/her right to compensation. But the Directive leaves a considerable margin of discretion to Member States both as to the duration of time limits and the detail of any transitional provisions – issues central to this case[249]. **Wyatt & Dashwood**[250] appear to marginally favour a view that disapplication of national law arises only in order to apply a directly effective rule of EU law. Simons J preferred that view in **RAPP**[251] - though also allowing its application to EU laws directly applicable[252]. The CJEU Grand Chamber recently, in **Deutsche Umwelthilfe eV**[253], expressed the obligation as one *" .. to disapply any provision of national law which is contrary to a provision of EU law with direct effect ..",* though also noting that even an EU law lacking direct effect can impose an obligation to interpret national law to the fullest extent possible in accordance with that EU law. Of course, even that obligation is subject to the *contra legem* principle, i.e. a national court is not required to do violence to the words of the legislation – **RAPP**. And, as I have said, it seems to me that §20 of the 2021 Scheme is clear. I note the submissions made on direct effect by reference to **Craig & de Burca** on EU Law.

224. Rather than unnecessarily decide those difficult questions, on which further argument would be required, it may prove that the declarations which I intend to make will suffice to enable a resolution of the parties' dispute. If not, I will, as I say, hear further argument. For what it is worth in this regard, I will say that it is clear that the CICT is an emanation of the State, if not indeed the State itself, against which directly effective rights can be asserted.

[248] Case C-213/89 R v Secretary of State for Transport, ex parte Factortame
[249] As to the difficulties this issue may raise, see Wyatt & Dashwood on EU Law 6th ed'n 2011 p278 et seq.
[250] Wyatt & Dashwood on EU Law 6th ed'n 2011 p278 et seq.
[251] Recorded Artists Actors Performers Ltd v. Phonographic Performance (Ireland) Ltd [2019] IEHC 2 (High Court, Simons J, 11 January 2019)
[252] I confess to having no appetite, save if necessary and on detailed argument, for the delicate dissection of the directly effective from the directly applicable.
[253] Case C-873/19 Deutsche Umwelthilfe eV v Bundesrepublik Deutschland, & Volkswagen AG: CJEU 8 November 2022

Constitutionality

225. The Applicants also say that the 2021 Scheme is invalid by reference to the requirements of the Constitution in that it involves the retroactive deprivation of the Applicants of their property right to pursue their claim before the CICT. It is agreed that in accordance with **Carmody**[254] I should decide this issue only if decision of other issues fail to resolve the case. As I have held in the Applicants' favour on EU Law grounds, and though as to interpretive principles it has been appropriate to refer broadly to constitutional considerations, I consider that should take the constitutional issue no further unless the parties require me to do so.

226. In these circumstances I need not decide whether the challenge to the constitutionality of the scheme by judicial review was incompetent and should have been brought by plenary summons. However, it may assist the parties to know I would have rejected the State's submission in this regard given I found the Impugned Decisions justiciable and having regard to the decisions on which the Applicants relied: **Galvin**[255], **Zalewski**[256], and **Murphy**[257]. Accordingly, I need not consider the Applicants' reliance on **Burke**[258] and on **Rewe-Zentralfinanz**[259].

REMEDY

227. I have indicated that I propose to make declarations grounded in breach of the principle of effectiveness by reason of the failure to make transitional provision in the 2021 Scheme allowing a period within which potential applicants for compensation such as Mr Bowes and Mr Brophy, might seek to avail of an extension of time, by reference to exceptional circumstances, within which to apply for compensation.

228. I respectfully invite the parties to consider what, if any, other remedies may be required. I have made certain observations on the manner in which the exceptional circumstances requirement should be interpreted and applied. The 2021 Scheme is, as the State has emphasised, constituted on an administrative basis pending legislation to give effect to the Compensation Directive. As the LRC pointed out[260] that position implies appreciable flexibility - which may bear upon the type and content of relief to be granted.

254 Carmody v. Minister for Justice, Equality and Law Reform; Ireland; and the Attorney General [2010] 1 IR 635
255 Galvin v DPP [2020] IECA 217
256 Zalewski v Adjudication Officer [2019] IESC 17 and [2021] IESC 24
257 Murphy v Ireland [2014] IESC 19 [2014] 1 IR 198
258 Burke v Minister for Education [2022] IESC 1
259 Rewe-Zentralfinanz and Others v Landwirtschaftskemmer fur das Saarland, case 33/76 EU:C 1976:188
260 Law Reform Commission Consultation Paper Compensating Victims of Crime (LRC CP 67 – 2022) §3.3

229. It seems to me, provisionally, that the Applicants have succeeded in general terms and are entitled to their costs.

230. I will list this matter for mention only on the 23rd of January 2023 with a view to final orders if possible at that point.

DAVID HOLLAND
20/12/2022