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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY RAYMOND McCORD FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE CIVIL LEGAL SERVICES APPEAL PANEL

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Martin O'Rourke KC and Andrew Moriarty (instructed by McIvor Farrell Solicitors Ltd) for the Applicant
Christopher Summers (instructed by the Departmental Solicitor's Office) for the proposed Respondent

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SCOFFIELD J

Introduction

[1] By these proceedings, the applicant seeks to challenge decisions of the Legal Services Agency (LSA) and a Civil Legal Services Appeal Panel ("the Panel"), made on 8 October 2024, whereby they (i) declined to hold an oral hearing in relation to the applicant's legal aid appeal and (ii) refused the application for legal aid. In fact, the legally effective decision is that of the Panel (and, for reasons explained below, a presiding member the Panel sitting alone but exercising the powers of a full appeal panel), which is independent of the LSA. I therefore treat the application as simply being against the Panel.

[2] The application for legal aid related to an appeal from the High Court to the Court of Appeal in a judicial review application. In turn, the judicial review related to a coroner's decision not to progress preparatory work on an inquest which, the coroner concluded, would not be completed before the 'cut-off' date of 1 May 2024 set out in the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ("the Legacy Act"); and to alleged delay in the conduct of the inquest between his appointment and the commencement of the proceedings.

[3] The applicant contends that the Panel's failure to hold an oral hearing was procedurally unfair and unlawful in that inadequate reasons were given for the conclusion that the criteria for an oral hearing were not met. He further contends that the proposed respondent erred in law as to the meaning of those criteria.

[4] The substantive decision to refuse legal aid is challenged on the basis (i) that the process by which this decision was reached was procedurally unfair in the absence of an oral hearing (as above); (ii) that there were also inadequate reasons provided for the refusal of legal aid; and (iii) that the decision was irrational.

[5] The applicant asked for expedition on the basis that the appeal to which the legal aid application relates is already being case managed by the Court of Appeal. A leave hearing was convened at which Mr O'Rourke KC appeared for the applicant with Mr Moriarty; with Mr Summers appearing for the proposed respondent. I am grateful to all counsel for their helpful written and oral submissions.

The underlying judicial review proceedings

[6] For present purposes it is unnecessary to set out in any great detail the underlying factual background to the applicant's judicial review proceedings. In short, he challenges the lawfulness of the coroner's decision in February 2024 "to desist from any preparatory work to advance the State's investigation into the death of his son in 1997" in anticipation of the commencement of the Legacy Act on 1 May 2024. The applicant was also challenging the delay in progressing the State's investigation into the death both generally and as a consequence of the aforementioned decision on the part of the coroner. I return below to the issue of what is and is not properly within the purview of the applicant's pleaded case in the underlying proceedings.

[7] The applicant's son was murdered on 9 November 1987. No inquest has yet reached the stage of hearing evidence and determining the statutory questions in relation to this death. The ongoing coronial proceedings were being managed by Mr Justice Fowler, sitting as a coroner, after he had been appointed as the coroner to manage and conduct the matter in April 2022. However, on 2 February 2024 he gave a decision to the effect that he had concluded, with regret, that the inquest would not be able to start and finish before 1 May 2024; that he should not start an inquest which he could not finish (in circumstances where it was overwhelmingly clear that it would not be possible to conclude the inquest within the timeframe set by Parliament); and that he should not prejudice other inquests which did have a reasonable prospect of concluding within that compressed timeframe by drawing resources away from them, since to do so would not be in the public interest or the interests of justice. He indicated that he would hear counsel on precisely how he should proceed, including upon what form of adjournment should be made.

[8] The applicant challenged this decision by way of an application for judicial review which was issued on 23 February 2024 ("the underlying judicial review"). The pleadings in that case have been made available to the court. In the Order 53 statement in those proceedings the impugned decisions or omissions are identified as follows:

> "a. the failure on the part of the coroner and Coroners' Service to provide disclosure and hold the inquest into the death of his son promptly and with reasonable expedition.
>
> b. the decisions to make no further directions for the future progress of the inquest and to cease all preparatory work for the hearing of the inquest.
>
> c. Insofar as is necessary, the compatibility of s.9(5) of the Human Rights Act 1998 with Article 2 ECHR."

[9] The third of these issues arose only if the coroner was found guilty of a breach of the article 2 requirement of reasonable expedition.

[10] The judicial review was heard and determined by Mr Gerald Simpson KC sitting as a Temporary High Court Judge ("Simpson J") in two stages, resulting in two judgments. The first – *Re McCord's Application* [2024] NIKB 60, given on 19 April 2024 ("the first judgment") – dealt with the issue of the cessation of preparatory work for the inquest, considering this by way of a rolled-up hearing. This part of the case was dealt with as a matter of urgency because, if the coroner's decision was overturned, there was still a period of time (albeit then of very limited duration) during which some additional steps may have been taken before the obligation fell upon the coroner to close the inquest pursuant to section 16A(3) of the Coroners Act (Northern Ireland) 1959 (as amended by section 44 of the Legacy Act). Simpson J granted leave on this issue (albeit considering it "very much a borderline case") but refused the substantive application. In the second of his judgments – *Re McCord's Application* [2024] NIKB 60, given on 10 July 2024 ("the second judgment") – the judge dealt with the issue of the ongoing delay in the case more generally. He refused leave to apply for judicial review in relation to the challenge to the coroner's actions between the date of the inquest having been assigned to him and February 2024.

[11] The central aspect of the applicant's challenge on the first issue was that, at the time of his decision, the coroner remained subject to rule 3 of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 ("the Coroners Rules") and, applying the case law which relates to that rule, was obliged to hold an inquest as soon as practicable which, by implication, also imposed an obligation upon him to prepare the proceedings for an inquest hearing. Simpson J dismissed this aspect of the application on two separate bases. First, given his analysis of rule 3 (see paras [38]-[40] of the first judgment), he concluded that there was no obligation upon a coroner to carry out preparatory work where it was clear that no inquest was to be held, since the carrying

out of such work was clearly predicated on the fact that an inquest would be held. He further explained that there would be no utility in granting a remedy in any event (see paras [41]-[43] of the first judgment) on the basis that the relief sought "would serve no useful purpose as there would be less than a two week period between the making of the declaration and the guillotine falling on 1 May 2024." In those circumstances, "nothing of any import could be done in the intervening period." The same would apply to an order of mandamus.

[12] In relation to the second judgment, it is relevant to note that the applicant had previously sought a declaration and damages in relation to the delay in holding an inquest into the death of his son. He lodged proceedings in that regard in 2017 and further such proceedings later, which were then consolidated in order to be dealt with together. These were resolved on 15 December 2022 and the resolution involved a payment of damages to the applicant in respect of delay. (The respondents to the judicial review appear to have suggested that the resolution occurred at a later point, in March 2023. Nothing much, if anything, is likely to turn on this; but for present purposes I assume the more favourable date for the applicant is the correct one.) Nonetheless, the applicant continues to complain about delay in the inquest process which is in breach of article 2 ECHR. He contends that since the settlement of those earlier proceedings a further substantial period of time has elapsed during which no disclosure was received "apart from a very modest amount (33 pages) of non-sensitive material from the Ministry of Defence in March 2023." In his view, no material progress had or has been made in moving the inquest procedure on. As Simpson J recognised in his judgment, at the moment there are no inquest proceedings which are current or subject to case-management in respect of the applicant's son's death. What may or may not happen in the future in this case, like several others, depends upon the detail of the government's plans to amend, repeal and/or replace the Legacy Act in response to the *Dillon & Others* litigation.

[13] In the course of the second judgment, Simpson J – having considered the terms of the applicant's pre-action correspondence, affidavit and skeleton argument, in addition to the terms of the Order 53 statement – considered that the pleaded challenge related only to "the period from the appointment of the coroner to the date on which he indicated that the inquest could not be held prior to the statutory cut-off date in the 2023 Act" (see para [32]). He examined the actions which had been undertaken by the coroner and his team during that period (principally by reference to a chronology set out in the coroner's ruling of 2 February) and concluded, applying the guidance given in the judgment of Stephens J in *Re Jordan's Application* [2014] NIQB 11, that there was no culpable delay in Fowler J's management of the case such as to give rise to a further article 2 breach in this period (see para [39]). He rejected the respondents' invitation to dismiss that aspect of Mr McCord's challenge on the basis that it was academic. In summary, however, he held that "the challenge to the coroner in relation to his actions between the date of his appointment and February 2024 is unarguable."

The legal aid application and the impugned decisions

[14] On 2 October 2024 an application was made by Mr McCord's solicitor on the Legal Aid Management System (LAMS) for legal aid to prosecute the applicant's intended appeal, relying upon an opinion from senior and junior counsel. The application contained the following statement in the section requiring "a full detailed statement of the facts of the case to be completed in first person":

> "The Applicant's appeal is listed before the Lady Chief Justice on 10 October 2024. The Applicant is appealing the decisions of Mr Justice Simpson (please see judgements uploaded hereto). The Applicant was granted Leave in respect of one of the two limbs of his case. These appeal proceedings are of exceptional importance to the Applicant. This case concerns the decision of the coroner to cease all works in relation to our client's son's inquest in February this year, 3 months before the guillotine date imposed by the Legacy Act. It also concerns the delay occasioned in the inquest proceedings since the coroner was appointed. It is an important case and our client believes very strongly that the Respondent, an emanation of the State, has failed him in that he has never had an article 2 compliant investigation into his son's murder in almost 27 years and that much more could have and should have been done to advance his son's case."

[15] The application was refused on 4 October 2024. This decision was communicated in a letter from Mr Paul Andrews, Director of Legal Aid Casework ("the Director"). Mr Andrews' letter was in the following terms in relation to the proposed appeal of the first judgment:

> "In relation to the decision to stop preparatory work:
>
> It cannot be the case the rule three requires preparatory work to continue on an inquest which will not be held. It is difficult to improve on the comments of Simpson J at paragraph 39 of the 19th April judgment:
>
> > "… The carrying out of any preparatory work (the investigation), however, is clearly predicated on the fact that an inquest will be held. It is precisely for the purposes of holding an inquest, and for no other, that the preparatory work is done. If no inquest is to be held, there cannot be any duty to continue with work the carrying out of which is predicated only on an inquest being held. Judicial interpretation of a

> statute should avoid absurdity. In my view if the court was to conclude that rule 3 imposed on the coroner a duty to continue work which was preparatory to the holding of an inquest in circumstances where a decision has been made that no inquest would be held, such a conclusion would be absurd."
>
> The decision to cease the preparatory work was made in the context where Parliament (rightly or wrongly) had imposed a cut-off date which made it impossible for the inquest to take place. In this context, it would be irrational to withhold resources from other inquests which had a prospect of being heard, to expend on preparatory work for one which could not be heard."

[16] Mr Andrews' letter continued in relation to the proposed appeal against the second judgment in the following terms:

> "In relation to the wider delay challenge:
>
> It is difficult to see how the court can look behind the previous compromised proceedings, outside some special circumstance, e.g. that they were compromised on the basis of assurances which were not then delivered on. There is nothing in the papers to suggest such a special circumstance exists. In this context, it can only be any delay from that point onwards which could be considered, viz. December 2022.
>
> It seems clear from the timeline of events post the appointment of the coroner, that things proceeded as promptly as they could reasonably have been expected to. It seems very difficult to make a case that matters were slow-walked, or more precisely "obstacles or difficulties" created to the progress of the case, after the coroner was appointed and the previous claim was compromised.
>
> For the above reasons, it is considered unlikely that the Court of Appeal will reach a different conclusion than the High Court and, consequently, legal aid for the appeal is refused."

[17] An appeal of that initial decision and a 'tabling request' was submitted by Mr McCord's solicitor on LAMS on 7 October 2024. The notice of appeal set out, rather unnecessarily, the basic function of the Court of Appeal. It then referred to counsel's

"50-page opinion setting out how it is that Mr Justice Simpson has erred in law" and continued as follows:

> "With the aforementioned in mind, it is simply ludicrous for an LSA adjudicator to copy and paste from the Judgment of the lower Court with regards to generating a refusal letter. There is absolutely no reference whatsoever to senior and junior counsels' comprehensive opinion, which required a significant amount of time and effort on their part. Therefore, the LSA decision is defective in public law terms because there has been no consideration of our client's case in the slightest. We made this application on behalf of our client by setting out the law and the arguments with regards to how Mr Justice Simpson has erred in law – that is the basis of this application; and yet all that the LSA has done is copy and paste the impugned Judgment. This is entirely unacceptable and our client would have a strong judicial review challenge in relation to this refusal decision because it is simply wrong in law in that there has been no analysis of his case…"

[18] The notice of appeal also made the following points:

> "Another major issue is that this is a niche and novel situation. The closing down of inquests has never occurred in this jurisdiction before and indeed, it is a unique process even from a global perspective.
>
> Finally, it is a case that is of extreme importance to our client and again the LSA has not given any consideration to this fact."

[19] The notice of appeal indicated that an oral hearing was required. Reasons were provided for the request for an oral hearing, indicating that the application related to "a complex case that involves niche and novel issues", a case "of the greatest importance to our client", and "an important case for all of those other unfortunate families who have suffered as a result of failings by emanations of the State" such that it was characterised as "a case which is of the utmost importance to our client and to victims."

[20] As the applicant had requested expedition (because of the forthcoming review of the appeal proceedings, which had already been commenced, in the Court of Appeal on 10 October) the appeal was progressed as an urgent appeal under regulation 17 of the Civil Legal Services (Appeal) Regulations (Northern Ireland) 2015 ("the 2015 Appeal Regulations"). This permits the Director – where he considers that it is not reasonably practicable to convene a full appeal panel to determine the appeal

in accordance with regulation 15 because of the imminence of a hearing – to arrange for the appeal to be considered by a presiding member from the list of persons appointed under regulation 12. Presiding members will usually chair legal aid appeal panels. They must be either a solicitor or barrister of not less than seven years' standing. A presiding member sitting alone in an urgent appeal under regulation 15 has all the powers of a full appeal panel to determine the appeal. In this case, Ms Suzanne Rice, Solicitor, dealt with the appeal as a presiding member sitting alone. There is no challenge to this aspect of the procedure. Although this issue was raised as a complaint in the applicant's pre-action correspondence, it has not been pursued in these proceedings. (Notwithstanding that the legal aid appeal was dealt with by a single presiding member, in parts of this ruling I have for convenience referred to the decision making, as did the parties, as having been undertaken by "the Panel.")

[21] The Panel declined to grant an oral hearing and refused the appeal on 8 October 2024. Pre-action correspondence followed immediately thereafter. The Panel's refusal decision was expressed in a letter of 8 October 2024 from the Secretary to the Panel. The summary reason indicated was that, "It has not been shown that there are reasonable grounds for taking, defending or being a party to the proceedings." Further, more detailed reasons were then provided for the Panel's decision. The letter noted that the Chair had considered all of the papers lodged in the application. It then summarised the subject matter of the two judgments and noted that the appeal was to be reviewed on 10 October 2024 by the Lady Chief Justice.

[22] In relation to the second judgment of Simpson J (which is dealt with first in the Panel's reasoning) the letter of 8 October said the following:

> "In the judgment a detailed chronology of actions from October 2022 undertaken by the coroner and the coroner's service are listed. It is noted the oral submissions departed from the Order 53 statement to a broader argument on the efficacy of the Coroner's service however the Judge was clear in his decision, as no application to amend the Order 53 statement had been made, that the remit of the hearing would be curtailed to the actions of the respondents during the period 2022-24. Having considered Counsel's detailed opinion on this appeal issue, it is not shown in arguments there are reasonable grounds to challenge the decision the respondents had "acted entirely appropriate in the circumstances and within the broad ambit of reasonable responses." The Judge states further the coroner's actions between date of appointment and February 2024 are "unarguable" and, having considered the submissions made in Counsels opinion relating to delay, it is considered the grounds made to appeal do not meet the reasonableness test as outlined."

[23] In relation to the proposed appeal of the first judgment, the Panel decision letter continued as follows:

> "The other subject matter of appeal relates to the coroner's decision not to proceed with any preparatory work before the cut-off date of 1st May 2024. The Applicant subsequently raised an argument the facts of the death did not fall into a troubled related death to permit the Inquest to continue however this was rejected by the coroner in his decision dated 26th September 2024. Therefore, having considered Counsels opinion and skeleton arguments pleaded in the judicial review hearing of the inquest as a troubles related death falling into the remit of the Legacy Act, Counsel's opinion does not show reasonable grounds to challenge the decision that as the Inquest could not be conducted on/before 1st May 2024 and this was identified in February 2024 then to continue any preparatory work up to 1st May 2024 would be academic. It is of note also this case would transfer to ICRIR where disclosure/discovery processes can continue under the Commission's disclosure powers and whilst Counsels opinion explored a number of theoretical options as to how the ICRIR would/could operate following change in UK government leadership, at present the Legacy Act remains in place, in its current format, as it did at the date of the lower court decisions."

[24] The letter separately explained why no oral hearing on the legal aid appeal had been granted. It did so in the following terms:

> "An oral hearing was not considered necessary under Regulation 26(2) in this matter, as the criteria of Regulation 26(3) of the Civil Legal Services (Appeal) Regulations (Northern Ireland) 2015 were not met.
>
> It is not considered the subject matter met the criteria for an oral hearing as under regulation 26(a) it would not establish or uphold and develop new and important legal principles (whether the coroner delayed in progressing a case and whether preparatory work can be continued when an Inquest is stopped) nor under regulation (b) it would not have unprecedented impact in its consequences for the appellant and be of direct benefit to society nor is it in terms of its complexity and duration distinct from other cases as can be evidenced by the body of case law already established dealing with the application of the Legacy Act which remains in force."

Relevant statutory provisions

[25] The initial decision in this case was made by or on behalf of the Director under Article 14(2)(a)(i) of the Access to Justice (Northern Ireland) Order 2023 ("the 2003 Order"). Where an applicant is dissatisfied with the Director's decision as to whether to fund civil legal services for an individual by way of representation in the higher courts, they may appeal that decision to an appeal panel under regulation 4 of the 2015 Appeal Regulations. The test for the LSA and, on appeal, the Panel is set out in Article 14(2A) of the 2003 Order, as follows:

> "A grant of representation for an individual for the purposes of proceedings—
>
> (a) shall not be made unless the individual shows there are reasonable grounds for taking, defending or being a party to the proceedings; and
>
> (b) may be refused if, in the particular circumstances of the case, it appears unreasonable that representation should be granted."

[26] This also reflects the same requirements, amongst others, for the issue of a legal certificate for the purposes of higher representation in regulation 43 of the Civil Legal Services (General) Regulations (Northern Ireland) 2015 ("the 2015 General Regulations"). Regulation 43 is in the following terms:

> "(1) Subject to para [2], an application for a certificate under this Part shall not be granted unless—
>
> (a) it is shown that there are reasonable grounds for taking, defending or being a party to the proceedings to which the application relates; and
>
> (b) the applicant has signed an undertaking to pay any required contribution.
>
> (2) An application for a certificate under this Part may be refused if, in the circumstances of the case, it appears to the Director—
>
> (a) to be unreasonable that a certificate should be granted;

(b) to be more appropriate that an application for a certificate should be made under Part 4; or

(c) that only a trivial advantage would be gained by the applicant in taking, defending or being a party to the proceedings to which the application relates, or, owing to the simple nature of the proceedings, a supplier would not ordinarily be employed."

[27] The two key tests are therefore whether the applicant has shown there to be reasonable grounds for taking the appeal; and whether, nonetheless, in the particular circumstances, it appeared to the Panel unreasonable that representation should be granted. The key issue in this case is the reasonableness of pursuing the appeal.

[28] Under Article 14(3) of the 2003 Order, the Department of Justice ("the Department") may issue guidance about the carrying out of the Director's functions, to which the Director must have regard (although the guidance cannot relate to the carrying out of those functions in relation to an individual case and must ensure the Director's independence in individual cases). The Department must publish any such guidance. It has, inter alia, issued and published guidance to the LSA in relation to the assessment of prospects of success and cost-benefit for the purposes of the grant of legal representation in the higher courts. This guidance was mentioned by Mr Summers in submissions but has not featured in the arguments in the case to date.

[29] Part 4 of the 2015 Appeal Regulations provides for the procedure to be adopted by appeal panels. For present purposes, I need only set out in detail regulations 26 and 28. Regulation 26, insofar as material, provides as follows:

"(1) An appeal panel shall take its decision on an appeal without hearing oral representations, except as provided for in paragraphs (2) and (3).

(2) The presiding member shall direct an oral hearing if, and only if, they consider it necessary to receive oral representations in accordance with para [3].

(3) Before allowing an oral hearing of an appeal under para [2], the presiding member must be satisfied that the case which is the subject-matter of the appeal –

(a) would establish or uphold and develop new and important legal principles;

(b) would have an unprecedented impact in its consequences for the appellant and be of direct benefit to society at large; or

(c) is, in terms of its complexity and expected duration, distinct from other cases."

[30] The right to make oral representations appears to arise only in respect of the appellant. This follows from the provisions of regulation 25 which provides that appeal panels shall sit in private. This is subject only to regulation 25(2) and (3). Regulation 25(2) permits the secretary to the appeal panels to be present during the hearing of an appeal where it is necessary or expedient for the efficient and effective working of the panels. The only other permitted attendees, under regulation 25(3), are "the appellant and their representative" where oral representations are being allowed under regulation 26.

[31] Regulation 27 provides that an appeal panel shall have the same powers as the Director under Article 14(2)(a)(i) of the 2003 Order; and, inter alia, that it is the duty of the Director to have regard to an appeal panel's decisions and obey any directions given by a panel (including as to the issue or amendment of a legal aid certificate).

[32] Regulation 28 provides for the decisions of appeal panels and is relevant to the reasons challenges in this case. It provides as follows:

"(1) Every decision of an appeal panel (including any decision by the presiding member to allow oral representations) shall be recorded by the presiding member, together with the reasons for that decision, and shall be referred to as a decision notice.

(2) The decision notice specified in para [1] shall be in such written form as shall have been approved by the Director and shall be signed by the presiding member.

(3) As soon as practicable after an appeal has been decided by an appeal panel, a copy of the decision notice shall be sent to the appellant and given to the Director."

Denial of an oral hearing: error of law

[33] I deal first with the failure to accord the applicant an oral hearing of his legal aid appeal. The applicant contends that the Panel misinterpreted the proper meaning of the criteria specified in regulation 26(3) and/or misapplied those criteria as, in his submission, "the facts of the present case readily satisfy these criteria." He has further

contended that it is implicit from the decision-maker's consideration of regulation 26(3) that "the condition precedent stipulated in Regulation 26(2)… was met", so permitting the Panel to move on to address regulation 26(3). He therefore highlights what he considers to be an inconsistency between the Panel's conclusions that it was necessary to receive oral representations but that, at the same time, none of the conditions within regulation 26(3) was met.

[34] I do not consider that the Panel's decision displays any arguable error of law. In my judgment, the structure of regulation 26 is such that it operates as follows:

(a) First, there is a presumption that legal aid appeals will be determined without an oral hearing. That follows from the wording of regulation 26(1). An oral hearing is the exception, rather than the rule. An oral hearing will only be permitted "as provided for in para [2] and [3]."

(b) Second, the text of regulation 26 indicates that para [2] and [3] are to be read and applied together, not as separate or sequential requirements. This is clear from the reference to each of those paras in para [1] and particularly from the use of the words "in accordance with para [3]" within para [2]. Put another way, the presiding member should not first decide whether it is "necessary" to receive oral representations in the case and then, separately, consider whether one of the conditions in para [3] is met. Rather, it is the satisfaction of one of the conditions in para [3] which *makes it* necessary for oral representations to be received. That is the meaning and effect of the phrase "if… they consider it necessary… in accordance with para [3]."

(c) It is clear that, before allowing an oral hearing of an appeal, one (or more) of the three specified conditions in regulation 26(3) must be satisfied. Given that these are conditions precedent to an oral hearing being allowed, and that the question of whether an oral hearing is necessary is to be determined "in accordance with para [3]", those conditions should be addressed first.

(d) Although there is some tension between the use of the word "allowing an oral hearing" in para [3] and the phrase "shall direct an oral hearing" in para [2], the effect of those two provisions read together is that, where one of the regulation 26(3) conditions is met, the statutory scheme treats an oral hearing as necessary. The only circumstance in which an oral hearing is unlikely to be necessary in those circumstances is if the panel is able to determine it in the appellant's favour in full on the papers, such that the attendance of the appellant or their representative would be pointless.

[35] In light of the proper construction of regulation 26 as I apprehend it, the Panel made no error of law in refusing an oral hearing because (in its view) none of the criteria in regulation 26(3) was met. It is the applicant's submissions which misconstrue the regulation by contending that there is a separate and anterior question under regulation 26(2) of whether a hearing is necessary.

Denial of an oral hearing: inadequate reasons

[36] The applicant further contends that the decision to deny an oral hearing in this case was explained through "a mere recitation of the statutory conditions… and an assertion that these conditions were not satisfied." No reasons were given as to how these conclusions were reached, he submits.

[37] I have some doubt as to whether reasons are required by law simply because an oral hearing of a legal aid appeal is not convened. As noted above, the starting position under regulation 26 is that there is no entitlement to an oral hearing. There is certainly a right to reasons for the *substantive* decision on the appeal (see regulation 28(1) and (3)). However, as to the hearing procedure regulation 28(1) refers only to reasons having to be provided for a "decision by the presiding member to *allow* oral representations" [my emphasis]. In other words, reasons must be given for a decision to depart from the default position of the appeal being determined without oral representations. It seems to me that the statutory scheme does not require reasons to be given where the presiding member is simply not satisfied that the subject-matter of the appeal meets one of the regulation 26(3) conditions, as to which the burden lies on the applicant seeking an oral hearing. No decision is required in that instance; the default position is simply adopted. That appears to me to accord with the express requirement of reasons only for a positive decision to allow oral representations.

[38] Assuming in the applicant's favour, however, that reasons *are* required where an oral hearing has been requested by the presiding member does not consider a direction for an oral hearing necessary, I would hold that very brief reasons on this issue would suffice. In some circumstances, this may amount to little more than an indication that the presiding member was not satisfied that any of the requisite conditions were met.

[39] In the present case, Ms Rice provided brief reasons which are set out at para [24] above. As usual, the extent of any obligation to give reasons must be considered in the context of the issue and circumstances as a whole. In the present case, it is relevant to note that the applicant – because of the timing of the application and the imminent review of the appeal before the Court of Appeal – had placed the Panel in a position where it had to deal with the issue urgently and within a short period of time. Any reasons provided must, of course, be read fairly and as whole; and taking into account the informed nature of the audience (both the appellant and the Director of Legal Casework who made, or on whose behalf, the decision appealed was made). Finally, I note that the case made for an oral hearing in the tabling request did not specifically quote or address the wording of the various criteria in regulation 26(3). A number of points were made which may be relevant to some of the criteria, or parts of them, but without properly identifying which criterion or criteria in regulation 26(3) was said to be met and why.

[40] Although the applicant contended that his case was one of some complexity, no submission was made that, in terms of its "expected duration" also, it was "distinct from other cases." Accordingly, condition (c) was not in issue. Ms Rice appears to have addressed this out of an abundance of caution and also mentioned that there was a considerable body of case-law already dealing with the implications of the Legacy Act.

[41] The presiding member did not consider that the subject matter of the appeal "would establish or uphold and develop new and important legal principles" such as to satisfy condition (a). The law in relation to article 2 and delay in coronial inquests is well-trodden and has been the subject of much previous litigation in this jurisdiction. Indeed, in the High Court and in his notice of appeal to the Panel, the applicant relied upon lengthy passages from the judgment of Stephens J in the *Jordan* case which were presented as setting out the relevant legal principles. It is unsurprising therefore that Ms Rice did not consider the issue of "whether the coroner delayed in progressing a case", which turned on the application of established legal principle to the facts of this case, to be a "new and important" legal principle which would be established or upheld and developed in the appeal.

[42] Ms Rice appears to have considered the only other candidate for such a principle to be the question of "whether preparatory work can be continued when an inquest is stopped." Reading her reasoning as a whole, it is clear that this was also not considered to meet condition (a) within regulation 26(3) because of the limited importance of the issue. In the first instance, it was essentially a question of construction of rule 3 of the Coroners Rules. It arose in the unusual context of the Legacy Act bringing Troubles-related inquests to a close. This would not affect a wide range of cases (partly because the relevant inquests had already been closed). In dealing with condition (b) Ms Rice did not consider that the case would be of direct benefit to society, indicating that she took a limited view of the significance of the issue at stake for others.

[43] Turning to condition (b), the presiding member was not satisfied that the subject-matter of the appeal "would have an unprecedented impact in its consequences of the appellant and be of direct benefit to society at large." Again, the reasoning for this appears to me to be clear when her decision letter is read as a whole. The delay issue really related to a period of some three months' preparation which the applicant contended had been lost; but in the context of a delay in the case already of some 27 years, it is difficult to see how the appeal would have an "unprecedented impact in its consequences" for him (notwithstanding the sympathy which one may readily have for his circumstances). The much more significant impact upon the applicant in this context will have arisen from the provision made by the Legacy Act itself, which was not the target of these proceedings.

[44] Ms Rice considered that the undertaking of preparatory work up to 1 May 2024, when no inquest was then to follow, "would be academic." Although the applicant criticises this statement (arguing that this was the substantive issue which he wished

the Court of Appeal to consider, amongst others) it is clear that the presiding member took the view that what could be achieved in that period, in the overall scheme of the delay and prospects for concluding the article 2 investigation, was very limited. This is particularly the case where the Legacy Act 'remained in place' and the Independent Commission for Reconciliation and Information Recovery (ICRIR), which could assume responsibility for the investigation, would then be responsible for gathering and disclosing documents. There was also no basis advanced as to why the subject matter of the appeal would be "of direct benefit to society at large" in order to satisfy condition (c).

[45] In my view, when the decision letter is read as a whole, adequate reasons were provided as to why the presiding member did not consider the regulation 26(3) conditions to be met in this case. The applicant may disagree with the reasons; but that is a separate issue, and no rationality challenge to the merits of the decision on the regulation 26(3) criteria has been pleaded.

Denial of an oral hearing: conclusion

[46] For the reasons given above, I do not consider that the Panel erred in law as to the meaning or application of regulation 26. I doubt whether the presiding member was required to give reasons for declining to direct an oral hearing but, in any event, consider the reasons provided as being adequate in all the circumstances of this case. I do not consider the applicant has raised an arguable case with a realistic prospect of success in relation to the denial of an oral hearing on his legal aid appeal.

Refusal of legal aid: procedural unfairness

[47] In view of the immediately preceding discussion, I do not consider that the decision to refuse the legal aid appeal was reached in a procedurally improper manner. The applicant also raised a more general case of procedural unfairness, to the effect that fairness simply required an oral hearing in the circumstances of this case. I reject that submission. The 2015 Appeal Regulations have restricted the right to an oral hearing to a very limited category of cases. The conditions in regulation 26(3) are designed such that an oral hearing will only be considered necessary in cases of the utmost legal significance, public interest or duration and complexity. Relatively few cases are likely to meet these conditions.

[48] The statutory scheme has clearly catered for the question of when oral hearings will be required and shapes the requirements of fairness in this area. There is no challenge to the legality of the 2015 Appeal Regulations in this regard. Moreover, the nature of this decision-making process is not such that an oral hearing would ordinarily be required as a matter of fairness. The questions for the appeal panel are largely legal issues; they do not involve detailed fact-finding or the giving of evidence; the hearing is not at all adversarial; the appellant has a right to lodge detailed written submissions, as well as advices or representations from his solicitor and/or counsel (as the applicant did in this case); and there is no respondent to the appeal present to

whom the appellant may be required to respond. Should it prove necessary, the appeal panel can seek further information from the appellant without having to afford an oral hearing. This appears to me to be a matter of but, in any event, also follows from the provision that the panel has the same powers as the Director (see regulation 27(1) of the 2015 Appeal Regulations); and the Director has power to require the provision by the applicant of such further information or documents as may be required (see regulation 41(4) of the 2015 General Regulations).

[49] I do not consider that the applicant has an arguable case in relation to procedural unfairness as to the mode of the Panel's consideration. He was at liberty to submit whatever information he wished, which was considered by the Panel. I consider it unarguable that fairness required an oral hearing in breach of the restriction in regulation 26(1) of the 2015 Appeal Regulations.

Refusal of legal aid: inadequate reasons

[50] The kernel of this proposed challenge, in my view, is in the claim that the Panel provided inadequate reasons for its conclusion that it had not been shown that there were reasonable grounds for taking the appeal, ie in its assessment of the merits. Both parties referred me to, and relied upon, the decision of Keegan J (as she then was) in *Re Tate's Application* [2019] NIQB 102 in relation to the standard of reasons required in this context. That was also a judicial review challenge to a decision of a Civil Legal Services Appeal Panel. At para [20], Keegan J said this in relation to the reasons challenge:

> "By virtue of Regulation 28 the obligation to provide reasons is now embedded in the legislative structure. The argument made by the applicant is that the panel failed to comply with its statutory obligation to provide adequate and intelligible reasons as the decision notice does not disclose how any of the issues of fact and law were resolved by the panel. In answering this part of the challenge I make a number of preliminary observations. First, as far as I can see this case involves factual issues rather than a point of law. However, if a case involved a point of law such as a limitation point there would be a required to deal with that in the decision notice. Second, the use of a decision *notice* reflects the reality that reasons will necessarily be succinct and focused given that this is an administrative process which requires to be managed efficiently to allow for the administration of justice."

[51] Keegan J also went on to note that the court should be cautious when considering ex post facto reasoning, which does not arise in the present case, at least at this stage, since (unlike in *Tate*) the presiding member has not supplemented her

reasoning on affidavit. The remainder of the *Tate* judgment gives the following guidance:

(a) The context of the decision has to be taken into account. "What is adequate will inevitably depend on the subject matter of a case and the nature of the tribunal… It is therefore difficult to apply any precise or uniform standard" (para [21]).

(b) "Also a court must bear in mind that the requirements for reasoning cannot stretch to onerous limits." Thus, approving previous authority to similar effect, "In many cases very few sentences should suffice to give such explanation as is appropriate in the particular situation" (para [21]).

(c) Approving and applying *Re Waide's Application* [2008] NICA 1 (a case in relation to a criminal injuries compensation scheme appeal) in this context, "… the reasons did not need to refer to more than the main issues and should be read in a straightforward manner" with the applicant being "entitled to a statement of the reasons for dismissing [his appeal] rather than an exposition of the reasoning by which that decision was reached" (para [22]).

(d) "I do not suggest that reasoning has to be substantive but it should deal with the core issues in a sentence or two and not simply recite the statutory test" (para [24]).

[52] The applicant relies upon the fact that the proposed respondents were provided with a detailed opinion from counsel recommending that the decision of the first instance judge should be appealed and giving reasons for that advice. He complains that the Panel has failed to engage at all in relation to any of the applicant's arguments as to why the judge erred in the first judgment in relation to the correct interpretation of rule 3 of the Coroners Rules. He says that the Panel's decision merely asserts that the continuation of preparatory work would have been academic by reason of the commencement of the Legacy Act. He takes issue with that but says that this was, in fact, the substantive issue (or one of them) for determination by the Court of Appeal in the appeal for which legal aid funding was being sought.

[53] The proposed respondent contends that the reasons provided by the Panel do deal with the core issues in the case and allow the applicant to ascertain how the decision was reached, having taken into account all of the relevant information. Mr Summers contended that the modest obligation explained in *Tate* has been discharged. The proposed respondent further relied upon the fact that the applicant had requested expedition in relation to the decision on his legal aid appeal in order to have the decision on the application in advance of the case management review in the Court of Appeal which was scheduled for 10 October, which also provides relevant context to the adequacy of the reasons provided.

[54] In my judgment, the obligation to give reasons for a refusal of legal aid to challenge a decision of the High Court (by way of appeal to the Court of Appeal) must be viewed in a commonsense way. In such a case – barring circumstances where new evidence or new grounds are likely, exceptionally, to be permitted to be adduced or raised on appeal – the applicant's case will have been carefully considered by a High Court judge and rejected. Normally, certainly in proceedings for judicial review and as was the case in this instance, a detailed and reasoned written judgement will have been provided setting out the basis upon which the applicant's case at first instance has been rejected. Legal aid is not to be granted merely because a litigant contends that the first instance judge has erred, whether as to reasoning or result; nor merely because counsel instructed on their behalf has provided an opinion suggesting as much. If that were the case, the Director and the Panel would be abdicating their responsibility to apply the statutory test set out in the 2003 Order and relevant regulations.

[55] In assessing the reasonableness of pursuing an appeal – bearing in mind that the legal aid authorities will frequently address their minds to the approach a reasonable, privately paying party would take in the proceedings – the decision-maker is entitled to take into account the reasoning of the judge below and to form an assessment of the prospects of success of that being overturned on appeal. I expressly reject the suggestion which appears to have been made on the applicant's behalf in this case (in response to the initial decision on the part of the LSA) that there is anything wrong in quoting from the judgment of the first instance judge which is proposed to be the subject of the appeal. There will be cases where it may be perfectly proper to say that the first instance judge clearly got it right; just as there will be cases where the first instance judgment may be quoted to illustrate how or why the judge got it wrong or may arguably have done so.

[56] The mere fact that an opinion from counsel suggests that the judge erred at first instance and should have preferred the appellant's arguments over those of their opponent also does not mean that legal aid must be granted. Nor does it mean that the decision-maker is required to address in detail the variety of arguments presented in the opinion in order to accept or dismiss them, with reasons, in the way one might expect in a written judgment from a court. That is inconsistent with the statutory scheme and the guidance set out in the *Tate* authority discussed above; and would impose an unrealistic and unwarranted burden on those charged with making decisions in this field. The obligation upon them is to explain in basic terms why the relevant test for the grant of a (further) certificate has not been considered to be met. That should not merely be a repetition of the statutory criteria; but may be a pithy explanation of why the application of the statutory criteria do, or do not, warrant the grant of a legal aid certificate. Where a decision to refuse legal aid affirms the decision of the Director or adjudicator below, the reasons should also often be read together (unless there is some indication that the panel disagreed with or have departed from an aspect of the initial decision).

[57] Against that background, I turn to the reasons provided in this case. They were clearly compiled under a degree of time pressure and would, no doubt, have been more polished if further time had been available. (The quotations set out at paras [22]-[24] above are taken verbatim from the decision letter with typographical errors, etc. neither corrected nor specifically identified.)

[58] As to the proposed appeal against the second judgment, the reasoning is adequate in my view. The presiding member considered that the challenge was properly restricted by the judge to the period from Fowler J's appointment as coroner to his decision of 2 February 2024. Simpson J had gone on to consider that period and the actions taken during it in some detail; had directed himself on the law (specifically, the *Jordan* case referred to above) as to what had to be established in order to secure relief against the coroner or Coroners' Service; and had found that the respondents in the underlying judicial review had "acted entirely appropriately in the circumstances and within the broad ambit of reasonable responses." That was a decision on the facts of the case and, notwithstanding the content of counsel's opinion, the presiding member was not persuaded that there were reasonable grounds to challenge the decision, particularly in light of conclusive nature of the judgment below in which Simpson J found this aspect of the challenge to be "unarguable." That echoes the Director's reasoning (see para [16] above) that, in view of the timeline of events, it was very difficult to make the case that the test for culpable delay was met and it was unlikely that the Court of Appeal would reach a different conclusion from Simpson J. In short, the weakness of the case on this aspect of the appeal did not warrant the grant of a certificate funding the appeal. The applicant may disagree with this view but the basis of the Panel's decision appears clear enough.

[59] Mr O'Rourke complained that the decision notice did not deal with what he referred to as the "core submission" on the delay aspect of the challenge, namely that the relatively short period of delay which was the focus of this part of the challenge had to be assessed *in the context* of the overall delay which had gone before (such that an increased intensity of review was required because, with the passage of time, there was a greater obligation on the coroner to move matters forward expeditiously). I do not consider that the Panel was obliged to address this directly in order to discharge the obligation described in the *Tate* case to explain the basis for its decision.

[60] As to the proposed appeal against the first judgment, the Panel considered that the inquest was a Troubles-related inquest (as the coroner had recently held); that the Legacy Act therefore required it to be brought to a close on 1 May 2024; and that the additional three months' preparation time which was at issue on this limb of the case was "academic." I understand this to be an endorsement of the view, as at February 2024, that requiring further preparatory work for an inquest which was no longer going to be held would effectively be pointless. However, a further aspect of the reasoning also appears to me to be that the proposed appeal would similarly be academic (even if successful). That is because the decision letter refers to the Legacy Act remaining in force, as it had been at the time of each of Simpson J's judgments. The import of that observation can only be that the additional preparation or

disclosure which the applicant sought could not be undertaken now; and there was no immediate prospect, if any, of the inquest being revived (notwithstanding speculation as to reforms or amendments to the Legacy Act which the government might promote). This is reinforced by the reference to the ICRIR through which, the decision explains, "disclosure/discovery processes can continue." In short, it was not reasonable to pursue an appeal when what was at stake – three months' preparation time which had been lost and could not be recovered – was not worth the candle. This clearly chimes with Simpson J's conclusion in the first judgment that the claim was of no utility, even at that time.

[61] Again, the presiding member's decision letter must be read fairly and in the round; without expecting it to be drafted with the precision of a statute or contract; recognising that it was produced under time pressure as a result of the timing of the application and appeal; and as addressed to informed parties, in the context of all of the materials put before the Panel and the preceding decision which was under appeal. I consider that the reasoning provided – whilst relatively sparse and imperfectly expressed in parts – was adequate in all of the circumstances of the case to explain why it was not considered by the Panel that there were "reasonable grounds" for pursuing the appeal.

Refusal of legal aid: irrationality

[62] There were a number of discrete strands to the applicant's pleaded irrationality challenge, which are dealt with below.

[63] First, it was contended that the decision had considered an irrelevant consideration, namely the coroner's decision (subsequent to the judgments of Simpson J) that the death of the applicant's son was "conduct forming part of the Troubles" and therefore subject to the provisions of the Legacy Act. The applicant submits that this was not the issue in the judicial review application which had proceeded on the basis that the Act would apply to this inquest. I do not consider that this was an irrelevant consideration. The coroner's decision affirming that the Legacy Act applied to the inquest touching upon the death of the applicant's son was referred to in the opinion of counsel submitted in support of the application. In any event, since the judgments below proceeded on the basis that the Legacy Act did apply to the inquest, and the proposed appeal was to proceed on that basis also, the presiding member's reference to the more recent decision to that effect did not have any material effect on the decision-making.

[64] A separate issue relates to the impugned decision's mention of the trial judge's finding that the oral submissions in the case before him departed from the applicant's Order 53 statement to become a much broader argument on the efficiency of the Coroners' Service. The applicant does not accept that there was any departure from the pleaded case, as was explained in the opinion submitted by his counsel. He contends that the delay between 2022 and 2024 could not be viewed in isolation from the preceding delay; nor from the information available to the Coroners' Service from

an earlier stage that the inquest would generate an enormous volume of disclosure "incapable of being addressed within a reasonable time by conventional coronial processes." Thus, he says that it was argued that the court could not analyse the respondents' actions within the specified period without the broader context being considered, namely the prior delay which had already occurred.

[65] Again, I do not consider that to be an irrelevant consideration. In the second judgment Simpson J made a somewhat pointed observation (at para [15]) that the oral submissions made before him on behalf of the applicant "bore little resemblance to the case which was made in the applicant's pre-action protocol letter, the grounding affidavit and the skeleton argument." He further observed (at para [23]) that "in light of the way in which the matter was pleaded" the applicant's skeleton argument had "unsurprisingly" concentrated on the period from 2022 (when the previous applications were compromised) and February 2024. He summarised the applicant's criticism of the earlier stages of the process when setting out a summary of the applicant's oral submissions (at paras [24]-[26]). At para [32] of the second judgment, he held that there was "nothing in the pleaded case which identifies the core submission of the applicant", which was a root-and-branch challenge to the efficacy of the whole coronial system in the circumstances of this case. He considered the pleaded case was confined to the 2022-2024 period. In fact, the opinion submitted to the LSA supports this, simply with the point being made that the previous delay set the *context* for the consideration of the coroner's actions in the 2022-2024 period. However, I cannot see how it was irrelevant for the Panel to mention that the judge had considered the pleaded case to relate only to that period. The opinion provided makes clear that the central thrust of the challenge was to the "further delay" that had accrued since the previous judicial reviews had been settled.

[66] The remainder of the irrationality challenge could only be an attack on the merits of the decision not to grant legal aid. This was not developed in oral submissions by Mr O'Rourke on the basis that, since there were inadequate reasons for the Panel's decision (in his submission), it was not possible to explain how the conclusions were irrational.

[67] Given the points raised in the applicant's pre-action correspondence in relation to irrationality, however, it is appropriate to make a number of further observations.

[68] A central feature of the representations to the LSA and then to the Panel was that counsel had provided a 50-page opinion in support of the application, as if this rendered it impossible for the LSA or the Panel to refuse legal aid (or, at least, to do so without taking issue with the detail of the opinion). The court has been provided with a copy of the opinion which was submitted. The spacing in its layout is generous. In addition, large portions of the opinion (around 15 pages) summarise the chronology and facts, much of this replicating portions of the applicant's affidavit in the underlying judicial review. The challenge is summarised, even though this is also set out in the judgments to be appealed, and sections of the Order 53 statement are quoted. Over eight pages are taken up with a quotation from the *Jordan* judgment

which sets out uncontentious legal principles and which the judge applied. Several pages address the issue in relation to section 9(3) of the Human Rights Act, which did not arise below and would only arise on appeal in the event that the second judgment was overturned. Introductory and conclusion sections are set out, which account for a number of pages. Inter alia, the opinion speculates on possible outcomes of the government's ongoing consideration of reform of the legacy process. It is probably only around 10 pages which contain the meat of the opinion as to why it was argued the judge should have preferred the arguments made by the applicant in the judicial review. Of that, some pages are spent discussing the decision of McAlinden J (sitting as a coroner in another case) not to cease preparatory work, even though the judge had identified that McAlinden J did not refer to or address rule 3 of the Coroners' Rules, so that the assistance which could be gained from that ruling was limited.

[69] None of this is in any way a criticism of the opinion which was provided, which I have no doubt was the product of diligent and conscientious efforts on the part of the counsel concerned. However, it is simply to illustrate that reference to the page-length of an opinion may not be a particular indicator of the length of the key portions for the purposes of the application of the statutory test. As with a judgment, the length of an opinion is also plainly not determinative of the strength of the propositions it advances. Moreover, the legal aid authorities are not obliged to accept counsel's opinion unquestioningly, particularly where the substance of the arguments it makes have been independently considered and rejected by a High Court (or other) judge at first instance. It is entirely natural that – albeit bearing in mind their professional obligations towards the legal aid fund in this context – lawyers may wish to present their client's prospects in proposed litigation in as favourable a light as they legitimately can. The obligation upon the LSA and appeal panels remains that of applying the statutory test independently, exercising their own judgment and taking all relevant information into account.

Postscript

[70] I do not wish to leave this case without saying something about the tone and content of some of the representations made to the LSA in the initial application for a further legal aid certificate, the tabling request, and the notice of appeal. A solicitor is, of course, entitled to seek to advance their client's interests forcefully. Nonetheless, in my view some of the statements contained in the representations – and particularly those criticising the initial decision on behalf of the Director (see para [17] above) as having given the applicant's case "no consideration… in the slightest" or have merely "copy and paste the impugned Judgment" – ought properly to have been more moderate in tone. Hyperbole and unnecessary antagonism ought to be avoided in this context; and solicitors who engage with the legal aid authorities should bear in mind that those authorities play an important role both in facilitating access to justice and safeguarding public funds in the public interest. Whilst their decisions are, rightly, open to legitimate criticism and challenge, care should be taken that enthusiasm for one's client's case does not result in a lapse of the objectivity required in this context or in professional standards of courtesy.

Conclusion

[71] In light of the expedition which the applicant sought in these proceedings; the fact that the proposed respondent was unlikely to wish to add to the contemporaneous reasons provided in the decision letter; the ongoing appeal proceedings in the Court of Appeal; and the nature of the issues raised, which do not arise in a specialist field outside the court's experience; this was a case where I have addressed the leave threshold with a relatively intense scrutiny of the applicant's proposed grounds (recognising the "elasticity" inherent in the leave threshold in different contexts: see para [43] of *Re Ni Chuinneagain's Application* [2022] NICA 56). I have accordingly taken a strict view of whether the grounds indeed have a realistic prospect of success. For the reasons given above, I have concluded that they have not; and leave to apply for judicial review is therefore refused.