

Neutral Citation No: [2020] NIQB 57

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Ref: McA11300

ICOS No: 2020/39793 &
2020/41070

Delivered: 21/08/2020

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY
MRS JENNIFER McNERN

Applicant

and

THE EXECUTIVE OFFICE

Respondent

and

THE SECRETARY OF STATE FOR NORTHERN IRELAND

Notice Party

and

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY
MR BRIAN TURLEY

Applicant

and

THE EXECUTIVE OFFICE

and

THE SECRETARY OF STATE FOR NORTHERN IRELAND

Respondents

AND IN THE MATTER OF DECISIONS OF THE EXECUTIVE OFFICE
AND
THE SECRETARY OF STATE FOR NORTHERN IRELAND

Mr Danny Friedman QC with Mr David Heraghty (instructed by Higgins Hollywood
Deazley Solicitors) for the Applicant Mrs McNern

Mr Barry MacDonald QC SC with Mr Jude Bunting (instructed by Phoenix Law Solicitors) for the Applicant Mr Turley
Mr Michael Humphreys QC with Mr Philip McAteer (instructed by the Departmental Solicitor's Office) for the Respondent the Executive Office
Dr Tony McGleenan QC with Ms Laura Curran (instructed by the Crown Solicitor's Office) for the Respondent/Notice Party the Secretary of State for Northern Ireland

McALINDEN J

Introduction

[1] This is an application for judicial review brought by two individuals who claim entitlement to payments under the Victims' Payments Regulations 2020 ("the 2020 Regulations"), made under sections 10 to 13 of the Northern Ireland (Executive Formation etc) Act 2019 ("the 2019 Act"), an Act of the United Kingdom Parliament. Section 10(1) of the 2019 Act which came into force on 22nd October, 2019, imposed a duty upon the Secretary of State for Northern Ireland:

"by regulations to establish a scheme under the law of Northern Ireland which provides for one or more payments to be made to, or in respect of, a person who has sustained an injury as a result of a Troubles-related incident."

This is further to the commitment set out in paragraph 28 of the 2014 Stormont House Agreement to find a way to provide a "pension" for those most seriously injured in the Troubles.

[2] Section 10(2) of the 2019 Act mandated that the first regulations made under sub-section (1) had to be made before the end of January, 2020 and had to come into force before the end of May, 2020. The explanatory note to the Act states that "in practice this means that the scheme should be in operation by that later date." Section 10(3) of the Act stipulated that the regulations made by the Secretary of State for Northern Ireland had to make provision as to the eligibility criteria for payments under the scheme and this subsection set out a number of matters that could be dealt with in such criteria including how the injury was sustained and whether or not a person had been convicted of an offence. It is clear from these provisions that the Secretary of State was empowered to make regulations which contained eligibility criteria drafted in such a way so as to exclude from the scheme individuals convicted of an offence connected with the incident in which they sustained their injury.

[3] Section 10(6) of the 2019 Act stipulated that the regulations had to make provision for payments in respect of past losses so as to ensure that any such payment reflected the amount that the person would have received had the scheme been in force from the making of the Stormont House Agreement (23rd December,

2014). Section 10(10) stipulated that in making the first regulations under this Act, the Secretary of State for Northern Ireland had to have regard to any advice given by the Commissioner for Victims and Survivors for Northern Ireland. A discretionary power was conferred upon the Secretary of State for Northern Ireland to provide for other elements of the scheme in the regulations. Of relevance to the present applications, section 10(7)(a) and (b) permitted the Secretary of State to make regulations about the administration of the scheme including the establishment of a body or the conferring of powers on an existing body and “the funding of the scheme by money from the Consolidated Fund of Northern Ireland (whether by virtue of grant funding from a Northern Ireland Department, the appropriation of money by an Act of the Northern Ireland Assembly or otherwise)”. Section 10(8) provided that the regulations could confer discretion on a person and this provision was clearly intended to empower the Secretary of State to permit the scheme administrator to make discretionary decisions in special circumstances. Section 13(4) of the Act stated that section 10 would come into force on 22nd October, 2019, “unless an Executive in Northern Ireland is formed on or before 21 October 2019 (in which case they do not come into force at all).” The clear meaning of this provision is that unless the Northern Ireland Executive was formed on or by 21st October, 2019, the Secretary of State was under an obligation to make regulations setting up the aforementioned scheme and that obligation was not removed by the subsequent establishment of a Northern Ireland Executive.

[4] The Northern Ireland Executive was not reformed until 10th January, 2020 and in order to comply with his statutory duty, the Secretary of State for Northern Ireland duly made the Victims’ Payments Regulations 2020 on 31st January 2020. The Explanatory Memorandum describes the purpose of the Regulations in the following terms:

“This instrument establishes a Scheme for payments to be made to those permanently disabled as a consequence of injury caused by a Troubles-related incident. The instrument makes provisions for who will be entitled to payments and for how much, for decisions and appeals, and creates a new body to operate the Scheme.”

[5] Under regulation 1 a number of these Regulations came into force on 24th February 2020 and the remainder came into force on 29th May 2020. Regulation 3 and Schedule 1 which established and made further provision for the Victims’ Pension Board (a corporate body) came into effect on 24th February, 2020 as did paragraph 4(1) of Schedule 2 which specifically required the Board to “make arrangement for guidance to be issued to health care professionals regarding the assessment of the degree of relevant disablement.” Paragraphs 1, 4 and 5 of Schedule 3 also came into force on 24th February, 2020 and these also specifically relate to the statutory recognition of the Board.

[6] The Regulations which came into effect on 29th May, 2020 included those in Parts 3 to 8 of the Regulations and the other provisions of Schedules 2 and 3. Part 3 of the Regulations sets out the parameters of entitlement to the scheme. Of crucial importance are the provisions of regulation 5 which can only be interpreted as meaning that those individuals who satisfy the conditions contained therein have a legal entitlement to victims' payments from 29th May, 2020. The bringing into effect of the legal entitlement to victims' payments by regulation 5 on that date presupposes the existence of a mechanism for the adjudication upon entitlement to payments and the actual awarding of payments. That mechanism is the Victims' Payments Board and for the right conferred in law by regulation 5 to have any meaning, the Board's establishment had to occur before that date.

[7] Regulation 6 sets out the impact which a conviction or "exceptional circumstances" would or may have on a person's entitlement to a payment. Regulation 6(4) gives the Secretary of State power to issue guidance to the Board "regarding the circumstances in which a relevant conviction or exceptional circumstances make entitlement to victims' payments inappropriate." Regulation 8 stipulates the method and timing of applications to the scheme, and regulation 12 provides for the determination of those applications by the Board. Part 4 and Schedule 2 provides for the determination of entitlement, both by the Board and health care professionals. Part 5 makes provision as to payments under the scheme. Part 6 relates to information and disclosure. Part 7 sets out the mechanisms for appeal, further assessment and review. Part 8 contains miscellaneous provisions, including provisions dealing with the burden and standard of proof to be applied to assessments under the scheme and, along with Schedule 3, also sets out consequential amendments.

[8] The bringing into force of the provisions relating to the establishment of the Board on 24th February, 2020 with the remainder of the regulations including those provisions creating a legal entitlement to victims' payments and those provisions relating to the operation of the scheme coming into force on 29th May, 2020, can only mean that in law the Board had to be established and to some extent operational in the period between 24th February, 2020 and 29th May, 2020 and that the scheme had to be ready to open at the end of May, 2020. Given that the Board was required to make arrangement for relevant guidance to be issued to health care professionals in the period between 24th February, 2020 and 29th May, 2020, the Board had to be in existence during this period and that can only mean that all steps that were mandated in the 2020 Regulations which came into force on 24th February, 2020 which were related to the establishment of the Board and its ability to function to the extent required had also to be taken during that same period.

[9] The fact that regulation 8 stipulates that, except in limited and prescribed circumstances, applications can only be made during the period "beginning with the date advertised in the Belfast Gazette as the first date on which applications may be made, and ending on the fifth anniversary of the date so advertised, or such later date as the Secretary of State may determine" but does not stipulate the precise date

by which such an advertisement has to be placed in the Belfast Gazette, must be interpreted as importing some degree of flexibility as to when the scheme would actually open. But that does not mean that the scheme did not have to be ready to open by the end of May, 2020 or that the Board did not have to be in existence and to be functioning to a limited extent in the period between 24th February, 2020 and 29th May, 2020.

[10] Having regard to the manner in which regulation 6 is drafted, it can cogently be argued that for potential applicants for payments to be in a position to know in advance of an application how convictions are going to be treated by the Board and what type of circumstances would or might fall within the ambit of “exceptional circumstances”, any guidance which may be provided by the Secretary of State under regulation 6(4) should be published before the scheme opens for applications. Such guidance was only published by the Secretary of State last week. However, the absence of such guidance prior to that time cannot in any sense support an interpretation of the regulations as a whole which imports a meaning that steps to establish and render the Board functional at least to a limited extent did not have to occur in the period between 24th February, 2020 and 29th May, 2020.

[11] If the Victims’ Payments Board had to be established and to be functioning to a limited extent in the period between 24th February, 2020 and the 29th May, 2020, what other steps had to be taken to achieve this during this period? It is to be remembered that Schedule 1 of the regulations came into force on 24th February, 2020 and it is important to look carefully at Schedule 1 in order to ascertain what steps were mandated by the provisions of Schedule 1 and to consider to what extent those steps which were mandated by the provisions of Schedule 1 were essential in order to facilitate the establishment and functioning of the Board. Paragraph 2(1) of Schedule 1 to the 2020 Regulations states in the clearest unqualified and unconditional language that the Executive Office “must in writing designate a Northern Ireland Department to exercise the administrative functions of the Board on the Board’s behalf.”

[12] No body such as the Victims’ Payments Board can effectively function without provision being made for administrative support and it is the clear intent of the 2020 Regulations that a Northern Ireland Department would provide that administrative support to the Board and that a Northern Ireland Department would be designated to perform this role by the Executive Office. This obligation to designate a Northern Ireland Department was imposed on the Executive Office on 24th February, 2020 and for the Board to be in existence and at least to some extent to be functional by 29th May, 2020, the Executive Office was under a clear, unqualified and unconditional obligation to designate a Northern Ireland Department to exercise the administrative functions of the Board before that date.

[13] It is equally clear that no body such as the Victims’ Payments Board can effectively function without provision being made for funding of that body. Under paragraph 6 of Schedule 1, the remuneration, allowances, pension provision and

expenses of the Board members are to be determined and payed by the designated Department. How is the Board to be established and functional even to a limited extent in the period between 24th February, 2020 and 29th May, 2020 if basic matters such as remuneration, allowances, pension provision and expenses of Board members have not been addressed by the designated Department and how can this be done without a Department being designated by the Executive Office? Paragraph 6 of Schedule 1 stipulates that the “staff required for the Board are, with the approval of the Executive Office as to numbers, to be provided by the Department.” No body such as the Victims’ Payments Board can effectively function without staff. How can the staff necessary for even the limited functioning of the Board envisaged by the legislation during this period be provided if a Department has not been designated? Paragraph 6 of Schedule 1 also stipulates that “the office accommodation and equipment required for the Board are to be provided by the Department.” No body such as the Victims’ Payments Board can effectively function even to a limited extent without office accommodation and equipment. How can this be provided if no Department has been designated?

[14] The issue of general funding of the scheme is dealt with in paragraph 9 of Schedule 1 to the 2020 Regulations. Under this provision, the Executive Office may make to the Department grants of such amounts as the Executive Office determines for the purpose of funding (a) the costs of exercising the administrative functions of the Board, (b) the actual making of payments to victims, and (c) reimbursing applicants for payments in respect of their recoverable expenses. This provision is obviously made under section 10(7)(b) of the 2019 Act. No other provision is made for the actual funding of the scheme and it is clear that without such funding the scheme cannot possibly operate. The question of whether the apparently permissive language of paragraph 9(1) of Schedule 1 does actually impose an obligation on the Executive Office to make grants to the Department will be considered below but what is clear, is that any sums of money secured by the Executive Office from the Department of Finance for the purpose of enabling to the scheme to function are to be channelled through the designated Department by way of grants and that cannot take place without a Department being designated by the Executive Office. In this regard, it is important to note that the evidence adduced before the Court by the Executive Office indicates that £2,500,000 has been secured by the Executive Office from the Department of Finance and is available for use in setting up the scheme.

[15] Paragraph 3 of Schedule 1 stipulates that the Northern Ireland Judicial Appointments Commission must appoint the legal, medical and ordinary members of the Victims’ Payments Board. However, a person can only be appointed as an ordinary member of the Board if it appears to the Department that the person has appropriate knowledge or experience. In other words, in the absence of a Department being designated by the Executive Office, the appointment of ordinary members of the Board cannot take place. Paragraph 4 of Schedule 1 relates to the appointment of the President of the Board by the Lord Chief Justice. Paragraph 5 of Schedule 1 stipulates that the terms and conditions of appointment of the members of the Board including the President are to be determined by the Northern Ireland

Judicial Appointments Commission with the agreement of the Department. Therefore, such terms and conditions cannot be finalised without a Department being designated by the Executive Office. No appointments can be made or probably even advertised without such terms and conditions being finalised.

[16] All these various provisions make it abundantly clear that the designation of a Northern Ireland Department by the Executive Office is a crucial and central preliminary step in establishing the Board and enabling it to function and it is equally abundantly clear that for the Board to be established and functioning even to a limited extent in the period between 24th February, 2020 and 29th May, 2020, that step had to be taken at an early stage during this period. In essence, the clear, unqualified and unconditional language of paragraph 2(1) of Schedule 1 can only be interpreted as imposing a duty on the Executive Office to designate a Northern Ireland Department on 24th February, 2020 or as soon as possible thereafter so as to enable the Board to be established and functioning to a limited extent before 29th May, 2020. Any other interpretation of this provision in the context of the overall legislative framework is frankly obtuse, absurd and irrational.

[17] Mrs McNern and Mr Turley both challenge what is in effect the deliberate and intentional failure of the Executive Office to comply with its obligation clearly and unequivocally set out in paragraph 2(1) of Schedule 1 to the 2020 Regulations to designate a Northern Ireland Department to exercise the administrative functions of the Victims' Payments Board established by regulation 3(1). They also allege that the Executive Office's failure to make any grants to the designated Department under paragraph 9 of Schedule 1 is unlawful. Mr Turley additionally alleges that if the provisions of paragraph 2(1) and paragraph 9(1) of Schedule 1 can be interpreted as not imposing a requirement upon the Executive Office to designate a Department and provide grant funding to that Department within the period between 24th February, 2020 and 29th May, 2020 but instead enable the Executive Office, for political reasons, to delay taking such steps until outstanding political issues can be resolved, then the Secretary of State has failed to comply with his statutory duty imposed upon him by the provisions of the 2019 Act because he has failed to enact regulations which establish an effective and workable scheme under the law of Northern Ireland which provides for payments to be made to or in respect of a person who has sustained an injury as a result of a Troubles-related incident.

[18] Mr Turley's case against the Secretary of State is by its nature one which only arises if his case against the Executive Office fails in its entirety or succeeds on the merits but the remedy provided does not ensure the effective operation of the scheme within a relatively short period of time. For the reasons set out in the preceding and subsequent paragraphs of this judgment, I am satisfied that the Regulations made by the Secretary of State do provide an effective, carefully constructed, well thought out and workable scheme and this finding is clearly relevant to the issues that I am required to determine as between the Applicants and the Executive Office. On 19th August, 2020, after the conclusion of the hearing of this matter which took place on 17th and 18th August, 2020, I received correspondence

from Mr Turley's Solicitors requesting that I defer giving judgment on the merits of Mr Turley's challenge against the Secretary of State until the outcome of the Applicants' challenges against the Executive Office was made known and time allowed for the impact of any remedy granted to be assessed. This provoked a response from the solicitors for the Secretary of State and a further response from Mr Turley's Solicitors. Having considered this correspondence, I do not consider that the course of action urged upon me on behalf of Mr Turley is the appropriate course of action to adopt in this case. The challenge brought by the Applicants against the Executive Office does involve an analysis of the Regulations made by the Secretary of State. A finding in favour of the Applicants and against the Executive Office does at least to some extent depend upon a finding as to the efficacy of the Regulations made by the Secretary of State. Therefore, that issue is addressed in this judgment and the determination that I have made at the start of this paragraph will form part of the judgment of this Court.

[19] The case put before the Court by the Executive Office insofar as I understand it is that the Regulations as made by the Secretary of State for Northern Ireland do require the Executive Office to designate a Department but do not require the Executive Office to designate a specific Department within any particular timeframe. It is also argued on behalf of the Executive Office that the apparently unqualified requirement to designate a Department must be interpreted as being qualified so that the Executive Office is permitted to deliberately delay designating a Department for so long as it takes to bring about the resolution of two political issues which presently exist between the Ministers in the Executive Office and the Secretary of State for Northern Ireland.

[20] Stated in very brief and general terms, the two political issues referred to in the previous paragraph relate to the ultimate source of funding for the scheme and who should be entitled to a payment under the scheme. Until very recently, both Ministers in the Executive Office appear to have considered that it was appropriate to deliberately delay the designation of a Department in the hope of extracting some form of concession from the Secretary of State that the Westminster Government would provide a substantial part of the funding for this scheme. Mrs Foster, the First Minister, has now changed her stance and is prepared to immediately designate a Department even though the dispute with Westminster over funding has not been resolved. She is committed to finding the necessary money from the Northern Ireland Block Grant, if that proves to be necessary.

[21] The Deputy First Minister appears to still consider it both appropriate and necessary to deliberately delay the designation of a Department in order to put pressure on the Westminster Government to provide a substantial part of the funding for this scheme. However, this is, seemingly, not the real crunch issue for the Deputy First Minister. Ms O'Neill as Vice President of Sinn Fein is implacably opposed to the current approach to the issue of eligibility to payments under the scheme on the basis that many Republicans with relevant convictions will or may be precluded from receiving payments. This political dispute rages between the

Deputy First Minister and the Secretary of State but also involves the First Minister as she has publicly made it known that she is prepared to allow the scheme to come into operation based on the present eligibility criteria.

[22] The Executive Office can only act if there is agreement between the First and Deputy First Ministers and it is clear that agreement in relation to the eligibility criteria issue and to a lesser extent the funding issue is absent and, as a result, the Executive Office has not acted to designate a Department. The questions for the Court to determine are whether the interpretation of the 2020 Regulations put forward by the Executive Office is the correct interpretation and whether the political disputes described above entitle the Executive Office to delay designating a Department up to the present time.

[23] I have already stated in paragraph [16] above that the clear, unqualified and unconditional language of paragraph 2(1) of Schedule 1 can only be interpreted as imposing a duty on the Executive Office to designate a Northern Ireland Department on 24th February, 2020 or as soon as possible thereafter so as to enable the Board to be established and functioning to a limited extent before 29th May, 2020. This, in the context of the overall legislative framework, is the only reasonable and rational interpretation. I do not wish to labour the point but one matter which becomes painfully and abundantly clear when one considers the voluminous evidence provided to the Court by the Respondents in this case is that whenever any relevant Department Official, Northern Ireland Civil Servant or member of the Victims' Pension Implementation Oversight Group was either requested for or volunteered an opinion on either the mandatory nature of the requirement on the Executive Office to designate a Department or the urgency to do so, the clear and unequivocal answer or opinion that was given was that the Executive Office was duty bound to do so and that the matter was urgent. The First and Deputy First Ministers could not have been in any doubt about those two issues. This is not a case of one, other or both Ministers being under a misapprehension as to the nature and urgency of the duty. This is a case of both and more recently one deliberately refusing to comply with the obligation to designate a Department in the hope of extracting political concessions relating to funding and eligibility.

[24] Mrs Judith Thompson, the Commissioner for Victims and Survivors helpfully provided a detailed Affidavit to the Court which was affirmed on 14th August, 2020. It is to be recalled that under section 10(10) of the 2019 Act, the Secretary of State for Northern Ireland was under a duty to consider any advice provided by the Commissioner prior to making the 2020 Regulations. Mrs Thompson did provide detailed, thoughtful and constructive advice on a range of issues relating to the scheme, including the issue of eligibility. For present purposes I need only concentrate on the introductory remarks of Mrs Thompson which are set out in paragraph 4 of her advice. She said the following:

“The Commission is pleased to respond to the consultation in recognition of the fact that following the

enactment of the Northern Ireland (Executive Formation etc) Act 2019, the UK Government is currently legislating for a dedicated scheme which will have effect by 31 May 2020.”

“...a dedicated scheme which will have effect by 31 May 2020.” This was the clear purpose of the Act and the Regulations. Everyone involved in this process knew that this was the case. To attempt to persuade the Court to now interpret the 2020 Regulations as meaning something different by relying on *Regina (R and Others (Minors)) v Children and Family Court Advisory and Support Service* [2012] 1WLR 811, a case which is clearly not on point, is frankly disingenuous and it is disappointing to see such an approach being adopted and maintained by a Minister in the Executive Office.

[25] Before this Court, the Executive Office sought to argue that irrespective of when it came under an enforceable duty to designate a Department, the apparently unqualified requirement to designate a Department must be interpreted as being qualified so that the Executive Office is permitted to deliberately delay designating a Department for so long as it takes to bring about the resolution of the two political issues referred to above. The Executive Office does not deny that it is under a duty to designate a Department. On the contrary it is asserted on behalf of the Executive Office that it is determined to implement the scheme and designate a Department as soon as these political issues are resolved. The case being made on behalf of the Executive Office is that the Court is not constitutionally entitled or properly equipped to explore, address and adjudicate upon what are essentially political/policy issues. The Executive Office asserts that it is presently refusing to designate a Department in furtherance of promoting a purely political policy agenda and, therefore, the Court should be very wary of engaging in any form of scrutiny of the reasons put forward by the Executive Office for refusing to designate a Department.

[26] This argument does not withstand even the most cursory form of scrutiny. It is, in reality, arrant nonsense dressed up in the guise of reasoned legal argument. The Court does not have to resort to reliance on the *Padfield* [1968] AC 997 line of authority in order to dispose of this argument. I accept that the Court must always be wary of engaging in any form of intensive merits-based review when matters of policy and political decision making are concerned. For the avoidance of doubt the Court is not concerned with the merits of the political arguments at the heart of this case. The Court is only concerned with the legality of the actions of the Executive Office and will only consider the political arguments to the extent that it is necessary to do so to determine the legality of the actions of the Executive Office. That legitimate level of scrutiny by the Court leads to only one conclusion. Far from delaying designating a Department in an effort to ultimately ensure that the policy and objects of the scheme are better delivered by changes to the scheme which the Executive Office or one Minister in it wishes to see occur, what is in reality being done is that the Executive Office is deliberately stymieing the implementation of the

scheme in order to pressurise the Secretary of State for Northern Ireland to make a different scheme which will be substantially directly funded by Westminster and which will have very different entitlement rules. The actions of the Executive Office cannot be construed as a lawful decision to delay designation of a Department in order to promote the policy and objects of the legislation but rather an unlawful decision to refuse to designate a Department in an effort to have the lawful scheme promulgated in the 2020 Regulations replaced by a very different scheme. Under no circumstances can such stance be sanctioned or left unaddressed by the Court.

[27] Put in its starkest terms, the Executive Office seeks to persuade the Court that it is legitimate for the Executive Office to deliberately refuse to comply with a legal requirement set out in a legislative scheme promulgated by the Westminster Parliament in order to force changes to that legislative scheme. This is a truly shocking proposition. It demonstrates either wilful disregard for the rule of law or abject ignorance of what the rule of law means in a democratic society. In case it is the latter, I will attempt to set out what the principle of the rule of law actually means in a democratic society. In order to do so, I quote from a passage of the Tom Sergeant Memorial Lecture given by Lord Neuberger, the former President of the UK Supreme Court, on 15th October, 2013 where he stated:

“At its most basic, the expression connotes a system under which the relationship between the government and citizens, and between citizen and citizen, is governed by laws which are followed and applied. That is rule by law, but the rule of law requires more than that. First, the laws must be freely accessible: that means as available and as understandable as possible. Secondly, the laws must satisfy certain requirements; they must enforce law and order in an effective way while ensuring due process, they must accord citizens their fundamental rights against the state, and they must regulate relationships between citizens in a just way. Thirdly, the laws must be enforceable: unless a right to due process in criminal proceedings, a right to protection against abuses or excesses of the state, or a right against another citizen, is enforceable, it might as well not exist.”

I should add that the rule of law also means that no one, regardless of their rank, position or status, is above the law and all must comply with the law as it applies to them and the law as it applies to an individual or group must be applied in a non-discriminatory manner.

[28] In 2011 Sir Declan Morgan, the Lord Chief Justice of Northern Ireland, when giving the Fifth Annual Chancellor’s Lecture at the Ulster University said the following about the rule of law:

“The obligation which the law imposes on the courts is to strike a balance between the rights and freedoms of the individual and the protection of the rights and freedoms of the community. Where they arise these are often difficult balances to strike but the duty of the judiciary is to ensure that the balance is struck in accordance with law without fear or favour, affection or ill will. Every party before the court is entitled to a fair and impartial resolution of the dispute.”

[29] Adherence to these principles is fundamental to the nurturing and survival of democracy. It is all the more important in a post-conflict society for those in positions of leadership to promote, support and demonstrate assiduous adherence to the principles of the rule of law. Without such leadership, the risk of lapsing back into an openly fractured and lawless society cannot be underestimated. That is the importance of the issues at the heart of this case and that it is why it is vital for this Court to fearlessly and impartially proclaim the importance of the principles of the rule of law.

[30] For the avoidance of any doubt, I make the following specific findings:

- (a) The clear, unqualified and unconditional language of paragraph 2(1) of Schedule 1 to the 2020 Regulations can only be interpreted as imposing a duty on the Executive Office to designate a Northern Ireland Department on 24th February, 2020 or as soon as possible thereafter so as to enable the Board to be established and functioning to a limited extent before 29th May, 2020. It is incumbent upon the Executive Office to forthwith designate a Department under paragraph 2(1) of Schedule 1.
- (b) The actions of the Executive Office in deliberately refusing to designate a Department and thus stymieing the implementation of the scheme in order to pressurise the Secretary of State for Northern Ireland to make a different scheme which will be substantially directly funded by Westminster and which will have very different entitlement rules constitutes unlawful action on the part of the Executive Office. The Executive Office has acted unlawfully in deciding to refuse to designate a Department in an effort to have the lawful scheme promulgated in the 2020 Regulations replaced by a different scheme. It is clearly unlawful for the Executive Office to deliberately refuse to comply with a legal requirement set out in a legislative scheme promulgated by the Westminster Parliament in order to force changes to that legislative scheme.

[31] I now turn to address the second limb of the Applicant’s case which relates to the question of funding and the interpretation of paragraph 9(1) of Schedule 1 to the 2020 Regulations. Unlike paragraph 2(1) of Schedule 1, paragraph 9(1) is couched in permissive as opposed to mandatory terms. However, the Applicants argue that, as this is the only means of funding the scheme contained in the Regulations, this

permissive provision must in law give rise to a duty to provide grants to the designated Department in order to have an effective scheme established and functioning. The Applicants seek a declaration that the failure of the Executive Office to make such a grant to the designated Department is unlawful and further seek an Order of Mandamus requiring the Executive Office to make such a grant. The Applicants are at pains to stress that they do not seek an Order requiring the Executive Office to make any specific sum of money available to the designated Department but rather seek an Order that the Executive Office makes such grants to the designated Department as the Executive Office determines for the establishment and functioning of the Board.

[32] The Court is very mindful of the degree of restraint that has to be exercised by the judiciary when scrutinising funding decisions made by public bodies. The Court acknowledges the strength of the arguments advanced by the Applicants that, as paragraph 9 of Schedule 1 sets out the only provisions for the funding of the scheme and as the scheme clearly needs to be funded to properly operate, the language of paragraph 9 must be interpreted as imposing a duty to provide grant funding to the designated Department, particularly in circumstances where the Executive Office has succeeded in securing £2,500,000 from the Department of Finance in order to facilitate the establishment and initial operation of the Board. However, having carefully considered the competing arguments in this case, and having regard to the valuable legal guidance given by Gillen LJ in the case of *Bell* [2017] NICA 69 I am not persuaded that it would be appropriate to declare that the failure of the Executive Office to provide a grant of funds to the designated Department constitutes unlawful conduct at this stage. Two factors which I take into account in reaching this decision are the degree of discretion vested in the Executive Office concerning funding and the fact that to date there is no designated Department. If paragraph 9(1) is to be interpreted as imposing a duty to provide grant funding, that duty can only crystallise when designation has taken place. In light of what was stated in Court by Mr Humphreys QC on behalf of the Executive Office, I am hopeful that the determination of illegality by the Court in respect of the failure of the Executive Office to designate a Department will set in motion a chain of events which will result in grant funding being provided to a designated Department within a very short timescale.

[33] However, in order to ensure that the parties are left in no doubt as to interpretation that the Court places upon paragraph 9(1), I make the following specific finding. In circumstances where the 2020 Regulations do not make specific provision for the funding of the Victims' Payments scheme other than under paragraph 9 of Schedule 1 to the Regulations, the permissive language contained in paragraph 9(1) may in certain circumstances impose a duty on the Executive Office to provide grant funding to the designated Department. Such a duty could arise immediately upon the designation of a Department by the Executive Office and the circumstances in which such a duty would arise would include the situation where the Executive Office has already succeeded in obtaining funding from the

Department of Finance for the establishment and operation of the Victims' Payments scheme.

[34] These are the findings of the Court in respect of the challenges brought by the Applicants against the Executive Office. In relation to Mr Turley's challenge against the Secretary of State; arising out of and consistent with my finding that the Executive Office has acted unlawfully in failing to comply with its clear and unequivocal statutory duty to designate a Department, I dismiss this aspect of Mr Turley's challenge as I find that the Secretary of State has complied with this statutory duty and has made Regulations to establish a scheme under the law of Northern Ireland which provides for one or more payments to be made to, or in respect of, a person who has sustained an injury as a result of a Troubles-related incident. Their meaning is clear and they can only be interpreted as meaning that the Victims' Payments Scheme would be ready to come into operation from the end of May, 2020.

[35] I will adjourn this matter for a period of seven days to allow the parties to consider this judgment. At the adjourned hearing I will deal with the issue of remedies and also costs and the parties may wish to address me on the issue of whether costs should be awarded to be taxed on the standard basis or on an indemnity basis.