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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 TA (A MINOR)
ACTING BY HIS MOTHER AND NEXT FRIEND
FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF COMPENSATION SERVICES NI
AND THE DEPARTMENT OF JUSTICE

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Ronan Lavery KC and Conan Fegan BL (instructed by McIvor Farrell, solicitors) for the applicant
Tony McGleenan KC and Laura McMahon BL (instructed by Compensation Services NI and the Departmental Solicitor's Office respectively) for both respondents

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SCOFFIELD J

Introduction

[1] By these proceedings the applicant challenges two matters relating to his claim for criminal injuries compensation, namely asserted failures on the part of the relevant authorities:

(a) to "provide [him] with upfront funding for the necessary medico-legal expert reports in order to substantiate his claim for criminal injuries" ("the reports issue"); and

(b) to "provide any reasonable remuneration for solicitor and junior and senior counsel in addition to damages" ("the remuneration issue").

[2] The application concerns the operation of the Criminal Injuries Compensation Scheme 2002 ("the Scheme") in Northern Ireland and, in particular, what funding is available at public expense for a claimant under the Scheme to secure medical and

other reports in support of their claim and to pay lawyers to advise them in relation to the claim. As appears further below, the claim in question is a complex one and involves tragic circumstances on the part of the minor applicant. The applicant challenges decisions on the part of the respondents and, in the alternative, the terms of the Scheme itself. The first respondent is Compensation Services NI (CSNI), the agency responsible for the administration of the Scheme; and the second respondent is the Department of Justice ("the Department"), the department of the Northern Ireland Government with policy responsibility for the Scheme. CSNI effectively acts as the Department's agent in the operational delivery of the Scheme.

[3] The Secretary of State for Northern Ireland was initially included as a proposed respondent on the basis that he enjoyed a discretion under Article 4(6)(d) of the Criminal Injuries Compensation (Northern Ireland) Order 2002 ("the 2002 Order") to amend the provisions of the scheme. However, by operation of Article 4 of, and Schedule 1 to, the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, the Secretary of State's functions under the 2002 Order were transferred to the Department with effect from 12 April 2010 (other than those which transferred to the Northern Ireland Judicial Appointments Commission under paragraph 39 of Schedule 4 to the Northern Ireland Act 2009). Since then, the relevant power has been and remains a power of the Department, not a power of the Secretary of State. On this basis, the case against the Secretary of State was not pursued and he dropped out of the proceedings by agreement.

[4] The applicant was represented by Mr Lavery KC, who appeared with Mr Fegan; and the respondents were represented by Mr McGleenan KC, who appeared with Ms McMahon. I am grateful to all counsel for their helpful written and oral submissions.

The factual background to the applicant's claim

[5] The applicant in this matter is now a 14 year old boy who, in September 2008 when he was a 3-month-old baby, suffered catastrophic brain injury after an assault while he was in the care of his father. His father was later convicted of a relevant offence arising out of the incident. The applicant was taken to hospital shortly after the incident, when he started having seizures and his injuries began to come to light, and it was initially thought that he may have meningitis. Investigation noted retinal and subdural haemorrhages and rib fractures. Whilst still very young, the applicant later presented with global developmental delay, which was thought to be secondary to his previous brain injury.

[6] The applicant continued to suffer epileptic seizures for a number of years and had to take anti-convulsant medication. He has been diagnosed with serious and permanent brain damage and a range of other injuries and difficulties including previous bilateral subdural haematomas; bilateral occipital infraction; severe, permanent learning difficulties; multi-focal epilepsy; sleep difficulties; marked microcephalia; and behavioural issues, with suspected autism.

[7] The applicant was referred to the Child Development Clinic and has been attending the Community Paediatric Service since 2009. He was under neurosurgical review for 3-4 years and has been attending a special school throughout his schooling. His current school caters for children with severe learning difficulties and the applicant needs two-to-one help because of his hyper-activity. At the time these proceedings were commenced he was in first year and his mother averred that he could not even hold a pencil. At the time of Dr Hanrahan's first report, discussed further below, he was noted as still wearing a nappy and giving no indication of when he requires this to be changed. He has no danger awareness. He has received a variety of additional supports from statutory agencies and services.

[8] An application for criminal injuries compensation under the Scheme was made on the applicant's behalf by his solicitor on 18 November 2013. A variety of enquiries were made, and various reports and records obtained, in the period between 2013 and 2017.

[9] At the time these proceedings commenced, the proposed respondents had funded one report – from Dr Donnacha Hanrahan, Consultant Paediatric Neurologist – upon the basis of which the first respondent made a decision on the amount of compensation to offer the applicant. CSNI made arrangements for Dr Hanrahan to examine the applicant and then they considered his report. As appears further below, additional reports have since been sought; but the proceedings commenced on the applicant's understanding that CSNI would fund one medical report and one report only.

[10] The applicant was initially offered the sum of £178,825.00 by way of compensation on 25 April 2017. I understand that this offer was broken down as follows:

(a) £175,000 for serious and permanent brain damage (at Level 26);

(b) £8,500 for epilepsy which is fully controlled (at Level 13), with 30% of this (£2,550) being payable since it is a second injury;

(c) £7,500 for extradural haematoma, with 15% of this (£1,125) being payable since it is a third injury; and

(d) £1,500 for fractured ribs, with 10% of this (£150) being payable since it is a remaining injury.

[11] The applicant's mother was and is not satisfied with this sum. In her evidence she has explained that this is "not a lot of money whenever one takes into consideration the fact that [the applicant] requires 24-hour care and will require same for the rest of his life." That is plainly right if the premise – that the applicant requires 24-hour care – is correct.

[12] The applicant's solicitor applied for a review on 19 July 2017. The reasons for the request for review were detailed as follows:

> "The award is incorrect in all the circumstances.
>
> The award for brain damage should be assessed at Level 29.
>
> The award for epilepsy should be assessed at a level higher than Level 13.
>
> The award should include special expenses under paragraph 32 of the Scheme in relation to loss of earning capacity.
>
> The award should include special expenses under paragraph 35 & 36 of the scheme in relation to cost of care.
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> Compensation Services should bespeak expert reports to assess the special expenses mentioned above."

[13] There then followed correspondence between the parties which failed to take the matter much further. I return to this correspondence below. In the meantime, the sum originally assessed as payable by CSNI has been paid into an account where it is held for the applicant's benefit and can be paid out on application to CSNI. Funds have been released periodically on this basis for a variety of reasons.

[14] The applicant initially contended that the respondents had "refused to pay for any further reports at all" and had stated in their response to pre-action correspondence that the applicant must cover such further expenses. As appears further below, matters have since moved on.

[15] I understand that the applicant himself has no income and no means, other than the compensation which has already been paid to him by CSNI. The applicant's mother has provided evidence of her income, which consists of benefit payments including the applicant's higher-rate PIP payment and housing benefit. She is a single parent and also has two other children to support. I accept that her means are modest and accept her averment that it is a financial struggle for her to survive and that she does not have disposable income or savings at her disposal with which she could readily fund the payment for expert reports on an up-front basis.

Relevant provisions of the Scheme and Guide

[16] This case relates to the 2002 Criminal Injuries Compensation Scheme. A later scheme has been adopted, which is not relevant for present purposes given the date

of the applicant's criminal injury. Para 23 of the Scheme relates to guidance which is issued in relation to the Scheme and is in the following terms:

> "**23** A Guide to the operation of this Scheme will be published by the [Department of Justice]. In addition to explaining the procedures for dealing with applications, the Guide will set out, where appropriate, the criteria by which decisions will normally be reached. It will also give details of any body providing advice, assistance and support to applicants which has been designated for the time being under article 11 of the Criminal Injuries Compensation (Northern Ireland) Order 2002."

[17] The Compensation Agency, the predecessor of CSNI, has issued guidance in relation to the Scheme, entitled 'A Guide to the Northern Ireland Criminal Injuries Compensation Scheme 2002' ("the Guide"). I refer to relevant portions of the Guide below.

[18] Para 20 of the Scheme, which touches on the costs of representation, is in the following terms:

> "It will be for the applicant to make out his case including, where appropriate:
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> (a) Making out his case for a waiver of the time limit in the preceding paragraph; and
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> (b) Satisfying the [Department] that an award should not be reconsidered, withheld or reduced under any provision of this Scheme.
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> Where an applicant is represented, the costs of the representation will not be met by the [Department]."

[19] Accordingly, there is nothing to stop a claimant for compensation being represented if they so wish; but the Scheme does not allow for the costs of such representation to be met at public expense by means of any award for that purpose from CSNI. That is emphasised by para 1.3 of the Guide, which is in the following terms:

> "You do not need legal advice or representation in order to apply for compensation. If you do decide to seek legal or other advice to help you make your application, we cannot pay the costs of these services."

[20] The Guide also directs claimants, however, to the fact that there are other avenues of assistance open to a claimant for compensation under the Scheme. Para 1.3 continues as follows:

> "If, however, you feel you need assistance with an application under the Scheme, advice can be obtained from Victim Support for Northern Ireland (VSNI) who are specifically funded by the Government to assist victims, free of charge, with the compensation process."

[21] The Guide emphasises that VSNI will have specially trained advisors to assist claimants through the review and appeal stages; although VSNI cannot offer legal advice.

[22] Para 22 of the Scheme, which is an important provision in the context of hits case, provides as follows:

> "Where the [Department] considers that an examination of the injury is required before a decision can be reached, the [Department] will make arrangements for such an examination by a duly qualified medical practitioner. Reasonable expenses incurred by the applicant in that connection will be met by the [Department of Justice]."

[23] Para 4.2 of the Guide touches on this. It describes that, after an application has been made and acknowledged, "We will then normally make enquiries with the police, medical authorities and other relevant bodies to enable your claim to be assessed."

[24] As appears further below, a particular category of claim is one where either compensation for loss of earnings or "special expenses" are sought arising from the criminal injury. In each of these cases, this will only arise where there has been a loss of earnings or earning capacity for a period of more than 28 weeks.

[25] Compensation for loss of earnings is dealt with in paras 30-34 of the Scheme. The basic position is set out in para 30:

> "**30** Where the applicant has lost earnings or earning capacity for longer than 28 weeks as a direct consequence of the injury (other than injury leading to his death), no compensation in respect of loss of earnings or earning capacity will be payable for the first 28 weeks of loss. The period of loss for which compensation may be payable will begin after 28 weeks incapacity for work and continue for such period as the Secretary of State may determine."

[26] The method of calculating compensation for loss of earnings is then set out. This includes past loss (dealt with in para 31) and future loss (dealt with in para 32). As to past loss, this requires an assessment of the applicant's emoluments at the time of the injury and what they would have been during the period of loss; any emoluments which would have become payable to the applicant in respect of the whole or part of the period of loss, whether or not as a result of the injury; any changes in the applicant's pension rights; any necessary reductions to take account of other payments (for instance, social security benefits, insurance payments and/or pension which have become payable to the applicant during the period of loss); and any other pension which has become payable.

[27] As to future loss considered likely either by way of continuing loss of earnings or of earning capacity, the calculation is likely to be more complicated. CSNI will calculate an annual rate of net loss (the multiplicand) or, where appropriate, more than one such rate. This will be calculated on the basis of the current rate of net loss; such future rate or rates of net loss (including changes to pension rights) as may be determined; an assessment of the applicant's future earning capacity; reductions to take account of other payments, as mentioned above; and any other pension which will become payable. Any rate of net loss for this purpose must not exceed one and half times the gross average industrial earnings in Northern Ireland at the assessment according to published government figures (see para 34). Such an assessment obviously includes a medical element, based on the prognosis of the applicant's condition and its effect on his or her earning capacity, as well as assumptions or evaluative judgments about the type of employment the applicant would have achieved, their prospects for promotion, etc.

[28] Para 32 of the Scheme continues:

> "The compensation payable in respect of each period of continuing loss will be a lump sum which is the product of that multiplicand and an appropriate multiplier. When the loss does not start until a future date, the lump sum will be discounted to provide for the present value of the money. The multipliers, discounts and life expectancies to be applied are those contained in the Government Actuary's Department's Actuarial Tables for Personal Injury and Fatal Accident Cases in force at the time of the incident. Any rate of return prescribed by the Lord Chancellor under section 1 of the Damages Act 1996 shall be applied in discounting the lump sum."

[29] By virtue of para 33, if CSNI considers that the approach in the preceding paragraph is impracticable, the compensation payable in respect of continuing loss of earnings or earning capacity will be such other lump sum as it determines.

[30] Compensation for special expenses is dealt with in paras 35-36 of the Scheme in the following terms:

> "**35** Where the applicant has lost earnings or earning capacity for longer than 28 weeks as a direct consequence of the injury (other than injury leading to his death), or, if not normally employed, is incapacitated to a similar extent, additional compensation may be payable in respect of any special expenses incurred by the applicant from the date of the injury for
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> (a) loss of or damage to property or equipment belonging to the applicant on which he relied as a physical aid, where the loss or damage was a direct consequence of the injury;
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> (b) costs (other than by way of loss of earnings or earning capacity) associated with treatment for the injury provided by, or under arrangements with, a Health and Social Services Board or any other health services body within the meaning of the Health and Personal Social Services (Northern Ireland) Order 1991;
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> (c) the cost of private health treatment for the injury, but only where the Secretary of State considers that, in all the circumstances, both the private treatment and its cost are reasonable;
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> (d) the reasonable cost, to the extent that it falls to the applicant, of
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> (i) special equipment,
> (ii) adaptations to the applicant's accommodation, and
> (iii) care, whether in a residential establishment or at home,
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> which are not provided or available free of charge from a health services body such as mentioned in sub-paragraph (b) or any other agency, provided that the Secretary of State considers such expense to be necessary as a direct consequence of the injury, and

(e) the cost of the Office of Care and Protection, the curator bonis or the Court of Protection.

In the case of sub-paragraph (d)(iii), the expense of unpaid care provided at home by a relative or friend of the victim will be compensated by having regard to the level of care required, the cost of a carer, assessing the carer's loss of earnings or earning capacity and additional personal and living expenses, as calculated on such basis as the Secretary of State considers appropriate in all the circumstances. Where the foregoing method of assessment is considered by the Secretary of State not to be relevant in all the circumstances, the compensation payable will be such sum as he may determine having regard to the level of care provided.

36 Where, at the time the claim is assessed, the Secretary of State is satisfied that the need for any of the special expenses mentioned in the preceding paragraph is likely to continue, he will determine the annual cost and select an appropriate multiplier in accordance with paragraph 32 (future loss of earnings), taking account of any other factors and contingencies which appear to him to be relevant."

[31] Special expenses claims are dealt with in the Guide at paras 4.14 – 4.15. As is clear from the Scheme, such claims are possible where the claimant has been incapacitated, or is likely to be incapacitated, for a period longer than 28 full weeks. They will arise, therefore, in relation to more serious injuries. Special expenses may be awarded to cover the costs of specialist medical equipment, necessary adaptations to the claimant's home and care costs. There is no cap on awards for special expenses, or indeed on claims for loss of earnings.

[32] Supplementary guidance in this area was also issued by CSNI, entitled 'A Guide to Applicants for Loss of Earnings and Special Expenses.'

[33] Para 4.24 of the Guide explains the arrangements for any award made to a child to be held on trust. Certain payments made be made out of any such funds for the child's benefit. It is expressly highlighted that this may include release to cover reasonable legal fees. The relevant paragraph of the Guide is in the following terms:

"If the applicant is a minor, any award made payable will be held in trust by the Compensation Agency until the applicant attains the age of 18 (Paragraph 52 of the Scheme).

> An advance may be made from an award at the discretion of the Agency although there is a general presumption that the award will be held in it's entirety until the child reaches 18. Advances will only be made where it can be clearly shown that the funds will be used **solely for the advancement, education or long-term benefit of the minor**. The Compensation Agency may release funds held in Trust to cover legal expenses, but we must be satisfied that the expenses being sought represent reasonable legal costs. The Agency is guided in this by the fees set out in the section of the County Court Rules which details the appropriate fees in respect of criminal injury claims under the Criminal Injuries (Compensation) (NI) Order 1988."
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> [bold emphasis in original]

The applicant's grounds of challenge

[34] The applicant – or, more accurately, his mother and next friend acting on his behalf – asserts that he and she are impecunious and have no means of funding the obtaining of further medical reports which are required to properly value his claim. He claimed that by obtaining and relying on only one report, the respondents are in breach of, or are frustrating the operation of, para 22 of the Scheme. He also contended that the respondents were erroneously reading the provisions of para 22 as providing that the Scheme will only meet the expenses of one medical practitioner. Leave to apply for judicial review in respect of this alleged misdirection was refused because, by the time of the leave hearing in this case, it was clear to me that the respondents were *not* contending that para 22 of the Scheme permitted the obtaining at public expense of one medical report only. Indeed, they had offered to obtain further reports but, for reasons which are explained shortly, something of an impasse had developed as to how the further reports which were required should be identified and justified in the circumstances of the case.

[35] Further, or in the alternative, the applicant contends that the Scheme itself is *ultra vires* the 2002 Order because it fails to give effect to the Order in a number of respects, including the following. First, if the Scheme only permits one medical practitioner in all cases, the amount of compensation payable cannot be properly determined, as required by Article 4 of the Order and its underlying statutory purpose. Second, if payment of legal representation is excluded in all cases, including cases such as the applicant's, the amount of compensation again cannot be properly determined. He says that neither he nor his mother can present the case without legal assistance and that it is unfair to expect them to do so. On similar grounds, the applicant contends that there has been a breach of his rights under article 6 ECHR and his common law right of access to justice.

[36] The applicant then contends that the proposed respondents have fettered their discretion in a variety of respects by reason of failing to amend the Scheme, or to

consider its amendment, in order to provide for further payment of medical reports and legal expenses; and by the resultant absence of sufficient discretion within the Scheme to make such payments in the exceptional circumstances of cases such as this.

[37] The applicant also has a more sophisticated Convention challenge, relying on his rights under article 14 ECHR (in conjunction with his rights under article 1 of the First Protocol to the Convention). He claims that he has been discriminated against on the basis of a variety of statuses, namely (i) "as a minor who is unable to earn and is being treated less favourably than comparators, to wit an adult"; (ii) "due to his disability and [he] is being treated less favourably than comparators, to wit a person without disabilities arising from a severe brain injury"; and (iii) "due to his disability and [he] is being treated less favourably than comparators, to wit a person who suffered severe brain injuries who can be awarded an order for compensation from a defendant by a court." Similar arguments are made on the basis of article 14 taken in conjunction with articles 6 and 8 ECHR.

[38] There was a ground based on failure to consider material considerations on which leave to apply for judicial review was also refused since, in my view, it added nothing of substance to the other grounds pleaded and, in any event, I was not persuaded that the applicant had surmounted the appropriate evidential hurdle (even at the leave stage) to suggest that the respondents had left the relevant matters out of account.

[39] There is a considerable degree of overlap between the applicant's grounds. These were essentially all different, but related, ways of making the same basic points: that the Scheme should provide for public funding for all of the reports the applicant wishes to obtain to support his claim and for lawyers to advise him and advance his claim on his behalf.

The hiatus which arose after the applicant's request for review

[40] The respondents contend that, once the applicant had applied for review on 19 July 2017, he (in common with any such applicant seeking a review) must provide the basis for seeking the review, or any claim for special expenses, so that the CSNI can consider if further reports are necessary. On CSNI's case, they made several requests of the applicant's solicitors throughout 2017, 2018 and into early 2019 but received no information to support the request for the review or to substantiate the claim for loss of earnings and cost of care. CSNI contends that the special expenses claim form was not completed and that further requests for information supporting the request for a review to provide additional compensation for financial loss and cost of care were not substantively responded to.

[41] In particular, CSNI wrote on 5 September 2017 seeking "a schedule together with the evidence [the applicant] will be relying upon in support of the loss of earnings and cost of care claims." The letter indicated that, once this had been received, it

would be considered by CSNI's accountant. No response to this correspondence was received. Interim payment of compensation was then accepted on 26 January 2018.

[42] A further letter was sent from CSNI on 5 March 2018 to the applicant's solicitor reminding him that review evidence had to be submitted. A reply advised that the applicant was in the process of obtaining medical reports. On 20 September 2018 CSNI sent a further request asking that evidence be submitted for the purposes of the requested review. Again, no response was received. A further letter was sent by CSNI on 31 January 2019 requesting an update on the information to be provided, again receiving no response.

[43] Instead, a pre-action letter was sent to the Department on 5 April 2019 on behalf of the applicant. The proposed respondents replied on 24 April 2019. In terms of expert reports, they said that there is no provision under the Scheme to allow for the recovery of the costs of expert reports "save where it is considered that the examination of an injury is required before a decision can be reached." In those circumstances, "reasonable expenses incurred by an applicant to the Scheme will be paid." This was based on a reading of para 22 of the Scheme. The respondents relied on the fact that Dr Hanrahan had been instructed and had provided a report and that compensation had been paid on foot of that. The letter continued: "The 2002 Scheme does not provide for further reports once a decision regarding compensation has been made." This seems to me to indicate clearly that there would be no further reports funded by CSNI because they had already made a decision on compensation, notwithstanding that there was an outstanding review request made under para 59 of the Scheme. On this issue, the respondents' pre-action response concluded as follows: "Should an applicant for compensation elect to obtain their own medical evidence, they must cover those costs themselves."

[44] The respondents' pre-action response was even more emphatic in relation to the question of legal costs, pointing out that there was no provision within the Scheme to allow for the recovery of any such costs incurred; and that, having regard to para 20 of the Scheme, the opposite was the case. The correspondence further rejected the suggestion that the Scheme was unlawfully discriminatory in any way. It drew attention to the ability to make an application for payment out of the compensation which was held in trust for the applicant to fund additional reports and/or legal costs.

[45] The situation at the commencement of the proceedings, therefore, was that a decision had been made (and accepted) on the basis of Dr Hanrahan's report. The applicant applied for a review but without providing any additional reports. CSNI pointed out that it was for the applicant to support his request for a review with any relevant additional information and that he was free to pay for any further reports himself. Without saying clearly that, in every case, CSNI would pay for one medical examination only, the impression was given that CSNI would *not* be funding more medical reports (at least at that stage) in the present case. That prompted the applicant's next friend to commence these proceedings.

Developments after the issue of the proceedings before the grant of leave

[46] The proceedings were issued on 23 July 2019. By Case Management Directions Order No 1 in the case, the respondents were each to respond in writing to the applicant's Order 53 statement by 23 September 2019. They did so by way of written response dated 19 September 2019 ("the respondents' response").

[47] In the respondents' response, they made clear their view that – contrary to the applicant's suggestion – it is *not* the case that para 22 of the Scheme only permits one medical expert to be instructed. They said:

> "Should a decision not be reached on one report, or that report raises further issues relevant to the likely award, further report/s will be sought and paid for by the CSNI."

[48] CSNI further said that, notwithstanding the lack of information provided on the applicant's behalf to support the request for a review and the claim for special expenses, in September 2019 they contacted the applicant's solicitor to try to identify the particular issues arising, so that they could 'take a view' as to whether or not additional reports were now required. They suggested a meeting with the applicant's solicitor but, at the time of providing their response, said that they were awaiting a reply to this invitation. Again, CSNI confirmed that, "Should a report/s be required on review, then CSNI will meet the reasonable costs of that report/s." This represented an appropriate softening of the stance which had been adopted in the response to pre-action correspondence.

[49] The first respondent has also explained in further detail that an application can be made by the applicant to access the compensation award held by it in trust for him in order to fund additional reports, should CSNI itself not deem additional reports to be necessary. Such an application has not been made by the applicant; and I think it is fair to say that the suggestion that he should have to expend funds paid to him as compensation for his injuries has been met with disdain.

[50] CSNI's basic position in the respondents' response was that the judicial review application was premature because "the elementary step of engaging with CSNI regarding the review sought and the special expenses claim has not been taken by the Applicant."

[51] There followed a leave hearing before Keegan J in October 2019 at which, I understand, the now Lady Chief Justice encouraged the parties to try to reach a resolution of matters and the applicant's senior counsel suggested that the applicant's representatives would liaise with CSNI in order to provide an outline of the type of reports which they considered were required.

[52] By way of letter from CSNI dated 10 December 2019, it again suggested a meeting with the applicant's legal representatives in an attempt to progress the

application for a review "so that we may be more properly informed and give consideration to the need for further medical evidence and subsequent further report(s)." The applicant's solicitor's response of 28 January 2020 said that the CSNI's correspondence contained "two glaring inconsistencies": firstly, lack of clarity as to whether CSNI would be responsible for the cost of any additional reports; and, secondly, if the Scheme was designed to enable a claim for compensation to be made "with minimal legal input", as CSNI had suggested, why CSNI was nonetheless asking the applicant's representatives to "direct proofs" as to what reports may be required. In any event, that correspondence went on to suggest that:

> "As a preliminary observation it will be necessary to obtain the following reports:
>
> 1. A report from a psychologist.
> 2. An occupational therapy report.
> 3. A report from an orthopaedic consultant surgeon.
> 4. A care report into the care needs of the Applicant.
> 5. An accountancy report to detail the cost of care etc.
> 6. A report from a physiotherapist.
> 7. A report from a speech and language therapist.
> 8. A technology and disability report to detail special needs technology which may be available and of assistance to the applicant.
> 9. A report from architect as to any required residential adaptations.
> 10. A report from a paediatric neurologist."

[53] In addition to this lengthy list, it was suggested that, "As these reports become available Counsel will be required to direct upon further necessary reports as may be required including updates on specific issues and reports that may be required from any other identified experts." The applicant's solicitor's correspondence re-stated that this would require more than minimal input from the lawyers and that CSNI must cover both the costs of the reports and of the legal assistance provided to the applicant. It was further maintained that the applicant was entitled to the full amount of his compensation award without any deductions and that "anything else would be completely inconsistent with the purpose of the scheme and the scheme as a whole would operate in a way which is prejudicial to children and people with a disability."

[54] This correspondence was met with a response from CSNI of 4 February 2020. It confirmed that, "It has indicated on several previous occasions that CSNI will meet the costs of a further report or reports if they are considered to be necessary." However, CSNI objected to the lack of specificity and detail which had been provided by the applicant's representatives in order to justify the purported requirement to fund all of the additional reports suggested as necessary. It said:

> "Your correspondence of the 28th January 2020 provides no information as to the specific need for any of the identified reports. This does not afford the CSNI any basis to make a decision that might assist the Applicant."

[55] CSNI was concerned at the suggestion that it had asked the applicant's lawyers to "direct proofs" and seems to have thought that this had been suggested "in an attempt to gain a forensic advantage for the purposes of advancing judicial review proceedings" (i.e. to support the applicant's claim that significant funding for legal representation was required). CSNI said that it was not seeking legal advice from the applicant's representatives but that they had asked *the applicant* to identify what, if any, additional clinical reports would be necessary to allow the case to be advanced, which was not an issue on which legal advice was necessary. A further response was requested within 14 days.

[56] Predictably, the applicant's solicitor's response of 13 February 2020 suggested that explaining in detail why each report was required "would require significant, time-consuming, complex and crucial legal input" which was "self-proving of the applicant's case." It deprecated the suggestion that this information was requested of the applicant, since he was a disabled 11-year-old boy, so that this question was "unspeakably unhelpful." There was no attempt to provide the additional justification CSNI had requested as to why the long list of supplementary suggested reports was each necessary. The letter concluded: "In the absence of any adjustment to your position our client will be forced to proceed with his application for judicial review."

[57] A terse response from CSNI dated 17 February 2020 noted simply that there had been "no real attempt to engage with the requests" in their letter of 10 December 2019. An equally combative response was then sent by the applicant's solicitor on 18 March 2020, disagreeing that there had been no real attempts to engage with the CSNI requests; requiring CSNI to "set out in clear terms what our role is in regards to the applicant's Criminal Injury application and how we would be paid for performing any such role"; asserting that they had meaningfully engaged with CSNI; but describing CSNI's position as appearing to be "circular."

[58] I regret to say that the judicially-encouraged dialogue between the parties, such as it was, failed to advance matters to any material degree. In my view, responsibility for this lies, to some degree, on both sides. CSNI failed to take a common sense view of what further was required in order to properly assess loss (on foot of the issues identified in the request for a review), insisting on a detailed and elaborate justification from the applicant or his lawyers; and the applicant's representatives declined to provide a simple, persuasive justification for the additional reports for which they considered funding to be necessary, digging in on the basis that payment for their services was required to be guaranteed and provided up-front by CSNI. As a result, what ought in my view to have been a relatively simple exercise in working together to ensure that the appropriate reports required – in order to ensure that the minor

applicant who is at the heart of these proceedings had his review request determined quickly and efficiently, on the basis of proper information – turned into an unnecessary stand-off.

[59] I might also say that I was concerned to see an averment in the grounding affidavit of the applicant's mother that she has been advised "that legal fees are likely to be hundreds of thousands of pounds" in this case. This appears to be based on an assumption that junior and senior counsel would be required to be briefed and would be entitled to a very significant brief fee on the basis of the ultimate award in the case, similar to that which might be payable in a contested King's Bench action. Even then, it is difficult to see how an estimate of the type mentioned above would be appropriate.

Developments further to the grant of leave

[60] It was against the above background that I was then asked to adjudicate on the outstanding application for leave to apply for judicial review and did so, granting leave on the basis discussed above. At that time, I further urged the parties to try to work together, on a pragmatic basis and without prejudice to either's position on the substance of the challenge, in order to try to advance matters for the sake of the minor applicant. I also observed that, in the first instance, it could be noted that Dr Bothwell had recommended input from the relevant Learning Disability Team, so that it seemed to me that it would be helpful to obtain that input first. (Dr Janice Bothwell is a Consultant Paediatrician who provided a report, at the applicant's solicitor's request, on 5 August 2016. The applicant had been attending Dr Bothwell's Community Paediatric Service from November 2009. She has provided a helpful overview of the applicant's history and conditions.) I further observed that it would be helpful to ask Dr Hanrahan to give a view on what further reports, if any, would be required to assess the issues of the applicant's ongoing and future care needs and loss of earning capacity. The matter could then be reviewed once that indication had been received.

[61] In light of this encouragement, CSNI wrote to the applicant's General Practitioner requesting a range of information, in particular in relation to the applicant's care package. Belatedly, and after a number of chaser letters had been sent, a response was received which indicated a list of health care professionals involved in the applicant's care. This response also indicated that the applicant had no current package of care in place; and suggested that further information might be obtained from his disability social worker within Belfast Trust.

[62] CSNI also wrote to Dr Hanrahan asking for a view on what further expert reports may be required to accurately assess TA's application and claim for compensation under the Scheme. Dr Hanrahan was specifically asked to express his opinion on the appropriate level within the tariff at which an award should be made in respect of the applicant's brain injury (this being one element of the request for review). In his response, Dr Hanrahan confirmed that "if forced to choose between

the two" his assessment would be in favour of CSNI's categorisation (at level 26) rather than that advocated on behalf of the applicant (at level 29).

[63] Dr Hanrahan also recommended that an occupational therapist report be obtained "to give a better picture of [TA's] difficulties with his activities of daily life." On foot of this, CSNI also sought a report on care needs from Dr Diane Watson, Advanced Occupational Therapist in Acquired Brain Injury, seeking information on the applicant's current and future needs, his current care package, what may be required in the future, and regarding any current or future shortfall with regard to his care. Dr Watson responded indicating that she felt this report would be outside her area of expertise. A further occupational therapist, Naomi Brown, was therefore approached with experience of children with acquired brain injury for this purpose and provided a report.

[64] CSNI also wrote to Dr Bothwell, Consultant Paediatrician, who had previously been retained by the applicant's solicitor and provided a report in June 2016. She was asked to provide a report covering, *inter alia*, the extent of the brain injury sustained and the appropriate level of tariff which should be applied to the injury. She later indicated that she no longer treats the applicant but suggested that a report should be obtained from a Dr McGinn, who is now his treating paediatrician. Dr McGinn, Consultant Paediatrician, provided a report in due course.

[65] Both of these further reports were then provided to Dr Hanrahan, who was asked to review them and indicate whether his initial view of the applicant's injuries, and the subsequent tariff placement of the applicant at level 26, would now differ. He maintained his view that the applicant's brain damage was serious and permanent but that his epilepsy was fully controlled. In CSNI's view, this confirmed the correctness of his having been placed at level 26 of the tariff. However, a range of further expert input was now available in order to assist with the determination of the applicant's request for review. A further decision on the review remains outstanding pending the outcome of these proceedings.

The case of *C v Home Office & CICA*

[66] Considerable discussion at both the leave hearing and substantive hearing centred on the case of *C v Home Office & CICA* [2004] EWCA Civ 234, a decision of the Court of Appeal of England and Wales which considered and dismissed a challenge sharing many features similar to the present case.

[67] In that case, the claimant had been seriously assaulted at the age of 11 months by her mother's boyfriend. A blow or blows to the side of her head had left her hemiplegic, doubly incontinent, almost blind and severely disabled intellectually and developmentally. The claimant's grandparents, who had parental responsibility for her, submitted a claim on her behalf, through solicitors, to the Criminal Injuries Compensation Authority. The authority made a final award of £406,246 which, on review, was increased to the statutory maximum of £500,000. In order to establish the

claim, the solicitors had obtained a number of expert reports and had taken counsel's advice. They had incurred costs both in doing that and in advising the grandparents and representing the claimant's interests. As in the Northern Ireland Scheme, the relevant criminal injuries compensation scheme in force in England and Wales at that time provided that, where an applicant was represented, the costs of representation would not be met by the authority. The relevant scheme also made materially similar provision for examination of the injury, and the meeting of reasonable expenses incurred in that connection, as is provided in para 22 of the Northern Ireland Scheme (set out at para [22] above).

[68] The claimant issued proceedings challenging the compatibility of the relevant provisions of the criminal injuries compensation scheme with her Convention rights. The judge at first instance held, and the defendant authority then accepted, that it was required to reimburse the solicitors the costs of some, but not all, of the reports obtained on the claimant's behalf. The claimant appealed to the Court of Appeal, contending that compensation under the scheme and the underlying legislation was a right, so that the state was obliged to fund access to it for those who were otherwise incapable of establishing their claim; and that the limited provision in the scheme for the costs of examination and representation failed to meet that obligation.

[69] The Court of Appeal (Dame Butler-Sloss P, Clarke and Sedley LJJ) dismissed the appeal. Sedley LJ gave the decision of the Court. The judgment contains a number of helpful comments or observations upon the obtaining of medical reports. At para [16], Sedley LJ said this:

> "What seems to me plain, however, is that once a claimant has advanced a tenable claim under paragraph 18 [the equivalent of para 20 in the 2002 NI Scheme], the claims officer has to decide whether a medical examination is needed before a decision can be reached either on causation or on quantum. In other words, paragraph 20 [the equivalent of para 22 in the NI Scheme] is comprehensive: it covers those cases where there is a factual question about the occurrence of an injury, those where there is an aetiological question about the attributability of an injury to a particular crime and those cases where the only question is the extent of attributable injury. It is also plain that the discretion of the claims officer is limited by the material before him: he cannot lawfully elect not to arrange a medical examination if, objectively, the decision he has to make requires one. That is not to say that there will not be marginal cases where his decision can legitimately go either way; but the margin is likely to be a slim one."

[70] He continued, at para [18], as follows:

> "The judge held – as I too would hold – that paragraph 20 of the Scheme means that where a claims officer considers an examination to be necessary, it becomes the duty of the Authority to arrange it. It follows - and the CICA has now accepted this - that it is not lawful for the Authority to displace the function or the cost of arranging such examinations on to the claimant as part of the obligation to make out her case, though it may lawfully delegate it to her or her representatives as part of its own functions. As the judge also held, such costs are not costs of representation. The Authority has accordingly accepted that it is required to reimburse to the solicitors the costs of some but not all of the reports obtained and provided by them on C's behalf…"

[71] The nub of the case, however, was whether the express exclusion of the payment of legal costs from the Scheme was compatible with C's Convention rights. Some limited scope for payment of legal costs arose where these were not costs of representation but the costs of organising a medical examination or report in circumstances where the authority had effectively delegated this to the claimant's solicitor. At para [31], Sedley LJ explained this as follows:

> "The upshot of the judgment below, despite criticisms levelled at it, is in my judgment clear. It is that the cost of obtaining material which the Scheme requires the CICA to obtain must be defrayed by the CICA to the extent that the CICA calls or relies upon the claimant to provide it. Where the claimant is represented, this must ordinarily include the costs properly incurred by the representative in furnishing the material. Beyond this, the judge holds, the Scheme leaves costs to lie where they fall."

[72] The judge below (Mitting J) had held this was compatible with C's Convention rights "both because of the duty of inquiry placed upon the CICA itself and because, for the rest, C's claim was being conducted on her behalf by carers who "can make for her all decisions which an adult could make"" (see para [32] of the judgment on appeal).

[73] The applicant's article 14 challenge was dismissed fairly summarily in para [36] of the judgment:

> "[Counsel for the appellant's] argument on discrimination under article 14 quickly ran into difficulties. He tentatively submitted that the disadvantaged class to which C belonged was children; but this would not do because a competent teenager would not necessarily be

> disadvantaged in making a claim, while a legally incompetent adult would be among the comparators and outside the class. He next, therefore, submitted that the material class consisted of persons under a legal disability; but to the extent that such persons may have a competent adult to act for them, they too cannot be said to be disadvantaged. In the alternative he therefore submitted that the material class was persons with complex claims; but it is impossible, to my mind, to fit such a class into the taxonomy of article 14, which has to do with who people are, not with what their problem is. It became no easier when Mr Lamb elided his arguments and fell back on a class of persons under a disability with complex claims. Such a class, far from escaping the problems I have mentioned, encounters them all."

[74] Article 8 was found to have no bearing on the issue. Article 1 of the First Protocol was also found not to avail the appellant. Although an eventual award was a possession, the court did not accept that to be compelled to charge that fund with the cost of securing it was to be deprived by the state of part of the fund (see para [39] of the judgment). Even if that was wrong, and there was a deprivation of property, the court was further disposed to accept that capping the award without any uplift for legal costs was a justifiable deprivation made in the public interest (see para [40]).

[75] In the *C* case, the authority accepted that the applicant's article 6 rights were engaged, since the scheme involved determination of her civil rights. It disputed her argument – similar to that raised in the present case – that she had no realistic possibility of a fair hearing unless she was legally represented. In that case – again as in the present – there was never any question but that the claimant was going to receive a substantial award of compensation, out of which payment towards legal fees could be made. Accordingly, the court considered that the argument had to be that to compel the claimant to expend a significant part of her already limited compensation in order to obtain it was to deny her a fair hearing. This was materially different from a situation where a claimant's eligibility was in issue and "who needed lawyers at a point where there was no assurance of eventual funds to pay them."

[76] Having considered some of the Strasbourg jurisprudence, the Court of Appeal applied the tests set out in *A v United Kingdom* (2003) 13 BHRC 623, namely that the obligation to provide legal aid was limited to cases where "such assistance proves indispensable for effective access to the court, either because legal representation is rendered compulsory or by reason of the complexity of the procedure or the case" so that, without legal aid, "the very essence of the right is impaired" (see para [44] of the judgment).

[77] Although the court reserved for decision a case where an impecunious claimant had to demonstrate his eligibility for compensation without the help of a lawyer (i.e.

both that he was criminally injured and was not disqualified from receiving some or all of the award), it considered that the case before it was different because C's entitlement to compensation was always accepted. Even though she had incurred substantial legal costs, she was therefore never facing the prospect of being unable to pay these. The kernel of the reasoning on this point is set out in paras [50]-[51]:

> "But C's situation, even so, is not analogous with Mrs Airey's [in Application No 6289/73, *Airey v Ireland*], nor with that of an impecunious claimant needing to establish a primary entitlement. Her situation is that of a person whose right of access to the CICA is recognised and effective (though impeded by prevarication) but whose carers, very reasonably, want to ensure that the award she obtains is as full as it should be. To that end they have committed a part of the eventual fund to obtaining representation. It is the intent of the Scheme that where this happens it is not to be at the CICA's expense. That the Scheme could have provided otherwise is clear; but it does not follow that it was bound to provide otherwise in order to give effect to C's Convention right under article 6(1).
>
> In my judgment it has not been shown that the Scheme invades C's human rights in this regard. It diminishes her award by the cost of her representation; but, while many people would regard this as unfair, it does not deprive her of the possibility of a fair hearing within the meaning of article 6(1)."

[78] Mr McGleenan for the respondents relied heavily upon this authority, which he urged me to regard as extremely persuasive. Mr Lavery for the applicant contended that I should not consider it persuasive, partly on the basis that the article 14 jurisprudence has moved on considerably from the time when it was decided in 2004 and partly on the basis that it was simply wrong to suggest that any legal costs should be permitted to be taken from the sums awarded to the applicant as compensation for his criminal injury.

Relevant statutory provisions

[79] Although I have set out above some relevant portions of the Scheme and the related Guide, the starting point for consideration of the issues raised in this case is the 2002 Order itself. Article 4, headed 'Basis on which compensation is to be calculated', provides (insofar as material for present purposes) as follows:

> "(1) The amount of compensation payable under an award shall be determined in accordance with the provisions of the Scheme.

(2) Provision shall be made for—

(a) a standard amount of compensation, determined by reference to the nature of the injury;

(b) in such cases as may be specified, an additional amount of compensation calculated with respect to loss of earnings;

(c) in such cases as may be specified, an additional amount of compensation calculated with respect to special expenses; …

(3) Provision shall be made for the standard amount to be determined—

(a) in accordance with a table ("the Tariff") prepared by the Secretary of State as part of the Scheme and such other provisions of the Scheme as may be relevant; or

(b) where no such provision is made in the Tariff with respect to the injury in question, in accordance with such provisions of the Scheme as may be relevant.

(4) The Tariff shall show, in respect of each description of injury mentioned in the Tariff, the standard amount of compensation payable in respect of that description of injury.

(5) An injury may be described in the Tariff in such a way, including by reference to the nature of the injury, its severity or the circumstances in which it was sustained, as the Secretary of State considers appropriate."

[80] Article 5 deals with claims and awards. Article 5(1) provides that:

> "The Scheme shall include provision for claims for compensation to be determined and awards and payments of compensation to be made by the Secretary of State."

[81] Article 11 is headed 'Advice, assistance and support for victims.' It states:

> "The Secretary of State shall inform persons seeking compensation for criminal injuries sustained in Northern Ireland of any body designated by him for the purposes of this Article as a body providing advice, assistance and support to persons seeking compensation for such injuries."

The Bloomfield Review and the ensuing legislative debate

[82] A considerable amount of evidence provided in the proceedings made reference to the Review of Criminal Injuries Compensation in Northern Ireland led by Sir Kenneth Bloomfield ("the Bloomfield Review") which was established in September 1998 and whose report was published in July 1999. It was this review which formed the basis of a new tariff-based compensation scheme in Northern Ireland. Both sides in these proceedings have relied upon the review to some degree.

[83] The report contained 64 specific recommendations for change to the then existing compensation scheme in Northern Ireland. For present purposes, it is relevant to note that it recommended that a partial tariff system should be introduced, using a tariff approach for less serious injuries but continuing to apply common law principles where compensation was provided for more serious injuries. It was also recommended that the government should not pay the costs of successful applicants in claims for less serious injuries; but should, instead, fund Victim Support (NI) to assist applicants, thereby reducing the need for lawyers to be involved and reducing costs. The review recommendations however envisaged that the government should continue to pay the reasonable costs of a successful applicant in a claim for compensation for more serious injuries. This is dealt with in recommendations 24, 25 and 31. It was also recommended that reasonable medical expenses incurred by the claimant for required reports would continue to be met by the Agency.

[84] The Northern Ireland Office (NIO) considered and consulted upon the report of the review. In July 2000, the then Secretary of State announced in Parliament the government's response to the review, noting that the majority of the recommendations were to be accepted. The government enthusiastically embraced the tariff approach, which was designed (in part) to "largely make legal assistance in the making of claims unnecessary", as well as making the scheme more transparent and straightforward, allowing claims to be settled more quickly. As it was thought that legal assistance would generally be unnecessary with the new tariff scheme, legal costs were therefore no longer to be met by the scheme.

[85] In due course, in June 2001, the Minister for Victims announced the government's proposals for the new legislative arrangements. The proposals were published in the form of a draft Order in Council. A draft scheme was also published. The government did not adopt all of the Bloomfield recommendations. In particular,

the draft Order introduced a tariff-based scheme for *all* injuries. It also withdrew paid legal assistance from all applicants, contrary to the recommendation which had been made as part of the review that this should remain for the most serious cases. Instead, funding would be provided to Victim Support in order that it could assist victims and families in making applications.

[86] Although responsibility for these matters rested in Westminster prior to the devolution of policing and justice, an Ad Hoc Committee was established by resolution of the Northern Ireland Assembly in September 2001 to consider the proposals. This committee heard evidence from a number of stakeholders. One witness in the proceedings before the committee was Mr Frank Brannigan, then Chief Executive of the Compensation Agency. He explained that:

> "Under the 1988 Order, the agency relies on the Applicant's Solicitor to provide it with the bulk of the documentation to sustain liability. For instance, medical reports and pecuniary loss details are provided to the Compensation Agency by the Applicant through his Solicitor, which can take a long time. Under the new arrangement, the agency would obtain the medical evidence from the hospital or GP and also the pecuniary loss details. Therefore, the onus would shift to the agency to form the claim."

[87] Under questioning from the committee about who would "foot the bill" if a claimant needed further specialist medical evidence, Mr Brannigan confirmed that the Compensation Agency would obtain this and pay for it. When challenged about the non-availability of funding for legal assistance, Mr Brannigan relied upon the new tariff scheme being much more clear and simple, so that claimants would no longer need legal advice. He added that, if a claimant still felt that they wanted such advice, they would have every right to seek it but that they would have to fund that themselves: "The difference is that the public money that funded legal advice under the existing compensation scheme is now being used to widen access to cover more victims."

[88] The Victim Support organisation also gave evidence to the committee. Its view was that the withdrawal of funding for legal representation should result in little disadvantage to the majority of claimants. However, it recognised that certain cases were particularly complex and, in those cases (citing fatal injury cases as the most likely to be complex), thought it advisable to encourage applicants to seek legal advice "to determine the appropriate calculations required for the application." It would continue "to provide other practical and emotional assistance as possible" in such cases.

[89] The Assembly Committee itself made a number of recommendations. It recommended that representation and the provision of advice to victims (in all cases) should be by the legal profession, rather than Victim Support; and that paid legal

assistance should continue to be provided to persons who made successful applications for compensation. This was also the view of the Northern Ireland Human Rights Commission. One of the reasons for this recommendation was the issue of "accessibility", namely the ease of access to a local solicitors' firm as compared to VSNI's mere eight branches across Northern Ireland.

[90] Back at Westminster, the First Standing Committee on Delegated Legislation also debated the draft scheme. Before that committee, the relevant Minister highlighted the savings to be made as a result of the withdrawal of costs being paid for legal services (some £8m in the following year). He also emphasised that it was not proposed to replace legal advice with advice from Victim Support. The withdrawal of funding for legal assistance proceeded on the premise that "legal assistance to process an application will not be required." He added that, "The agency itself will have the obligation to ensure that the process is expedited and that the onus will not be on the Applicant."

The Green Form Scheme

[91] The respondents in this case also rely upon the fact that there is some public funding available to assist claimants under the Scheme (if financially eligible) in the form of making an application to the Legal Services Agency (LSA) for extensions under the Advice and Assistance Green Form Scheme. This was raised by the respondents in their initial evidence but only expanded upon fairly late in the day in the course of the proceedings. It has been the subject of some evidence before me.

[92] A solicitor may apply for public funding to offer advice and assistance as provided for under the Access to Justice (Northern Ireland) Order 2003. This permits advice and assistance to be provided for civil legal services relating to matters of Northern Ireland law. There are a number of exclusions, but these do not relate to the criminal injuries compensation scheme. Advice which may be provided includes oral or written advice on the application of the law to any particular circumstances that have arisen in relation to the individual seeking the advice and "as to any steps which that person might appropriately take, having regard to the application of the law to those circumstances." Assistance in this context means "any assistance (other than advocacy) to any individual in taking any of the steps which an individual might take, including steps with respect to proceedings, having regard to the application of the law to any particular circumstances that have arisen in relation to him, whether the assistance is given by taking such steps on his behalf or by assisting him in taking them on his own behalf" (see article 2(2) of the 2003 Order). In order to qualify for funding for such advice and assistance the applicant must also be financially eligible (as determined by reference to the Civil Legal Services (Financial) Regulations (Northern Ireland) 2015).

[93] Under what is known as the Green Form Scheme there is no limit on the number of extension applications which may be made to the LSA or to the amount of extra hours which may be requested for the provision of such advice and/or

assistance by a solicitor. These requests are dealt with through the LSA's digital case management system, LAMS. The respondents therefore contend that a solicitor assisting a claimant such as the applicant could apply for extensions for the purposes of obtaining medical and/or accountancy evidence in high value cases. The respondents contend that this could 'bridge the gap' between what CSNI obtain and what the applicant's own representatives may deem appropriate, although it is recognised that this scheme does not extend to representation.

[94] For their part, the applicants' representatives are sceptical about the practical assistance the Green Form Scheme might provide in such circumstances. They make the point that there is no guidance in relation to the use of the scheme for this purpose and contended that its use for criminal injuries compensation claims is generally unknown amongst practitioners. They also contended that this does not remedy the issue in relation to payment for the involvement of counsel. It is generally limited to initial advice and assistance, designed to operate at a stage *before* proceedings are taken. It is not designed to operate in place of a substantive grant of civil legal aid. The applicant's solicitor went as far as to say that they were "confident that there would be real resistance and opposition from the Legal Services Agency with regard to trying to seek cover for advice/assistance and authority for expert reports in this type of case…" They also drew attention to a potential circumstance where the claimant was not financially eligible for this type of assistance, although it was not argued that that would apply in the present case.

[95] A point of some possible substance which was made on the part of the applicant was that the LSA will generally expect other sources of funding to be exhausted before recourse is had to the legal aid fund. Where it is the case that CSNI *does* fund the provision of some reports, the applicant's representatives are concerned that the LSA would not go behind that to provide public funding for other reports which CSNI had not deemed necessary (but which the claimant's representatives did).

[96] In a document provided by Mr Paul Andrews, the Chief Executive of the LSA, for the assistance of the court, the following is noted:

> "In general terms, the Agency does not refuse funding for criminal injury matters under the advice and assistance scheme on an application by a solicitor on behalf of an eligible client. All requests for extensions are assessed based on the reasonableness test outlined above… [This test is set out in regulation 32 of the Civil Legal Services (General) Regulations (Northern Ireland) 2015.]
>
> In respect of requests for reports, the Agency would be entitled to determine that it is not reasonable to pay for reports when they are not deemed necessary by the determining authority given the fact that the determining authority will pay for reports which it considers to be

> necessary. This is consistent with the provisions of article 11(2) of the Order which says "In funding civil legal services the Department shall aim to obtain the best possible value for money."
>
> Further, should the determining authority not consider that a report was necessary and proceeds to determine on the basis of the application, if there is a subsequent review/appeal and the determining authority is not commissioning a report, in appropriate circumstances it may be "reasonable" to allow a report to be secured through advice and assistance.
>
> However, all applications are dealt with on a case by case basis and it is for the Applicant's Solicitor to show how the reasonableness test has been met in each request."

[97] Mr Andrews' briefing paper then sets out in an annex some statistical information specifically in relation to applications for advice and assistance, and for extensions under the Green Form Scheme, for criminal injuries cases from 1 July 2019 to January 2022. This discloses that 588 requests were made for such advice and assistance, of which 481 were granted. Of those 481 applications granted, 149 extension requests were made, of which 127 were granted. The sums requested amounted to over £51,000; and the public funding granted amounted to over £35,000. Some 34 requests were made for expert reports (29 of which were for psychiatric reports). Over £9,000 of funding was granted to secure expert reports. 79 separate solicitors' firms made requests for such advice and assistance to be granted; and 18 of those firms made applications for extensions.

[98] On the basis of those statistics, I have been satisfied that, contrary to the scepticism expressed on behalf of the applicant's solicitors, the Green Form Scheme has been used by solicitors throughout this jurisdiction to seek and obtain public funding, including for the instruction of experts, when assisting clients making a claim for criminal injuries compensation under the Scheme or its successor scheme.

Obtaining and paying for medical reports

[99] As noted above, I considered there to be no merit in the applicant's challenge based on the premise that para 22 of the Scheme permits one, and only one, medical report to be obtained at public expense in support of a compensation claim. The respondents have firmly disavowed any such meaning or effect. The pre-action correspondence preceding these proceedings, and the application itself, were initially based on a false premise, namely that CSNI would not provide funding for or cover the cost of additional expert reports.

[100] Para 22 of the Scheme (set out at para [22] above) is worded in a way which might suggest that one examination only of the claimant's injury will be arranged. However, that is plainly not the meaning or effect of the paragraph; nor do the respondents so contend. There are well known principles of construction which indicate that, where a power is conferred, this may be exercised from time to time as the occasion requires; and that, where appropriate, a reference to a matter in the singular will include the plural: see, for example, sections 17(1) and 37(2) of the Interpretation Act (Northern Ireland) 1954. There is nothing to preclude CSNI arranging, and paying for, more than one examination of the applicant or more than one medical report to be prepared in relation to his medical condition. That is a matter of common sense where, for instance as in this case, complex injuries require examination by medical practitioners of different specialties.

[101] In my view, the words "examination of the injury" should also be given a wide interpretation, consistent with the statutory purpose, as referring to examination of the *effects* of the injury. Para 22 itself discloses that the purpose of such an examination is where this is required "before a decision can be reached." That indicates that such an examination by a medical practitioner can be directed towards any element of either eligibility for, or the appropriate level of, an award under the Scheme, including where a medical report is necessary for proper consideration of a claim for loss of earning capacity or special expenses (such as a claim for care costs).

[102] Indeed, this is reflected in the following averments of Ms Catherine Rodgers, the Acting Head of CSNI, on its behalf:

> "The position of CS is that they will fund the cost of the fees for obtaining copies of GP notes, GP medical information reports, dental reports and hospital reports from the treatment providers whom the Applicant has already attended in relation to the criminal injury they have suffered. CS will seek a report if none exists and such a report seems reasonable to permit assessment for the purposes of the tariff. CS may also need to seek further medical reports from other specialists in order to make a decision and take a broad view of what examinations and reports may be needed.
>
> This may include medical reports sought from approved Psychiatrists, Dentists and Orthopaedic specialists; the fees for these specialists will be paid by CS…"

[103] As to the number and type of reports which are required in a case such as this, this must be considered in the context of the types and limits of compensation payable under the Scheme and the manner of its calculation. As paras 24(a) and 26 of the Scheme make clear, where the victim has suffered a non-fatal injury, a standard amount of compensation is payable determined by reference to the nature of the injury

in accordance with the scale of fixed levels of compensation. In other words, the Scheme is a tariff-based scheme. Leaving aside the question of lost earning capacity and special expenses, the compensation payable as what one might call 'general damages' for the injuries is determined by reference to the particular category into which the injury falls. Once the variety of relevant injuries have been recognised, it is really the identification of the appropriate category to which each injury should be assigned to which the medical reports should be directed.

[104] In many cases, the reports or records which ought to be obtained will be obvious. As Ms Rodgers' averment above indicates, two obvious sources will be those who provided and/or are providing the treatment in respect of relevant injury and (if different) the claimant's GP. In other cases, where a more specialist report may be required, this will have to be determined by reference to the description of the injury and its effects set out in the claimant's application for compensation.

[105] I reject the applicant's case that he is entitled to be funded "up-front" and "as of right" to enable him (or his next friend and/or solicitor on his behalf) to obtain expert medical reports of their own choosing and at their own election. That is to misunderstand the nature of the Scheme. Para 22 of the Scheme makes clear that it is for the Department, or CSNI acting on its behalf, to make arrangements for medical examinations and reports. As mentioned during the debate on the draft Scheme, the onus is on CSNI in this regard. I turn in a moment to discuss how that onus ought to be discharged. For present purposes, however, it is important to note that the obtaining of such evidence is to be CSNI-driven, taking into account any relevant representations made by or on behalf of the applicant, rather than driven by the applicant himself or herself.

[106] Mr McGleenan, on behalf of the respondents, quite properly accepted in the course of his oral submissions that CSNI has to act in good faith in this regard. This is an extremely important consideration in my view. The nature of the compensation scheme – which is not adversarial in nature – is such that there is an onus on CSNI to ensure that its power to arrange (and pay for) medical reports is exercised reasonably and with a view to securing the correct level of compensation for an eligible claimant; *not* with a view simply to trying to minimise the costs of determining the application, and much less with a view simply to trying to minimise the level of compensation payable. The applicant is right to say that a basic statutory purpose behind the Scheme is that those eligible, who have been injured through a crime of violence, should be awarded the correct level of compensation allowable under the Scheme. When the claimant has properly put an injury in issue, it is for CSNI to ensure that this injury and its effects are fairly and reasonably considered.

[107] I endorse for this jurisdiction the approach set out by Sedley LJ in the *C* case (see paras [69]-[70] above) that a CSNI caseworker must look objectively at whether a certain report is required to properly determine a claim under the Scheme; and that their discretion in this regard is limited by what is objectively required. The need to exercise any judgment in this regard fairly, and indeed potentially with a level of

generosity towards the claimant, is a corollary of the type of scheme which was introduced in 2002, namely one where legal representation was to be minimised and CSNI itself was instead to accept the onus of ensuring the claim was properly examined. This was expressly recognised at the time: see paras [86] and [90] above. This involves CSNI discharging an appropriate duty of inquiry in relation to the injuries. That duty of inquiry will obviously be more onerous where, as here, the injuries are very complex.

[108] Several other short points require to be made in this context:

(a) First, as in the *C* case, I would hold that the obligation to "make arrangements" for medical examination in para 22 of the Scheme is broad enough to encompass paying a claimant's solicitor for arranging the examination and report where CSNI effectively delegates that function to the solicitor for practical or administrative reasons. That would not be to fund the "costs of representation" in breach of the prohibition in para 20 of the Scheme.

(b) Second, there is nothing to stop a claimant, should they so wish, from instructing their own expert to provide a report and then furnishing this to CSNI. In circumstances where, in light of the contents of that report, CSNI then consider it was in fact required before a decision could be reached, it would be open to CSNI to reimburse the costs of obtaining that report (since, with hindsight, it ought to have obtained it itself). However, any claimant who proceeds in that way does so at their own cost risk since, as explained above, it is for CSNI to determine what reports are required.

(c) There is also nothing to stop a claimant from making representations to CSNI (as occurred in this case) as to what reports they contend are required. Any such representations should be carefully considered by CSNI. They are most likely to be effective where (unlike in this case) a short explanation is set out as to why a particular report is required. At the same time, this is an issue which CSNI should be conscientiously considering, without requiring a claimant to set out a fully reasoned basis as to why a particular report is necessary.

(d) Where there is a dispute about what reports are or may be required, there are a number of ways in which this might be resolved. For the reasons given above, CSNI should not be unduly reticent to commission a report where it is clearly relevant to a head of claim plausibly advanced by the claimant. There ought to be some expertise which has been built up by experience within CSNI in relation to these issues, particularly in complex cases which are dealt with by more senior caseworkers. If necessary, CSNI may want to consider some additional training for staff in this regard. However, an extremely helpful mechanism is likely to be that of seeking advice from those medical practitioners who have already been involved in the claimant's case as to what further reports (if any) they consider to be required before a decision can

properly be reached. As the brief discussion at paras [60]-[65] above shows, this has resulted in some progress in the applicant's case.

[109] A particular issue arose in this case because the initial award was accepted on the applicant's behalf on the basis of limited medical evidence and, when the review request was made, CSNI took the view that it was for the applicant to justify that request because para 59 of the Scheme says that "an application for the review of a decision… must be made in writing… and must be supported by reasons together with any relevant additional information." It is open to an applicant at that point to provide further reports if they wish. However, where part of the case made on an application for review is that insufficient reports were obtained in the first instance, CSNI should reconsider the issue. That follows, in my view, from the statement in para 60 of the Scheme that:

> "When the [Department] considers an application for review, [it] will reach [its] decision in accordance with the provisions of this Scheme applying to the original application, and [it] will not be bound by any earlier decision either as to the eligibility of the applicant for an award or as to the amount of an award."

[110] In short, where the issue is raised in an application for review, the caseworker considering the review should look afresh at whether the necessary reports have been commissioned under para 22 of the Scheme.

Funding for other expert reports

[111] A more difficult issue arises in this case because of the claim for special expenses. This might well require the engagement of experts *other than* medical practitioners. Although the focus of the applicant's challenge was on the provision of medical reports, and his pleaded case is directed to *medico*-legal reports, in the course of correspondence and in submissions attention has also been drawn to the potential need for an architect or surveyor's report (in relation to necessary adaptions of the applicant's home, in respect of which compensation may be payable for special expenses under para 35(d) of the Scheme) and/or for a forensic accountant's report (in relation to the loss of earning capacity aspect of the claim and/or the cost of care which might be a special expense within para 35(b) or (c) of the Scheme).

[112] It is only medical practitioners who are referred to in para 22 of the Scheme. Does this mean that it is only reports from such experts which can be funded by CSNI? I cannot accept that to be the case for several reasons.

[113] First, Mr McGleenan confirmed to the court that care reports *would* be paid for in this case; and submitted that the first respondent could similarly pay for such reports, where appropriate, in other cases. The applicant submitted that the averments in this regard were limited to the circumstances of the present case and, moreover, that there was no clear explanation of the basis upon which such reports would be funded by CSNI or under which provision of the Scheme this would be effected. As to this, Ms Rodgers, having referred to para 20 of the later 2009 Scheme (which provides that, "Where an applicant incurs ancillary costs in making the application, such as a fee paid to an expert for a medical or other specialist report, these will not be met by the [Department]"), avers as follows:

> "Therefore, Compensation Services do not routinely pay for accountant, architect or further medical reports not required by Compensation Services to enable them to properly assess an application. However, should it become apparent from information available to them that additional information may serve to inform their assessment beyond what is currently available, then CS will endeavour to explore those options to the extent necessary to ensure the correct tariff is awarded, as applicable."

[114] This averment is not a model of clarity. In particular, it is not clear what 'endeavouring to explore those options' really means. Later, however, she added:

> "By their nature, claims and compensation for special expenses will be entirely fact specific and will require information, and, where necessary, further expert reports to set out the nature and reasons relied upon in support of a claim of compensation for special expenses. These reports will also be paid for by the CS, the need for such having been established. So, by way of example, should current and future care needs be identified, the CS accountant will assess a figure for special damages related to care costs which can be added to the general damages figure."

[115] Leaving aside for the moment the reference to the CSNI internal accountant, I take from this averment that, in appropriate cases, additional external expert reports can and will be obtained and funded by CSNI in circumstances where these reports are also considered to be required in order to properly determine the claim. This is consistent with what was said in submissions by Mr McGleenan in the course of the hearing.

[116] Where does one find the power within the Scheme to obtain and pay for such reports? It might be thought to be inherent within paras 35-36 of the Scheme, set out above. Where the Department, in the form of CSNI, considers it needs some additional expert assistance in order to properly determine a claim, why should it not

be at liberty to seek (and pay for) that assistance? There is certainly nothing in the Scheme which appears to preclude it from doing so where it has determined that such further reports are necessary. In those circumstances, it might be thought that the power to obtain such further reports is implied into the scheme as being reasonably necessary for CSNI to perform its function in a way consistent with the statutory purpose. There is much to be said for such an analysis. For my part, however, I would prefer to base the Department's powers in this respect on para 21 of the Scheme, which provides that:

> "The [Department] may make such directions and arrangements for the conduct of an application, including the imposition of conditions, as [it] considers appropriate in all the circumstances…"

[117] This provision appears to me to be wide enough to authorise the organisation of and payment for a further report which may be required in order to properly consider and determine an application for compensation or any part of it.

[118] The further reports obtained after the grant of leave in this case were not considered by CSNI to impact the level of the tariff award. However, it was said that they "may serve to inform consideration of a special expenses/future loss award." Ms Rodgers has further averred that:

> "Information required to quantify this element of the claim will be requisitioned by Compensation Services Accountant and an assessment of the losses will be undertaken. This will ensure that such losses are adequately and reasonably reflected in the applicant's compensation award."

[119] When pressed during the second day of hearing as to how this would work in practice, the first respondent provided additional affidavit evidence to the following effect:

(a) If a victim indicates on an application form and the medical questionnaire that they are claiming for future loss or special expenses, the case worker will issue to them the appropriate claim form and the specific guidance (mentioned at para [32] above).

(b) When the applicant confirms that they have been off work for more than 28 weeks, the case worker will also issue a letter to them (or their representative) requesting details of financial loss and/or any cost of care claim, to include calculations, assumptions and supporting documentation.

(c) Upon receipt of this information and completion of the medical evidence, the case worker will assign the claim to a more senior case worker, at one of two higher civil service grades, depending on the level of injuries.

(d) If the case involves complex financial loss, for instance "determining cut off dates, self-employed, future loss, cost of care, etc", it will be assigned to a staff officer.

(e) The senior case worker will then send a financial loss questionnaire to the applicant's employer and request Social Security Agency benefit details and national insurance contributions information.

(f) On receipt of this information, the claim will then be passed to the CSNI accountant for assessment. As appears above, the accountant then has a role in determining what further information, if any, is required in order to properly quantify the special expenses and/or loss of earnings claim.

[120] It can be seen from the above that an applicant has an opportunity to submit detailed accountancy evidence if he or she wishes; but that cases will generally proceed on the basis of CSNI collecting and collating relevant information which is then provided to its own accountant for assessment. Before the CSNI accountant begins his assessment of a claim for financial loss or cost of care, he would ask the case worker to confirm with the applicant or their representative if it is their intention to submit an accountant's report. There is no requirement for this but, in high value or complex claims, I was informed that such a report is generally submitted. It is common, however, for straightforward claims of lower value to be resolved without an accountant's report being provided by the applicant.

[121] If an accountant's report is not received from an applicant, the CSNI accountant will proceed and endeavour to obtain the necessary information to calculate the loss (which will normally include medical reports, details of pre-incident pay, details of post-incident pay, state benefits, etc.). The first respondent has averred that, in complex cases, the accountant will work closely with the CSNI legal advisor to determine the expected duration of loss and other assumptions, if these are not clearly expressed in the medical evidence and other supporting information. Generally, these claims would not be as complex as the applicant's case.

[122] Senior case workers are trained to identify claims in which there may be a financial loss element (which, in any event, is specifically addressed on the application form) and will seek to gather relevant information. They will also request further reports – such as a cost of care report – where any further enquiries are directed by the CSNI accountant. The respondent's evidence is that Victim Support are clear on this process and will advise an applicant accordingly.

[123] The steps outlined at para [119], I was told, had been taken in the applicant's case; but a difficulty was that neither the applicant's mother nor his solicitors had

completed the more detailed questionnaire about these aspects of the claim. This got caught up in the dispute over additional reports and payment of legal fees. Ms Rodgers has further averred as follows:

> "It is not necessary for a Forensic Accountant to prepare a report for the applicant but in most High Value claims this is done. The applicant's representative was asked to complete a financial loss questionnaire and asked for information regarding a claim for special expenses. If this had been received, the CSNI accountant would have assessed the information and issued an offer under these heads of claim.
>
> … In the case at hand, this element of the claim has not progressed to date as the information requested by CSNI was not supplied."

[124] This element of the claim has therefore fallen victim to the stand-off between CSNI and the applicant's representatives described above. It has not been progressed to any significant degree because the applicant has been seeking up-front funding for reports he wishes to obtain. However, it seems to me that further information in support of this aspect of the claim could have been provided and that there could have been more constructive discussion between CSNI and the applicant's next friend or his solicitors as to what further was needed. I consider any challenge to the determination of this aspect of the applicant's claim to be premature at this stage.

[125] It is clear, however, that CSNI has the right, and in appropriate cases will be prepared, to seek and pay for additional expert reports in order to properly determine a claim for loss of earnings (or earning capacity) or special expenses (including cost of ongoing care in the future). It is also clear that, in most cases, CSNI will not fund the provision of an external forensic accountant's report, in light of the fact that it has its own internal accountancy expertise to assist with determination of these elements of criminal injury claims. In this regard, it is in a different position to determining medical questions, where it has no in-house expertise. I would add, however, that, as with the requisitioning of further medical reports, CSNI and its accountant are under an obligation fairly and in good faith to obtain whatever additional reports are required in order to properly determine this aspect of a claim.

[126] It remains open to a claimant to seek a forensic accountant's report at their own cost risk. As already apparent from the statistics set out at para [97], in a case where the claimant is on a low income, the LSA can and do fund certain expert reports under the Green Form Scheme. It has been further confirmed in evidence that, if a solicitor seeks an extension under the advice and assistance provisions to enable them to instruct an expert and to incur the expert's costs in preparing the report, the Agency can in appropriate cases authorise an extension for both the solicitor's costs and those of the expert where persuaded that it is reasonable to do so. In the present case, it

might well be reasonable for such a report to be funded in this way, in light of the respondents' candid acceptance that the present case is more complex even than most of those in which significant loss of earning capacity or special expenses claims are made; and in light of the fact that CSNI would not normally seek its own external report of this kind.

Payment of legal costs

[127] The applicant's case in relation to legal costs is founded on the simple basis that CSNI does not provide any payment towards legal costs, so that the compensation claimant must fund this.

[128] Although there may be issues of contention which arise in the consideration of an application for compensation under the Scheme, a claimant for compensation does *not* stand in an adversarial position *vis-à-vis* CSNI. If the applicant's contention were correct that CSNI was required to provide funding for legal representation to advise in the circumstances of this case, in relation to assessment of the quantum of an award, it is difficult to see how similar funding could be denied to those challenging a view on the part of CSNI about some of the conditions of eligibility, or the bases on which an award may be reduced, set out in para 6 of the Scheme. In short, it would require a fully funded right of representation on all aspects of eligibility and level of award where an applicant was not in a position to fund that themselves. But that is to misunderstand the nature of the Scheme.

[129] As is apparent from the discussion of the pre-legislative scrutiny of the draft 2002 Order and Scheme, the executive and legislature made a conscious decision to move away from a scheme where individual lawyers were funded on behalf of claimants. They did so consciously – indeed, in the face of a recommendation on the part of the Bloomfield Review and the relevant Assembly Committee that publicly funded individual legal advice should remain available in at least some cases – in favour of a scheme which diverted funding which would go towards legal advice or representation into the substantive funding of compensation payments under the Scheme. Ms Rodgers has averred that:

> "It was the significant legal costs associated with claims that made the previous scheme financially unsustainable and that, therefore, was the impetus to reform the criminal injury scheme and introduce a tariff scheme. The NI Scheme is similar to the GB compensation scheme – no legal costs are paid. However, awards under the GB Scheme are capped at £500,000."

[130] The respondents' evidence provided an estimate from the accountant for CSNI to the effect that, should the cost of legal fees have to be met by CSNI, such fees would likely be around £950,000 to £1m per annum, based on the personal injury scale. This was based on a review of tariff awards made in the 2019-20 financial year in relation

to standard cases and using the personal injury scale of fees, assuming no uplift was applied. An allowance was also made in relation to high value claims.

[131] Those considerations are, of course, no bar to the court considering this approach to be unlawful if, in the circumstances, it results in a breach of the applicant's rights under article 6 ECHR. In approaching that issue, the ultimate question is whether – as the English Court of Appeal set out in the *C* case – the very essence of the applicant's right to seek compensation under the Scheme is impaired by reason of the complexity of the matter. In my judgment, that has not been shown to be the case for a variety of reasons:

(a) First, as noted above, although an applicant for compensation must make out their entitlement, the process is not adversarial. An applicant for compensation has no opponent in the process. Moreover, it is not a court process where witnesses are called and cross-examined. It is an administrative application.

(b) Second, and relatedly, CSNI has a duty of inquiry to discharge when commissioning medical reports, which might be particularly acute in a complex case such as the applicant's, to ensure that its decision on quantum is properly informed.

(c) Third, many cases will be straightforward. The non-availability of funding for legal advice or representation from CSNI is not primarily to be assessed by reference to the most complex of cases.

(d) Fourth, in all cases, some advice and assistance (which might include, in complex cases, signposting the application as one where legal advice ought to be sought) is available from Victim Support, a body specifically tasked and equipped to provide such advice.

(e) Fifth, the key issue in a complex case of this type is not so much that the applicant has legal assistance but that, rather, there is a facility for appropriate expert evidence to be obtained to ensure effective and fair consideration of their claim. That assistance and expertise will be available provided CSNI obtain the appropriate reports.

(f) Sixth, although there is an argument that legal assistance may be required to identify the type of reports which ought to be obtained, in my view this has been over-complicated in the present case – both by CSNI's unwillingness to obtain certain reports without a detailed justification from the applicant's lawyers and by the applicant's representatives failing to provide little more than a list of reports which were said to be required in the absence of a guarantee of remuneration. Consequently, its significance has been overblown.

(g) Seventh, there is, in any event, a safety net provided by the availability of legal assistance through the Green Form Scheme. I reject the suggestion made on

the applicant's behalf that use of that scheme in the present context is unrealistic or fanciful. On the contrary, the statistics provided on behalf of the LSA have satisfied me that many solicitors firms in Northern Ireland are aware of, and have made use of, the Green Form Scheme for the very purpose of funding advice and assistance to clients who are making criminal injuries compensation claims and, where appropriate, funding additional reports which have not been obtained by CSNI.

(h) Eighth, there are a variety of additional safeguards. The fairness of the process must be considered as a whole. An inadequate decision-making process might be cured on review under para 58(d) of the Scheme, during which CSNI should (pursuant to para 60 of the Scheme) reconsider afresh whether it has obtained the necessary expert input where the claimant contends that it has not. It might also be remedied on an appeal under para 61, at which point an independent appeal panel with a legally qualified chairperson will consider the case. The adjudicators have the ability to direct that the panel meet the reasonable expenses of any witness (which might include a further medical professional) and have the right themselves to call witnesses (see paras 74 and 75 of the Scheme). In addition, they are able to make such declarations as they think fit as to the decision to be made by the Department on the application for compensation in accordance with the relevant provisions of the Scheme (see para 77). This appears to me to be wide enough to permit the panel to declare that additional expert evidence requires to be obtained by CSNI. The appeal panel's decision is also, of course, subject to judicial review (in respect of which legal aid is available, subject to financial eligibility).

[132] Against this background, I do not consider the applicant to have made out his case that the process is unfair without funding for legal representation or that it breaches his article 6 rights. I proceed on the basis that the civil limb of article 6 ECHR is engaged. However, whether viewed through article 6 or common law fairness, I do not consider it to be inherently unfair that a claimant, even in a complex case, has no automatic right of payment of any legal costs, for the reasons given above.

[133] Although reliance need not be placed on this factor in the present case, if necessary, it is appropriate to take into account, as the English Court of Appeal did in *C*, that there are funds available to the applicant by which he could secure legal assistance. I agree that it is somewhat unattractive to take into account the applicant's ability to have recourse to funds awarded to him as compensation as a means of funding legal assistance, if necessary. That prospect is much less unattractive in relation to the Northern Ireland Scheme which is uncapped, however, than in relation to the equivalent capped scheme which operates in England. In relation to any legal or administrative procedure where costs are not recoverable, an individual who is ineligible for legal aid will have a choice to make as to whether they wish to deplete their resources by paying for legal or other assistance in the hope of securing a better outcome. For the reasons given above, in criminal injuries cases this should not

generally be required; but the applicant's ability (through his next friend) both to seek and pay for such assistance is not an irrelevant factor.

[134] Some emphasis in this case was placed on the fact that the applicant is a child. However, I do not consider that to be a significant factor because appropriate arrangements are made for children (or those who otherwise lack capacity) to have the application presented and managed on their behalf by an adult with capacity.

Fettering of discretion and amendment of the Scheme

[135] I accept the respondents' submission that the applicant's challenge based on fettering of discretion must fail. In terms of CSNI's decision, there has been no fettering of discretion as to the obtaining of further medical reports by limiting this to one report only, for the reasons set out above. There has been no fettering of discretion as to the payment of legal costs for a different reason, namely that there is no discretion to fetter. CSNI must act in accordance with the Scheme which (save to the limited extent mentioned at para [108] (a) above) does not permit the payment of legal costs for representation.

[136] The main thrust of the applicant's case on 'fettering' was that the Department has wrongly failed to alter the Scheme to permit the payment of the costs of legal representation. Although the Department has power to seek to alter the Scheme, it is wrong to view this as a classic statutory discretion amenable to review for unlawful fettering. It is more in the nature of a legislative power. Indeed, under Article 10 of the 2002 Order, the Department cannot effect an amendment of the Scheme itself. It can merely lay a proposal for alternation before the Northern Ireland Assembly for approval. In any event, in light of the conclusions I have reached above about the present operation of the Scheme, there was no illegality in my view in the Department failing to bring forward a proposed amendment to allow for the payment of legal costs.

The article 14 challenge

[137] Turning to the article 14 challenge, Mr Lavery contended that there was direct discrimination in this case as between the applicant (with a complex claim) and those whose claims are "more simple." In addition, he contended that the rule against funding legal costs, whilst applicable to all, was indirectly discriminatory, as it put people with serious injuries at a disadvantage. He contended that the applicant's status for this purpose, akin to that of disability, was a suspect status requiring a high level of justification of any difference in treatment (or differential impact).

[138] I cannot see how someone with a complex claim is discriminated against directly, since no distinction is made in the Scheme between their entitlement to legal costs or representation and the like entitlement of others. In my view, if there is any arguable article 14 breach in this case, it is on the basis of indirect discrimination or *Thlimmenos*-type discrimination (where materially different cases are unjustifiably

treated in the same way). I accept that the article 14 claim arises within the ambit of either A1P1 or article 6 rights.

[139] I do not consider that someone with a complex claim should be disadvantaged by the operation of the Scheme in respect of the obtaining of medical reports provided, as discussed above, that the medical reports which are necessary to properly assess their claim are obtained. If there was a limit on the reports which could be obtained, that might well disadvantage those whose injuries were so complex that they required input going beyond the relevant 'cap' on available reports. However, that is not the case.

[140] The Scheme recognises that there will be cases where an application is made for the benefit of an individual and on their behalf by some other person: see para 6. Paras 3.7 to 3.10 of the Guide deal with applications made on behalf of children or adults unable to manage their own affairs. In the case of a child, the application should normally be made on their behalf by an adult with parental responsibility for them. Where there is no-one legally entitled to act for a child, help may be sought from the Official Solicitor. In the case of an adult who is legally incapable of managing their own affairs, the person making the application on their behalf must be properly authorised to do so with a power of attorney and must be considered suitable by CSNI. In this case, the issue of the applicant's minority and learning disabilities is catered for by his having a mother and next friend who is acting for him. There is no suggestion that she either lacks capacity or understanding in any material way or that she is acting otherwise than in what she considers to be the applicant's best interests. In cases where this is not possible, the potential involvement of the Official Solicitor operates as a safety net. The mere fact that some applicants for compensation may lack capacity is not a reason why the provision of legal representation at public expense is necessary.

[141] I also do not accept that requiring a person who is a child, or a person with a disability, to have to bear the financial burden of engaging legal assistance, should they wish to, or to expend funds on the procurement of additional reports in the event that the CSNI is not persuaded that they are necessary, is discriminatory in a way which offends article 14 of the Convention. In this case, by reason of the interim payment which has been made to him, the applicant has funds at his disposal should his next friend consider that an additional report or report ought to be obtained, once CSNI has reached a final position on the reports which it will arrange and pay for. The real complaint is that there will be those – such as children – who are not in a position to work and who would therefore not have this option available to them. However, given the availability of publicly funded assistance by way of the Green Form Scheme, there is again a safety net for those who cannot afford to fund an additional report where the LSA is persuaded that it is reasonable for one to be obtained at public expense.

[142] The objection that the applicant should not have to expend monies payable to him as compensation in the hope that he might secure a higher award is one that could

be made by any criminal injuries compensation claimant, including adults and those whose injuries were purely physical. Why should they have to spend money which was meant to compensate them? The answer, of course, is that they are not obliged to engage lawyers or to engage additional experts. They may choose to do so in the hope that this ultimately secures them a net benefit. In the case of a minor claimant, providing they have a competent adult acting as their next friend, they are able to make precisely the same assessment.

[143] I also accept the respondents' point that the Scheme is fundamentally different in character to an action for common law damages against a tortfeasor and so any comparison between a claimant under the Scheme and a plaintiff in such an action is inapposite. They are not in an analogous position.

[144] I am not persuaded, therefore, that there is differential treatment calling for justification on a variety of bases upon which the applicant mounts his case. I nonetheless accept that there is an arguable case of indirect or *Thlimmenos*-type discrimination which arises because there is a blanket rule against funding legal costs in claims under the Scheme; and this arguably has a disproportionate impact on those with complex claims, as compared with those whose claims are more simple – although no real evidence has been provided for this proposition other than (the applicant would submit) that it is a matter of common sense. For this purpose, a clear dividing line for use as a proxy measure to identify which cases are complex and which cases are not appears to me to be between those who will be eligible for special expenses (i.e. those who are incapacitated for a period of 28 weeks or more), as compared with those who will not. Where a claim for special expenses or loss of earnings is in prospect, there is an argument that more assistance is required.

[145] Insofar as that arises however, I would also hold that the approach which the Scheme adopts is justified, in that it serves a legitimate aim and operates proportionately. Article 11 of the 2002 Order specifically envisages the provision of advice and assistance to claimants under the Scheme by Victim Support. In contrast, there is no provision within the Order or Scheme for the payment of a claimant's legal costs. That was plainly a deliberate choice on the part of the legislature, as discussed above.

[146] It is tempting to suggest, as the applicant's representatives do, that there must be some provision for an exceptional case where legal representation is required. The difficulty, however, is that when such a facility is introduced, the simplicity and cost-effectiveness of the system breaks down by virtue of having to assess in each individual case whether or not it is exceptional. This has been recognised in authorities which make clear that, in certain areas, the state is entitled to adopt bright-line or blanket rules: see, for example, the joint dissenting opinion of Lord Sumption and Lord Reed in *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57, at paras [88]-[91]; and the prior decision of the ECtHR in *Animal Defenders v United Kingdom* (2013) 57 EHRR 21, at paras 106-110. The proportionality of the approach in such cases is not to be judged by reference to individual hard cases but

by considering the core issue of "whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it" (see para 110 of *Animal Defenders*).

[147] In this case, I consider the approach adopted by the legislature to be within its margin of appreciation. This is largely for the reasons discussed earlier in the course of this judgment in rejecting the applicant's procedural fairness claim. Mr Lavery was in my view right to suggest that the 'status' involved is one which is capable of protection under article 14 in light of the development of article 14 jurisprudence after the English Court of Appeal decision in the *C* case. However, it is not a status where a high degree of justification is required. (Although the applicant argued the status was one of disability, the relevant comparator – a claimant seeking compensation under the Scheme for a less serious injury – will also have a disability.) In addition, the judgment made by the legislature was a policy choice of a socio-economic nature, to seek to widen the class of beneficiaries of the scheme by simplifying it in a way which would render legal representation superfluous. Cases as complex as the applicant's will be few and far between. In most cases, legal representation will be unnecessary. The Scheme envisages advice and assistance being provided by Victim Support and CSNI taking up the onus of securing the necessary reports. The availability of the Green Form Scheme operates as a safety net where a financially eligible claimant may need or want some legal advice to assist in the presentation of their claim. The legislature was entitled to take the view, in my judgment, that legal costs should not be payable under the Scheme and that the simplicity, certainty and cost-effectiveness of this approach would be unacceptably compromised by building in an exceptionality provision.

Conclusion and the way ahead

[148] For the reasons given above, I have not found any of the applicant's grounds of judicial review made out. His challenge was to the Scheme and/or to the underlying 2002 Order. I do not consider these to be unlawful in any respect.

[149] That said, the approach of CSNI has also not been exemplary in this case. The applicant's mother has averred that she has been "advised by [her] solicitor that in order for [the applicant] to recover the compensation to which he is entitled and which he needs for his future care and needs, it is necessary to instruct many experts for quantum reports, care reports and complex loss of earnings calculations." I accept that, in a case of this type, it would be unusual to proceed simply on the basis of one specialist medical report. I cannot understand how CSNI considered it appropriate to do so, and to make an award with no element of loss of earning capacity or special expenses, in the face of the applicant having sustained serious injuries with obvious life-long consequences and where a claim for loss of earning capacity and special expenses was evident upon the completed application to CSNI.

[150] The applicant's mother has further been advised that "in order to even identify which reports are required requires the input of senior and junior counsel." I do not

accept that. Some progress has already been made in terms of obtaining additional reports (see paras [60]-[65] above). As I have explained above, this is primarily a matter for CSNI. Insofar as legal assistance is appropriate, identifying what expert reports are required to properly assess the injuries sustained by the applicant and their impact upon him is a matter which ought to be capable of being addressed by a solicitor with experience of personal injury claims.

[151] Reports from Consultant Paediatricians, a Paediatric Neurologist and an Occupational Therapist have now been obtained. Ms Brown has recommended that assessment by a speech and language therapist with acquired brain injury knowledge would be recommended to further clarify the level of the applicant's language comprehension and offer any potential communication supports. It would seem sensible that such a report be obtained in advance of any final decision being taken on the review. The applicant's GP has also advised that an approach should be made to the relevant disability social worker within the Trust in order to obtain his or her input. Again, that seems sensible. CSNI should reconsider whether any further reports are required, having regard to the type of reports requested by the applicant's representatives (see para [52] above) and bearing in mind the guidance contained in this judgment about the onus upon it to do so fairly.

[152] The CSNI accountant should also consider what, if any, further reports are required in relation to assessment of the special expenses and loss of earning capacity claim – although in the first instance, the applicant's mother should complete the additional questionnaire in relation to this and provide whatever additional information or representations she wishes in relation to it. It seems to me likely that, at the very least, a cost of care report will be required. The loss of earning capacity and special expenses claims are obviously very significant aspects of TA's claim for compensation. These have not yet been properly considered as the additional information requested of the applicant has not yet been provided. Once this has been done and the CSNI accountant has considered the issue (including what further reports or information he or she feels is needed), there will be a much clearer understanding of where things stand.

[153] The applicant's solicitor remains free to seek to make use of the Green Form Scheme on his behalf. The court having been told by both respondents and, through them, by the Legal Services Agency that this is a facility which is available to solicitors in appropriate cases, I would not expect an unduly restrictive approach to be taken to what is reasonable in the circumstances of this case which, CSNI acknowledges, is particularly complex. Any request for additional assistance through the Green Form Scheme, however, should be dealt with after it is clear what CSNI itself will or will not commission. I should also add my provisional view (albeit reached without argument) that the interim compensation payment made to the applicant should not affect his financial eligibility for advice and assistance under that scheme by reason of regulation 24 of the Regulations referred to at para [92] above.

[153] I propose to dismiss the application for judicial review and hope that the CSNI review of the applicant's compensation claim can now proceed expeditiously.

[154] I will hear the parties on the issue of costs.