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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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AND IN THE MATTER OF AN APPLICATION BY PETER McCABE AND JEANITTA McCABE FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE VICTIMS' PAYMENTS BOARD

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Steven McQuitty KC and Paul Wilson (instructed by KRW Law) for the applicants
Philip McAteer (instructed by the Departmental Solicitor's Office) for the respondent

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SCOFFIELD J

Introduction

[1] By these proceedings, the applicants challenge both guidance issued, and decisions made, by or on behalf of the Victims' Payments Board (VPB) ("the Board"), a board established by statute to determine applications under the Troubles Permanent Disablement Scheme, also known as the Victims' Payments Scheme ("the Scheme").

[2] The challenge is twofold but, in each case, relates to the question of whether injuries the applicants suffered arose from a 'Troubles-related incident' (TRI). First, the applicants challenge guidance published by the VPB on 23 November 2023, entitled 'Information Note – Troubles Related Incidents and Paramilitary Style Attacks' ("the guidance"). This guidance was issued by the President of the Board. It covers paramilitary-style attacks (PSAs) of a variety of types but, in the context of these cases, deals specifically with vigilante-style paramilitary attacks (VSPAs), that is, brutal attacks carried out by a paramilitary organisation in some purported 'policing' function. Such attacks were presented as a response to some real or perceived offending on the part of the victim, such as theft, drug-dealing or (commonly) "anti-social behaviour."

[3] The second aspect of the challenge concerns two decisions of an appeal panel of the Board ("the Panel" or "the appeal panel"), which are in materially similar terms, dated 19 December 2023, whereby the Panel determined that neither applicant was entitled to a victims payment. This was on the basis that the injuries sustained by Mr McCabe, the first applicant, were *not* caused by a TRI as defined by section 10(11) of the Northern Ireland (Executive Formation etc) Act 2019 ("the 2019 Act") or, at least, had not been established to have been so caused to the Panel's satisfaction on the balance of probabilities.

[4] Mr McQuitty KC and Mr Wilson appeared for the applicants; and Mr McAteer appeared for the respondent. I am grateful to all counsel for their comprehensive and helpful written and oral submissions.

Factual background

[5] Before turning to the Board's guidance and the specific decisions which are challenged in these proceedings, it may be helpful to summarise the facts of the incident which led the applicants to apply for payments under the Scheme. This occurred on 13 September 1990, shortly before 11.00 pm.

[6] In his affidavit, Mr McCabe states that his thirteen-year-old daughter Lorainne had opened their front door after hearing a knock. She discovered four or five masked men, one of whom was holding a pistol, at the door. Lorraine was told to enter the living room, where two of Mr McCabe's other children were present. This included the second applicant in these proceedings, Jeanitta McCabe, who was aged 10 at the time of the attack.

[7] The first applicant avers that, at the time, he was in his bedroom with his wife, when he heard his children screaming downstairs. As he reached the top of the stairs, he saw the men and was directed by them to come downstairs, to enter the kitchen and to sit on a chair at the breakfast bar. The man holding the pistol then demanded that Mr McCabe give them the keys to his van, which Mr McCabe did. In his affidavit, Mr McCabe recalls that he was afraid that he would be forced to drive a bomb to a checkpoint or government building.

[8] Mr McCabe states that he was informed that the men were going to take his van. They admitted to acting on behalf of the Provisional IRA (PIRA); and they informed Mr McCabe that he had to leave Ireland within 24 hours. Immediately thereafter, the man with the pistol shot Mr McCabe in his left knee. The bullet went straight through and exited Mr McCabe's leg. Mr McCabe then grabbed a typewriter which was nearby and attempted to shield himself with it. A second shot was fired and ricocheted off the typewriter, hitting a nearby radiator. The men then sprinted from the house, carrying Mr McCabe's van keys, although in the event they did not take the van with them.

[9] Jeanitta McCabe (the second applicant) states that, while she did not see the actual shooting, she witnessed the immediate aftermath of this incident in the family home, which was highly traumatising.

[10] Mr McCabe was subsequently taken by ambulance to Daisy Hill Hospital, where he received treatment and made a statement to the police. Two days later, Mr McCabe discharged himself from hospital so that he could leave Ireland. In his affidavit he states, "I feared that I would be killed if I disobeyed."

[11] Mr McCabe and his family therefore relocated to Great Britain, where he avers to have lived a life of instability without a permanent home. After approximately five years the family returned to Northern Ireland. Mr McCabe says this contributed to feelings of fear about experiencing another attack, and at times he felt so unsafe that he would wake up his family and they would sleep in their van outside a police station. He says that he struggles both with physical and mental injuries from the attack, which severely impacted his abilities to gain and maintain meaningful employment. The psychological sequelae of the incident in respect of both applicants are addressed in evidence from a consultant psychiatrist which was available to the Panel and to the court. It is unnecessary to set these out in detail for present purposes.

[12] Although there may be uncertainty or dispute around the margins of the factual picture presented by the first applicant, the Panel accepted in basic terms that the incident occurred as Mr McCabe described. The central issue in terms of his eligibility under the Scheme was the reason for the attack and whether this was shown to fall within the statutory definition of a TRI.

The Scheme and the guidance

[13] I return to the relevant statutory provisions in further detail below. However, it is relevant to note that the Victims' Payments Regulations 2020 (SI 2020 No 103) ("the 2020 Regulations") were laid before Parliament on 31 January 2020. Regulations 3 and 4, within Part 2, established the Board and set out the principles to which it must have regard when making decisions about eligibility for payments to victims. By February 2021, the Board was operational.

[14] The guidance which is challenged in these proceedings is in the form of an 'information note' which relates to TRIs and PSAs. The information note was adopted by the Board on 23 November 2023 but reflected the content of a decision which had then recently been given by the President of the Board, whilst chairing an appeal panel, in a separate case involving a PSA. The guidance recalls the definition of a TRI which is set out in section 10(11) of the 2019 Act (see further para [32] below) and continues as follows:

> "Bearing in mind that there is a need to ensure consistency of approach between panels dealing with

similar factual scenarios, this Appeal Panel which is chaired by the President of the Board takes this opportunity to provide additional guidance on what does and does not constitute a TRI for the purposes of this scheme.

It must be clearly understood that any such guidance must be treated as such. It is only guidance but it is intended to ensure consistency of approach by different panels set up to deal with applications and appeals. Each application and appeal must be decided on its own facts and merits, having due regard to any guidance issued by the Board, and paying close attention to the wording of the governing legislative provisions.

It must also be clearly understood that the guidance that is set out in this appeal determination is not exhaustive in terms of the identification of what is and what is not a TRI but is intended to set out in a principled manner the key issues that have to be considered when determining what is and what is not a TRI."

[15] The guidance then refers to a number of types of incidents which respectively should and should not be regarded as TRIs for the purposes of the Scheme. The following portion of the guidance is the most relevant in the present case and the primary target of the applicants' attack:

"An example of an incident which should not be regarded as a TRI.

(a) … [F]or the purposes of the present scheme an attack by members of a paramilitary grouping upon a person who was engaged in or was perceived as being engaged in "anti-social behaviour" or crime cannot per se and should not fall within the ambit of a TRI. In essence where the paramilitary grouping is exercising a vigilante function in a community this exercise of this function however repugnant and abhorrent cannot and should not be regarded as the use of violence "for a reason related to the constitutional status of Northern Ireland or to political or sectarian hostility between people there." This may seem harsh and insensitive to victims of such attacks but it is important for the integrity of the Scheme as a whole that a line is drawn somewhere in relation to

> the issue of what is and what is not a TRI and vigilantism in a community although it may have the indirect effect of suppressing overt opposition to paramilitarism in a community it cannot be said to be the use of violence "for a reason related to the constitutional status of Northern Ireland or to political or sectarian hostility between people there." It is the use of violence for the purpose of deterring anti-social activity or crime in a community where the ability of the police to act effectively and efficiently is stymied."

[16] The above passage deals with the only example cited as one which should *not* be regarded as a TRI. The guidance concludes in the following terms:

> "The central focus is and should be on the identification of the reason or reasons behind the use of violence or force rather than engaging in a speculative quest in the hope of identifying a collateral consequence of the violence or force which may advance the cause of the paramilitary group in question or assist it in achieving its aims. The adoption of any other approach to this question runs the risk of bringing the scheme into disrepute by reason of inconsistent decision making. It is only by the adoption of the recommended approach can the Board hope to identify what is a TRI on a consistent and principled basis."

[17] Earlier in the guidance, four examples are given of incidents which *should* be regarded as TRIs. A number of these are consistent with other guidance issued by the Board making clear for instance that TRIs can occur as a result of tensions *within* communities in Northern Ireland and not merely *between* them. These further examples in the information note were in the following terms:

> "(a) An attack by members of the paramilitary grouping upon a person who was or who was perceived as being opposed to the cause by that paramilitary grouping… An act of violence perpetrated against a vocal opponent of paramilitarism by a paramilitary group during the Troubles is clearly an act of violence "for a reason related to the constitutional status of Northern Ireland or to political or sectarian hostility between people there." The act of violence is done to quell dissent in the community in which the paramilitary grouping is operating to ensure it can continue

with its campaign of violence which is directly linked to "the constitutional status of Northern Ireland or to political or sectarian hostility between people there."

(b) An attack by members of a paramilitary grouping upon a person who was or who was perceived as being an informer or "tout" by that paramilitary grouping. An act of violence perpetrated against an actual or perceived informer or "tout" by a paramilitary group during the Troubles is clearly an act of violence "for a reason related to the constitutional status of Northern Ireland or to political or sectarian hostility between people there." The act of violence is done to ensure that the paramilitary grouping is not infiltrated and that it can go about its clandestine business relating to its campaign of violence which is directly linked to "the constitutional status of Northern Ireland or to political or sectarian hostility between people there" without interference from state agencies.

(c) An attack by members of a paramilitary grouping upon a person who was or who was perceived to be fraternising with or in a close personal relationship with a member of the police, army, prison service or customs. This in essence is an example of an attack upon a person who is or is perceived to be fraternising with the enemy. The history of the early Troubles contains many examples of young women tied to lamp posts and being tarred and feathered for associating with soldiers. An act of violence perpetrated against such a person by a paramilitary group during the Troubles is clearly an act of violence "for a reason related to the constitutional status of Northern Ireland or to political or sectarian hostility between people there." The act of violence is done to prevent cross community engagement, to reinforce the notion of us and them and to ensure the perpetuation of the use of violence in relation to "the constitutional status of Northern Ireland or to political or sectarian hostility between people there."

(d) An attack by members of a paramilitary grouping upon a person who was in premises that were being robbed for the purposes of obtaining money or materials necessary to fund or equip the said paramilitary grouping, thus enabling it to continue its campaign. An act of violence perpetrated against a shop keeper, pub owner or warehouse operative by a paramilitary group during the Troubles in order to steal money or materials in order to enable the grouping to continue to operate is clearly an act of violence "for a reason related to the constitutional status of Northern Ireland or to political or sectarian hostility between people there." The act of violence is done to ensure it can continue with its campaign of violence which is directly linked to 'the constitutional status of Northern Ireland or to political or sectarian hostility between people there.'"

The applicants' applications and the Board's decisions

[18] Jeanitta McCabe and Peter McCabe submitted their applications to the Board on 17 November 2021 and 24 November 2021 respectively. On 20 June 2023, a panel of the Board, having considered the papers, determined that Mr McCabe was not entitled to a victims' payment as he did not meet the eligibility requirements under regulation 5 (entitlement to victims' payments) and regulation 7 (causation of injury) which require that the incident causing the applicant's injury is a TRI. By virtue of this finding, the second applicant's application was also rejected.

[19] In its decision, the panel noted the definition of a TRI as set out in section 10(11) of the 2019 Act. It also made reference to another piece of guidance issued by the Board entitled 'Guidance Note (04/21) on the Definition of a Troubles-related incident'; and to the Government response to the consultation in advance of making the 2020 Regulations entitled 'A legal framework for a Troubles-related incident Victims Payment Scheme: Government response.' Inter alia, this latter document stated as follows, which the panel quoted:

> "Other state-sponsored mechanisms are also in place to support and recompense those injured in crime and criminality today, including victims of paramilitary activity…
>
> … Although the Fresh Start Agreement set out a commitment to deal with the scourge of paramilitarism, there was no suggestion of equating organised criminality

> and dissident violence – often in response to the peace process – with the everyday horrors of the Troubles."

[20] (The applicants contend – rightly, I think, having considered this statement in context – that this passage of the response is addressing the *temporal scope* of the definition of the Troubles, with the Government's position being that they should be treated as a thing of the past and that the Scheme should not be open-ended. In oral argument, Mr McAteer indicated that the respondents were not relying strongly on this document. The applicants in turn rely on other passages within this Government document, for instance that the scheme will be "victim-centred.")

[21] This initial panel ultimately held as follows:

> "Despite the attack being carried out by a paramilitary organisation, when taking into account the applicant's extensive criminal record, it could not be concluded on the balance of probabilities that the attack was carried out for a reason related to the constitutional status of Northern Ireland or for a reason related to political or sectarian hostility between people in Northern Ireland, rather it was punishment for engagement in anti-social behaviour."

[22] Both applicants challenged the determinations by the initial panel in their case and commenced appeals against those determinations with the assistance of WAVE Trauma Centre (a community victims' group based in Northern Ireland). The basis for the appeals related to the finding that the incident did not constitute a TRI, amongst other grounds which are not relevant to the present proceedings. A joint appeal hearing took place in Newry on 14 December 2023, with the applicants both legally represented. On 19 December 2023, the applicants were each informed that their appeal had been unsuccessful. The reasoning for the decision was provided the following day, on 20 December 2023.

[23] The Panel which dealt with the appeal provided a comprehensive and detailed summary of the applicants' cases and the reasons for rejecting their applications. In substance, the decisions in each case are the same, given their close connection. (Generally, where the Panel decision is cited in this judgment the reference is to the somewhat longer decision in the first applicant's case.) The decisions set out the relevant background, including the details of the incident; recount the relevant provisions of the 2020 Regulations and the 2019 Act; and refer to guidance note GN04/21, as well as the information note forming the impugned guidance in this case relating to the meaning of a TRI.

[24] The decisions then set out the Panel's initial findings, which included the following:

> "The initial requirement of the TRI definition had been satisfied relating to an incident involving an act of violence or force being carried out in Northern Ireland. The further requirement of the definition remained to be determined, namely whether the incident was 'for a reason related to the constitutional status of Northern Ireland or to political or sectarian hostility between the people there.'"

[25] This was the core issue to be determined by the appeal panel in each case. In making its assessment as to whether the incident suffered by the first applicant amounted to a TRI within the context of the victims' payments scheme, the Panel noted as follows:

> "PSAs are incidents, forming part of a relevant application under the Scheme, to be assessed and determined as with any other category of incident on a case-by-case basis as to whether or not they satisfy the definition of a TRI. They are neither automatically included, nor automatically excluded from the scheme. Some PSAs will fall within the definition of a TRI and others will not, this is explained and illustrated within the PSA information note."

[26] The Panel noted that it had carefully considered the evidence before it, which included oral evidence from both applicants during the hearing. At paras 59-60, it made the following finding:

> "59. The panel noted the Appellant's conviction history. It was significant in terms of the number of offences and the decades over which the offences spanned… They could accurately be considered the type of crimes that could have resulted in attention from paramilitary organisations… in the Panel's view the most likely reason for the attack was some form of abhorrent vigilante 'retribution' perpetrated by the PIRA against the Appellant within his family home. …
>
> 60. In light of all of the above, and mindful of the evidential burden as outlined at paragraph 47 above, the Panel is not able to conclude that on the balance of probabilities the incident of the 13th September 1990 was for a reason related to the constitutional status of Northern Ireland or to political or sectarian hostility between the people there. The Panel therefore cannot

> determine the incident as being a TRI and the appeal is unsuccessful."

[27] The decisions of 19/20 December 2023 in both applicants' cases are the subject of this challenge by way of judicial review, along with the information note on the definition of a TRI, published on 4 December 2023 and referred to by the Panel of the Board in making its decisions.

Relevant statutory provisions

[28] The starting point for consideration of the relevant law is section 10 of the 2019 Act. Unfortunately, little assistance is to be gleaned in this case by consideration of the scheme of the 2019 Act as a whole. That is because it involved Parliament addressing a range of significant but unrelated issues arising during the course of the collapse of the devolved administration in Northern Ireland from early 2017 to early 2020.

[29] The issue of the introduction of a scheme whereby victims of crimes which took place during the Troubles could receive compensation for the harm they had suffered had been raised during the negotiations leading to the Stormont House Agreement (SHA) in 2014. The resulting agreement was a culmination of all-party discussions and several commitments were made with a view to facilitating further transition to peace and stability. This included commitments to recognise the needs of victims and survivors, and at para 28 of the SHA, the following:

> "Further work will be undertaken to seek an acceptable way forward on the proposal for a pension for severely physically injured victims in Northern Ireland."

[30] Despite this commitment, continued delay in implementing a victims' payment scheme ensued, which led to its inclusion by Parliament in the 2019 Act.

[31] Section 10(1) of that Act provides as follows:

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

[32] Importantly, section 10(11) sets out the definition of a 'Troubles-related incident' within the context of the 2019 Act and therefore also for the purpose of the regulations to be made under it. It provides as follows:

> ""Troubles-related incident" means an incident involving an act of violence or force carried out in Ireland, the

United Kingdom or anywhere in Europe for a reason related to the constitutional status of Northern Ireland or to political or sectarian hostility between people there."

[33] The Secretary of State in due course made regulations, pursuant to section 10(1), in the form of the 2020 Regulations. Regulation 5 makes provision in respect of entitlement to victims' payments. Insofar as material for present purposes, it provides as follows:

"(1) A person is entitled to victims' payments in respect of injury caused by a Troubles-related incident if—

(a) the injury results in permanent disablement;

(b) the assessed degree of relevant disablement amounts to not less than 14 percent;

(c) the Troubles-related incident took place—

(i) in the United Kingdom…

(d) the Troubles-related incident took place on or after 1 January 1966 but before 12 April 2010, and

(e) an application has been made in accordance with regulation 8.

(2) But this entitlement is subject to regulation 6.

…

(5) Paragraph (1)(d) does not apply in any case where a panel considers that the application of that paragraph would undermine the purposes of this Scheme.

(6) For the purpose of paragraph (5), the purposes of this Scheme are to—

(a) acknowledge the harm suffered by those injured in the Troubles, and

(b) promote reconciliation between people in connection with Northern Ireland's troubled past."

[34] Regulation 7 is also relevant. Regulation 7(1) provides as follows:

> "For the purpose of these Regulations, a person's injury may only be considered to be caused by a Troubles-related incident if it is suffered by that person when—
>
> (a) present at a Troubles-related incident;
>
> (b) present in the immediate aftermath of a Troubles-related incident in which a loved one died or suffered an injury;
>
> (c) responding, in the course of employment, to a Troubles-related incident, in which the person reasonably believed a loved one had died or suffered significant injury."

[35] The question of whether a TRI has occurred is therefore clearly key to any application for payments under the Scheme.

[36] Regulation 6 – under the heading 'Convictions' – makes provision which, in broad terms, ensures that an individual will not be entitled to victims' payments if the incident giving rise to their injury was one which they caused by their own hand (as shown by a related conviction). It also provides for the circumstances in which the President of the Board might exercise discretion and find, on a further basis, that an individual is not entitled to the payments. (The applicants emphasise that individuals subject to VSPAs are not mentioned within regulation 6 as persons who are, or may be, ineligible under the scheme.)

[37] Regulation 6, insofar as material, provides:

> "(1) A person is not entitled to victims' payments in relation to a particular Troubles-related incident where the person—
>
> (a) has a conviction (whether spent or not), and
>
> (b) that conviction was in respect of conduct which caused, wholly or in part, that incident.
>
> (2) A person is not entitled to victims' payments where the Board considers that the person's relevant conviction makes entitlement to victims' payments inappropriate.

(3) A person is not entitled to victims' payments where the President of the Board considers that the exceptional circumstances of the case, having regard to material evidence, make entitlement to victims' payments inappropriate.

(4) The Secretary of State may issue guidance to the Board regarding the circumstances in which a relevant conviction or exceptional circumstances makes entitlement to victims' payments inappropriate.

(5) The Board and the President must have regard to any guidance issued under paragraph (4) when taking a decision under paragraph (2) or (3)."

[38] I return to the potential relevance of regulation 6 below.

Judicial review of policies

[39] Since the applicants seek to challenge the guidance which was issued by the Board (with a view to promoting consistency in decision-making in relation to TRIs of a certain type) and the Panel's reliance on that guidance when making its decisions, it is necessary to consider some case-law dealing with judicial review of policies. There was considerable argument about some of these cases (and others) in the course of the hearing.

[40] *R (A) v Secretary of State for the Home Department* [2021] UKSC 37 is a leading authority on how policy documents or statements of practice issued by the government should be considered. The appellant in *A v SSHD* was a convicted sex offender who had been subjected to violence and harassment after others discovered his convictions. He argued that the non-statutory guidance issued by the defendant Secretary of State in relation to the Child Sex Offender Disclosure Scheme failed to go far enough in providing guidance about the circumstances in which a police force would be required to seek representations from the subject before answering a disclosure request about him. The appellant argued that this was unlawful and gave rise to a breach of his rights under article 8 ECHR, among other things.

[41] The Supreme Court dismissed the appeal and affirmed the principle previously established in the case of *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112, in which Lord Scarman had stated:

> "It is only if the guidance permits or encourages unlawful conduct… that it can be set aside as being the exercise of a statutory discretionary power in an unreasonable way."

[42] The Supreme Court went on to set out additional guidance concerning the role of policies in the law, including when and how they might be unlawful*:*

> "38. In our view, *Gillick* sets out the test to be applied. It is best encapsulated in the formulation by Lord Scarman at p 182F (reading the word "permits" in the proper way as "sanction" or "positively approve") and by adapting Lord Templeman's words: does the policy in question authorise or approve unlawful conduct by those to whom it is directed? So far as the basis for intervention by a court is concerned, we respectfully consider that Lord Bridge and Lord Templeman were correct in their analysis that it is not a matter of rationality, but rather that the court will intervene when a public authority has, by issuing a policy, positively authorised or approved unlawful conduct by others. In that sort of case, it can be said that the public authority has acted unlawfully by undermining the rule of law in a direct and unjustified way. In this limited but important sense, public authorities have a general duty not to induce violations of the law by others.
>
> 39. The approach to be derived from *Gillick* is further supported by consideration of the role which policies are intended to play in the law. They constitute guidance issued as a matter of discretion by a public authority to assist in the performance of public duties. They are issued to promote practical objectives thought appropriate by the public authority. They come in many forms and may be more or less detailed and directive depending on what a public authority is seeking to achieve by issuing one. There is often no obligation in public law for an authority to promulgate any policy and there is no obligation, when it does promulgate a policy, for it to take the form of a detailed and comprehensive statement of the law in a particular area, equivalent to a textbook or the judgment of a court. Since there is no such obligation, there is no basis on which a court can strike down a policy which fails to meet that standard. The principled basis for intervention by a court is much narrower, as we have set out above."

[43] The court cited a number of other reasons which supported the application of this standard of review at para [40] of the judgment of Lord Sales and Lord Burnett (with which all of the other justices agreed). This included the public interest in

public authorities issuing useful information to improve administration; and the potential for courts to be drawn into an exercise of excessive criticism and analysis of policy guidance, which would be an unjustified expenditure of court resources. After finding that the guidance issued by the respondent in the *A v SSHD* case was "clearly lawful", the Supreme Court went on to note that there "will be cases where the application of the *Gillick* test for lawfulness of a policy may be less clear than it is here" (see para [43]). The further analysis and guidance then set out has been referred to by both the applicant and the respondent in this case. It is therefore convenient to rehearse it in its entirety:

> "46. In broad terms, there are three types of case where a policy may be found to be unlawful by reason of what it says or omits to say about the law when giving guidance for others:
>
> (i) where the policy includes a positive statement of law which is wrong and which will induce a person who follows the policy to breach their legal duty in some way (ie the type of case under consideration in *Gillick*);
>
> (ii) where the authority which promulgates the policy does so pursuant to a duty to provide accurate advice about the law but fails to do so, either because of a misstatement of law or because of an omission to explain the legal position; and
>
> (iii) where the authority, even though not under a duty to issue a policy, decides to promulgate one and in doing so purports in the policy to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position.
>
> In a case of the type described by Rose LJ, where a Secretary of State issues guidance to his or her own staff explaining the legal framework in which they perform their functions, the context is likely to be such as to bring it within category (iii). The audience for the policy would be expected to take direction about the performance of their functions on behalf of their department from the Secretary of State at the head of the department, rather than seeking independent advice of their own. So, read objectively, and depending on the content and form of the policy, it may

> more readily be interpreted as a comprehensive statement of the relevant legal position and its lawfulness will be assessed on that basis. In the present case, however, the police are independent of the Secretary of State and are well aware (and are reminded by the Guidance) that they have legal duties with which they must comply before making a disclosure and about which, if necessary, they should take legal advice."

[44] In the present case, the applicant contends that the challenged guidance falls into either category (i) or (iii) in the above taxonomy. The respondent disputes that there is any error of law but, in any event, also contends that this is not a case where the relevant information note purports to "provide a full account of the legal position"; nor, in fact, that it is likely to mislead any decision-makers (even assuming, which is contested, that it contained any error of law) given that panels are chaired by independent, legally-qualified chairpersons.

The correct approach to statutory construction

[45] The court is also asked to conduct an exercise of statutory interpretation to determine the meaning of the phrase "Troubles-related incident." The applicants have submitted various materials which they contend can and should be considered by the court when undertaking this exercise, including advisory papers for government authored by the Commission for Victims and Survivors for Northern Ireland and other statutory provisions which deal with issues relating to the Troubles.

[46] *R (Project for the Registration of Children as British citizens) v Secretary of State for the Home Department, R(O) v Secretary of State for the Home Department* [2022] UKSC 3 is again relied upon by both parties in this case as the key authority setting out the approach to be followed by the court when interpreting a statute. Lord Hodge summarised the relevant principles at paras [29]-[31]:

> "29. The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated:
>
> > "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context."

(*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] AC 349, 396). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, 397:

> "Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament."

30. External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. …

31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered…"

[47] I also note that this passage has been endorsed in recent times by the Court of Appeal in this jurisdiction in the judgment of the Lady Chief Justice in *Safe Electricity A&T Limited and Patrick Woods* [2022] NICA 61, at para [35]. More recently, in *Brown v Ridley and Another* [2025] UKSC 7, Lord Briggs expressed the position more pithily thus:

> "Statutory construction requires the court to ascertain the objective intention of the legislature as manifested by the language which it has chosen to use, interpreted in the context of the legislation as a whole and with due regard to its underlying purposes so far as they can reliably be obtained from admissible material."

Principles relevant to review of the Panel's decisions

[48] In terms of the challenge to the decisions of the Panel, I accept the respondent's submission that some assistance is to be gleaned from the authorities discussed briefly below which deal (albeit in different contexts) with applications for judicial review of a decision of an experienced and expert panel, making decisions by assessing facts in the context of a statutory scheme, after a hearing with the benefit of legal submissions.

[49] In *Wilcox's Application* [2010] NIQB 70, Treacy J, at para [18], emphasised that the court exercises a supervisory and not an appellate jurisdiction; and that assessment of the evidence and its reliability was quintessentially a 'jury question' for the panel to decide. On appeal in that case ([2010] NICA 42), Morgan LCJ reiterated, at para [10], that the onus lies on the challenger to demonstrate that there was some error by way of irrationality or improper consideration on the part of the panel.

[50] The respondent also relied upon the judgment of Maguire J in *Re P's Application* [2013] NIQB 129, where emphasis was again placed on the deference due to such a panel which had had the benefit of hearing oral evidence, similar to the appeal panel of the Board in this case:

> "[15] It is clear that a Panel at the oral hearing should be able to assess the reliability of the applicant's case bearing in mind what he said; how he said it; any discrepancies between the accounts he had given over time; and any other relevant factor… A Panel, it seems to the court, must be entitled to form a judgment, bearing in mind that the onus of proof to establish the claim before it is on the applicant.

> [16] The Panel in this case formed a judgment. It seems to the court that the reasons given for its judgment must be read as a whole and *in bonam partem*. Given that this is a judicial review application, this court must avoid substituting its judgment for that of the Panel which is the duly appointed decision-maker.
>
> [17] Having considered the totality of the papers in this application, the court is not persuaded that an arguable case for judicial review has been established by the applicant. In effect, the applicant is, in the court's view, unable to establish to the level of arguability that the decision of the Panel was irrational. It should be made plain that this does not mean that this court necessarily agrees with the position adopted by the Panel on the various issues but it must be for the Panel to determine the outcome of the appeal and there are well established limits to this court's ability to intervene by way of judicial review."

Summary of the parties' submissions

[51] The focus of the applicants' challenge was the guidance set out in the information note. The Panel decisions in the respective appeals are also challenged, partly (although not exclusively) on the basis that they relied upon unlawful guidance (which, accordingly, it was submitted, should be considered an irrelevant consideration in law or which was such as to give rise to an error of law).

[52] In summary, the applicants submit that the guidance is *ultra vires* or represents an error of law in that it adopts an unduly narrow and incorrect approach to defining a TRI in the context of section 10(11) of the 2019 Act. Relatedly, it is argued that the guidance introduces unjustified distinctions between different types of incidents, which may or may not be TRIs, without any proper or evidential basis. Moreover, it is contended that the guidance was wrong to specifically exclude from the payments scheme those who were subjected to PSAs for which the motive was exercising a vigilante function in the purported punishment of crime or antisocial behaviour (see para [15] above).

[53] The applicants contend that the guidance issued by the VPB is unlawful on the basis of category (i) and/or (iii) of the Supreme Court's judgment in *A v SSHD* (see para [43] above) in that, by defining a TRI in a manner which excludes the applicants' cases and others like them, the Board has made a positive statement of law which is wrong and/or a specific misstatement of the law which is misleading. On this basis, the applicants characterise the challenge as one of statutory construction. In turn, relying on para [30] of the *O v SSHD* case (see para [46] above), they pray in aid a range of other sources which they contend assist in giving

section 10 of the 2019 Act its proper and/or a purposive meaning. On their case, this includes those subject to VSPAs by paramilitary organisations.

[54] The applicants also submit that the guidance is wrong to state or imply that there must be a 'direct link' between the reason for the violence and a statutory hallmark of the Troubles (as referred to in examples (a), (b) and (d) of those which *should* be regarded as a TRI in the guidance: see para [17] above); and wrong to make distinctions between the types of violence and their motives given in the examples without any evidential basis for doing so. (For this purpose, the phrase "statutory hallmarks" of the Troubles was used as a shorthand to refer to the constitutional status of Northern Ireland and to political or sectarian hostility between people here. I have similarly adopted this phrase for convenience in the course of this judgment. In the 2019 Act there must be a relationship with one or other of those features as a necessary part of an incident being Troubles-related.)

[55] In any event, the applicant contends that vigilante or punishment-beating PSAs are related to the constitutional status of Northern Ireland, both generally and in this case. In this regard, reliance is placed upon what is referred to as "expert evidence." The main documentation relied upon by the applicant in this respect is a report written by Prof Kieran McEvoy of Queen's University, Belfast, and exhibited to affidavit evidence filed on behalf of the applicants further to the grant of leave in this case. Prof McEvoy was instructed to conduct a literature review with a view to addressing the question of "What was (or were) the motivation(s) behind PSAs carried out by paramilitary organisations during the conflict in the relevant period (1966-2010)?" He was also instructed to provide his opinion on whether it was justified for the VPB guidance to state that VSPAs should not be regarded as TRIs. I return to this evidence, and other evidence also prayed in aid by the applicant (but much of which was not before the Panel), below.

[56] The appeal decisions themselves are contended to be irrational as failing to take relevant factors into account, namely the multi-faceted reasons for the IRA to carry out VSPAs and the specific motivations for punishment attacks. The applicant also submits that the Panel failed to consider relevant evidence, in particular a letter submitted from Mrs Naomi Long MLA (a former Justice Minister in the Northern Ireland Executive), or wrongly failed to investigate matters further pursuant to its powers under regulation 29 of the 2020 Regulations. Finally, the applicants argue that the decisions give rise to a violation of their rights under article 14 ECHR, since they would have been entitled to victims' payments if it were not for the discriminatory exclusion of certain PSAs from the scope of the Scheme.

[57] The respondent submits that the proper focus of this application should be on the decisions of the appeal panel, rather than the guidance contained within the information note. It submits that the decisions are sound and support the fact that the guidance was applied properly in a manner which recognised its nature as guidance only. In any event, it is argued that there is no basis for a challenge to the lawfulness of the guidance, which must overcome a high hurdle in light of the

content of the judgment of the Supreme Court in *A v SSHD* (see above). The Board submits that there is no positive statement of law in the guidance (other than reference to the statutory test under section 10(11) of the 2019 Act); that it does not authorise or approve unlawful conduct; and nor does it induce someone following it to breach a legal duty. This submission was underscored by the fact that the guidance was addressed to legally qualified panel members who would understand its status merely as guidance and would not be deflected from their own faithful application of the statutory scheme.

[58] The respondent contended that the fresh evidence relied upon by the applicants in these proceedings was inadmissible but, in any event, was of minimal relevance to the key issue in this case. In addition, it contended that the extra-statutory materials were of limited, if any, relevance; as were the provisions of other statutory schemes which were not directly at issue. The court's focus should be on the words used by Parliament in the relevant provisions.

[59] In the respondent's submission, the interpretation of a TRI advanced by the applicants would effectively mean that *all* attacks carried out by PIRA should immediately trigger eligibility under the Scheme. It argues that this cannot be said to have been Parliament's intention when legislating for the Scheme and that, had that been, this would simply have been spelt out in the relevant provisions.

[60] When the particular panel decisions are examined, the respondent submits that the Panel directed itself to the correct statutory test; that it merely "had regard to" the guidance in the impugned information note; that it properly analysed the specific facts and evidence before it; and that it carefully and conscientiously weighed the evidence before reaching its overall conclusion (at para 60 of its decision, set out at para [26] above). The respondent further argues that the applicants have not discharged the burden of showing that the Panel left relevant considerations out of account; and that the application is in reality an impermissible challenge to the weight given by the Panel to certain aspects of the evidence. The failure to conduct further inquiry on the part of the Panel itself was not *Wednesbury* unreasonable.

[61] Finally, the respondent further submits that the applicants' article 14 claim reduces to a broad and circular submission alleging that those who are eligible under the Scheme have been treated differently to those who are not eligible. However, the mere fact of ineligibility is not enough to establish differential treatment which violates article 14, nor even such as to call for justification. In this regard, the respondent relies on *R (SC, CB & 8 children) v Secretary of State for Work & Pensions* [2022] AC 223, underscoring the wide margin of appreciation afforded to the State in relation to general measures of economic or social strategy. It submits that the policy underpinning the statutory entitlement is not manifestly without reasonable foundation.

Construction of the relevant provisions

[62] The primary difficulty in this case is that the statutory scheme itself does not make clear, one way or another, how a claim under the Scheme such as that on the part of the first applicant should be determined. It is accepted by the first applicant that his injury must have been sustained as a result of a "Troubles-related incident" and that the concept of a TRI is foundational within the Scheme.

[63] However, the statutory definition of that concept, contained in section 10(11) of the 2019 Act, leaves a range of questions unanswered. Certain elements of the definition are (relatively) straightforward, such as the need for an act of violence and the geographical conditions. The issues of complexity which arise in this case really concern the meaning and effect of the short phrase "for a reason related to" the constitutional status of Northern Ireland or political/sectarian hostility. Two questions immediately occur: (i) is only one reason relevant, or can there be more than one reason for this purpose; and (ii) how closely *related* to the hallmarks of the Troubles must the relevant reason be?

[64] The Regulations are the obvious place to turn for further assistance. They are what the Board must apply in administering the Scheme. However, these do not further define the concept of TRI. That concept is lifted from the 2019 Act and plainly must bear the same meaning as in the parent Act. Only very limited assistance is to be found in the Regulations, in my view, in regulation 6. To the extent they assist, however, I consider that they favour the applicants' construction, for reasons discussed further below. One is left with the clear impression though that both the Act and the Regulations left the definition vague (or, more charitably, flexible) by design. In the case of the Act, this may be because it was hoped that further detail could be provided by the Regulations. In the case of the Regulations, this may be because it was simply left to the Board, through its determinations, to put flesh on the bones. As the papers in this case show, the whole concept of victimhood for the purpose of such a payments scheme has proven to be politically contentious.

[65] Returning to the two questions posed at the end of para [63] above, I do not consider that the reason for the act of violence which is related to one of the statutory hallmarks must be *the only* reason for the act of violence in order for eligibility to be established. Nor, by the same token, must it be the primary or dominant reason, provided that (using the words of the statute) "*a* reason" for the act of violence is related to the constitutional issue or political or sectarian hostility. It seems to me that this is the ordinary and natural meaning of the words used. Parliament could have made clear that one reason for such an act must be isolated and that it is only *that* reason which must be assessed in order to establish whether the wider incident was a TRI. It has not done so. Common experience tells one that there could be multiple reasons for an act of violence. Personal animosity may be one; acting under duress may be another, by way of example only. Those who perpetrated such acts during the Troubles, or were pressured into doing so, did not always have single or

clearly defined reasons. I note that this is not, in fact, an issue in dispute between the parties. The respondent's written submissions make clear that the information note "does not require that a single reason be identified" and there may be more than one reason for such a PSA, which is why the information note itself refers to the "reason or reasons."

[66] In my judgement, provided a *material* reason for the act of violence is a qualifying reason, this would suffice for the purposes of eligibility under the Scheme. As noted above, that is in my view the most natural reading of the statutory words used. As the respondent submitted, this also seems to be consonant with the approach adopted in the guidance which refers to the Board's central focus being appropriately "on the identification of the reason *or reasons* behind the use of violence or force…" (emphasis added; set out, in its full context, at para [16] above). I also bear in mind the provision in section 6(c) of the Interpretation Act 1978 that in any Act, unless the contrary intention appears, words in the singular include the plural. The onus will still rest on an applicant for victims' payments to show that at least one material reason for the use of violence qualifies under the terms of the Scheme. However, I do not consider that this must be shown to be the sole or dominant reason for the act.

[67] Turning to the second question posed in para [63], the strength of relation required between (on the one hand) the reason for the act of violence and (on the other) the constitutional issue or political or sectarian hostility is also at large. This is really a matter of judgement for the Board in individual cases. If the connection between the relevant reason and the statutory hallmarks is so remote or strained that they cannot be said to be a material or operative reason for the act of violence, eligibility will plainly not be established. However, provided there is a sufficient relationship – which I would again define as the constitutional issue or political/sectarian hostility being a *material* reason for the act of violence (even if only one of a number of reasons) – in my judgement that would suffice. The requirement of a reason "related to" the hallmarks of the Troubles does not necessarily imply a particularly close connection.

[68] The applicants referred the court to various other interpretations of the phrase "related to" in different cases and statutory contexts. These have to be approached with caution since the meaning of each provision will turn on its own specific context. However, in the case of *Derby Teaching Hospitals NHS Foundation Trust & Ors v Derby Council & Ors* [2019] EWHC 3436 (Ch), Morgan J considered the meaning of the phrase "related to" (in the context of section 43(2) of the National Health Service Act 2005) and some earlier caselaw which had considered the same or similar words: see paras [62]-[77] of the judgment. It was noted that the phrase has an "elastic character." At para [64] of his judgment, Morgan J commented as follows in relation to the phrase "related to":

> "The phrase shows that there must be a connection but does not tell one very much about how close that

> connection must be. The closeness of the connection, or the relationship, which is required depends upon the perceived purpose of the statutory provision. It is not easy to define what precisely is required but nonetheless it is possible to make some useful comments as to what is involved."

[69] In the context which he was considering in that case, Morgan J considered that the relevant 'related' purposes did not need to be subservient to, or intended to assist with achievement of, the specified purposes. There must simply be a connection to, or a relationship with, the specified purposes. In that case, the use of this drafting phrase was considered to be defining the functions "in wide terms."

[70] Albeit that the present case arises in a different context, it seems to me that the use of the phrase "related to" in the TRI definition in section 10(11) of the 2019 Act is also designed to give the definition a relatively expansive, rather than restricted, meaning. That is particularly so given the breadth of the definition generally: "an incident" merely "involving" an act of violence or force, carried out "anywhere" in Europe (as well as in Ireland or the United Kingdom) for a reason "related to" the two statutory hallmarks (constitutional status or political/sectarian hostility), each of which is also itself a relatively broad concept. A similar construction of the same phrase, as denoting a broad application, was adopted by Fowler J in his ruling in the Raymond McCord Jr Inquest, discussed below, in respect of a statutory regime much closer in time and subject-matter to the 2019 Act than that under consideration in the *Derby Hospitals* case.

[71] I did not find any particular assistance in regulation 5(6) of the 2020 Regulations. I assume for present purposes that that paragraph should be taken as setting out the general purposes of the Scheme for a variety of purposes (rather than, as it says on its face, simply for the purpose of extending the statutory timeframe of the Troubles in accordance with regulation 5(5)). That is clearly the approach which the Board itself has taken since GN 04/21 directs decision-makers to consider the purposes in regulation 5(6) where there is a question as to whether or not an incident is a TRI (see para 4 of that note). Nevertheless, the two purposes outlined there are of such a general nature that they do not assist with the issues of construction raised in this case. On one view, this fact itself might assist the applicants; and it might be said that the applicants are individuals who have suffered harm by being injured in the Troubles, so that that harm should be acknowledged by compensation under the Scheme. On the other hand, regulation 5(6)(a) refers to those injured "in the Troubles", which may simply give rise to the same or similar questions as arise in respect of section 10(11) of the 2019 Act. I reject the submission on the part of the applicants, insofar as it was made, that regulation 5(6) means effectively that the definition of a TRI should be read as widely as is at all possible.

[72] I found more assistance in regulation 6. Although this is not directly on point and applies where it is clear that there *has been* a TRI (which is the very matter at

issue in the present case), it nonetheless casts some light on the legislator's view of how and when the claimant's own conduct may be relevant to the question of eligibility. It provides (see para [37] above) that a person – who would otherwise be entitled to victims' payments under the Regulations – is not so entitled in certain circumstances. This applies, first, where they have a conviction in respect of conduct which caused the incident wholly or in part; and/or, second, where they have a relevant conviction (defined further in regulation 6(6)) which the Board considers makes entitlement inappropriate. The first of these exclusions is mandatory and caters for the situation where an individual is injured by their own hand; the classic example being the intending bomber whose bomb explodes prematurely and injures them. The second involves an element of discretion on the part of the Board where conduct, which has been proven to the criminal standard, makes entitlement to victims' payments inappropriate. There is also a broader power, third, exercisable by the President of the Board under regulation 6(3), to determine that a person is not entitled to victims' payments where the exceptional circumstances of the case make entitlement inappropriate. This permits a determination of ineligibility where, for instance, it would be an affront to the purposes of the Scheme for an individual to be compensated as a victim even where (it appears) the relevant concern is established by material evidence falling short of criminal convictions or "relevant" convictions as defined in the regulations. The Secretary of State issued guidance in August 2020 under regulation 6(4) to which the Board and President must have regard under regulation 6(5) when making a determination under regulation 6(2) or (3).

[73] These provisions are potentially relevant in this way. The first applicant contends that they show that the Regulations make specific provision for dis-entitling a claimant under the Scheme in certain circumstances by reason of their own conduct and that, where the regulation 6 route to doing so is not applicable, the claimant's own conduct should not be a relevant (or at least not a determinative) factor. In his submission, the effect of the Panel's decisions in this case is to penalise each applicant for his (alleged) behaviour. This argument is a variation on the application of the maxim *expressio unius est exclusio alterius*. It proceeds on the basis that the first applicant could not be deprived of entitlement under regulation 6. For my part, I doubt whether that is necessarily correct (although express no decided view on it in the absence of any detailed argument). It is at least arguable that regulation 6(1) could be wide enough to deprive those who are the subject of VSPAs of compensation. If the claimant had been *convicted* of behaviour which was then also the motivation for a VSPA, the Board could conceivably consider that he or she had been convicted in respect of conduct "which caused, wholly or in part, that incident." There would obviously be issues of fact to be decided and there would have to be argument about the remoteness of causation. (It is common case that regulation 6(1) principally applies where the act of violence was being perpetrated or assisted by the claimant in some way, rather than through the intervening act of a third party.) Alternatively, if the claimant had relevant convictions, or even exceptionally where there had been no relevant conviction, if the claimant's behaviour was established to the Board's or President's satisfaction (as the case may be) to have been so poor as to render them an inappropriate recipient of public

funding as a victim, they could be denied victims' payments on that basis. This is how certain provisions of the Criminal Injuries Compensation Scheme operate, although in that case, the relevant misconduct sounding on the applicant's character must also be evidenced by way of convictions.

[74] In either event, the applicants' basic point is the same. If the first applicant in this case could have been precluded from entitlement on a *conduct* basis, this should be a considered and reasoned assessment by the relevant panel or President of the Board and *not* a matter for the paramilitary grouping itself. In such circumstances, the onus is on the Board to establish that a provision of regulation 6 excludes the claimant from entitlement; rather than prima facie entitlement not having been established in the first place.

[75] I should make clear that none of the discussion in para [73] above is to suggest that a claimant should be deprived of eligibility because their treatment at the hands of a paramilitary grouping was in some way justified or warranted. However heinous an individual's perceived or actual offending, the proper response is by way of due operation of law. Vigilante-style attacks are abhorrent to the rule of law, as the impugned guidance in this case and the Panel's decisions go out of their way to make clear. Any such assessment under any of the above-discussed provisions of regulation 6, therefore, would not be based on the premise that the claimant's treatment was in any way deserved or approbated; rather, it would simply be based on the assessment that, by reason of their own conduct, the claimant was undeserving of compensation out of public funds under the terms of the Scheme.

[76] In any event, I considered the applicant's reliance on regulation 6 persuasive as an indicator that issues of eligibility related to the claimant's own conduct were dealt with independently under regulation 6 rather than in some manner inherent within the definition of a TRI itself.

[77] I should add that the applicants also relied upon the guidance issued by the Secretary of State pursuant to regulation 6(4) of the 2020 Regulations, which included the following passage:

> "In reaching decisions the Board and President must have due regard to the stated purpose of the scheme: to provide those living with permanent disablement caused by injury through no fault of their own in a Troubles-related incident with payments primarily in acknowledgement of the acute harm which they have suffered."

[78] The applicants emphasised that their injuries arose "through no fault of their own" applying any meaningful understanding of the rule of law in this context.

Extraneous aids to construction

[79] I set out below my view of the impact of the above exercise of statutory construction in light of the content of the Panel's decisions and the guidance in this case. Before doing so, however, it is necessary to deal with a number of other points raised by the applicants in aid of their arguments on statutory construction; in particular, their reliance on external materials which (they submitted) supported their approach. Superficially, a number of these appear to support the applicants' preferred interpretation. Ultimately, however, I accept the thrust of the respondent's argument that many, if not all of them, are of limited assistance given that they are inadmissible or inappropriate aids to interpretation. Similarly, the applicant also relied upon a number of other statutory provisions dealing with related themes or concepts, particularly in the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ("the Legacy Act"). Again, they were able to gain some rhetorical force from at least one decision dealing with the Legacy Act but, in the final analysis, this does not sound directly on the issue before the court in this application.

Pre-enactment materials

[80] First, it was argued that the 2019 Act was adopted following commitments made in the 2014 Stormont House Agreement and that the SHA is therefore "directly linked" to the resulting victims' payment scheme. Payments were to be back-dated to the date the SHA was signed (see section 10(6) of the 2019 Act). In the SHA, the term "victims and survivors" is used to describe those who would be eligible to receive payments under the envisaged scheme. This is also the terminology which had previously been used in the Victims and Survivors (Northern Ireland) Order 2006 ("the 2006 Order"), which established the Commission for Victims and Survivors for Northern Ireland ("the Victims Commission"). The 2006 Order defines a victim or survivor in broad terms in Article 3 as including an individual appearing to the Victims Commission to be "someone who is or has been physically or psychologically injured as a result of or in consequence of a conflict-related incident." In turn, the phrase "conflict-related incident" is defined in Article 2 of the 2006 Order as "an incident appearing to the Commission to be a violent incident occurring in or after 1966 in connection with the affairs of Northern Ireland."

[81] The applicants contend that section 10 of the 2019 Act should be construed in this context and that the commitments made by the parties in the SHA adopted a broad concept of victim and conflict-related incident, as defined in the 2006 Order, along with a commitment to acknowledge and address the suffering of victims. It was submitted that Parliament would not have intended to give a TRI a narrower definition than that of conflict-related incident in the 2006 Order, nor would Parliament have intended to create a 'hierarchy' of victimhood and exclude victims of VSPAs.

[82] Ancillary to this argument, the applicants referred the court to five sets of advice given to the Secretary of State by the Victims Commission prior to the

adoption of the 2019 Act and the subsequent creation of the Scheme. The first piece of advice is dated 22 September 2013; the second 27 March 2014; the third was provided in June 2014; and the fifth in May 2019. In the advice, the Victims Commission is argued to have consistently endorsed the 2006 Order definitions of victims and survivors and conflict-related incidents. The applicants relied, in particular, upon the Victims Commission's May 2019 advice to the Secretary of State, which was submitted to have been "a key aspect of the specific context in which Parliament enacted the 2019 Act."

[83] The Victims Commission stated that its advice and recommendations about the qualifying criteria for individuals severely physically injured by the Troubles/Conflict was informed by research conducted on behalf of WAVE Trauma Centre by Marie Breen-Smith, entitled 'The needs of individuals and their families injured as a result of the Troubles in Northern Ireland.' The Breen-Smith report discusses victims who were shot by paramilitary groups in punishment or vigilante attacks (at p 74) in terms which suggest that they are deserving of support. On this basis, it was argued that the Victims Commission plainly supported this cohort of victims (to which the first applicant belongs) being considered as eligible victims under the payment scheme.

[84] In my judgement, this is plainly much too remote to be relied upon as an aid to construction of the words Parliament used in the 2019 Act. Parliament could have used the same wording as had been used in the 2006 Order or merely incorporated the definition of victimhood in that Order. However, that course was not taken. In any event, it would simply give rise to the same issue under different rubric; since the concept "conflict-related incident" is similarly ill-defined (albeit in a slightly different manner) to that of a TRI. The Victims Commission's view was plainly not intended to be determinative of applications under the Scheme. The Breen-Smith report is mentioned in the Commission's advice to government but *not* the portion relied upon by the applicants. Nor is there anything to indicate that Parliament, in enacting section 10 of the 2019 Act, was intending to give effect to this advice, much less the full content of the underlying report. As the respondent rightly pointed out, the Government's own response (published in January 2020) to the consultation preceding the making of the 2020 Regulations did not define in detail the concept of a TRI. That paper did indicate that the underpinning principles included that the Scheme would be victim-centred but also consistent with the Government's commitment that it will not be open to those injured through fault of their own. In summary, this line of argument was much too ambitious.

Similar test in the Legacy Act

[85] The applicants also relied upon the meaning and effect of section 1(1) of the Legacy Act. It defines the phrase 'the Troubles' in the following manner:

> "In this Act "the Troubles" means the events and conduct that related to Northern Ireland affairs and occurred during the period—
>
> (a) beginning with 1 January 1966, and
>
> (b) ending with 10 April 1998."

[86] "Northern Ireland affairs" for this purpose was further defined in section 1(6) as meaning "the constitutional status of Northern Ireland, or … political or sectarian hostility between people in Northern Ireland", ie in similar terms to section 10(11) of the 2019 Act.

[87] These provisions were analysed by Fowler J, sitting as a coroner, in *Raymond McCord Junior Inquest: Decision on "Troubles Related" Issue* [2024] NICoroner 29. That case concerned the question of whether the inquest into the death of Mr McCord Jr was an "inquest into a death that resulted directly from the Troubles" for the purpose of section 16A of the Coroners Act (Northern Ireland) 1959. That provision, which was inserted by the Legacy Act, required such inquests to be halted and closed on or shortly after 1 May 2024. In addressing that question, Fowler J used the shorthand phrase "Troubles-related inquest" to describe those inquests which were required to be closed down. The key issue, having regard also to section 16C of the 1959 Act, was whether the act of violence causing Mr McCord's death was "conduct forming part of the Troubles" as that concept was defined in section 1 of the Legacy Act.

[88] Although the McCord Inquest was at an early stage, the information available suggested that the death may have related to a drugs deal and/or some form of internal UVF feud. It was "common ground" that Mr McCord Jr was himself in the UVF and, for the purpose of the ruling, that he had been killed by others in the UVF and at the behest of one of its members. The issue arose as to whether this was a Troubles-related inquest or not. The deceased's next of kin submitted that it was not, relying on the fact that the death related to a drugs deal. The police submitted that it was.

[89] Fowler J held that the inquest did come within meaning of the relevant statutory phrase. At para [38] of his ruling, he said:

> "I am of the view that the activities of the UVF clearly fall within the catchment of conduct related to Northern Ireland Affairs, as defined in section 1(6)(b) above, as "political or sectarian hostility between people in Northern Ireland.""

[90] He went on to hold, at para [40], that, as the violence which caused the death was "so closely related with the activities of the UVF", it could reasonably be held

(on balance) to relate to political or sectarian hostility between people in Northern Ireland. At para [41], Fowler J commented as follows:

> "It could also be argued this death was related to the other part of section 1(6). Those involved in the UVF wanted Northern Ireland to remain part of the UK. They were prepared to engage in unlawful activity in order to further that aim. It could therefore be argued that one of the UVF's core activities, being concerned with maintaining the Union, was related to the constitutional status of Northern Ireland, thereby falling within the first category of Northern Ireland Affairs provided for in section 1(6) of the Legacy Act."

[91] However, even taking a narrow view of the circumstances giving rise to the murder (which the next of kin described as "criminality simpliciter"), Fowler J considered that still "the death "related to" the conduct of a proscribed terrorist organisation whose activities were inherently connected with the statutory definition of Northern Ireland affairs." Even on that narrow view, therefore, the death was still caused, in the coroner's estimation, by an act of violence which was conduct forming part of the Troubles: see paras [42]-[43] of the ruling. Fowler J considered a range of other possible motivations for the murder but, in respect of each of them, considered that it was to minimise the risk of UVF members being identified and to allow the organisation to continue its campaign of violence (which was directly linked to the constitutional status of Northern Ireland and sectarian hostility): see para [46].

[92] The applicants rely on this authority to suggest, in essence, that (a) the relevant test should be broadly construed; and (b) if an act of violence is carried out by a proscribed terrorist organisation to assist it in its ends, that of itself will (or is at least likely to) meet the relevant test.

[93] There is only limited assistance which can be gained by the applicants from this ruling in my view. It is something of a jury point to contend that what is, or is not, included within "the Troubles" must be the same in the 2019 Act and the Legacy Act respectively. The statutory definitions are similar but not on all fours (see, for instance, the extended meaning of events or conduct for that purpose in section 1(2) of the Legacy Act and the inclusion of the phrase "to any extent" in section 1(5)(a)). Parliament *may* have intended a broader meaning to be given to the concept for the purposes of reform of investigative measures than it did for the purposes of the victims' payments scheme.

[94] Nonetheless, Fowler J also commented, in para [37] of his ruling, that:

> "The use of the words "related to" in section 1(1) of the Legacy Act indicates to me the intention of Parliament for the provision to have a broad scope. (Similarly, the

> examples provided in section 1(2) are defined by using the words "connected with", which again indicates an intention for the provision to have a broad scope.)"

[95] That observation on the effect of the statutory language immediately preceded his comment at para [38] (set out at para [89] above) that the activities of the proscribed organisation clearly fell within the scope of conduct related to the hallmarks of the Troubles. I consider that the applicants can legitimately find some support for their argument in the present case on that issue (which I have addressed at paras [68]-[70] above in any event).

The applicants' further evidence

[96] In the course of these proceedings, the applicants have sought to adduce a range of evidence which was not before the initial panel or appeal panel of the Board, nor the President of the Board when the impugned guidance was issued (nor, indeed before the President when the appeal panel decision in the earlier case which formed the basis of the guidance was made).

[97] The central plank of this evidence may be thought to be the report from Prof McEvoy referred to at para [55] above. He describes his instructions as having been to produce "a summary of academic and other relevant literature responses to" PSAs, the Government's understanding of them, their role and significance during the Troubles, and any formal government position as to them. In summary, Prof McEvoy's analysis is that "the PIRA's engagement in PSAs evolved into a self-conscious effort to challenge the state and its justice system." More broadly, he opines that the motivation for such attacks by the PIRA were "all linked to the broader conflict concerning the constitutional status of Northern Ireland." His conclusion, in essence, is that the motives behind the IRA carrying out VSPAs and punishment shootings were due to the community's distrust in State policing organisations such as the RUC. He also states that acts of violence of this nature were "intrinsically connected to the conflict concerning 'the constitutional status of Northern Ireland or to political or sectarian hostility between people there.'" His report is provided as evidence of what the motives behind such attacks were, or may have been, to support the submission that they were properly to be viewed as TRIs. It is relied upon to advance the position set out by Prof McEvoy that the distinction made in the guidance between PSAs which amount to TRIs and those which do not "is not intellectually, politically or historically justified."

[98] In the course of his report, Prof McEvoy also highlights views of the Northern Ireland Office (NIO) in relation to punishment shootings – albeit from 1992, but proximate therefore to the time when the applicants were injured – which was provided to the Standing Advisory Committee on Human Rights. This document recorded the view that punishment shootings carried out by both loyalist and republican paramilitary groupings were "in order to establish their control and authority" in areas where they had support; that, in the case of the PIRA, this was

overseen by 'Civil Administration Units' designed to offer something by way of an alternative police force; and that the PIRA considered such attacks beneficial as it assisted with community perception and also dealt with criminal activity which might otherwise attract security forces into the area, thereby hampering proposed PIRA operations.

[99] The additional material relied upon by the applicants also included an affidavit from Ms Sarah Kay of the Wave Trauma Centre; correspondence from Mrs Naomi Long MLA; chapters from a book by Prof Liam Kennedy entitled 'Who was responsible for the Troubles?'; a statement of Andree Murphy on behalf of Relatives for Justice (RfJ); and an article written by McEvoy and Mia entitled 'Punishment, Policing and Praxis' (2010). It was only the letter from Mrs Long MLA which was before the Panel

[100] The respondent robustly challenged the admissibility of much of this evidence, relying on the rejection of such evidence ('expert' evidence given otherwise than on oath on an ex post facto basis) in cases such *Horne v United States of America (No 3)* [2021] NIQB 67, at paras [63]-[79]. It did so with good reason in my view. The applicants argued that the evidence was nonetheless important to illustrate the complexity of the issue, and as supporting the submission that VSPAs can, and should, be considered as related to the constitutional status of Northern Ireland, at least in certain circumstances.

[101] I was not materially assisted by much, if any, of the additional evidence mentioned above. Insofar as the evidence purported to express a view about the meaning of, or intention behind, section 10 of the 2019 Act, I consider it to be an inadmissible aid to construction of that provision; or to be expressing a mere view on contested issues of law which are a matter for the court. Some of the evidence was, as the respondent observed, more in the nature of campaigning material arguing for what the Scheme *ought* to provide for (whether or not it actually did so in law). Prof McEvoy's report, whilst learned and clearly researched, amounts to evidence on an essentially factual issue (the motivation behind various PSAs) which was not placed before the relevant decision-making panel. I do not therefore consider it admissible in the challenge to the panel decisions at issue in these proceedings. In reaching that view, I have taken into account the proper approach to expert evidence in judicial review proceedings as outlined, for instance, by Treacy J in *Re Bryson Recycling's Application* [2014] NIQB 9, at paras [112]-[115].

[111] The position is arguably more complex when it comes to the applicants' challenge to the guidance. In that context also the McEvoy report was not produced and relied upon, or provided to the President of the Board, before the guidance was issued or in the appeal the determination of which formed the basis of the guidance. The report is therefore entirely post hoc. The applicants assert that, before the guidance was issued, the Board ought to have exercised its information-gathering powers to enquire more generally into the reasons for VSPAs; and that, had it done so, it would have had the benefit of the information or conclusions contained within

Prof McEvoy's report, or something similar. That may be so but it was a matter for the Board whether it considered such an exercise necessary and, applying the principles set out in *R (Plantagenet Alliance) v Secretary of State for Justice* [2015] 3 All ER 261 (at paras [99]-[100]), I do not consider that it was irrational for the Board not to seek such material.

[112] I should make clear that no one disputes Prof McEvoy's expertise in his chosen academic field, nor that he acted entirely in good faith in providing the report which was commissioned from him. However, the assistance to be gained from an academic literature review – which the respondent characterised as 'hearsay' evidence at best – in a dispute of the present type is extremely limited. Prof McEvoy could not speak to issues of law. As noted above, his evidence was in truth directed towards issues of fact, either in this case or more generally, as to which he had no direct experience other than by way of learned study and in respect of which it is unclear whether he could in truth express an expert opinion such as is required to be admissible as expert evidence of opinion in this context.

[113] In any event, some of the key conclusions in Prof McEvoy's report are matters of commonsense or of which judicial notice might be taken, namely: that paramilitary organisations wished to exert control over the communities in which they operated for a range of reasons; and that they wished to minimise police presence or activities in the areas they controlled or in which they operated, again for a number of reasons. Those reasons included antipathy towards the police (particularly, although not exclusively, on the republican side); a desire to discourage and intimidate informants or potential informants; a desire to increase their own claimed or perceived legitimacy within the community; a desire to maintain control of criminal enterprises themselves in order to generate funding; and a desire to operate freely in certain areas or communities with reduced risk of police detection. In addition, the NIO document referred to by Prof McEvoy and discussed at para [98] above does appear to me to be of some assistance, representing (as it appears to) a view of the NIO, the sponsor department of the 2019 Act, at a time proximate to the attack on the applicants. It is perhaps unfortunate that this document was not identified by the applicants and provided by them to the Panel in advance of its decisions.

The Panels' decisions

[114] Turning back to the main focus of these applications, namely the Panel decisions in the first and second applicants' cases, I consider that the decisions do evince one legal error, namely that they wrongly seek to focus on the identification of one single (or dominant) reason for the attack on the first applicant.

[115] Notwithstanding the absence of much of the evidence relied upon in this application, Mr McCabe's written submissions on appeal after the initial panel determination did squarely put in issue that *one* of the reasons for the attack on him (ie a material reason) may have been a qualifying reason under the Scheme. His

appeal submission relied upon the fact that the police response to a regulation 29 request did not describe attack as a "punishment attack" but also contained the following paragraphs (amongst others):

> "If it was indeed a punishment attack (disputed as it is by Mr McCabe) these were carried out for a variety of reasons. Chiefly amongst them to prevent the police having recourse to enter nationalist/republican areas making it more difficult for the IRA to operate. Communities were reminded regularly not to contact the police because of the IRA's ideological opposition to British rule of law and the security risk this posed to their volunteers. Punishment attacks were of value to the IRA as they asserted the organization's power and authority in Nationalist areas; they helped to raise the morale of volunteers by giving them a sense of purpose; they contributed to keeping the IRA's 'military machine' in working order; they helped to underline the traditional Republican rejection of the police (RUC); and they served to enhance the image of the IRA in those Republican areas where there has been traditional support for the organization as well as a desire for action against anti-social elements in the community.
>
> We respectfully submit the attack could reasonably on the balance of probabilities fall into any of these categories again meeting the definition of a Troubles Related Incident as defined in section 10(11) of the Northern Ireland (Executive Formation etc) Act 2019 thereby satisfying Regulation 5 and Regulation 7."

[116] Some of this text was lifted from a journalistic website (*Frontline*, associated with PBS America) including commentary on the IRA from a writer called Sean Boyne. Extracts from the website were also included with the submission. The letter from Mrs Long MLA was also put before the Panel on foot of a supplementary submission. That letter made the case that, in Mrs Long's view, PSAs including VSPAs were intrinsically Troubles-related and served a number of purposes including: instilling fear in communities in order to minimise resistance to terrorist operations; exerting coercive control over individuals and communities to force people to engage in illegal activity or turn a blind eye to it; dissuading people from reporting crime and making cooperation with legitimate authorities impossible; falsely purporting to fill the void left by the forced absence of policing; and entrenching control of communities by seeking to endear themselves to the local community. Mrs Long MLA's view was that such attacks were an integral part of the strategy of paramilitary organisations and were essential to their ability to operate within the community and evade justice. The Panel clearly considered this

letter, which is referred to in the relevant determinations, and I dismiss any claim that they left it out of account. It is fair to say, however, that the Panel did not engage in detail with analysis put forward in the correspondence (or the *Frontline* material) for reasons discussed below, related essentially to the legal error mentioned at para [114] above.

[117] The Panel was satisfied that there was an act of violence basically as alleged by the applicants and that the incident "was perpetrated by the PIRA." Those fundings were reached "on the basis of clear, cogent, consistent evidence contained within the available documentation including the medical evidence, press articles, information from the PSNI and written documentation submitted…" The key remaining issue, as is clear from para 23 of the Panel's determination, was whether the incident was "for a reason related to the constitutional status of Northern Ireland or to political or sectarian hostility between the people there."

[118] Notwithstanding the court's conclusions on the content of the impugned guidance, I do not consider that the Panel's decisions are liable to be struck down by reason of having taken that guidance into account. The Panel correctly noted that PSAs "are neither automatically included, nor automatically excluded from the Scheme", in circumstances where "some PSAs will fall within the definition of a TRI and others will not", as explained in the PSA information note (see para 45 of the decision). The Panel also correctly directed itself that each case must be considered on its own merits (see para 46). It agreed and acknowledged that PSAs occur for "a wide range of different reasons" (para 48) but rejected the suggestion that because they were carried out by a paramilitary organisation that meant that they automatically satisfied the definition of a TRI. I accept the respondent's submission that, accepting the detailed written determination at face value, the Panel did not treat the impugned guidance as determinative of the issue before it. The Panel members referred to the guidance and took it into account but set out their own detailed reasons for declining to find that the applicants' eligibility had been made out.

[119] As indicated above, however, where I consider that the Panel *has* fallen into legal error is in approaching the matter as if there can only be one reason, or one relevant reason, for an incident, which must then be assessed as to whether or not that reason qualifies for the purpose of the Scheme. One sees this, for instance, in the following passages; and perhaps most clearly in para 47 of the Panel's written decision in the first applicant's case. In that paragraph, discussing its approach to PSA incidents generally, the Panel says this:

> "The burden of proof in respect of any issue, and for the purpose of this determination that includes the reason for an incident, is on the Appellant and the standard of proof is the balance of probabilities… It is noteworthy that it is not a requirement of a VPB panel to prove or disprove the reason for an incident, such an approach would be

> completely at odds with the [sic] Regulation 44 and would essentially and inappropriately shift the burden of proof from an applicant, or in this case an appellant, to the VPB. While a panel will have to seek to identify the reason for an incident, there will be cases where a panel simply cannot, on the balance of probabilities, establish the reason for an incident. Again, in such circumstances, an appeal cannot succeed since in those circumstances an applicant or appellant will not have discharged the evidential burden."
>
> [underlined emphasis added]

[120] In a later paragraph (para 53), directed to the particular circumstances of the first applicant's case, the same type of approach is evident:

> "The Panel carefully considered the evidence before it and addressed its mind to the reason for the incident on 13th September 1990. The Panel could not fail to note that on multiple occasions it was stated that no-one knows the reason for the incident. It was explained that the Appellant remains fearful to this day because he doesn't know why the incident happened and it could happen again. The Appellant's daughter on multiple occasions referenced not knowing why the incident occurred and Mr Wilson opined that only the gunmen would know why it happened. The Panel noted all of the aforementioned and whilst this made the Panel's task challenging, it was mindful that it must still turn its consideration to all of the evidence before it in order to determine if the evidence satisfied the TRI definition."
>
> [underlined emphasis added]

[121] Similar expressions appear later in the Panel's determination, for instance at para 54 ("the Panel was being asked to conclude that *the reason* for the attack was to steal a van…"); para 55 ("The Panel therefore placed no reliance on the book in regard to its considerations as to *the reason* for the incident"); and para 56 ("… if there was some form of political dispute or difference, then in the Panel's view this would almost certainly have been communicated to the appellant and it would have been understood as *the* obvious reason for the incident").

[122] Arguably most significantly, at para 59 of its decision the Panel addressed the first applicant's conviction history and went on to say:

> "It was significant in terms of the number of offences and decades over which the offences spanned. Criminal acts for which the Appellant was convicted in the years

> preceding the incident of 13th September 1990 included burglary and theft, common assault, and attempted burglary and theft. They could accurately be considered the type of crimes that could have resulted in attention from paramilitary organisations. When the nature of the attack was factored in, already described above, as a cold, cruel, carefully crafted attack, in the Panel's view the most likely reason for the attack was some form of abhorrent vigilante 'retribution' perpetrated by the PIRA against the Appellant within his family home."
>
> [underlined emphasis added]

[123] I consider there to be force in the applicants' complaint (advanced in para 81 of their skeleton argument) that the Panel did not pay enough attention to the other possible reasons (even if secondary but nonetheless potentially material reasons) for the attack which had been raised in the appeal submissions (see paras [115]-[116] above). However, this appears to me simply to be facet of the error already diagnosed, namely that the Panel focused on finding the reason (or most likely reason) for the attack and then focused on that to the exclusion of others. Given the analysis at paras [65]-[66] above, I consider this to have represented an error of law.

[124] In fairness to the Panel, four points should be noted:

(a) First, earlier guidance – 'Guidance Note (GN 04/21): Defining a Troubles Related Incident' – notes (at para 10) that, once it has been established by an applicant to the scheme that the relevant incident did indeed involve an act of violence or force, "it must then be shown that *the reason* for that act of violence or force" (my emphasis) was related to one of the three statutory hallmarks. This guidance does appear to suggest that the decision-maker should seek to isolate the reason for the attack and consider the nature of that reason, contrary to the position adopted by the Board in these proceedings.

(b) Second, the information note describes a VSPA as not being the use of violence for a qualifying reason but, rather, "the use of violence for the purpose of deterring anti-social activity or crime in a community where the ability of the police to act effectively and efficiently is stymied." In my view, this may be thought to again suggest that a single isolated, or single relevant, reason for the attack can be identified (despite the guidance going on to say that the central focus should be on the identification of the reason "or reasons" behind the use of violence).

(c) Third, the applicants (the appellants before the Panel) appear to have run a primary argument that this case may fall within example (d) set out in the guidance as quoted at para [17] above, namely that, because the armed men who entered his home demanded the keys to his van, the incident was one where the IRA was expressly seeking to steal a vehicle to be used for terrorist

purposes. This case was rejected (or not found established on the balance of probabilities), no doubt because it was common case that, in fact, the van was not taken; shooting the applicant was not necessary in order to steal the van; and a number of other indicators suggested that this was not the real purpose behind the attack.

(d) Fourth, the first applicant's case on appeal was not entirely clear. It was suggested 'no one would ever know' the truth of why he was shot; but he also (at least partially) relied upon text from a published book written by an undercover agent in the IRA, purporting to describe the shooting, which made the case that the attack was part of "another personal vendetta, a score to be settled or a reputation to be upheld – all under the veneer of IRA "housekeeping."" There was mention in the evidence of people having said to Mr McCabe's children, "Your daddy is a tout." Another theory advanced in his oral evidence before the Panel was that he had been involved in an altercation with a neighbour. Medical evidence relating to the second applicant also made reference to a "personal vendetta" against the family. Put simply, the applicants' case before the Panel about the reason (or reasons) for the shooting was all over the place.

[125] Although I have found that the Panel erred in the respect discussed above, it is proper to note that the decision and written determination were commendably produced within a short period of time after the hearing; that the written decision analyses in detail a wide range of evidence; that it is, within its terms, carefully and conscientiously set out and reasoned; and that it did not slavishly or unquestioningly follow the guidance as being determinative of the issues before it. I did not consider any other grounds of challenge in relation to the Panel's decisions to be made out.

The policy challenge

[126] The examples given within the information note of cases which are likely to fall within the definition of a TRI are helpful. The extent of the attack on the guidance was really confined to that portion set out above at para [15] above.

[127] I am concerned that certain portions of the guidance set out in that short excerpt are in terms which are too stringent, including the statement that "an attack by members of a paramilitary grouping upon a person who was engaged or perceived as being engaged in "anti-social behaviour" or crime *cannot per se and should not* fall within the ambit of a TRI" [emphasis added]. The applicants focused on the use of the word "cannot." If the guidance simply said that a VSPA "cannot" fall within the definition of a TRI, I would consider that to be an error of law for the reasons discussed above. A material reason for such an attack may be sufficiently related to the statutory hallmarks of the Troubles set out in the 2019 Act to give rise to eligibility. However, in this portion at least, the guidance does not say, in absolute terms, that such an attack cannot represent a TRI. It merely says that such

an attack cannot "per se" fall within the ambit of a TRI, that is, by virtue of that fact alone. On my reading of it, this aspect of that portion of the guidance is designed to indicate that a VSPA cannot be considered *without more* to automatically qualify the victim for compensation. In other words, the mere fact that members of a paramilitary group have carried out such an attack on (purported) behalf of the organisation is not enough *on its own* to satisfy the statutory test. Another view could quite possibly have been taken of this. Indeed, *applying* the test myself, I might well have taken a contrary view on the basis that such paramilitary organisations existed and operated only *because of* the contested constitutional status of Northern Ireland and/or political or sectarian hostility between people here. Nonetheless, I do not consider that this aspect of the guidance is clearly contrary to the statutory text or the scheme of the legislation such as to represent an error of law.

[128] I have more concern about the following phrase, namely that such an attack "should not" fall with the ambit of a TRI. This appears to me to represent more directive language, suggesting that such an attack should not be considered to meet the statutory definition even if other evidence might point in that direction. That reading of the guidance is reinforced shortly afterwards in the same paragraph where – after having made clear that such attacks are both repugnant and abhorrent – it indicates that the use of violence when exercising a vigilante function "*cannot and should not* be regarded" as the use of violence for a qualifying purpose. In my view, that statement is too absolute to represent an accurate reflection of the statutory test discussed above. A similar reading may be indicated by the introductory words to the relevant example ("An example of an incident which *should not* be regarded as a TRI ..."); and from the later comment that "although [such vigilantism] may have the indirect effect of suppressing overt opposition to paramilitarism in a community it *cannot* be said to be the use of violence" for a relevant reason under the Scheme (my emphasis throughout).

[129] As the guidance goes on to recognise generally, there can be more than one reason for a PSA ("the central focus is and should be on the identification of the reason *or reasons* behind the use of violence or force…"). A material reason may be to further the terrorist organisation's operations in a variety of ways as part of its campaign related to the constitutional status of Northern Ireland or political or sectarian hostility (just as it is accepted that other examples given of cases which are to be viewed as TRIs do so). In such cases, it is quite possible that a VSPA could be a qualifying TRI. In my view, it is impossible to say (if indeed this is suggested) that in every such case the only material reason for such an attack is deterrence of anti-social activity or crime.

[130] The guidance, in my view, draws a legitimate distinction between a "reason" for the attack and a mere "collateral consequence." For the reasons discussed above, however, I consider that this distinction may be hard to draw in practice and, provided a *material* reason for the attack was the furtherance of the terrorist organisation's objectives more generally (and the decision-maker was so satisfied on the balance of probabilities), that would be sufficient to establish eligibility under the

Scheme. I considered there to be force in the applicants' submission that the difference between "a reason" and an *intended* consequence may be vanishingly small.

[131] The applicants contend that the examples given within the information note as constituting a TRI show that the guidance wrongly requires the use of violence or force to be "directly linked" to the constitutional status of Northern Ireland (rather than merely "related to" a hallmark of the Troubles); and, so, represents an error of law. I do not accept that this aspect of that ground is made out. The relevant phrase is used in examples (a), (b) and (d) (see para [17] above). The point being made is that those are clear examples (in the view of the President) where the TRI test will be met; not that a direct link is a *necessary* prerequisite for a TRI to be established. Significantly, that phrase is not used in example (c), also given as an example of what should be regarded as a TRI. I consider the applicants' submissions to be correct insofar as a reason *indirectly* linked to the constitutional status of Northern Ireland or political/sectarian hostility may be sufficient, provided the reason is still "related to" those matters (ie the link is sufficiently proximate for one of those matters to be a material reason for the incident). However, I do not consider the applicants to have made out that the President in the guidance (or the Panel in their decisions) misdirected themselves by requiring a direct link.

[132] In summary, I have been persuaded that, in essentially one limited respect, the guidance includes a positive statement of law which is wrong, namely that a VSPA "cannot and should not" be regarded as meeting the definition of a TRI. It is quite possible that such an attack *could* meet that definition provided the Board was satisfied on the balance of probabilities that at least one material or operative reason for the attack was related to the constitutional status of Northern Ireland or to political or sectarian hostility between people here. The degree of connection between the reason and those hallmarks need not be particularly close. It is possible that this may be satisfied if at least one reason for the attack was the furtherance or facilitation of the paramilitary organisation's operations which were more obviously or directly related to those matters. I am afraid I cannot accept Mr McAteer's submission that the guidance does not exclude any case. The clarity of the words used in the portion set out at para [15], and discussed at paras [127]-[128] above, plainly suggests that VSPAs should be excluded from eligibility as TRIs. Using the *A v SSHD* taxonomy discussed above, this is plainly not a category (iii) case in my view but may be a category (i) case.

[133] The respondent is correct – as the Panel expressly noted in its decision – that the statutory scheme could have provided for victims' payments to be made simply on the basis that an incident was perpetrated by one of a range of proscribed organisations (with a number of exceptions to eligibility being provided for in these circumstances). That is not the nature of the Scheme. Parliament could have used such a formulation, as it did in the definition of "victim of violence" in section 1(4) of the Northern Ireland (Location of Victims' Remains) Act 1999 (meaning "a person killed before 10th April 1998 as a result of an unlawful act of violence committed on

behalf of, or in connection with, a proscribed organisation"). It did not. There will be incidents which constitute TRIs where an individual (a 'lone wolf'), or group not constituting such an organisation, have committed terrorist acts which are plainly TRIs. There could also be incidents undertaken by members of a proscribed organisation which, properly viewed, are *not* for a reason related to the hallmarks of the Troubles, or where this has not been established. Such cases might include the truly personal vendetta. Further speculation is unlikely to be unhelpful. Nonetheless, for the reasons given above, I consider that, applying the statutory scheme as this court has construed it, it cannot be said that VSPAs "cannot", or even "should not" as a matter of generality, meet the statutory definition.

[134] Mr McAteer's ultimate submission in respect of the guidance was to the effect that any defect was 'saved by the audience'; that is, could be disregarded by legally qualified and independent panel chairs applying the statutory test for themselves. In this regard, it is fair to note that the guidance appropriately: (i) referred to the terms of the statutory definition of a TRI in section 10(11) of the 2019 Act; (ii) made clear that it was guidance only and "must be treated as such"; (iii) reiterated that each application and appeal must be decided on its own facts and merits; (iv) stated that it was not exhaustive; and (v) set out only the "key issues that have to be considered" in addressing the question of whether the incident was or was not a TRI.

[135] On the other hand, the guidance was expressly given bearing in mind the "need to ensure consistency of approach" and with a view to ensuring this. In relation to the issue in question, it is expressed in clear and absolute terms, with an indication that "it is *only* by the adoption of the recommended approach" that consistent and principled decisions could be made (my emphasis). There was some evidence from Sarah Kay of WAVE Trauma Centre about panel members in other cases orally stating that they were "bound" by the guidance (although that does not appear in the determinations at issue in these proceedings). Taking a commonsense view of the matter, I consider it extremely likely that panel chairs would plainly be influenced by the guidance in reaching decisions in future cases given its nature, terms, intended effect and the fact that it was issued by the President of the Board. Although not entirely on all fours with the present case (and decided before *A v SSHD*) for similar reasons as were given by Fordham J in *R (JCWI) v President of the UTIAC* [2021] PSTR 800, at paras 4.19 to 4.20 of his judgment, I consider that the guidance in this case is not 'saved' by the target audience.

Article 14

[136] Mr McQuitty advanced his case under article 14 ECHR (and section 3 of the Human Rights Act 1998 (HRA)) briefly, accepting that these arguments may not add very much beyond the arguments earlier deployed. The respondent strongly submitted that it added nothing to the applicants' other (widely) pleaded grounds. I am inclined to agree with that submission. The distinction drawn in the guidance is not one which is set out in the statute itself. Accordingly, it is difficult to assess the

justification for the difference in treatment. But the respondent is surely right that, had the distinction been drawn in the statutory scheme, the applicants' status for this purpose is a non-core and non-suspect status in an area where the State enjoys a wide discretionary area of judgment. In light of my analysis above, however, I do not consider that this issue really arises; and I do not propose to consider it further.

Conclusion and remedy

[137] The impugned Panel decisions will be quashed for the reason given at paras [119] to [123] above and on the grounds set out at paras 5.2(i)(f) and (iv)(e) of the most recent version of the applicants' Order 53 statement (dated 11 November 2024), which are those most proximate to the error of law which I have diagnosed. Subject to any appeal of this judgment, the decisions will be remitted to an appeal panel of the Board for further determination in accordance with the judgment of the court.

[138] In this case, the first applicant has a significant criminal record. The version produced in the exhibited papers shows 67 convictions for a range of offences including assault on police, burglary, common assault, intimidation, riotous or disorderly behaviour, theft, threats to kill, and a significant number of road traffic offences. A good number of these predate the incident in 1990; although many do not. If the Board is satisfied on further consideration (including any further evidence, if permitted) that, on the balance of probabilities, the incident giving rise to the applicants' injuries was a TRI, it may then have to turn its mind to regulation 6, as discussed at paras [73]-[74] above.

[139] For the reasons summarised at para [132] above, the challenge to the guidance will also be allowed. As to the grant of any potential remedy in respect of the impugned guidance, I propose to allow some time for consideration of the judgment before returning to this. I am acutely aware that the President of the Board is himself a High Court judge of eminent standing. It may be that the Board wishes to appeal this decision for consideration by the Court of Appeal. Alternatively, it may be that the President wishes to take the opportunity to voluntarily amend or reformulate the relevant information note or certain portions of it. I consider that the respondent, and the President in particular, should be given an opportunity to consider and reflect on these matters before determining whether or how the court will proceed. Should it be necessary, I will hear the parties on the issue of relief.

[140] In any event, I will hear the parties on the issue of consequential directions and costs.