Neutral Citation No: [2026] NIKB 30 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **McA13075** *ICOS No:* *Delivered:* **17/06/2026**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND KING'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY CONAL MORGAN (A MINOR) BY HIS GRANDFATHER AND NEXT FRIEND, PATRICK RYAN TO APPLY FOR JUDICIAL REVIEW

Appellant

and

DEPARTMENT FOR INFRASTRUCTURE

First Respondent

and

MOTOR INSURERS' BUREAU

Second Respondent

and

SECRETARY OF STATE FOR TRANSPORT

Notice Party

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Mr R Lavery KC with Mr C Fegan (instructed by McIvor Farrell Solicitors) for the Applicant
Mr T McGleenan KC with Mr Phillip McAteer (instructed by the Departmental Solicitor) for the first Respondent and (instructed by the Crown Solicitor's Office) for the Notice Party
Mr Donal Sayers KC with Mr C Coyle (instructed by Clyde & Co, Solicitors) for the second Respondent

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Before: Keegan LCJ, Colton LJ and McAlinden J

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McALINDEN J (*delivering the judgment of the court*)

[1] This is an appeal against the reserved decision of Rooney J handed down on 1 October 2025 in which he dismissed the appellant's challenge to the Untraced

Drivers' Agreement of 1 June 2004, which was entered into between the Motor Insurers' Bureau ("MIB") and the Department for Infrastructure ("DfI"), being the current successor to the Department of the Environment ("DoE"), ("the 2004 Agreement"). The appellant's challenge was mounted on the grounds that the 2004 Agreement did not comply with the principles of equivalence and effectiveness under EU law, having regard to the purpose and content of Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability ("2009 Directive"). This Directive was in the nature of a consolidating Directive.

[2] The appellant also argued that the 2004 Untraced Drivers' Agreement effectively stymied or placed unjustified impediments in the way of the appellant's right of access to the court which, it was argued, he enjoyed both under common law and as protected by article 6 of the European Convention on Human Rights ("ECHR"). It was argued that the right to compensation for injuries caused by an untraced driver gave rise to a direct cause of action against the MIB as the body with the responsibility for administering the scheme set up to compensate the victims of untraced drivers and that the scheme for compensating the victims of untraced drivers in Northern Ireland prevented the appellant from exercising that right before the courts.

[3] Finally, it was argued that the differences in the procedures for dealing with claims brought by those injured by reason of the fault of an insured driver or an uninsured but identified driver on the one hand and an untraced driver on the other resulted in unlawful discrimination against the appellant in breach of article 14 ECHR in combination with article 6 ECHR and A1P1.

[4] At the hearing before Rooney J, which took place over a number of days, all these issues were fully explored and they were dealt with in great detail in his reserved judgment in which the learned judge concluded that by reason of the approach adopted by the MIB in this particular case, none of the heads of challenge were made out.

[5] The background to these proceedings is that on 22 August 2011, the appellant who was born on 2 June 2011, sustained minor soft tissue injuries when an unidentified vehicle driven by an untraced driver collided with the appellant's pram as it was being pushed by the appellant's mother on the public highway. Following the accident, the appellant's mother, on behalf of the appellant, brought a claim for compensation under the 2004 Agreement. As it was required to do, the MIB investigated the claim and determined an amount of compensation (£500) further to clause 7 of the 2004 Agreement. The initial determination was rejected by the appellant's mother on the advice of her solicitor who stated in correspondence to the MIB that, having obtained counsel's opinion, the minor appellant's injuries would warrant the payment of £1,500 by way of compensation. On 11 October 2018, the MIB made an offer in this amount. The appellant's solicitors indicated to the MIB

that, whilst the proposed figure of £1,500 was acceptable, the said offer of compensation required approval by a judge and that, the offer should be put before the court by way of a minor's petition and that, if approved by the court, the agreed amount of compensation should be paid into the Court Funds Office and should remain invested there until the appellant reached the age of majority. The appellant's solicitor also indicated that the adoption of this course of action was needed to protect the interests of the appellant and that if this course of action was agreed to by the MIB, the appellant would be entitled to costs which were properly measured by reference to the applicable county court scale costs.

[6] It is the appellant's case that the MIB failed or refused to allow the offer of compensation to be brought before the court by way of a minor's petition for approval by a judge. It also failed to have the sum paid into court until the appellant reached the age of majority and failed to set up a trust pursuant to clause 25 of the 2004 Agreement. Further, it is alleged that the MIB insisted that the agreed sum of compensation be paid directly to the appellant's mother even though the appellant's solicitor had advised the MIB that due to the unstable nature of the appellant's mother's lifestyle, she should not hold compensation monies on the appellant's behalf.

[7] On 4 February 2020, the present judicial review proceedings were commenced. The amended Order 53 Statement which was considered by the lower court is dated 21 January 2021. This is the version of the Order 53 Statement which this court will consider. Following the commencement of proceedings, matters were put on hold for some considerable time to allow the Department of Justice ("DOJ") to consider a recommendation contained in the Review of Civil and Family Justice in Northern Ireland, Review Group's Report on Civil Justice (September 2017) to the effect that in all cases where minors or those under some other form of disability claimed compensation in respect of injuries occasioned by the fault of another, any settlement of such a claim should go before a court for approval. The DOJ eventually decided that it would not at the present time introduce legislation to implement this recommendation. The matter was further put back by reason of the appellant's desire to await the outcome of the *Dillon* litigation on account of the appellant seeking to rely on the Northern Ireland Protocol and the Windsor Framework.

[8] In the meanwhile, pursuant to clauses 7 and 16 of the 2004 Agreement, the MIB made a final award decision in respect of the appellant's application for compensation and issued a formal notice of award on 8 August 2024. In this notice, the offer was increased to £2,500 plus interest pursuant to clause 9, giving a total of £2,901.28. The correspondence from the MIB stated that if the offer was accepted, the MIB proposed to pay the said award to "an adult nominated to hold the funds on his behalf until the date of his majority." The correspondence went on to state that if a suitable adult could not be nominated, the MIB wished to draw the appellant's solicitor's attention to the provisions of article 159(5) of the Children (Northern Ireland) Order 1995 and Order 80 Rule 14(2) of the Rules of the Court of

Judicature (Northern Ireland) 1980 ("RCJ 1980") which refer to the inherent jurisdiction of the High Court to appoint the Official Solicitor or some other suitable person as guardian of the fortune or estate of any child in a range of circumstances including where it "seems desirable to the Court" to do so.

[9] The correspondence also informed the appellant's solicitor that the MIB had acted proactively and had directed some preliminary inquiries to the Official Solicitor who had confirmed that if the court were to appoint her as guardian to the fortune or the estate of the appellant, she would be willing to hold the award pending the appellant's majority. In the event of such an appointment, the award would be paid into the Court Funds Office and held on identical terms to those on which awards of damages made by courts in Northern Ireland are held on behalf of minors. Correspondence from the Official Solicitor's office to the MIB dated 23 July 2024 was enclosed with the notice of award. Other enclosures included the circular from the Northern Ireland Courts and Tribunals Service (NICTS) dated 13 February 2017 which explained the administrative charges which are normally levied on funds which are held in the Court Funds Office following an award of damages by a court. The correspondence indicated that the MIB anticipated that the investment of the appellant's compensation in the Court Funds Office would probably attract similar fees. The MIB indicated that it would be responsible for the discharge of any such fees and would also cover any professional charges levied by the Official Solicitor arising out of her appointment as guardian of the fortune or the estate. The MIB also agreed to cover the reasonable costs associated with making an application to the High Court under Order 80 RCJ (NI) 1980. On looking at the note from NICTS, it is apparent that in respect of an award of this size, a one-off opening fee of £20 is levied upon the initial lodgement of funds and a closing fee of £40 is levied when the award is paid out to a claimant who has reached the age of majority. It is clear that no annual fee is presently levied on invested awards that do not exceed £5,000.

[10] Importantly, the letter went on to state that:

> "This aspect of the offer is limited to this specific award and is made without the acceptance of any responsibility to do so should any future applicants for compensation under the Untraced Driver's Agreement also seek to appoint the Official Solicitor as Guardian of the Fortune."

[11] The correspondence went on to outline the right of appeal to an arbitrator which was provided for under the 2004 Agreement. A draft notice of appeal was enclosed. Importantly, the correspondence highlighted the time limit of six weeks for an appeal and also emphasised how this time limit was rigidly enforced with no discretion to extend time. The MIB, in recognition of the difficulties of identifying an appropriate adult to act on behalf of the appellant in this case, agreed to pay the costs of any appeal to the arbitrator where the only issue was the sufficiency of the award and undertook not to seek costs or the imposition of any financial penalty if

the arbitrator did not increase the award. This offer was caveated in the following manner.

> "This aspect of the offer is also limited to this specific award and is made without the acceptance of any responsibility to incur any additional financial responsibilities beyond what is provided in the Untraced Drivers' Agreement in respect of any future applicants for compensation who similarly seek to exercise their right of appeal under the Agreement. "

[12] The correspondence went on to state that if a decision was made to appeal to the arbitrator, that appeal notice had to be accompanied by an undertaking given by the appellant or someone acting on the appellant's behalf also that the appellant would be bound by the decision of the arbitrator, subject to the right to apply to the High Court under section 67 (substantive jurisdiction challenge) and section 68 (serious irregularity challenge) of the Arbitration Act 1996. As a matter of general observation, in a case involving a minor, where there was no suitable adult to act on the minor's behalf, one wonders how any such undertaking would be enforceable.

[13] The correspondence went on to inform the appellant's solicitor that if a notice of appeal was lodged, any further information or evidence provided by the appellant would be considered by the MIB and the MIB could proceed to re-examine the decision in light of any new information or evidence and could carry out further investigations and, thereafter, could provide a further report which the appellant could comment upon. The appellant's solicitor was advised of the appeal procedure under the 2004 Agreement which involved the arbitrator providing a preliminary decision on the entirety of the papers to both the appellant and the MIB. Thereafter, if the preliminary decision of the arbitrator was not accepted by either the appellant or the MIB, the appellant and/or the MIB could make written observations in respect of the preliminary decision and/or request an oral hearing within 28 days of the delivery of the preliminary decision.

[14] It can readily be seen that in this correspondence, the MIB sought to address the two central issues raised on behalf of the appellant, namely (i) a mechanism for the independent assessment of the adequacy of the offer; and (ii) a method for securing and protecting the independently approved award made to the appellant from the date of approval up to the date of his majority. It must be remembered that in this case, the appellant's legal advisers were content to recommend the final offer made in this case. All that was sought was independent judicial approval of that offer. In reply to the MIB, the appellant's solicitor, by correspondence dated 30 August 2024, indicated that the offer was acceptable and that no appeal to the arbitrator would be lodged but that the judicial review challenge would be maintained unless the matter was put before the court for approval and the compensation was subsequently held by the court until the minor reached the age of majority.

[15] In the appellant's Order 53 Statement dated 21 January 2021, the applicant challenges the decisions of the respondents and their alleged failures to act in that they:

(a) refused or failed to give effect or proper effect to the Directive 2009/103/EC in that the arrangements under the 2004 Agreement are not adequate to transpose directly effective obligations arising under that Directive;

(b) refused or failed to provide the applicant with access to the court to have his offer of compensation approved and for the sum to be paid into the Court Funds Office;

(c) refused or failed to provide the applicant with a trust for his award of compensation until his majority; and/or

(d) required that the compensation be paid directly to the applicant's mother.

[16] It is worthy of note that the Order 53 Statement was not subject to further amendment prior to the hearing before Rooney J in order to take account of the change of position adopted by the MIB where it altered its position in relation to the payment of compensation directly to the appellant's mother and, instead, proposed a mechanism whereby the compensation could be paid into the court with the OS acting as guardian of the fortune or estate.

[17] In the Order 53 Statement dated 21 January 2021, the appellant sought the following relief:

> "(a) a declaration that the Untraced Drivers' Agreement (Compensation of Victims of Untraced Drivers) made between the respondents dated 1 June 2004 as amended ('2004 Agreement') is inconsistent or is being operated inconsistently with the Directive 2009/103/EC relating to insurance against civil liability in respect of the use of motor vehicles and the enforcement of the obligation to insure against such liability ("the 2009 Directive");
>
> (b) a declaration that the 2004 Agreement is unlawful, ultra vires, and of no force or effect;
>
> (c) an order of certiorari to quash the 2004 Agreement;
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> (d) an order of certiorari to quash the respondents' decisions or failures to allow the offer of

compensation to be brought for approval before a court and for the compensation to be paid into the Court Funds Office.

(e) further, or in the alternative, an order of certiorari to quash the respondents' decisions or failures not to set up a trust in favour of the applicant pursuant to clause 25 of the 2004 Agreement.

(f) a declaration pursuant to section 8(1) of the Human Rights Act 1998 that the respondents' acts or failures to act are incompatible with the appellant's rights pursuant to articles 6, 14 and/or article 1 of the First Protocol to the Human Convention on Human Rights (ECHR) in breach of the respondents' duty pursuant to section 6(1) of the Human Rights Act 1998.

(g) a declaration pursuant to section 3 of the Human Rights Act 1998 that the 2004 Agreement must be construed to allow the appellant's offer of compensation to be approved and for the compensation to be paid into the Court Funds Office to ensure conformity with the appellant's rights pursuant to article 6, 14 and/or article 1 of the First Protocol of the ECHR.

(h) a declaration that the said decisions/failures to act were unlawful, ultra vires and void.

(i) an order of mandamus requiring the respondents to take all necessary steps to:

(i) give effect or proper effect to the 2009 Directive;

(ii) allow the offer of compensation to be brought before the court to be approved and for the compensation to be paid into the Court Funds Office; and/or

(iii) establish a Trust for the payment of the compensation until the applicant reaches majority."

[18] In advance of the hearing before Rooney J, the parties submitted a jointly agreed note dated 10 December 2024 which purported to set out the scope and parameters of the challenge. This note indicated that the central pillar of the appellant's case rested upon the 2009 Directive, in particular, article 3 that provides for the compulsory insurance of motor vehicles and article 10 that requires member states to set up or authorise a body to provide compensation for injury or damage caused by an uninsured or untraced driver. The court was specifically asked to determine two questions:

> "(i) The extent of the rights under article 3 and article 10 of the 2009 Directive and, in particular, whether the said provisions encompass a right to court approval of an award of compensation to a minor under the Untraced Drivers' Agreement 2004 and/or a right to investment of any such award by a court; and
>
> (ii) Whether the EU law principles of equivalence and effectiveness which are applicable in this case are satisfied by the Untraced Drivers' Agreement."

[19] Prior to delving into the issues in this case, it is worthwhile saying something about the history of the MIB. The MIB is a "not-for-profit" company limited by guarantee which was incorporated under the Companies Act 1929 on 14 June 1946. It was initially created by the United Kingdom government for the purpose of providing compensation to victims of road traffic collisions involving uninsured drivers. Its role was subsequently expanded to provide compensation to victims of road traffic collisions involving untraced drivers. The first Untraced Drivers' Agreement in GB was entered into between the Minister for Transport and the MIB on 21 April 1969 and the first Northern Ireland Untraced Drivers' Agreement was entered into between the Ministry of Home Affairs and the MIB on 8 December 1969. The MIB is funded by a compulsory levy on all motor insurance companies underwriting compulsory vehicle insurance in the UK. This compulsory levy is, in turn, recouped by the insurers from their customers through the premiums charged. The insurers are obligated to belong to the MIB and to contribute to its funding further to Part VIII of the Road Traffic (Northern Ireland) Order 1981. The MIB presently performs its assigned function through a series of agreements in Great Britain between the Secretary of State for Transport and the MIB and in Northern Ireland between the Department of Infrastructure and the MIB.

[20] The version of the Northern Ireland Untraced Drivers' Agreement which applies in this case is the one dated 1 June 2004 ("the 2004 Agreement"). This version has been superseded by the Northern Ireland Untraced Drivers' Agreement 2024 ("the 2024 Agreement") which came into force on 1 January 2024 and applies to road traffic accidents occurring after this date. For present purposes, the main difference between the two versions is that under the more recent Agreement, in a

minor's case or in the case of an applicant under legal disability, it is mandatory to refer all settlements to the arbitrator for an assessment of adequacy.

[21] EEC and subsequently EU law have played important roles in the evolutionary process of change and development which is evident when one considers the earlier and later versions of both the Uninsured and Untraced Drivers' Agreements in both GB and NI. The 2009 Directive with which we are concerned, as is clear from its Recitals, is a consolidating EU Directive and the important provisions of this Directive, so far as this case is concerned, are article 3 and article 10.

[22] The conformity/compatibility of the MIB arrangements and Agreements with EU law has been tested before the Court of Justice of the European Communities ("CJEC"), the predecessor to the Court of Justice of the European Union ("CJEU"). In the case of *Evans v the Secretary of State for the Environment, Transport and the Regions* (Case C-63/01), the CJEC held that the procedural arrangements under the MIB Agreements which were operative at that time were sufficient to provide protection to victims under the Second Council Directive, which considered the approximation of the laws of the member states relating to insurance against civil liability in respect of the use of motor vehicles. The CJEC stated at para [27] that the intention of the Community legislature to entitle victims of damage or injury caused by unidentified or insufficiently insured vehicles to protection equivalent to, and as effective as, that available to persons injured by identified and insured vehicles.

[23] The EU law principles of equivalence and effectiveness are explained further in the judgment at para [45]:

> "It is settled case law that in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derived from community law, provided, however, that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness)."

[24] It is worthwhile setting out the relevant provisions of article 10 of the 2009 Directive as they delineate the duties imposed on member states in respect of compensating those who sustain injury or damage caused by uninsured and untraced drivers:

> "(1) Each Member State shall set up or authorise a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in Article 3 has not been satisfied …
>
> (4) Each Member State shall apply its laws, regulations and administrative provisions to the payment of compensation by the body, without prejudice to any other practice which is more favourable to the victim."

[25] The 2009 Directive does not contain any express reference to the need for enhanced protections for injured parties who are minors or who are subject to some other form of legal disability, nor does article 10 make any express reference to a right of access to a court. The appellant contends that the 2009 Directive refers to access to the courts within article 22 and paras [37] to [39] of the Recitals, however, these references have absolutely nothing to do with the issues in dispute in this appeal and are clearly focused on other specific issues such as duty imposed upon insurance undertakings authorised in one member state to appoint claims representatives in other member states with the authority to represent the said insurance undertaking in the courts of the other member states.

[26] Delving deeper into the EU principles of equivalence and effectiveness, it is clear from the authorities that the principle of equivalence requires member states to ensure that domestic procedural rules laid down to safeguard rights deriving from EU law do not operate in a manner so as to place the person seeking to establish that right in a less favourable situation compared to someone seeking to establish a similar right derived from domestic law. However, the principle does not impose obligations of uniformity or identicality of procedures either at the level of national law, or across the EU.

[27] The principle of effectiveness requires member states to ensure that national procedures which are intended to give effect to EU rights/obligations do not render the enforcement of those EU rights/obligations impossible or excessively difficult, contrary to the principle of proportionality. The question is, therefore, whether national procedural rules hinder the operation of EU law to a degree that cannot be justified by a member state.

[28] The learned trial judge set out the key points to be extracted from the recent consideration of the principles of equivalence and effectiveness by the UK Supreme Court in the cases of *Totel Ltd v Revenue and Customs Commissioners* [2018] UKSC 44 and *PSNI v Agnew and others* [2023] UKSC 33 at paras [39] to [44] of his detailed judgment. This court endorses that approach and agrees with the judge's conclusions, which are summarised in the following manner:

(i) Whilst EU law recognises that member states have autonomy in setting procedural rules governing how EU rights/obligations are to be secured and enforced in domestic law, there are two qualifications to that procedural autonomy, namely, the principle of effectiveness and the principle of equivalence. (*PSNI v Agnew* at para [50]).

(ii) Referring to the decision of the CJEU in *Levez v TH Jennings (Harlow Pools) Ltd* (C-326/96) at para [44], the UKSC in *PSNI v Agnew* emphasised at para [51] that "whenever it falls to be determined whether a procedural rule of national law is less favourable than those governing similar domestic actions, the national court must take into account the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts."

(iii) The exercise of an EU right must not be subjected to stricter conditions than the exercise of a corresponding right conferred by national law alone. (*PSNI v Agnew* at para [54] citing *Preston v Wolverhampton Healthcare NHS Trust* (Case C-78/98) at para [79]).

(iv) It is important to recognise two limitations in respect of the principle of equivalence. Firstly, there may not be a similar action available in domestic proceedings as an appropriate comparator. National courts should not regard superficial similarity as being sufficient. For example, it is insufficient to say that two claims arise in the same area of law. (*PSNI v Agnew* para [56]). Secondly, the principle of equivalence is not to be interpreted as requiring member states to extend their most favourable rules to all actions brought in a particular area of law. (*PSNI v Agnew* para [57]).

(v) It is "for the courts of each Member State to determine whether its national procedures for claims based on EU law fall foul of the principle of equivalence, both by identifying what, if any, procedures for domestic law claims are true comparators for that purpose, and in order to decide whether the procedure for the EU law claim is less favourable than that available in relation to a truly comparable domestic claim. This is because the national court is best placed, from its experience and supervision of those national procedures, to carry out the requisite analysis." (*PSNI v Agnew* para [68]).

[29] As a matter of general principle, when it comes to looking at the issue of the identification of correct comparators, it is clear that when a domestic court is conducting a comparison based on the principle of equivalence, it should focus on the purpose and essential characteristics of the allegedly similar procedures in order to assess whether they are true comparators. In the context of a victim of an untraced driver, it is unnecessary for this court to grapple with the issue of correct comparators in that the CJEC effectively identified the correct comparators in para [27] of the *Evans* decision (see para [22] above). It is important to note that CJEC did not go so far as to specify that the correct comparator was or could be one that was

found in another member state. This is relevant when it comes to considering what regard, if any, should be had to the procedures operated in the Republic of Ireland where an applicant under the Irish equivalent of the Untraced Drivers' Agreement is able to sue the Motor Insurers' Bureau of Ireland ("MIBI") in the ordinary courts.

[30] One of the striking features of the *Evans* decision is that the CJEC did not follow or endorse some of the key recommendations made by the Advocate General in that case. In summary, the Advocate General had recommended that the CJEC should reply to the questions submitted for preliminary ruling by the national court by stating that interest and costs are necessary components of compensation claims brought by victims of untraced vehicles if and to the extent that interest and costs form part of claims for compensation brought by victims of properly insured and identified vehicles. The Advocate General's view was that having regard to the rights of victims, the Second Directive had not been transposed in UK national law with the precision and clarity necessary to satisfy the requirement of legal certainty and that a victim, must on the grounds of effective legal protection, have a right to appeal to an ordinary court on questions of fact and law. The Advocate General was also of the view that the UK had failed to ensure that those injured by untraced vehicles had an enforceable claim, at least up to the limits of the insurance obligation, against the MIB and that this failure on the part of the UK was "a sufficiently serious breach of Community law."

[31] Following the promulgation of the Advocate General's opinion but before the CJEC had delivered its judgment, the UK government took steps to amend the Untraced Drivers' Agreement to allow for the payment of interest and costs. Although the CJEC did proceed to address the issues of interest and costs, it concentrated on the unresolved issues and, in doing so, chose not to follow some of the Advocate General's recommendations.

[32] The CJEC in *Evans* noted at para [22] that "in contrast to victims of damage or injury caused by identified vehicles, victims injured by an unidentified vehicle are normally unable to enforce their claims in legal proceedings for compensation because of the impossibility of identifying the person against whom proceedings should be brought." The CJEC went on to state that:

> "[27] It is thus clear that the Community legislature's intention was to entitle victims of damage or injury caused by unidentified or insufficiently insured vehicles to protection equivalent to, and as effective as, that available to persons injured by identified and insured vehicles.
>
> [28] It must nevertheless be emphasised that, to meet the requirements of the Second Directive, the body responsible for awarding compensation does not necessarily have to be placed, as far as civil liability is

> concerned, on the same footing as a defendant such as the driver of an identified and sufficiently insured vehicle."

This is in direct contrast with the views expressed by the Advocate General and effectively scuppers the appellant's argument in this case that his right to compensation for injuries caused by an untraced driver gives rise to a direct cause of action against the MIB under EU law.

[33] At para [32] of its judgment, the CJEC noted that the first subparagraph of article 1(4) of the Second Directive contained no provision concerning the legal status of the national body set up to compensate victims of uninsured vehicles, nor did it contain detailed arrangements for the authorisation of such a body. The CJEC went on to note that the right of member states to "to regard compensation by the body as subsidiary and enables them to make provision for the settlement of claims between that body and those responsible for the accident and for relations with other insurers or social security bodies required to compensate the victim in respect of the same accident" is specifically recognised in article 1(4). What is required by EU law is that the victim of an uninsured or untraced vehicle must be able to "apply directly to the authorised body responsible for paying compensation …" (*Evans*, para [33]). The fact that the source of the obligation of the body in question lies in an agreement concluded between it and a public authority is immaterial, "provided that the agreement is interpreted and applied as obliging the body to provide victims with the compensation guaranteed to them by the Second Directive and provided that victims may apply directly to that body" (*Evans* para [37]). A similar point was subsequently addressed in *Farrell v Whitty (No.2),* C-413/15 of 10 October 2017, where the grand chamber of the CJEU stated that the provisions of a Directive which are capable of having direct effect may be relied on against a private law body on which a member state has conferred a task in the public interest. In that case, the CJEU held that the provisions of the Second Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of member states relating to insurance against civil liability in respect of the use of motor vehicles as amended by the Third Directive 90/232/EEC were unconditional and sufficiently precise and consequently could be relied upon against an organisation such as the MIBI (see paras [41] and [42] of *Farrell v Whitty*).

[34] Pausing there, this court is firmly of the view that there is a world of difference between the concept of being able to make a direct application to the MIB as is clearly permitted under the 2004 Untraced Drivers' Agreement and the right to sue the MIB (as a surrogate for the untraced driver) for the injuries and damage caused by the untraced driver as contended for by the appellant in this appeal. *Evans* does not lend any support to the existence of such a right. The issue of the existence of some form of direct cause of action against the MIB in this jurisdiction was addressed head on in the case of *Morrison v MIB* [1987] NI 204 which is a first instance decision of Carswell J as he then was. The minor claimant in that case argued that a claimant who was a minor or a person under a disability was entitled to issue an originating summons describing the MIB as a defendant, seeking an

order that the terms of a settlement agreed between the MIB and the representatives of the claimant under the Untraced Drivers' Agreement be approved by the court and made an order of court, with the award being paid into court and invested for the benefit of the claimant.

[35] Carswell J held that as there was no cause or matter in existence between the claimant and the MIB, the approach proposed by the claimant in the *Morrison* case was impermissible. The appellant in this appeal argues that matters have moved on since 1987 and that the impact of EU law means that the *Morrison* decision no longer reflects the law. It is clear that the *Morrison* decision reflected the common law position at that time and does not support the appellant's argument that a direct cause of action against the MIB exists at common law. As stated above, *Evans* does not lend any support to the existence of such a right under EU law, so the argument that *Morrison* has to be revisited in light of developments in EU law is baseless.

[36] The CJEC in *Evans* at paras [35] and [36] went on to emphasise the duty imposed on member states when implementing a directive is to guarantee that the relevant national authorities will effectively apply the directive in full and ensure that the legal position under national law is sufficiently precise and clear. Member states must also ensure that individuals are made fully aware of their rights and, where appropriate, are able to rely on those rights before the national courts, especially where the directive in question is intended to accord rights to nationals of other member states. The CJEC emphasised that the Second Directive was, in accordance with the fifth recital in its preamble, intended to guarantee victims adequate protection, irrespective of the member state in which the accident occurred. The appellant in this case latches on to the reference to national courts in para [35] of the *Evans* judgment in support of his argument that the 2009 Directive effectively requires that the applicant should have a right to a determination or an approval hearing before the court and thereafter the right to have any sum determined or approved invested under the protection of the court until the applicant reaches the age of majority.

[37] In paras [38] and [39] of its judgment in *Evans*, the CJEC noted submissions made by Mr Evans which are very similar to the core complaints made by the appellant in this case, namely, that the arbitration procedure set out in the Untraced Drivers' Agreement does not comply with the requirements of the principle of effective judicial control and does not comply with the right to a fair hearing which is protected by article 6 ECHR. In this case, it is argued on behalf of the appellant that the appellant's right to an oral hearing before the arbitrator is fettered by the risk of cost penalties if an oral hearing is requested by the appellant and that oral hearing does not bring about a result favourable to the appellant. The appellant also argues that his right of access to the court is significantly curtailed in that he can only seek redress before the court in respect of the arbitrator's findings if he can bring himself within sections 67 and 68 of the Arbitration Act 1996. Section 67 only permits a challenge against "any award of an arbitral tribunal as to its substantive jurisdiction" or a challenge against "an award made by the tribunal on the merits

because the tribunal did not have substantive jurisdiction." Section 68 of the 1996 Act allows a challenge against the arbitrator's award on the ground of some serious irregularity affecting the tribunal, the proceedings or the award.

[38] The appellant also argues that the principle of equivalence is breached because applicants under the Uninsured Drivers' Agreement have automatic access to the court in that, in the case of an uninsured tortfeasor, the MIB only becomes liable to compensate a victim of an uninsured driver under this Agreement following the obtaining of a judgment against the driver which remains unsatisfied and that judgment can only be obtained by the initiation of court proceedings. The initiation of such court proceedings involving a minor or a person under disability can only be resolved by an award being made by the court or by the court approving an agreed award.

[39] From para [44] of *Evans* onwards, the CJEC was keen to stress that the Second Directive confined itself to "laying down minimum procedural requirements by providing that victims of damage or injury caused by unidentified or insufficiently insured vehicles must be able to apply directly to the body responsible for providing them with compensation … and that that body is required to give a reasoned reply concerning the action taken by it." In the absence of Community rules governing the matter, it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness).

[40] The CJEC noted that although the MIB is not a court, it is required to determine the amount of compensation in the same manner as a court would assess compensation in an ordinary road traffic accident claim. The CJEC noted that the applicant for compensation has a right to ask the MIB to review its determination and also has a right of appeal to an arbitrator. The independence and expertise of the arbitrators appointed for this process cannot be seriously challenged as the appointment of these individuals is made by the Lady Chief Justice from a pool of applicants who must be lawyers with significant relevant experience and expertise in personal injuries litigation. It is noted that the senior partner in the firm of solicitors representing the appellant in this appeal is on the panel of appointed MIB arbitrators.

[41] The CJEC noted that the arbitrator makes an award after making his/her own assessment of the information in the file and this file must contain, among other things, all the documents lodged by the victim and all comments made by the victim in connection with both the application for compensation and, if appropriate, the application for review. The arbitrator may call on the MIB to undertake additional investigations and the applicant has a right to make further comments or

submissions in response to the results of any such investigations. The CJEC also noted the limited right of appeal to the High Court in respect of the arbitrator's decision under the relevant provisions of the Arbitration Act 1996 with further potential of an appeal on a point of law to the Court of Appeal and the United Kingdom Supreme Court. This present case also demonstrates that the arrangements set out and contained within the Untraced Drivers' Agreement are amenable to judicial review.

[42] The CJEC accepted that the procedures set out in the Untraced Drivers' Agreement gave victims the advantages of speed and the economy of legal costs, with the bulk of the costs incurred in relation to applications for compensation and the gathering of relevant evidence being borne by the MIB and it is the MIB that makes contact with all the witnesses to the accident to obtain statements from them and endeavours to obtain all necessary medical and other expert evidence.

[43] The CJEC concluded that the procedural arrangements laid down by the national law in question did not render it practically impossible or excessively difficult to exercise the right conferred on victims of damage or injury caused by unidentified or insufficiently insured vehicles by the Second Directive and thus comply with the principle of effectiveness. It further held that in view of the objective pursued by the Second Directive which, was to provide a simple mechanism for compensating victims, the cumulative effect of the possibilities of review available under the procedure established in the United Kingdom and also the practical advantages associated with that procedure confer on victims of damage or injury caused by unidentified or insufficiently insured vehicles a level of protection corresponding to that provided for by that directive.

[44] The CJEC went on to emphasise the need for any procedures adopted by the MIB to guarantee that both in their dealings with the MIB and with the arbitrator, victims are made aware of any matter which might be used against them and have an opportunity to submit their comments thereon. In this regard, it is important to note the right of an applicant to request an oral hearing before the arbitrator.

[45] In relation to the specific issue of the payment of interest, the CJEC, having observed that the Second Directive made no specific reference to the payment of interest, decided that although the effluxion of time between the date of the accident and the date on which an award of compensation was made had to be taken into account when considering the adequacy of any award of compensation, member states were free to choose between awarding interest or paying compensation in the form of aggregate sums which took account of the effluxion of time.

[46] The CJEC also observed that the Second Directive made no specific reference to the payment of costs and concluded that in light of this, compensation awarded for damage or injury caused by an unidentified or insufficiently insured vehicle, paid by the body authorised for that purpose, is not required to include reimbursement of the costs incurred by victims in connection with the processing of

their application for compensation "except to the extent to which such reimbursement is necessary to safeguard the rights derived by victims from the Second Directive in conformity with the principles of equivalence and effectiveness. It is for the national court to consider whether that is the case under the procedural arrangements adopted in the Member State concerned." (para [78]). It is to be remembered that legal representation and the costs of legal representation for applicants under the Untraced Drivers' Agreement are now catered for.

[47] In relation to the issue of the right of access to a court, the case of *Evans* cannot be said to support the proposition that the provisions of the 2009 Directive require that all those applying for compensation under the Untraced Drivers' Agreement 2004 should have unfettered access to a court either by means of an unrestricted right of appeal from the arbitrator or by means of a direct cause of action against the MIB. However, the case of *Evans* did not address the issue of whether a court must be involved in the approval of any settlement where the applicant is a minor or is a person suffering from a disability nor did it address the issue of the need for the protection of the compensation fund awarded under the Untraced Drivers' Agreement 2004 to a minor or a person under disability. These issues were subsequently considered in the domestic decision of Ouseley J in *R (Roadpeace Ltd) v Secretary of State for Transport* [2017] EWHC 2725 ("*Roadpeace*") where it was argued that the 2003 and 2017 GB Untraced Drivers' Agreements were unlawful because they did not afford protection to minors and protected persons involved in seeking compensation from the MIB which was equivalent to the protection they would receive if they were engaged in civil litigation arising out of a road traffic accident under the Civil Procedural Rules (CPR) in England & Wales.

[48] It should be remembered that the 2003 GB Agreement and the 2004 NI Agreement did not require or provide that any settlement reached by the MIB and an applicant under a disability had to go before an arbitrator for consideration of whether the settlement was a fair settlement from the applicant's perspective. This situation changed in 2017 in GB and 2024 in NI so that in both jurisdictions any such settlement must now be referred to an arbitrator for scrutiny. It should be noted that none of these four Agreements make provision for the investment of such a compensation award under the supervision of the court. However, during the course of this challenge, the MIB offered to instruct an arbitrator to scrutinise the award and also offered to engage with the Official Solicitor with a view to having the appellant's compensation award invested by the court in the Court Funds Office.

[49] The applicant in the *Roadpeace* case highlighted what it saw as a two-fold lack of protection in the 2003 GB Agreement (no scrutiny by the court to assess adequacy and no investment of the sum approved by the court for as long as the beneficiary of the award remains under a disability) and the persisting lack of protection in the 2017 GB Agreement (the no investment point). The applicant in the *Roadpeace* case sought to rely on the decision in *Dunhill v Burgin* [2014] UKSC 18, where the court held that the rationale behind the CPR Pt 21 provisions which state that any settlement of a claim by a person under a disability is void unless approved by the

court was that children and protected parties require protection, not only from themselves, but also from legal advisers who might lack the necessary skill or experience to properly represent them, leading to settlements below the actual value of their claims. Lady Hale at para [33] of *Dunhill* described the underlying policy considerations in the following terms:

> "… the policy underlying the Civil Procedure Rules is clear; that children and protected parties require and deserve protection, not only from themselves but also from their legal advisers. The notes to Order 80 in the last (1999) edition of the *Supreme Court Practice* stated that among the objects of the compromise rule was 'to protect minors and patients from any lack of skill or experience of the legal advisers which might lead to a settlement of a money claim far less than it is worth,' a sentiment which has been carried forward into the current edition of Civil Procedure."

[50] The appellant in this case also relies upon the *Dunhill* case in the context of a similarly drafted provision in Order 80 rule 8 of RCJ (NI) 1980 which provides as follows:

> "Where in any proceedings money is claimed by or on behalf of a person under disability, no settlement, compromise or payment and no acceptance of money paid into court, whenever entered into or made, shall so far as it relates to that person's claim be valid without the approval of the Court."

Order 44, rule 1 of the County Court Rules (Northern Ireland) 1981 contains a very similar provision. The appellant argues that these provisions reflect the existence of a right at common law enjoyed by a minor or a claimant under some other form of disability to have any proposed settlement of a claim subjected to scrutiny and approval by the court.

[51] The appellant also argues that the provisions of Order 80 of RCJ (NI) 1980 reflect the existence of a right at common law enjoyed by a minor or a claimant under some other form of disability to have the award of compensation invested by the court and protected by the court until the claimant has reached the age of majority or has otherwise recovered capacity. In summary, the applicant argues that the arbitration process under the 2004 Agreement is not equivalent to the process for the settlement of claims involving minors against insured and uninsured drivers. Fundamentally, it is argued that the 2004 Agreement fails to protect minors to ensure court approval of settlement figures and fails to provide a mechanism for investment of the settlement awards under the auspices of the court.

[52] Before the lower court and repeated before this court, the appellant sought to garner support for his arguments from the recommendation made at para 7.58 of the Civil Justice Report published in September 2017, in which Sir John Gillen stated that "serious consideration be given to introducing legislation to make court approval of legal settlements of financial cases involving minors mandatory." However, this clearly undermines the applicant's argument that the common law rights referred to above actually exist because if they did exist why would there be any need for such a recommendation. It is also worthy of note that the DOJ has decided not to implement this recommendation of the Civil Justice Report. The appellant also seeks to argue that the CJEU in the case of *Withers v MIBI* (Case C-158/01), made it clear that in relation to the insurance directives, disparity of treatment must not exist between member states and that since the courts in the Republic of Ireland have concluded that the MIBI can be sued directly in the Irish courts, applicants should be able to sue the MIB directly in the courts of Northern Ireland. However, this is to entirely misunderstand the *Withers* case which related to disparities in compulsory insurance cover of passengers in motor vehicles between certain member states. It was not concerned with mandating uniformity in the procedures adopted by member states when considering claims for compensation arising out of road traffic accidents.

[53] It was also argued in the *Roadpeace* case and was referenced in this appeal that the opinion of counsel was almost always required to assist the court in its task of approving a settlement. The argument is based on the premise that without such an opinion, neither the court nor arbitrator could assess whether a claimant suffering from a disability had been properly advised. Pausing there, this court finds this argument rather surprising as, in reality, counsel's opinion is more likely to be needed to reassure the claimant, and possibly the instructing solicitor, that the settlement is appropriate rather than being obtained for the purpose of providing guidance to an experienced judge or arbitrator in relation to the issue of the adequacy of the settlement.

[54] In relation to the 2017 Agreement, Ouseley J in his judgment in *Roadpeace* at para [110] stated:

> "But even if one compares a claim in respect of an unidentified driver with a claim in respect of an identified, insured driver, which would be governed by the CPR, the differences are quite significant, in particular the absence of a defendant in an adversarial process. The MIB is under a duty to investigate the claim, and to determine the award under the same conditions as those which would apply where the claim is made against an identified driver. No such duty applies to a defendant under the CPR. The arbitrator has the power to require counsel's advice. There is no bar on legal advice or representation for a minor, and they would have an

> authorised person to assist. Clause 14 represents a careful provision for minors and protected parties."

[55] When it came to considering the 2003 Untraced Drivers' Agreement, he stated at para [111]:

> "So far as the position in respect of accidents occurring before 1 March 2017 is concerned, I have concluded that the provisions just about satisfy the principles. This is because of the duties on the MIB, the independent arbitrator and the process of onward review under the Arbitration Act. This has been a long-standing process in respect of which there has been, so far as I am aware, no complaint by the European Commission; nor have I seen evidence of real problems on the part of minor or protected claimants in obtaining satisfactory awards under the UtDA, which would not have been found in a CPR claim against an insured driver. In any event I could not order the dis-application of the agreement in relation to accidents before 1 March 2017; I could only make a declaration that the defendant or agreement had failed to fulfil the duty imposed by the Directive."

[56] The decision of Ouseley J in *Roadpeace,* although clearly relevant to this court's deliberations, has to be treated with some degree of caution because of the clear indication from the CJEC in *Evans* that the identified and insured vehicle was the correct comparator in relation to an application made under the Untraced Drivers' Agreement.

[57] Another case which is relied upon by the appellant in this appeal is the case of *Lewis v Tindale* [2019] EWCA Civ 909. In that case, the MIB appealed against the Order of Soole J dated 14 September 2018 on the trial of preliminary issues by which, the judge determined the 2009 Directive relating to compulsory motor insurance had direct effect against the MIB as an emanation of the state, so that the MIB was liable to indemnify the claimant in respect of the injury he suffered as a result of being struck by a motor vehicle driven by Mr Tindale, the first defendant, whilst he walking on private land. There was no policy of insurance in place in relation to the vehicle and the MIB's case was that although the collision was clearly the driver's fault, the Uninsured Drivers' Agreement only applied in the context of a road traffic collision on the public highway and did not apply to a collision which occurred on private land. The MIB and the Department of Transport were the other two defendants. Default judgment was obtained against Mr Tindale.

[58] Having considered the relevant caselaw of the CJEU including, in particular, *Farrell v Whitty (No.2),* Flaux LJ, giving the judgment of the court, concluded at para [71] that:

> "The CJEU recognises and applies the broader objective of the Motor Insurance Directives of protecting the victims of motor accidents, by requiring member states to ensure that motor insurance is compulsory, so that the victims are compensated by the insurer or, in cases where the obligation to insure the vehicle has not been satisfied, by the compensation body to which that task has been delegated under article 10."

The compensation body's duty to compensate encompasses both the case where the state has not fully implemented its insurance obligation under article 3 of the 2009 Directive and the case where, although the state has implemented the obligation, the driver or owner of the vehicle has not taken out the compulsory insurance required. Flaux LJ went on to state at para [72] that the broad terms of judgment of the CJEU in *Farrell v Whitty (No.2)* are to the effect that the national compensation body is intended to protect and compensate victims by remedying the failure of the member state to fulfil its obligation under article 3 to ensure that civil liability in respect of the use of motor vehicles is covered by insurance.

[59] For the avoidance of doubt, the CJEU jurisprudence makes clear that the obligation under article 3 includes the situation where the vehicle in question is being used on private land. At para [73], Flaux LJ stated that the MIB, albeit a private law body, has had conferred on it by the UK government the task under article 10, which includes remedying the failure of the government to institute in full a compulsory insurance regime, which in the *Lewis* case related to the use of vehicles on private land. Flaux LJ noted that the MIB just like the MIBI possesses special powers by virtue of the provisions of the relevant road traffic legislation which oblige all authorised motor insurers to be members of the MIB and to contribute to its funding. Accordingly, like the MIBI, the MIB is an emanation of the state against which article 10 of the 2009 Directive can be enforced by the claimant, as it has direct effect. Flaux LJ stressed that this does not have the effect of making the MIB a primary compensator but on the basis that the MIB is an emanation of the state, it is no answer to its liability to compensate the claimant that this liability has only arisen through the fault of the government.

[60] Between paras [81] and [96] of his judgment the learned trial judge described in detail the provisions of the 2004 Untraced Drivers' Agreement. This court is content to adopt that description and simply notes that the role and powers of the arbitrator are set out in clauses 22 to 24 of the Agreement. As stated above, in the 2004 Agreement, there is no mandatory referral provision in the case of minors or applicants under a disability. However, clause 25 does make some provision for the protection of minors or those suffering from a disability in that it provides as follows:

> "(1) If in any case it appears to MIB that, by reason of the applicant being a minor or of any other circumstances affecting his capacity to manage his affairs, it would be in the applicant's interest that all or some part of the award should be administered for him by an appropriate representative, MIB may establish for that purpose a trust of the whole or part of the award (such trust to take effect for such period under the statutory provisions as appears to MIB to be appropriate in the circumstances of the case) or, as the case may be, initiate or cause any other person to initiate the proceedings necessary to have the award administered by an appropriate representative and otherwise cause any amount payable under the award to be paid to and administered by the appropriate representative.
>
> (2) In this clause "appropriate representative" means the Office of Care and Protection."

[61] The appellant notes that in the *Lewis v Tindale* case, considerable emphasis was placed on the duty of the compensation body appointed pursuant to article 10 of the 2009 Directive to act in the public interest. The appellant argues that when carrying out its duties under the 2009 Directive, the MIB must act in the public interest. It is argued that the case of *Dunhill v Burgin* demonstrates that it is a matter of public interest that any offer of compensation to a minor by way of proposed settlement of a claim for damages should be approved by a judge and, thereafter, the settlement monies should be paid into court as directed by the judge. The MIB's requirement to act in the public interest and the requirement to ensure equivalence and effectiveness of rights enjoyed under the 2009 Directive must mean that the appellant in this case has to be provided the same protection as afforded to other minors injured by insured and uninsured drivers. It is argued that since such protection is not provided under the 2004 Agreement, there is a clear breach of the 2009 Directive.

[62] When considering the merits of the appellant's arguments and the overall merits of this appeal, it is important for this court, just as the lower court did, to confine its adjudication to the actual facts and circumstances of this case which include the important fact that at all times the applicant/appellant had the benefit of legal representation. This court must also take into account the proposals made by the MIB in respect of the independent scrutiny of the adequacy of the award and its subsequent investment, including those proposals made after the initiation of proceedings in this case. Having considered all the facts and circumstances of the case, Rooney J stated at para [125] that he was satisfied that:

> "the duties imposed on the MIB under the 2004 Agreement, the right of appeal to an independent

> arbitrator and the process of review under the arbitration Act 1996 are sufficiently equivalent to the procedure for court approval in respect of an identified insured or uninsured driver, so as to achieve compliance with the principles of equivalence and effectiveness in relation to the approval of MIB awards to minors and the investment of the awards."

[63] In coming to this conclusion, the judge recognised that Ouseley J in the *Roadpeace* case had queried whether the process under the Civil Procedure Rules in England & Wales represented a correct measure for equivalence with the revised 2017 Untraced Drivers' Agreement but Rooney J clearly accepted and adopted the position set out by the CJEC in *Evans* at para [28] that in order to meet the requirements of the Directive:

> "the body responsible for awarding compensation does not necessarily have to be placed, as far as civil liability is concerned, on the same footing as a defendant such as a driver of an identified and sufficiently insured vehicle."

[64] It is clear from the above passage that the judge clearly addressed his mind to the identification of the correct comparator and has, indeed, identified and utilised the correct comparator in this case. Having regard to the facts of this case and the sequencing of events as set out in paras [5] to [14] of this judgment, the lower court concluded that the right of appeal to an arbitrator under the 2004 Agreement, as described by the MIB in its correspondence with the applicant's solicitors, was equivalent to and as effective as the procedure for court approval of a minor settlement. This court agrees with these conclusions, particularly having regard to such matters as the independence and expertise of the arbitrator, the approach which the arbitrator must adopt to the assessment of compensation, the ability of the applicant to provide new material to the arbitrator, the availability of an oral hearing with representation and the opportunity of adducing evidence from witnesses, the ability of the arbitrator to direct that further evidence be obtained and/or further investigations be carried out, the MIB's undertakings re costs and time limits and, finally, the ability of the arbitrator to increase the award, if he or she considers this to be appropriate. It should be noted that this last-mentioned power is one which a court hearing a minor settlement does not enjoy, unless with the consent of the defendant.

[65] In relation to the issue of the adequacy of the award, this court concludes that the tests of equivalence and effectiveness are satisfied in this case, having regard to its particular facts and circumstances and the court emphasises that each case must turn on its own particular facts and circumstances.

[66] However, it would be remiss of this court if it did not make the general comment that in the context of any future applications brought under the 2004

Agreement involving a minor or a person under a disability, a reviewing court might be hard to persuade that the tests of equivalence and effectiveness were satisfied in the absence of similar assurances being given and similar facilities being offered by the MIB as were given and offered in this case. In making these comments, this court acknowledges and approves of the assurance given by the MIB during the course of the hearing that the MIB would not deal with an application under any of the Untraced Drivers' Agreements involving a minor or a person under disability unless that applicant is legally represented.

[67] In relation to the issue of the investment of any compensation award which has either survived scrutiny by the arbitrator or has been adjusted by the arbitrator, it is to be noted that under clause 25 of the 2004 Agreement, the MIB may establish a trust as an investment vehicle for an award of compensation made to a minor or take steps to have the compensation sum made to an adult under a disability dealt with under the auspices of the Office of Care and Protection. In this particular case, the MIB informed the appellant's legal advisers that they had approached the Official Solicitor with a view to the Official Solicitor applying to the court to be appointed guardian of the fortune or estate. The Official Solicitor has indicated a willingness to take on this role, if so appointed by the court. The MIB has agreed to cover the costs of any such application and any investment fees levied by the Court Funds Office.

[68] In the context of the offers and proposals made by the MIB in this case, the lower court at para [148] was satisfied that the 2004 Agreement possessed sufficient flexibility to:

> "ensure that, in cases where the applicant is legally represented and the matter regarding the sufficiency of the award has been referred to the independent arbitrator, that mechanisms exist to secure the appropriate investment of the compensation award in a manner equivalent to the protections available following court approval and directions by the court."

[69] This court notes that under the 2024 Agreement, the issue of ongoing protection of any compensation award made to a minor or a person under a disability remains largely the same as existed under the 2004 Agreement. This court has some concerns about the potentially cumbersome nature of the procedure proposed by the MIB in this case but is prepared to accept that, in principle, the setting up of a trust or the appointment of the Official Solicitor as guardian of the fortune or the estate of the minor satisfies the test of equivalence and effectiveness, especially in light of the undertaking given by the MIB in respect of any costs or fees incurred. However, the court would wish to make it clear that although each case must be judged on its own facts, in the context of any future applications brought under the 2004 Agreement or, indeed, any applications brought under the 2024 Agreement which involve minors or persons under a disability, the tests of equivalence and effectiveness may well not be satisfied unless similar assurances are

given and similar facilities are offered by the MIB as were given and offered in this case in relation to the protection of the funds by their investment in an appropriate account.

[70] During the hearing of this appeal, the court considered the approach adopted in respect of awards to minors and those under a disability under the Criminal Injuries (Northern Ireland) Order 2002. Clause 55 of the Northern Ireland Criminal Injuries Compensation (Amendment 2020) Scheme (2009) provides that where the applicant is a minor, the Secretary of State will hold the award in trust for the applicant until the applicant attains the age of eighteen. Only the Compensation Agency Head of Branch can authorise the release of funds before the claimant's 18th birthday. If the claimant is suffering from a disability, when he or she reaches the age of eighteen, the Office of Care and Protection take over the management of the funds. The MIB should give some consideration to replicating the approach adopted by the Compensation Agency with a view to formalising arrangements for the investment of compensation awards to minors and persons under disability in a bespoke account. The court would regard this as a very positive step and one which would provide consistency of approach and, additionally, minimise the risk of future challenges to the Untraced Drivers' schemes.

[71] This in essence disposes of the appellant's appeal. The appellant also argued before Rooney J that there was an infringement of article 6(1) ECHR in respect of the right of access to the court and that there was also a valid convention discrimination claim in that the appellant was being unlawfully discriminated against (article 14) in respect of his right of access to the court (article 6) and his enjoyment of property (A1P1). The learned trial judge dealt with these issues in great detail in paras [151] to [183] of his judgment. The appellant's counsel before this court did not actively pursue these grounds of challenge in oral submissions but stated that he was content to leave the issues to be addressed on the basis of his written submissions.

[72] In relation to the article 6(1) point, assuming that article 6(1) is engaged in respect of the issues of the scrutiny of a settlement and the subsequent investment of any compensation award, once the court has concluded that, on the basis of the facts of the case, the EU tests of equivalence and effectiveness are satisfied, there is little if any scope for an article 6 challenge arising out of the facts of this particular case. A generic article 6 challenge cannot hope to succeed in that the appellant would have to establish that in all or nearly all applications under the 2004 Agreement, the rights protected by article 6(1) were unlawfully infringed. Bearing in mind that access to the court is available by way of judicial review, by way of appeal under the Arbitration Act 1996, by way of an action for breach of contract as envisaged by clause 31 of the 2004 Agreement which specifically refers to the provisions of the Contracts (Rights of Third Parties) Act 1999 and by virtue of clause 32 of the 2004 Agreement which enables a claimant to pursue the MIB through the courts if the MIB for some reason fails to make the agreed payment, there is no legitimate basis for arguing that article 6(1) ECHR is unlawfully infringed in the operation of what is essentially an inquisitorial investigative process under the provisions of the 2004 Agreement.

Rooney J placed some reliance on the decision of Hickinbottom J in *Carswell v Secretary of State for Transport and the Motor Insurers' Bureau* [2010] EWHC 3230 at paras [63] and [64] to support his conclusions on this aspect of the claim and we consider that such reliance is well-founded.

[73] The Convention discrimination claim is similarly bound to fail. There is a significant question mark in respect of the engagement of A1P1 in this case but even if one assumes that the procedures to be adopted to assess the adequacy of an award made under the 2004 Agreement and the adequacy of the protections in place to preserve the award during the claimant's minority or period of disability fall within the ambit of article 6(1) and/or A1P1, the fact that the EU tests of equivalence and effectiveness are met puts an end to any argument of discrimination and, in any event, the test of justification for any differences in the approaches adopted by the state is manifestly satisfied. This court does not need to address these issues in any greater detail and endorses the conclusions reached by the lower court in respect of these aspects of the challenge.

[74] In summary, the court affirms the decision of the lower court and dismisses this appeal. We do so having made recommendations as to the way forward which we hope the MIB will consider and implement. The application for judicial review is refused and the court will hear the parties in respect of the issue of costs.