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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JUSTIN CHADWICK AND ANDREW HARVISON FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE NORTHERN IRELAND POLICING BOARD

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Ian Skelt KC and Richard Smyth (instructed by Edwards & Co, Solicitors) for the Applicant
Neasa Murnaghan KC and Joseph Kennedy (instructed by the Crown Solicitor's Office) for the Respondent

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SCOFFIELD J

Introduction

[1] This is an application in which the applicants, both former constables in the Police Service of Northern Ireland (PSNI), seek to challenge a decision of the Resources Committee of the Northern Ireland Policing Board (NIPB) ("the Board") to refuse them an injury award under regulation 10 of the Police Service of Northern Ireland and Police Service of Northern Ireland Reserve (Injury Benefit) Regulations 2006 (SR 2006/268) ("the 2006 Regulations").

[2] The applicants rely on grounds of illegality and irrationality. The nub of the applicants' case is that the Board has wrongly failed to give effect to the report and certificate of the independent medical referee (IMR) in each case, contrary to regulation 30(3) of the 2006 Regulations. The Board was concerned that the IMR had "deferred to his own guidance document… which contains a methodology not contained within the… official guidance documents for medical assessments within this jurisdiction." However, the applicants contend that, in fact or in substance, the IMR directed himself to the correct legal issues under regulation 29 of the 2006 Regulations and answered the medical questions referred to him in a way which was

legally open to him. His determination of those issues then became binding on the Board. It is agreed that the case turns upon whether the Board has the power, duty or function to reject a report and certificate from an IMR in such circumstances.

[3] The applicants were represented by Mr Skelt KC and Mr Smyth; and the respondent by Ms Murnaghan KC and Mr Kennedy. I am grateful to all counsel for their helpful written and oral submissions.

Relevant statutory provisions

[4] As the applicants have observed in their submissions, police officers are not employed in the classic sense. Rather, they are office holders in respect of whom delegated legislation provides for many of the conditions and procedures applicable to that office. These include powers to retire officers on the grounds of ill-health and as to the compensation payable where officers suffer injuries on duty.

[5] Regulation 10 of the 2006 Regulations entitles officers who are permanently disabled as a result of an injury on duty to a gratuity and an injury pension. It provides as follows:

> "(1) This regulation applies to a person who ceases or has ceased to be a police officer and is permanently disabled as a result of an injury received without his own default in the execution of his duty (in Schedule 3 referred to as the "relevant injury").
>
> (2) A person to whom this regulation applies shall be entitled to a gratuity and, in addition, to an injury pension, in both cases calculated in accordance with Schedule 3; but payment of an injury pension shall be subject to the provisions of paragraph 5 of that Schedule and, where the person concerned ceased to serve before becoming disabled, no payment shall be made on account of the pension in respect of any period before he became disabled."

[6] There are a number of conditions to be satisfied before an officer becomes entitled to these benefits. The 2006 Regulations make provision as to how and by whom it is to be determined whether these conditions are met. In particular, regulation 29 requires the NIPB to refer certain medical questions to a duly qualified and appointed medical practitioner, known as the selected medical practitioner (SMP). Regulation 29(1) provides as follows:

> "Subject to the provisions of this Part, the question whether a person is entitled to any, and if so what, awards

> under these Regulations shall be determined in the first instance by the Board."

[7] The Board therefore is the decision-maker, or determiner (in the first instance), in respect of awards under the 2006 Regulations, which includes those awards under regulation 10. However, that role is also expressly "subject to the provisions of this Part", namely Part 4 of the 2006 Regulations (in which regulation 29 is found) which deals with procedural matters.

[8] Regulation 29(2) provides as follows:

> "Subject to paragraph (3), where the Board is considering whether a person is permanently disabled, it shall refer for decision to a duly qualified medical practitioner selected by it the following questions—
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> (a) whether the person concerned is disabled;
>
> (b) whether the disablement is likely to be permanent,
>
> except that, in a case where the said questions have been referred for decision to a duly qualified medical practitioner under regulation H1(2) of the 1988 Regulations, a final decision of a medical authority on the said questions under Part H of the 1988 Regulations shall be binding for the purposes of these Regulations;
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> and, if it is further considering whether to grant an injury pension, shall so refer the following questions—
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> (c) whether the disablement is the result of an injury received in the execution of duty, and
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> (d) the degree of the person's disablement;
>
> and, if it is considering whether to revise an injury pension, shall so refer question (d) above."

[9] The determination of the degree of the claimant's disablement is important in determining the amount of the gratuity and pension payable to them under regulation 10. That follows from the provisions of Schedule 3 to the 2006 Regulations. There are several categories of disablement set out in para 3 of that Schedule, ranging from 'slight' disablement, through 'minor' disablement and 'major' disablement, to 'very severe' disablement. The process of assigning a level of disablement is often referred to as 'banding', as it places the claimant into one of

these four bands for the purpose of assessing the level of payments to which they are entitled.

[10] The effect of regulation 29(5) is of particular importance in these proceedings. It provides that:

> "The decision of the selected medical practitioner on the question or questions referred to him under this regulation shall be expressed in the form of a report and a certificate and shall, subject to regulations 30 and 31, be final."

[11] By virtue of regulation 29(6) a copy of the SMP's report and certificate shall be supplied to the person who is the subject of that report. As appears from the above, the decision of the SMP on the questions referred to him or her are to be final, subject to regulations 30 and 31. Regulation 30 provides a right of appeal against the decision of the SMP to an IMR, with this right of appeal being afforded only to the person assessed. Regulation 30 is in the following terms:

> "(1) Where a person is dissatisfied with the decision of the selected medical practitioner as set out in a report and certificate under regulation 29(5), he may, within 28 days after he has received a copy of that report and certificate or such longer period as the Board may allow, and subject to and in accordance with the provisions of Schedule 6, give notice to the Board that he appeals against that decision.
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> (2) In any case where within a further 28 days of that notice being received (or such longer period as the Board may allow) that person has supplied to the Board a statement of the grounds of his appeal, the Board shall notify the Secretary of State accordingly and the Secretary of State shall appoint an independent medical referee to decide.
>
> (3) The decision of the independent medical referee shall, if he disagrees with any part of the report and certificate of the selected medical practitioner, be expressed in the form of a report and certificate of his decision on any of the questions referred to the selected medical practitioner on which he disagrees with the latter's decision, and the decision of the independent medical referee shall, subject to the provisions of regulation 31, be final."

[12] Although the 2006 Regulations refer to the IMR being appointed by the Secretary of State, the Secretary of State's functions under these provisions are now exercised by the Department of Justice in Northern Ireland ("the Department") following the devolution of policing and justice functions. As appears from regulation 30(3), where there has been an appeal from the SMP, the decision of the IMR on the appeal is final, subject to regulation 31. The applicants contend that the finality of the IMR's decision where an appeal has been brought is further underscored by para 6 of Schedule 6 to the 2006 Regulations, which provides as follows:

> "The independent medical referee shall supply the Secretary of State with a written statement of his decision. Where the independent medical referee disagrees with any part of the selected medical practitioner's report, the independent medical referee shall supply a revised report and certificate, which shall be final."

[13] Regulation 31(1) provides that a tribunal hearing an appeal under regulation 33 may refer the decision back to the medical authority who has given the final decision (whether the SMP or, where there has been an appeal to an IMR, the IMR) for reconsideration by them, in which case the reconsidered opinion is final. Regulation 31(1) is in the following terms:

> "A tribunal hearing an appeal under regulation 33 may, if they consider that the evidence before the medical authority who has given the final decision was inaccurate or inadequate, refer the decision of that authority to him for reconsideration in the light of such facts as the tribunal may direct, and the medical authority shall accordingly reconsider his decision and, if necessary, issue a fresh report and certificate which, subject to any further reconsideration under this paragraph, shall be final."

[14] The right of appeal under regulation 33 to the Secretary of State (who must then appoint an appeal tribunal) is again confined to the police officer (or a person claiming an award in respect of such a police officer) who is aggrieved by the Board's decision.

[15] Aside from the rights of appeal mentioned above, there is provision that the officer and the Board may agree to refer the SMP's or IMR's decision back to him or her for reconsideration (after which, again, the reconsidered decision is to be final). This facility is provided for in regulation 31(2):

> "The Board and the claimant may, by agreement, refer any final decision of a medical authority who has given such a decision to him for reconsideration, and he shall

> accordingly reconsider his decision and, if necessary, issue a fresh report and certificate, which, subject to any further reconsideration under this paragraph or paragraph (1) or an appeal, where the claimant requests that an appeal of which he has given notice (before referral of the decision under this paragraph) be notified to the Secretary of State, under regulation 30, shall be final."

[16] Regulation 35 provides a duty upon the Board to reassess whether the degree of disablement in a particular case in which an injury pension is payable has altered. Those reassessments are to be conducted at "suitable" intervals. I was informed that, in practice, SMPs and IMRs recommend when such a reassessment should occur. This provision is not directly relevant to the question which arises in these proceedings but is an important feature of the scheme and was addressed in argument.

Factual background to the applications

[17] There is no significant factual dispute in either case and, indeed, there is no need to set out the factual background to the applications in any great detail because this case ultimately turns on statutory construction of the 2006 Regulations. What follows below is a brief summary only.

The assessments in the first applicant's case

[18] The first applicant joined the PSNI in September 2003. His case was referred by the Board to an SMP, Dr Hamilton, who made an assessment in July 2020. Dr Hamilton determined that the applicant was permanently disabled as a result of post-traumatic stress disorder (PTSD). He was also disabled, although not permanently so, due to hip and knee pain. The SMP determined that the PTSD (the permanent disability) was an injury on duty; and that the degree of disablement – or the injury's impact on the applicant's earning capacity – was within Band 2 ('minor') for the purposes of calculation of his injury gratuity and pension. He also recommended that the extent of disablement should be reassessed in three years' time.

[19] The first applicant appealed Dr Hamilton's assessment pursuant to regulation 30. He provided two additional medical reports in support of this appeal. Dr Vivian was appointed by the Department as the IMR to consider the appeal and he assessed the applicant in September 2021. In the IMR's assessment, the applicant was permanently disabled due to PTSD, anxiety and depression. He was also permanently disabled due to problems with his right hip; but it was unclear if he was disabled due to problems with his right knee. Dr Vivian considered that the PTSD was expected to improve over time and should, in due course, be compatible with some civilian work. However, it was unclear if the applicant would ever be able to work regularly, ie for 30 or more hours per week. The hip problems were very

intrusive and the applicant was not expected to be fit for regular work. The IMR considered that the PTSD symptoms were substantially caused by events during the applicant's police career, which had accelerated symptoms by 10 years. His hip problems had been accelerated by 3 to 5 years. At the date of the assessment, the IMR considered that the applicant had no meaningful income capacity and that his loss of earnings, therefore, was total. The period of acceleration of his hip symptoms would be complete by 2022, and of the PTSD by 2027.

[20] As a result of this assessment, Dr Vivian determined that, as at the date of assessment, the applicant was permanently unfit to perform the duties of a police officer; that the disablements were the result of an injury on duty; and that the effect of the disablement on the applicant's earning capacity was very severe (in Band 4). He recommended that the degree of disablement should be reassessed in both 2022 and 2027. For present purposes, the key difference in outcome, as compared with the certificate issued by the SMP, was that the IMR assessed the degree of disablement in Band 4, rather than Band 2.

The assessments in the second applicant's case

[21] The second applicant joined the PSNI in November 2003, having previously been a reserve constable for over 10 years. In due course he was promoted to the rank of sergeant. He was assessed by the SMP, Dr Hamilton, in June 2019. The SMP determined that he was permanently disabled as a result of chronic back pain. He considered that an injury on duty had contributed 30% to the back condition and that this was not a substantial contribution, so that an injury on duty award would not be appropriate in respect of that condition. However, the SMP also considered that the applicant was permanently disabled due to PTSD and that that was an injury sustained on duty so that an injury award was appropriate. He determined that the PTSD had a minor impact on the applicant's earning capacity (Band 2). He recommended that the degree of disablement should be reviewed in three years. Dr Hamilton then further reviewed this applicant in October 2019 to consider other medical issues which had not been addressed within the original assessment; but this did not materially change the outcome.

[22] The second applicant also appealed Dr Hamilton's certificate pursuant to regulation 30. Again, Dr Vivian was appointed as the IMR. He assessed this applicant and made his determination in November 2021. Dr Vivian considered that the applicant was highly disabled both with back pain and PTSD; and he was disabled by pain in his right knee, hips and feet. The back pain and PTSD represented permanent disablements, whilst the others were not permanent. He considered that the PTSD was wholly or substantially due to the applicant's duties as a police officer. The issue of back pain was complex but, unlike the SMP, he considered that a 30% contribution from duty *was* substantial. He considered that duty activities accelerated the back pain symptoms by 5 to 10 years and he took a mid-point of 7½ years. He found that the applicant was unfit for work as a result of his permanent disablements and classed his loss of earning capacity as total, so

qualifying as very severe (Band 4). He recommended a reassessment of the extent of disablement in 2025. Again, therefore, although there were a variety of differences in the reasoning, the key issue between the SMP and IMR was the assessment of the degree of the second applicant's disablement and whether he fell into Band 2 or Band 4.

The respondent's response

[23] The Board considered the IMR's certificate and report in each case and then provided a decision to each applicant in respect of their appeal on 21 December 2021. In each case, the appeal was refused. In each case, the Board's correspondence was in materially identical terms, with the key passage in the following terms:

> "The ultimate decision as to eligibility of an award rests with the Board. In keeping with its statutory responsibilities as the final decision-maker, the Board considered the recommendation made by the IMR at the Resources Committee on 16 December 2021 to include the process applied by the IMR in reaching his recommendation. On review of the documentation provided by the IMR, the Board noted that the process applied is not consistent with the current guidance in place and under which your client's original Selected Medical Practitioner (SMP) case was progressed. Accordingly, this application has been refused. As the existing guidance has not been applied by the IMR we are corresponding with you to confirm this and to offer the opportunity for your client's case to be expedited for appeal with another IMR to ensure due process is followed."

[24] Each applicant requested further details of the Board's decision, which was provided in further correspondence from NIPB dated 22 February 2022. Again, the Board wrote to each applicant in materially identical terms. This correspondence provided the joint guidance issued to medical practitioners co-authored by the Board and the Department; a separate document prepared by Dr Vivian, the IMR; and the reports and certificates prepared by the IMR in relation to each applicant. The letter went on to explain as follows:

> "By way of brief background Board Officials undertake a quality control of all results received from IMRs (being the doctors procured and managed by the DOJ) as well as its own Selected Medical Practitioners (SMP).
>
> On review of the subject results Board Officials noted inconsistencies in the methodology applied by the IMR.

> During subsequent investigations it has come to light that the IMR has deferred to own guidance document (attached) which contains a methodology not contained within the attached official guidance document for medical assessments within this jurisdiction to include a methodology of his own devising referred to as "assigning acceleration."
>
> This guidance document is not ratified for use within this jurisdiction nor was it the process applied during your client's initial assessment with the SMP. As the established guidance has not been followed it is on this basis, we are offering a fresh appeal. We have separately raised this issue as a matter of urgency with the DOJ being the body responsible for procuring and managing IMRs and the IMR process."

[25] The guidance document jointly issued to SMPs and IMRs by the Board and the Department, which has been made available to the court, provides detailed guidance on how assessments under the 2006 Regulations should be undertaken. It includes explanations of some of the key concepts contained within the 2006 Regulations and some commentary on previous case law which clarified how the Regulations are to be applied. It is designed, at least in part, to ensure that SMPs and IMRs do not fall into legal error and that they operate on a consistent understanding and approach to the requirements of the Regulations. Nonetheless, as the applicants in this case emphasise, that guidance contains the following caveat in its introductory section:

> "Please note however [that] this document does not have statutory underpinning and neither the Northern Ireland Policing Board (NIPB) nor the Department of Justice (DOJ) have the authority to give a binding interpretation on a point of law."

[26] The applicants therefore submit that the Board's key concern about the IMR process in this case is that he failed to have regard to guidance which the Board itself accepts is non-binding.

[27] I should declare an interest at this point. In 2014, whilst in private practice at the Bar of Northern Ireland, I undertook a significant piece of work for the NIPB consisting of a comprehensive review of the system for the payment of ill health pensions and injury on duty awards to former police officers, which was in a state of crisis at that point. (Both parties to these proceedings were aware of my previous involvement with the Board in this respect and neither considered this to represent any impediment to my determining this application for judicial review. Indeed, I was informed that it was considered by both parties to be an advantage that I had some previous familiarity with the scheme. Whether that was right or wrong is not

for me to judge.) In any event, that review resulted in a number of recommendations, one of which was in the following terms:

> "One authoritative, Northern Ireland-specific guidance document should be issued to assist SMPs and IMRs to interpret and apply the Regulations in a consistent manner (and to enable applicants to understand how this will be done). This should be agreed at least between the Board and the Department, although ideally also with officers' representatives."

[28] The guidance which the Board considers not to have been properly followed by the IMR in this case appears to have resulted from this recommendation; and its contents have been shaped by other recommendations made in the course of the review.

[29] In its evidence in these proceedings – provided in an affidavit from Ms Aislinn McGuckin, a Director in the Police Pensions and Injury Benefits Directorate of NIPB – the Board has set out a much fuller description of its concerns with the methodology adopted by Dr Vivian in his certificates in these cases. I summarise these only very briefly because it is accepted that the only issue for me to determine is the issue of law stated at para [2]. I am also conscious that Dr Vivian is not represented in these proceedings. The applicants have defended his methodology in their written submissions but I have not been required or invited to determine whether his approach was lawful.

[30] Ms McGuckin has averred that the Board undertakes a "quality assurance exercise in respect of all medical reports and certificates produced by both SMPs and IMRs." This involves consideration of the reports against a checklist. Many of the issues addressed are administrative in nature: for example, checking if there are any obvious errors; checking if the medical authority has addressed the correct questions under regulation 29 and provided a clear answer; and checking that the answers provided in the report and the certificate are not inconsistent. In the course of this exercise, Board officials are said to have identified some inconsistencies in the reports prepared by Dr Vivian and in the process which he followed. As a result of this, a paper-based review of eight cases which Dr Vivian had determined was undertaken by two doctors, who are also occupational health specialists who act as SMPs and IMRs and who had had no previous involvement in these cases. Their conclusions were significantly at variance with those of Dr Vivian, and much less generous in their assessment of the awards due to the officers concerned.

[31] The Board's concerns with the IMR's methodology included that he had relied upon a guidance document that he had prepared himself which had not been shared with the Board or the Department; that this guidance document contained errors (in the Board's view), in particular by introducing a concept of "acceleration" when assessing the impact of a duty injury which was said to be "at best, speculative" and

which the reviewing doctors considered to be so subjective that they could not explain how it had been applied, as well as involving judgments which were required to be made by a different medical specialist rather than an occupational health specialist. The Board was also concerned that the IMR had wrongly assessed the banding for each applicant against their loss of earnings (using figures said to be arbitrary), rather than their loss of earning *capacity*, amongst other things.

[32] The difference in liability to the public purse between the applicants' awards at Band 2 and awards at Band 4 has been calculated by the Board. In each case, the lump sum award would essentially double; and the yearly payments would increase by 64% and 57% respectively. In addition, where an officer receives a Band 4 award, they will usually apply for and be granted an augmented award under regulation 11, which is a lump sum payable where the officer is found to be totally and permanently disabled. The augmented awards in these two cases would amount to over £435,000. A significant sum of public money is therefore at stake. These funds also ultimately come out of the policing budget.

[33] Of the eight officers whose cases gave rise to concern and in respect of whom the Board has declined to give effect to Dr Vivian's certificates, there is one further case where a judicial review has been issued (which is stayed pending the outcome of these cases); a fourth officer has availed of the offer of referral to a different IMR; and four other officers have not objected. In most of these cases, the IMR had increased the banding from Band 2 to Band 4, although in one case he had reduced the award from Band 1 to Band 0. In the meantime, the Department has raised the issue of his methodology with Dr Vivian. He has defended the way in which he approached these cases; but the Board does not agree with the views he has expressed in this regard.

[34] The guidance document co-authored by Dr Vivian, who appears to have considerable experience in the field of police injury awards in England and Wales and in Scotland, was produced in conjunction with a working party involving two other SMPs and solicitors with experience in police pensions work. Dr Vivian has indicated that it has been shared across constabularies in Great Britain and has been favourably received, as well as having been the subject of training conducted by him for the Police Federation of England and Wales. There is no suggestion other than that it was produced in good faith and in an attempt to faithfully apply the equivalent regulations in the rest of the UK. Dr Vivian has indicated in his response to the Department that he believes his approach is lawful but has no doubt the Board has the same confidence in its guidance: "The challenge is that there is a significant difference between these two approaches, and it seems unlikely that this will be resolved easily." Dr Vivian has offered to step back from his work for NIPB whilst the issue is addressed.

Summary of the parties' positions

[35] In some of the evidence and skeleton arguments presented in this case, there was a degree of dispute about the nature and extent of the shortcomings, if any, in

the process of assessment undertaken by the IMR, Dr Vivian. In the event, at the hearing I was informed that it was an agreed position between the parties that these matters did not fall for resolution by the court. Both parties agreed that the issue in this case resolved to a question of statutory construction of the 2006 Regulations and, in particular, the extent of any discretion (or overarching decision-making power) on the part of the Board to decline to give effect to the certified determination of the medical questions referred to an SMP (or, as the case may be, and as it is in this case, an IMR).

[36] For the applicants, Mr Skelt submitted that the resolution of this question was plain on the face of the statutory scheme and, in particular (although not exclusively), from the ordinary and natural meaning of regulation 29. He supplemented his textual analysis of the 2006 Regulations with reliance upon a range of previous decisions construing similar statutory schemes which, in his submission, clearly supported the argument that the Board could not go behind the decisions contained in a medical authority's certificate in the absence of agreement on the part of the claimant that the matter be reconsidered, referral back for reconsideration by an appeal tribunal, or a successful application for judicial review.

[37] For the respondent, Ms Murnaghan submitted that the ultimate decision-maker under regulation 29 remained the Board, which allowed it, where there was some proper basis to do so, to decline to accept the certificate issued by an SMP or an IMR. She argued that, where it was clear that the medical authority had made some error of assessment, it could not have been the legislature's intention that the Board was bound to give effect to this, including in cases where this would result in unjust enrichment of the claimant and unnecessary expenditure from the public purse. This was particularly so given that injury on duty awards are generally payable for life (see regulation 40). In her submission, some of the more recent authorities emphasised the need for accuracy in medical determinations under the 2006 Regulations as much as, if not in priority to, the need for certainty. She contended that the absence of a right of appeal on the part of the Board must be counter-balanced, when construing the 2006 Regulations, by some provision permitting the Board to safeguard against unwarranted windfall payments to claimants. Otherwise, it would be acting in breach of its obligations to manage public money responsibly and to secure the efficient operation of the police service.

The issue of statutory construction

[38] In my view, the key issue of statutory construction which lies at the heart of these proceedings is to be resolved decisively in favour of the applicants. Regulation 29 of the 2006 Regulations deals with the reference of medical questions to an SMP. (It has been a matter of comment in previous case law that the term "medical questions" is somewhat of a misnomer, given that the four specified questions set out in that provision – and particularly the question of whether the disablement is the result of an injury received in the execution of duty, as well as the issue of 'default' under regulation 29(4) – are not necessarily matters *exclusively* of medical opinion.

However, that is beside the point for present purposes.) Significantly, pursuant to regulation 29(2), those questions are referred to a medical practitioner "for decision." In order to avoid controversy about what the medical practitioner has decided, he or she is required to set out their decision on the question or questions referred in the form of a report and a certificate: see regulation 29(5). The certificate will certify the decision in respect of each question and the report will generally provide the reasoning behind the decision or decisions set out in the certificate.

[39] Regulation 29(5) goes on to say that the decision of the medical practitioner is "final." That finality is subject only to regulations 30 and 31. Both of those provisions allow, in different ways, for the questions to be reconsidered by the first medical practitioner or to be considered by a different medical practitioner: an IMR under regulation 30(3), whose decision is also to be final; or a reconsideration by the medical practitioner who has previously made a decision either by way of referral back by an appeal tribunal (regulation 31(1)) or by agreement between the Board and the claimant (regulation 31(2)). In each of the 'reconsideration' cases, the matter should be referred back to the *same* SMP or IMR who has issued the certificate which then stands as final. It is only where that medical practitioner is unable or unwilling to act when the matter is referred back that there is a prospect of a further medical practitioner becoming involved: see regulation 31(3). In any event, neither regulation 30 nor 31, to which regulation 29(5) is subject, envisage a determination on the medical questions by anyone other than a medical practitioner.

[40] True it is that, under regulation 29(1), the Board remains the first instance determiner of whether a person is entitled to any, and if so what, awards under the 2006 Regulations. But that function is expressly said to be "subject to the provisions of this Part", that is to say, subject to the remaining provisions within regulation 29 and regulation 30, amongst others. In other words, the Board's residual decision-making function is expressly subject to the finality of a medical practitioner's certificate on the referred medical questions. To my mind, that cannot be construed otherwise than as imposing an obligation on the Board, in the course of its decision-making, to treat the relevant medical practitioner's certificate as determinative of the issues he or she has considered and to give effect to his or her decisions. I accept the submission made by Mr Skelt that a final certification in respect of a referred medical question cannot be reconciled with the notion of the certificate expressing a declinable recommendation on that question. The respondent here erred in law in referring to the IMR's decisions as a mere "recommendation" and treating them as such.

[41] Why then does regulation 29(1) give any role to the Board in determining eligibility? The obvious answer is that there are aspects of the overall determination which fall outside the medical questions capable of being (and required to be) referred to a medical practitioner under regulation 29. The most obvious example of such an issue is the start date, or 'implementation date', for an award under the 2006 Regulations. (Other issues which potentially fall within this category are whether the officer should be required to retire and if so on what date and, if such a question

arises, whether he should be treated as having received the injury because he was known to be a police officer under regulation 5(2)(c).) Interestingly, regulation 32(a) gives the Board power to determine medical issues only in very limited circumstances, where the person concerned refuses to engage with the medical practitioner. However, where one or more of the specified medical questions set out in regulation 29 has been finally decided by an SMP (or IMR, as the case may be) it is not open to the Board to fail to give effect to that decision in the overall resolution of the question whether a person is entitled to any, and if so what, awards under the 2006 Regulations. In this case, it is clear that the Board's quibble with the applicants' eligibility was because it disagreed that it should be bound by the decisions Dr Vivian had certified. Whether this was simply because it disagreed with the substance of the decision or had concerns about the decision-making process is of no import for present purposes. The Board was not entitled to treat the IMR's certificates as being capable of being set aside of its own motion.

[42] Where there is a genuine concern on the part of the Board that the SMP (or IMR, as the case may be) has gone so far wrong as to reach a decision which is unlawful for some reason, that can be cured by way of an application for judicial review. The Board accepts that it has previously pursued such a course in this jurisdiction. The authorities discussed below also recognise that, in principle, the decision of a medical practitioner expressed in their certificate is susceptible to judicial review. It will be rare for such a challenge to succeed if, in reality, the Board takes issue merely with the medical opinion of the practitioner. However, where the practitioner has plainly left a relevant consideration out of account, has acted on the basis of a misapprehension of an established and material fact, or has erred in law, there is no reason why that ought not to be corrected by way of judicial review (see, for instance, the comments of Laws LJ in the *Laws* case, discussed below, at para [20]). The possible inconvenience and expense of bringing such proceedings is not a reason to read into the statutory scheme a more wide-ranging power on the part of the Board to reject a medical authority's certificate, when this clearly cuts against the grain of the 2006 Regulations.

[43] The respondent relied upon a number of cases which explain and apply the principle of statutory construction that Parliament is to be taken to have legislated in a way which avoids anomalous or absurd results: see, for example, *R (Edison First Power Ltd) v Central Evaluation Officer* [2003] UKHL 20, at paras [116]-[117]; and *Project Blue Ltd v Revenue and Customs Commissioners* [2018] 1 WLR 3169, at paras [31] and [110]. This argument proceeded on the basis that, where a medical practitioner had plainly erred, the 2006 Regulations could not have intended that the Board had no power to decline to act in accordance with their medical certificate. I do not consider that this argument assists the respondent for the following reasons. First, this principle of construction must, as always, give way to the express words of the statutory provision where those words plainly displace a more purposive approach. I consider that to be the case in this instance. Second, the respondent's argument proceeds on the basis that SMPs and IMRs will or may regularly conduct assessments or issue certificates in a manner which is obviously wrong. The court

should not construe the statutory scheme on this basis. Medical practitioners are appointed by the Board or by the Department and the court should proceed on the basis that they will be properly trained and will conduct their assessment conscientiously and to the best of their professional ability. Aberrant assessments must be considered to be rare exceptions, rather than regular occurrences. Third, truly aberrant assessments in favour of the claimant ought to be able to be addressed either by way of referral for reconsideration under regulation 31(2) or, failing that, by way of judicial review. Fourth, the argument is in some degree circular: in this case it assumes the incorrectness of the very thing that the legislature has declared to be final.

[44] As to the approach which claimants ought to take where the Board raises valid concerns about an SMP's decision or assessment process, it seems to me (without deciding the issue or hearing detailed argument on it) that any refusal on the part of an officer or retired officer to consent to referral for reconsideration is unlikely to be susceptible to challenge by way of judicial review, since it is a decision made by an individual as to their private interests. In any event, it is to be hoped that officers, and those representing them, would take a pragmatic and responsible view in a case where it was clear that something had obviously gone wrong (although I accept that some of the cases discussed below indicate that this is not always to be the case). Where the Board was required to apply for judicial review of a certificate and did so successfully, in the face of opposition from the relevant officer appearing as a notice party, this could be reflected in the award of costs against the officer, which might well be warranted depending on the circumstances of the case.

[45] Some of the respondent's submissions in these proceedings approached or amounted to a complaint that the Board should be provided with a right of appeal against decisions made on medical questions. The absence of such an appeal was advanced as one reason why the correct construction of the 2006 Regulations was likely to afford the Board some scope for departing from the decision of an SMP or an IMR. It will be clear from the discussion above that I have rejected this submission. It is undoubtedly the case that some procedural aspects of the 2006 Regulations are weighted in favour of claimants, giving them a number of bites at the cherry. However, as the introductory wording of the 2006 Regulations makes clear, they were made after consultation with the Police Negotiating Board for the United Kingdom, which no doubt pressed hard for significant procedural protections for police officers whose livelihood and financial security would be radically affected by decisions made pursuant to the 2006 Regulations, particularly where they were permanently disabled and so unable to perform the duties of their chosen career. Any concern that the procedural rights afforded under the 2006 Regulations are weighted too far in favour of officers and against protection of the public purse is a question of policy to be addressed by reform and amendment of the scheme.

[46] It is also of note that Schedule 6 to the 2006 Regulations provides for a formalised hearing in which the Board may be represented where an appeal has been brought to an IMR from the decisions of an SMP. The Board may be represented at

the hearing (see para 3(2)); it may submit written evidence or a written statement (see para 4(2)); and any hearing of the appeal (including any examination) may be attended by the SMP whose certificate is appealed against, or if they do not attend by another medical practitioner appointed for that purpose by the Board (see para 5(1) and (2)). The IMR also has power to award costs and expenses. The costs provisions in para 8 refer to the IMR deciding "in favour of the Board" or "in favour of the appellant." In my view, these provisions also clearly point away from the construction urged upon the court by the respondent (rather than, as it submitted, supporting that construction). The notion that a party to an appeal can simply ignore the outcome – at its own behest and without the clearest of statutory wording to this effect – is entirely contrary to an orthodox reading of such provisions.

[47] The respondent relied upon the decision of the Court of Appeal in *McKee & Hughes v The Charity Commission for Northern Ireland* [2020] NICA 13 in support of the proposition that the NIPB must retain an ultimate oversight role over the medical authorities taking decisions on its behalf. I do not consider this authority to provide any material assistance in the present circumstances or to represent an apt analogy. That case involved statutory powers specifically conferred on the Charity Commission being discharged (at the Commission's election) by members of its staff. Here, the power to determine medical questions has specifically been conferred by the statutory provisions upon the relevant medical authority; and the Board's general power of decision-making is expressly "subject to" the more detailed procedural mechanisms set out in Part 4 of the 2006 Regulations. Although the specialist decisions of the SMP or the IMR, as the case may be, become *part* of the decision-making process conducted by the Board, the medical practitioners are not to be viewed simply as a delegate of the Board.

Relevant previous authority

[48] I have reached the conclusion set out above on the basis of a straightforward construction of the text of the 2006 Regulations. However, had it been necessary, I would have been reinforced in that view by a number of the authorities upon which the applicants relied.

[49] In *R v Dorset Police Authority, ex parte Vaughan* [1994] Lexis Citation 1780; [1995] COD 153, Popplewell J dealt with a judicial review of a decision of a police authority that the applicant was not entitled to an injury award under regulation B4 of the Police Pensions Regulations 1987. The relevant provisions of those regulations were in materially similar terms to the 2006 Regulations. The SMP found permanent disablement as a result of an injury on duty and the applicant was compulsorily retired. It then became clear that the information provided to the SMP was not complete. The authority informed the applicant that they were going to resubmit the matter to the SMP for him to carry out another examination and issue another certificate. The applicant's solicitors objected. In the event, the SMP did carry out another examination and, on the basis of the fuller information, completely revised his initial view. The applicant contended that the authority was bound by the first

certificate; and the authority contended that they had flexibility to go behind that certificate provided the court considered it had acted "fairly, honestly and reasonably." The judge rejected that as the test and said this:

> "I have no doubt that they have behaved fairly, honestly and reasonably. It seems to me, however, that the words of the regulation in this case preclude me from entering into that realm. It is somewhat disagreeable to come to a conclusion in which a public body may well be paying out sums of money to an unmeritorious Applicant. I say 'may be', because I do not have sufficient information to come to a firm conclusion about it. However, the regulations seem to me to be quite decisive in the instant case.
>
> The decision of Henry J [in the *Kamal* case, relied upon by the police authority] proceeds on the basis that there were either no rules or that the rules could be supplemented by the application of doing what is just in all the circumstances. That is not how the regulations in the instant case read. It has been decided that, absent fraud, the practitioner's decision shall be final. It is up to the police authority to provide him with all the material which is necessary to enable him to come to a conclusion.
>
> I have therefore come to a clear conclusion that the submission which [counsel for the police authority] makes on the basis of *Kamal* has in fact no bearing on the wording of the regulations in the instant case. Accordingly, I am prepared to make a declaration that the second examination by [the SMP] is not provided for by the regulations and is therefore invalid."

[50] In this jurisdiction, in *Re Wilson's Application* [1997] Lexis Citation 6241 – a statutory appeal to the High Court from an appeal tribunal under the Royal Ulster Constabulary Pensions Regulations 1988 ("the 1988 Regulations") – the police authority had refused to accept the appellant's claim to be entitled to an injury pension, notwithstanding the issue of a medical certificate in her favour (in that case, by the Chief Medical Officer to the RUC). The issue was whether the appeal tribunal could go behind the medical certificate or make a finding contrary to its contents. The tribunal relied upon its power in the 1988 Regulations to make such order as appeared to it to be just (under a provision equivalent to what is now regulation 33(7) of the 2006 Regulations). The appellant contended that the tribunal was limited to referring the matter back to the relevant medical authority, if they considered that the evidence before him had been inaccurate or inadequate, pursuant to the provision which is equivalent to the current regulation 31(1). An initial question, however, related to whether, before the matter proceeded to the appeal tribunal, the

police authority had been entitled to reject the applicant's claim (so requiring her to pursue an appeal). Carswell LCJ held as follows:

> "I consider that the argument on behalf of the appellant is correct. The Police Authority is bound to accept the medical authority's certificate as final on the issue whether the disablement is the result of an injury received in the execution of duty. The Authority has not been given any power to refer a certifier's finding on such an issue back to him for reconsideration, in the absence of agreement by the claimant (see Regulation H3(2)). Subject to the procedural question, which I shall consider in a moment, it ought to have accepted the certificate as final, unless the parties had agreed to invoke Regulation H3(2). It was accordingly wrong in my view to reject the appellant's claim for an injury award."

[51] As to how the appeal tribunal ought to have dealt with the matter, Carswell LCJ went on to hold as follows:

> "When the matter came before the tribunal – which it would ordinarily do only if the medical decision had gone against the claimant, for otherwise the Police Authority is bound to accept it – it misconstrued its powers when it decided to hear evidence from the medical examiners and determine the medical issue for itself. In my opinion [counsel for the appellant's] submission was correct, and it should have declined to hear medical evidence, except insofar as it might have been directed to showing that the evidence which had been before the certifier was inaccurate or inadequate. Even then, if it had been so satisfied, its proper course was then to refer the certifier's decision back to him for reconsideration in light of such findings as the tribunal might direct."

[52] Carswell LCJ re-emphasised the binding nature of a medical certificate on the police authority in the conclusory paragraph of his judgment, which is in the following terms:

> "I have already held that the Police Authority was wrong to reject [the SMP's] view on this issue, which it was bound to accept. It would not have been entitled, on the wording of the Regulations, to refer the matter back to him instead if it had thought that the evidence before him was inaccurate or inadequate, which can only be done by the tribunal. [The SMP] should review the case and take

> into account the contents of this judgment. If after having done so he gives a certificate to the effect that the appellant's disablement was the result of prolonged work-related stress connected with exposure to distressing events in the course of her work… the Police Authority must accept his decision and make an injury award under Regulation B4 in favour of the appellant."

[53] The portions of Carswell LCJ's judgment set out at paras [50]-[52] above seem to me to be directly on point or, at least, almost directly on point (given that this case did not, as did the *Wilson* case, proceed to consideration before a tribunal). Albeit they relate to a previous version, the 1988 Regulations, those regulations were in materially identical terms to the 2006 Regulations for present purposes. This decision is of powerful persuasive authority and I should not depart from it unless satisfied that it is clearly wrong. In the event, I have reached the same conclusion on the basis of my own consideration of the relevant 2006 Regulations.

[54] A similar issue in a slightly different context was considered in *R v Merseyside Police Authority, ex parte Yates* [1999] Lexis Citation 2295. In that case the relevant officer was ill through stress which he had suffered arising out of protracted disciplinary proceedings against him, in the course of which it was alleged that he had failed to properly carry out his duties. The question was whether his disablement was the result of an injury received without his default in the execution of his duty. The relevant police authority refused to refer the matter to a medical practitioner for decision on the basis that, even assuming the applicant's claim was correct as a matter of fact, it could not in the authority's view amount to an injury received in the execution of his duty as a matter of law. In the circumstances of that case, it was found that the right of appeal to the Crown Court which the applicant enjoyed under the relevant English regulations provided him with an effective remedy, since the Crown Court would be entitled to address all issues of both fact and law. Nonetheless, the judge also went on to consider a secondary issue, namely whether, had a medical certificate been issued, this would have been binding on the police authority. Latham J referred to this as an argument of some importance not only in that case, but generally. He was concerned that the statutory scheme provided a medical practitioner with the responsibility for deciding issues in relation to which he or she was not necessarily appropriately qualified. Nonetheless, he considered that this was the literal reading of the statutory scheme and that the police authority would not be entitled to go behind a properly certified decision on a medical question which had been referred:

> "I do not, however, consider that the Regulations permit anything other than a literal reading. The questions which are to be referred to the medical practitioner under reg H1(2) are unambiguous, and the answers given by the medical practitioner are, pursuant to reg H1(4) to be final. The answers will determine the claim, subject to the rights

> of appeal. This produces an unsatisfactory result. If the claimant is dissatisfied with the answers of the medical practitioner as to the facts upon which his opinion is based, he has an appeal to the Crown Court; if he is aggrieved by reason of the medical practitioner's medical opinion, then he has an appeal to the medical referee; if he is aggrieved by the medical practitioner's conclusions as to law as to whether or not an injury was received in the execution of duty, it would appear that he can only challenge the matter by way of judicial review. That would be one of the special circumstances in which this Court would intervene because the statutory scheme provides no effective remedy. As for the Police Authority, there is no mechanism which would enable it to correct any errors of fact upon which a medical practitioner may have based his opinion, unless they could be dressed up as issues of law, which again could be the subject of judicial review.
>
> Despite the unsatisfactory consequences of the literal interpretation, I can see no way in which better sense can be made of the provisions without rewriting them…
>
> It follows that a Police Authority is not entitled to pre-empt the answers of the medical practitioner by coming to adverse conclusions as to fact, or law, in relation to the claim in order to avoid reference to the medical practitioner."

[55] The English High Court returned to this theme a few years later in the case of *Clinch v Dorset Police Authority* [2003] Pens LR 59. That was a case in which the claimant was certified as disabled due to a psychiatric condition, namely depression, and had been retired from the police force on an ill-health pension. His case was that his depression, which had been caused by his disappointment at repeated failures to obtain promotion, was an injury received in the execution of his duties as a constable. It was another case where the responsible police authority had refused to refer the case to a selected medical practitioner for consideration because the authority considered it clear that the relevant injury was not one received in the execution of the applicant's duty. In contrast, the applicant contended that this was a question not for the authority but one which it was obliged to refer to an SMP. McCombe J noted that a number of Crown Courts, in appeals before them pursuant to the English regulations, had concluded that it was not the inevitable effect of the English regulations that such matters had to be referred to a medical practitioner. On the other hand, Latham J in the *ex parte Yates* case discussed immediately above had taken a different view.

[56] The submissions of the respondent in the *Clinch* case, which echo some of the points made by Ms Murnaghan in the present case, urged a more common sense view, namely that some cases were so clear that they ought not to be referred to a medical practitioner. In the end, McCombe J felt it proper to follow the approach in *Yates* and, on the wording of the English regulations as they were drafted, it seemed to him that this conclusion was unavoidable. There was nothing in the other provisions identified by the respondent which was sufficient to do away with the need to follow the literal words of the English regulations; nor did those points suggest an obvious alternative re-reading of the English regulations such as to make clear that the intention of the legislature was other than that which the express words provided. The safety valves were that, first, in many cases in practice the questions which went to the doctors would be truly medical ones; second, that the claimant and the police authority were able to make representations to the doctors on matters which were not truly medical in nature; and, third, judicial review remained as an avenue by which issues could be addressed by the court.

[57] Some of the more recent cases grapple with the more difficult issue of the extent of the finality of a previous medical certificate which has been issued when an injury pension falls for reassessment under a regulation making equivalent provision to that in regulation 35 of the 2006 Regulations: see, for example, *R (Turner) v Police Medical Appeal Board* [2009] EWHC 1867 (Admin); and *R (Laws) v Police Medical Appeal Board* [2010] EWCA Civ 1099. I did not find these cases of particular assistance given the different context in which they arise. By and large, they emphasise that the initial certificate is determinative of the issues considered by the medical practitioner at that stage and that the medical practitioner who later considers the case for the purposes of reassessment should focus on what if anything has changed in respect of the degree of disablement, rather than undertaking a review of the correctness of the decisions set out in the earlier certificate. Although there is an understandable desire that medical decisions are accurate, that does not, in my view, displace the clear meaning of the 2006 Regulations which provide that such certificates are to be final as far as the Board is concerned, even where they disagree with them. As the applicants pointed out, the availability of reassessments under regulation 35 also provides some degree of mitigation in respect of decisions which are later shown to have been over-pessimistic about an officer's prognosis.

[58] The authorities discussed at paras [49]-[56] above point strongly, in my view, towards the correctness of the applicant's case on the key issue of statutory construction in these proceedings.

The alternative remedy issue

[59] The respondent has relied upon the fact that the applicants have an alternative remedy available to them, namely a further appeal against the Board's decision under regulation 33. This was raised at the leave stage and dealt with in the order granting leave. My view then was that, even if there was an alternative remedy open to the applicants, the court should nonetheless exercise its discretion to hear this

application for judicial review in light of the significance of the legal issue raised in the case to the operation of the injury award scheme. I considered it was better to have this issue resolved by the court one way or another.

[60] If the applicants had simply appealed under regulation 33, the situation may not have been adequately resolved. Pursuant to regulation 34(2), the appeal tribunal would have been bound by the final decision of a medical authority within the meaning of regulation 31. The applicant appellants would inevitably therefore have contended that this meant that the tribunal was bound by Dr Vivian's certificate. Had the tribunal agreed, the Board would have been bound to judicially review that decision (unless they abandoned the issue entirely). Had the tribunal disagreed and disregarded the IMR's certificate, the appellants would inevitably have appealed to the High Court further – as happened in the *Wilson* case – pursuant to regulation 33(8). Although there may also have been a right on the part of the applicants to pursue the issue by way of complaint to, or dispute before, the Pension Ombudsman under Part X of the Pension Schemes (Northern Ireland) Act 1993, the Ombudsman's jurisdiction is ousted if the matter is the subject of proceedings before any such complaint is made (see section 142(6)(a) of the 1993 Act). In any event, the availability of that potential remedy, which was not raised at the leave stage, would not have altered my view that the court should exercise its discretion to hear these proceedings in order to deal with the issue of statutory construction which lies at their heart.

Consideration of reform?

[61] In the *Yates* case referred to above, Latham J observed of the equivalent regulations in England and Wales that:

> "These regulations have been the subject of adverse comment in the past. I was pleased to learn that they are being reviewed. As will be apparent from this judgement, they are seriously flawed, at least in relation to the procedures for determining what are described as 'medical questions.'"

[62] A number of the previous authorities referred to above also make reference to the unwieldy nature of the decision-making provisions in police injury award regulations or to their producing, or being liable to produce, unsatisfactory results. In the same vein, in the review referred to at para [27] above, it was recommended (in 2014) that the Board and Department, in consultation with other relevant stakeholders, should consider major reform of the police injury award system and replace it with a simpler scheme. A further, more limited recommendation was in the following terms: "New Regulations should radically simplify the decision-making process for [injury on duty] awards. In particular, they should remove the distinction between decision-makers, and separate appeal routes, for medical and non-medical questions." Notwithstanding that much progress has been made on the

majority of other recommendations, most of which have been implemented, these more major suggested reforms have not been progressed. That is obviously a matter for the Department in the first instance.

[63] The present case, however, is another example of concerns which are apt to arise with the current statutory process. In fairness to the respondent, a Northern Ireland Audit Office (NIAO) report in March 2020 regarding injury on duty schemes for officers in the PSNI and Northern Ireland Prison Service raised a number of issues of concern in relation to the current scheme and, in its final recommendation, urged NIPB to "take action in the short term to mitigate the issues arising", including "in their role as final decision makers, considering whether further reviews of cases are appropriate." That is what the Board has sought to do in the present cases but in a way which, in the court's view, went beyond what was permissible under the current 2006 Regulations. This continues to be an area which might be thought to remain ripe for consideration of further reform.

Conclusion, disposal and next steps

[64] For the reasons given above, I consider that each applicant should succeed in their application for judicial review. In my judgment, the Board misdirected itself as to the meaning and effect of the 2006 Regulations and as to the scope of its decision-making powers under those regulations. Accordingly, I will quash the decisions about which the applicants complain.

[65] The result of this order will be that a determination in each of the applicant's cases now falls again for consideration by the Board. In making that determination, the Board is presently bound by the decision of the IMR (Dr Vivian) contained in the certificates issued by him in each of the applicant's cases under regulation 30(3) in respect of each of the medical questions referred to him for decision under regulation 30(2). It is open to the Board to make an award on foot of those certificates. It is also open to it to invite the applicant in each case to have the decision referred back to Dr Vivian for reconsideration. They may refuse to agree to this. If they are so invited and agree, the matter should be referred back to Dr Vivian for reconsideration by him unless he is unable or unwilling to act. That is a matter for him, although some hint as to his potential response might be found in his correspondence with the Department.

[66] If the Board, in further considering these cases (and subject of course to any appeal it may pursue in respect of this judgment), reaches the view that there is some flaw in the IMR's decision-making which would render his determination unlawful and liable to be set aside on an application for judicial review, it retains the option of commencing such proceedings. If it were to do so, the applicants in this case (as notice parties in any such application) might well argue that the challenge was out of time. In response, the Board would no doubt contend that it did not pursue an application for judicial review earlier because it took the view (erroneously, as I have held) that it was not required to do so given the extent of its own residual decision-

making responsibilities. I make no further comment on the strength of either party's position should such an argument arise, since the court's consideration of whether time to apply for judicial review should be extended would inevitably involve some consideration of the merits of the claim (which has not been argued before me for the reason mentioned at para [35] above) as well as the public interest in correcting a determination which might result in an unwarranted windfall from public funds (which again would turn on the strength of any legal objection which could be mounted to the IMR's determination, rather than merely a disagreement on the substance of the outcome). I would add that my provisional view is that it would not be appropriate for me to hear and determine any judicial review of that character since much of the issue appears to resolve to a difference in view as to the methodology which should be applied to assessing the degree of an officer's disablement, with the competing models being that devised by Dr Vivian and his working group on the one hand and that devised by the Department and the Board and set out in their joint guidance on the other hand. The latter approach, however, appears to flow directly from recommendations made in the course of the review which I conducted for the Board which is discussed above.