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2015/No: 50156/01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

The General Council of the Bar of Northern Ireland and the Council of the Law Society of Northern Ireland [2015] NIQB 99

IN THE MATTER OF AN APPLICATION BY THE GENERAL COUNCIL OF THE BAR OF NORTHERN IRELAND AND THE COUNCIL OF THE LAW SOCIETY OF NORTHERN IRELAND

and

IN THE MATTER OF THE VALIDITY OF SUBORDINATE LEGISLATION

MAGUIRE J

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Introduction

[1] This application for judicial review has been bought by the General Council of the Bar of Northern Ireland (hereinafter "the Bar") and the Council of the Law Society of Northern Ireland ("LS"). The respondent to the application is the Minister for Justice ("the Minister" or where the context requires "the Department"). In essence, the applicants seek an Order of Certiorari from the court quashing a set of statutory rules which are described as the Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2015 ("the 2015 Rules"). These came into force on 5 May 2015. These proceedings were begun on 26 May 2015. Other forms of relief are sought as well but it is not necessary at this stage to go into them. The 2015 Rules were made by the Minister. They were subject to negative resolution procedure in the Assembly. In fact no motion to annul the Rules was brought before the Assembly. The Rules, as required by the parent legislation, the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 ("the 1981 Order"), have been the subject of statutory consultation with the Lord Chief Justice, the Attorney General and the Crown Court Rules Committee. The power to make the Rules, as conferred by the parent Order, is stated in the following terms:

> "The Minister may make such rules generally for carrying this Part into effect and such rules shall in particular prescribe… (d) the rates or scales of payment of any fees, costs or other expenses which are payable under this Part": see Article 36(3).

"This Part" is a reference to Part III of the 1981 Order which is headed "Free Legal Aid in Criminal Proceedings". Article 29 provides for free legal aid in the Crown Court. *Inter alia*, this provision stipulates that "any person returned for trial for an indictable offence … shall be entitled to free legal aid in the preparation and conduct of his defence at the trial and to have solicitor and counsel assigned to him for that purpose in such manner as may be prescribed by rules, if a criminal aid certificate is granted in respect of him". While these proceedings are not concerned with the circumstances in which a criminal aid certificate is granted, it will be noted that these are set out at Article 29(2) of the 1981 Order.

[2] Of great importance to these proceedings are the provisions found in Article 37 of the 1981 Order as it has now been amended by Schedule 4 paragraph 6(3) of the Access to Justice (Northern Ireland) Order 2003. As amended, Article 37 now reads:

> "The Minister of Justice in exercising any power to make rules as to the amounts payable under this Part to counsel or a solicitor assigned to give legal aid, and any person by whom any amount so payable is determined in a particular case, shall have regard among other matters which are relevant to –
>
> (a) the time and skill which work of the description to which the rules relate require;
>
> (b) the number and general level of competence of persons undertaking work of that description;
>
> (c) the costs to public funds of any provision made by the rules; and
>
> (d) the need to secure value for money,
>
> but nothing in this Article shall require him to have regard to any fees payable to solicitors and counsel otherwise than under this Part".

[3] The issue of whether the Minister has performed his obligations under Article 37 in connection with the making of the 2015 rules is the principal issue in this application for judicial review. In short summary, the applicants maintain that the rules should be quashed for multiple reasons: the rules, as made, it is alleged, are *ultra vires* the powers contained in Article 37; they have been made without lawful consultation with the applicants; they contain provisions which fail to provide for fair remuneration; they have been made without any proper impact assessment being made; and they contain defective provisions in the area of fee arrangements in the field of confiscation hearings. The Bar was represented by Ms Quinliven QC and Mr Hutton and the LS by Ms Quinliven QC and Mr Sayers. The Respondent was represented by Mr McGleenan QC and Mr McAteer. For a fuller statement of the grounds of judicial review see below at paragraph [198].

The background to the provision of Criminal Legal Aid

[4] Modern criminal legal aid can be dated back to 1945. In that year the Rushcliffe Report (Report of the Committee on Legal Aid and Legal Advice in England and Wales Cmnd 6641 May 1945) was published on the subject of legal aid and legal advice in England and Wales. This was the forerunner to the passage of the Legal Aid and Advice Act 1949. Rushcliffe, in the context of the criminal courts, had argued that legal aid should be granted in all cases heard in criminal courts "where it appears desirable in the interests of justice". Any doubt should be resolved in favour of the applicant. The mechanism by which legal aid in criminal courts was to be given was by a judicial decision granting a legal aid certificate. The

principle for remuneration of solicitors and counsel was stated to be that of fair remuneration "having regard to the amount of work involved in each case".

[5] As was made clear in a later published summary of the proposals for the new Act of 1949, remuneration payable to barristers and solicitors where legal aid was granted in criminal cases was to be subject to regulations made by the Secretary of State. This has set the pattern since.

[6] In Northern Ireland there had been facility for legal aid in criminal cases as a result of the Criminal Justice Act (Northern Ireland) 1945. The Act authorised one of two certificates. These were later described in a report published in June 1960, the Steele Report, as follows:

> "First, a person who cannot afford to be legally represented and who is charged with any offence before a court of summary jurisdiction may, by reason of the gravity of the offence or other exceptional circumstances, be granted by the court a "Legal Aid Certificate", which entitles him to the services of a solicitor and, in cases of murder, of counsel. Second, any person returned for trial for an indictable offence, and who cannot afford legal representation, may be granted a, "defence certificate" which will entitle him to free legal aid in the preparation and conduct of his defence at the trial and to have solicitor and counsel assigned to him for that purpose."

[7] The Steele Report did not discern any need for fundamental alteration in the system in Northern Ireland (see paragraph 9), though it did suggest a number of proposals designed better to ensure that the accused person was made aware of legal aid facilities in good time before his trial. Steele also recommended that the fees paid to solicitors and counsel who provide aid under the statutory scheme should be increased.

[8] Thereafter, in Northern Ireland, there were a number of statutes dealing with, *inter alia*, criminal legal aid. In 1965 there was the Legal Aid and Advice Act (Northern Ireland) 1965 which was later followed by amending statutes: the Legal Aid, Advice and Assistance (Northern Ireland) Order 1977 and the Legal Aid, Advice and Assistance (Northern Ireland) Order 1979. These measures eventually led to a consolidating order: the 1981 Order , some of whose provisions have already been referred to *supra*.

[9] Of particular interest is the original version of Article 37 which was in different terms to the present Article 37. The original version, like its successor, is headed "Remuneration of Solicitors and Counsel" but the provision is shaped quite differently than that which exists today. It reads:

> "The Secretary of State in exercising any power to make rules as to the amounts payable under this Part to counsel or a solicitor assigned to give legal aid, and any person by whom any amount so payable is determined in a particular case, shall have regard to the principle of allowing fair remuneration according to the work reasonably undertaken and properly done".

[10] The movement away from the above provision to its current form appears to owe its origin to circumstances in England and Wales where broadly the same had occurred. The impetus for change had been a White Paper published by the Lord Chancellor on 26 March 1987. This was entitled "Legal Aid in England and Wales: A New Framework" (Cm 118). In this paper, the Government dealt at some length with the question of remuneration for solicitors and barristers in the context of legal aid. It stated:

> "45. A solicitor's bill reflects the amount of time taken to complete the work needed to protect the client's interests and the skill which that requires. Barristers conducting the case in court are paid a "Brief Fee", which reflects the time and skill in preparation and appearance in court for the first day (sometimes the first two days), together with a "Refresher" for each subsequent day in court. Fees are also payable for other items of work. Lawyers bills therefore normally have two components: time spent and rate charged".

The paper went on to indicate that the rates for all legal aid work should in future be set by the Lord Chancellor in regulations. Of importance, it was indicated that:

> "48. In setting rates the Government will continue to have regard to the principle of fair remuneration for work actually and reasonably done. It is necessary, however, for the Government also to have regard to the other claims on public funds. The Government has to be fair to the tax payer as well as to the practitioner. The Government does not consider that the rates for legally aided work should necessarily be the same as those for privately funded work".

[11] Emphasis was also placed in the White Paper on the Government's determination to ensure that legal aid was provided efficiently and effectively "and that it gives the best possible value for the money spent" (paragraph 3).

[12] It can thus be seen that at this time a variety of factors were being canvassed as relevant to the setting of legal aid rates, in particular, the time and skill of the professional; the public expenditure involved; and value for money for the tax payer.

[13] These factors found expression when the Legal Aid Act 1988 was passed for England and Wales. In Section 34, which bears a resemblance to the current Article 37 of the 1981 Order in Northern Ireland, it is provided that for the purpose of making regulations for the remuneration and payment of the expenses of solicitors and counsel and for the courts, the Lord Chancellor, as respects any description of legal aid work, shall have regard, among other matters which are relevant, to –

> "(a) the time and skill it requires;
>
> (b) the general level of fee income arising from it;
>
> (c) the general level of expenses of barristers and solicitors which is attributable to it;
>
> (d) the number and general level of competence of barristers and solicitors undertaking it;
>
> (e) the effect of the regulations on the handling of the work; and
>
> (f) the cost to public funds of any provision made by the regulations."

[14] It seems clear that the absence from the above of the fair remuneration principle, which the White Paper had expressly said remained relevant, was not intended to alter its materiality. The court, without objection from the Department, was shown by the applicants' counsel extracts from the parliamentary debates on the 1987 Bill. These confirm the then Government's view that the fair remuneration principle remained of significance in this context. It has been common case in these proceedings that the fair remuneration principle has continued to underpin the setting of fees in Northern Ireland, including those set by the 2015 Rules.

Recent History

[15] While the challenge made by the applicants in this case is to the 2015 Rules, these have not been made in a vacuum. In fact, there have been successive rules or amending rules over recent years. The main sets of rules in the sequence (omitting sets of rules of no significance to this challenge) have been as follows:

(i) The Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 1992 ("the 1992 Rules"). These have been superseded by (ii) below.

(ii) The Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2005 ("the 2005 Rules"). These have been amended by (iii) and (iv) below.

(iii) The Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2011 ("the 2011 Rules"). These take the form of amendments to (ii) above.

(iv) The Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2015 ("the 2015 Rules"). These also take the form of amendments to (ii) above, as amended by (iii) above.

[16] The 1992 Rules had initially been administered by the LS, though later they were administered by the Legal Services Commission. Fees, under these rules, were subject to an *ex post facto* assessment system which will be described in more detail below at paragraph [41].

2005 Rules

[17] More important were the 2005 Rules which have provided the basic structure of remuneration schemes since. These Rules had been promoted by the Northern Ireland Court Service, which was the predecessor body to the Department as rule maker under Article 37 of the 1981 Order. Only the broadest outline of the 2005 Rules follows.

[18] The main object of the 2005 Rules was to introduce a system of standard fees which was to be central to the operation of the fee structure. Such standard fees were to operate on a swings and roundabouts basis. This, it was thought, would open the way to a simpler and speedier method of administration to the advantage of everyone, as delays in the administration and payment of fees had for long been endemic.

[19] The principle standard fees were described as –

- A guilty plea one fee (abbreviated to "GP1"), which was intended to be an all-inclusive fee, paid following a plea of guilty at first arraignment.

- A guilty plea two fee ("GP2"), which was to be paid following a plea of guilty after the first arraignment but before the end of the first day of trial. This fee was not intended to be an all-inclusive fee and could be supplemented by a number of additional payments.

- A basic trial fee, payable where the assisted person pleaded not guilty and the trial proceeded beyond the first day of trial or completed as a trial within one day. The basic trial fee was not an all-inclusive fee, and a variety of additional payments could be made to reflect variables such as the length of the trial.

[20] These standard fees were to operate in the context of detailed provisions dealing with a range of variables: the type of lawyer or advocate or counsel (for example, solicitor, solicitor advocate, QC or junior counsel); the nature of the offence charged (offences were classified into 9 different classes); and provisions for different kinds of applications which may arise.

[21] The standard fee system was not, moreover, all enveloping and mechanisms were built into the Rules to deal with cases which fell outside the rubric of standard cases.

[22] In the first place, the Rules recognised and made allowance for cases which were styled Very High Costs Cases ("VHCCs"). These were cases where, if the trial ran, it would be likely to last for more than 25 days. Once a case was certified into this stream, it was subject to its own rules and system of fees.

[23] Secondly, the Rules made provision for exceptional cases where the system of payment of standard fees under the Rules would not provide reasonable remuneration. In such circumstances an application could be made for a Certificate of Exceptionality which, if granted, had the effect of specially providing for the particular situation.

The 2011 Rules

[24] The 2011 Rules made significant changes to the 2005 Rules. These are worthy of note.

[25] Firstly, it was decided to remove the separate provision which had been put in place in respect of VHCCs. In its place, the standard fee arrangements were to cover trials lasting up to a period of 80 days.

[26] The reasons for this will be referred to later but, in essence, it had proved to be the case that despite very high cost certification certificates being obtained in many cases, in the majority of these the trial, if there was a trial at all, had a duration of less than the prescribed 25 days. This was proving to be very expensive for the pay-master.

[27] Secondly, Certificates of Exceptionality were also removed. This seems to have arisen from a concern that these might operate in practice more widely than had originally been intended and so undermine the standard fee system.

[28] Thirdly, a new element was introduced, that described as "PPE Range". This was a reference to the number of pages of prosecution evidence in a case. That evidence could be in the form of witness statements, exhibits or records of interviews. The PPE Range, it was decided, should feature in the calculation of guilty plea two fees. A system of banding was established (to be read with the class into which the underlying charges related). Three bands were created: Band 1 related to a PPE Range of 1-750; Band 2 to a PPE Range of 751-3000; and Band 3 to a

range of 3001+. The bands were ascending with greater fees payable as the case proceeded up the bands. It would appear that the rationale behind this new element was to introduce a factor (the PPE Range) in payment related to the size and/or complexity of the case.

[29] Fourthly, new provisions dealing with costs in respect of trials which lasted for a greater period than 80 days were produced. It is unnecessary to explore the detail of these.

2015 Rules

[30] It is the 2015 Rules which are impugned in these proceedings. Technically, these Rules have introduced a number of key changes from 2011 Rules. It is as well to record here the principal ones.

[31] Firstly, the guilty plea one fee has been removed.

[32] Secondly, the guilty plea two fee has been removed.

[33] Thirdly, in place of the removals above, there has been established a guilty plea fee which is linked to a tiered system of pages of prosecution evidence in the case of solicitors but not barristers.

[34] Fourthly, a fee available to counsel only has been introduced. This is called a trial preparation fee. It is linked to the PPE Range.

[35] Fifthly, the PPE Range is introduced into calculations in respect of the Basic Trial Fee for solicitors only.

[36] It will be necessary to look more closely at these changes in due course.

Events leading to the 2005 Rules

[37] The ever changing architecture of successive sets of rules only tell a limited part of the story which lies behind the events of the last 12 years or so. At its very basic, the shift to standard fees begged the question of how the standard fees were to be set and what numerically they were to be. In respect of each of the decision-making processes associated with successive sets of rules or amending rules there has been controversy and debate. While it will be necessary to go into the decision-making process leading to the 2015 Rules in some detail, some reference to earlier events is justifiable as background. It is convenient to consider key events chronologically. A recurring theme is that the rule maker and the professions have enjoyed a continuing relationship and there has been a regular pattern of consultation associated with each new decision making process.

[38] In connection with what became the 2005 Rules separate consultation papers, one for the solicitors' profession and one for barristers, were published at different

times in 2004 by the Northern Ireland Court Service. Each was described as remuneration proposals in respect of Crown Court cases.

[39] At that time the quantification of fees for criminal legally aided work in the Crown Court, as has already been alluded to, was conducted largely and in the great majority of cases on a non-standard basis. In other words, each claim was looked at individually and assessed against various criteria. The central aim behind the proposal for standard fees in the proposed 2005 Rules was to introduce a system that produced more predictable results and was easier and cheaper to administer.

[40] However what, of course, remained crucial was how the standard fees were arrived at. In the documents published to each side of the legal profession in 2004 specific figures were set out as proposed standard fees. These were to be read alongside a number of variables, as explained above.

[41] These figures have produced an on-going controversy which remains a live one in these proceedings. The Department maintained that the actual figures in the Court Service's consultation papers derived from, in the case of both solicitors and barristers fees, actual data collected over a range of cases which had been determined under the 1992 Rules. In each of these cases the fees had, say the Department, been determined following careful assessment on a bespoke basis of the claims submitted by barristers and solicitors. These had been assessed under the 1992 Rules regime by panels which consisted of experienced criminal lawyers and others. Some of the costs were certified by a Taxing Master. Once the claims were considered the panels had to apply their knowledge and experience and decide what would be reasonable remuneration in respect of the circumstances of the particular case under consideration. The claimants could appeal against assessments which they thought were not reasonable. This was the system operating at that time. It was described to the court in an affidavit from a senior official who had been involved in operating it. He averred that it was data concerning these cases which had been utilised to develop the rates at which the proposed standard fees were set. The Bar, on the other hand, does not accept that this was so and has disputed the evidence put before the court. However, the Bar has properly accepted, in an affidavit filed on its behalf, that it has "no collective memory of the approach to the fixing of fees" being described by the Department.

[42] An oddity in the documents prepared at the time, which the court has seen, was that in the consultation paper directed to solicitors they were told that "the proposed level of remuneration set out in this proposal has been developed on a "cost neutral basis"". The paper explained what this meant *viz* that the levels of remuneration were based on the number of hours claimed by solicitors in a representative sample of cases which had been submitted under the 1992 Rules. It is noted that solicitors' fees, in the majority of cases, were time based. It was, therefore, the position that it was considered that the proposals for solicitors would not be expected to nor would they produce any overall reduction in the cost to the public purse of remunerating defence solicitors in the Crown Court.

[43] The same references are not found in the Court Service's consultation paper for the Bar.

[44] Nor, in fact, were the figures for payments to counsel as standard fees "cost neutral". On the contrary, Court Service projected that the new fees would result in an annual saving of £3.5m (a 35% reduction) mostly in the area of the new Guilty Plea Two Fees.

[45] The court has carefully considered the above evidence. Insofar as it is relevant to these proceedings to do so, the court considers that it should accept the contents of the affidavit of the senior Court Service official at the time who has set out in some detail how, in the case of both branches of the profession, the 1992 Rules cases were considered and their outcome applied to the proposed fees structure.

[46] It seems to the court that it is unlikely that the figures found in the consultation paper were plucked from the air. The evidence which the Department has put before the court on this point has not been contradicted by any witness with contemporaneous knowledge and the court considers it should be preferred.

Events leading to the 2011 Rules

[47] Following the making of the 2005 Rules discussions between the rule maker and the professions continued. However it was not until 2010 that a substantial decision-making process began in relation to the next round of fixing of fees. The process leading to the 2011 Rules appears to have been inspired by budgetary considerations. The essential elements in this were that the cost of criminal legal aid, according to the Department which had now (operating through the Courts and Tribunals Service) become the rule maker, had been going up whereas the funds available to the Department had been going down. An important feature of the former development was that VHCCs were responsible for a substantial element in the spend, even though, in fact, relatively few such cases actually produced trials of over 25 days.

[48] The Department's approach was to seek the changes which have already been described, in architectural terms, above. The removal of the VHCCs was not strongly contested, the LS ultimately agreeing to it and the Bar substantially agreeing to it. The removal of Exceptionality Certificates was contested by both solicitors and barristers alike. However, of more importance still, was the subject of reductions in the level of standard fees.

[49] In the Department's published consultation paper of September 2010 the Department indicated that it was proposing to reduce standard fees at the level of 30% for solicitors and 20% for counsel. This, they said, was justified by budgetary considerations. Unsurprisingly, it produced a negative reaction on the part of the professions.

[50] While a lengthy process of engagement resulted in which concessions were offered by solicitors and barristers alike no agreement could be arrived at. At one point the solicitors indicated a willingness to accept a cut of 10% in their fees, and the Bar a willingness also to accept a cut of 10%, though in a targeted rather than across the board way. These concessions were not, however, sufficient for the Department.

[51] In their rejection of the LS and Bar's proposals it is clear that the Department was influenced by a comparative analysis with the system of assessing fees in the Crown Court in England and Wales. This system was known as the Graduated Fees System ("GFS"). The Department had been looking at it for some time and had, before 2010, identified it as an option in respect of the fixing of legal aid fees in the Crown Court in Northern Ireland. In the past, the professions had strongly opposed GFS as a suitable option for Northern Ireland – on the basis that the circumstances in Northern Ireland were quite different from England and Wales. It appears that the rule maker had accepted this but nonetheless the option of the system applying generally to Northern Ireland was included in the September 2010 consultative paper. As before, this option was opposed by the professions, a position ultimately recognised and accepted by the Department.

[52] But in the course of discussions in 2010/2011 the Department plainly viewed the legal aid costs in criminal cases in the Crown Court in Northern Ireland as running substantially ahead of similar costs in England and Wales.

[53] This was a factor in the way the Department had treated the concessions offered by each side of the legal profession. While the Department expressed the view that it was not seeking to bring costs in Northern Ireland down to the level of those under the GFS in England and Wales, reducing the differential, nevertheless, was important. For this reason, combined with budgetary considerations, the Department's decision was to impose across the board cuts to standard fees which in the case of solicitors amounted to a cut of 25% and in the case of barristers a cut of 20%.

[54] This level of cut engendered considerable concern on the part of the professions. In the course of discussions during the consultation the spectre of a significant adverse impact on solicitors whose practice involved significant legally aided criminal work on the Crown Court was addressed by the LS. As is clear from the post consultation document published by the Department, there was a widespread view within the solicitors' profession that 30% cuts (the figure consulted on) was too severe and that as a result solicitors' practices and access to justice would suffer. The Department, it appears, did carry out some work on the issue of impact of the proposed level of cuts on solicitors. It had access to information about legal aid payments to solicitors and was in a position to make some estimation of impact, at least in respect of solicitors who received a substantial income from legal aid payments in Crown Court proceedings. In the post-consultation document the Department rejected the view that the proposed rates would pose a threat to solicitors' firms that were otherwise financially sound (see paragraph 6.6), but it did

accept that there was "some merit" in the points made by the LS and by individual solicitors in relation to the impact of proposals on certain solicitors' firms. This appears to have been a reason why the Department reduced the figure of proposed cut in respect of solicitors from 30% to 25%. Interestingly, there was acceptance by the decision-maker that "some solicitors may refuse to take on certain cases" as a result of the proposed changes but that was seen as "a matter for individual solicitors".

[55] Similar submissions had been made on behalf of the Bar during the consultation process, especially in respect of the possibility that very experienced counsel might be deterred by the low level of fees payable under the new arrangements in respect of trials which lasted in excess of 25 days from continuing to do such work. In its post-consultation document, the Department accepted that some counsel might refuse to take on certain cases but that, in the Department's view, was a matter for individual counsel. Suitable alternative legal representation, it was asserted, would be available should any counsel refuse to take on these cases.

[56] While many other particular issues were the subject of discussion and while at one stage there was a joint proposal made by the LS and the Bar, which was not accepted, the Minister made the ultimate decision, which was approved by the Northern Ireland Executive. He remained of the view that there was a need for cuts to solicitors' standard fees of 25% and to barristers' standard fees of 20%. In the course of discussion, the Minister indicated that a thorough review of the arrangements should occur when enough cases had gone through the new provisions. The Minister also accepted that maintaining access to justice was important. But overall his view was that the proposals represented "a fair level of remuneration".

[57] After the 2011 Rules were made the Council of the LS passed a resolution on 30 March 2011 which indicated that "in considering whether or not to accept instructions, a solicitor should give due regard to the level of skill and care necessary in order to provide a proper standard of work". The solicitor should also consider the proposed level of remuneration and whether it "will adequately provide for the solicitor to do" the work. The motion went on:

> "Where a solicitor is of the view that the proposed level of remuneration is insufficient to enable him or her to conduct the work to the proper standard, he/she should not accept instructions in that matter".

[58] The motion, it seems, reflected a degree of concern engendered by the new fees contained in the 2011 Rules. Thereafter, it appears from a letter written by the Chief Executive of the LS on 28 April 2011, that "a number of solicitors [had] withdrawn from cases being committed for trial to the Crown Court".

[59] The Bar also, subsequently to the making of the rules, expressed strong dissatisfaction with them describing them in a briefing note to the Justice Committee

of the Assembly as "ill-considered". The Bar also questioned the proposition that the costs of defence representation in Northern Ireland were higher than in England and Wales. Notwithstanding these views, when the Minister attended the Justice Committee on 26 May 2011, he held to the view that the changes made by the new Rules were fair.

[60] In the course of discussion in the Justice Committee the Minister indicated that he had concerns about moving to the situation in England and Wales where there were on-going issues about access to justice. As he put it "cost cutting is one aspect, but ensuring that we maintain access to justice is important".

[61] On 16 June 2011 the Minister indicated to both the Chairman of the Bar Council and the President of the LS that a review on how the new Crown Court fees were operating should take place as early as practicable.

[62] The Minister's suggestion resulted in a range of meetings then occurring. The focus moved to the issue of the professions identifying "anomalies" in the 2011 Rules which could then be made subject to consideration by the Department. This occurred and there appears to have been sufficient constructive engagement to enable a decision to be made by solicitors in the summer to return to normal working. The Minister, at the end of August 2011, was able to indicate that his Department intended to act to correct certain anomalies, relating to proceeds of crime, confiscation orders and certain other applications. These became the subject of a consultation process which led eventually to a number of changes being introduced in respect of them when the 2015 Rules were made.

Events leading to the making of the 2015 Rules

[63] As has already been indicated, it is necessary to set out in some detail the events which led to the making of the 2015 Rules. Without going into these, it would not be possible for the grounds of challenge being pursued in this judicial review to be understood in their proper context.

[64] These events extend over a substantial period – approximately from November 2012 to the date when the Rules were made – 13 April 2015, some 2½ years, though some earlier events also need to be visited. Needless to say, it is not possible in this judgment to engage in a process of setting out every step along the way (the Department's chronology alone prepared for the application has 158 items in it), but the court will seek to provide an intelligible summary which captures what generally was going on.

[65] At the same time as these events were unfolding there were a number of official reports published which have been of importance in the development of policy.

The Audit Office Report

[66] The first of these was the publication on 29 June 2011 of the Northern Ireland Audit Office Report entitled "Managing Criminal Legal Aid". This report by the Comptroller and Auditor General for Northern Ireland offered a variety of perspectives on the subject. In particular, it made the point that demand in respect of criminal legal aid was rising every year and that the increases in criminal legal aid were unsustainable. The Report was particularly critical of how VHCCs had been dealt with indicating that only 11% of such cases had actually proceeded to a trial which lasted more than 25 days. 52% of the cases at trial lasted less than 25 days whereas 37% of the cases never went to trial at all. By the date of the report, the 2011 Rules had been made and VHCCs had been removed, but the Audit Office was, despite this development, of the view that standard fees in Northern Ireland were more generous than elsewhere in the UK and that there was a need for the Legal Services Commission (which was then administering payments) to be more active in assessing quality and value for money when dealing with criminal legal aid services funded from the public purse. Another aspect of legal aid which the Audit Office Report criticised was what it viewed as a liberal approach to the appointment of two counsel in Crown Court cases in Northern Ireland. It noted that such representation was provided in 55% of cases in Northern Ireland as against 5% in indictable cases in England and Wales. In these circumstances the report recommended a tightening up in the criteria used for determining the level of representation provided for by the criminal legal aid system for proceedings in the Crown Court.

[67] The report, as a whole, envisaged a range of efficiency improvements and costs savings and the need for the relevant government bodies to work together. The current framework for managing criminal legal aid, the report concluded, did "not ensure value for money for the tax payer or proper accountability for public money".

Access to Justice Review

[68] An influential further report, whose gravamen is worth recording, is the report of the Access to Justice Review, Northern Ireland, published in August 2011. This was the product of a team appointed by the Justice Minister in September 2010. The team was to conduct a review of access to justice in Northern Ireland which, *inter alia*, included ensuring the defendants had adequate representation to secure the right to a fair trial in criminal cases. The team was also asked to make proposals to achieve value for money in the use of public funds within the available budget.

[69] It is clear from the report that the team was fully up to date with developments in respect of standard fees and the introduction of the 2011 Rules (including the removal of VHCCs). They acknowledged that there had been sharp reductions in remuneration levels. In their view, it was important that the workings of the 2011 Rules should be the subject of review as soon as sufficient numbers and a representative mix of cases had passed through the system. They suggested

principles which might inform the setting of remuneration in criminal cases. These were:

- Reasonable but not excessive remuneration taking account of what trained and experienced professionals might reasonably expect to earn from working full time on criminal legal aid cases and of the overheads associated with a practising barrister or a well-run firm operating to a business model that secures a high level of efficiency.

- Remuneration that reflects the skills and professional expertise required in this broad area of work.

- Broad comparability with remuneration for publicly funded cases in similar jurisdictions and with that paid by the Public Prosecution Service.

- A system of levels of remuneration that sustained the quality and expertise of representation, including at the highest levels, now and into the future.

- The need to encourage and incentivise efficient business models supporting quality service delivery by legal professionals.

- Affordability and value for money.

- Remuneration mechanisms that were straightforward to administer in a way that supported prompt payment.

- Mechanisms that enable verification that bills were properly paid and that the work to which they related had been carried out to the required standard.

[70] While the team recounted the apparent disparity between the use of two counsel in cases in England and Wales as against their use in Northern Ireland, it went no further than to indicate that if reform in this area was to have the consequence of limiting the assignment of two counsel to those exceptional Crown Court cases where they were needed for the purpose of achieving effective representation, regulations would need to be drafted tightly and with precision.

[71] Another area commented on in the report was that of early guilty pleas. It was noted that under the 2011 Rules standard fees were paid at different levels depending on whether there was to be a contest, a plea of guilty before listing for trial or a plea after listing but before trial. This was in contrast with the position in Scotland where fees were paid *via* a single standard fee, irrespective of the factors referred to. In respect of this topic, which the team described as a "complex area", there was a recommendation for the case for and against the introduction of a single fee to be researched as a matter of urgency. However, pending a decision based on the outcome of such research, it was considered that Northern Ireland should retain the 3 levels of fees – Guilty Plea 1, Guilty Plea 2 and a contest.

[72] In the area of quality, the need for legal aid services to be up to standard was emphasised. The team envisaged that the commitment to secure value for money would be met by a series of pro-active measures on the part of the Legal Services Commission.

[72] Finally, the team warned of the need to keep in mind at a strategic level the impact of economic developments and changes in legal aid on how to sustain for the future the supply of quality advocacy, especially at the highest levels.

[73] In his reply to the Access to Justice Review, the Minister accepted the principal recommendations of the team which have been referred to above.

Criminal Justice Inspection

[74] The final official report which deserves mention at this point is the work of the Criminal Justice Inspection Northern Ireland on "The Use of Guilty Pleas in the Criminal Justice System in Northern Ireland". This was published in February 2013. While the topic was a wide one, the inspectors saw their task as being related to how best effectively to deliver mechanisms to support and assist earlier guilty pleas for those who wish to plead guilty. Among the issues considered was whether a single fee structure for legal aid pleas in the Crown Court might advance the goal of earlier pleas. The reason why it might not do so is identified in the Report's section on legal aid fees in Scotland. Reference was made (albeit in the context of the Magistrates' Courts) to a key part of legal aid reform being the removal of differing fee structures which might create "a perverse incentive" to solicitors to plead not guilty in order to secure a significantly enhanced fee. As regards Northern Ireland, it is recorded that "inspectors heard evidence and concerns, for example, that there was an incentive to delay plea hearings which attract a high fee, and also to escalate matters to a contest on the one hand and to the Crown Court where enhanced fees could be earned on the other." Reference later was made to higher payments in respect of GP2 fees as against GP1 and contest fees. The conclusion offered was that "if the differential in Scotland led to the conclusion that there were perverse incentives, then the same is undoubtedly true for Northern Ireland". The recommendation ultimately made by the inspection was that "early action should be taken by the Department to create a single criminal legal aid fee structure in the Magistrates' Courts … a single fee in the Crown Court is more challenging but the principle of removing incentives to prolong cases must be followed there".

Review of the Rules

[75] The review of the Rules, as last amended in 2011, can be viewed as beginning on 14 November 2012. On that day the Department wrote to both the LS and the Bar. The letter, in each case, indicated that the existing Rules would be examined against 5 criteria. These were:

- The time and skill which work of the description to which the Rules relate require.

- The number and general level of competence of persons undertaking work of that description.

- The cost to public funds of any provision made by the Rules.

- The need to secure value for money.

- Whether there were any omissions in the Rules.

The Department offered to receive the recipients' views "as a stakeholder". Views were sought generally and in respect of any of the criteria. Comments were invited by 31 December 2012. Depending on the outcome of the review, it was indicated that the Department may consider changes to the Rules. If so, proposals would be made the subject of public consultation in the ordinary way.

[76] The letter ended with an offer of a meeting with officials "to discuss any issue relating to the review or the operation of the … Rules".

[77] Neither the LS nor the Bar appear to have responded within the time initially allowed by the Department. The Assistant Secretary of the LS replied to this letter on 31 December 2012 saying that the Society had not yet completed its response and seeking further time.

[78] On 10 January 2013 the Department wrote again to the Bar. The letter referred to the stakeholder engagements phase having come to an end on 31 December 2012. Hence the Department had entered the next phase of the review, which was the development of proposals. In this connection, it is indicated that the Department's views were at an early stage. Notwithstanding this, however, the letter indicates that "there is still an opportunity for stakeholder engagement to take place as part of the development of proposals phase of the review". Representatives of the Bar were invited to engage and subsequently they did so.

[79] There was a meeting between representatives of the Bar and the Minister on 25 January 2013. At this meeting there was discussion of the current programme of legal aid reform. This program involved a wide range of topics, described as projects. Details of these were provided to the Bar by a letter from Departmental officials dated 7 February 2013.

[80] The next event the court can trace is that there was a meeting between the Bar and the LS on 21 May 2013 but this was concerned with a range of general issues and did not, to any significant degree, discuss the review of the Rules.

The Consultation Paper

[81] The Department's consultation paper on review of the Rules was provided to the LS and the Bar towards the end of June 2013. The way in which the review was

to be conducted was referred to at paragraph 3.1. The "have regard" factors are set out in full. The additional factor in this review, to take account of whether there are any omissions in the Rules, is adverted to directly.

[82] At paragraph 3.3 important information is given, namely that in taking forward the review the Department had analysed payments made to solicitors and counsel under the 2005 Rules as amended for the financial year 2011/12 in the light of the criteria set out in Article 37 of the 1981 Order, including the additional criterion added by the Department, and comments made by stakeholders.

[83] There are then consecutive headings dealing with each of the statutory criteria.

The Criteria

[84] The paper indicates that "the 2005 Rules are correctly structured to reflect the time and skill required to deliver defence representation in legal aided criminal cases in the Crown Court". Specifically, it is noted that standard fees payable in a Crown Court case were determined by reference to two elements which were set out:

- the seriousness of offence for which the accused was prosecuted; and
- the manner in which the case was disposed of.

In the Department's view the fee structure in the Rules generally made proper provision to take account of time and skill required to represent defendants in legally aided cases, by ensuring that larger cases, and cases involving more serious charges, received higher levels of remuneration.

[85] The paper went on to refer to various additional fees which were available to legal representatives within the fees structure. But the difficulty in providing for fees to deal with all eventualities was illustrated in the paper by the facts of the Brownlee case which will be discussed later in this judgment. The paper indicated that Brownlee had uncovered an omission in the rules which it was proposed to rectify.

[86] Under the criterion related to "number and general level of competence of persons undertaking work" reference was made to there being currently around 2,000 solicitors in private practice operating out of 500 firms managed by partners or operating on a sole trader basis. The view of the Department was that "the network of solicitors across the province provides a comprehensive access to justice service, with most people living within relatively easy reach of a solicitor's office". As regards barristers, the paper record that there were over 600 counsel in independent practice in Northern Ireland. Around 10% were senior counsel. In the Department's opinion "there are sufficient competent solicitors and counsel undertaking defence representation in Crown Court cases". Moreover, the Department went on to say "that the structure of the 2005 Rules helps to ensure that an adequate supply of solicitors and counsel, willing to carry out legal aided defence work, is retained".

[87] The third criterion referred to was that of cost to public funds of provision made by the Rules. Under this heading it was explained that it was predicted that there would be a shortfall of £11m between the assigned budget for legal aid and the forecast expenditure. Having set out in tabular form the Department's financial position and having discussed measures taken to off-set the difficulties, it was stated that "the Department must be satisfied that the remuneration arrangements for legal aid are reasonable, when considered in the light of the overall cost to public funds". The Department concluded that further reductions in expenditure should be made in the light of the comparison of expenditure in Northern Ireland with expenditure in England and Wales.

[88] The fourth criterion was the need to secure value for money. The treatment of this issue began with the Department referring to the GFS in England and Wales. As noted earlier, the option of adopting the GFS in Northern Ireland had been raised by the Department before but had not been pursued. On this occasion the Department indicated that it had undertaken a comparison of remuneration levels between the two jurisdictions. This involved the costs which had been assessed by the Legal Services Commission under the 2005 Rules (as amended) in 213 actually assessed cases being compared with how those same cases "would have been assessed under the current rates in the 2013 Regulations" in England and Wales. The outcome of this was, it was asserted, that fees paid in Northern Ireland for solicitors were 46% higher, for junior counsel/solicitor advocate some 41% higher, and for senior counsel some 29% higher than would have been paid in England and Wales in the same cases.

[89] It is then noted in the paper that the Ministry of Justice in England and Wales had recently gone out to public consultation with proposals to reduce rates of remuneration for advocates under GFS. If such reductions were to be made in England and Wales, the paper noted that "the fees paid to counsel/solicitor advocates in Northern Ireland would become even more expensive proportionately when compared to England and Wales".

[90] The scale of the differences in remuneration levels between Northern Ireland and England and Wales, the paper argued, demonstrated that fees paid under the Northern Ireland Rules were "unnecessarily high" when compared with those paid in England and Wales. "In these circumstances the Department [considered] that the 2005 Rules (as amended to 2011) no longer represented value for money".

[91] The added criterion of omissions in the 2005 Rules was then addressed. A number of types of proceedings, calling for new remuneration arrangements, were set out, for examples, sentencing hearing fees and confiscation order application fees.

Options

[92] As befits a consultation document, it contained a section putting forward "options for change". Two general main options were identified: that of amending the Rules to reduce the level of remuneration – to obtain greater parity between the levels of remuneration in Northern Ireland as compared to England and Wales; and that of the Department introducing a new scheme in Northern Ireland based on the England and Wales GFS. In the latter case, there were sub-options of considering the GFS as it was at that time configured or considering GFS in the light of changes to be consulted upon by the Ministry of Justice in England and Wales.

[93] Sub-options of the first option were also set forth in the paper.

[94] In considering further the first option, the Department indicated that it had taken into account comments made in the Criminal Justice Inspection Report in February 2013. These have been set out above at paragraph [73] above. This led the Department to the view that GP2 fees should be "removed" and that the remaining GP1 fee would become the guilty plea fee: "however, this would no longer be an all-inclusive fee and legal representatives would be permitted to claim various additional fees in appropriate circumstances".

[95] The removal of GP2 as aforesaid, the Department indicated, would make £900,000 in savings but "it would still be necessary, as part of Option 1, to apply a reduction in fees of 45% for solicitors and 30% for counsel to align levels of remuneration between the two jurisdictions". These steps, which would result in a reduction of fees (ex VAT and disbursements) of approximately £2.8m for both solicitors and barristers, making a saving of £5.6 m, were said to enable the Department to demonstrate that the amended rules would provide value for money.

[96] The Department left open the possibility of phasing in the proposed levels of cuts over a period of three years and invited respondents to provide evidence on the potential impact of these proposals on the financial viability of solicitors' firms and counsel.

[97] A further variant on the option of amending the Rules was stated to be to apply reductions on percentage differences that were identified as part of the exercise undertaken by the Department to compare remuneration levels between Northern Ireland and England and Wales. This would mean the reduction in fees of 45% (solicitors); 46% (sole junior counsel/solicitor advocate); 31% for a led junior counsel; 20% for leading junior counsel; and 29% for Queen's Counsel.

[98] A possibility which was canvassed was that there could be phasing of the last variant over a period of 3 years.

[99] As regards the option of introducing in Northern Ireland a new scheme based on GFS in England and Wales, the Department saw no insurmountable reason why the main elements of the England and Wales scheme could not be introduced in

Northern Ireland. There would be a need to make modifications to ensure a proper fit. The modifications, however, would still allow for reduction in the disparity with England and Wales in terms of remuneration levels. This would meet the value for money test.

[100] While a number of other issues formed part of the paper, it is unnecessary for present purposes to refer to these. Naturally the paper sought the views of consultees. A series of consultation questions were set out. Of particular interest were the following questions:

(i) Do the options proposed meet the statutory criteria?

(ii) What are your views on the removal of GP2 fees?

(iii) What effect would the implementation of any of the options have on the financial viability of solicitors' firms and counsel in Northern Ireland?

The closing date for a response was set as 16 August 2013.

The Impact Assessment

[101] On the same day as the consultation was officially promulgated an impact assessment consultative document was also issued by the Department. Such assessment was said to be "a basic component of best practice in policy making". It formed, the Department said, a sound basis on which to review existing policy.

[102] In the paper it was acknowledged that the proposals being made by the Department involved substantial amendments to the Rules.

[103] The key section of the Impact Assessment document was that headed "screening the policy". It was indicated that the Impact Assessment was to cover a range of areas: social, economic and environmental. It was asserted that "the report has screened the policy for all impacts as identified in government guidelines".

[104] The outcome of the screening process, as put forward in the document, was:

(i) In respect of the human rights impact assessment it was noted that Article 6(3)(c) of the European Convention on Human Rights was engaged. The proposed amendments to the 2005 Rules to remove provision in relation to GP2 and reduce the level of remuneration, the document said, did not affect a defendant's rights. Nonetheless the Department welcomed views on the potential impact of the proposals on Article 6(3)(b).

(ii) Rural impact assessment: it is said that rural proofing was recognised as a key element in policy development and evaluation. The policy was to apply in rural areas and communities but the proposed options were, the document

recorded, "unlikely to have either a negative or positive impact in rural areas or communities".

(iii) Economic Impact: the Department considered that the proposal was likely to have little impact on the economy. This was on the basis that the reduction in fees was negligible when considered in the light of the overall economy.

(iv) Regulatory Impact Assessment: the proposals did not impose any restriction on businesses, it was recorded. They merely made changes to the structure and levels of fees payable to the legal profession by the Legal Services Commission. Accordingly, a regulatory impact assessment was not required.

[105] An impact table was supplied as an Appendix to the document. It assessed no impacts on human rights, rural communities or the business sector.

[106] Potential consultees to the impact assessment were asked to say whether the Department had correctly identified and assessed the possible impacts.

The Bar's Interim Response to the Consultation Paper

[107] An interim response to the consultation paper was provided on 16 August 2013 by the Criminal Bar Association which represented barristers who worked in criminal cases.

[108] In the course of the response a request was made for "the raw data" on the cases used for comparative purposes by the Department as the basis for their proposals.

[109] The response of the Criminal Bar Association was directed chiefly at the issue of payments in respect of sentencing hearings where a change in the defence legal team was involved. This involved the territory of the Brownlee case, already referred to.

[110] On 23 August 2013 a spread sheet containing the cases used by the Department as its data base for the comparison in respect of costs with England and Wales was supplied by the Department to the Bar. The spread sheet was later on 24 September 2013 also supplied by the Department to accountants acting on behalf of the LS. Thereafter, on 16 October 2013 a meeting was held between the LS's accountants and departmental officials. On the same day, the Department provided the accountants with copies of the relevant statutory provisions applying in Northern Ireland and England and Wales respectively.

[111] On 17 October 2013 the Department issued invitations to meet both branches of the legal profession.

[112] A meeting was held with the LS on 21 October 2013. The main issue of relevance which was discussed was the removal of the GP2 fee. In defending this

proposal, Departmental officials indicated that they had taken on board the Criminal Justice Inspection proposal. This was not a surprise given that the Minister had accepted the Inspection's recommendation in this area. The representatives of the LS stated their view that the Guilty Plea fee to be introduced did not fairly recognise the additional work required in preparing a case for trial. The Department indicated that it was open to discussion on how cases involving significantly more effort might be identified. The LS queried the use of the GFS model in England and Wales as the comparator for cases in Northern Ireland. It was pointed out by representatives of the LS that the Magistrates' Courts in Northern Ireland did cases which in England and Wales would go to the Crown Court.

The Law Society's Response

[113] The response of the LS to the consultation paper was provided by way of a document dated October 2013. Its highlights can be taken from its executive summary:

- Opposition to the proposed changes to the rules and in particular to the fee reduction of 46.44% for solicitors.

- Opposition to the introduction of a GFS which, it was considered, would have similar effects.

- The LS was of the view that the Department had taken an overly constrictive view of what "value for money" constituted.

- The LS was also of the view that the Department had assumed that large fee reductions would not affect access to justice and the right to a fair trial.

- The LS considered that the quality of defence services and the viability of businesses had a direct bearing on the right to adequate representation and the importance of equality of arms.

- The RIA process was described as inadequate and did not measure the impact of the proposed measures in respect of jobs in the community and the reduction in the viability of legal aid practices in rural or deprived areas.

- There was an erroneous assumption that there was a direct comparison between Northern Ireland and England and Wales in terms of fee arrangements. There has been no attempt to look at differences in the procedures and the contribution to higher costs of more delays and hearings within the system.

[114] It is plain that the LS had been consistent in their opposition to the importation of the GFS to Northern Ireland. The operation of that system, in a time of austerity, had led to concerns in England and Wales about whether reductions in

funding had affected detrimentally issues of access to justice. In the LS's view, the differences between Northern Ireland and England and Wales were such as to make this proposal unsuitable as a general option.

[115] Additionally, it was quite evident from their response that the LS believed that the Department was viewing the value for money criterion very much through the lens of those familiar with the England and Wales model. This was, in the LS's view, unfortunate. There had been a failure to see that the comparison between Northern Ireland and England and Wales was flawed: the practice models were different, the Crown Court operated differently, there were differences in the remuneration arrangements in place and the practice of professionals also was different, for example, solicitors did not normally personally attend at the Crown Court in England and Wales with their clients.

[116] In particular the comparison of the assessed cases from Northern Ireland did not, according to the LS, sufficiently acknowledge a range of differences in the way the respective jurisdictions operated. It was pointed out that in Northern Ireland Magistrates' Courts did work which in England and Wales went to the Crown Court, as in Northern Ireland professional District Judges had greater sentencing powers.

[117] The response contained a series of strong statements on the subject of how the proposals in the consultation paper might affect the financial viability of solicitors' firms. In the LS's view, the issue of viability should be viewed taking legal aid provision in the round, as most practices in Northern Ireland were mixed, having both civil and criminal elements. As there were cuts being made to legally aided civil work, this should also be considered.

[118] Solicitors firms, it was asserted, were also small businesses and should have been assessed by the Department as such.

[119] Declining profit margins and the unprofitability of criminal work in England and Wales were features which had become well known in that jurisdiction. The point was made that in Northern Ireland the structure of firms was different. Given the small jurisdiction, there were more mixed practices and, in general, firms were smaller. These factors created a need to distinguish the case of Northern Ireland solicitors from those in England and Wales.

[120] The frustration of the LS can be seen where at one point in its response it posed a rhetorical question: the questioner wanted to know "if any other publicly funded providers of services [had] been asked to absorb a further cut of close to half of their remuneration whilst being expected to provide the same level of service"?

[121] In the area of impact assessments, the LS returned to the theme, expressed earlier in the paper, that the Department had failed to carry out necessary research. The screening exercise, it was argued, lacked credibility and had been executed

inadequately. It was asserted that officials must be adequately equipped to undertake assessments substantively. A way forward was referred to as follows:

> "The Department needs to ascertain the number of practices providing a high concentration of legal aid services within the jurisdiction, their location in key areas mapped against need locally and to list the groups from rural to urban who might be disadvantaged by the policy. Profitability margins and job provision need to be taken into account in the substantive analysis and weighed against the proportion of employees a firm has and the relative share of legal aid casework. Once this analysis has been undertaken, an informed discussion on remuneration and the effect of cuts will be possible".

[122] In the LS's view there had been no justifiable reason given for not screening the policy against important factors in this case.

[123] The response also contained sections on issues such as contracting and legal aid work and the use of a public defender. These need not be considered here.

[124] A particular issue surrounding the removal of GP2 was also discussed in the response. In essence, the LS's view was that there should be remuneration which was commensurate with the work undertaken and the skill applied. Necessarily there was work done in preparing a case to go to trial even where in the end the defendant pleaded. There ought, therefore, be a remuneration framework for this. If the GP2 was being removed, it should be replaced by a Trial Preparation Fee to ensure that legitimate work was to be properly remunerated.

The response of the Bar

[125] The Bar's response to the consultation paper was provided on 25 October 2013. It extolled the record of the Bar as an independent profession offering high quality legal representation. Indeed competition at the Bar, the paper remarked, secured quality. In the Bar's submission, access to justice was an indispensable feature of a democratic society which must not be lost sight of. It must be safeguarded so that the citizen was protected against the excesses of the State.

[126] However, it was noted that "it is a fallacy to believe that this competitive and dynamic body cannot be mortally wounded by the proposals contained within the consultation document".

[127] Unfortunately, the Department's paper, it was claimed, contained a number of fundamental misconceptions and ill-informed analyses. In the first place, having set out a range of figures in relation to the legal aid spend, especially those for the years 2011/12 and 2012/13, it was stated that over these years the expenditure on

criminal legal aid had been £10.7m less than had been anticipated. By way of comment, it was then stated that "this demonstrates that not only did the cuts of 2011 achieve their purpose, they went far beyond the level of savings that were anticipated by some considerable margin".

[128] In the second place, the Bar's response referred to the "myth" which belied the proposition that fees for solicitors and barristers for legally aided criminal work in the Crown Court in Northern Ireland were higher than those payable in the England and Wales. The Bar, on the contrary, stated that based on figures for 2012/13 per capita the cost in England and Wales ran currently at £17.41 whereas in Northern Ireland the cost was lower at £17.12.

[129] The Bar was also critical of the analysis carried out by the Department in respect of the 213 sample cases under the 2011 Rules in Northern Ireland. Various differences between the position in England and Wales as against Northern Ireland were referred to to support the Bar's analysis in this regard. The submission stated:

> "No account whatsoever has been taken of the fact that in England and Wales more generous rules apply to determining in what circumstances a trial fee should be payable as opposed to a plea fee and that special provision for other fees [which] apply there ….. do not apply here. No account has been taken as to the more generous methods for calculating the length of trial and no account taken of the fact that in England and Wales they have retained a provision for payment of very high cost cases. No account has been taken of the fact that in Northern Ireland only the most serious of cases are returned to the Crown Court for determination of guilt, unlike England and Wales where the range of lesser offences in the Crown Court is much greater".

[130] The Department's analysis was referred to as "rather course". The review was not "a reliable mechanism". The Bar indicated that "it would seem reckless in the extreme to engage upon this proposed course of action … based upon an analysis, which is so completely wrong".

[131] The response has a section dealing with "omissions in the 2005 Rules" which drew attention to four "further inequities". It is unnecessary in this summary to go into these.

[132] In respect of "value for money" as one of the statutory criteria, the Bar was clear: that the proposition that the standard fees found in the 2005 Rules as amended in 2011 no longer represented value for money was simply wrong.

[133] The issue of the removal of GP2 was also taken up in the submission. It was pointed out that the Bar had made representations in the face of similar proposals in respect of fees in the Magistrates' Court. It had argued for the adoption of a fee designed to deal with the time and work involved from arraignment to a plea being entered. This had found favour with the Department. Consequently, the Department brought in what was referred to as a "trial preparation fee". In the Bar's response it was submitted that it was "disingenuous of the Department … to support an additional workload between a not guilty arraignment and guilty plea in the Magistrates' Court through a trial preparation fee but to ignore this concept in its consultation for Crown Court fees".

[134] In this area, the Bar also strongly repudiated any suggestion that members of the Bar would ever prolong cases for their own gain. There were many reasons why a plea of guilty might occur after arraignment. On this issue the Bar went so far as to say that the "perception" of the Criminal Justice Inspectorate, of incentives on the part of legal representatives to prolong cases, had been relayed by the Department to their inspectors in the first place and then fed back to the Department by them in their report.

[135] The Bar did not consider that the option of introducing the GFS to Northern Ireland contained a detailed analysis as to its implications.

[136] Overall, "the introduction of these proposed reductions", in the Bar's view, "would irreparably damage access to justice and the quality of representation".

Other responses to the paper

[137] In fact, there were 25 substantive responses to the consultation paper. To a large extent, the contributions overlapped with one another in terms of themes. The Northern Ireland Young Solicitors Association, made up mostly of assistant solicitors, was concerned that its members might lose their employment because the impact of reduction of fees might have to be absorbed by the making of redundancies or firms not having the resources to take on new apprentice solicitors. The association was also worried about over-reliance on newly qualified solicitors. A particular criticism levelled by the Belfast Solicitors' Association at the consultative paper was its failure to measure the impact on jobs in the community and within the 570 solicitors' practices which employed in the region of 6,200 people.

[138] The Public Prosecution Service also provided a response. They supported the removal of GP2 fees. In doing so, they indicated that there had been, for some time, a perception held by the prosecution that the existence of these fees provided a disincentive to the entry of an early guilty plea.

Follow up meetings

[139] In the period November to the end of January it was not the case that contact between the professions and the Department stopped. There were in fact numerous

meetings between the Department and the LS and at least one meeting between the Department and the Bar. These meetings require no detailed discussion but an issue did arise between the Department and the LS which the court will briefly describe.

[140] This issue arose at a meeting at which the Minister was present with LS representatives on 4 December 2013. An official of the Department indicated that he had concern lest the Crown Court proposals might adversely affect access to justice by damaging the network of solicitors' firms across the province in a way that could lead to job loses or firms closing down. The Chief Executive of the LS indicated his view that the Department had not done enough to properly quantify in its regulatory impact assessment the effects of its proposals. The Minister then indicated that it was a matter for the LS to quantify the effects of the proposals and present their analysis to the Department for consideration. He noted that the Department was not in a position to know what overheads were faced by solicitors' firms and what solicitors' earned from non-legally aided work. The Minister asked the LS to provide this information. The President of the LS, in response, said he thought the Society would be able to do this. A solicitor present, moreover, said that her country practice which did legal aid work, civil and criminal, would be massively affected.

[141] A follow up letter was sent by an official of the Department to the President of the LS seeking the requisite information on the basis that he had indicated a willingness to provide same to support the LS's recommendations about the impact of the proposals on the solicitors' profession. In particular, the President was asked to give some indication of the current level of profit margins across the firms represented by the LS in respect of both criminal and civil legal aid, together with any available information on overheads, for example, rents, rates and staff costs.

[142] A response to this letter was sent to the Minister on 9 December 2013 from the President of the LS. He said:

> "We indicated at the meeting that while we would consider whether we might be in a position to provide some information that would assist you … it is for the Department of Justice to conduct its own research and be satisfied of the implications of implementation of its proposals. It is incumbent upon the Department to be fully aware of the out-workings of its proposals in terms of the impact on the community and their responsibility cannot be displaced to the LS or any other such organisation.
>
> It is alarming, following the close of consultation, to receive from the Department correspondence which requests information in the terms described…All relevant matters ought properly to have been integral to development of the Department's proposals.

> The Society remains of the view clearly articulated by the Chief Executive towards the end of the meeting that it is for the Department to conduct its assessment of the implications of the proposals. The Chief Executive also indicated that the Society would assist so far as possible in gathering information within the context of the broader review which the Society is seeking which would seek to identify efficiency savings by streamlining procedures and processes within the justice system".

[143] This response produced a further response from the Minister dated 14 December 2013. It would appear that on 11 December 2013 the President of the LS sought a number of meetings with the Minister including one in relation to the Crown Court proposals. The Minister was content to have further meetings, but in respect of the purpose of the meeting in respect of criminal legal aid in the Crown Court he said:

> "It is to enable the Society to make further representations … about the impact of the proposals on the solicitors' profession and, in particular, to provide any available information on current levels of profit margins and overheads of solicitors' firms undertaking criminal and civil legal aid work."

[144] The Minister wanted the information so he could take into account before making final decisions on the way forward.

[145] It is unclear whether this particular issue was discussed at the meetings between the LS and officials which occurred on 10 and 18 December 2013 and on 6 January 2014.

[146] The Bar had a single meeting with officials on 6 January 2014. Mainly, this covered well-trodden ground. Points contained in the Bar's consultation response were re-emphasised. The Department sought to explain that the £31m spend figure on which the Bar relied was not correct. In respect of the comparison exercise, the Bar raised the point that travel expenses should be excluded in any comparison with England and Wales. The Bar also questioned the extent to which officials understood how the 213 cases should be assessed in England and Wales.

Interim Post Consultation Report

[147] The above report contained the Department's initial views in respect of the consultation exercise. It was published on 31 January 2014. The Department indicated that the figure quoted by the Bar of £31m spent in 2012-2013 was inaccurate and required correction. The actual spend, the Department maintained,

was £47.4m. The Department indicated that this meant that the per capita comparison was that a case in Northern Ireland came out at £26.19 per capita as against a figure of £17.14 for England and Wales. In respect of the impact assessment, the Department registered that there had been criticism from consultees. The Department response went no further than saying that it was currently considering the representations it had received. It had made no final decision about them. Memorably, the Department stated that legal aid was not there to provide for a network of small solicitors' offices across Northern Ireland.

[148] In relation to the way forward, it was indicated in the paper that departmental officials would be attending the Assembly's Justice Committee to discuss the post consultation document. There would also be further meetings with the branches of the legal profession. The intention was to seek to finalise the proposals and present them to the Justice Committee for their consideration.

Next Steps

[149] After the publication of the interim post consultation paper, there continued to be regular meetings between the professions and the Department. Some of these meetings had wider remits than the immediate issue of remuneration for legally aided defence work in the Crown Court. A particular issue which was the subject of discussion related to how best to target resources to the areas which required the greatest work/skill where required. This topic became associated with an expression which was introduced by the Bar to the debate. It concerned targeting resources to where "the heavy lifting was done" by means of alterations and revisions to standard fees to accomplish this. Another issue which was the subject of discussion was that of the effect the 2011 Rules had had in terms of making savings. The Bar pressed the Department as to what savings had in fact been achieved but the Department's position was that the effect was not yet clear as cost reductions were only working their way through the system. The outcome would be unclear until 2015/16. Controversy continued unabated in respect of the 213 case comparison. In respect of this issue, the Department provided the detail of the information it had to the professions, including the case logs for the bulk of the 213 cases. The Bar, in particular, continued to work on these. The LS, as noted earlier, had forensic accountants to assist them when they considered the information. The focus of the discussion was on how the regulations in England and Wales had been applied and as to whether there had been errors made in the course of the comparison by the Department. Particular issues included solicitors' actual attendance at the Crown Court in England and Wales; the inclusion of travel expenses in the calculation of fees in Northern Ireland; and the significance of the fact that in England and Wales there was no half day fee, as there was in the Northern Ireland fee scheme.

[150] The Department's officials attended the proceedings of the Justice Committee of the Assembly on 6 February 2014. The object of this meeting was to discuss with them the interim post consultation paper. Many of the subject areas discussed reflected the increasingly familiar agenda dominating the debate at the time. It is

obvious that many of the Assembly members had had advance briefings before the Committee sat.

[151] What may be of importance from this meeting was not the rehearsal again of the established lines of argument but the comments of officials during discussion. The court accepts that these should be treated with caution as to a large extent the individuals were responding to questions spontaneously. Notwithstanding this, some insight into their thinking may be obtained. Thus at one point, the lead official said, as per the transcript "we are keen to ensure that once the necessary cost reductions have been made the remaining resources are targeted at areas where the greatest cost is incurred on behalf of the legal aid client".

[152] The same official, interestingly, expressed the view that the object of the Department was not to seek parity with the system in England and Wales.

[153] There was, in these proceedings, also discussion about the issue of the adverse effects which might arise from the implementation of the proposals and whether the proposals would have a detrimental effect on the quality of the representation which was available to the recipient of legal aid.

[154] As regards the former issue, the lead official said that in the case of a single solicitor who operated a practice entirely on the basis of criminal legal aid "there may well be challenges associated with that". He also acknowledged that in the light of the changes there may well be a need to look at business models and the need to change them. He also commented that "we invited the representative bodies to provide any additional information that they could". However only anecdotal stories came back saying that there will be an adverse impact and that people would be laid off. He then noted that "we do not have any detailed information on which to make further assessments. If that is available, we would welcome it in order to make the assessment".

[155] As regards the quality issue, the lead official stated that "our assessment is that…[the proposals] should not impact on the quality of the representation that people are able to get … there was nothing in our analysis that would demonstrate that there would be a diminution in the quality of the service to individual legal aid clients".

[156] On 18 February 2014 the Minister answered questions in the Assembly. He was asked by an Assembly member to outline the impact on the future viability of solicitors' firms which would arise out of the implementation of his proposals to change the rules.

[157] The Minister's response was to indicate that, in advance of the publication of the consultation paper, the Department's assessment was that "there was no evidence to suggest that there would be any adverse impact on legal firms". As regards to the current assessment, at that time, the Department's view was that "there [was] no evidence that [the proposals] will result in job losses or

redundancies". The Minister then indicated that he had invited stakeholders to submit their views on the proposals, including data on the subject of impact. Consistently with the lead official's view expressed at the Justice Committee, he acknowledged that the reforms may require practitioners to consider more efficient business models and to adapt.

[158] The Minister's words provoked a reaction from one member who accused him of not living in the real world when he suggested that there would be no or little impact on firms of solicitors. The member went on:

> "The cuts in 2011 amounted to at least 30%, if not more and now the Department is proposing cuts in the region of 30-40% … how can he suggest that there would be virtually no impact on the profession?"

The Minister's reply pointed up the absence of any detailed figures from the legal profession as to what the impact would be.

[159] On 10 April 2014 departmental officials again attended the Justice Committee of the Assembly. This time the subject of discussion was the Access to Justice Review (see paragraphs [68]-[73] *supra*). During the meeting the Department's lead official sought to clarify an issue which had emerged as a point of contention in connection with what the figure should be for criminal legal expenditure for 2012-13, a matter which had exercised the Bar in its consultation response. A figure of £31m had been quoted in an annual report of the Legal Services Commission. The official, however, told the Committee members that the figure took into account "provisions that had been made for future expenditure" *viz* some £19m. When that figure was omitted, the actual cash payments were some £50m for criminal legal aid.

[160] On 11 April 2014 the Bar was provided by the Department with a breakdown of legal aid expenditure as between the different tiers of court for the year 2013-14.

The Post Consultation Report

[161] The next event of substance was the publication on 28 May 2014 of the post consultation report (as opposed to the interim post consultation report which had been published on 31 January 2014). This provided the Department's position in the light of the consultation process.

[162] The main features of the Department's response to criticisms made in answer to the consultation paper may be summarised as follows:

(a) The Department rejected the criticism which had been made by consultees of the 213 case Northern Ireland – England and Wales cost comparison.

(b) The Department rejected the contention that the reductions made to rates of remuneration in 2011 had more than achieved value for money in relation to criminal legal aid.

(c) The figure of £31m quoted by the Bar in its response was "a resource accounting figure": for the year 2012-13. The cash spend on criminal legal aid in Northern Ireland for that year was £50.4m.

(d) It was accepted that, following research, the position in England and Wales was that solicitors do still attend Crown Court but not as regularly as in Northern Ireland.

[163] As regards the way forward the conclusions reached by the Minister were:

(a) That option 1 should be implemented with some adjustments. He rejected other options. In particular, he concluded that staged implementation of reductions was not appropriate. In this area he said he had received no information from practitioners on the operating costs of business models, as compared with England and Wales, or earnings from non-legally aided work.

(b) GP1 and GP2 fees were to be removed and replaced by a single guilty plea fee for solicitors and barristers. There was no suggestion in the paper that the new guilty plea fee ("GPF") for solicitors was designed to meet solicitors' costs post arraignment but prior to a plea of guilty before trial.

(c) The guilty plea fees were to have a three band structure providing for enhanced fees based on the number of served pages of prosecution evidence but only in the case of solicitors.

(d) The PPE range would also be used to enhance the basic trial fee in respect of solicitors only.

(e) There would be some rebalancing of the PPE bands so that less serious cases would not be paid the same as more serious cases.

(f) In the case of solicitors, the reduction was set at a level of 27% (reduced from the figure consulted on of 45%).

(g) In the case of counsel, it was accepted that the removal of GP2 fees was a significant concern. The Department proposed to introduce an additional fee for counsel called the trial preparation fee. These fees would operate with enhancement based on the number of pages of prosecution evidence. At paragraph 6.7 it was noted as follows:

> "The proposed single guilty plea fee (that is the fee to replace the old guilty plea one fees) would not provide sufficient remuneration. The situations where the

> profession considered it appropriate to prepare the case as a contest were highlighted to the Department and it accepted that a legal representative could be required to undertake additional work on those cases, including some cases which did not proceed to trial".

(h) Cases within classes A and B were to be preserved at existing rates. The definition of these classes would be expanded to bring in some new offences.

(i) In relation to the reduction, in the case of counsel, this was set at the level of 22% (against the level of 40% consulted on).

(j) Various new specific fees were introduced to deal with matters such as confiscation hearings and public protection applications.

[164] It is therefore clear that the consultation process had resulted in modifications to the Department's original proposals. In particular, the overall level of reduction went down, not insignificantly, in the case of each profession. By reason of the consultation process, it had been decided by the Minister that while GP2 fees would disappear, in the case of counsel, but not solicitors, a new fee – the Trial Preparation Fee – was to be established.

Meetings with the Justice Committee

[165] On the same day as the post consultation report was published, 28 May 2014, officials of the Department appeared before the Justice Committee which had received the report. The discussion there proceeded on familiar lines. The Department maintained that the reductions proposed would bring the level of remuneration in this area "more into line" with England and Wales. It was indicated that legal representatives in Northern Ireland who worked on legal aid in the Crown Court would, if the changes proposed were implemented, still be better paid than their counterparts in England and Wales. Moreover the Department expressed satisfaction that the proposed savings could be achieved "without any diminution in the quality of the service" provided to Crown Court defendants. It was also put forward on behalf of the Department that the new arrangements would pass the "value for money" test.

[166] As had occurred at similar previous meetings the Department's officials were pressed about the impact of the changes on employment. The lead official commented:

> "We would like to do more but we do not have an enormous amount of data on the earnings. We know how much legal aid is paid to individual firms, but we do not have additional data on any other earnings that the firms might have and how this would impact".

When asked about the impact on urban and rural firms, the reply was that the Department "do not have the information because that would involve asking how much a firm earns from legal aid and other sources". Reference was then made by another official to the professions not providing the Department with information on these matters when asked.

[167] The theme of access to justice was touched on. The lead official for the Department indicated that there was a need to maintain such access but that this had to be achieved "at an economic rate" obtaining value for money.

[168] At its meeting with the Justice Committee, the Department promised to supply further information to the Committee on a range of issues. The Department made good that promise by letter of 27 June 2014. The letter covered the provision of further information about the comparative costs of prosecution and defence in Northern Ireland; the impact of costs reductions since 2011; and an analysis of Crown Court costs in Northern Ireland compared with England and Wales.

[169] In respect of the first issue, as regards to the instruction of independent counsel to prosecute in Crown Court cases, in essence, the position was that prosecution fees were modelled on legal aid fees minus 5%. Thus, fees paid to counsel for the prosecution and defence in the same case were very similar.

[170] The issue of the impact of costs reductions since 2011 was described as complex. It was indicated that it would take time for cases under the new arrangements since 2011 to pass through the system and full savings would not become apparent until 2015/16. The use of two counsel, it was noted, had gone down from 50% to 22% of cases at a projected saving of £1.5m per annum. The letter communicated a range of information about VHCC Crown Court costs over the period 2010-11 – 2014-15 and about non VHCC costs in the Crown Court over the same period.

[171] In respect of comparison of costs with England and Wales, the extent of the differences between the criminal court system in the respective jurisdictions made a direct comparison of costs "quite challenging" though the Department were of the view that a fees paid comparison and per capita cost comparison could be made. The 213 case project was in the former territory. There were moreover per capita figures from 2012/13. These suggested that Northern Ireland was more costly per capita than either England and Wales or Scotland.

[172] Each professional body and the Department had meetings with the Justice Committee in September 2014. While, particularly as regards to the Bar and the LS the meetings were of some length, it would be difficult to identify very much new ground.

[173] The meeting with the Bar was the first in time, being held on 17 September 2014. In a wide-ranging debate, the main point to emerge was a complaint that the Department had come forward with its new proposals for reduction in funding in

circumstances where the real effect of the cuts made in 2011 had not yet been seen. In simple terms, it was suggested that the Department should have waited until a clearer picture emerged. In the Bar's view, the picture which would have been likely to emerge had the Department held their fire was one that demonstrated that the extent of the cuts of 2011, taken with other factors (such as the reduction in certificates for two counsel), more than sufficiently provided the reductions which the Department's budget required. Indeed the impact of the 2011 cuts would have, once they worked through, detrimental consequences for the profession and to access to criminal justice.

[174] The former Chairman of the Young Bar at the meeting indicated that barristers who had qualified over the last 5 years predominantly earned less than £20,000. There was, he thought, a real risk that the best and the brightest would not take on legally aided work given the rates of remuneration for it.

[175] The Bar, did not believe that the Department knew of the extent of the adverse impact arising from 2011. The Bar had asked the Department to pause so that they could see the true effect of what had gone before but to no avail.

[176] In the area of the comparative study, the Bar maintained it was flawed "at least in some respects". The Department at the least could see that it had got some figures wrong. As a result, it had to amend its targets for saving downwards to between 25-30%.

[177] The meeting between the LS and the Committee, which was also held on 17 September 2014, began with the LS endorsing the Bar's view that it was wrong for the Department to launch a second round of cuts when the results of the first round were unknown.

[178] The predominant theme at this meeting was that of the impact of the further proposals on solicitors' practices. In dealing with this, the intensity of the concern appeared to be high. One of the LS delegation commented that in this area "you are entering into a world of generalities". Once cuts arrive any business person must ask whether he or she can afford them and can continue to do the work. The speaker felt that more rural practitioners would be likely to be faced with that option as he or she would be likely to do a smaller volume of that work. Changing the business model, as referred to by the Department, meant making decisions as to the type of work done and who could be employed. People could be made redundant or hours cut or salaries brought down. Another solicitor on the delegation said that if profitability was reduced a solicitor like a barrister would inevitably say that he or she could not afford to put as much time into that, reducing the quality of the service. The solicitor referred to the cuts being a "disaster". New staff had not been taken on and old staff let go.

[179] There was a debate about the evidence base to support the picture being presented by the LS. One of the LS delegation felt that it was for the Department *via* its impact assessment, to gather such information. As he put it:

> "It is not up to us to do that".

The LS could only rely on anecdotal information. It was for the Government, another delegate commented, to know as the proposer of further cuts, what the impact will be. The Chairman did not seem to be impressed with this position. He said:

> "When we ask you to show us the evidence, you say 'well, it's not really our job to do that' but you use statements to suggest devastation".

[180] In the course of the debate when the issue moved to solicitors using counsel in criminal work, one of the LS delegation said "at this moment in time it is possible to get counsel to work on the fees that are set".

[181] The Department met with the Committee on 24 September 2014. The meeting was aimed at civil legal aid but a portion of it was directed to offering the Department an opportunity to respond to the content of the meetings of 17 September 2014 with each profession in respect of criminal legal aid remuneration.

[182] In fact most of what was said by the Department followed lines which had in one form or another been rehearsed before and do not require repetition. The Department did speak of access to justice being a critical factor in its fee structure and reiterated its position that there was no evidence to suggest that Crown Court defendants were unable to access appropriate representation.

[183] On 1 October 2014 the Minister himself met with the Justice Committee to inform the Committee of the outcome of the June monitoring round. While it is not necessary to go into what he said in detail, the message he gave to the Committee was that the Department was facing a bleak situation in which he, as Minister, would have to find further substantial savings.

[184] The Justice Committee indicated that they wished to provide their view about the proposed 2015 Rules. In preparation for doing this, the Committee asked the Criminal Justice Inspection Northern Ireland ("CJINI") to assist them by offering some views on the impact of the Department's Legal Aid Reforms. CJINI accordingly produced a short report and appeared on 8 October 2014 before the Justice Committee.

[185] Its conclusions can be stated briefly. Firstly they indicated to the Committee that when they looked for materials which would help them to assess the impact of changes to the legal aid system in Northern Ireland they found that hard facts were thin on the ground. Secondly, they said they could find little evidence of self-representation. Thirdly, they could find no evidence that the changes affected access to justice for criminal defendants. Fourthly, they thought that the number of practices delivering civil and criminal legal aid services would be likely to reduce

with small and more rural firms being the more likely to give way to the larger firms.

[186] In their report entitled "An Assessment of the Impact of the Department of Justice Legal Aid Reform Package" (3 October 2014), CJINI also referred to the depth of the cuts proposed: 27% cuts for solicitors and 22% cuts for barristers. In their opinion, they were at a level below that indicated by the Department's research comparison with fees in England and Wales.

The Justice Committee, following their meeting with CJINI, approved the proposed Rules.

Final Stages

[187] On 13 January 2015 a copy of the draft 2015 Rules was provided by the Department to the Crown Court Rules Committee ("the Rules Committee"), a statutory consultee.

[188] The Rules Committee met on 10 February 2015. In advance it had received a written submission from the LS. Departmental officials attended the meeting.

[189] In the course of discussion the issue of the impact of the proposed changes on access to justice was discussed. The Chairman indicated that it would be helpful to have information in relation to this. Another issue which featured was the Bar's position in respect of the proposed cuts and whether it would accept them. The Chairman said it would be helpful if the Committee had information from the Bar regarding gross income of middle ranking junior and senior counsel along with a comparison with the position in England and Wales. A member asked if any analysis had been done around time and skill. The Department's officials said that that had formed part of a comparison study with England and Wales. The issue of exceptionality was raised by the Chairman who wished to know whether consideration had been given to making provision for it. The Department's officials said they were alert to the issue and were keeping it under review.

[190] The meeting was adjourned to enable the Department to further consider the issues raised.

[191] The Rules Committee received a variety of information before it next met on 10 March 2015. This new information included:

(i) Some information from the PPS about payments to junior barristers.

(ii) A written submission from the Bar which indicated that a comparative study of barristers' earnings was in progress and would be ready soon.

(iii) A response from the Department.

[192] In the course of discussion at the meeting the following main points were raised:

(i) The question of the impact of the proposals on solicitors' firms, especially in relation to the retention of staff and recruitment to the profession.

(ii) The question of whether the pool of barristers to do cases would diminish by reason of the proposals.

(iii) The question of the effect of the 2011 changes on the payment of fees.

(iv) The question of whether the proposals represented value for money (as the Department claimed).

(v) The question of the fees to be paid to a solicitor where his or her client pleads guilty after arraignment.

[193] Following discussion of the above and other issues, the Chairman indicated that as the Bar had asked more time to produce further information, the Department should reflect on this request as it was a matter for the Minister. The Chairman asked for the matter to be brought to the Minister's attention.

[194] By a letter of 25 March 2015 the Minister wrote to the Chairman indicating that the matter had been drawn to his attention but that it would not be appropriate to delay the implementation of the proposed rules. The Minister also provided a substantial justification for the new arrangements put in place for guilty plea fees. Much of this has already been referred to but the letter notably did not make the case that the new GPF for solicitors was intended to cover solicitors work post arraignment. Rather it sought to make the case that the main burden of work before arraignment fell on solicitors while the main burden of work after arraignment fell on barristers.

[195] On 13 April 2015 the Minister signed the 2015 Rules. It cannot be doubted that the process leading to the making of the Rules was extensive. On a rough estimation, the Minister and/or Departmental officials met with representations of the LS on some 13 occasions; they met with representatives of the Bar on some 6 occasions; all of the parties engaged with the Justice Committee of the Assembly and with the Rules Committee.

Grounds of Judicial Review

[196] As has already been noted, this judicial review challenge to the 2015 Rules was mounted within a few days of the rules coming into effect on 5 May 2015.

[197] The Order 53 Statement contains a wide range of grounds of judicial review. The court does not propose to set out all of these as there are a great number of grounds and sub-grounds. The skeleton argument filed on behalf of the applicants

helpfully crystalizes the grounds of challenge and the court will set those grounds out.

[198] There are five main grounds of challenge:

(i) That the Department acted *ultra vires* its powers under the 1981 Order by failing to have any or any proper regard and/or adopted an erroneous approach to each of the four matters to which it must have regard under Article 37 of the 1981 Order and failed to have any or any proper regard to various other grounds of relevance to the determination required.

(ii) The Department failed to consult with the branches of the legal profession in a manner compliant with the Sedley criteria; or in respect of arguable yet discarded alternative options.

(iii) The 2005 Rules remove provision for a guilty plea 2 fee and introduced a trial preparation fee payable only to counsel, but introduced no analogous fee in respect of trial preparation work by solicitors where a defendant enters a not guilty plea on first arraignment but a guilty plea before the end of the first day of trial and in so doing failed entirely to remunerate solicitors for work necessarily undertaken in representing their client.

(iv) The defendant failed properly to approach the issue of impact assessment in respect of the proposals leading to the 2015 Rules.

(v) The provision made by the 2015 Rules for the payment for confiscation order hearings of daily fees is confusingly expressed and severance should be effected to the table following paragraph 14(2) of the schedule to the Rules so as to reflect the intent of paragraph 14(2) and representations made by the respondent during consultation.

[199] Leave to apply for judicial review was granted on the papers by Treacy J on 28 May 2015.

Judicial Review Principles

[200] Before examining the applicants' grounds of judicial review against the backcloth of the court's lengthy exposition of the factual background, it is appropriate for the court to remind itself of what may be viewed as certain fundamentally important aspects of the judicial review jurisdiction. This can be achieved speedily with only limited citation of authority.

[201] Firstly, to a public lawyer, it almost goes without saying that the role of the court in judicial review is supervisory only. In particular, the court is not concerned with the merits of the decision or decision making process it is reviewing. The decision making authority conferred by the legislature in this case has been invested in the Minister and not in the court. In short, the issue of whether the court agrees or

disagrees with what has emerged from the decision making process in this case simply does not arise and the court will not interfere unless a public law wrong has been committed.

[202] Secondly, the limits of the court's investigation in a public law case are well known. The decision maker must, to put the matter generally, act in good faith; must act within the limits of his or her powers; must act in a procedurally proper way; must act to promote the purpose or purposes for which the power has been given; must make sufficient inquiry; and must not act unreasonably or irrationally. Provided he or she avoids these errors, the decision will not be susceptible to successful challenge.

[203] Thirdly, issues which concern the weight to be given to relevant factors and the extent to which the decision maker's investigation should go will usually be for the decision maker to take, subject only to a rationality challenge.

[204] Fourthly, the burden of proof to establish unlawful conduct on the part of the decision maker will lie on the applicant or applicants who have mounted the challenge.

[205] In this jurisdiction in the recent case of Re Independent Care Home Providers [2013] NIQB 29 Treacy J made a number of general observations which have a resonance for a case of this type and are worthy of citation. He said:

> "[3] The applicant has put a large body of material before the court which appears to relate more to the substantive merits of the respondent's determination that the regional rate set for 2012/13 was, as a matter of fact, fair and affordable. This court must be astute not to allow itself to be drawn into impermissible territory beyond the proper constitutional frontiers of judicial review. Equally, however, it must not abdicate its responsibility to examine, within the proper scope of judicial review, whether the impugned decision is legally flawed on any of the pleaded grounds.
>
> [4] There is considerable force in the respondent's invitation to the court to examine carefully what role the court can properly discharge in respect of a dispute about fairness and affordability in an area of resource allocation within the context of a reducing budget. This is a complex area of specialised budgetary arrangements taking place in the context of a challenging economic environment and major cutbacks on public spending…
>
> [7] Allegations of lack of sufficient inquiry or adequate consultation are not infrequently deployed in judicial

> review in an attempt to persuade the court to embark on what is, in reality, a thinly disguised but wholly impermissible merits review. Ordinarily on judicial review there should be little scope or necessity for the court to engage in microscopic examination of the respective merits of competing economic evaluations of a decision involving the allocation of (diminishing) resources".

[206] In the case of R (Plantagenet Alliance) v Secretary of State for Justice [2014] EWHC 1662 a Divisional Court has helpfully gleaned a series of principles from the authorities in the area of the duty of inquiry which may fall on a public authority. Several of these are worth setting out (internal citations omitted) as they act as a reminder of the limits of the public law jurisdiction.

> "1. The obligation upon the decision maker is only to take such steps to inform himself as are reasonable.
>
> 2. Subject to a Wednesbury challenge, it is for the public body and not the court to decide upon the manner and intensity of inquiry to be undertaken.
>
> 3. The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision".

Ground 1 - The Ultra Vires Ground

[207] This argument turns on the structure of Article 37 of the 1981 Order, the terms of which have been set out above at paragraph [2]. The applicants' principal argument under this head is that the Department failed to have regard to relevant factors. In particular it did not "have regard" to the four factors expressly identified as relevant in Article 37 *viz*:

(i) The time and skill which work of the description to which the rules relate requires.

(ii) The number and general level of competence of persons undertaking work of that description.

(iii) The cost to public funds of any provision made by the rules.

(iv) The need to secure value for money.

[208] It is suggested by the applicants that the Department's decision-making neglected all of these factors or, in the alternative, some of them. It will, therefore, be necessary to look at each factor in turn. A particular allegation made by the applicants is that the decision-maker was so taken up with what it discerned to be "value for money" that it lost sight of other factors and ended up ignoring them. The Department's response in this area of the case is that it did take into account all relevant factors, including the four factors referred to expressly in the 1981 Order. This, most obviously, is evident, the Department says, from the consultation paper published by it prior to the making of the 2015 Rules where all of the statutory factors are individually discussed and referred to. But it is also evident from the exchanges which the Department had in the course of the decision making process both with the applicants and with others, such as the Justice Committee of the Assembly.

Time and Skill

[209] Article 37 requires the Department to have regard to "(a) the time and skill which work of the description to which the rules relate requires".

[210] The applicants' factual case that this factor was ignored is elaborately constructed and seems to be based on a series of statements made by officials, some going back over a considerable period to earlier decision-making processes. An example is that it is suggested that a statement by an official on 7 December 2010 when addressing the Justice Committee of the Assembly in the context of proposed remuneration changes in respect of Crown Court proceedings, to the effect that "… there is always a risk that some will not work at those particular rates" is an acceptance that the reduction in rates under the proposed 2011 Rules might well impact on both time and skill and number and competence criteria. As put in the applicants' skeleton argument, the comment made at that time undermines the contention made more recently that account had been taken of those criteria "in imposing a further reduction of the magnitude provided for in the 2015 Rules".

[211] Similarly, the applicants rely on an exchange between the Justice Minister and the Justice Committee on 26 May 2011. In an answer to a question asked, the Minister indicated that he wasn't sure that "we want to move to the England and Wales situation". He felt there were issues about access to justice and he noted, as has been quoted above, that "cost cutting is one aspect, but ensuring we maintain access to justice is important". This approach (also shared by a senior official who was also quoted by the applicants from the same discussion (though in a wider context) was said to be (*per* applicants' skeleton) "in sharp contrast to its stance in the process leading to the 2015 Rules, which was premised on the assumption … that the 2013 Regulations (in England and Wales) provided value for money".

[212] Reliance is also placed on ministerial correspondence to the Bar Council on 16 June 2011 in which the Minister stated that his objective was "to ensure that we have remuneration changes for criminal legal aid cases which are fair to practitioners

while at the same time recognising that the budget for criminal legal aid work in Northern Ireland has now been set".

[213] In similar vein, the applicants draw attention to a ministerial response to a recommendation made by the Access to Justice review. In the response the Minister said that the review of the 2011 Rules will be carried out in accordance with the statutory criteria. "This will include consideration of any impact of the new rules on the quality of criminal defence services and access to justice". The applicants' remark that there is no evidence that such a consideration was in fact conducted.

[214] At paragraph 47 of the applicants' skeleton argument the applicants quote words used by the Department in the context of the 2011 consultation paper in the area of time and skill. The Department, through an official, said:

> "The Department considers that the 2005 Rules are correctly structured to reflect time and skill required to deliver defence representation and legally aided criminal cases in the Crown Court. Specifically, standard fees payable in a Crown Court case are determined by reference to two principle elements:
>
> - The seriousness of offence for which the accused is prosecuted; and
>
> - The manner in which the case is disposed of.
>
> The Department considers that the fee structure contained in the 2005 Rules generally makes proper provision to take account of the time and skill required to represent defendants in legal aided cases, by ensuring that larger cases and cases involving more serious charges, receive higher levels of remuneration."

[215] The comment the applicants make about this statement is that the Department of Justice (in the consideration of the proposals leading to the 2015 rules) had disregarded the fact that the fee structure had been significantly amended by the 2011 Rules, with the removal of any provision for non standard cases which could not be remunerated by standard fees. Reference was also made by the applicants to the Department providing no evidential basis for its conclusion that the 2005 Rules made proper provision to take account of the time and skill required of Crown Court practitioners.

[216] There are other similar references which the applicants draw attention to in their skeleton argument which the court will not set out.

[217] The applicants say that the further reductions in fees effected by the 2015 Rules were underpinned by the Department's comparative costs analysis and the

conclusion that fees in Northern Ireland did not represent value for money. This thinking was maintained, the applicants say, at the expense of the consideration of what the statute required.

[218] The respondent's response to these contentions centres on the consultation paper published in 2013 which, the Department submits, showed that each of the specified criteria was considered in turn. In respect of time and skill, the respondent submits that the 2005 Rules were based on an assessment of this criterion. Fees, it was submitted, were matched to the type of case and to the work done. This was summarised in the Department's main deponent's affidavit where he said (at paragraph 19):

> "The standard fee structure had regard to the time and skill as more complicated and serious cases required more skilled representation and taking a longer time to deal with were paid a higher fee than more straightforward matters. The structure of the new system included a comprehensive matrix of fees prescribed according to:
>
> (a) The class of offence with which the assisted person was charged as set out in the table of offences …
>
> (b) The mode of disposal of the case (whether guilty plea, either at first arraignment … or subsequently … or trial …) together with refresher fees; and
>
> (c) Any case management or interlocutory type hearings – such as mentions, disclosure applications, sentencing hearings and confiscation hearings".

[219] The point is further made that the 2005 fees were based on actual hourly rates and brief fees which had been assessed and paid in respect of cases which fell under the 1992 Rules. The court has already accepted that this on the balance of probabilities is factually correct: see paragraphs [41] – [46] *supra*.

[220] The Department's case in this area was that the Rules over subsequent reviews have maintained the original structure developed in the 2005 Rules, though there has been an on-going process of amendment. An example of change was that in 2015 some offences have been reclassified to reflect issues of the time and skill required by those professionals dealing with such cases. It was also said that the rules have been progressive and the basic structure of them over time has been maintained. Where they have been added to, such as in respect of the PPE Range, this has been to provide a proxy indicative of cases which require more work on the part of the professional.

[221] As regards the various remarks (quoted above) on which the applicants rely the Department argued that they must be placed in their due context. In particular, the Minister's various statements have been to be read as applying to the circumstances as they were when they were made. Circumstances may change and there may be a need for reappraisal in some instances. There was and is nothing wrong with this.

Numbers and Competence

[222] Article 37 requires the Department to have regard to "(b) the number and general level of competence of persons undertaking work of that description".

[223] The case made by the applicant that this criterion was ignored arises partly from the overlap with some of the quotations set out above and partly from other factors set out in detail at paragraphs 113-116 of the applicant's skeleton argument.

[224] The underlying concern, in the applicants' submission, is in relation to the potential impact of changes to the rules on the health and vitality of the Bar and solicitors' firms. There has been and is, the applicants say, a need to sustain quality advocacy especially at the highest level and there has been and is a need to nurture the provision of solicitor services across Northern Ireland.

[225] The applicants have quoted materials from the Access to Justice review which, they argue, support the above objectives (see paragraph [68] above for the relevant quotation). The Minister himself, the applicants say, supported the benefits of an independent private sector legal profession to provide criminal defence services. Where publically funded work is involved, the Minister, the applicants pointed out, has accepted that remuneration should be set on a basis that provides reasonable margins for well run businesses that take advantage of efficiencies that can be secured from specialisation, rationalisation, economies of scale and new ways of delivering services.

[226] Building on these positions, the applicants say that "there is no evidence that these factors informed the Department's approach to the issues in the process leading to the 2015 Rules".

[227] The Minister, it is asserted, did not explore the willingness or ability of lawyers to offer legal aid services at the rates of payment proposed by the Department.

[228] The Department counters the applicant's arguments in this area by relying on its consultation paper which, it pointed out, considers the overall numbers of solicitors and barristers in private practice. Indeed the Department concluded expressly that "there [were] sufficient competent solicitors and counsel undertaking defence representation in Crown Court cases and that the structure of the 2005 Rules helps to ensure that an adequate supply of solicitors and counsel willing to carry out legally aided defence work, is retained".

[229] Additionally, the Department's lead deponent averred that "the Department sought to identify whether any defendants were unable to obtain representation from either solicitors or barristers at the Crown Court". However, there was no information or suggestion, from either applicant, that there were not currently sufficient numbers of practitioners with the appropriate training, skills and experience to undertake the work. In the Department's view, the applicants' concern in this area was one about the future effect of change on defence solicitors and barristers in terms of numbers and competence, but in this area, it was argued by the Department, that there was no empirical evidence to support the view that changes in legal aid funding had such a chilling effect as to prevent competent persons engaging in this type of work. In short, the Department was entitled to conclude that there were and would be adequate numbers of competent persons available to do the required work under the rules.

[230] In 2011, the Department recalled that both the Bar and LS predicted that the changes being made at the time would severely impact on the professions to the extent that there would be a damaging effect on the criminal justice system. In the event, however, this did not prove to be the case and there has been, says the Department, no evidence of defendants appearing without the appropriate level of representation.

Cost to Public Funds

[231] Article 37 of the 1981 Order requires the Department to have regard to (c) "the cost to public funds of any provision made by the rules".

[232] The applicants' skeleton argument deals with this heading at paragraphs 117-127. These paragraphs refer to a variety of matters but it is difficult to see where they make good the case that the Department did not have regard to the factor of cost to public funds of the provision made by the rules. Attention is drawn by the applicants to the Department apparently being unable to say what effect the 2011 Rules had had in terms of the cost to public funds. It will be recalled that the Department maintained throughout that the effect of the 2011 changes would not work through to 2015/2016.

[233] The Department's position on this issue, in contrast to the applicants, is that it was entitled to have regard to a range of financial indicators. It did have regard not just to the costs of the legal aid budget as a whole but to the specific costs of criminal defence legal aid work in the Crown Court. In particular, the Department had regard to a representative number of cases whose costs had been assessed under the 2011 Rules. In the Department's evidence, criminal legal aid costs in the Crown Court have to be viewed within the context of the Department's budgetary position as a whole.

[234] The Department also drew attention to the fact that it did provide the applicants with financial information which included information about the

operation of the 2011 Rules at various times in the course of the lengthy discussions with the professions which followed the consultation paper. This showed that the Department was constantly monitoring issues of costs to the public fund. Such information was provided in correspondence with the Bar on 11 April 2014 and on 2 July 2014. It was also provided to the Justice Committee on 27 July 2014 (see paragraph [170] above).

The Need to Secure Value for Money

[235] Article 37 of the 1981 Order requires the Department to have regard to "(d) the need to secure value for money".

[236] The applicants' case in this area is difficult to characterise as a case of the Department failing to have regard to the factor of value for money. This is because the reality is that the applicants' case is quite different and has been that the Department's focus on the need to secure value for money had eclipsed its consideration of other factors (see paragraph 128 of the applicants' skeleton argument).

[237] The applicants make other cases in this area which are worthy of mention. It is suggested that in fact the Department has elided the concepts of "value for money" and "cost to public funds" and that the Department has failed to understand that quality is an inherent feature of value for money.

[238] Moreover the applicants challenge the Department's comparative study of 213 cases as fundamentally flawed. This is an issue which the court will comment on separately later in this judgment.

[239] The Department maintained that it did concern itself with and have regard to value for money. This was exemplified, they say, in the consultation paper and is evident throughout its discussions with the applicants and others, such as the Justice Committee of the Assembly.

[240] The Department further maintains that while there was a link between value for money and cost to public funds, it appreciated that the two were not the same.

[241] Overall, the Department made the point that "value for money" is a relative concept which does not remain static. Rather it requires periodical review. When budgets are under pressure, value for money assumes greater importance. There is a need to keep quality and value for money under review (as was recommended by the Audit Office report (see paragraph [66] above)) and to monitor comparable publicly funded remuneration in other jurisdictions (a recommendation of the Access to Justice Review (see paragraph [69] above)).

Assessment

[242] At this point the court is only assessing the proposition that the Department did not have regard to the statutory factors. The court reminds itself that consistently with the ordinary rules of judicial review the onus rests with the applicants to establish any failure to have regard to these factors. It is for them to prove to the civil standard of proof that which they allege. The term "having regard to", in the court's view, should be read sensibly as meaning having addressed or considered. A superficial reference to a factor would not be sufficient to satisfy the test and nor would paying lip service to it be. In essence, the question to be answered is one concerned with the court's assessment of the evidence before it, read as a whole. Looking at each of the factors in turn, the court bears in mind the broad point that the consultation process encompassed each of the factors and the consultation paper issued by the Department referred to each one. Thereafter there was a very extensive and lengthy period of discussion with the applicants and with the Justice Committee of the Assembly. All of this has been well documented. While it is true that the emphasis during the preponderance of these discussions was on the issues of budgetary pressure and value for money, particularly as shown by the apparent findings of the comparative study of costs in the 213 cases, this is not to say that other factors were not also discussed and taken into account. The summary which the court has undertaken contains many references to discussions about the time and skill factor and the number and general competence factor. Both in the course of the consultation process and beyond important elements related to the impact of the proposal holistically: who would be expected to do the work; whether the professions would be detrimentally affected by the changes and if so, to what extent, particularly in the case of solicitors; whether the quality of the work performed would suffer; whether any defendant would end up lacking representation of the appropriate standard; whether there should be a move to a single plea structure; and, more radically, whether the time has come to adopt a GFS model. This list is not intended to be exhaustive.

[243] In the court's estimation, it has not been demonstrated by the applicants that the Department did not have regard to the issues of time and skill which work of the description to which the rules relate requires. It seems to the court that this aspect was considered and the court accepts the Department's arguments on this point. The structure of the 2005 Rules, in the court's view, was a constant in the on-going process of discussion. The agenda concerned amendments to those rules.

[244] The same, in the court's view, is the outcome when one looks at whether the number and general level of competence of persons undertaking the work of various descriptions is examined. The court again accepts the Department's case that it did address this factor and is not satisfied that it has been demonstrated otherwise. The materials the court has considered and summarised above show that this was so. Apart from the terms in which the consultation document was published, the role of each branch of the profession was considered as was the potential impact of the proposals. Any potential effect on access to justice through the loss of personnel within the legal profession was the subject of numerous exchanges between the

Department and others. The court rejects any suggestion that the Department was operating with a closed mind. It is to be noted that it sought information about potential impacts from the professions but with limited success (see: paragraphs [140] – [144] above). There also were discussions about whether, in the context of the proposals, the quality of representation might suffer.

[245] The factor of the cost to public funds of the provision made and also that of value for money, it seems to the court, were plainly at the centre of discussions over a substantial period. This was and is unsurprising in the times in which we live. It is difficult to conclude that there is any real evidence to support the idea that there was confusion over these factors such as to lead the Department to elide the concepts and so fall into significant error. The court is not persuaded that this was so. Equally, the court does not find that the Department's approach in this area demonstrated a failure to have regard to the factor of value for money by reason of the distinction drawn by the applicant between the element of cost and quality. The court harbours no belief that the Department was unaware of the inter-relationship between the concepts of value for money and quality.

[246] In the light of these conclusions it seems to the court to follow that the particular allegation made by the applicants that the Department had failed to have regard to any factor other than that of value for money (and/or cost) cannot be sustained.

[247] It is therefore the court's view that, unless a different case to that which the court has just rejected can be promoted, it will follow that how the Minister chooses to deal with the four factors, having had regard to them, will be an issue about the weight he decides to give them. As the court has already noted, issues of weight are generally subject only to an irrationality challenge, as the well-known case of Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759 shows. The issue of judgment is usually viewed as within the exclusive province of the decision-maker (see the speech of Lord Hoffman *supra* at page 780). This approach, for the avoidance of doubt, transcends the subject matter and does not apply only in planning matters: see Lord Brown's *dictum* in Secretary of State for the Home Department v AP (No 1) [2011] 2 AC 1 at paragraph [12] where he said "the weight to be given to a relevant consideration is, of course, always a question of fact and entirely a matter for the decision maker – subject only to a challenge for irrationality".

[248] Within the context of relevant factors, such as those found within Article 37, the Department will, it seems to the court, be bound to make a wide variety of judgments. Examples will often be concerned with matters of degree: at what point might the proposals affect the availability of professionals to do the work in the future; how significant is the possibility that the proposals may create a head-wind to access to justice; how real is the prospect that changes in the fee structure may affect the quality of the defence which a defendant on legal aid is provided with; what will be the impact of the proposed reduction in fees; and so on. Generally these sorts of judgments will not be set aside unless they can be demonstrated to be

irrational. Moreover, establishing irrationality is difficult. As Lord Hailsham said in Re W (An Infant) [1971] AC 682 at 700:

> "two reasonable [persons] can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable…".

The court is clear in its view that, subject only to what is said at paragraph [250] below, the applicants have not established any case of ministerial irrationality in respect of the way he dealt with the factors which he had to consider.

[249] The first ground of judicial review also makes reference to the Minister "adopting an erroneous approach to each of the four matters". This, the court believes, adds little to the grounds on which it has just ruled. The court does not consider that it can be said in this case that the Minister had misdirected himself. How he decided to go about his task was a matter for the Minister to determine as was his approach to the issue of the depth of his inquiry. While there may be aspects of how the Minister and his officials comported themselves in the course of the decision making process which could attract criticism, the standard which would for judicial review purposes have to be breached is one of unreasonableness. For example, the court has not been impressed by the extent to which the outcomes of the 2011 process had been measured before the Minister set out on the journey leading to the making of the 2015 Rules, but it does not follow, and the court does not find, that this renders the 2015 Rules *ultra vires* because it seems to the court that a reasonable Minister could lawfully conclude that it was necessary to pursue further changes due to financial and budgetary pressures, even before there has been a full assessment completed of the effects of earlier changes. The court also is of the view that the proposals as implemented could not be viewed as unlawful because of they might create a chilling effect on the provision of services to those who qualify for or deliver criminal legal aid services. In the court's view, there is insufficient evidence available to establish such a scenario in this case. The difficulty in making good a case of this nature referred to by the court in R (Ben Hoare Bell and Others) v Lord Chancellor [2015] EWHC 532 (Admin) at paragraphs [67]-[70] has not been overcome in this case.

[250] Whether Article 37 had been complied with, however, can also be considered from the point of view of the purposes or objects of the statutory scheme. It is the court's view that there remains an argument as to whether the rules as made may conflict with the principles which underpin the promotion of statutory purpose. This arises in this case in respect of one particular issue *viz* whether the provisions in the rules dealing with the removal of GP2 fees may conflict with the underlying objective, accepted on all sides, of ensuring fair remuneration for solicitors. To consider this issue an appropriate way forward is to view the first and third grounds as a composite ground of challenge.

The First and Third Grounds of Challenge Taken Together

[251] It will be recalled that the third ground of challenge related to the changes made in the 2015 Rules in respect of fees hitherto dealt with under the headings of Guilty Plea 1 and Guilty Plea 2. Ground 3 sets forth the particular case that the 2015 Rules had failed to provide fair remuneration for solicitors in this sphere as under the new arrangements, it is alleged, solicitors are no longer being remunerated for work they necessarily do in representing their clients in cases where their client pleads not guilty at arraignment but ultimately pleads guilty before the end of the first day of trial.

[252] Such a failure, if it can be made out, is open to attack in a variety of ways. First, it may be said to be contrary to the purpose of the 1981 Order as it has the effect of failing to provide fair remuneration in the way just mentioned. Indeed in a particular case it might lead to a situation where a solicitor failed to do the work in question, on the basis that he is not being paid for it, with consequent damage to the Article 6(3)(c) rights of the legally aided defendant. That plainly has not yet arisen so far as the court knows. Secondly, it may be argued that the existence of circumstances in which the legally aided defendant has to rely on a solicitor working for no remuneration demonstrates neglect by the rule maker for factors within Article 37, the most likely one being the factor which requires attention to be given to time and skill in the context of the work in question.

[253] Before considering these arguments, it is important to see whether the factual substratum necessary to support the third ground of challenge has been established.

[254] In this area the court has already set out how the architecture of the 2005 Rules has been amended over time (see paragraphs [15] – [36] *supra*). The court also has before it detailed affidavits from solicitors who have offered accounts of the necessary work that they must do after arraignment but before trial in their experience. These will be discussed below.

[255] It seems to the court that the Department in its original consultation document preceding the 2015 Rules was clear in its position that what it wished to do was to remove the old GP2 fees from the rules altogether: for solicitors and barristers alike (see paragraph [94] above). The justification given was that the Department had accepted the argument in the Criminal Justice Inspection report for a single guilty plea fee in the Crown Court. This proposal meant that the old GP1 fee would have to be remodelled and replaced by what would become known as the guilty plea fee. The new guilty plea fee, unlike the old GP1, would not be all inclusive and would operate in tandem with certain additional fees. The effect of these changes had the consequence of substantial cost savings.

[256] The consultation paper did not set out the detailed figures as to how the GPF was to operate. As has been traced above, each of the applicants strongly criticised the proposed change and lobbied the Department at length.

[257] When the post consultation report became available on 31 January 2014 it charted a different course as between solicitors and barristers. In essence, while each profession, it was proposed, would receive the new guilty plea fee (though not an identical guilty plea fee in each case) barristers only were to receive a further fee which was entitled a trial preparation fee. The rationale for this has been set out above at paragraph [163] above. It was acknowledged by the Department that the problem was that the new guilty plea fee would not provide sufficient remuneration where the case had to be prepared for trial but later the defendant pleaded guilty. It was, it appears, to make up for this shortfall in fees, that the trial preparation fee was devised for barristers. Interestingly, the post consultation report made no comment upon the effect this might have on the goal of a single guilty plea fee which had been the original inspiration for change and also made no comment on why solicitors should not receive a trial preparation fee also – as they had argued for in the consultation process.

[258] There was also no suggestion in the post consultation report that the Guilty Plea Fee for solicitors was intended to pay him or her for all work done in the window of time which in the past had been covered by the GF2 fee. It seems to the court that there is a clear inference that the Department made a positive decision to provide for the work done during the relevant timeframe by barristers but not to provide for such work or similar work being done by solicitors.

[259] The question, therefore, arises as to whether in fact solicitors do any substantial work during the timeframe which ought to be remunerated?

[260] On this point, extensive affidavit evidence which has been placed before the court by the LS which makes the case that during the relevant timeframe solicitors in cases which have not pleaded out at arraignment continue to do substantial work. The court in this regard refers to the affidavits of Mr McDermott at paragraphs 63-66 and Mr Shields at paragraphs 14-21. These affidavits, in the court's view, substantiate what in any event seems an obvious proposition that solicitors are actively involved in working for their clients in the period from arraignment to a later plea in the great bulk of cases. For example, Mr McDermott, a solicitor of substantial experience and a long-time member of the Solicitors' Criminal Bar Association, in speaking of the role of the solicitor in the preparation of a Crown Court trial, refers to "the continuing process of engagement" involving the defendant, the prosecution, the court and additional parties such as translators and defence witnesses, including expert witnesses. The work, he avers, includes detailed analysis of the papers; assessment of the prosecution case; consultations with the defendant (which may involve in the case of a defendant remanded in custody a prison visit or the use of a video-link); the briefing of counsel; the review of physical exhibits (for example, video recorded interviews with a complainant); the examination of material provided under the prosecution's continuing duties of disclosure (and third party disclosure); consultation with defence witnesses (and potential witnesses); the instruction of experts (a matter frequently requiring the solicitor to acquire a level of understanding of the applicable area of expertise); and other matters besides which he lists. Mr McDermott makes the point that the

completion of these tasks requires expenditure of significant time but may result in a saving of time and resources for the criminal justice process. In these circumstances, he refers to what he describes as "a striking example of unfairness under the 2015 Rules" *viz* the failure to provide for the trial preparation work of a solicitor when a defendant enters a plea of guilty after first arraignment but before the end of the first full day of trial and the trial does not proceed further. Such a situation arises, he says, for a number of reasons. It may be that additional prosecution evidence is served which gives rise to a change in the defendant's attitude. It may be that advice to the defendant changes or that the attitude of the prosecution changes, for example, where it agrees to accept a plea to a lesser offence. It may be that an expert's report provides a previously unavailable view as to the viability of a defence to be taken by the prosecution or defence.

[261] In Mr McDermott's view, "fair and proper recognition of the work done by solicitors following arraignment to bring a Crown Court case to trial requires regard to be had to the time and skill involved in that multi-faceted task". The court thinks that this view is reasonable.

[262] If the above is correct, as the court thinks it is, the 2015 Rules produce, not as a result of unforeseeable omission, a failure to provide to solicitors fair remuneration for work actually and properly done by them.

[263] The court does not consider that the averments made by the Department's lead deponent in this area to the effect that the new Guilty Plea Fee was intended to recognise all of the work required to be undertaken by solicitors up to the point at which the trial proceeds can be accepted. As the court has already pointed out, there is no reference to this policy goal in any of the contemporaneous documentation. Even at the very end of the process, this case was not being made in the Minister's letter to the Chairman of the Crown Court Rules Committee on 25 March 2015: see paragraph [194] above. Alternatively, if the lead deponent's averments are correct, the court does not believe that his intention has been realised, given the strength of the evidence of practising solicitors who have made affidavits in this case strongly averring to the situation that under the 2015 Rules solicitors will not be paid for such work.

[264] The issue which now arises is how this state of affairs impacts on the legal situation. Counsel for the applicants has put three cases before the court which she submits deals with this very type of issue.

[265] Reliance was placed on Re Brownlee's Application [2014] UKSC 4; Re Burns [2015] NIQB 24; and R v Higgins [2014] NICA 4.

[266] In Brownlee, the applicant had been convicted of serious offences but before the jury had found him guilty he dismissed his legal team consisting of senior and junior counsel and solicitor. After the finding of guilty by the jury, the trial judge proposed to hold a sentencing hearing and he extended the applicant's legal aid certificate as he expected the sentencing hearing to be complex. Under the 2005

Rules as amended by the 2011 Rules, the fees available in this circumstance for counsel were, in accordance with the standard fee scales, so unattractive that no one could be found who would do the work for them. While prior to 2011 there had been provision made in the Rules for a Certificate of Exceptionality to be given in a case where the standard fees did not allow for fair remuneration, this provision had been removed by the 2011 Rules. In these circumstances the applicant judicially reviewed the absence in the Rules of any ability to be able to modify the standard fees to be paid in this type of circumstance. Treacy J held in the applicant's favour at first instance. Ultimately, on appeal to the Supreme Court, that court also held in the applicant's favour. Lord Kerr, who gave the leading judgment, said that:

> "The assessment and payment of fees to a legal representative who has replaced another at the sentencing stage of criminal proceedings was, self-evidently, a material consideration which should have been taken into account by the rule-making body which introduced amendments to the 2005 Rules by the 2011 Rules."

Moreover:

> "It has frankly been acknowledged that the situation was not averted to at the time of the making of the 2011 Rules."

Therefore, "there was … an admitted failure to have regard to a relevant factor and, on that account, judicial review will lie of the decision to introduce the 2011 Rules without making provision for the payment of fees which would properly reflect the preparatory work which a legal representative, new to the case at the sentencing stage, would have to undertake."

Lord Kerr went on:

> "Since Article 37 of the 1981 Order requires the rule-making body to devise rules that prescribe payments to be made which reflect the time and skill necessary to carry out particular types of criminal legal aid work, a failure to make provision for remuneration, for example, preparatory work by a new legal representative is, to that extent, ultra vires the enabling provision. The situation is not relieved by the circumstance that the rule-making body must also have regard to the cost of public funds of any provision made by the rules; and to the need to secure value for money. These factors complement the obligation to have regard to the time and skill

> required to undertake particular forms of work; they do not extinguish it".

[267] Re Burns was another judicial review where the argument centred on the alleged failure in the 2005 Rules, as amended by the 2011 Rules, to make adequate provision to enable fair remuneration to be obtained for the exceptional work which counsel would have to do in making a peculiarly complex abuse of process application on a pre-trial basis. Treacy J held that this state of affairs was *ultra vires* the 1981 Order as the rules operated as a disincentive to advocates to take on the most difficult cases requiring the most extensive preparation. Such an outcome he said "is contrary to terms of the enabling legislation [and] to the public policy underlying that legislation".

[268] R v Higgins is a different type of case altogether. It took the form of an appeal by an appellant from the decision of a Crown Court Judge relating to the making of a confiscation order against the defendant. The appeal was successful but what is of interest for present purposes were comments made by the court about the appellant's legal team at trial abandoning the appellant at the end of the trial when the confiscation order proceedings were pending. This step was taken by the legal representatives because of the inadequacy of the remuneration available for the conduct of complex confiscation proceedings under the 2005 Rules as amended. The court criticised the counsel involved for not continuing to represent their client in those proceedings and went on to say:

> "If, indeed the Legal Aid Rules and/or the practice and policy of the LSC entail the limiting of legal aid remuneration in all confiscation proceedings in criminal cases to a small fixed fee suitable for a mere application it would not be difficult to see how such rules, policy or practice would be open to challenge in judicial review on the grounds of Wednesbury unreasonableness and on the grounds that such a rigid policy or rules would be unlawful in the light of the approach taken by the Supreme Court in Re Brownlee …. The rigidity of the fixed fee system … may work injustice …"

The above comments were *obiter dicta*.

[269] In the light of these authorities, the court is satisfied that the failure or omission by the rule-making authority to provide fees to solicitors for work necessarily and reasonably done for their legally aided clients during the period from arraignment to a guilty plea being entered before trial breaches the key principles and purposes which lie behind the 1981 Order, especially the principle of providing fair remuneration. This is an obligation of outcome, in the court's view.

[270] In the course of argument, it was submitted that it should be unprepared to make a ruling against the Department in respect of an issue of this kind as the challenge is of a general nature and is unconnected to the facts of a particular case. Authority for this proposition was put forward in the form of R (Unison) v Lord Chancellor [2015] EWCA Civ 935. The applicants' responded by relying on the Ben Hoare Bell case referred to above at paragraph [249]. In this latter case the court granted a remedy in a context which has substantial similarities to the present case where it was being alleged that a statutory regulation was repugnant to the purpose of the relevant statutory scheme. The Unison case, in comparison, involved a different sort of challenge which turned, *inter alia*, on the issue of whether the imposition of fees to access certain legal proceedings breached the EU principle of effectiveness. Whether it did or not depended on whether there was evidence that potential claimants could not afford to pay the fees and whether payment of the fees was impossible in practice. The evidence adduced in the Unison case related principally to statistics about the decline in the number of claims being taken. In those circumstances the court indicated that the absence of evidence about individual complainant's financial position was important and lacking. The court, however, did not say that evidence of notional complainant's could not have assisted in establishing the claim. In these circumstances the court does not view Unison as an authority which precludes the making of a ruling in this case in respect of the position of solicitors under the 2015 Rules. However, it is of the view that Ben Hoare Bell is of assistance in showing that in proper circumstances it can be done. The court will consider later what, if any, remedy is appropriate in respect of this matter.

Consultation

[271] The second ground of challenge relates to the consultation process carried out by the Department. It is alleged by the applicants that it did not comply with the Sedley criteria.

[272] There is no dispute between the parties that the Department was bound to consult the applicants on its proposals for changes to the 2005 Rules, as amended. This was not because there was any statutory requirement on it to consult the professions. There was and is no such obligation. It was because the case clearly fell within that class where the obligation arises from a legitimate expectation borne of established practice on the part of the decision-maker: see: R (Plantagenet Alliance Ltd) v Secretary of State and Others (*supra*) at [97]-[98].

[273] The origin of the obligation is of secondary importance in this case as what counts, at least for present purposes, is whether the consultation process was conducted in accordance with the requirements of legality. These requirements have been the subject of discussion by the Supreme Court in a recent decision called R (Moseley) v Haringey LBC [2015] 1 AER 495. In this case the Supreme Court endorsed the well-known Sedley criteria as to the key requirements in order for a consultation exercise to be conducted lawfully: see, in particular, Lord Wilson at [25]. These are:

(i) That consultation has to take place when proposals are still at a formative stage;

(ii) Sufficient reasons have to be given for any proposal to permit intelligent consideration and response;

(iii) Adequate time has to be given for consideration and response; and

(iv) The product of the consultation has to be conscientiously taken into account in finalising any statutory proposals.

[274] The applicant submits that the consultation process in this case was defective because no option that did not involve significant cuts was proposed or identified as having been considered but rejected by the Department. In other words, the applicant submits that the consultation document communicated a preordained outcome. There was no consultation about whether cuts were necessary, fair or appropriate. Additionally, it is argued that the Department did not conscientiously take into account the outcome of the consultation process.

[275] The Department's response has been to say that in fact it consulted on a variety of options for change and that in its consultation paper it had said why change was, in its view, required. On its behalf, it was emphasised that the respondents to the consultation paper were free to make such representations as they wished in connection with the proposed options. It was open to a respondent, it was argued, to propose that no change at all was required. In respect of the allegation that the Department did not consider conscientiously the outcome of the consultation process, the Department submitted that it was clear that this was incorrect as, following a long process of interaction during which it is had provided extensive further information to the professions, it made significant changes to the proposals in a variety of areas.

Assessment

[276] The court has already set out above a substantial account of the consultation process (see paragraphs [81]–[164]). It will not repeat it here. What, however, seems clear is that the Department did in its consultation paper of 5 July 2013 explain the financial position confronting it. At paragraph 3.10 of the paper it is noted that it was expected that there would be a substantial shortfall between the assigned budget for legal aid and forecast expenditure. A table was published of the spending in question over a period of three years.

[277] The position as regards criminal legal aid was also specifically addressed with the Department coming to the conclusion that in the light of the comparison of expenditure between Northern Ireland and England and Wales, further reductions were needed. This was explicitly stated.

[278] The Department also set out its approach as to what it saw as the need to secure value for money.

[279] It is against this backcloth that in the consultation document the options for change were then set out. It appears correct to say that no option for change which did not involve significant cuts was proposed. However it is the court's view that it was implicit in the paper that the option of doing nothing had been rejected.

[280] After the publication of the consultation paper there appears to have been an on-going engagement between the Department and the professions over a substantial period. Without going into the detail of the factual ground (which is summarised above) it seems to the court that there is force in the point that the Department was co-operative with the professions in providing necessary information and source materials, especially in relation to the comparative study where, in effect, the raw material upon which the study was based was provided to the LS (for their forensic accountants) and the Bar. There were numerous meetings and discussions in respect of a range of issues. All of this did result in changes (which are set out above at paragraphs [163] – [164] above). Importantly, there was a modification of the depth of the cuts which the Department intended to make in respect of each of the professions. But, the discussions also led to various other changes being made to enable minimal or no interference with some particular fees or classes of fee, memorably described as areas of "heavy lifting" by the Bar. This process inevitably involved, within the overall fees matrix, an element of redirection of resources from one area to another.

[281] Given all of these circumstances, the court is not satisfied that there has been any failure to comply with the Sedley criteria in this case.

[282] Firstly, it is not seriously in dispute that the consultation process took place when proposals were at a formative stage. In fact, as can be seen from the material summarised above, there was advance notice to stakeholders of the upcoming review as to whether changes in the Rules may be necessary and the criteria for that exercise were spelt out. This was followed some months later by the consultation paper which ushered in a lengthy period of discussion, as is evidenced in the account of events provided above, before the outcome of the process was published in the Post Consultation Report. Post-publication of that report, discussion did not cease.

[283] Secondly, the court considers that sufficient reasons were given for the proposals being made. In this regard, it will be recalled that the parties had a continuing relationship and regular contact extending over a wide range of issues in the subject area of legal aid, including fees issues relating to Crown Court proceedings. There was, on the part of all concerned, an existing familiarity in relation to the agenda. Accordingly, the content of the consultation paper must be read in its due context. It seems to the court that there was no need for the Department to consult on a no or no significant cuts option in all of these circumstances. Rather, it is the court's view, that it was open to the Department to

set its objective, especially if it is one driven by resource considerations, and then to consult, as occurred in this case, on the options to achieve it. Provided the Department acts fairly and rationally, it is difficult to see why it cannot determine the scope of its consultation. In the court's view, while there may be cases in which a greater volume of information might need to be produced than that provided in this case, including information about alternative but discarded options, such information was not in the court's judgment required here.

[284] Thirdly, there is no complaint in this case that adequate time was not provided for consideration of the consultation paper and the making of a response.

[285] Fourthly, the court is unconvinced that the Department did other than consider conscientiously the responses received and factor these into its final position – which in significant ways was different from the position set out in the consultation paper.

[286] For these reasons, the court is satisfied that the way in which the consultation process was conducted in this case was lawful.

[287] In view of the above conclusions, it is not strictly necessary for the court to seek to resolve a substantial debate between the parties about whether defective consultation may render subordinate legislation vulnerable to being struck down. The Department sought to rely on the well - known case of Bates v Lord Hailsham [1972] 3 AER 1019. In this case Megarry J had held that in the context of the exercise of legislative functions there was no general obligation of fairness which required consultation with bodies affected by a proposed Order. The legislator was not bound, absent statutory provision, to comply with the rules of natural justice. He put the matter in this way at page 1024:

> "The function of the committee is to make or refuse to make a legislative instrument under delegated powers…Let me accept that in the sphere of the so called quasi-judicial the rules of natural justice run, and in the administrative or executive field there is a general duty of fairness. Nevertheless these considerations do not seem to me to affect the process of legislation, whether primary or delegated. Many of those affected by delegated legislation, and affected very substantially, are never consulted in the process of enacting that legislation; and yet they have no remedy. Of course, the informal consultation of representative bodies by the legislative authority is commonplace; but although a few statutes have specifically provided for a general process of publishing draft delegated legislation and considering objections…I do not know of any implied right to be consulted or make objections, or any principle on which the courts may enjoin the legislative process at the suit of

those who contend that insufficient time for consultation and consideration has been given".

[288] It was therefore suggested that as a matter of law in the present context the applicants' criticisms of the consultation process were misconceived and could not give rise to any remedy.

[289] The applicants, in response, have argued that Bates should not be regarded as a barrier to relief being granted even where the function at issue was legislative. It was suggested that administrative law had developed substantially since 1972 and that since that time new doctrines, such as that of legitimate expectation, had emerged which had the effect of requiring public authorities to give effect to obligations borne of established past practice, such as those arising in this case.

[290] In support of their argument the applicants referred the court to a substantial volume of recent authority both in Northern Ireland and England and Wales. As regards the former, reliance was placed on two judgments of Weatherup J (as he then was): General Consumer Council's Application [2006] NIQB 86 and Christian Institute's Application [2008] NI 86. In both of these judgments the court had to consider an argument concerning consultation made in the context of the exercise of a subordinate law making function. In each of these cases the respondent authority had relied on Bates in the manner described above. In the Consumer Council case Weatherup J, following a substantial discussion, held that despite the legislative function being performed, a duty of consultation could arise by means of legitimate expectation and that that obligation could be the subject of supervision by judicial review to ensure that where consultation was required it was carried out properly. In fact, he held in that case that the consultation which had been carried out was not carried out properly. In Christian Institute, the Judge followed the approach he had taken in Consumer Council, with a similar result.

[291] As regards authorities in England and Wales, the applicants relied on three cases: R v Secretary of State ex p United States Tobacco International Ltd [1992] QB 353; R (C (A Minor)) v Secretary of State for Justice [2009] QB 657; and R (on the application of the Members of the Committee of Care North East Newcastle) [2012] EWHC 2655 Admin.

[292] The court has considered all of these cases. It seems to the court that broadly they support the view that legitimate expectations can create obligations that can give rise to remedies in judicial review even where the context is legislative. In the England and Wales cases, Bates was not referred to and the court would incline to accept, if it stood on its own, that United States Tobacco International is a case which might be viewed as heavily dependent on its particular facts. However this case should be read now in the context of the other cases.

[293] The conclusion the court reaches on the point in dispute is that if it had to decide the point because the consultation process had been substantially defective it would follow the approach of Weatherup J.

Impact Assessment

[294] The fourth ground of the applicants' challenge is that the Department failed properly to approach the issue of impact assessment in respect of the proposals leading to the 2015 Rules.

[295] Impact assessment, as a process, derives from intra-governmental requirements in the area of policy-making. The court was taken to two documents in this regard. The first was called "A Practical Guide to Impact Assessment" which is an OFM/DFM publication and the second was called "Better Policy Making and Regulatory Impact Assessment: A Guide for Northern Ireland", which was published by DETI in December 2004.

[296] The Practical Guide is concerned with the development of policy and traces a series of stages in that process. Impact assessments are one of those stages and are described in the Practical Guide as "a basic component of best practice". The impacts to be assessed are wide-ranging. Under the heading "Social" reference is made to health, crime, community safety and victims, equality, human rights, rural and social inclusion. Under the heading "Economic" reference is made to economic appraisal, economic impact assessment, regulatory impact assessment, legal aid impact and State Aid compliance assessment. Under the heading "Environmental" reference is made to environmental assessment and strategic environmental assessment. It is acknowledged in the Practical Guide that many of the assessments will cut across the various categories.

[297] It would appear that a key feature of impact assessment is to identify the policy aim *viz* what the authority seeks to achieve. "Screening" is the process which helps to determine when a full impact assessment may be required and also when no further action is necessary.

[298] Where there is a full assessment done, it is expected that this will identify negative and positive aspects of the proposal – in relation to the different subject areas of assessment. Measures to reduce or remove negative impacts or to enhance positive impacts may then be taken. It seems clear that the assessment is intended to be evidenced based with the issue being assessed being informed by both quantitative and qualitative evidence. An aspect of assessment is not just how significant a particular impact is likely to be but also how likely the impact is to occur. In making final decisions in respect of the policy, it is expected that decision-makers will take into account the outcome of the impact assessment process.

[299] The DETI publication is written in the context of regulatory impact assessment ("RIA"). This is designed to assess the impact of policy options in terms of costs, benefits, and the risks of the proposal. The process is intended to help the policy maker to:

"

- Think through the full impact of … proposals.
- Identify alternative options for achieving the desired policy change.
- Assess options …
- Ensure your consultation exercise is meaningful …
- Determine whether the benefits justify the costs."

[300] In Northern Ireland the use of an RIA is mandatory where there is a likely impact on businesses, save where the impact involves negligible costs or savings.

[301] The contents of an initial RIA are similar to those discussed in the context of screening impact assessments already referred to. As part of the initial assessment, there is a need for early consultation with those affected.

[302] In the context of concern over potential impact in respect of small businesses, a small business impact test should be used. This involves sounding out small businesses to check if there is an impact and, where there is, the carrying out of impact tests with focus groups. Ultimately, if there is an impact, this will be fed into a partial or full RIA as appropriate. Significant impacts on small businesses can be where there is a high cost involved or a disproportionate cost.

[303] In the present case, as has been set out above (see paragraphs [101] – [106] *supra*), there was a consultation document in respect of impact assessment sent to those who received the Department's substantive consultation paper. This document noted that it was issued in accordance with the OFM/DFM Policy Guidance. At Section 5 of the document it referred to the areas of impact assessment covered for the purpose of screening. These are areas set out earlier in this section. The outcome of the screening process appears to have been that the proposals were, provisionally at any rate, screened out from full assessment in all areas of assessment, save equality impact assessment, which is a statutory requirement and falls into a separate regime from that here under consideration.

[304] The applicants contend that the decisions evidenced in the impact assessment consultation document - effectively to screen out all assessment areas was unlawful and at least some of the areas screened out ought rationally to have been made the subject of full assessment. In this last respect attention is drawn to regulatory impact assessment and economic impact assessment among others. The applicants, in particular, note that the proposals involved significant reduction in criminal legal aid fees, which is undoubtedly correct.

[305] The Department, on the other hand, maintains that the approach taken was one well within their discretion to take. It says concerns about the impact of earlier changes (such as those made in 2011) on solicitors and barristers had not been substantiated so that on this occasion it was entitled to take this into account. The Department also made the point that the applicants had produced no actual evidence during the decision-making process to demonstrate any relevant impact.

Assessment

[306] It does not appear that, despite complaints being made in the course of the consultation process about the issue of impact assessment and how it was carried out, any of the screening outcomes found in the impact assessment consultation document were ever revisited. Thus, the position in fact is that no area of assessment was ever made subject to a full impact assessment. The question is whether this outcome can be viewed as outside the bounds of a lawful outcome?

[307] In seeking to answer the question just posed the court takes into account that there is authority in Northern Ireland on the issue of whether the failure of a government department to carry out an impact assessment when developing policy was unlawful. The court refers to the decision of Treacy J in Re CPNI's Application [2011] NIQB 132. In that case the Judge held that such a failure was unlawful. At paragraph [56] he said as follows:

> "The Department has offered no convincing justification for its failure to comply with the guidance and appears to have overlooked or disregarded the requirements of 1.6 and 1.7. The failure to conduct such an assessment constituted the significant procedural flaw in the decision making process. The question then arises as to whether this flaw was sufficiently serious to render the resulting decision unlawful".

At paragraph [59] Treacy J went on:

> "The absence of a RIA confounds the legitimate expectation of the applicant (founded on the guidance) that one should have been carried out. The absence of such an assessment may well have resulted in relevant local information being left out of account in the process. I am therefore satisfied that the failure to conduct an appropriate RIA amounted to a procedural irregularity in the process".

[308] Whatever else may be said, the proposals in this case involved significant cuts in the fees payable to solicitors and barristers in the context of criminal legally aided proceedings in the Crown Court. The proposals, moreover, were temporally being made only a short period after other similarly based cuts in the same area of fees had been made as recently as 2011. There had been, moreover, on top of these, cuts to some barristers' incomes by in-roads being made in the area of the granting of legal aid for two counsel in criminal cases, with the number of cases obtaining this facility having been reduced.

[309] As a matter of first impression and common sense, in the court's view, it was obvious that the impact (including the cumulative impact) of such reductions would be likely to affect: small businesses, as many solicitors offices constituted; the areas in which small businesses operate (often in rural communities); and the prospects of, at least, those barristers who had done or were likely to do substantial criminal legal aid work in Northern Ireland.

[310] It seems to the court that the Department's view that in respect of impact assessments the onus rested on those potentially affected by the policy change under consideration to produce the necessary evidence to support the existence of the relevant impact was misconceived. Such a position is not consistent with the *modus operandi* of impact assessments, as described in the documents to which the court has drawn attention above. At the very least, it appears to the court that the job of the assessor is to be proactive in seeking evidence of impact, wherever it can be found. A good example is the use of small business impact tests in the context of regulatory impact assessments. No such steps appear to have been taken in relation to the proposals which were considered in this case. Nor does the court consider that the Department is right to say that, in effect, it could decide not to pursue the assessments, in view of what it saw as a failure by the professions to substantiate claims they had made on an earlier occasion involving similar proposals. Such an approach appears to be contrary to the rationale of the assessment process.

[311] There existed, in the court's judgment, a legitimate expectation on the part of the applicants that not only would impact assessments be done by the Department but that they would be done properly. This expectation, which arose out of the published literature in the area of the development of policy, has, on the facts of this case, been disappointed.

[312] The net position seems to the court to be as follows:

(i) The applicants had a legitimate expectation that there would be appropriate impact assessments carried out.

(ii) The Department did seek to carry out these assessments.

(iii) However, wrongly and inexplicably, all assessments (save for equality impact assessment) were screened out when it was obvious that in certain areas the case for a full assessment was self-evident.

(iv) On a conservative view, there ought to have been full assessments of economic impact; rural impact; and regulatory impact assessment, in the court's opinion.

[313] The above set of circumstances leads the court to the conclusion that a procedural impropriety has occurred in this area. If thorough impact assessments had been carried out, these may have benefited the decision-making process, as it can be seen that the area of the impact of the proposals was a heavily contested one

where evidence was thin on the ground. In these circumstances, the court considers that it should follow the approach of Treacy J in CPNI's Application referred to above.

[314] The court considers that the applicants' legitimate expectation in relation to the conduct of impact assessments was disappointed by the Department's unlawful approach to this issue. It will defer the issue of what, if any, relief should be granted in respect of this matter until a later point in this judgment. In so far as any issue arises in relation to this ground of challenge based on the Bates case *supra* the court adopts the approach referred to at paragraph [293] above.

Confiscation Orders

[315] As is evident from the court's reference in paragraph [268] above to R v Higgins, a feature of confiscation proceedings has, until recently, been that they attracted no bespoke set of fees for legal representatives under the rules.

[316] This state of affairs attracted a measure of judicial censure in the course of the proceedings in Higgins in the Court of Appeal, as has already been recounted.

[317] Thereafter the issue of a remuneration package tailored for such proceedings became the subject of extensive discussion between the Department and the Bar and LS. Indeed, it was one of the anomalies referred to at paragraph [62] above. A proposal for specific fees to be made available in respect of confiscation hearings was made by the Department in the Consultation Paper and this was followed up, in similar terms, in the Post Consultation Report of 28 May 2014. At paragraph 6.16 of the latter document it was stated that:

> "The Department is to amend the 2005 Rules to provide specific fees for confiscation hearings at the level of the highest daily refresher fee payable under the 2005 Rules".

Since that time provision has been made in 2015 Rules but this has not resolved the issues in this area.

[318] In the fifth ground of judicial review, the applicants maintain that "the provision made by the 2015 Rules for the payment for confiscation order hearings of daily fees is confusingly expressed and severance should be effected to the table following paragraph 14(2) of the Schedule to the Rules so as to reflect the intent of paragraph 14.2 and representations made by the respondent during consultation".

[319] The Department's lead deponent has addressed the background to this issue in his affidavit at paragraphs 233-234. In essence, he avers that what the Department consistently had suggested was that specific fees would be made available for this type of hearing "at the level of the highest daily refresher payable". That is consistent with what is said in the Post Consultation report.

[320] At paragraph 237 of his affidavit the deponent explains what this means. He said:

> "Under the 2005 Rules as amended where a case goes to trial, in addition to the relevant basic trial fee, daily refresher fees are paid depending on the duration of the trial. For solicitors there are three bands – 2-8 days; 9-16 days and 17-80 days. For counsel there are ten bands from 2-8 days up to 73-80 days. The amount of the refresher increases in line with the length of the trial and for each band, both a full day and a half fee is prescribed".

[321] The highest refresher, on the above analysis, would be the fee for a solicitor at the 17-80 day level and for a barrister at the 73-80 day level. The deponent, however, goes on to say that "the rate payable varies depending on the time spent in court as is clear from the rules".

[322] The relevant provision found in the 2015 Rules dealing with this is paragraph 14(2) of Schedule 1. It says:

> "(2) A hearing to which this paragraph applies shall not be included in the length of the main hearing or of any sentencing hearing for the purpose of calculating costs, and the fee specified in the table below as appropriate to the representative (including the category of counsel instructed as applicable) shall be payable for each day of the hearing.
>
> Table of Confiscation Hearing Fees

Solicitor Fee	QC Fee	Leading Junior Counsel Fee	Lead Junior Counsel Fee	Sole Junior Counsel Fee
Full day				
£525	£800	£600	£400	£520
Half day				
£263	£400	£300	£200	£260"

[323] In respect of the table, the Department's argument is that "on a sensible reading of the provision as a whole, including the table, it is clear that one fee is payable by way of refresher where the additional hearing on the day in question took half a day or less to complete (the half day fee) and another is payable where it took longer than that (the full day fee)".

[324] In the applicant's skeleton argument at paragraph 141 it states that "the section of the table which lists half day fees is otiose and should be severed from the

rules. There is no function within paragraph 14(2) to pay a half day fee or to delineate between days and half days and the table does not reflect the provision and is apt to confuse".

Assessment

[325] The court is of the opinion that the issue disclosed by these submissions should be determined in a case which raises the question of the interpretation of paragraph 14(2) before a relevant decision maker within the Legal Services Agency, which is the body now responsible for assessing fees. This is the way the rules intended such an issue to be dealt with. If there is dissatisfaction with that decision maker's conclusion provision is made in the rules for redetermination and for appeals to a specialist Master and, in some limited circumstances, to the Court.

A fundamentally flawed comparative analysis?

[326] An issue raised in the course of the proceedings, which does not appear in the Order 53 Statement, but which the court feels it should comment on, relates to whether the Department's comparative study, which had informed its approach to the making of the proposals, was fundamentally flawed as the Bar and LS have maintained. By this the court takes the applicants to mean that the study was so defective that no reasonable authority could have relied on it.

[327] The background to this issue has substantially been set out above. It appears that the Department carried out an exercise which involved taking 213 Northern Ireland cases which had been fully assessed for costs under the 2011 Rules for the purpose of ascertaining how those cases would be assessed under the GFS in England and Wales. The Northern Ireland cases were said to consist of a representative sample, a point not in dispute, and that they constituted some 20% of the cases assessed from the Crown Court within a defined timeframe.

[328] The outcome of the comparative assessment has been outlined at paragraph [88] above. In essence it was asserted by the Department on the basis of the study that fees paid in Northern Ireland for solicitors were 46% higher than in England and Wales; for junior counsel/solicitor advocate some 41 % higher; for and for senior counsel some 29% higher. This led on to proposals which went out to consultation for reductions in fee levels of 45% for solicitors and 30% for counsel.

[329] The above proposal understandably was resisted by the professions and, as has been recounted earlier in this judgment, the Department agreed to co-operate with the Bar and LS and, upon request, provided each with detailed information about the cases which had been selected for the comparative exercise together with information as to how it had been carried out. In the case of the Bar, it carried out its own examination of the materials provided whereas in the case of the LS it obtained the assistance of a firm of forensic accountants.

[330] As a result of the above the comparative exercise was the subject of many discussions between the Department, the Bar and the LS.

[331] Much of the discussion was taken up with the payment of fees to barristers with issues such as the representativeness of the sample (now not an issue); whether in fact the assessment of case costs in the context of the England and Wales Regulations was accurate; and whether differences between the jurisdictions affected the outcome.

[332] Unsurprisingly, in the course of discussions, various areas of difference between the jurisdictions did become apparent as well as differences in the methods of assessment as between the jurisdictions. Notably, the Department demonstrated no unwillingness to engage in discussion and it was prepared to take into account points which hitherto it had been unaware of and which made a difference to the figures. This occurred in relation to such issues as Travel Costs as a feature of fees for barristers as between the jurisdictions (they are calculated as part of the fees in Northern Ireland but not in England and Wales). In respect of these the Department agreed to substantially discount them: see a letter of 3 June 2014 from the Department to the Chief Executive of the Bar. Other admitted miscalculations were also discounted (*ibid)*.

[333] At all material times, however, the Department continued to hold to the view that the exercise in comparison remained a legitimate one and that it showed that costs in Northern Ireland in respect of criminal legal aid fees in the Crown Court were significantly higher than in England and Wales. While the Department was prepared to make changes to the precise percentages by which the Northern Ireland costs were higher than those in England and Wales in respect of the 213 cases, this did not alter its conviction that in England and Wales fees were better value for money than their counterparts in Northern Ireland. Ultimately the Department, after the consultation process had been completed, reduced the depth of the cuts in respect of standard fees as against those originally proposed largely to take account of the various factors concerning the comparison which has come to its attention. The proposed cuts for solicitors of 45% was lowered to 27% whereas the proposed cuts for barristers was brought down from 40% to 22%.

[334] The Bar and LS have remained of the belief, notwithstanding the discussions they have had with the Department over a prolonged period, that the latter's exercise in comparative costs was fundamentally flawed.

[335] The issue has been pursued in the forum of this judicial review application.

[336] Indeed for the purpose of this judicial review the Bar commissioned reports from expert forensic accountants notwithstanding that they did not do so at the time when the decision making was live. Consequently the Department had not seen these reports before they were served on them in these proceedings. This produced the reaction that after leave had been granted the Department filed a response of its

own commissioned specially from expert accountants to repel the case being advanced by the Bar's forensic accountants.

[337] In the course of the hearing the court indicated that it had considerable reservations about the parties filing evidence from forensic experts after the decision-making process had ended when that evidence had not formed any part of the decision-making process itself. This was especially so when it was clear that the issue had been the subject of substantial discussion between the parties during the decision making process and neither expert had been involved. Consistently with the court's understanding of the judicial review jurisdiction, the court expressed its view that it would be very unusual for evidence of this type to be received in a case of this type. If there had been any need for experts to become involved the obvious way in which this might occur was for the expert to have been engaged on their client body's behalf in the decision making process.

[338] The applicants' approach to this issue in these proceedings appears to involve two central propositions. First, the proposition that there were differences between the jurisdictions involved in the comparative study which could affect the comparative outcome. Secondly, it was argued that the differences between the jurisdictions were so significant as to render the exercise fundamentally flawed so that it was unreasonable for the Department to rely on it.

[339] In respect of the first issue, the applicants placed before the court in the course of their submissions a very extensive document – which the Department had not seen before - running to some 25 pages – setting out in detail and at length differences between the jurisdictions of Northern Ireland and England and Wales in the area of Crown Court practice and costs in respect of barristers' fees. Many of the major points made in this paper had, however, featured in the course of the history of the discussion between the Department and the Bar and LS in respect of the comparative study (and are referred to in the court's earlier narrative) but some were new matters collated for the first time and not dealt with in the course of the decision making process itself by any party.

[340] The Department has not responded to this paper in any formal way. However it appears to the court that it is not a matter of significant dispute that at least the broad thrust of the document's contents will be likely to be accurate so that it is safe to conclude that there are a range of differences between the practice and procedure of the respective costs regimes in each jurisdiction. The court does not believe that in itself this situation would come as a surprise to any party. There were bound to be differences and no-one had maintained either that the systems were identical or that the exercise was other than a robust one. The first proposition therefore can be accepted by the court.

[341] It is therefore necessary to go to the second stage and ask the question whether, given the extent of the differences, it has been demonstrated, the onus being on the applicants, that such differences as do exist render the comparative exercise fundamentally flawed so as to make it unreasonable for the Department to

have relied on it. It will be recalled from the discussion of judicial review principles above that the issue of the manner and extent of the decision maker's inquiry is one for the public body to determine not the court. In the court's view, there could be no credible suggestion made in this case that the Department were seeking to underwrite the legal accuracy of every detail of the assessment of costs under the English and Welsh system.

[342] In respect of the second issue, the expert accountants for the Bar and for the Department had meetings between them to see whether they were able to form an agreed view about the impact variations between the jurisdictions may have had on the outcome of the exercise. This produced a further report – one which depicted some areas of agreement, some areas of disagreement and some areas where the experts could not finalise any assessment.

[343] While the court remained of the view that the evidence of the forensic accountants was not evidence which ought ordinarily to be received in a judicial review it did agree to look at the joint paper *de bene esse*.

[344] Having considered the joint paper the court is un-persuaded that it demonstrates that the existence of differences between the jurisdictions renders the exercise conducted by the Department fundamentally flawed. Rather the joint paper, in the court's opinion, tends to show that the figures as to the extent of the differences in fees which initially were put forward by the Department were pitched too high and required some modification. However during the decision-making process the percentage differences were the subject of modification and it was those modified figures which were then used to bring down the levels of proposed reductions to standard fees put forward in the Post Consultation Report (the actual reduction in the case of barristers decreasing from 30% to 22%). In these circumstances, while there may be a relatively small further modification which could be justifiable, taking the joint accountants' report into account, there is still insufficient evidence, in the court's judgment, to enable the Bar's allegation to be shown to be made good or to demonstrate that, with the new information now available, it is established that the comparative process was so fundamentally flawed that the Department were acting unreasonably to rely on it.

[345] In any event, the court, having considered the joint report *de bene esse* rules that the expert accountants' reports created for the judicial review by the Bar and the Department and the joint report produced mid hearing all should not be received in evidence in this case for the reasons already given. This is not to be interpreted as meaning that there could never be circumstances where reports from experts could be received but such situations in the court's view would be likely to be rare and would not normally involve a case, like the present one, where the parties had already a substantial dialogue and discussion on the relevant issue prior to the end of the decision-making process and where there existed more than adequate opportunity to have introduced expert evidence into that discussion. In fact, in the present case the LS, it will be recalled, had the assistance of a forensic accountant

during the consultation process. But that expert did not swear an affidavit in these proceedings.

Exceptionality

[346] It is appropriate to make a brief mention of the above topic. When the applicants first initiated these proceedings they contained a ground for judicial review which attacked as unlawful the alleged failure by the Department to include in the 2015 Rules provision for exceptional cases which fell outside the standard fee structure.

[347] In fact the issue has not been pursued in these proceedings. The reason for this has been the subject of averments by the Department's lead deponent. He has explained that this issue was the subject of further consideration by the Department after the Rules were made. Moreover, that consideration resulted in the view being taken by the Department that provision does need to be made for exceptionality within the remuneration scheme. A consultation paper was published on the topic in September 2015.

Appropriate Relief

[348] The court has found for the applicants in respect of two issues:

(i) It has held that the fee arrangements made for solicitors in respect of work done by them between arraignment and the first day of the trial in a case in which the legally aided client in the Crown Court pleads guilty within that timeframe does not amount to fair remuneration and is repugnant to the 1981 Order.

(ii) It has held that the applicants' legitimate expectation that the Department's proposals would be subject to properly carried out impact assessments, where the conduct of these was reasonably required, as the court has held it was in respect of economic impact, rural impact and regulatory impact assessment, has been breached.

[349] As regards (i) above, the following options as regards appropriate relief seem to be open to the court:

(a) Make no order;

(b) Make a declaration along the lines set out above; or

(c) Seek to render the relevant provisions of the rules invalid and strike them down.

[350] A no order solution is not attractive, in the court's opinion, as it would mean that the court would take no formal step to ensure recognition of the finding it has arrived at.

[351] Making a declaration, on the other hand, is attractive as the court is confident that the Department would seek to rectify the state of affairs which has been disclosed without any need for any coercive action on the part of the court. At the same time there would be public recognition of the unlawfulness of the existing provision.

[352] Striking down the provisions is a step which, in the court's view, carries with it considerable difficulty in this case. It is not self-evident to the court how striking down would be accomplished. In particular, the court would be wary of attempting to carry out a surgical operation of trying to sever the good from the bad.

[353] The court will, in these circumstances, make a declaration in suitable terms in the interests of ensuring that the Department is provided with an opportunity speedily to rectify the situation in a thought out and appropriate way.

[354] As regards (ii), the court has no real hesitation in believing that the appropriate course is for it to make a declaration in this area. To strike down the regulations because of this procedural impropriety would, in the court's view, be a disproportionate reaction, especially as it is far from clear that had the required assessments had been done at the time, they would have altered, at least in any significant way, the policy proposals which the Department have given effect to. However the court wishes to make it clear that the failure to carry out proper impact assessments in this case is a serious matter which should not be repeated.

Conclusion

[355] The court will grant two declarations which will reflect the findings above. Otherwise, it dismisses the grounds of judicial review. It will hear the parties on the issue of costs.