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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

ICOS No:

Delivered: 09/02/2021

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY BRIAN TURLEY FOR
JUDICIAL REVIEW OF THE ONGOING FAILURE OF THE EXECUTIVE OFFICE
AND THE SECRETARY OF STATE TO PUT IN PLACE A SCHEME
PROVIDING FOR VICTIMS' PAYMENTS

Mr Barry Macdonald QC and Mr Jude Bunting (instructed by Phoenix Law) for the
(Appellant)

Mr Michael Humphreys QC and Philip McAteer (instructed by Departmental Solicitor's
Office) for the Executive Office for the (Respondent)

Dr Tony McGleenan QC and Ms Laura Curran (instructed by the Crown Solicitor's
Office) for the Secretary of State for Northern Ireland

Before: Morgan LCJ, Treacy LJ and O'Hara J

Morgan LCJ (delivering the judgment of the court)

[1] This is an appeal in respect of the funding of the scheme established by the Victims Payments Regulations 2020 ("the Regulations") making provision for the payment of pensions in respect of persons who sustained an injury as a result of a Troubles-related incident. McAlinden J heard the matter at first instance and found that the Executive Office acted unlawfully in deliberately refusing to designate a Northern Ireland Department to enable the scheme to progress. There is no appeal from that part of the judgment. The issue in this court concerns his refusal to declare that the failure of the Executive Office to provide a grant of funds to the designated Department constituted unlawful conduct.

Background

[2] The Stormont House Agreement ("SHA") was made on 23 December 2014. It is a political agreement reached between the political parties of the Northern Ireland Executive and the British and Irish Governments. It made proposals about dealing with the past. Paragraph 28 of the Agreement states that:

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

[3] An implementation group took forward some work on the pension issue but this was suspended in late 2015 because of political disagreement about legacy issues. As a result of other matters, the Northern Ireland Executive ceased to function in early 2017. On 24 May 2018 then Secretary of State for Northern Ireland (“SoS”) wrote to the Commissioner for Victims and Survivors asking her to update the Commission’s 2014 advice on a pension for those severely injured, to include psychological injury. On 31 May 2019, the Commissioner provided the updated advice. The advice was published on the Commissioner’s website on 17 July 2019.

[4] The Northern Ireland (Executive Formation etc) Act 2019 (“the 2019 Act”) was passed on 24 July 2019. Section 10 of the Act required the SoS “by regulations, to establish a scheme under the law of Northern Ireland which provides for one or more payments to be made to, or in respect of, a person who has sustained an injury as a result of a Troubles related incident.” It required the first regulations to be made by 31 January 2020 and to come into force before the end of May 2020.

[5] On 22 October 2019, the SoS launched a public consultation on a proposal for a scheme of payments in respect of troubles related injuries. It closed on 26 November 2019. Devolution was restored in Northern Ireland on 11 January 2020. On 31 January 2020, the SoS published the government’s response to the consultation stating:

“This document sets out our response to the main points raised through the consultation; in parallel I am laying a regulation in Parliament to provide the legal parameters for the scheme. The Northern Ireland Civil Service will intensify and finalise preparations to implement the scheme to ensure that the commitment to make it operational by the end of May 2020 is fulfilled.”

[6] A dispute has arisen between the Northern Ireland Executive and the SoS on funding. The commitment made by the parties in the SHA was to carry out further work to seek an acceptable way forward on the proposal for a pension for severely physically injured victims in Northern Ireland. It is common case that the regulations now extend the eligibility for pension to include psychological injury. In a letter issued from the Department of Finance in Northern Ireland to the Northern Ireland Office (“NIO”) on 12 May 2020, it was submitted that it was clearly a policy decision of the SoS to extend eligibility for the scheme and consequently expenditure appraisal and approval and responsibility for securing baseline funding should rest with the SoS.

[7] It was further contended that this was in line with the Statement of Funding Policy which states that “the body whose decision leads to the additional cost will meet that cost.” In particular, the Department of Finance relied on principle 10 at paragraph 1.17 of the Statement of Funding Policy issued by HM Treasury in November 2015 in respect of funding the Northern Ireland Assembly:

“Where decisions taken by any of the devolved administrations or bodies under their jurisdiction have financial implications for departments or agencies of the UK government or, alternatively, decisions of UK government departments or agencies lead to additional costs for any of the devolved administrations, where other arrangements do not exist automatically to adjust for such extra cost, the body whose decision leads to the additional cost will meet that cost.”

[8] In a reply dated 21 May 2020, the NIO asserted that victim payments was a devolved matter which the Executive was to take forward under the SHA. Parliament mandated a timetable for progress and the SoS made decisions on the shape of the regulations taking into full account the range of views expressed, including by the five main NI parties. The parties endorsed the broad approach, including the inclusion of psychological injury and of injury sustained outside Northern Ireland. It was not accepted, therefore, that the United Kingdom Government should fund the scheme. The SoS was exceptionally required to act in this devolved area by reason of the absence of the Executive.

[9] This dispute has not been resolved. On 30 March 2020, the Northern Ireland Executive considered the implications for the Budget in 2020/21 and recorded the commitment given by the Minister of Finance that if additional funds for victims’ pensions were not provided by HM Treasury, these would be made available from the NI Block.

[10] As a result of delays in setting up the scheme, funding was only required for administrative work associated with the setup in the 2020/21 year and that was provided by the Department of Finance in the sum of £2.5 million. As part of the budgetary process for 2021/22 and the two following years, the Executive Office has provided an estimate to the Department of Finance indicating a likely requirement of £28.7 million in 2021/22, £64.3 million in 2022/23 and £72 million in 2023/24.

[11] Subsequent to the hearing before this court, the Minister of Finance published a draft budget in which there is no provision to fund the Executive Office in respect of victims’ payments in future financial years. The Executive Office acknowledges that the scheme needs to be funded to operate properly. In the first affidavit sworn by Mr Gareth Johnston on behalf of the Executive Office, he explains that in the absence of an allocation for the proposed expenditure in the Budget estimates the Executive Office is prohibited by Managing Public Money NI from financing the

scheme in the coming years from the resources provided, all of which have been fully allocated in the Budget estimates prepared by the Department of Finance.

The Regulations

[12] Part 3 of the Regulations provides for the entitlement to victims' payments in regulation 5:

"Entitlement to victims' payments

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

- (a) the injury results in permanent disablement;
- (b) the assessed degree of relevant disablement amounts to not less than 14 percent;
- (c) the Troubles-related incident took place –
 - (i) in the United Kingdom, or
 - (ii) anywhere in Europe, at a time when the applicant –
- (aa) was a British Citizen;
- (bb) was a person born in Northern Ireland and having, at the time of their birth, at least one parent who is a British Citizen, an Irish Citizen or is otherwise entitled to reside in Northern Ireland without any restriction on the period of residence;
- (cc) was outside the United Kingdom in service of the Crown, or
- (dd) was an accompanying close relative of a person serving outside the United Kingdom in service of the Crown;
- (d) the Troubles-related incident took place on or after 1 January 1966 but before 12 April 2010, and
- (e) an application has been made in accordance with regulation 8."

There are certain qualifications which are not relevant to this appeal. An application for victims' payments must be made to the Board established by Regulation 3(1).

[13] Regulation 12 provides that the Board must determine whether the applicant is entitled to victims' payments. Regulation 17 provides that following determination of eligibility for victims' payments, the Board must as soon as reasonably practicable notify the applicant in writing of whether the applicant is eligible for victims' payments and the assessed degree of relevant disablement of the applicant.

[14] Part 5 deals with payments. Regulation 18 provides that if a person is entitled to victims' payments, the Board must determine the amount of victims' payments payable to the applicant. There are various provisions dealing with adjustments. Regulation 21(2) states that for the purpose of determining the amount of victims' payments payable, the entitlement must be backdated to the date the Board considers that the person would have become entitled to victims' payments had the scheme been established on 23 December 2014 (the date of the SHA). After making a determination of the amount of victims' payments payable to an applicant, Regulation 22 provides that the Board must as soon as reasonably practicable notify the applicant in writing of the amount payable, a summary of the reason for the determination and the right to appeal.

[15] Regulation 23 deals with the making of payments:

“Making of payments

23. – (1) Victims' payments must be paid monthly unless the Board considers the facts of a particular case means other arrangements are more appropriate.

(2) The first payment of victims' payments to a person must be made as soon as reasonably practicable after the determination of the amount of victims' payments payable to the person.

(3) The Board may make payments by whatever means the Board considers appropriate.”

Regulation 25 enables the Board to recover any amount of victims' payments or a lump sum paid in excess of entitlement.

[16] Schedule 1 deals with the Board. Paragraph 2 provides that the Executive Office must in writing designate a Northern Ireland Department to exercise the administrative functions of the Board on the Board's behalf. The Department of Justice has been designated.

[17] Paragraph 6 of the Schedule provides that the Department must pay the remuneration and reasonable expenses of Board members. Funding is dealt with in paragraph 9:

“Funding

9. – (1) The Executive Office may make to the Department grants of such amounts as the Executive Office determines for the purpose of funding –

- (a) the costs of exercising the administrative functions of the Board;
- (b) the payment of victims' payments and lump sums, and
- (c) the reimbursing of expenses under regulation 51.

(2) The Board must pay to the Executive Office all sums received by it in the course of, or in connection with, the exercise of the Board's functions.

(3) But sub-paragraph (2) does not apply to such sums, or sums of such description, as the Executive Office may direct with the approval of the Department of Finance in Northern Ireland.

(4) Any sums received by the Executive Office under this paragraph must be paid into the Consolidated Fund of Northern Ireland.”

The conclusions of the learned trial judge

[18] The trial judge noted the appellant’s submission that as Paragraph 9(1) of Schedule 1 was the only means of funding the scheme contained in the Regulations, this permissive provision must in law give rise to a duty to provide grants to the designated Department in order to have an effective scheme established and functioning. The reasoning of the court is set out at paragraphs 32 and 33 of the judgment:

“[32] The Court is very mindful of the degree of restraint that has to be exercised by the judiciary when scrutinising funding decisions made by public bodies. The Court acknowledges the strength of the arguments advanced by the Applicants that, as paragraph 9 of Schedule 1 sets out the only provisions for the funding of the scheme and as

the scheme clearly needs to be funded to properly operate, the language of paragraph 9 must be interpreted as imposing a duty to provide grant funding to the designated Department, particularly in circumstances where the Executive Office has succeeded in securing £2,500,000 from the Department of Finance in order to facilitate the establishment and initial operation of the Board. However, having carefully considered the competing arguments in this case, and having regard to the valuable legal guidance given by Gillen LJ in the case of *Bell* [2017] NICA 69 I am not persuaded that it would be appropriate to declare that the failure of the Executive Office to provide a grant of funds to the designated Department constitutes unlawful conduct at this stage. Two factors which I take into account in reaching this decision are the degree of discretion vested in the Executive Office concerning funding and the fact that to date there is no designated Department. If paragraph 9(1) is to be interpreted as imposing a duty to provide grant funding, that duty can only crystallise when designation has taken place. In light of what was stated in Court by Mr Humphreys QC on behalf of the Executive Office, I am hopeful that the determination of illegality by the Court in respect of the failure of the Executive Office to designate a Department will set in motion a chain of events which will result in grant funding being provided to a designated Department within a very short timescale.

[33] However, in order to ensure that the parties are left in no doubt as to interpretation that the Court places upon paragraph 9(1), I make the following specific finding. In circumstances where the 2020 Regulations do not make specific provision for the funding of the Victims' Payments scheme other than under paragraph 9 of Schedule 1 to the Regulations, the permissive language contained in paragraph 9(1) may in certain circumstances impose a duty on the Executive Office to provide grant funding to the designated Department. Such a duty could arise immediately upon the designation of a Department by the Executive Office and the circumstances in which such a duty would arise would include the situation where the Executive Office has already succeeded in obtaining funding from the Department of Finance for the establishment and operation of the Victims' Payments scheme."

Consideration

[19] The task for this court is to establish what obligation, if any, has been imposed upon the Executive Office by Regulation 9(1)(b) of the 2020 Regulations. That requires the court to establish the intention to be attributed to the legislature in respect of the words used. Guidance on this approach was given by Lord Nicholls in R v Secretary Of State for the Environment, Transport and the Regions ex p Spath Holme Ltd [2001] 2 AC 349 at 396:

“Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used.”

[20] Lord Bingham provided assistance on the approach to context in R (on the application of Quintaville) v Secretary Of State for Health [2003] UKHL 13 at [8].

“The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.”

[21] In this instance, we know because of section 10 of the 2019 Act that the purpose of the Regulations was to establish a scheme which provides for payments to be made in respect of persons who had sustained an injury as a result of the troubles related incident. The Regulations set out a basis for entitlement the determination of which is the role of the Board. Regulation 18 requires the Board to determine the amount of victims' payments payable to the applicant.

[22] Regulation 23(3) requires the Board to make payments by whatever means it considers appropriate. The payments must be made monthly unless the facts of the case mean that other arrangements are more appropriate and the first payment must be made as soon as reasonably practicable after the determination of the amount of the victims' payments payable to the person. These provisions are, therefore, consistent with the statutory purpose set out in the preceding paragraph.

[23] Schedule 1 deals with various funding issues. By Paragraph 6(1) the Department must pay to or in respect of the President and each member of the Board such remuneration, such allowances, and such sums for the provision of the pension as the Department may determine. The mandatory nature of the requirement in Paragraph 6(1) is to be contrasted with Paragraph 6(2) where the Department may reimburse the President and each member of the Board for such expenses as the member reasonably incurs in acting as such.

[24] Similarly, by Paragraph 8 of Schedule 1 the Department may defray the expenses of the Board to such amount as the Department may determine. In Paragraph 9 the Executive Office may make to the Department grants of such amounts as the Executive Office determines for the purpose of funding the cost of exercising the administrative functions of the Board and the payment of victims' payments, lump sums and subsistence expenses but the Board must pay to the Executive Office all sums received by it in the course of, or in connection with, the exercise of the Board's functions.

[25] Plainly it would defeat the purpose of the Regulations if the funding of the payment of victims' payments or lump sums was a discretionary decision for the Executive Office. Such an interpretation would also be inconsistent with Regulation 23 of the 2020 Regulations. It is necessary, therefore, to review the use of language in respect of funding issues in Schedule 1 in order to understand their effect.

[26] It is unsurprising that the Department which is responsible for the appointment of the members of the Board should be under an unequivocal duty to pay the members the appropriate agreed remuneration for the office. The payment of expenses, however, depends upon some process of authentication and consideration of what is reasonable. There is, therefore, an area of discretionary judgement which is reflected in the use of the language. The same position arises in respect of the expenses of the Board in Paragraph 8 of Schedule 1.

[27] In respect of the funding obligations of the Executive Office in Paragraph 9(1), the starting point is that the Paragraph contemplates a determination by the Executive Office for the purpose of the funding. In other words, this provision contemplates an assessment of the cost of administrative functions, the extent of victims' payments and lump sums and reasonable expenses. All of those matters will require authentication or carefully considered estimation of anticipated liabilities.

[28] The Executive Office is not required to accept the estimates that may be advanced by the Board but in order to satisfy the statutory purpose must make a determination of the funding requirement for the three matters set out in Paragraph 9(1). That is why the funding is couched in permissive terms while the obligation on the Board to pay to the Executive Office all sums received by it in the course of or in connection with the exercise of its functions does not require the same discretionary decision-making.

[29] In our view the statutory purpose set out in section 10 of the 2019 Act and the internal coherence of the 2020 Regulations imposing an obligation on the Board to effect payments as soon as reasonably practicable both lead to the imposition of a legal duty on the Executive Office to fund victims' payments and lump sums having carried out the accounting exercises appropriate to the expenditure of public money.

[30] The learned trial judge was dissuaded from coming to that view in particular by the decision of this court in Department of Justice v Bell and the Ombudsman [2017] NICA 69. That was a case concerning the funding of the Ombudsman by the Department. The relevant statutory provision required the Department to pay to the Ombudsman such sums as appeared to the Department to be appropriate for defraying the expenses of the Ombudsman under the Act. The court concluded that the Department had a statutory discretion with a wide latitude with which the court should not interfere.

[31] In our view, that case dealing with a completely different statutory provision was of no real assistance in the interpretation of the obligations falling to the Executive Office under the 2020 Regulations. As appears above, we also conclude that the apparently permissive wording of Regulation 9(1)(b) does not prevent the imposition of a duty to pay.

Conclusion

[32] For the reasons given, we declare that there is a legal duty on the Executive Office to fund victims' payments and lump sums under the 2020 Regulations so that the Board can make the necessary payments in accordance with Regulation 23. We express no view on the dispute between the Northern Ireland Executive and the NIO. We will adjourn the appeal until 5 March 2021 to allow the parties to find an agreed solution. If that is not possible, the case will be relisted on notice to the Department of Finance as an additional notice party.