Neutral Citation No: [2022] NIKB 35	*Ref:*	**COL12017**
	ICOS No:	**22/088876/1**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**16/12/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY HUGH O'NEILL FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Mr Thomas Stewart BL (instructed by Phoenix Law Solicitors) for the Applicant
Mr Philip McAteer BL (instructed by the Departmental Solicitors Office) for the proposed Respondent

COLTON J

Introduction

[1] This application concerns the implementation of the scheme for the award of pensions for victims and survivors of Troubles-related incidents.

[2] The scheme had a troubled political history and was the subject matter of a significant decision in these courts in the case of *McNern & Turley's Application* [2020] NIQB 57. In that case Mr Justice McAlinden was critical of the failure of the Executive Office to designate a Northern Ireland department to enable a board to be established and functioning pursuant to its obligations under the Victims' Payment Regulations 2020 ("the Regulations").

[3] It is these Regulations that are at the heart of this application.

[4] Taking a step back, the Regulations were made pursuant to sections 10-13 of the Northern Ireland (Executive Formation etc) Act 2019 ("the 2019 Act").

[5] The 2019 Act which came into force on 22 October 2019, imposed a duty upon the Secretary of State for Northern Ireland:

> "By regulations to establish a scheme in 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."

[6] The Regulations are detailed and complex. They provide for the establishment of a Victims' Payment Board. They provide details about the constitution of the board. It sets out the basis upon which victims are entitled to payments to be assessed by the Board. They set out in detail the procedure for the making of applications and the determination of entitlement to payments.

[7] The scheme opened for applications on 31 August 2021. It is a novel and complex scheme, involving a number of stages which require to be completed before an application is determined.

The Applicant

[8] The applicant avers that he was shot in the knees by members of the Provisional IRA in September 1992. As a consequence, he expects that he is entitled to victims' payments according to Regulation 5 of the Regulations. Accordingly, on 5 November 2021 his solicitors lodged an application with the Board.

[9] The application form lodged on that dated stated:

> "Stole a car earlier in the day. Was out with his friends and some men came to get him, he knew it was because of what he did. He tried ran away (sic) and was grabbed by the men and taken to a safehouse. Here he was beaten and was coming in and out of consciousness. The men tried to move house and told Hugh to get down and keep his head down when they were on the street. He refused. As a result of this he was shot in both his legs."

[10] The Board did not respond to this application until 1 June 2022 when it sought further information from the applicant. The applicant's solicitors responded to the Board's request for more evidence by email on 14 June 2022. The Board wrote to his representative on 16 June 2022 asking, "for clarification, is the applicant saying that the IRA are responsible for the attack on him? Unfortunately, this information has not been mentioned anywhere in the application or attached documents and this is the reason for my previous correspondence (sic)."

[11] The applicant's representative did not reply until 28 July 2022 to confirm the position.

[12] On 1 August 2022 the board acknowledged receipt of the clarification provided and indicated that the application would be progressed accordingly.

[13] On 9 September 2022 at 16.25 the applicant's solicitor emailed the Board for an update on the application.

[14] On the same date at 16.30 the Board responded by email to confirm that the application had been "allocated to a work queue" and that no timescale for a determination could be provided.

[15] A pre-action protocol letter was sent on behalf of the applicant on 5 August 2022.

[16] The Departmental Solicitors Office replied in detail on 9 September 2022.

[17] The applicant lodged an application for leave to apply for judicial review on 27 October 2022.

[18] By way of update the application was referred to Capita for disablement assessment on 13 September 2022.

[19] Between 20 October 2022 and 2 November 2022 Capita engaged with the applicant and his solicitor on multiple occasions to ascertain relevant information and to arrange an assessment.

[20] A medical assessment of the applicant by Capita took place on 1 December 2022.

The application

[21] In this application the applicant seeks the following relief:

(a) An Order of Mandamus requiring the proposed respondent to determine the applicant's application to it, which was commenced on 5 November 2021.

(b) An Order of Mandamus requiring the proposed respondent to take all necessary steps to fully implement the Troubles Permanent Disablement Payment Scheme ("the Scheme") in order that it can receive and process applications for payments in accordance with the statutory relevancy that such applications need to be processed "without delay."

(c) Declarations that:

(i) the proposed respondent is under a common law duty to give effect to the functions contemplated by the Regulations by ensuring their meaningful and effective exercise. Its failure to do so constitutes illegality;

(ii) by failing to effectively establish a scheme which can process and attend to applications in a timely manner, the proposed Respondent has breached his duty to act in a manner which is consistent with the purpose of the Regulations."

The Arguments

[22] The applicant's focus is on Regulation 4 of the 2020 Regulations.

[23] Regulation 4 provides:

> "**Principles**
>
> 4.-(1) When exercising functions under these Regulations, the Board must have regard to –
>
> (a) the need to prioritise, and be responsive to, the needs of victims of Troubles-related incidents;
>
> (b) the need to be transparent and to communicate effectively with the public and victims of Troubles-related incidents;
>
> (c) the need for the Scheme to be straightforward and simple to navigate;
>
> (d) the need for applications to be determined without delay;
>
> (e) the need for personal data to be handled sensitively.
>
> (2) The duties in paragraph (1) apply only so far as they are relevant in the particular context."

[24] In his thoughtful and well researched submissions Mr Stewart argues that the duty under Regulation 4(1)(d) is a mandatory one. Applying Regulation 4(2), the context of the applicant's application relates to victims of the Troubles who have waited many years for such a scheme to be implemented. This context, he argues, requires that the court carries out a high degree of scrutiny of the respondent's implementation of its obligations under the Regulations.

[25] He submits that the intention of the draftsmen of the Regulations is clear, namely a concern to ensure that applications are processed in such a way to provide

payments to a finite number of possible applicants to the Scheme whose number will diminish with increasing speed as time progresses.

[26] In short Mr Stewart argues that the Board is not yet operating properly or functioning to the extent contemplated by the Regulations. The delay experienced by the applicant and the lack of communication, particularly between November 2021 and June 2022 together with the failure to provide any timescale for a decision in relation to the application all point to an unlawful failure to comply with the Regulations.

[27] The court has the benefit of a detailed PAP response. The detail provided in the response is important in assessing the merits of the application. In relation to the Scheme generally the court is told that the Scheme opened for applications on 31 August 2021. A number of stages require to be completed before each application is determined as follows:

- Initial Claims Team (ICT) processes – ensuring the application has all the necessary information to allow the team to undertake detailed evidence gathering from 20+ stakeholders with whom the proposed respondent has entered into information sharing agreements;

- Quality Review and Refer Team (QRRT) processes;

- Legal overview of the application in respect of eligibility;

- Healthcare professional assessment of disablement (by Capita);

- Financial calculation for an assessment of percentage disablement (Finance Team);

- Review by Listing and Determinations Team (LDT), including compilation of bundle for Independent Hearing Panel and preparing the applications for hearing;

- Panel hearing;

- Notification of determination and issuing of payment (if recommended).

[28] The requirement to seek supporting information can take considerable time as there is a reliance on third party organisations to provide such information. Much of the information is historical in nature. Each application must be considered on its own merits. The evidence gathering process is not always straightforward. Many applications feature multiple incidents which requires information gathering and checks to be completed against each separate incident.

[29] In terms of prioritisation the ICT is responsible for the prioritisation of applicants prior to completing any further applications, which involves:

- Identifying applicants over 80;

- Reviewing all medical information provided by applicants who have indicated that they have terminal illness to ensure there is sufficient proof.

[30] The Board acknowledges that it has faced a number of challenges in its work but says that it has been taking steps on an ongoing basis to address the issues that have arisen.

[31] Some of the issues referred to are as follows.

Information provision

[32] The quality of applications continues to be a challenge for the Board, with key information not being provided at an early stage which can impact the speed at which the application would move through the assessment process. Examples of information not provided include:

- Dates of incident or estimate date range;

- Injuries sustained, either physical/psychological or both;

- Details of the incident to establish presence at a Troubles related incident;

- Missing personal information (eg National Insurance Number, DOB, GP details, previous addresses etc);

- Correctly certified identity documents.

[33] Currently one in every two claims is via hard copy which slows the assessment process down. Efforts are being made to increase the use of online applications. Addressing gaps or missing information on paper applications is time consuming and results in delays in processing times.

Complexity of cases

[34] Each application is considered on its own merits, but many applications have examples of more than one Troubles-related incident which in turn leads to alengthy evidence gathering process to ensure all information is on file before going to the Board for determination. An example is given that the ICT is currently processing applications with up to and in excess of 40 separate multiple incidents. As already indicated the requirement to obtain information from third party organisations and stakeholders results in further challenges and potential delays.

Staffing

[35] Recruitment of staff to the VPB team has been a challenge for the proposed respondent. The team now has 70 staff in post. More staff are required. Work is ongoing with the Northern Ireland Civil Service ("NICS") Human Resources ("HR") to recruit staff. It is estimated that in the region of 140 staff are required. All staff working within the VPB team must be security cleared to CTC level. Such a recruitment process inevitably involves significant delay.

Covid

[36] The proposed respondent points out that the Scheme was developed and launched in the middle of a pandemic. The restrictions imposed as a result of the pandemic have had an impact on the Board in terms of staff training and working with other organisations.

Review of operational processes

[37] The Scheme is a novel one and requires putting in place complex and necessary administrative arrangements. The Board continues to review its operational procedures to streamline the processing of applications but also to ensure that each application is progressed with appropriate due diligence.

[38] The proposed respondent provides examples of ongoing continual assessment and refinement of processes generally to include:

- Staff attend quarterly meetings with sectoral groups to identify any issues and inform refining of processes;

- Staff attend weekly meetings with the Trust to work towards a more timely return of medical evidence;

- Staff attend regular meetings with Capita to work towards a more timely return of reports;

- Extensive steps have been taken to recruit the staff required to administer the Scheme fully;

- The Board has continued to swear in and train more panel members. It now has 61 panel members. It hopes to increase the number of hearings once all panel members have been trained;

- Since the initial processing of the subject application, it became apparent that acknowledgement letters were not being issued immediately – a number of

acknowledgment letters were issued as part of an overtime exercise. This process has since been rectified to ensure timely issuing of same;

- The information seeking request form to PSNI has been refined, to minimise return/repeat request to PSNI and to aid more timely processing of applications.

[39] The proposed respondent asserts that all of these steps continue to improve performance and the timely processing of applications.

Consideration of the application

[40] The duty relied upon in this case is a duty to "have regard to." This obligation is an open-textured one. It could not be said, nor does the applicant argue, that the Regulations imposed standalone duties to process applications without delay. At its height such an obligation is one which permits only a soft edge review by the court. The court agrees with Mr McAteer's forceful submissions that on any showing the proposed respondent is manifestly having regard to the requirement to make decisions without delay in accordance with the Regulations. In my view this alone is sufficient to answer the applicant's case. This is true in a general sense but also true in respect of the applicant's case. The applicant will have been understandably frustrated and disappointed at the delay in the initial response to his application. This is an issue that the proposed respondent has addressed. More importantly it is clear that the applicant's case is now being dealt with and progressing through the assessment process. Quite properly he has not sought priority under the Regulations.

[41] In his diligent research Mr Stewart has referred the court to authorities in which the courts did intervene in respect of decisions around delay and an obligation to "have regard to." However, it is clear from an analysis of those decisions that the court was considering a specific decision as opposed to the general process involved in this application. The context of those cases was entirely different.

[42] Thus, in *Niarchos (London) Ltd v Secretary of State for the Environment & Anor* [1991] 2 EGLR 154 the court was considering an actual decision by the respondent to re-open a local inquiry which had the effect, in the view of the court, of producing "nothing except further delay and expense to the parties." The court determined the Secretary of State's decision crossed "the border-line dividing the valid exercise of his discretion from perversity."

[43] In the case of *R (on the application of Boyejo) v Barnet LBC* [2009] EWHC 3261 (Admin) the court was dealing with a duty on a public authority to have:

> "due regard to

> … (d) the need to take steps to take account of disabled persons disabilities even where that involves treating disabled persons more favourably than other persons;
>
> … (f) the need to encourage participation by disabled persons in public life."

[44] There the court was considering an actual decision by the relevant council to change the way it provided support services to those living in sheltered accommodation in its area by terminating contracts for on-site warden based services and developing a peripatetic support service with the retention of an alarm service to all residents in such accommodation.

[45] Similarly in the case of *The Queen (on the application of JM and NT, by their litigation friends) v Isle of Wight Council* [2011] EWHC 2911 (Admin) the court was dealing with a specific decision to restrict the eligibility threshold for adult social care.

[46] The context of these cases is entirely different from the obligation considered in this application. In the same context of Troubles-related pensions in the *McNern & Turley* case (see para [2] above) the court was dealing with the specific failure of the Executive Committee to nominate a department to administer the Scheme.

[47] Equally cases which related to "resource issues" or lack of funds are not on point. This is not a case where the proposed respondent is refusing to act. Nor is it making the case that it has not been provided with adequate funding to set up the necessary administration to deal with all applications.

[48] A new scheme such as this cannot be created by the flick of a switch. By definition it will require time to put in place the processes and administrative support necessary. That process has begun and is ongoing.

[49] It cannot be said that the proposed respondent is not having regard to its obligations under Regulation 4 and in particular the obligation to determine decisions "without delay." There is nothing to suggest that the proposed respondent has sought to frustrate the implementation of the Regulations. Indeed, the contrary is the case.

Conclusion

[50] Having considered the arguments, I have come to the conclusion that this is not an appropriate case in which to grant leave for judicial review. The court is satisfied that the proposed respondent is having regard to its duty under Regulation 4. The case is unarguable and has no prospect of success.

[51] Accordingly, leave to apply for judicial review is refused.