THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 342

[2019/283]

Donnelly J.

Ní Raifeartaigh J.

Power J.

BETWEEN

PAUL DOYLE

APPELLANT

AND

THE CRIMINAL INJURIES TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

[2019/282]

BETWEEN

GARY KELLY

APPELLANT

AND

THE CRIMINAL INJURIES TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 4th day of December, 2020

Nature of the Appeal

1. This is an appeal from a decision of the High Court (Murphy J.) refusing the reliefs sought by the appellants in judicial review proceedings. The issues in the proceedings arise in connection with the appellants' (separate and unconnected) compensation claims to the Criminal Injuries Compensation Tribunal (hereinafter "the Tribunal) under the *Scheme of Compensation of Personal Injuries Criminally Inflicted (*hereinafter "the Scheme"). The main grounds of complaint relate to:

(1) the absence of any provision for legal aid and/or costs for applicants who apply for compensation under the Scheme;

(2) the presence of a provision in the Scheme which confers discretion on the Tribunal to disentitle an applicant from an award or to reduce an award on the basis of conduct, character or way of life (paragraph 14 of the Scheme);

(3) the absence of any method by which an applicant can access previous decisions of the Tribunal on the application or non-application of paragraph 14; and

(4) the exclusion of compensation for pain and suffering from the Scheme with respect to injuries suffered after 1 April 1986.

2. While some arguments based upon the Constitution were advanced, the bulk of the appellants' case involves claims that the Scheme, insofar as it has the above features, is contrary to EU law and in particular Council Directive 2004/80 of 29 April 2004 relating to compensation to crime victims (hereinafter "the Directive").

3. The Grand Chamber of the CJEU delivered an important judgment on the scope of the Directive in July 2020 in a case to which I will refer as "the *B.V.* case".[1] This was not only after the judgment of the High Court in these proceedings but also after the hearing of the

[1] C-129/19; ECLI:EU:C 220:566 *Italian Presidency of the Council of Ministers v. B.V.*

appeal. Following this significant decision, supplemental submissions were sought from the parties in light of the judgment, which contained among other things a clear statement that the Directive confers a right to compensation in respect of violent injuries intentionally inflicted on an individual even where there is no cross-border dimension to the incident. Thus, an Irish resident has a *right* to fair and appropriate compensation under the Directive where he or she has been the subject of such a crime within the State. The identification of such a right may have significant ramifications for a scheme which was until now conceived of as an *ex gratia* scheme falling squarely within the range of executive discretion. This judgment addresses some of those ramifications by addressing the four specific issues raised by the appellants, although, as will be seen, there are significant hurdles of prematurity to be addressed by reason of the fact that neither of the appellants' compensation claims has yet been the subject of any Tribunal decision, or indeed proceeded past a very preliminary stage.

TABLE OF CONTENTS

By reason of the length of this judgment, I propose to set out a table of contents to assist the reader:

PART 1: BACKGROUND AND LEGAL FRAMEWORK ..... - 6 -

Background ..... - 6 -

Events and pleadings as they relate to Mr. Doyle ..... - 6 -

The reliefs and grounds in Mr. Doyle's case ..... - 9 -

Events and pleadings as they relate to Mr. Kelly ..... - 10 -

The reliefs and grounds in Mr. Kelly's case ..... - 12 -

The statements of opposition ..... - 13 -

The High Court Judgment ..... - 15 -

Relevant Legal Framework ..... - 19 -

The Scheme of Compensation for Personal Injuries Criminally Inflicted ..... - 19 -

European Developments preceding the introduction of Directive 2004/80/EC ..... - 21 -

Council Directive 2004/80 relating to Compensation for Crime Victims ..... - 23 -

Report on the application of the Directive ..... - 25 -

PART II: THE DECISION IN THE B.V. CASE AND THE LEGAL ISSUES IN THESE PROCEEDINGS ..... - 26 -

The legal source and scope of a right to compensation for injuries which have been criminally inflicted ..... - 26 -

The argument as to an EU right stemming from Directive 2004/80/EC ..... - 27 -

The Decision in the B.V. case..... - 28 -

The First Issue: Legal Aid and/or the costs of making an application under the Scheme..- 39 -

The pleadings and the evidence on this issue ..... - 39 -

Prematurity and evidential foundation..... - 42 -

Submissions of the parties on the merits ..... - 44 -

Decision of the Court on the issue of legal aid and/or costs..... - 46 -

The Second Issue: The exclusion of pain and suffering (paragraph 6(e) of the Scheme) ..- 58 -

Submissions ..... - 58 -

Decision ..... - 60 -

The Third Issue: Conduct, character and way of life (paragraph 14 of the Scheme) . - 62 -

Submissions ..... - 62 -

Decision ..... - 64 -

The Fourth Issue: Is there a right of access to previous decisions of the Tribunal?..... - 67 -

Submissions ..... - 68 -

Decision ..... - 69 -

CONCLUSIONS ..... - 79 -

PART 1: BACKGROUND AND LEGAL FRAMEWORK

Background

4. The pleadings and the evidence presented on affidavit on behalf of each of the appellants is slightly different although there are also many similarities. I will deal with each of the appellants in turn.

Events and pleadings as they relate to Mr. Doyle

5. On 6 April 2014, the applicant Mr. Doyle was the victim of a serious assault and sustained serious brain injury.

6. On 4 July 2014, an application for compensation was submitted to the Scheme on behalf of Mr. Doyle by his solicitors, instructed by his father. This was accompanied by a medical report of Dr. Margaret Gallagher dated the 16 May 2014 which says that Mr. Doyle sustained an acquired brain injury which has had "profound" effects on his ability to walk, stand, and speak, among other abilities.

7. On 28 July 2014, the Tribunal wrote to Mr. Doyle's solicitors acknowledging receipt of the application and saying that the Tribunal would request a Garda report on the incident. The letter requested certain documentation from Mr. Doyle in relation to medical expenses and loss of earnings and pointed out that the Scheme prohibits the payment of damages for pain and suffering in relation to all incidents that occurred on or after the 1 April 1986.

8. The Tribunal, as is usual practice, obtained information from An Garda Síochána. The Garda report sent to the Tribunal and exhibited in the proceedings indicated that the assault took place at Mr. Doyle's residence in Dublin and that the injuries consist of blunt force injuries to the head suspected of being inflicted by an axe. It says that a row had taken place on the night in question between the suspect and Mr. Doyle, during which a number of

punches were thrown between the parties. The row culminated in the suspect lifting up a hatchet and hitting Mr. Doyle on the head several times.

9. The report also contained a list of Mr. Doyle's previous convictions. The list indicates that Mr. Doyle was sentenced on approximately 34 occasions in respect of a large number of criminal incidents. Many of the convictions include matters such as threatening or abusive behaviour in a public place, theft, handling stolen property, common assault, possession of knife/other article, failing to appear in court on remand dates, and road traffic offences, and many of his sentences involve fines or relatively short periods of imprisonment. Between 1997 and 2000, however, he received some significant sentences ranging from 7 years to 10 years for robbery and use of a syringe to threaten. Convictions are recorded from when he was approximately 14 years of age, in 1989. His date of birth is the 22 July 1975. His most recent conviction prior to his sustaining the injuries described above was in January 2014.

10. On the 24 March 2015, Mr. Doyle's solicitors wrote to the Tribunal enquiring as to whether the Garda report into the incident had been obtained and requesting a time frame within which the application would be processed. They did not furnish any documentation in relation to the request from the Tribunal described above.

11. By letter dated the 15 July 2015, the Tribunal responded enclosing a copy of the Garda report and referring to his previous convictions. The letter continued:

> "*In relation to the contents of the garda report, I bring your attention to the limitations and restrictions of compensation. It is possible that due to the fact that the applicant has numerous criminal convictions and served several terms of imprisonment the Tribunal member deciding this application will consider Article 14 of the Scheme when making a decision on compensation. For this purpose it would be important to give your client an opportunity to comment further regarding this*

aspect of his Application". [The letter then set out the terms of Article 14 of the Scheme].

12. By letter dated the 18 December, 2015, solicitors for Mr. Doyle sent a letter of reply to the Tribunal. The letter said:

"*As you will be aware our client's injuries are very serious and in order for us to be properly equipped to prepare a comprehensive claim on his behalf we would need to be assured that funding would be available for this purpose. We note that the Scheme provides that legal costs will not be recoverable.*

In those circumstances there is little reality in our client being in a position at this juncture to raise funds to pay for the preparation of his claim. This is especially so, when, as appears to be the case here, it may well be that, regardless of the extent of our client's claim and the cost of preparation of same, he appears to be exposed to a serious risk that under the terms of the scheme, he may receive no compensation at all because of his 'conduct', character' or 'way of life'.

In the circumstances we require the following:

(a) Details of any policy or guidelines, whether published or otherwise, under which the Tribunal member deciding the application would operate under in relation to the consideration of Article 14 issues; and

(b) Your confirmation that you will make available to us, prior to any decision being made on our client's application, copies of relevant previous decisions of the Tribunal in relation to the application (and non-application) of Article 14. Our client accepts that such decisions should be redacted to preserve the confidentiality of previous applicants.

We will not be in a position to reply fully to your letter of the 15th July 2015 until the above is satisfactorily dealt with. We would respectfully suggest that natural and

constitutional justice and fair procedures entitles our client to the above as, inter alia, otherwise the Tribunal would be effectively in secret".

13. Follow up letters were sent on the 26 January 2016 and the 3 February 2016. By letter dated the 11 February 2016, the Tribunal confirmed that there is no provision in the Scheme for the provision of financial assistance to an applicant to establish a claim and that the Tribunal does not pay legal costs, but that an applicant could make an application without legal advice. It also said that Tribunal members "are guided only by the text of paragraph 14 of the Scheme". Regarding the request for access to previous decisions, the letter said: "The Tribunal does not keep records in a manner that would allow for easy extraction of the information sought concerning paragraph 14 of the Scheme" and that attempting to find applications matching the criteria in the appellant's correspondence "would involve the reading of all files held by the Tribunal", an extensive task for which the Tribunal did not have resources. It also confirmed there was no provision for an advance ruling on the application of paragraph 14. It concluded by saying that Tribunal members are simply guided by the text of paragraph 14 in each case and decisions are made on an individual basis.

14. Mr. Doyle then brought an application for leave to bring judicial review proceedings. On the 11 April 2016, the High Court (Humphreys J.) granted Mr. Doyle leave to apply for judicial review.

The reliefs and grounds in Mr. Doyle's case

15. The following is a summary of the reliefs sought and statement of grounds relating to Mr. Doyle:

(i) An order of *mandamus* compelling the first respondent to make available to the applicant and his legal advisers copies of previous decisions of the first respondent relating to claims such as that being made by the applicant, and in

particular, copies of decisions relating to the application or non-application of Art. 14 of the Scheme;

(ii) A declaration by way of application for judicial review that the Scheme is inadequate by its terms to provide such benefit to the applicant as is his entitlement under European Law;

(iii) A declaration by way of application for judicial review that the State has failed to properly transpose into national law and/or implement the provisions of Council Directive 2004/80/EC.[2]

16. The grounds upon which the reliefs were sought relate to the various issues identified in the first paragraph of this judgment.

Events and pleadings as they relate to Mr. Kelly

17. On the 18 May 2016, Mr. Gary Kelly applied to the Tribunal for compensation for injuries sustained in an assault on him in April 2016.

18. By letter dated the 24 May 2016, the Tribunal acknowledged receipt of this application and indicated that it would request a Garda report into the incident in due course. The letter also requested that documentation in relation to medical expenses and benefit payments be forwarded to the Tribunal once Mr. Kelly's injuries had stabilised. No reference to paragraph 14 of the Scheme was made in this correspondence.

19. The Garda report exhibited in these proceedings indicates that Mr. Kelly and his long partner presented at Kilmainham Garda station on the 25 March 2016 seeking help with securing emergency accommodation. Mr. Kelly had been assaulted on the 23 March 2016 which resulted in his hospitalisation. Subsequent to this, while they were in hospital, the door to their flat was forced in and their flat completely ransacked.

[2] There was a further relief sought relating to failure to provide an effective remedy for breach of EU law, but this was withdrawn in the High Court on the basis that it was premature.

20. On the 27 May 2016, solicitors for Mr. Kelly wrote to the Tribunal noting "it appears possible" that the Tribunal member assigned to his application will take paragraph 14 of the Scheme into consideration when making a decision on compensation. They acknowledged that legal costs are not recoverable under the Scheme, reserved their position in that regard and asserted the view that in so far as reasonable costs were not recoverable, the Scheme was not in compliance with EU law. The letter went on to say there was "little reality" in their client being in a position to raise funds for the preparation of his claim without the prospect of having such costs paid in the event of his claim being successful and demanded that the Tribunal agree to pay reasonable costs in that regard. They asserted that paragraph 14 of the Scheme is "unlawful, *inter alia,* because it constitutes unlawful discrimination of persons who are unfortunate enough to have criminal records." They claimed an entitlement to general damages and damages for pain and suffering, payment of which is excluded from the Scheme. The letter also requested: (1) details of any policy or guidelines, whether published or otherwise, under which the Tribunal would operate in relation to paragraph 14 of the Scheme and (2) the Tribunal's confirmation that it would make available, prior to any decision being made on Mr. Kelly's application, copies of relevant previous decisions in relation to the application (and non-application) of paragraph 14 of the Scheme. Finally, the letter set out that there should be a mechanism in place to ascertain whether paragraph 14 of the Scheme is intended to be applied, in whole or in part, to claims such as their client's so as to avoid the expenditure of funds on the preparation of claims. The letter requested a preliminary decision on Mr. Kelly's application in that context. Judicial review proceedings were threatened in the absence of a response within twenty-one days.

21. No information about medical or other expenses was furnished to the Tribunal.

22. The Tribunal acknowledged receipt of this letter on the 1 June 2016.

23. On the 25 July 2016, leave was granted by Humphreys J. to apply for judicial review.

24. As of the date when Mr. O'Connell was swearing his affidavit in reply (22 December 2016), the Tribunal was not aware of any history of criminal convictions on the part of Mr. Kelly. In response, a further affidavit was sworn on the 5 January 2017 by Mr. Kelly's solicitor, exhibiting his previous convictions. The convictions span the period 1993-2012, and therefore commence when the appellant was approximately 15 years of age. They relate to offences committed on approximately 22 different dates during that period. The offences include larceny, robbery, possession of drugs for sale or supply, intoxication in a public place, threatening/abusive behaviour in a public place, failing to appear in court on a remand date and obstruction under the Misuse of Drugs Act. His most recent conviction is recorded as December 2011. Many of the sentences imposed consisted of fines and relatively short periods of imprisonment, as well as a three year suspended sentence imposed for robbery in 2008; but there are some substantial periods of imprisonment also; the list records a three year sentence in 2000 consecutive to a two year sentence at the same time, a four year sentence for robbery in 1996, and 2 years 6 months in the same year.

The reliefs and grounds in Mr. Kelly's case

25. The key reliefs sought in Mr. Kelly's case are as follows:

(i) A declaration by way of application for judicial review that the Scheme is inadequate by its terms to provide such benefits to the applicant as is his entitlement under European Law;

(ii) A declaration by way of application for judicial review that the State has failed to properly transpose into National Law and/or implement the provisions of [the Directive];

(iii) A declaration by way of application for judicial review that fair and appropriate compensation provided for in Article 12(2) of the Directive must be interpreted

as comprising of or including general damages for pain and suffering;

(iv) A declaration by way application for judicial review that the failure of the first named applicant to assume responsibility and pay the applicant's reasonable legal costs and expenses upon the success or completion of claim is incompatible with Article 47 of the Charter of Fundamental Rights of the European Union;

(v) A declaration that paragraph 2 of the Scheme incompatible with Article 47 of the Charter of Fundamental Rights of the European Union;

(vi) An order of *mandamus* compelling the first respondent to make available to the applicant's legal advisers copies of previous decisions of the first respondent relating to claims such as that being made by the applicant and in particular, copies of decisions relating to the application or non-application of Article 14 of the [scheme];

(vii) A declaration that fair procedures on the principle of effectiveness require there to be in place a system or regime whereby the applicant is entitled to have dealt with as a preliminary issue the question of whether Article 14 of the Scheme will be applied to the applicant's claim.

26. The grounds supporting the reliefs sought include the various issues identified in the first paragraph of this judgment.

The statements of opposition

27. The Statement of Opposition in each case raised the issue of prematurity insofar as no decision had been made by the Tribunal in respect of either of the applications. Further, in the case of Mr. Kelly, it is pleaded that the Tribunal does not have sufficient information to make a decision either on the substantive application or the issues on which he seeks a preliminary determination and that his application is incomplete.

28. It also pleaded that the Directive did not extend to injuries sustained otherwise than involving a Union citizen in a Member State other than the Member State of nationality i.e. it was being pleaded that the Directive was confined to situations involving a cross-border element.

29. Regarding the issue of access to previous decisions, it was pleaded that the decision to decline to furnish such decisions did not breach the applicant's rights and/or (in Mr. Doyle's case) that the right was adequately vindicated by his being told that Article 14 might be applied to him. It was pleaded in the alternative that a grant of *mandamus* would be an unnecessary interference with the separation of powers. It was denied that the Directive required any member State to provide compensation for pain and suffering. It was pleaded that the Directive gave Member States a wide discretion and that it had been properly transposed.

30. It was pleaded that Article 14 of the Scheme constituted a lawful exception to the categories of persons entitled to benefit under the Directive. Again, the Directive gave Member States a wide discretion. Further, Article 14 of the Scheme was in accordance with Article 8 of the European Convention on the Compensation of Victims of Violent Crime of 23 November 1983 which was the international basis for national schemes referred to at Article 12 of the Directive. It was denied that the Scheme breached the principle of legal certainty.

31. It was denied that either Article 47 of the Charter of Fundamental Rights or Article 19 of the Treaty of the European Union required payment of legal costs or expenses.

32. Mr. Charles G. O'Connell, Secretary to the Tribunal, swore a replying affidavit in each of the appellants' cases in which he gave an overview of the Scheme. He said that the Scheme was drafted "with the intention that it would be comprehensible to a person with little or no legal knowledge and that a person, acting on his/her own behalf, could bring an

application to the Tribunal without the necessity of legal assistance". He said that the staff of the Tribunal are responsible for inquiring into the circumstances surrounding the incident the subject of the application and for ensuring that claims are supported by relevant documentation. Decisions are made by an individual Tribunal member and there is an appeals procedure to three Tribunal members (excluding the one who made the original decision).He said that the Tribunal does not keep records in a fashion that would allow for the ready extraction of the information concerning paragraph 14 of the Scheme. Accordingly, all files would have to be read and the Tribunal did not have the resources to do that. He confirmed that there was no provision for an advance ruling.

The High Court Judgment

33. The respondent did not object to the form of procedure adopted by the appellants. The appellants apparently made an application to convert the proceedings toward the conclusion of the hearing in the High Court. The High Court judge (Murphy J.) in her judgment did not rule on this application as such, saying that she considered that the applications were fundamentally misconceived in any event. She said that the applications were premised on the contention that persons who suffer injury as a result of a criminal act have a right to compensation for that injury, both under Irish law and European law. The rights being claimed were said to be ancillary to this right. She said there was no such right to compensation, either in Irish law or in European law and accordingly, all the claims for ancillary relief were without foundation. She said that it had been clear since the judgment of Carroll J. in *A.D. v Ireland* [1994] I.R. 369, there is no constitutional right to compensation for criminal injuries. The Scheme of Compensation for Personal Injuries Criminally Inflicted was introduced by the Government in 1974 as a matter of social policy. The Scheme is *ex gratia* and non-statutory. Social policy is liable to change, at the option of the Government.

One such change was introduced in 1986, when the Scheme, which had originally included provision for compensation for pain and suffering, was changed to exclude such compensation. That change was challenged unsuccessfully, in *A.D. v Ireland*. This decision, as well as disposing of the applicants' claim to be entitled to damages for pain and suffering, makes it clear that the existence of a scheme is a matter of social policy, and is not one of legal right. She said that the applicants' rights were: the right to claim compensation under the Scheme, and to have that claim dealt with in accordance with the provisions of the Scheme.

34. Murphy J. criticised the timing of the applications, saying that, having as part of their applications accepted the terms of the Scheme, they now in mid-application, seek to challenge its terms. This simultaneous approbation and reprobation of the Scheme was not permissible in law.

35. The parameters of the Scheme were entirely rational in the context of social policy. Compensation for injuries criminally inflicted was directed at blameless victims of crime, who, but for the social intervention of states, might otherwise go uncompensated. It was permissible, as a matter of social policy, that those who by their conduct or lifestyle, set themselves against the common good, should be excluded from such a scheme.

36. As regards the claim of right to see previous decisions of the Tribunal, she noted that the Tribunal did not retain the factual details of specific cases in which compensation has been refused or restricted and that it maintained that each decision turns on its own facts.

37. Murphy J. accepted that there was a requirement that the Scheme be operated according to the constitutional norms of fair procedures. For example, a decision to refuse or reduce compensation taken by the Tribunal would have to be supported by reasons, so that the applicant would be left in no doubt as to the basis on which the decision was reached and to render the decision amenable to judicial review.

38. She said that while the Scheme does not require the Tribunal to maintain or disseminate details of previous decisions, that does not mean that intending applicants are left bereft of information as to the operation of the Scheme because paragraph 19 of the Scheme provides that the Tribunal will submit annually to the Minister for Justice a full report on the operation of the Scheme together with their accounts, and the report and accounts will be laid before both Houses of the Oireachtas. In addition, the Tribunal may, in connection with its annual report or otherwise, publish such information concerning the Scheme and decisions in individual cases as may, in its opinion, assist intending applicants for compensation. She said that it was to be expected that a full report in any given year will contain details of the numbers of claims refused or reduced by virtue of the provisions of paragraph 14. She also noted the second limb of paragraph 19, which though not mandatory, empowers the Tribunal to publish decisions in individual cases, and said that publication of decisions to grant, refuse, or reduce awards, particularly pursuant to paragraphs 13 and 14 of the Scheme, might well assist applicants in assessing the consistency of the Tribunal's approach to such claims. However, the Article makes it clear that publication of decisions is a matter for the Tribunal's discretion, to be exercised if, in the Tribunal's opinion, it would be of assistance to intending applicants.

39. Murphy J. specifically rejected the applicants' submission that there was a right to compensation for injuries criminally inflicted in European Union law. The genesis of EU policy appears in the '*European Convention on the Compensation of Victims of Violent Crimes*' (24 November 1983) (Strasbourg, 24.XI. 1983) ("the 1983 Convention"), although Ireland has neither signed nor ratified the Convention. She noted that Article 4 sets out the minimum provisions (loss of earnings, medical and hospitalisation expenses and funeral expenses, and, as regards dependants, loss of maintenance.)" and also that Articles 7 and 8 set out circumstances in which compensation may be reduced or refused. Of particular

interest in the context of this case, she said, was Article 8 which made it clear from the outset that certain victims of criminal injuries could be excluded.

40. She said that Directive 2004/80/EC does not give victims of crime a free-standing right to compensation for injuries criminally inflicted but rather, to give effect to a right of access to claim compensation in cross-border scenarios, the Directive requires that each Member State have a scheme which guarantees fair and appropriate compensation to victims. She noted that the applicants laid particular emphasis on Recital (3) of the Directive, but said it was clear from the judgment of the ECJ in *Commission v Italy*[3] that this objective was abandoned during the legislative procedure which led to the adoption of the Directive. It follows that the Directive does not impose on Member States any obligation to meet minimum standards in the provision of compensation to victims for damages, or for legal costs. What the state must provide to victims of crime, is access to a scheme of compensation which is 'fair and appropriate'. The fairness and appropriateness of Member States' schemes is monitored by the European Council and the European Commission. Ireland's Scheme has been submitted to the Commission and to date, no issue has been taken with its fairness or appropriateness.

41. She noted the contents of the report reviewing the schemes in different jurisdictions. While there was variation in the national schemes, virtually all schemes contained a provision that reflects the Commission's view that victims who in some way contribute to the circumstances in which they were injured may have their compensation reduced or their claim rejected altogether. By contrast, a substantial majority (4:1) takes the view (not proposed in the minimum standards) that victims who have a criminal record should not for that reason be precluded (in whole or in part) from compensation. She thought that

[3] Case C-601/14 (Judgment of the Grand Chamber of the 11th of October, 2016)

paragraphs 13 and 14 of the Irish Scheme appear to be entirely in line with the schemes operated by other Member States.

42. The High Court accordingly rejected the applications.

43. The appellants appealed against the entirety of the High Court decision and contested each finding made by the High Court judge.

Relevant Legal Framework:

The Scheme of Compensation for Personal Injuries Criminally Inflicted

44. As Mr. O'Connell, Secretary to the Tribunal describes, the Irish scheme was introduced in 1974 after the tragic events two years prior usually referred to as the "Dublin-Monaghan bombings". The Scheme was drafted to facilitate an applicant with little or no legal knowledge bring an application to the Tribunal without the necessity of legal assistance.

45. The compensation to be awarded by the Tribunal is on the basis of damages awarded under the Civil Liability Act with certain express exceptions, including that compensation will not be payable in so far as injuries sustained on or after 1 April 1986 are concerned in respect of pain and suffering.

46. The Scheme is a non-statutory one, the provisions of which are found in a document published on the Department of Justice website.

47. The first paragraph of the Scheme says that the Tribunal "may pay *ex gratia* compensation in accordance with this Scheme in respect of personal injury where the injury is directly attributable to a crime of violence…". The injury must have been sustained within the State or aboard an Irish ship on or after 1 October 1972. Paragraph 2 provides that the Tribunal will be "entirely responsible for deciding in any particular case whether

compensation is payable under the Scheme, and, if so, the amount". There is no appeal against or review of a final decision of the Tribunal other than by way of judicial review.

48. Paragraph 3 deals with who can claim under the Scheme, while paragraph 4 considers claims in respect of injuries received in certain particular circumstances. Paragraph 5 makes it clear that a person will not receive "duplicate" compensation where the person obtains compensation otherwise than under the Scheme.

49. Paragraph 6 of the Scheme, entitled "Nature and extent of compensation" provides:

> "Subject to the limitations and restrictions contained elsewhere in this Scheme, the compensation to be awarded be the Tribunal will be on the basis of damages awarded under the Civil Liabilities Acts except that compensation will not be payable
>
> (a) by way of exemplary, vindictive or aggravated damages;
>
> (b) in respect of the maintenance of any child born to any victim of a sexual offence;
>
> (c) in respect of loss or diminution of expectation of life;
>
> (d) where the victim has died, for the benefit of the victim's estate, or
>
> (e) *in so far as injuries sustained on or after 1st April, 1986 are concerned in respect of pain and suffering*." (emphasis added)

50. The exclusion of compensation for pain and suffering is one of the major targets of the challenge by the appellants to the Scheme in these proceedings.

51. Paragraph 13 of the Scheme provides that "no compensation will be payable where the Tribunal is satisfied that the victim was responsible, either because of provocation or otherwise, for the offence giving rise to his injuries and the Tribunal may reduce the amount of an award where, in its opinion, the victim has been partially responsible for the offence".

52. Paragraph 14 of the Scheme provides that "*compensation will not be payable where the Tribunal is satisfied that the conduct of the victim, his character or his way of life make*

it inappropriate that he should be granted an award and the Tribunal may reduce the amount of an award where, in its opinion, it is appropriate to do so having regard to the conduct, character or way of life of the victim." This is another of the appellants' targets in their challenge to the Scheme in these proceedings.

53. Paragraph 26 of the Scheme provides that the hearing of the Tribunal will be by way of a presentation of his case by the applicant who will be entitled to call, examine and cross-examine witnesses. It says: "It will be for the claimant to establish his case".

54. Paragraph 27 provides that an applicant may be accompanied by his legal adviser or another person "but the Tribunal will not pay the costs of legal representation". The Tribunal may at its discretion pay the necessary and reasonable expenses of witnesses. The absence of legal aid/costs is also one of the targets of the appellants' challenge to the Scheme.

55. Paragraph 30 provides that hearings are in private and the standard of proof is the balance of probabilities.

European Developments preceding the introduction of Directive 2004/80/EC

56. The European directive with which these proceedings are concerned was preceded by a number of developments on the European stage over several decades. The first significant event was the drafting of a Council of Europe Convention by a Committee of Governmental Experts under the authority of the European Committee on Crime Problems. This was the European Convention on the Compensation of Victims of Violent Crimes which opened for signature by members states on the 24 November 1983. This, among other developments, reflected a new emphasis among policy makers and criminologists on the interests of victims of crime, now starting to be seen as on par with the penal treatment of offenders in terms of its importance. Ireland has neither signed nor ratified the Convention.

57. The Convention envisaged that compensation would be payable to victims from public funds for offences which were intentional, violent and the direct cause of serious bodily injury or damage to health. Interestingly in the context of the present proceedings, Article 4 of the Convention provides for "minimum" items for which reasonable compensation is to be paid, being loss of earnings, medical expenses, hospital fees, funeral expenses and loss of maintenance. It provides that other "possible" items, subject to the provision of national legislation, include pain and suffering, loss of expectation or life and additional expenses arising from disablement caused by an offence. It is also interesting for present purposes to note that Article 8 provides that compensation may be reduced or refused on account on the victim's or the applicant's conduct before, during or after the crime, or in relation to the injury or death; compensation may also be reduced or refused on account of the victim's or the applicant's involvement in organised crime or his membership of an organisation which engages in crimes of violence; and compensation may also be reduced or refused if an award or a full award would be contrary to a sense of justice or to public policy (*ordre public*). Numerous other aspects of compensation are dealt with in the Convention.

58. The next important landmark was the so-called "Tampere meeting". In October 1999, the European Council held a special meeting in Tampere on the creation of an area of freedom, security and justice in the EU. The conclusions arising from this meeting under the heading of "European Area of Justice" included that minimum standards should be drawn up on the protection of victims of crime, in particular on crime victims' access to justice and "on their rights to compensation for damages, including legal costs". This reference to legal costs is emphasised by the appellants. The Tampere meeting is referenced in one of the Recitals to the next and crucial development, the introduction of Directive 2004/80/EC relating to compensation for crime victims.

Council Directive 2004/80 relating to Compensation for Crime Victims

59. Council Directive 2004/80/EC of 29 April 2004 deals with compensation to crime victims. I will set out certain of the Recitals to the Directive because they feature in the analysis of the recent judgment of the CJEU in the *B.V.* case, discussed below. These are the following Recitals:

> *'(1) One of the objectives of the European [Union] is to abolish, as between Member States, obstacles to the free movement of persons and services.*
>
> *(2) The Court of Justice held in the [judgment of 2 February 1989, Cowan (C 186/87, EU:C:1989:47)] that, when [European Union] law guarantees to a natural person the freedom to go to another Member State, the protection of that person from harm in the Member State in question, on the same basis as that of nationals and persons residing there, is a corollary of that freedom of movement. Measures to facilitate compensation to victims of crimes should form part of the realisation of this objective.*
>
> *(3) At its meeting in Tampere on 15 and 16 October 1999, the European Council called for the drawing-up of minimum standards on the protection of the victims of crime, in particular on crime victims' access to justice and their rights to compensation for damages, including legal costs.*
>
> *...*
>
> *(6) Crime victims in the European Union should be entitled to fair and appropriate compensation for the injuries they have suffered, regardless of where in the European [Union] the crime was committed.*
>
> *(7) This Directive sets up a system of cooperation to facilitate access to compensation to victims of crimes in cross-border situations, which should operate on the basis of Member States' schemes on compensation to victims of violent intentional crime, committed in their respective*

territories. Therefore, a compensation mechanism should be in place in all Member States.

(10) Crime victims will often not be able to obtain compensation from the offender, since the offender may lack the necessary means to satisfy a judgment on damages or because the offender cannot be identified or prosecuted.

60. Chapter I of the Directive is entitled 'Access to compensation in cross-border situations'. Article 1 of Directive 2004/80, which is contained in this Chapter, provides:

'Member States shall ensure that where a violent intentional crime has been committed in a Member State other than the Member State where the applicant for compensation is habitually resident, the applicant shall have the right to submit the application to an authority or any other body in the latter Member State.'

61. Article 2, entitled 'Responsibility for paying compensation' provides:

Compensation shall be paid by the competent authority of the Member State on whose territory the crime was committed.'

62. The remainder of Chapter I deals with the details of making and hearing claims for compensation in these cross-border situations.

63. Chapter II of the Directive is entitled 'National schemes on compensation'. Article 12 is the only Article in this Chapter. It provides:

'1. The rules on access to compensation in cross-border situations drawn up by this Directive shall operate on the basis of Member States' schemes on compensation to victims of violent intentional crime committed in their respective territories.

2. All Member States shall ensure that their national rules provide for the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories, which guarantees fair and appropriate compensation to victims.'

Report on the application of the Directive

64. On the 20 April 2009, there was a report from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the application of the Directive, as stipulated by Article 19 of the Directive itself. This contained the results of an examination of the current stage of implementation of the Directive in Member States and covered the period 1 January 2006 to 31 December 2008.

65. On the basis of the information available at that point, all but two Member States (Greece and Italy) had a scheme in place. Interestingly, the report notes that "virtually all schemes contain a provision that victims who in some way contribute to the circumstances in which they were injured may have their compensation reduced or their claim rejected altogether. By contrast, there is a substantial majority (4:1) of schemes in which victims who have a criminal record are not for that reason precluded (in whole or in part) from compensation". The vast majority of schemes provided compensation for financial loss arising from injury and most provided compensation for longer term disabilities. Some schemes operated a tariff that fixed a financial value to specified injuries. A majority of schemes imposed an upper limit on the total of compensation in any case. The report concluded that there appeared to be a substantial degree of compliance across Member States but made some recommendations for ensuring greater effectiveness, including by ensuring greater communication about the Directive, dealing with language issues in cross-border cases, and ensuring clarity and transparency concerning key elements of national compensation schemes.

PART II: THE DECISION IN THE B.V. CASE AND THE LEGAL ISSUES IN THESE PROCEEDINGS

The legal source and scope of a right to compensation for injuries which have been criminally inflicted

66. This case was argued in the High Court and the Court of Appeal prior to the important decision of the Grand Chamber of the CJEU in the "*B.V.* case"[4] being handed down. That decision has made it clear that there is a right to compensation in respect of injuries criminally inflicted under Directive 2004/80/EC and therefore an important and fundamental aspect of the legal landscape has changed since the delivery of the High Court judgment and the appeal hearing. The appellants had concentrated their arguments on the Directive in any event, and their contention that the Directive conferred a right on their clients has transpired to be correct.

67. While the appellants did attempt to put their case forward on the basis of a constitutional as well as an EU right to compensation, the argument was not strongly pressed nor was there any detailed argument as to why the decisions in *A.D. v. Ireland*[5] was wrong. That was a case in which the plaintiff had suffered considerable injuries as a result of rape, buggery and assault and claimed that there was a constitutional right to compensation from the State. The High Court (Carroll J.), in rejecting the plaintiff's claim, held that although the plaintiff's unenumerated constitutional right to "bodily integrity" had been violated by the crime committed against her, there was no constitutional right to compensation from the State for criminal injuries and the question of compensation for such injury was a matter of policy to be determined by the government and the Oireachtas. More recently, in *Byrne v.*

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[4] *Italian Presidency of the Council of Ministers v. B.V.* (Case - 129/19; ECLI:EU:C 220:566).
[5] [1994] 1 IR 369

CICT,[6] the High Court (White J.) granted a declaration that a delay (of the order of 13 years) on the part of the CICT in making an award was in breach of constitutional justice but specifically refused, having considered *A.D.*, to make a declaration that the exclusion of pain and suffering from the Scheme was a breach of the applicant's constitutional rights. The *A.D.* case was also referenced in the High Court judgment in the present case as authority for the proposition that there is no constitutional right to compensation from the State in respect of injuries criminally inflicted. In domestic Irish law, the Scheme has always been considered an *ex gratia* scheme which can be expanded or contracted in its scope as a matter of executive policy. Indeed, the Scheme describes itself as *ex gratia* on its face. As the arguments of the appellants concentrated on an EU law right, I will not discuss the Irish constitutional position any further here.

The argument as to an EU right stemming from Directive 2004/80/EC

68. At trial and on appeal, the appellants concentrated their energies upon establishing the existence of a right from an EU source, namely *Directive 2004/80/EC.* The difficulty with that argument at that time was that it was not clear whether the Directive was confined to cross-border situations (e.g. where a citizen of member state A has been criminally injured in members state B) or whether it additionally conferred rights in purely domestic situations (e.g. where a citizen of member state A has been criminally injured in member state A). The jurisprudence of the CJEU up to that point had left the matter open to argument.[7] The High Court in *Byrne v Ireland* had interpreted the state of the EU jurisprudence as yielding the

[6] [2017] IEHC 28

[7] See *Paola C. v Presidenza del Consiglio dei Ministri*, Case C‑122/13, judgment of 30 January 2014, *Commission v. Italian Republic*, Case 601/14, judgment of Grand Chamber, 11 October 2016, together with the prior opinion of Advocate General Bot, 12 April 2016. A useful discussion of how these decisions and opinions could be used to support alternative arguments on the question of whether the Directive imposed any State obligations in a 'purely domestic', as distinct from a cross-border situation, were set out in the opinion of Advocate General Bobek in the *B.V. case*; his opinion is dated 14 May 2020.

proposition that the Directive did not confer any rights outside a cross-border situation (see paras 22-28 of the judgment). So too did the High Court Judge in the present case.

69. However, subsequent to the oral hearing of this appeal, the decision in the *B.V. case* was handed down. There is no longer any doubt that the Directive does indeed confer an EU law right to compensation from the State upon the victim of a violent intentional crime in a wholly domestic situation. In that respect, the decision of the High Court judge must, with hindsight, be seen to be wrong.

70. This important clarification of the scope of the Directive and its confirmation of an EU law right to compensation shifts the focus more squarely on to (a) the extent or scope of that right (in particular the exclusion of compensation for pain and suffering from the Irish Scheme, and the 'conduct, character and way of life' clause permitting reduction or refusal of compensation), and (b) the impact, if any, of the decision on related procedural matters, such as the question of legal aid and access to previous decisions of the Tribunal. These are the four specific issues raised by the appellant in these proceedings. It is therefore necessary to set out the decision in *B.V.* at some length to lay the groundwork for the analysis of its impact upon those issues.

The decision in the B.V. case

71. In *Italian Presidency of the Council of Ministers v. B.V*, judgment was delivered by the Grand Chamber on 16 July 2020. The judgment arose on foot of a request for a preliminary ruling under Article 267 TFEU from the Supreme Court of Cassation, Italy in connection with the Directive. In 2005, an Italian citizen residing in Italy had been the victim of violent sexual crimes committed on Italian territory. The perpetrators of the crimes were convicted and received prison sentences but since their whereabouts was unknown, the sum of €50,000 damages ordered by the court could not be recovered.

72. In 2009, *B.V.* brought a claim in the District Court of Turin against the Presidency of the Council of Ministers in order to establish the liability of the Italian republic for failure to fully and correctly implement the Directive, in particular Article 12(2) of the Directive. She was successful in the District Court and on appeal before the Court of Appeal Turin. The Presidency of the Council of Ministers brought an appeal to the Court of Cassation on a point of law, arguing that the Directive was not a source of rights that could be relied on by a citizen of the European Union against his or her member state of residence because the Directive concerned only cross-border situations.

73. It may be noted that in 2016, Italy had adopted legislation which fixed amounts of compensation for victims of violent intentional crime such that in cases of sexual violence a fixed amount of €4,800 would be awarded.

74. Having taken into account the prior jurisprudence of the CJEU on the Directive, the Court of Cassation thought that in accordance with the general principles of equal treatment and non-discrimination on the basis of nationality as enshrined in Article 18 TFEU and Articles 20 and 21 of the Charter of Fundamental Rights of the European Union, it was possible to take the view that the Italian Republic could not fully implement the Directive by limiting the application of the national compensation scheme only to victims who were in cross-border situations because such a limitation would subject Italian citizens who resided in Italy to unjustified discriminatory treatment.

75. Accordingly, it referred two questions to the CJEU. The first was whether, where there was late implementation of the Directive, this gave rise to liability on the part of the State in relation to persons who were not in a cross-border situation, namely residents, "who are not the direct addressees of the benefits flowing from implementation of the directive but who, in order to avoid infringement of the principle of equal treatment/non-discrimination in that [EU] law should have and could have - if the directive had been fully

implemented within the appropriate time - benefited, by extension, from the effectiveness of that directive (that is to say, the abovementioned compensation scheme)".

76. The second question was whether, if the answer to the preceding question was in the affirmative, the compensation established in Italy for the victims of violent intentional crimes (and in particular the crime of sexual violence) in the fixed sum of €4,800 could be regarded as "fair and appropriate compensation to victims" within the meaning of Article 12(2) of Directive 2004/80.

77. In its analysis of the first question, the CJEU said as follows (paras. 38-56 inclusive):-

> *39. As regards, in the first place, the wording of Article 12(2) of Directive 2004/80, it must be observed that that provision sets out, in general terms, the obligation for Member States to provide for the existence of a scheme on compensation to 'victims of violent intentional crimes committed in their respective territories' and not only to victims that are in a cross-border situation.*
>
> *40. In the second place, as regards the context of Article 12(2) of Directive 2004/80, it must be recalled that Article 12 of that directive is the only article in Chapter II thereof, which concerns, according to its title, 'national schemes on compensation'. Unlike that of Chapter I of the directive, the title of Chapter II of that same directive does not specifically refer to 'cross-border situations'.*
>
> *41. Article 12(1) of Directive 2004/80 provides that the provisions of that directive on access to compensation in cross-border situations 'shall operate on the basis of Member States' schemes on compensation to victims of violent intentional crime committed in their respective territories'.*
>
> *42. It follows that the EU legislature opted not for the establishment, by each Member State, of a specific compensation scheme that was restricted to those victims of*

violent intentional crime who were in a cross-border situation only, but for the application, in favour of those victims, of national schemes on compensation to victims of violent intentional crime committed in the respective territories of the Member States.

43. Consequently, Article 12(2) of Directive 2004/80 imposes on each Member State the obligation to provide a scheme on compensation to victims of violent intentional crimes committed in its territory.

44. In that regard, it must be observed, as is clear from recital 8 of Directive 2004/80, that on the date of adoption of that directive, such a scheme was provided for by provisions in force in most Member States. However, as the Commission stated in the observations it submitted to the Court, as at that date two Member States had not yet established a scheme of compensation to victims of violent intentional crime committed on their territory.

45. Unless it establishes such a scheme, a Member State is unable to comply with its obligations on access to compensation in cross-border situations, as laid down in Directive 2004/80, since, in accordance with Article 12(1) of that directive, the provisions on access to compensation in such situations are to 'operate on the basis of Member States' schemes on compensation to victims of violent intentional crime committed in their respective territories'.

46. As regards, in the third place, the objectives pursued by Directive 2004/80, it is true that recital 1 thereof refers to the EU legislature's wish to abolish, as between Member States, obstacles to the free movement of persons.

47. Furthermore, recital 2 of that directive states, after recalling the case-law according to which, when EU law guarantees to a natural person the freedom to go to another Member State, the protection of that person from harm in the Member

State in question, on the same basis as nationals and persons residing there, is a corollary of that freedom of movement (judgment of 2 February 1989, Cowan, 186/87, EU:C:1989:47, paragraph 17), that measures to facilitate compensation to victims of crime should contribute to the realisation of that objective.

48. However, it is necessary also to take into account recitals 3, 6, 7 and 10 of that directive.

49. Recital 3 of Directive 2004/80 states that the European Council, at its meeting in Tampere on 15 and 16 October 1999, called for the drawing-up of minimum standards on the protection of the victims of crime, in particular on crime victims' access to justice and their rights to compensation for damage.

50. In that regard, it is clear from recital 6 of Directive 2004/80 that victims of crime in the European Union should be entitled to fair and appropriate compensation for the injuries they have suffered, regardless of where in the European Union the crime was committed. Consequently, and as stated in recital 7 of that directive, it is necessary for a mechanism of compensation for those victims to be in place in all Member States.

51. In addition, recital 10 of Directive 2004/80 indicates that the EU legislature intended to take into consideration the difficulties that victims of violent intentional crime often face in obtaining compensation from the offender, whether that is because the offender lacks the necessary means to satisfy a judgment awarding damages to the victim or because the offender cannot be identified or prosecuted. As the facts giving rise to the case in the main proceedings show, such difficulties are equally likely to be encountered by victims of that type of crime when they reside in the Member State in which the crime in question took place.

52. It follows from the considerations set out in paragraphs 39 to 51 above that Article 12(2) of Directive 2004/80 imposes the obligation on each Member State to provide for a scheme of compensation covering all victims of violent intentional crime committed on their territory and not only those victims that are in a cross-border situation.

The Court sought to explain its previous caselaw:-

53. That finding is not called into question by the case-law of the Court to the effect that Directive 2004/80 provides for a compensation scheme solely in circumstances in which a violent intentional crime has been committed in a Member State in which the victim finds himself or herself in exercising their right to free movement, meaning that a purely internal situation is not covered by the scope of application of that directive (see, to that effect, judgments of 28 June 2007, Dell'Orto, C467/05, EU:C:2007:395, paragraph 59, and of 12 July 2012, Giovanardi and Others, C79/11, EU:C:2012:448, paragraph 37, and the order of 30 January 2014, C., C122/13, EU:C:2014:59, paragraph 12).

54. By that case-law, the Court merely stated that the system of cooperation established by Chapter I of Directive 2004/80 solely concerns access to compensation in cross-border situations, without however determining the scope of application of Article 12(2), which appears in Chapter II thereof (see, to that effect, the judgment of 11 October 2016, Commission v Italy, C601/14, EU:C:2016:759, paragraph 49).

In clear and unambiguous language, the Court declared the existence of a right:-

55. It follows that Article 12(2) of Directive 2004/80 confers the right to obtain fair and appropriate compensation not only on victims of violent intentional crime committed in the territory of a Member State who find themselves in a cross-

border situation, within the meaning of Article 1 of that directive, but also on victims who reside habitually in the territory of that Member State. Therefore, subject to the matters recalled in paragraph 29 above, and provided that the other conditions laid down in the case-law recalled in paragraph 34 above are satisfied, an individual has a right to compensation for damage caused to him or her by the breach by a Member State of its obligation flowing from Article 12(2) of Directive 2004/80, and that is so irrespective of whether that individual finds himself or herself in such a cross-border situation at the time when he or she was the victim of a crime which is a violent intentional crime.

It followed that the State could have a liability for damage caused by a failure to transpose within the appropriate time:

56. Having regard to all the foregoing considerations, the answer to the first question is that EU law must be interpreted as meaning that the rules on the non-contractual liability of a Member State for damage caused by the breach of that law applies, on the ground that that Member State did not transpose, within the appropriate time, Article 12(2) of Directive 2004/80 as regards victims residing in that Member State, in the territory of which the violent intentional crime was committed.

78. With regard to the second question, which was in essence a question as to whether the fixed rate of €4,800 for victims of sexual violence was "fair and appropriate", the key passages in the court's judgment are as follows:

58. In the absence of any indication in Directive 2004/80 as to the amount of compensation deemed to correspond to 'fair and appropriate' compensation, within the meaning of Article 12(2) of that directive, or as to the detailed arrangements for

the determination of such compensation, it must be held that that provision allows Member States a discretion in that regard.

59. In that context, it must be observed that the compensation referred to in Article 12(2) of Directive 2004/80 is to be paid not by the offender who committed the violence concerned himself or herself, but by the competent authority in the Member State in the territory of which the crime was committed, in accordance with Article 2 of that directive, by means of a national scheme for compensation whose financial viability must be ensured in order to guarantee fair and appropriate compensation to any victim of violent intentional crime committed in the territory of the Member State concerned.

60. Therefore, it must be held, as the Advocate General stated in points 137 to 139 of his Opinion, that 'fair and appropriate' compensation, provided for in Article 12(2) of Directive 2004/80, is not necessarily required to correspond to the damages and interest that may be awarded to the victim of a crime that is a violent intentional crime, which are to be paid by the perpetrator of that crime. Consequently, that compensation is not necessarily required to ensure the complete reparation of material and non-material loss suffered by that victim.

61. In that context, it is ultimately for the national court to ensure, with regard to the national provisions establishing the compensation scheme concerned, that the sum awarded to a victim of violent intentional crime pursuant to that scheme is 'fair and appropriate compensation', within the meaning of Article 12(2) of Directive 2004/80.

62. Nevertheless, in the context of the procedure under Article 267 TFEU, in order to provide a useful answer to the referring court it is necessary to set out the relevant criteria for the interpretation of Article 12(2) of that directive, which must be taken

into account for the purpose of the verification envisaged in the preceding paragraph.

63. Thus, it is necessary to state that a Member State would exceed its discretion under Article 12(2) of Directive 2004/80 if the national provisions provided compensation to victims of violent intentional crime that was purely symbolic or manifestly insufficient having regard to the seriousness of the consequences, for those victims, of the crime committed.

64. For the purposes of Article 12(2) of Directive 2004/80, the compensation granted to such victims represents a contribution to the reparation of material and non-material losses suffered by them. Such a contribution may be regarded as 'fair and appropriate' if it compensates, to an appropriate extent, the suffering to which those victims have been exposed.

65. Having made that clarification, it is also necessary to find, having regard to the characteristics of the scheme for compensation to victims of violent intentional crime established by the Italian Republic, that Article 12(2) of Directive 2004/80 cannot be interpreted as meaning that it precludes a fixed rate of compensation to such victims, with the fixed amount granted to each victim being capable of being varied in accordance with the nature of the violence suffered.

66. However, a Member State that has opted for such a compensation scheme must ensure that the compensation scale is sufficiently detailed so as to avoid the possibility that, having regard to the circumstances of a particular case, the fixed rate of compensation provided for a specific type of violence proves to be manifestly insufficient.

67. As regards, in particular, sexual violence, it must be observed that such violence is likely to give rise to the most serious consequences of violent intentional crime.

68. Consequently, subject to the verification which it is for the referring court to carry out, a fixed rate of EUR 4,800 for the compensation of a victim of sexual violence does not appear, at first sight, to correspond to 'fair and appropriate compensation', within the meaning of Article 12(2) of Directive 2004/80.

79. The first and central point emerging from the *B.V.* case is that it confirms that Article 12(2) of the Directive confers a right to fair and appropriate compensation upon a victim of a violent intention crime even if the injuries have been sustained in a wholly Irish context without any cross-border aspect. Insofar as it may have been previously thought that the scope of any EU law right was confined to the victim in a cross-border situation, this view has now been established as incorrect.

80. Secondly, the judgment provides some guidance as to the nature and scope of compensation required by the Directive. This guidance may be summarised as follows:

a) Member States have a discretion with regard to the amount of compensation;

b) A relevant consideration is the financial viability of a domestic scheme;

c) It is not necessary that the amount of compensation correspond with what the perpetrator of the crime would be ordered to pay;

d) It is not necessary that the compensation ensure “the complete reparation of material and non-material loss”;

e) A Member State would be acting outside the range of its discretion if the compensation were “purely symbolic or manifestly insufficient having regard to the consequences”;

f) There must be “a contribution to the reparation of material and non-material losses”;

g) The compensation must compensate to an appropriate extent the suffering of the victim;

h) A Member State is not precluded from employing a system of fixed amounts provided this varies in accordance with the nature of the violence suffered and the scale is sufficiently detailed as to avoid the possibility that in a particular case the fixed is manifestly insufficient;

i) A sum of €4,800 for a rape victim was "at first sight" manifestly insufficient.

81. One of the effects of the decision must be that while the Irish Scheme was previously conceptualised in domestic legal terms as a mere non-statutory *ex gratia* scheme (and indeed so describes itself on its face), which was introduced by the executive as a matter of policy choice (at least insofar as "purely domestic" crimes with no cross-border element were involved), its character must now be conceived of differently; it must now be seen as the means by which the State gives effect to its obligations under the Directive both as regards cross-border and purely domestic scenarios.

82. Insofar as the High Court judge held that there was no right to fair and appropriate compensation for victims of violent intentional crime under EU law, this finding must be now, in light of the *B.V.* decision, be set aside.

83. I will now examine each of the claims put forward by the appellants; (1) the issue of legal aid and/or costs; (2) the question of access to previous decisions of the Tribunal; (3) the question of character, conduct and way of life as a reason for refusing or reducing an award; and (4) the exclusion of pain and suffering from the Scheme. The first two matters are procedural matters related to the making of a claim, while the second two relate to the quantum or scope of awards.

84. Although the respondents have raised prematurity as a preliminary issue in a general way, I prefer to consider the question of prematurity in relation to each of the distinct issues before the Court on an individual basis.

85. The appellants also appealed against the decision of the High Court not to rule on the application to convert the proceedings into plenary proceedings. This application had been made by them towards the conclusion of the hearing. The High Court judge decided not to rule on the application because she considered the entire case to be "misconceived". Given the lateness of the application, I do not think it was properly before the High Court and I do not think that this Court should rule upon the issue in those circumstances.

The First Issue: Legal Aid and/or the costs of making an application under the Scheme

86. The High Court judge appears to have dealt with the issue of legal aid primarily on the basis that the argument was ancillary to the main argument that there was a right under EU law to compensation, and that the failure of the main argument must lead to the failure of the ancillary argument. As the decision in *B.V.* has overtaken matters in this regard, it is now necessary to consider the issue in light of the position as clarified in the *B.V.* case. Does the fact that the Directive confers a right to compensation for injuries inflicted in the course of a violent intentional crime change the answer to the question of whether legal aid and/or an award of costs is required in order to give an applicant to the Scheme effective protection of his right?

The pleadings and the evidence on this issue

87. In addition to the reliefs of a general nature which are sought on grounds that the Scheme is not in conformity with EU law, sought by both appellants, Mr. Kelly also seeks a specific declaration that the failure of the Tribunal to assume responsibility and pay the applicant's reasonable legal costs and expenses upon the successful completion of claim is incompatible with Article 47 of the Charter of Fundamental Rights of the European Union. His statement of grounds deals with this issue in much more detail than that of Mr. Doyle.

He refers to Article 47 of the Charter and Article 19 of the Treaty of the European Union, and pleads that the lack of jurisdiction on the part of the first respondent to pay an applicant's legal costs, coupled with the failure of the second respondent to prescribe the first respondent under s.27 of the Civil Legal Act 1995, unlawfully renders it impossible and/or excessively difficult for the applicant to obtain funding to bring a claim of compensation under the scheme. He also says, when addressing the paragraph 14 issue (character, conduct and way of life), that it would be unfair and in breach of the principle of effectiveness if the applicant were forced to mount a "full claim", involving the assembly of all elements of the claim and appropriate evidence, particularly expert evidence including perhaps psychological, actuarial, psychiatric evaluation(s) , whilst being denied any financial support in the form of legal aid and without any knowledge of whether the claim would be rejected *ab initio* under the provisions of paragraph 14 of the Scheme. He pleads that the imposition of such a requirement would involve the expenditure of considerable sums, unavailable in fact to this applicant, in the knowledge that the claim might in any event "fall at the first fence" on account of the paragraph 14 considerations. He pleads that no reasonable lender would be likely to advance any financial assistance under such a precarious regime, which thereby operates as an unlawful obstacle to effective access to justice.

88. What evidence was adduced by the appellants on the issue of their need for legal aid? The evidence in Mr. Doyle's case is as follows. The appellant exhibited a letter of 18 December 2015 in which his solicitors noted that legal costs are not recoverable under the Scheme and said that there was "little reality" in their client being in a position to raise funds to pay for the preparation of his claim and that they would require assurance that funding would be available for that purpose. No further information on Mr. Doyle's financial position was advanced. By letter dated 11 February 2016, the Tribunal confirmed that there is no provision in the Scheme for the provision of financial assistance to an applicant to establish

a claim and that the Tribunal does not pay legal costs, but said that an applicant could make an application without legal advice.

89. The evidence in Mr. Kelly's case is as follows. By letter dated 27 May, 2016, solicitors for Mr. Kelly wrote to the Tribunal saying that their client's injuries were very serious and in order for them to be properly equipped to prepare a comprehensive claim on his behalf they would need to be assured that funding would be available for the purpose. They note the Scheme provides that legal costs are not recoverable and say that the Scheme is not in compliance with EU law in this regard. They "hereby demand that the Tribunal agree (in the event of our client's claim being successful" to be responsible for our client's reasonable costs". The letter goes on to say there was "little reality" in their client being in a position to raise funds for the preparation of his claim without the prospect of having such costs paid in the event of his claim being successful, particularly with the potential application of paragraph 14 of the Scheme to his application.

90. In his affidavit, Mr. Kelly says that the situation "has the potential to result in an obstacle to my right of access to justice in regard to the claim I have made and wish to pursue" (paragraph 10) and that "I could ill afford the cost or potential cost of assembling my full claim" (paragraph 12). He says that he might have a reasonable chance of raising funds from friends, family or a financial institution if he knew that any compensation would not be cancelled or reduced by reason of paragraph 14 of the Scheme. He says he is advised by his solicitor that "in his view, no wise lender would fund the prosecution of my claim, in the knowledge that it might come to nothing". He also refers to the absence of any preliminary procedure by which the paragraph 14 issue might be determined.

Prematurity and evidential foundation

91. I do not think that an issue of prematurity as such arises in connection with this first limb of the appellants' claim. It is clear from the express terms of the Scheme and the relevant legal aid legislation that there is no provision for legal aid or for an award of costs to a successful claimant. There is no decision that the Tribunal can make in its discretion which alters that situation. The appellants seek relief of a declaratory nature in relation to this aspect of the Scheme as a whole rather than any particular decision of the Tribunal, actual or anticipated. Accordingly, I do not think this claim fails on the ground of prematurity, although a reasonable question may be asked as to why the proceedings were not commenced by way of plenary summons. It seems that this issue was raised before the High Court Judge but she decided not to rule on it as she considered the proceedings 'misconceived' in any event and rejected the arguments of the appellants on their merits. The issue of the form of proceeding adopted by the appellant was not pursued on appeal**.**

92. Leaving prematurity to one side, I have a slightly different preliminary concern, which is whether a sufficient evidential foundation has been laid by the appellants to make arguments relating to legal aid and/or costs. The courts have repeatedly expressed their dissatisfaction with being asked to decide important issue of constitutional law in an evidential vacuum (*Sweeney v. Ireland*[8], *M.D. v. Ireland*[9]), and indeed this problem is often linked with the inappropriate use of judicial review rather than plenary proceedings to launch such challenges in circumstances where there is no specific administrative or judicial decision being challenged; (see recent discussion by the Court in *Galvin*[10]). The problem is no less pressing when the challenge is based upon rights under EU law rather than the

[8] [2019] IESC 39
[9] [2010] IEHC 101, [2010] 2 ILRM 491
[10] *Galvin* [2020] IECA 319, judgments delivered by Ni Raifeartaigh and Collins JJ, 19 November 2020

Constitution. Here, the appellants put forward a far-reaching claim that they are entitled to legal aid and/or costs in the context of the Criminal Injuries Compensation Tribunal, and yet offer the most minimal of information about their personal and financial circumstances, both pre- and post-injury. There are assertions that they cannot fund the preparation of their claims to the Tribunal but there is no background evidence at all. The Court has simply been invited to accept their bare assertions that they would not be able to fund the preparation of a claim. This is not a satisfactory situation. The launching of proceedings involving a claim that the State is involved in a breach of rights under EU law and the European Convention of Human Rights is a serious matter and should be underpinned by appropriate and detailed factual information in which the legal issues raised can be considered. The Court should not be asked to consider such matters in a near-evidential vacuum and on the basis of assumption and inference.

93. With some reluctance, I will however proceed to deal with the arguments as to legal aid on their merits. Mr. Doyle suffered a very serious brain injury and the inference can readily be drawn that he has not been able to work at least since he received the injuries the subject of his compensation claim. The actual criminal record of each of the appellants (described earlier), starting when each was a juvenile, is suggestive of a somewhat chaotic lifestyle unlikely to be associated with steady employment. In the circumstances, I am prepared to proceed on the assumption that the assertions that each of them are correct and that they would have considerable difficulty funding a legal team to present their claims before the Tribunal, despite the absence of explicit evidence as to their personal financial history and current circumstances.

Submissions of the parties on the merits

94. In the course of their submissions on this issue, the appellants rely upon Article 47 of the Charter, Article 19 of the TEU, and recital 3 of the Directive. They reference cases such as *D.E.B.*[11] and *Unison*[12] and the principle of "effectiveness" under EU law which, they submit, require that the appellants be provided with financial support either by way of legal aid or by means of the prospect of an award of costs at the conclusion of the process in order to enable them to properly bring a claim and protect their EU right to compensation. Comparison was drawn with what would happen in civil proceedings brought against the perpetrator of the crime, where a successful action would result in an award of costs which would cover the expenses of mounting the claim in the first place. Counsel relies on an article written by a current judge of the European Court of Human Rights in which the potential impact of EU law on the right of access to justice is explored: '*The legacy of Airey v. Ireland and the potential of European law in relation to legal aid'* by Síofra O'Leary. Counsel also relies upon *Gustafsson*[13], a decision of the European Court of Human Rights, which dealt with a claim for compensation for criminal injuries under the Swedish scheme.

95. The supplemental submissions on behalf of the appellants contend that the decision in *B.V.* has a significant impact on the question of legal aid and/or costs. They submit that the decision makes clear that the Scheme falls within the field of EU law (a phrase used in Article 19 TEU) and that appellants should benefit from the relevant Charter provisions ensuring protection of their rights and access to legal assistance. They submit that the Tribunal in determining claims for compensation on behalf of victims of crime is making a decision which attracts the protection of Article 6 of the European Convention on Human

[11] DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland (Case C-279/09) [2010] ECR I-13849
[12] *R (Unison) v. Lord Chancellor* [2017] UKSC 51
[13] *Gustafsson v Sweden* (application no. 23196/94, 1 July 1997)

Rights. They also submit that if the Court has any doubt in relation to the matter, it might consider making a preliminary reference to the CJEU on this point.

96. The respondents submit that the analogy to adversarial personal injuries litigation demonstrates a flawed understanding of the Scheme and emphasise that a claim under the Scheme is not an adversarial claim mounted in court. They point out that Article 3(3) of the Directive imposes a requirement on Member States to endeavour to keep to a minimum the administrative formalities required of an applicant, and submit that this is precisely what the Scheme does. Assistance is provided to an applicant by the Tribunal Staff and it funds the costs of experts. Costs are kept to a minimum and there is no need for legal representation. They point to the description of the Scheme set out in the affidavit of Mr. O'Connell and contrast this procedure with cases which have been held to attract legal aid under Article 6 of the European Convention on Human Rights, relying in this regard upon the useful summary provided in the *Guide to Article 6 of the European Convention on Human Rights: Right to a fair trial (civil limb)* provided by the European Court of Human Rights itself.

97. The respondents acknowledge the wording of Recital 3 in the Directive which references legal costs but point out that the substantive provisions of the Directive do not incorporate provision for legal costs. The supplemental submissions of the respondents contend that the decision in *B.V.* has no impact on the issue of legal aid and /or legal costs in relation to an application under the Scheme. The decision is silent on the issue, even though the court took account of Recital 3 when interpreting Article 12(2) of the directive. This emphasises that despite the aspiration set out in Article 3, the Directive itself deliberately goes no further than it does on the issue of legal aid and/or costs.

Decision of the Court on the issue of legal aid and/or costs

98. The question is whether, in circumstances where there is an EU right to fair and appropriate compensation for violent intentional injuries criminally inflicted, there must also be an ancillary procedural right either to have legal aid to mount one's claim for compensation or to have the costs of mounting a successful claim awarded at the conclusion of the process.

99. Article 47(1) of the EU Charter provides:

> "Everyone whose rights and freedoms guarantee by the law of the Union are violated has the right to an effective remedy before a tribunal"
>
> Article 47(3) provides:
>
> "Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice".

100. Under the well-established caselaw of the CJEU, the domestic rules for safeguarding an individual's rights under EU law must (1) be no less favourable than those governing similar domestic actions (the principle of equivalence); and (2) not render practically impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness). [14]

101. Under Article 19(1) TEU, Member States "shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law".

102. Much of the submission of the appellants on this issue appears to come close to asserting that if there is an EU right to fair and appropriate compensation for violent intentional injuries criminally inflicted, the necessary and inevitable corollary of that was the existence of an ancillary procedural right either to have legal aid to mount one's claim

[14] C-33/76 Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer fur das Saarland EU:C:1976:188; Case C268/06, Impact v Minister for Agriculture and Food, EU:C:2008:223.

for compensation or to have the costs of mounting a successful claim awarded at the conclusion of the process. I do not agree that matters are that simple or that the corollary is inevitable. Rather, the matter requires much closer examination.

103. It is true that EU law does now concern itself with the question of access to justice, and legal aid and/or costs as a component of that in relation to litigation concerning rights under EU law. A leading case in that regard is *D.E.B.*. As the judgment in that case demonstrates, the CJEU is heavily influenced by the pre-existing jurisprudence of the European Court of Human Rights on issues relating to access to justice, including the question of legal aid, or what might be described as the *Airey* line of Strasbourg jurisprudence[15]. It combines that approach with the weighty principle of "effective judicial protection" developed in its own caselaw. This blended approach can be seen in the judgment in *D.E.B.*.

104. What was in issue in *D.E.B.* was the question of legal aid for a company, as distinct from a natural person. The company wished to pursue litigation against Germany for damages (Francovich-type damages) for failure to transpose certain directives concerning the internal market in natural gas. The question was whether the conditions in German law concerning the grant of legal aid to a company were, by virtue of their stringency, in breach of the principle of effective judicial protection.

105. The Court examined the caselaw of the European Court of Human Rights and said that it was apparent from this jurisprudence that the grant of legal aid to legal persons was not in principle impossible, but that the correct approach was for the national court to ascertain whether the conditions for granting legal aid constituted a limitation on the right of

[15] *Airey v. Ireland* [1979] 2 E.H.R.R. 305, *McVicar v. United Kingdom* application no. 46311/99 (2002) 35 EHRR 21, *Steel and Morris v. United Kingdom* application no. 68416/01, [2005] ECHR 103, and *P, C and S v. United Kingdom* (2002) 35 EHRR 31

access to the courts which undermined the very core of that right; whether they pursued a legitimate aim; and whether there was a reasonable relationship of proportionality between the means employed and the legitimate aim which was sought to be achieved. In making that assessment, the national court must take into consideration a number of factors (all of which are familiar from the Strasbourg jurisprudence) namely the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant's capacity to represent himself effectively. In order to assess proportionality, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts. With regard to legal persons, the court could take into consideration inter alia, the form of the legal person in question and whether it is profit-making or non-profit-making; the financial capacity of the partners or shareholders; and the ability of those partners or shareholders to obtain the sums necessary to institute legal proceedings.

106. A relatively recent discussion of the relationship between EU law and that of the European Convention on Human Rights in this area is that of the UK Supreme Court in *Unison*[16] This was a case where a Fees Order which imposed fees in respect of proceedings in employment tribunals ("ETs") and the employment appeal tribunal ("EAT") was struck down on the basis that it rendered access to the tribunals in order to litigate rights under EU unduly difficult. Again, one sees the harnessing together of the EU principle of effectiveness and the Strasbourg jurisprudence on Articles 6 and 13 to create a powerful protection for

[16] *R (Unison) v. Lord Chancellor* [2017] UKSC 51.

litigants who seek to protect their EU law rights in the domestic system, which includes in appropriate cases the removal of obstacles of access to litigate those rights.

107. The first matter to be considered is the precise nature of an application to the Tribunal. The first and obvious point is that it is not a court proceeding. It is not an adversarial procedure. Nor is it a proceeding in which the EU right to fair and appropriate compensation is itself in dispute. Rather it is a proceeding in which the claimant seeks to establish that he falls within the conditions for entitlement to compensation defined by EU law i.e. (i) that he suffered injury; (ii) that the injury was caused by a violent intentional crime. Indeed, the scope of the proceedings before the Tribunal may be contrasted with the content of the present proceedings, where the scope of the right to compensation under the Directive *is* being litigated. While it is true that the Scheme requires a claimant to present his claim, the affidavit of Mr. O'Connell makes clear that Tribunal staff will assist the claimant and also procure any necessary medical reports if necessary.

108. Given the close alignment between EU law and that developed under the European Convention on Human Rights, one question which might be posed is whether the procedure by which a claimant makes a claim to the Scheme would be deemed to fall within the scope of Article 6 of the Convention. Recalling that that Article 6 concerns a "determination of civil rights and obligations[17]", I note that the European Court's own Guide to Article 6 says: "*The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. Lastly, the result of the proceedings must be directly decisive for the 'civil' right in question…".* The Guide also says: "…*Article 6 does not apply to a non-contentious and unilateral procedure which does not involve opposing parties and which is available only where there is no dispute over rights*". The

[17] Or of any criminal charge; which of course does not arise here.

Guide cites, in this regard, *Alaverdyan v. Armenia*[18], a case in which the applicant chose to institute 'special' non-contentious proceedings to establish the paternity of his alleged (deceased) father. He subsequently complained to the Court under Article 6 as to how matters were dealt with under that procedure but the European Court of Human Rights ruled the application under Article 6(1) inadmissible on the basis that there was no dispute or 'contestation'. It said:

> *".....As regards the existence of a 'contestation', the court reiterates that this word should not be construed too technically and that it should be given a substantive rather than a formal meaning, especially that it has no counterpart in the English text of Article 6.1. The use of the French word contestation in that provision, nevertheless, implies the existence of a disagreement (see Le Compte, Van Leuven and De Meyere v. Belgium, 23 June 1981, § 45, Series A no. 43, and Gorou v. Greece (no. 2) [GC], no. 12686/03, § 27, ECHR 2009-...). In other words, there must be a question of law and/or of fact in dispute between two opposing parties, whether two private persons or a private person and the State (see, mutatis mutandis, Ringeisen v. Austria, 16 July 1971, § 94, Series A no. 13; and Albert and Le Compte v. Belgium, 10 February 1983, § 27, Series A no. 58).*
>
> *In the present case, the Court notes that the applicant sought the establishment of paternity as a fact of legal significance by initiating a procedure under Article 189 of the CCP referred to under the domestic law as "special" proceedings. However, this was a non-contentious and unilateral procedure which did not involve opposing parties and was applicable only to cases where there was no dispute over rights. The*

[18] application no. 4523/04

applicant availed himself of this "special" procedure, despite the fact that the issues raised in his application to the courts involved such a dispute and attracted conflicting interests, including pecuniary ones, since a question of inheritance was at stake. This became the reason why the judgment of the Kentron and Nork-Marash District Court of Yerevan, by which his application had been granted, was quashed and the case was reopened by the Court of Cassation (see paragraph 8 above)."

109. The above might suggest that an application for compensation under the Scheme would not fall within Article 6 of the Convention were it not for the decision in *Gustafsson v. Sweden*[19], which actually concerned an application under a State scheme for injuries criminally inflicted. A key feature of the case was (unlike the appellants' cases) that there was a dispute as to whether the applicant had been the victim of injuries which were criminally inflicted. Mr. Gustafsson, who had been convicted himself of certain fraud offences, made application for compensation to a Board in respect of alleged incidents of kidnapping and extortion by other persons, including one Mr. L. The latter individual was prosecuted and ultimately acquitted. The Board rejected the applicant's claim for compensation at first instance and on a review. In a wide-ranging challenge to the Board's decision and procedures pursuant to Article 6(1), one of the issues raised by the Swedish Government was whether his case fell within Article 6(1) of the Convention at all. The Court rejected that argument and said (at paragraphs 38-42):

"*The Court recalls that the applicability of Article 6 para. 1 (art. 6-1) under its "civil head" requires the existence of a dispute ("contestation" in the French text) over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law. That dispute must be genuine and serious; it may*

[19] application no. 23196/94, 1 July 1997,

relate not only to the existence of a right but also to its scope and to the manner of its exercise. Furthermore the outcome of the proceedings must be directly decisive for the right in question (see the Masson and Van Zon v. the Netherlands judgment of 28 September 1995, Series A no. 327-A, p. 17, para. 44; the Acquaviva v. France judgment of 21 November 1995, Series A no. 333-A, p. 14, para. 46).

Having regard to these principles, the Court considers in the first place that there was a dispute over the applicant's alleged right to compensation under the 1978 Act. He lodged a claim with the Board and that claim was rejected on the grounds that he did not satisfy the essential condition defined in the Act for an award of compensation, namely, that he had suffered damage as a result of a crime (see paragraph 16 above). His eligibility under the Act was accordingly in dispute. Nor can it be said with certainty that the dispute over his entitlement to compensation was not a genuine and serious one having regard to the respective functions of the Board and of the domestic courts. The fact that the Court of Appeal acquitted L. for lack of evidence was not conclusive as to whether or not the applicant had in fact been the victim of a criminal act. It was for the Board to adjudicate on that quite separate issue having regard to the specific functions assigned to it under the 1978 Act, to the standard of proof which it required claimants to satisfy and to the information which the applicant had placed before it. In the Court's view a claim submitted to a tribunal for determination must be presumed to be genuine and serious unless there are clear indications to the contrary. Although the applicant may not have adduced any new evidence before the Board to substantiate his allegation that he had suffered personal injury as a result of a crime, this in itself is not sufficient to rebut such a presumption. In particular, it could not be said that the applicant's claim was frivolous or vexatious or otherwise lacking in foundation.

...

The Court, like the Commission, is also of the opinion that the right asserted by the applicant can be categorised as a "civil" right within the meaning of Article 6 para. 1 of the Convention (art. 6-1). It is to be noted in this respect that the right invoked by the applicant was intended to confer on him a pecuniary benefit in the form of compensation.

For the above reasons the Court finds that Article 6 para. 1 of the Convention (art. 6-1) is applicable in the instant case. It remains to be considered whether the Board which adjudicated on the applicant's claim satisfied the requirements of a tribunal as laid down in that Article (art. 6-1)."

110. Having determined that Mr. Gustafsson's case did fall within Article 6, the Court went on, however, to reject the applicant's claim that the Board procedures violated Article 6(1) of the Convention. It held that it was entirely acceptable under Article 6(1) that a tribunal outside the ordinary court system might be set up to deal with a specific subject matter, provided the procedural and substantive guarantees of Article 6 were complied with.

111. The applicant had not disputed that the Board in its composition and operation satisfied the requirements of independence and impartiality, nor that it had jurisdiction to examine and decide with binding effect on all questions of fact and law relevant to the applicant's claim for criminal injuries compensation. The procedures expressly provided for the possibility of an oral hearing and he would have expected to request a hearing if he considered it important that one be held but failed to do so, and it could therefore reasonably be considered that he had waived his right to a hearing. The Board could properly determine in the absence of a hearing whether or not the elements in the file established that the applicant had been the victim of a criminal act either at the hands of L. or of the two other suspects whom he mentioned to the police. The Court rejected his arguments that his claim

was only given scant and routine consideration. Furthermore, the reasons given by the Board were sufficient in the circumstances to justify its rejection of the applicant's claim and its subsequent confirmation of that rejection. Finally, the absence of a right of appeal was not in breach of Article 6. For present purposes, it may be noted that no issue as to the absence of legal aid was raised in the *Gustafsson* case.

112. Although it appears unlikely that there would be any dispute before the Tribunal that the appellants had suffered injuries in course of a criminal incident, unlike Mr. Gustafsson, the decision of the European Court of Human Rights would appear to suggest that the safer view for the Court to take is that a claim to the Irish Scheme *would* fall within the ambit of Article 6(1) of the Convention. In any event, the key question in the present is perhaps not whether the procedure before the Tribunal falls within Article 6(1) of the Convention but whether the EU principle of effective judicial protection (which is informed by Convention law but perhaps not coterminous with it) requires that an impecunious claimant should be afforded legal aid in his claim for compensation (or an award of costs if he is successful).

113. Having regard to the judgment the *D.E.B.* case, it would appear to me that the relevant questions this Court should ask itself in that regard are: 1. Whether the absence of legal aid/possibility of an award of costs constitutes a limitation on the right of access to the Tribunal which impairs the core of the right to compensation; 2. Whether the absence of legal aid/possibility of an award of costs pursues a legitimate aim; and 3. Whether there is a reasonable proportionality between the means employed to achieve that legitimate aim and the aim sought to be achieved. Further, the exercise should be informed by the following considerations; the nature of the proceedings and what is at stake for the claimant; the complexity of the proceedings; and the capacity of the claimant to represent himself.

114. On the one hand, in the case of Mr. Doyle, there is certainly an issue of his being able to represent himself, although in fact the claim has been brought by his father on his behalf. There is no information about Mr. Kelly's capacity to represent himself before the Tribunal. On the other hand, the proceedings of the Tribunal are, as Mr. O'Connell explained, deliberately designed to be as simple as possible. They are also unlikely to raise complex legal issues. This stands in contrast to the kinds of cases where the absence of legal aid was found by the European Court of Human Rights to constitute a violation of Article 6(1) of the Convention. For example, in *Airey v. Ireland*, what was in issue was a judicial separation between husband and wife, and that the proceedings were complex and involved complicated points of law and evidentiary difficulties. In *P, C and S v. United Kingdom*[20], what was in issue was the taking of a daughter into care. In the latter case, the European Court of Justice said that the proceedings were of "exceptional complexity" extending over a period of 20 days; the documentation was voluminous; there was "highly complex expert evidence" relating to the fitness of P and C to parent their daughter; and the hearing raised difficult points of law. The complexity of the case, along with the importance of what was at stake and the highly emotive nature of the subject-matter, led the court to conclude that the principles of effective access to court and fairness required that P receive the assistance of a lawyer. It will also be recalled that in *McVicar*[21], an Article 6(1) claim *failed* in Strasbourg in circumstances where the defendant even though the defendant had represented himself in the High Court over a week in formal legal proceedings involving a defamation claim.

115. It seems to me that the application of the principles developed in those authorities would not support the appellants' argument as to a requirement for legal aid and/or costs. The process under the Scheme is not neither a court procedure nor an adversarial one; the

[20] (2002) 35 EHRR 31
[21] application no. 46311/99 (2002) 35 EHRR 21

Tribunal is willing to organize and pay for any necessary reports (such as medical or psychiatric reports) with regard to an applicant under the Scheme, in order to provide for expert description of the injuries and future prognosis; and there is no question of a costs award being made against the applicants at the conclusion of the process. While I accept that what the issue of compensation for the applicants is extremely important to them, it does not seem to me that the issue of the same order as the issue in cases such as *Airey v. Ireland,* or *P,C and* S such that it would bring them 'over the line'. Here the proceedings are relatively legally straightforward, even if the medical evidence might be complex.

116. Presumably the appellant would suggest that the application or non-application of paragraph 14 and the "character, conduct or way of life" clause introduces a level of legal complexity into the proceedings, but again I do not see that as being of such a level that it brings the case over the line into a category of case where Article 6 of the ECHR or EU law mandates dictates that legal aid be provided.

117. As to the proportionality exercise described in *D.E.B.*, the aim being pursued by having a simple, non-adversarial claims process before the Tribunal is to make it easy to make a claim and to keep the costs down, in order to ensure the financial viability of the scheme. The latter point was expressly adverted to by the CJEU in the *B.V. case*. This is a legitimate aim and the absence of legal aid and/or the possibility of an award of costs in that particular context appears to me to be proportionate, particularly bearing in mind that the State is not at fault and it is a third party who has inflicted the criminal injuries in question. A claimant can still go to the Tribunal, without a lawyer, and the Tribunal will assist, and obtain reports. This does not appear to me to impair the essence of the right to compensation, even though the claimant might prefer to be have funding for a professional legal team to represent him before the Tribunal.

118. Accordingly, I have reached the conclusion that Article 47 of the Charter, Article 19 TEU, and the principle of effectiveness in EU law, do not require that legal aid must be provided to the appellants in order to vindicate their right under the Directive to receive fair and appropriate compensation by bringing a claim before the Tribunal; nor that the Tribunal must make an award of costs in the event of a successful claim.

119. For completeness, I refer to one further decision to which the Court was directed by the appellants: *Burns v. Governor of Castlerea Prison*[22]. This was a decision concerning disciplinary proceedings against prison officers (a very different context) and in which no Convention law was cited in the judgment. As it happens, the court rejected the submission that the applicants should have had legal representation. The main significance of the case is that Geoghegan J. considered useful a list of factors suggested in *R. v. Secretary of State for the Home Department ex parte Tarrant*[23]. The list consisted of (1) the seriousness of the charge and of the potential penalty; (2) whether any points of law are likely to arise; (3) the capacity of a particular prisoner to present his own case; (4) procedural difficulty; (5) the need for reasonable speed in making the adjudication, and (6) the need for fairness as between prisoners and as between prisoners and prison officers. Approving this list as "*a list merely of the kind of factors that might be relevant in the consideration of whether legal representation is desirable in the interests of a fair hearing*", Geoghegan nonetheless said that legal representation in such proceedings should be "*the exception rather than the rule*". Given the very different context of disciplinary proceedings to what is in issue in the present case is concerned with, I do not think that case can be said to advance the contention that the appellants are entitled to legal aid in their application to the Tribunal. In any event, matters

[22] [2009] IESC 33
[23] [1985] 1 QB 251

have moved on considerably since then in terms of the EU law dimensions to the appellants' argument.

120. Accordingly, I would uphold the conclusion of the trial judge on the legal aid and costs, albeit that I have arrived at this conclusion by a different route.

The Second Issue: The exclusion of pain and suffering (paragraph 6(e) of the Scheme)

121. It will be recalled that paragraph 6(e) of the Scheme excludes compensation for pain and suffering arising from injuries sustained after 1 April 1986. The reliefs sought by the appellants are the general declarations sought by each of the applicants that the Directive was inadequately transposed and/or that their EU rights have been inadequately protected, together with one specific relief sought by Mr. Kelly, namely a declaration that fair and appropriate compensation provided for in Article 12(2) of the Directive must be interpreted as comprising of or including general damages for pain and suffering.

Submissions

122. The appellants submit that the exclusion of compensation for pain and suffering is in breach of the Directive. They say that the decision of the Grand Chamber in *B.V.* adds even greater force to their argument that fair and appropriate compensation includes both material and non-material loss, citing paragraphs 60, 64 and 69 of the court's judgment (set out above). They submit that the court made it clear that compensation should not be purely symbolic or manifestly insufficient having regard to the seriousness of the consequences for the victims both as regards compensation for material and non-material loss, whereas the Scheme excludes pain and suffering regardless of the consequences of the crime for the victim.

123. The appellants acknowledge that the CJEU affords to the Member States a degree of discretion and that the level of compensation is not necessary to ensure the *complete* reparation of all material and non-material loss, but they submit that the courts must be guided by doctrines of equivalence and effectiveness and are mandated by the decision of the CJEU to ensure that *some account is taken* of the seriousness of the consequences of the harm suffered by the victims. They say that a scheme which vests no power to make *any* award of general damages for pain and suffering cannot ensure that the seriousness of the consequences for the victims are taken into account.

124. The respondents for their part emphasise those portions of the judgment in *B.V.* which discuss the discretion given to Member States in determining what amounts to fair and appropriate compensation (paragraphs 58 and 61 for example). They point out that the comments of the CJEU about what is "fair and appropriate" must be read in the context of the Italian Scheme which provided for fixed rates. In that context, the court indicated that fixed rates were acceptable in general, but member states would have to give careful consideration when fixing the different rates to the potential seriousness of the consequences for different victims. They submit that the Irish Scheme definitively engages in a process of correlating the compensation awarded with the seriousness of the consequences for victims because it provides compensation for out of pocket expenses and what might be termed special damages - including but not limited to financial losses to date and into the future, medical expenses to date and into the future, costs of care to date and into the future, and loss of potential earnings.

125. They say that the Tribunal will consider medical reports on the nature of the injuries which may include psychiatric injuries. If the injuries are psychiatric in nature and an applicant indicates that injury renders them unfit to work and to claim for loss of earnings, the Tribunal will fund the provision of specialist reports from a reputable consultant

psychiatrist and based on this report, claims for loss of earnings past and future will be assessed by the Tribunal. A consultant may be asked to give an opinion as to an applicant's reduced income-earning capacity to date and into the future. All these factors are then taken into account in the decision by the Tribunal.

126. They emphasise that the Scheme does not place a cap on any award that may be made and there is no artificial cut-off point. This ensures, they say, that the correlation required by the CJEU is achieved in all cases where claims are submitted under the Scheme. They also point out that reviewing the various schemes available across the EU[24], Ireland is one of the few countries with no upper limit on the amounts that may be awarded.

127. They also observe that the CJEU acknowledged that the financial viability for such schemes was of importance and that it was not expected that member states would provide full compensation to victims. They emphasise that this is not a harmonising Directive and the Directive did not provide nor did the CJEU rule that the Directive must provide compensation for damages for pain and suffering.

128. They also emphasise, again, as they did throughout the case, that the appellants have not finalised their applications nor have they received a determination from the Tribunal. They say that the appellants "*cannot seek to impugn the merits of a Scheme to which they have applied but from which they have yet to receive a determination, and to date, have failed to cooperate with the said Scheme to allow such determination to be reached*".

Decision

129. I am of the view that the *B.V.* case offers much guidance on what constitutes "fair and appropriate" compensation, but it does not signal definitively whether a member state must provide *some* compensation for pain and suffering. There are comments in the

[24] Reference the report that was exhibited here

judgment supportive of both the appellants and the respondents' positions. References in the judgment to the discretion afforded to member states, the need to ensure financial viability of national schemes, the fact that compensation need not be the same as that which would be required of the actual perpetrator, that what is prohibited is something that is "purely symbolic" or "manifestly insufficient", and the approval in principle of schemes that include a fixed-rate approach, all tend to support the State's position. However, the clear and repeated references to "non-material" as well as material loss might be thought to support the appellants' view that compensation for pain and suffering cannot be entirely excluded from the outset. The matter may well ultimately require a reference to the CJEU to indicate the correct interpretation of the Directive. However, the issue of prematurity is relevant.

130. The appellants might well say, in response to the prematurity argument, that while it is true that they do not yet know what figure of compensation might be awarded to them and that it is possible that they might receive substantial awards in order to reflect loss which is compensable under the Scheme, it is also true that they know definitively that whatever sum might be paid to them will inevitably and necessarily *exclude* any figure representing pain and suffering. This is simply not within the discretion of the Tribunal. The provisions of the Scheme itself make this clear. On that basis, it might be suggested that a decision on the merits and/or a reference to the CJEU is not premature.

131. However, taking the judgment in *B.V.* as a whole, and its emphasis on the discretion left to the member state in crafting a scheme within the outer parameters set by the Directive, I do not consider that it would be appropriate to ask the CJEU to decide upon the matter in the absence of an actual award by the Tribunal; this is particularly so, where there is a real question still in the balance as to whether these appellants will receive anything by way of compensation by reason of their previous convictions and paragraph 14 of the Scheme. In those circumstances, namely that the Tribunal has not yet made any rulings in the appellants'

cases, I consider that it would be premature to rule on the issue and/or to refer a question to the CJEU on the exclusion of damages for pain and suffering from the Scheme.

132. In the circumstances, I would confirm the High Court judge's ruling in this respect also.

The Third Issue: Conduct, character and way of life (paragraph 14 of the Scheme)

133. It will be recalled that paragraph 14 of the Scheme provides that "*compensation will not be payable where the Tribunal is satisfied that the conduct of the victim, his character or his way of life make it inappropriate that he should be granted an award and the Tribunal may reduce the amount of an award where, in its opinion, it is appropriate to do so having regard to the conduct, character or way of life of the victim.*" Most of the declarations sought by the appellants are of a general nature and make a generalised allegation that EU law has been breached and/or that there has been a failure to properly transpose the Directive, with the issue of paragraph 14 dealt with in the supporting grounds. One of the declarations sought by one of the appellants relates specifically to Article 14, namely: "A declaration that fair procedures on the principle of effectiveness require there to be in place a system or regime or by the applicant as entitled to have dealt with as a preliminary issue the question of whether Article 14 of the [scheme] will be applied to the applicant's claim."

Submissions

134. Following the decision of the Grand Chamber in *B.V.*, the appellants in their supplemental submissions argue that it is clear from the judgment that the Directive applies to all victims of violent intentional crime without distinction. They describe the broad exclusion in Article 14 as "vague and imprecise" and lacking the necessary characteristics of legal certainty mandated by the obligation to provide effective protection to the victims

of crime. They say that it is a fundamental tenet of EU law that everyone is equal (Articles 2, 3, 6 and 19 of the TEU and Article 20 of the Charter) and that discrimination on grounds such as social origin (way of life) is prohibited (Article 21). They also say that vagueness and lack of certainty in the provision offends against principles of legality and respect for the rule of law and the guarantee of effective legal protection enshrined in EU law (Article 19 of the TEU and Article 49 of the Charter).

135. The respondents maintain that any decision by the Court on this issue would be premature in circumstances where the appellants' claims have not yet been adjudicated upon by the Tribunal. Indeed, they go further and complain that the appellants have not completed their claims by submitting all necessary information for their claims to be processed and they point out that Mr. Kelly did not even furnish the Tribunal with any information as to his prior criminal record. (This was subsequently put before the High Court by way of a supplemental affidavit sworn by his solicitor). They rely upon *Chakari v. Criminal Injuries Compensation Tribunal*[25] where the applicant brought judicial review proceedings seeking certain declaratory reliefs concerning the lawfulness of the Scheme in circumstances where his application had neither been processed nor, indeed, completed at his end. It was held by the High Court (Barrett J.) that if the applicant wished to challenge the Scheme itself, the correct course of action was to commence plenary proceedings; and if he wished to challenge a decision of the tribunal, he must progress his application to the point where there was a decision that was susceptible to judicial review.

136. The respondents, on the merits, submit that the judgment of the CJEU in *B.V.* is silent on the legitimacy of such exclusions from a scheme of compensation and that the issue is not impacted by the ruling. They say that the CJEU recognises that the financial viability of

[25] [2018] IEHC 527

a national scheme is a legitimate consideration for member states (paragraph 59 of the judgment) and that nothing in the judgment precludes the application of such an exclusion. They also point out that a similar exclusion is contained in other schemes operated by other member states, which they say are the products of legitimate policy decisions of the various governments within the discretion afforded to member states.

137. The respondents also point out that a similar exclusion is contained in the Council of Europe Convention of Compensation of Victims, Article 8, which as we have seen earlier, provides that compensation may be reduced or refused *inter alia* on account of the victim's or the applicant's involvement in organised crime or his membership of an organisation which engages in crimes of violence, or if an award or a full award would be contrary to a sense of justice or to public policy (*ordre public*).

138. The High Court judge at paragraph 21 of her judgment appears to have dealt with the argument relating to paragraph 14 on the merits, saying that there was nothing objectionable about paragraph 14; that such a limitation was common to all the schemes mentioned to the court in the proceedings, that such a limitation was "entirely rational in the context of social policy", and that it was "permissible, as a matter of social policy, that those who by their conduct or lifestyle, set themselves against the common good, should be excluded from such a scheme". She also pointed out that the Scheme would have to be operated according to the constitutional norms of fair procedures, which included the giving of reasons, and that any decision to refuse or reduce compensation would have to explain the basis on which this decision was arrived at.

Decision

139. The question of whether paragraph 14 will be applied in a given case is a matter within the discretion of the Tribunal on a case by case basis. As matters stand, the Tribunal

could (a) grant a full award; (b) make a deduction from what might otherwise be awarded; or (c) refuse to give any compensation at all. Each of the appellants has a significant criminal record and this is likely to be relevant to the 'character' limb of paragraph 14. Insofar as 'conduct' or 'way of life' are different from 'character'[26], the court has no way of knowing whether those limbs of paragraph 14 might be engaged in the present case because so little in the way of evidence has been adduced by the appellants or how paragraph 14 would be applied by the Tribunal. In these circumstances, the court simply does not know how the Tribunal might exercise its discretion and so there is a good deal of force in the respondents' argument that a decision on Article 14 is premature insofar as the Court cannot anticipate how paragraph 14 might be applied to the appellants' claims. However, the argument of the appellants is not premature if the argument is that the Directive precludes such matters (conduct, character or way of life) from *ever being relevant* to a claim for compensation. If they were correct about this, then the Tribunal should not have any discretion and paragraph 14 should not form part of the Scheme at all.

140. In my view, it is inconceivable that the Directive does not give discretion to member states to provide a general clause in their schemes of compensation giving the decision-maker a discretion to reduce or refuse an award on the basis of the matters referred to in paragraph 14. Take the wording of Article 8 of the 1983 Convention, which I accept is not in any way binding but nonetheless assists on constructing hypothetical examples; it refers to involvement in organised crime or membership of an organisation which engages in crimes of violence, and it refers to an award which might be contrary to a sense of justice or to public policy (*ordre public*). Suppose a man who has a lengthy record of drug-dealing and

[26] Noting of course that paragraph 13 of the Scheme deals separately with the question of whether the victim was responsible or partially responsible for the offence in question, and assuming therefore that paragraph 14 refers to something different from that when it refers to 'conduct'.

murder receives injuries in the course of an assault by one of the many enemies he has generated in the course of his criminal lifestyle. I am absolutely persuaded that the Directive does not require that all member states are *mandated* to give an award of compensation which completely disregards his criminal history and lifestyle, particularly when the Directive in its recitals refers to the 1983 Convention, Article 8 of which suggests a number of situations in which a refusal of compensation might be considered appropriate. The refusal of an award to such a man would not, in my view, constitute a form of discrimination prohibited by the Treaty provisions cited by the appellants. That being so, the real question, I believe, posed by the appellants' claim is as to *when* it is appropriate to refuse or reduce an award on the basis of matters such as criminal record. This is where questions of proportionality come into play, as well as issues of non-discrimination and perhaps consistency as between applicants to the scheme. However, this brings me back to the original point; until the Tribunal makes a decision in respect of these two appellants, a claim that any such potential decision is unlawful is premature in circumstances where the Tribunal has full discretion to decide how to apply paragraph 14 to their claims.

141. As to the variant of the appellants' argument based upon the absence of a preliminary procedure whereby paragraph 14 can be the subject of argument and ruling, it seems to me that the Tribunal is entitled to be master of its own procedures and it could not possibly be said that a failure to provide for a preliminary application on a particular issue could be described as a breach of constitutional, EU or Convention right. No authority supporting such a proposition was produced.

142. The question of fairness and proportionality, and perhaps consistency in decision-making, in decisions made by the Tribunal as between different applicants, does, however, come into play in considering the final limb of the appellants' claim, to which I now turn.

The Fourth Issue: Is there a right of access to previous decisions of the Tribunal?

143. Among the reliefs sought by the appellants were an order of mandamus compelling the first respondent to make available to the applicant and his legal advisors copies of previous decisions of the first respondent relating to claims such as that being made by the applicant, and in particular, copies of decisions relating to the application or non-application of paragraph 14 of the Scheme. Also sought was a declaration that fair procedures on the principle of effectiveness require there to be in place a system or regime or by the applicant as entitled to have dealt with as a preliminary issue the question of whether paragraph 14 of the Scheme will be applied to the applicant's claim.

144. Mr. Doyle stated on affidavit that he was advised by his solicitor that it was not possible for the latter to make any meaningful submissions or representations on his behalf on paragraph 14 of the Scheme without the benefit of copies of previous decisions of the Tribunal and that this meant that a decision in respect of his claim would "effectively be made in secret and arbitrarily". Mr. Kelly's affidavit exhibits a letter from his solicitor (the letter dated 27 May 2016 already referred to) in this regard. The letter also submits that there should be a mechanism in place to ascertain whether paragraph 14 will be applied in whole or in part to his client's claim prior to the client being forced to try and raise and expend "considerable sums of money on assembling and preparing this significant claim".

145. Mr. O'Connell, Secretary to the Tribunal, submits in his affidavit that an order of mandamus would breach the separation of powers as it would direct the Tribunal as to the manner in which its limited resources should be allocated, and further, that the fact that the appellants are not furnished with copies of previous decisions of the Tribunal does not interfere with any discernible right. Dealing with matters of fact, he says that the Tribunal does not keep records in a fashion that would allow for the extraction of the information concerning paragraph 14 of the Scheme and says that attempting to find applications

matching the criteria of a particular application would in effect involve the reading of all the Tribunal files, a task which it does not have resources to perform. Even if it could be done, the redaction of relevant data would be "a time-consuming and expensive exercise in a limited pool of staff" and an "onerous and expensive burden".

146. It will be recalled that the High Court, having concluded that there was no right to compensation either under Irish or EU law, took the view that all of the appellants' claims were "ancillary" to such an alleged right and therefore also without foundation. This general statement presumably encompassed this limb of the claim. Murphy J. also said at paragraph 22 of her judgment that the range of circumstances which might give rise to a refusal or reduction of compensation are so varied that previous decisions on particular sets of facts would be "of doubtful value to an intending applicant". She also referred to the annual reports required under paragraph 19 of the Scheme which, she said, one would expect to contain details of the number of claims refused or reduced by virtue of paragraph 14; therefore intending applicants were not left "bereft of information".

Submissions

147. In the High Court and at the hearing of the appeal, the appellants' argument on this limb of their case was made primarily on the basis of domestic law, relying upon *P.P.A*[27]. which concerned access to decisions of the Refugee Appeals Tribunal. The respondents for their part pointed to the decision in *Jama*[28], where the High court refused similar relief in the context of social welfare appeals. Following the decision of the Grand Chamber in *B.V.*, the appellants in their supplemental submissions now seek to introduce an EU dimension into the argument. They submit that the fact that there is a right to fair and appropriate compensation under EU law means that they are entitled to not only previous decisions of

[27] *P.P.A. v. Refugee Appeals Tribunal* [2007] 4 IR 94
[28] *Jama v. Minister for Social Protection* [2011] IEHC 379

the Tribunal, but also arguably that the proceedings should be conducted in public. They refer to the case law under Article 6.1 of the European Convention on Human Rights in relation to the public pronouncement of judgments including *Moser v. Austria*[29] and *Fazliyski v Bulgaria*[30]and say that this jurisprudence weighs heavily in favour of an entitlement to access the previous decisions of the Tribunal, particularly where the Tribunal itself does not sit in public. They further submit that if the court entertains any doubt as to its compatibility with EU law of a refusal to make available previous decisions of the Tribunal and the absence of a pronouncement in public of those judgments, it would be appropriate to raise the question by way of preliminary reference to the CJEU.

148. The respondents emphasise that each application is considered on its own merits and depends solely on the information made available to the Tribunal and submit that as the appellants have failed to comply with the requests from the Tribunal for further information, it is not readily identifiable upon what basis they could benefit from such decisions as each case is dealt with on its own merits. They submit that the case is closer to *Jama* than *P.P.A.* in terms of the individuality of the decision-making process. They also emphasise the facts referred to in Mr. O'Connell's affidavit, in particular that no database of decisions is currently maintained such that decisions concerning paragraph 14 could be readily extracted and that the costs would be enormous, raising issues about the separation of powers if the Court were to direct the establishment of such a database.

Decision

149. The High Court Judge dismissed this limb of the appellants' case on the basis that it was ancillary to their main point that the appellants had a right to compensation, which she rejected; that of course has changed since the decision in *B.V.* She also said that information

[29] *Moser v. Austria* application no. 12643/02, 21 September 2006
[30] *Fazliyski v Bulgaria* application no. 40908/05, 16 April 2013

could be obtained by prospective claimants from the annual reports of the Tribunal. However, the record of the Tribunal in publishing annual reports is patchy at best in recent decades, despite the mandatory nature of paragraph 19 of the Scheme itself which requires annual publication. The affidavit of Mr. O'Connell, Secretary to the Tribunal, indicates that annual reports for 1993 and 1994 were signed in 1996 and not laid before the Houses until 2001. He makes no reference to the availability of reports for the years between 1994 and 2017. He says that in 2017, the Tribunal and the Department of Justice produced an "oversight agreement" which included a commitment produce a separate annual report for 2017 and going forward. He said that the 2017 annual report was being drafted and would be laid before the Houses of the Oireachtas in due course. I am not aware what the position is concerning that report but it is not currently available on the Department of Justice website, nor is any other annual report of the Tribunal. The Court has seen nothing to establish that the content of annual reports would in any event break down information such that one can see how paragraph 14 is applied in general. [31]In those circumstances, it seems to me that the respondents' argument that sufficient information as to the operation of paragraph 14 can obtained from the annual reports is entirely divorced from reality. It is therefore necessary

[31] Incidentally, the Irish position may be contrasted with the UK scheme which operates in a much more formal, structured and transparent manner. Following the enactment of the Criminal Injuries Compensation Act 1995, CICA was established to administer a tariff-based compensation scheme in England, Wales and Scotland. Since 1996 the tariff scheme has been revised three times, with the latest scheme having been approved by Parliament in November 2012. The final appeal under that system is to a First-tier Tribunal (Criminal Injuries Compensation) established pursuant to the Tribunal, Courts and Enforcement Act 2007. There is an online database of decisions (with names redacted), a set of Practice Directions, and a series of annual reports. Further, there is a Guide containing a clear and detailed framework for dealing with previous convictions of a claimant. There is is a list of convictions leading to certain sentences which disqualifies a claimant from any award. For remaining convictions and sentences, there is a detailed 'penalty points' system ; more recent the conviction and the more serious the sentence, the more penalty points the conviction will attract. It is also stated, however: "Although the penalty points system helps us improve consistency in decision making, we are not bound by it. Depending on the facts of the case we make a greater or lesser reduction. For example, we may make a smaller reduction or no reduction at all, if you were injured while helping the police uphold the law, or while helping someone who was being attacked. On the other hand, a low points score is no guarantee that we will make an award if your record includes violent or sexual offences". The Irish scheme is at the other end of the spectrum in terms of transparency and formality, but of course it operates under severe constraints of resource and in a much smaller jurisdiction. The English scheme appears to involve a turnover of sums of hundreds of million pounds sterling.

to consider the appellants' argument that fair procedures require some access to the decisions themselves.

150. There is of course a general principle that a person affected by a decision is entitled to sight of material upon which the decision may be based, be it in the nature of evidence in respect of the person or other contextual or relevant information. Similarly, it appears that where a decision-maker's discretion is informed by a policy, the person is entitled to have access to that policy (*Luximan v. Minister for Justice and Equality*[32], *Used Car Importers of Ireland Limited v The Minister for Finance, The Revenue Commissioners, Ireland and The Attorney General*[33]*)* There are numerous cases applying that general principle of notice in different contexts to different material. The appellants referred to the case of *Nolan v Irish Land Commission*[34], where the defendant had published a certificate that the plaintiff's land was required for the purpose of resale and the plaintiff was held to be entitled to discovery and inspection of documents which had been relied upon by the commissioners before they made their certificate. I think this is but one example of many in which the general principle referred to has been stated and applied.

151. In the present case, however, what arises is not that there is material to which the decision-maker has access and the appellants do not, as arose in other cases including the recent Used Car case, but rather a situation where (a) the material sought does not exist as such, at least in the form in which the appellants seeks it (i.e some form of collection of decisions of the Tribunal concerning the application or non-application of paragraph 14 of the Scheme) and (b) the Tribunal says that individual decision-makers do not have regard to such material in any event; there is no system of precedent and each decision-maker simply

[32] [2015] IEHC 227
[33] [2020] IECA 298
[34] [1981] IR 23

deals with each case on its own facts. Accordingly, out of the many common law authorities concerning the notice requirement, , the decisions in *P.P.A.* and *Jama* are most pertinent in the present context.

152. In *P.P.A v. Refugee Appeals Tribunal* (sometimes referred to as the *Atanasov* case), the Supreme Court upheld a decision of the High Court to the effect that the constitutional right to fair procedures required that there be access to previous decisions of the Refugee Appeals Tribunal. Geoghegan J said (at paragraph 24):

> *" ... The kind of fair procedures the Constitution may require in any given instance will always depend on the particular circumstances and, in the case of tribunals, what constitutes fair practice may differ greatly. The refugee appeals are heard by single members of the tribunal taken from a large panel. The chairman of the tribunal assigns a particular member of the tribunal to hear a particular appeal. It is of the nature of refugee cases that the problem for the appellant back in his or her country of origin which is leading him or her to seek refugee status is of a kind generic to that country or the conditions in that country. Thus, as in these appeals, it may be a problem of gross or official discrimination against homosexuals or it may be a problem of enforced female circumcision or it may be a problem of some concrete form of discrimination against a particular tribe. Where there are such problems, it is blindingly obvious, in my view, that fair procedures require some reasonable mechanisms for achieving consistency in both the interpretation and the application of the law in cases like this of a similar category. Yet, if relevant previous decisions are not available to an appellant, he or she has no way of knowing whether there is such consistency. It is not that a member of a tribunal is actually bound by a previous decision, but consistency of decisions based on the same objective facts*

may, in appropriate circumstances, be a significant element in ensuring that a decision is objectively fair rather than arbitrary".

He also said (at paragraph 26):

"*Previous decisions of the tribunal may be ones which, if applied in the appellant's case, would benefit the appellant but if there is no access he has no knowledge of them and, indeed, he has no guarantee that the member of the tribunal has any personal knowledge of the previous decisions made by different colleagues. It does not require an elaborate review of relevant case law and fair procedures to come to the conclusion that such a secret system is manifestly unfair. The unfairness is compounded if, as in this jurisdiction, the presenting officers, as advocates against the appellants, have full access to the previous decisions. That raises immediately an "equality of arms" issue*."

153. In contrast, in *Jama v. Minister for Social Protection,* the High Court refused to grant similar relief in the context of an appeal under the Social Welfare Consolidation Act, 2005. The particular case concerned an appeal in which there was an issue as to the calculation of the period of time for which the applicant was eligible for child benefit, in circumstances where she was a Somali national whose son was born after she arrived in the State but before she was granted refugee status. The applicant brought proceedings seeking an order requiring the respondent to provide her with access to copies of relevant reasoned decisions of the Social Welfare Appeals Officer and the Chief Appeals Officer. She also sought orders directing the respondent to publish such reasoned decisions and to establish a system enabling such decisions to be accessible to parties to a social welfare appeal. The respondent opposed the application on the grounds of costs and the logistical and administrative burden it would impose and also submitted that no database of the type sought was maintained.

154. The High Court (Hedigan J.) accepted the State's argument that the information on such a database would pose considerable problems in terms of personal and confidential information, and that anonymizing such a large database would be a very costly exercise. He said that the decisions in this type of case 'do not involve very different assessments of countries where there is no evidence of change' and involved 'whether a particular person meets the requirements set out in statute or detailed guidelines'. He said that the expense of maintaining such an anonymized database had to be balanced against the 'somewhat doubtful benefit that might accrue from the ability of applicants for social welfare entitlement to access such information' and that 'public policy in this regard, notably in these straitened times, must surely outweigh a right of access to such information'. The respondents maintain that a similar anonymizing problem would arise in relation to making public the previous decisions of the CICT on the issue of the application or disapplication of Article 14 of the Scheme.

155. It should be said that while the courts must of course be careful not to trespass into areas of executive function in breach of the separation of powers, the courts may and must sometimes make decisions which have cost, sometimes significant cost, implications for the executive but which may be required as a matter of constitutional fair procedure. If the present case falls within the *P.P.A.* principle, which was grounded on a requirement of constitutional fair procedures, the court cannot shirk its duty to say so, irrespective of the cost implications. The question then arises, if there is in Irish constitutional law a dividing line between the types of decision-making at issue in *P.P.A.* and *Jama* respectively, on which side of the line does the present case fall?

156. Before answering that question, it should be observed that the appellants put this limb of their case forward on a twin-track approach, namely, both under Irish constitutional relating to fair procedures, and under the EU law relating to the principle of effectiveness or

effective protection of EU rights and/or fields covered by Union law. In that regard, they build upon the foundation (established in the *B.V.* case) of a right under EU law to fair and appropriate compensation, upon which they construct an argument that the principle of effectiveness requires that they have access to previous decisions in order to properly vindicate their right to compensation. They also weave the equality or non-discrimination clauses of the Treaty and/or Charter into their argument.

157. It seems to me that, speaking at the most general level, some types of decision (or aspects of a decision) can truly be said to be responsive only to the particular personal circumstances of the individual affected by the decision, while other types of decision (or aspects of a decision) are ones which require some measure of consistency of approach. One way of testing which category a particular decision or aspect of decision falls into is perhaps to ask whether it would be unfair to treat equally-situated cases differently. Looking at the facts of the *P.P.A.* case, for example, it would be unfair for two decision-makers to treat two individuals from the same country of origin differently (all other features of the two cases being equal) based on different views of the decision-makers as to the available facts about that country. As Geoghegan J. said, "*consistency of decisions based on the same objective facts may, in appropriate circumstances, be a significant element in ensuring that a decision is objectively fair rather than arbitrary".* I accept, of course, that factual "country of origin" information is of a different character to what is in issue in the present proceedings. Nonetheless, it seems to me that Geoghegan J. was allowing for the possibility of a more general principle to the effect that where the decision-making is of a kind which requires consistency of approach, there may be an entitlement to information about previous decisions made by decision-maker on the same topic.

158. Applying that test, then, the question may be posed: is consistency in the application of paragraph 14 of the Scheme in different cases an important element to ensure that

decisions of the Tribunal are fair rather than arbitrary? One might consider the following hypothetical example; suppose the Tribunal had before it three claimants; and that all their cases were the same in all material circumstances; and that all their criminal records were likewise the same. Suppose, further, that the first claimant received a substantial award of compensation, the second only 50% of that award, and the third no compensation at all. It would seem to me that such inconsistency would be considered unfair. It *is* in my view the type of matter which is and should be susceptible of a consistency of approach. Accordingly, I would take the view that the Tribunal *should* strive for a measure of consistency in the application of paragraph 14, even if it currently does not.

159. I pause to say observe that to require of a decision-maker, such as the Tribunal, that it strive for a measure of consistency is not the same thing as suggesting that it should be bound by precedent; this was made clear in *P.P.A.* and in *COI v Minister for Justice, Equality and Law Reform*[35].

160. Another way of looking at the issue of the application of paragraph 14 of the Scheme is through the prism of EU law and the principle of effectiveness. Again, it seems to me that it could not be said that the right to fair and appropriate compensation under EU law could be said to be adequately vindicated if the Irish system of compensation allowed room for arbitrary and inconsistent awards because paragraph 14 of our Scheme was applied in an inconsistent manner on the issues of conduct, character and way of life.

161. If it is correct to conclude that the Tribunal *should* strive for some measure of consistency in its application of paragraph 14 of the Scheme, it seems to me to follow that there must be some method by which each individual decision-maker has some idea of how other cases presenting similar issues are being or have been dealt with by other decision-

[35] [2007] 2 ILRM 471

makers within the Tribunal. And if the decision-maker is to have access to this information, a claimant should have some access too. In a Tribunal where there is a small pool of decision-makers, it may be that the reality of what happens at present is that there is informal 'in-house' knowledge of how paragraph 14 is applied. If so, this may create a difficulty a for a claimant, who has no access to this collective approach, if there is one.

162. The problem of a lack of access to previous decisions demonstrating how paragraph 14 is applied in practice by the Tribunal is compounded by the absence of any other source of information about the issue e.g. from annual reports, or from something in the nature of guidelines. Given this complete dearth of information as to how "conduct, character and way of life" may reduce an award of compensation, or even result in its rejection in entirety, I see merit in the appellants' submission that it would be unfair to expect them to put together a claim, perhaps one involving considerable medical evidence, only to learn at the conclusion of the entire process that paragraph 14 has been applied to their cases, perhaps even leading to the refusal of *any* award, particularly in circumstances where there has been no legal aid throughout the process. As a matter of fairness of procedure, the claimant should have some idea of how the Tribunal applies paragraph 14 in practice. This is not to say that the claimant is entitled to any particular outcome, but rather that the manner in which the Tribunal reaches its decisions on this issue should be more transparent. The complete absence of any information which might assist both decision-maker and claimant in ensuring that the claimant gets the benefit of a consistent approach, and has notice as to what that approach is, seems to me to be fundamentally unfair. I consider it to be both a breach of constitutional fair procedures and a failure to protect, effectively, the exercise of an EU right.

163. Nonetheless, issues of cost and practicality must be taken into account. Some of the Declarations sought by the appellants are very broad in their terms. Insofar as they seek relief in respect of all previous decisions of the Tribunal, this would in effect require the Tribunal

(i) to have someone read through the entirety of whatever records it holds in respect of more than forty years of compensation decisions; (ii) identify decisions in which paragraph 14 was considered and either applied or disapplied; (iii) redact the records in such a way as to anonymize information that would identify the claimants in those past cases; and (iv) make those selected and redacted decisions available in some collated format for the appellants. I do not think that the vindication of the appellants' rights under either constitutional law or EU law would require the Tribunal to go that far. Nor do I consider that it would be appropriate to order the Tribunal to hold some form of preliminary hearing in relation to the paragraph 14 issue for the appellants or more generally. It should be master of its own procedures in this regard.

164. I would like to hear from the parties as to what final orders might be made in respect of this issue. It seems to me that, for example, a more restricted declaration than any of those sought by the appellants may be adequate to vindicate the appellants' rights. For example, it might be that receiving (suitably redacted) copies of decisions relating to a much more restricted time-period (such as, for example, the last two years), or listed numerically (such as for example the last ten Tribunal decisions in which paragraph 14 was considered), would be sufficient to give the appellants a general sense of how paragraph 14 has been applied, and would adequately vindicate their rights.

165. Accordingly, I have reached the conclusion that the principle of notice as discussed in the *P.P.A.* decision, and the principle of effective protection of an EU right, both require that the appellants be provided with information to give them a sufficient understanding of how paragraph 14 has been applied by the Tribunal for the purpose of presenting their claims and vindicating their EU right to fair and appropriate compensation. However, I will not reach a conclusion as to what order should be made until I have heard from the parties on what precise form of order should be granted and the parameters of that order.

CONCLUSIONS

166. In view of the length of this judgment it may be helpful if I summarise my conclusions as follows:

- Noting the decision of the Grand Chamber in the *B.V.* case, which makes it clear that a victim of an intentional violent offence has an EU law right to fair and appropriate compensation from the State under Directive 2004/80/EC, even if the perpetrator committed the offence in Ireland in respect of an Irish victim,
    1) Neither Article 47 of the Charter, Article 19 of the TEU, nor the principle of effectiveness in EU law (alone or in combination), as informed by the jurisprudence of the European Court of Human Rights on Article 6 of the European Convention on Human Rights, require that legal aid must be provided to the appellants in order to vindicate their rights under the Directive to receive fair and appropriate compensation by bringing a claim before the Tribunal; nor do they require that the Tribunal must make an award of costs in the event of a successful claim. I would dismiss the appeal in respect of this limb of the appellants' claim.
    2) The claim relating to the exclusion of pain and suffering from the Scheme is premature in the absence of any Tribunal decision as of yet. I would dismiss the appeal in respect of this limb of the appellants' claim.
    3) Insofar as paragraph 14 of the Scheme permits the Tribunal to consider conduct, character and way of life, this is not in breach of the Directive.
    4) Insofar as the appellants' claim that it would be unfair to apply paragraph 14 to their cases, their claims are premature in the absence of any Tribunal

decision as of yet. I would dismiss the appeal insofar as it concerns paragraph 14 of the Scheme.

5) The inability of the appellants to access any information as to how paragraph 14 has been applied in the past by the Tribunal is in breach of their constitutional right to fair procedures (applying the decision in *P.P.A)* and/or fails to meet the requirements of effective protection of their EU law right. I would allow the appeal in respect of this limb of the appellants' claim.

6) The precise relief to be granted in respect of the last preceding conclusion remains to be determined following further argument.

167. This judgment is being delivered electronically, I wish to record that both Donnelly J. and Power J. have indicated their agreement with it. The issue of costs is also to be addressed at the further short hearing which will be arranged to deal with the precise form of relief to be granted (points 5 and 6 above).