

Neutral Citation No: [2025] NIKB 6

Ref: McA12703

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

ICOS No:

Delivered: 27/01/2025

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

**KING'S BENCH DIVISION
(JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY THE BAR COUNCIL OF
NORTHERN IRELAND
and
THE INCORPORATED LAW SOCIETY OF NORTHERN IRELAND
FOR JUDICIAL REVIEW**

**Mr Paul McLaughlin KC with Ms Laura King (instructed by Marie-Louise Lowry of
Elliott, Duffy, Garrett, Solicitors) for the Applicants
Dr Anthony McGleenan KC with Mr Philip McAteer (instructed by Ms Louise Crilly, the
Departmental Solicitor for Northern Ireland) for the Department of Justice (the
respondent)**

Hearing dates: 19 and 20 November 2024, 10 and 13 January 2025.

Materials considered:

Amended Order 53 Statement dated 1 March 2024.

PAP responses of the respondent dated 4 December 2023 and 26 January 2024.

**Affidavits of Mr David Mulholland sworn on 13 February 2024, 14 June 2024 and 28
October 2024 together with the documents exhibited thereto.**

**Affidavit of Mr Peter O'Brien sworn on 28 October 2024 together with the documents
exhibited thereto.**

**Affidavits of Mr Paul Andrews sworn on 8 October 2024, 3 January 2025 and 27 January
2025 (draft) together with the documents exhibited thereto.**

Affidavit of Ms Deborah Brown sworn on 13 January 2025.

Applicants' Skeleton Argument dated 8 November 2024.

Respondent's Skeleton Argument dated 15 November 2024.

**Report authored by Mr Tom Burgess CBE entitled "Fundamental Review of Criminal
Legal Aid" dated 23 August 2024.**

Two Bundles of Statutory Materials and Authorities.

McALINDEN J

[1] The applicants in this case are the representative bodies of the two branches of the legal profession in Northern Ireland. The respondent is the government department with the responsibility for the provision of legal aid services in this jurisdiction. The day-to-day management and operation of the legal aid system in Northern Ireland is carried out by the Legal Services Agency (“LSA”), an executive agency within the Department of Justice (“DOJ”). In the amended Order 53 statement, the applicants challenge “the historic and continuing failure of the Respondent (or alternatively its policy and practice) to assess fee claims and to authorise for payment within a reasonable period such sum as is allowable for solicitors and barristers for work carried out under both criminal and civil legal aid certificates granted pursuant to the Access to Justice (Northern Ireland) Order 2003 in accordance with Regulations made thereunder.”

[2] The applicants seek the following declaratory relief:

- (i) A declaration that the respondent is obliged, within a reasonable period of time of the submission of a valid claim for professional fees, to assess the fee claim and to authorise for payment such sum as is allowed for barristers and solicitors for work carried out pursuant to a civil or criminal legal aid certificate.
- (ii) A declaration that a reasonable period of time within which the respondent is obliged to assess fee claims and to authorise payment of such sum as is allowed for barristers and solicitors for work carried out pursuant to a civil or criminal legal aid certificate is 10 days (and at most 30 days) from receipt of a valid claim or conclusion of taxation, if required.
- (iii) A declaration that the practices and/or policy of the respondent in relation to the timescales for assessment of fee claims and payment of barristers and solicitors for work carried out pursuant to a civil or criminal legal aid certificate is *ultra vires* the Access to Justice (Northern Ireland) Order 2003 and the Regulations governing the remuneration of barristers and solicitors made thereunder.
- (iv) A declaration that the budgetary allocation decisions of the respondent during the 2023/2024 financial year have been unlawful insofar as the respondent has failed to allocate (from the funds appropriated to it by Parliament) sufficient funds for legal aid expenditure to meet the liabilities of the respondent to pay valid fee claims by barristers and solicitors for work carried out under civil and criminal legal aid certificates within a reasonable period of time.

[3] The parties to this case have provided the court with a wealth of documentation concerning the historic and current operation of the legal aid system in Northern Ireland with particular emphasis on the timescales for the payment of fees by the LSA and the court is very grateful for the erudite and illuminating written and

oral submissions of the parties in respect of the contentious issues that separate them in this case. This case essentially boils down to a matter of statutory interpretation and what the respondent is or is not entitled to do when fulfilling its statutory duty to pay barristers and solicitors for work carried out pursuant to a civil or criminal legal aid certificate.

[4] It is not in dispute that the relevant legislative framework imposes a duty upon the respondent to discharge properly presented bills for legal professional fees for work done in respect of legally aided clients pursuant to a civil or criminal legal aid certificate. Nor is it in dispute that the same legislative framework does not specify any timescales or time limits for the payment of properly presented bills. The parties agree that payment should be effected within timescales that are reasonable so as not to defeat the statutory purpose of the relevant legislative provisions. What is in dispute between the parties is how the concept of reasonableness is to be determined in the context of these timescales. What is objected to by the applicants are the timescales presently and historically in operation for the payment of such bills. Relying on statutory provisions such as section 14 of the Supply of Goods and Services Act 1982 and the Late Payment of Commercial Debts (Interest) Act 1998; government policy as set out in the Northern Ireland Executive's prompt payment commitment; the payment timescales achieved by the legal aid authorities in England, Wales and Scotland; and the payment timescales achieved by Northern Ireland government bodies and agencies who brief barristers such as the Public Prosecution Service and the Directorate of Legal Services; it is argued that, irrespective of budgetary constraints, properly presented bills should be discharged by the LSA within 10 or at most 30 days and as a fall-back position, the court should declare that the present period of approximately 12 weeks is unreasonable.

[5] The respondent argues that it like all government departments and government bodies in Northern Ireland is required to operate within its annual budgetary allocation. It argues that the concept of reasonableness in terms of the timescales for the payment of legal aid bills has to take into account the rigid requirement for the LSA and the DOJ to operate within their budgets and if that means that timescales for payment are more protracted than the two branches of the legal profession would wish to see achieved, that is unfortunate but not unlawful. The bills presented have historically been paid, they continue to be paid and they will be paid in the future. What cannot be guaranteed is that they will be paid promptly even though that is the aim of the LSA and the reason for that is that although the Department annually seeks and bids for sufficient funding to ensure prompt payment of properly presented bills, its initial budgetary allocation each year is significantly less than its bid and as a result the Legal Service Agency must structure its payment profile at the start of each financial year to ensure regular monthly payments in line with the initial budgetary allocation in the hope of being provided with additional in year funding through the process of in year monitoring that occurs in June, October and January of each year. The central question which the court must address and answer is whether the statutory duty to pay properly presented bills permits such flexibility in the fulfilment of that duty or whether the approach adopted by the LSA

to the payment of properly presented bills which involves the manipulation of timescales to ensure than it lives within its annually allocated budget constitutes a breach of the duty to pay properly presented bills.

[6] In examining this question, certain key matters must be borne in mind:

- (a) There is a statutory duty imposed upon the respondent to pay properly presented bills and this duty is not made the subject of any express qualifications or time limits¹.
- (b) Legal professionals are required under the relevant statutory framework to present bills for payment within strict timescales and are penalised financially for delays in the presentation of bills.²
- (c) There is no contractual relationship between legal professionals providing legal services to lay clients on foot a civil or criminal legal aid certificate and the LSA or the DOJ.
- (d) As such neither section 14 of the Supply of Goods and Services Act 1982 nor the provisions of the Late Payment of Commercial Debts (Interest) Act 1998 apply to the payment of legal aid bills.
- (e) Legal aid payments are expressly excluded from the ambit of the Northern Ireland Executive's prompt payment commitment. The applicants do not directly challenge this exclusion. Therefore, the applicants cannot hope to achieve by indirect challenge the result which they have not seen fit to seek to achieve by direct challenge.
- (f) Government departments and public bodies in general are required to operate within their annual budget allocations.
- (g) In all jurisdictions in the UK, legal aid funding is allocated to the budgetary category of Departmental Expenditure Limits ("DEL") as opposed to Annually Managed Expenditure ("AME"). In relation to DEL spend, government departments and bodies may not exceed the limits that they have been set. In respect of AME spend, it is recognised that due to volatility, government departments or bodies may not have the ability to manage the spending within budget for the relevant financial year but any over and above spending requires Treasury approval. The applicants do not directly challenge the allocation of

¹ Articles 36 and 37 of the Legal Aid Advice and Assistance (Northern Ireland) Order 1981; Articles 11, 12, 14, 23 and 24 of the Access to Justice (Northern Ireland) Order 2003; the Magistrates Courts and County Courts Appeals (Criminal Legal Aid) (Costs) Rules (NI) 2009; the Criminal Defence Services (Remuneration Order) (NI) 2016; the Crown Court Proceedings (Costs) Rules (NI) 2005; Ss.184 & 185 Extradition Act 2003; Rule 4 (1) of the Legal Aid in Criminal Proceedings (Costs) Rules (Northern Ireland) 1992; and the Civil Legal Services (Remuneration) Order (Northern Ireland) 2015.

² Article 34 of the access to Justice (Northern Ireland) Order 2003.

legal aid funding to DEL. In such circumstances, the applicants again cannot hope to achieve by indirect challenge the result which they have not seen fit to seek to achieve by direct challenge.

- (h) In general, courts should not involve themselves in the scrutiny of budgetary allocations or prioritisation decisions by government.
- (i) In the last 13 years, the DOJ in Northern Ireland has not seen anything like the same percentage increase in its budgetary allocation as is reflected in the percentage increase of the overall block grant or the percentage increase in other high spending government departments. The overall block grant has increased by 53% during that period, whilst the DOJ has only seen an increase of 13% with its share of the overall grant dropping from 11% to 8%. Health and Education have fared much better.
- (j) The DOJ in NI for the size of population and for the level of its responsibilities in respect of the provision of justice related services receives, in relative terms, significantly less funding than the equivalent Whitehall department.
- (k) The DOJ in NI is responsible for the funding inter alia of legal aid, the Courts and Tribunals Service, the PSNI, the Prison Service and the Probation Service.
- (l) When the relevant legislative framework was amended in 2005 to impose standard fees for the bulk of work conducted by lawyers in the Crown Court, the DOJ did highlight and emphasise that one of the clear advantages of the new system would be the prompt payment of fees. After the bedding in of the 2005 changes, a high percentage of Crown Court fees claimed were paid within five weeks but this time interval has slipped over the years and now sits at 12 weeks (it was previously higher) with a significant and much increased level of unassessed fees, presently sitting at approximately £20M (of which £6M is by way of exceptionality accruals) at the end of the financial year.
- (m) There has been a significant increase in demand placed on the legal aid budget in recent years, particularly in the area of taxed civil cases. In the 2023/2024 financial year, taxed civil cases made up just under 3% of the number of bills submitted but constituted well over 30% of the overall legal aid spend at over £38M.
- (n) If the DOJ succeeds in achieving additional budgetary allocations by means of successful bids as part of the various in year monitoring rounds that take place, a healthy proportion of such additional funding is and has been allocated to the legal aid budget for the simple reason that it can be spent within the relevant financial year in paying bills that have been presented. The allocation of additional in year funding to other bodies for which the DOJ is responsible may not be a worthwhile exercise as expenditure in these other areas is usually

subject to more structured planning and the additional funding might not be spent within the relevant financial year, resulting in it being returned to the Department of Finance.

- (o) There is some evidence, largely anecdotal, that supports the propositions that delays in the payment of legal aid fees have a disproportionately severe impact on those legal practitioners who do not have a steady run of legally aided work and may have a greater impact on young female barristers and solicitors operating as sole practitioners.
- (p) In relation to statutory duties imposed upon government departments or bodies, the court's role is usually limited to examining the duties and determining whether the department or body is acting in a lawful manner in purporting to fulfil those duties.

[7] I now propose to describe in relatively brief compass what the DOJ and the LSA do to purportedly fulfil their legal aid payment obligations and at the same time remain within the budgetary constraints imposed either by the Executive/Assembly or imposed internally and then to consider whether the actions of the DOJ and the LSA constitute the lawful fulfilment of the statutory obligations to pay properly presented bills as imposed by the relevant statutory framework. In describing the actions, motives and intentions of the DOJ and LSA, I unreservedly accept and rely heavily on the affidavit evidence of Mr Andrews, the long-standing Chief Executive of the LSA, and I make it clear at this stage that I am firmly of the opinion that at all times Mr Andrews, demonstrating great industry, dedication and skill, in very difficult financial circumstances, has very capably carried out a very difficult role and has to the very best of his ability, with a high measure of success, tried to ensure that legal aid bills are paid as fairly and as quickly as possible across the whole width of legal aided work streams, having regard to the limited budgets within which he had had to operate.

[8] In short, each year prior to a budget been set by the Executive and approved by the Assembly, the DOJ gathers in from the various bodies for which it has funding responsibilities estimates of their budgetary needs for the forthcoming financial year. In the latter stages of the previous financial year, the LSA, being aware of the quantum of payments made in that previous financial year, the likely back log at the end of that financial year and the likely demand for legal aid in the coming financial year based on the previous year's figures and the number and type of legally aided cases that are likely to be completed during the coming financial year, is able to estimate the likely demand for legal aid in the financial year ahead. This detailed information available to the LSA, allows the LSA to put in a reasonably accurate bid for funding to deal with the anticipated demand. The DOJ can have a high degree of confidence in the accuracy of the bid submitted by the LSA, bearing in mind the Agency's track record for accuracy.

[9] Having gathered in all the estimates from the various bodies, these estimates or bids are carefully considered and are amalgamated into the overall annual bid for funding for the forthcoming financial year which is submitted by the DOJ to the Department of Finance. The DOJ also provides a detailed analysis on the impact on the provision of services within its sphere of responsibility if the bid it has put in is not met in full. The DOJ liaises closely with the Justice Committee in the Assembly and the Northern Ireland Affairs Committee in Westminster in relation to its bid for funding both in respect of the annual budget and in respect of in year monitoring rounds. In this way, the issues of democratic oversight and accountability are addressed.

[10] The Department of Finance has the unenviable task to divvying up the Northern Ireland block grant provided by Westminster amongst all the Northern Ireland spending departments. There then follows a round of engagements between the Department of Finance and each individual department which results in a draft allocation for each department which then forms the basis for the Budget Acts. Before these allocations become set in stone, the Executive has to agree the draft budget and the Assembly has to vote on same. This provides further democratic oversight and accountability. Following the Assembly vote, the budget for that year is fixed and it is for each department to allocate its share of the block grant to the various bodies, agencies and workstreams within that department's area of responsibility.

[11] In the case of the DOJ, it is responsible for a number of bodies and agencies including the PSNI, the Prison Service, the Probation Service, the Courts and Tribunals Service, the Youth Justice Agency and the LSA. The DOJ has the difficult task of properly funding all these bodies and agencies out of the money allocated to it in the budget. Its decisions in this regard are subject to scrutiny by the Justice Committee. It is clear from the evidence identified by Mr Andrews in his affidavits that the overall bids prepared and submitted by the DOJ to the Department of Finance have historically and currently never been met and that there is always a significant shortfall. It then falls to the DOJ to allocate this reduced budgetary allocation between the various bodies and agencies in the knowledge that it will be impossible to meet all their anticipated needs.

[12] What is clear from the affidavit evidence of Mr Andrews and the exchanges between DOJ officials and Justice Committee on 13 June 2024 in relation to the June monitoring round in the 2024-2025 financial year recorded in Hansard and set out in the papers at page 2187 is that the DOJ, in determining the budgetary allocation to each body or agency, takes the deliberate decision not to provide the LSA with funding sufficient to meet its anticipated commitments during the financial year to come, even though it knows that these commitments will largely arise as a result of a duty to pay legal aid bills for work actually completed by legal professionals. If the anticipated financial commitments of the LSA were to be met in full as part of the DOJ's initial allocation of funding to the various bodies and agencies for which it has responsibility, then other bodies' and agencies' funding would suffer greater funding shortfalls. In

an effort to try to ensure that those bodies and agencies can operate effectively, the LSA does not get all the funding it needs to discharge its anticipated liabilities. The DOJ deliberately allocates funding in this manner in anticipation of obtaining additional funding during the three in year monitoring rounds in June, October and January in the knowledge that if it is successful in obtaining additional in year funding, it can allocate a good proportion of this additional in year funding to the LSA and, importantly, the LSA will have the capacity to process legal aid bills and pay those bills so that all the additional funding directed to the LSA is spent in the relevant financial year, as any unspent additional funding cannot be carried over into the next year but has to be surrendered to the Department of Finance. It must also be remembered that both the DOJ and the LSA must keep within their respective budgetary allocations and that the receipt of additional in year funding cannot be guaranteed.

[13] When the LSA receives its budgetary allocation for the upcoming financial year, hard decisions have to be made about how to deal with the previous year's backlog of unassessed/unpaid bills and how to deal with bills coming in during the current financial year. There are various workstreams which generate civil and criminal legal aid certificates and bills. On the criminal side, there are, inter alia, the Court of Appeal, the Crown Court, the Magistrates' Court and County Court Appeals from the Magistrates' Court. On the civil side there are, inter alia, the three family court tiers, civil claims in the County Court and High Court, judicial reviews and Court of Appeal cases. Practitioners tend to specialise or be briefed in specific types of work so it is important that the different practitioners engaged in these workstreams are treated fairly and equitably when it comes to the assessment and payment of legal aid bills for work done. In order to promote fairness and equity, bills are not assessed in strict chronological order but are taken for assessment from the various workstreams (described as "payment lines" in Mr Andrews' second affidavit) and the decision in relation to which bill to process next is informed by such matters as the volume and value of claims in each payment line and the processing capacity known to be available.

[14] In addition to issues such as fairness and equity, the LSA is keen to ensure continuity and regularity of payments. However, even though a keen eye is kept on all these various issues, one other issue cannot be ignored and that is the need to operate within budget and in order to operate within budget and address the other issues outlined above, the LSA examines the budget it has been allocated and aims to process bills in such a way so that one twelfth of the overall starting budget is paid out each month during the financial year. In this way, the continuity and regularity of payments are maintained. However, in order to achieve this regularity and continuity and at the same time remain within budget, only so many bills can be processed each month and this restriction on the number of bills that can be processed each month inevitably results in time intervals (presently running at approximately 12 weeks) between the submission of bills and their payment. The capacity exists to process more bills each month and, thereby, reduce the backlog and payment times. However, if this was done then the annual budget would be exhausted long before the end of the

financial year and in the absence of additional funds being received following one or more of the in-year monitoring rounds, the LSA would have to stop payments completely for the rest of the financial year. There would be a cliff edge payment profile. In order to avoid such a scenario, the LSA begins the year on the assumption that it will not receive any additional in year funding and it structures its monthly payment profile so that one twelfth of its initial annual budget is used up each month. However, the inevitable and direct consequence of this approach is that there is at present a 12 week gap between the presentation of the bill and payment. This period has stretched to 20 weeks when the initial annual budgetary allocation was significantly less than the sums bid for. What is also clear is that when the DOJ makes its initial budgetary allocation to the LSA each year, the Department knows that the LSA deals with the shortfall in its allocation by limiting the amount of bills it deals with each month. In essence, the DOJ knows when making its budgetary allocation to the LSA each year that the inevitable and direct consequence of this budgetary approach is that there will be a lengthy period of time (currently sitting at 12 weeks) between the presentation of bill for legally aided work done by a legal professional and the payment of that bill.

[15] There are three in year monitoring rounds in each financial year and the LSA through the DOJ present bids for additional funding. If additional funding is obtained by the DOJ, it can direct a good proportion of that additional funding, particularly if it is obtained in the later in year monitoring rounds, to the LSA, in the confident knowledge that processing can be ramped up so that the additional money is spent in year. What this means in practice is that if the initial budgetary allocation is £X, then bills are initially processed so that £X/12 is paid out each month. If during the October in year monitoring round, the LSA are allocated an additional sum £Y, then for the remaining months of the financial year bills can be processed so that $X/12 + Y/6$ is paid out during each remaining month of the year. If additional in year funding becomes available early in the year, then the Agency will seek to apply that additional funding across all payment lines. If significant additional funding is made available later in the year, then the funding will have to be focused on certain payment lines to ensure that the money is utilised before the end of the financial year. This usually means that higher value payment lines, for example taxed and Crown Court cases will receive the bulk of the additional funding as more significant sums of money can be expended in a shorter period of time.

[16] Significant additional in year allocations have been made to the LSA in the last number of years and these additional in year allocations have enabled the LSA to bring down payment times from over 20 weeks to approximately 12 weeks. But unless there is a significant increase in the funding provided to the LSA or there is a significant reduction in demand for legal aid, the present payment times are likely to continue and there is likely to be a significant backlog of cases at the end of each financial year.

[17] The issues at the heart of this case are whether the approach adopted by the DOJ when faced with a budgetary allocation which does not fully address the needs and requirements of the various agencies and bodies for which the DOJ is responsible

and whether the approach adopted by the LSA when faced with an initial annual budgetary allocation which is significantly less than that required to meet the anticipated demand for legal aid during the financial year is or are lawful having regard to the statutory duty to pay properly presented legal aid bills. On behalf of the Department, it is argued that having regard to the need for public bodies to operate within budget and having regard to the competing statutory duties imposed upon the Department to adequately fund a number of bodies and agencies, the court should not trespass into the area of scrutinising governmental funding and spending decisions. In the alternative, if such scrutiny is permissible, bearing in mind the degree of democratic oversight, the court should be very slow to declare that the DOJ and/or the LSA has acted or is acting in a manner which does not comply with the statutory duty imposed upon it. It is argued that it cannot be said that either the Department or the Agency are acting unreasonably in a public law sense.

[18] With all due respect to the cogent arguments skilfully marshalled and made on behalf of the respondent, I consider that these arguments are missing the key point in this case. Paying due regard to the valuable guidance to be gleaned from cases such as *R(Tandy) v East Sussex CC* [1998] 2 WLR 884, *R(G) v Barnet LBC* [2003] 3 WLR 1194, *R(Imam) v London Borough of Croydon* [2023] UKSC 45, *DOJ v Bell* [2017] NICA 69, *Hutton and Deolin's Application* (NIKB unreported, SIM12379, 12/1/2024), and the passage from *De Smith* pages 897 to 898, I am of the view that one has to distinguish between what can be termed to be evaluative duties on the one hand such as a duty to properly fund policing or probation services in Northern Ireland and a straightforward statutory duty to pay properly presented legal aid bills on the other.

[19] In the context of evaluative duties, where there is a statutory duty to provide a service or facility or fund a body to provide such a service or facility, the statutory duty can only sensibly be interpreted as vesting in the providing or funding authority a power to evaluate and determine how best to provide that service or facility or fund the provision of that service or facility and the courts should be very slow to interfere with the exercise of such a power, particularly when that power is exercised in the higher echelons of government and/or is subject to meaningful democratic scrutiny and oversight. However, there is no good reason why the same degree of deference should be afforded in the context of a straightforward statutory duty to pay properly presented legal aid bills.

[20] It should go without saying that the statutory duty to pay properly presented legal aid bills must afford the payor some flexibility as to when to make payment. Issues such as the time that needs to be taken to properly process a bill and the staffing resources devoted to bill processing work are clearly matters for the payor to evaluate; as is the issue of ensuring fairness and equity between different legally aided workstreams. However, having regard to the nature of the statutory duty in question (a duty to pay properly presented legal aid bills), in the absence of some exceptional circumstances, the degree of flexibility afforded to the responsible department or the actual payor cannot legitimately extend beyond such practical and operational matters and it certainly cannot extend to allowing the payor to postpone processing and

payment so that there is a time interval of 12 weeks between the presentation of the bill and the payment of the bill as a means of providing the responsible department with a greater degree of flexibility in the performance of its evaluative duties to fund other bodies or agencies or as a means of ensuring that the payor does not exceed its budgetary allocation in that financial year. The statutory duty which is a straightforward duty to pay legal professionals for work done on foot of civil or criminal legal aid certificates cannot legitimately be interpreted as allowing such a degree of flexibility in respect of payment times.

[21] I have a large measure of sympathy for the DOJ and the LSA as both are doing their level best to operate a system of legal aid in Northern Ireland which best serves the goal of maintaining access to justice in the face of chronic, sustained and unaddressed under-funding of the DOJ and I also recognise that the absence of such a degree of flexibility in payments times may result in the Department being forced to make other changes to the system of legal aid in Northern Ireland which may cause significant concern to the legal profession but I cannot take such matters into account when engaging in the court's restricted and limited functions of (a) interpreting the statutory duty in question, which I emphasise is a straightforward duty to pay a properly presented bill for work done by legal professionals on foot of civil or criminal legal aid certificates; and (b) determining whether the respondent through its actions has complied with that statutory duty.

[22] In light of the above, I do not consider that it is appropriate, warranted or necessary to make any declaration which attempts to define or delineate what constitutes a reasonable time within which to pay properly presented legal aid bills. The only declaration which the court can legitimately make is in the following terms. The court grants a declaration that:

“the strategies adopted by the Department of Justice in its allocation of funding to the Legal Services Agency in order to enable the Agency to pay properly presented legal aid bills and those strategies adopted by the Legal Services Agency in the payment of properly presented legal aid bills aimed at ensuring that the Agency operates within its annual budget, constitute non-compliance with the statutory duty to pay properly presented legal aid bills, insofar as those strategies directly and inevitably result in time intervals of twelve weeks between the date of presentation of a properly presented bill and the payment of that bill.”

[23] A subsidiary issue has been raised by the applicants in this case and that is whether the respondent acted unlawfully in failing to perform a Regulatory Impact Assessment (“RIA”) when adopting and implementing the strategies described in the foregoing paragraphs of this judgment. Unlike an Equality Impact Assessment (“EIA”), there is no statutory underpinning for the performance of a RIA. There is,

however, published policy/guidance³ in relation to the performance of RIAs by public bodies which was amended following a decision of Treacy J in *Re CPNI* [2011] NIQB 132 in order to reduce the possibility of an applicant in a judicial review successfully arguing that he enjoyed a legitimate expectation that a RIA would be performed in any given circumstances.

[24] In light of my conclusions on the substantive issue in this case and bearing in mind the terms of the amended policy/guidance, and taking into account the information that the court received this morning in Mr Andrews' third affidavit confirming that in the course of the preparation of the budget for Northern Ireland, the Department of Finance does not carry out a RIA and does not place specific requirements on other departments in relation to carrying out a RIA in respect of its proposed budgetary allocation, I do not consider it necessary or appropriate to reach a conclusion on whether a RIA should have been performed in this case prior to the implementation of the strategies described above. I will simply comment on the reason offered on behalf of the respondent for not carrying out a RIA in this instance. In his second affidavit, Mr Andrews, on behalf of the respondent, stated that the DOJ did not carry out a RIA because it did not consider that the setting of payment Key Performance Indicators (KPIs) was part of a policy process.

[25] I have concerns that the right question was not addressed by the DOJ. The question which I consider should have been posed in this context is whether, in reality, the Department was devising or implementing a policy when it adopted the strategies outlined above. I consider that there are sound grounds for concluding that in acting as they did, the Department and the Agency were clearly acting in pursuance of an unwritten but clearly understood and co-ordinated policy which has been clearly articulated in the respondent's evidence submitted in response to this application. In the circumstances, I have no hesitation in concluding that irrespective of whether a RIA was warranted in this case, the reason proffered by the respondent for not carrying out a RIA, when properly analysed, does not withstand scrutiny, as in acting as they did the Department and the Agency were clearly acting in pursuance of an unwritten but clearly understood and co-ordinated policy. This should not be taken as meaning that a RIA should have been carried out in this case. I am simply commenting on the reasons put forward for not carrying out a RIA.

[26] The only declaration that need issue in this case is the declaration set out in para [22] above. Taking into account, the prior agreement reached by the parties in respect of the issue of costs and in light of the matters highlighted in para [21] above, I consider that the appropriate order in this case is that each party should bear their own costs.

³ Northern Ireland Regulatory Impact Assessment Guidance July 2023