

Neutral Citation No: [2024] NIKB 70	Ref: SIM12384
<i>Judgment: approved by the court for handing down (subject to editorial corrections)*</i>	ICOS No: 18/73662/01
	Delivered: 05/01/2024

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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

**IN THE MATTER OF AN APPLICATION BY BRONAGH BOWDEN,
AS PERSONAL REPRESENTATIVE OF LIAM HOLDEN (DECEASED)
FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF A DECISION TAKEN BY THE
DEPARTMENT OF JUSTICE IN NORTHERN IRELAND**

**Dessie Hutton KC (instructed by Harte Coyle Collins Solicitors) for the Applicant
Philip McAteer of counsel (instructed by Departmental Solicitor's Office) for the
Respondent**

RULING ON COSTS

SIMPSON J

Introduction

[1] I gave judgment dismissing this application for judicial review on 12 September 2023 – [2023] NIKB 89. The parties asked for time to see if they could agree on the order for costs of the application. They have been unable to do so. The parties have now provided written submissions and I am asked to provide my ruling on costs.

[2] The background to the application for judicial review was as follows: In 1973 the deceased, Liam Holden was convicted of the (then) capital offence of murder and was sentenced to death; the sentence was later commuted to one of life imprisonment. In 1989 the deceased was released on licence. In 2012 the conviction was quashed by the Court of Appeal. The prosecution did not seek to support the conviction.

[3] Following the quashing of the conviction the deceased, in February 2014, lodged an application for compensation for a miscarriage of justice pursuant to the

provisions of section 133 of the Criminal Justice Act 1988 (“the 1988 Act”). An independent assessor, then Kevin Rooney QC (“the IA”) determined that the total amount of compensation for pecuniary and non-pecuniary loss was £1,182,166. However, since the provisions of the 1988 Act restricted the maximum award of compensation to £1 million, the deceased received £1 million.

[4] The issue in the application for judicial review was: does the ‘compensation’ provided for in section 133A of the Criminal Justice Act 1988 include the costs incurred by an applicant in making the application for compensation.

Consideration of costs

[5] Section 59 of the 59(1) of the Judicature (Northern Ireland) Act 1978 provides:

“Subject to the provisions of this Act and to rules of court and to the express provisions of any other statutory provision, the costs of and incidental to all proceedings in the High Court and the Court of Appeal, including the administration of estates and trusts, shall be in the discretion of the court and the court shall have power to determine by whom and to what extent the costs are to be paid.”

[6] Order 62 Rule 3(3) of the Rules of the Court of Judicature (Northern Ireland) 1980 provides:

“If the court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.”

[7] Accordingly, the ‘default’ position is that costs follow the event. In this case the ‘event’ was the dismissal of the application.

[8] In *R v Lord Chancellor, ex p Child Poverty Action Group* [1999] 1 WLR 347 Lord Dyson said, page 355H/356B:

“I accept the submission of Mr. Sales that what lies behind the general rule that costs follow the event is the principle that it is an important function of rules as to costs to encourage parties in a sensible approach to increasingly expensive litigation. Where any claim is brought in court, costs have to be incurred on either side against a background of greater or lesser degrees of risk as to the

ultimate result. If it transpires that the respondent has acted unlawfully, it is generally right that it should pay the claimant's costs of establishing that. If it transpires that the claimant's claim is ill-founded, it is generally right that it should pay the respondent's costs of having to respond. This general rule promotes discipline within the litigation system, compelling parties to assess carefully for themselves the strength of any claim."

[9] The respondent rightly submits that the applicant failed and relies on the presumptive principle that costs will follow the event.

[10] I remind myself of the words of Lord Loyd of Berwick in *Bolton Metropolitan District Council v Secretary of State for the Environment (Practice Note)* [1995] 1WLR 1176, 1178 where he said:

"As in all questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the court, and a practice, however widespread and longstanding, must never be allowed to harden into a rule."

[11] Bearing all of the above in mind, in the exercise of my discretion in this matter I consider it an important factor that, as the parties suggested to me, this was the first occasion on which a court was called upon to decide the point at issue in this case, namely whether the 'compensation' provided for in section 133A of the Criminal Justice Act 1988 includes the costs incurred by an applicant in making the application for compensation, in circumstances where the Independent Assessor had assessed the total figure for compensation at £1,113,323, but could only award the statutorily capped figure of £1 million. Therefore, the respondent has the advantage of judicial guidance on the point.

[12] Secondly, I consider it to be a highly relevant matter in exercising my discretion that following the award of the maximum figure of £1 million by the IA, the respondent either encouraged or condoned a further assessment exercise to be carried out by the IA; ie an assessment of the costs properly incurred by the applicant's solicitors. This, as the judgment made clear, involved the incurrance of further costs by the applicant's solicitors, including the instruction of a costs drawer, and this at a time when the respondent never intended to pay those costs. Thus, at paragraph [64] of the judgment I said:

"Following the IA's award capped at the statutory maximum the IA went on to assess the amount of reasonable costs with the encouragement, or at the very least, the acquiescence of the respondent. I consider that this was odd behaviour on the part of the respondent, since

it at all times understood that whatever figure was assessed by way of costs, it did not intend to pay any figure in excess of the £1 million already awarded. While I understand that such an exercise would have been appropriate if the compensation figure had been, say, £750,000 – ie it would have been a proper exercise for the IA to determine what costs were “necessary reasonable and proportionate” – I find it impossible to comprehend why the further assessment was encouraged or permitted to be undertaken in the specific circumstances of this case. All that was achieved by this wholly futile exercise was the unnecessary expenditure of further public funds (to pay for the work undertaken by the IA, including the instruction of, and the obtaining of two reports from, the costs drawer) and the unnecessary incurrence of further costs by the deceased’s solicitors which, as the respondent intended, would never be recouped from the respondent. I have little doubt but that the deceased’s solicitors followed this exercise believing that the costs would be paid.”

Disposition

[13] In all the circumstances of this case I consider that the appropriate order is to make no order as to costs.