

Neutral Citation No [2008] NIQB 48

Ref:	WEAH4836.T
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*Judgment: approved by the Court for handing
(subject to editorial corrections)**

Delivered:	18/04/2008
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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

AN APPLICATION BY ALAN CROSS FOR
LEAVE TO APPLY FOR JUDICIAL REVIEW

WEATHERUP J

[1] This is an application for leave to apply for judicial review of a decision of the Criminal Injuries Compensation Appeals Panel of 19 December 2007 refusing to extend the time for the applicant's appeal against a refusal of compensation. Ms Campbell appeared on behalf of the applicant and Mr Scoffield appeared on behalf of the Appeals Panel as proposed respondent and on behalf of the Compensation Agency as a notice party.

[2] The applicant's compensation claim arises as a result of an incident that he and Mr William McCartney were involved in on 5 December 2004 when each was injured as a result of an alleged assault. The applicant made a criminal injury application on 22 December 2004 which was refused on 25 January 2006. A review was sought by the applicant and this was refused on 19 July 2007. The applicant appealed on 21 November 2007 with an application to extend the 90 day time limit for appeals. The decision that is the subject of this application for judicial review was issued by the Chairman of the Appeals Panel on 19 December 2007 refusing the extension of time.

[3] The reason for the applicant's delay in lodging the notice of appeal was stated to relate to a search for CCTV evidence which it was said would show what had happened during the incident in question. In addition the applicant received standard form guidance on appeal procedures further to the refusal of the review on 19 July 2007. The applicant contends that the guidance was misleading in relation to the extension of time limits.

[4] The applicant's grounds for judicial review are, first, the proposed respondent's failure to take into account that the applicant was awaiting full disclosure of the CCTV video. The evidence was received outside the 90 day time limit and was immediately forwarded to the respondent. Secondly, the decision on extension of time was said to sever the case of the applicant from that of

William McCartney, the other injured party. Thirdly, the applicant relied on the misleading guide to appeal procedures. Fourthly, the proposed respondent, in breach of the duty to act in a procedurally fair manner and in breach of the applicant's procedural legitimate expectation, made an ultra vires representation that was said to be legally unenforceable and in particular, issued the applicant with a guide to appeal procedures that incorrectly stated the appeal procedures as provided for in the Scheme and further issued an amended guide to appeal procedures after the decision in this case was taken.

[5] The nature of the application for leave was such as may have rendered it appropriate to complete a rolled up application dealing with leave and substance together. Accordingly, a response was invited from the Appeals Panel as to the issues that had been raised, before hearing the leave application. The result was an affidavit filed by Bill Gallagher, the Chief Executive of the Appeals Panel in which he addressed the issues that arose on the application.

[6] The Compensation Scheme was established under the Criminal Injuries Compensation (Northern Ireland) Order 2002 and the Northern Ireland Criminal Injuries Compensation Scheme 2002 which was issued by the Secretary of State on 1 May 2002. Paragraph 61 of the Scheme deals with appeals against review decisions and an appellant must lodge the appeal within 90 days of the date of the review decision. Paragraph 62 deals with extension of time and provides as follows:

“A member of the staff of the Panel may, in exceptional circumstances, waive the time limit in the preceding paragraph where he considers that –

(a) an extension requested by the appellant and received within the 90 days is based on good reasons; **and**

(emphasis of the word “and” added)

(b) it would be in the interests of justice to do so.

Where, on considering a request to waive the time limit, a member of the staff of the Panel does not waive it, he will refer the request to the Chairman of the Panel or to another adjudicator nominated by the Chairman to decide requests for waiver, and a decision by the adjudicator concerned not to waive the time limit will be final. Written notification of the outcome of the waiver request will be sent to the appellant and to the Secretary of State, giving reasons for the decision where the time limit is not waived.”

[7] A Guide to the Northern Ireland Criminal Injuries Compensation Scheme 2002 was also issued by the Compensation Agency. It reiterates the 90 day time limit for appeals. In addition, a guide to appeal procedures was issued by the Appeals Panel. This guide to appeal procedures was amended in November 2007. The old wording of the guide to appeal procedures stated as follows:

“The time limit of 90 days for submitting an appeal may be extended in exceptional circumstances if a member of staff considers that –

- a request from you within the time limit is based on good reasons, **or**

(emphasis of the word “or” added)

- it would be in the interests of justice to do so.

If a member of staff considers that the time limit should not be extended your request will be referred to the Chairman or an adjudicator for decision. The decision not to extend the time limit will be final.”

[8] Thus the Scheme provides for waiver of the time limit in exceptional circumstances where, first of all, the request for extension of time is made within 90 days, secondly, there is good reason and thirdly it is in the interests of justice. However the applicant read the guide to appeal procedures as providing for extension of time in exceptional circumstances under one of two limbs. In one case it was necessary to establish that the request was made within 90 days and that there was good reason. In the alternative it was not necessary to make the request within 90 days and it was necessary to establish that an extension of time was in the interests of justice.

[9] The new wording of the guide to appeal procedures issued in November 2007 adopted the same wording as the Scheme by substituting for the word “or” the word “and”.

[10] On 19 July 2007 the applicant received notice of refusal of review and the notice informed the applicant that he had 90 days to lodge an appeal. The old guide to appeal procedures was enclosed with that notice. The applicant lodged the appeal and the request for extension of time on 21 November 2007, being outside the 90 days, under cover of a letter that referred to the issue of the CCTV evidence and the parallel claim of William McCartney. The proposed respondent replied on 23 November 2007 in which it was pointed out that the appeal notice had been received outside the 90 day time limit and it was stated that:

“The only reasons whereby the time limit can be waived are set out in paragraph 62 of the Scheme i.e. an extension requested by the appellant and received within 90 days is based on good reason **AND** it is in the interests of justice to do so. Other than that, applications for waiving the time limit can only be considered in very exceptional circumstances.”

The applicant was invited to submit any very exceptional circumstances within three weeks of the date of the letter.

[11] The applicant replied to the request for very exceptional circumstances by letter of 11 December 2007. In that letter he referred to the close link between his case and that of William McCartney and to the video evidence that had been obtained. He enclosed a DVD of the attack which had only recently come into the possession of the applicant. The letter stated that “.... this is a very exceptional set of circumstances for the late submission of this appeal....” and invited the Panel to extend the time.

[12] The request for extension of time was referred to Mr Loughran, Chairman of the Appeals Panel, who gave his decision on 16 December 2007. His reasons were stated to be that no application for extension of time was received within the 90 day limit and no exceptional reasons had been furnished as to why the time limit should be extended. These were the reasons conveyed to the applicant on 19 December 2007.

[13] The applicant’s first ground relates to a failure to take into account that the applicant was awaiting disclosure of the video from the PSNI. A response to that ground appears in the affidavit of Mr Gallagher. He states that the applicant was not correct and that the Appeals Panel did not fail to take into account the fact that the applicant was waiting for the CCTV material from the PSNI. The information about the CCTV was made clear to the proposed respondent by the applicant’s solicitors letters of 21 November and 11 December, which were said by Mr Gallagher to have been before the Chairman and which were properly considered. There is no basis for considering that the Chairman did not take account of the stated reason for the delay that there was a search for the recovery of CCTV evidence.

[14] The applicant’s second ground, although it is expressed in terms of severing the matter of William McCartney, relates, in effect, to a failure to take account of the circumstances of Mr McCartney’s case. His appeal had been lodged in time, although he too had been awaiting the video evidence. His appeal had been adjourned pending receipt of that evidence. Again the position regarding Mr McCartney was referred to in the correspondence and known to the decision-maker. Each case must be treated according to its own facts. That one appeal is in time and another appeal is out of time makes a difference and provides a basis on which cases might be treated differently, although they arise out of the same event. There is no

basis for concluding that the Chairman did not take into account, or erred in not granting an extension of time because of Mr McCartney's position.

[15] The applicant's third ground, and the heart of the matter, relates to the guidance to appeal procedures issued by the Appeals Panel. The applicant's reason for delay in lodging the notice of appeal concerned the CCTV evidence. The proposed respondent objects that the absence of the video did not affect the lodging of the notice of appeal and was not the cause of the delay. The applicant signed the appeal notice on 25 July. On 21 November, when the appeal was lodged, the applicant did not have the video, but nevertheless he did lodge notice of appeal at that time. William McCartney did not have the video, but he appealed in time. The applicant forwarded the video on 11 December. The applicant gave notice of the availability of the video on 21 November and that seems to have been confirmed to the applicant's solicitor by the applicant on that day. In considering the correspondence I am satisfied that the reason for the delay did relate to the video. Therefore I do not accept the proposed respondent's contention that the video was not in reality the explanation for the delay. Whether this is a good reason for delay is a different matter, to which I shall return.

[16] The next issue concerns the effect of the wording of the old guide to appeal procedures. The applicant claims that he was misled by the guidance. The old guidance referred to requests within 90 days for extension of time for good reason or requests in the interests of justice. The applicant sought to rely on the second limb, namely the interests of justice, where it was contended there was no need to apply within the 90 days. On the other hand the respondent pointed to paragraph 62(a) and (b) of the Scheme which uses the word "and" rather than "or". Therefore the respondent contends that the requirements for extension of time were that there must be an application within the 90 day time limit, there must be good reason to extend time and it must be in the interests of justice to extend time.

[17] In addition, it is clear from the affidavit of Mr Gallagher that the Appeals Panel considers applications after the 90 day time limit has expired. The second part of paragraph 62 of the Scheme states that where a member of staff does not extend time to appeal the request is referred to the Chairman. The Appeals Panel operates on the basis that the Chairman's consideration of requests is not limited to those made within 90 days. The Scheme requires exceptional circumstances to obtain an extension of time for requests made within 90 days. If the request is made after 90 days it generally requires what Mr Gallagher characterised as a higher level of exceptionality in order to obtain an extension of time.

[18] As a result there has been the following approach to applications for extension of time. First of all the Scheme provides for waiver of the time limit in exceptional circumstances but does not state expressly that there would be a discretion to extend time for requests made after 90 days. Secondly, the old guide to appeal procedures, which like the Scheme relied on the need to prove exceptional circumstances, appeared to require, either that a request be made within 90 days and a

good reason be established, or that an appellant should rely on the interests of justice limb whenever the request was made. Thirdly, the new guide to appeal procedures restored the formula recited in paragraph 62 (a) and (b) of the Scheme. Fourthly, the Appeals Panel operates an additional basis for extension of time for requests after 90 days for good reason and in the interests of justice and in such cases generally requires what is described as a higher level of exceptionality.

[19] There was no issue raised in the present proceedings about the adoption by the Appeals Panel of a discretion to extend time in circumstances which are not provided for expressly under the Scheme. I proceed on the basis that the Appeals Panel exercised that discretion in the present case.

[20] The applicant's request for an extension of time was made outside the 90 day time limit. The Appeals Panel exercised the discretion to extend time on the basis that a higher level of exceptionality is generally required. Counsel for the applicant challenged the operation of a higher test being set for requests made after the 90 days. The approach of the Appeals Panel is permissible under the legislation and the Scheme and accords with the purpose of the legislation and the Scheme. The approach is not a rigid approach as it is stated that a higher level of exceptionality is "generally" required. In any event the approach may be interpreted as a graduation of the exceptional circumstances required for requests within 90 days in that the longer the delay the more demanding the justification in terms of exceptional circumstances. The Appeals Panel have chosen a high exceptionality test and it falls within the bounds of a rational choice. There are no arguable judicial review grounds on which to set aside the approach of the Appeal Panel to requests for extension of time after 90 days.

[21] The Chairman was satisfied that there were not such exceptional circumstances as warranted an extension of time for appeal. It is necessary to identify the grounds on which the applicant sought to establish an exceptional case. First of all reliance was placed on the obtaining of the video. I do not accept that the obtaining of the video need have affected the lodging of the notice of appeal. In the event the absence of the video did not prevent the lodging of the notice of appeal because ultimately it was lodged before the applicant obtained the video. Mr McCartney, the other injured party, did not wait until the video had been obtained before he put in his notice of appeal. The second matter relied on was the treatment of Mr McCartney whose appeal had been accepted. However his appeal had been lodged in time and the issue of a request to extend time had not arisen. That his appeal had arisen out of the same events is of limited value to the applicant's position.

[22] The further matter relied by the applicant concerns the wording of the guidance. Now was this a factor in the lodging of the notice of appeal? It was not mentioned when the exceptional circumstances for an extension of time were referred to in the letters of 21 November or 11 December 2007. The applicant's solicitor supplied a supplementary affidavit stating that he was in contact with the

proposed respondent's office after receipt of the letter of 23 November 2007. He referred the office to the discrepancy in the wording involving the use of the word "and" as opposed to the use of the word "or" in the guide to appeal procedures that had been given to the applicant when he received notice of the review decision.

[23] I accept that the use of the word "or" in the guide to appeal procedures was a factor in the applicant's solicitor's approach prior to the lodging of the notice of appeal and the request for an extension of time.

[24] The applicant's solicitor proceeded on the basis that he was relying on the interests of justice limb to obtain an extension of time after the 90 day period had expired and he would have to establish exceptional circumstances. In the event the proposed respondent did consider the exercise of discretion to extend time. In so doing the proposed respondent was not satisfied that the applicant met the required standard of exceptional circumstances.

[25] I am satisfied, as was the Chairman, that there were no exceptional circumstances that could warrant the extension of time. In relation to the issues that he considered, neither the absence of the video nor the appeal of Mr McCartney, either singly or together, could be said to be good reasons for holding up the lodging of the notice of appeal nor would the interests of justice warrant an extension of time in such circumstances.

[26] While the wording of the guidance may have been a factor in the mind of the applicant's solicitor, this was not a consideration that the Chairman took into account because it was not brought to his attention. The Chairman's decision cannot be set aside on the basis of a consideration that was not made known to him. However I do not accept that it would have had any effect on the decision in relation to extension of time. The Chairman did consider an extension of time and found an absence of good reasons and that the interests of justice did not require an extension of time. Any misstatement of the basis for the exercise of discretion could have had no bearing on the decision made, in the absence of such exceptional circumstances as would warrant an extension of time. I am satisfied that there are no arguable judicial review grounds for setting aside the decision not to extend the time for appeal.

[27] While not affecting this particular case I should make some comment on the Scheme as it has now developed in relation to appeals. The Secretary of State's Scheme and the Appeal Panel's guide to appeal procedures provide expressly for requests for extension of time within 90 days. The Appeals Panel interprets the Scheme as providing the Chairman/adjudicator with a discretion to extend time for requests made after 90 days. The basis of this discretion was not an issue in the judicial review proceedings and is an issue on which no comment is made or should be implied. However the guide to appeal procedures does not make clear the existence of that discretion nor the basis on which it would be exercised. Prospective appellants are thus unaware of the existence of this discretion and the manner in

which it is being exercised. It may be that prospective appellants would not request an extension of time to appeal after 90 days from the notice of refusal of review, believing that the wording of the Scheme and the guide to appeal procedures do not admit of such a request and being unaware of the discretion operated by the Appeals Panel. Consideration might be given to the wording of the Scheme and the guide to appeal procedures in relation to the exercise of discretion to extend time after 90 days.

[28] I refuse leave to apply for judicial review.