**Neutral Citation No. [2016] NIQB 3** | *Ref:* **COL9829**

*Judgment: approved by the Court for handing down* | *Delivered:* **11/01/2016**

*(subject to editorial corrections)**

**2015 No 6338/1**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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

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**Carson's (Eileen) Application (Leave Stage) [2016] NIQB 3**

**IN THE MATTER OF AN APPLICATION BY EILEEN CARSON FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF A DECLARATION OF THE CRIMINAL INJURIES COMPENSATION APPEAL PANEL NORTHERN IRELAND MADE ON 22 OCTOBER 2014**

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**COLTON J**

[1] This is an application for judicial review of a decision of the Criminal Injuries Compensation Appeal Panel (Northern Ireland) ("CICAPNI") made on 22 October 2014, leave having been granted by Treacy J on 3 June 2015. There are two further judicial reviews arising from the same set of circumstances brought on behalf of the children of Eileen Carson.

**Background**

[2] The applicant married Robert John Carson on 18 July 1992. There are two children of the family who are 20 years of age and 13 years of age respectively. Robert Carson died on 1 February 2003 as a result of a gun attack on a taxi in which he was a passenger. Another passenger John Maurice Gregg was also killed. According to the police report in relation to the matter Gregg was a prominent member of the UDA and was the target of the gun attack which was indiscriminate in the sense that the gunmen did not care who else was shot as long as Mr Gregg was killed.

[3] At the time of his death Mr Carson was a stained glass artist and provided financial support for his wife and two children.

**Original Application for Criminal Injury Compensation**

[4] Applications were received by the Compensation Agency ("CA") for criminal injury compensation on behalf of the applicants in this case on 2 May 2003. The CA declined compensation and the applicants requested a review of the decision. The review decision was made on 23 March 2006. The decision which declined compensation was sent to the applicants' solicitors, Donnelly & Wall. The reason given for the refusal was that the Secretary of State did not consider that an award of compensation would be appropriate as police intelligence indicated that the late Mr Carson was an active member of an illegal Loyalist paramilitary organisation. Reference was also made to the existence of a mural which depicts the victim as an active member of that illegal organisation. In relation to that issue the applicant averred that her husband had no involvement with paramilitaries, that he had no paramilitary related convictions and had never been arrested by the police in relation to paramilitary activity. His funeral did not have any paramilitary trappings nor does his gravestone make any reference to paramilitary involvement. She further avers that the letters from the CA containing the review decision and indicating the right to appeal the decision were sent to her then solicitors but were not copied to her. In a letter dated 1 June 2006 those solicitors advised her that:

> "We feel that in view of the police stance we do not feel that you will be successful."

[5] The review decision was never appealed.

**Second Application for Criminal Injury Compensation**

[6] On 29 August 2013 the applicant contacted her present solicitors who on her instructions lodged a second application for compensation on her behalf and on behalf of her children on 15 October 2013. In particular the focus of the second application will be to challenge the police intelligence and scrutinise the foundation of that intelligence. The applicant, correctly, did not seek to appeal the original review decision of 23 March 2006 having regard to the provisions of paragraphs 61 and 62 of the Northern Ireland Criminal Injuries Compensation Scheme 2002 ("the 2002 Scheme") which provide a strict time limit of 90 days within which to do so. A similar provision in relation to the request for a review of the decision has been considered by Gillen J in the case of *Re LM (Criminal Reviews Compensation)* [2007] NIQB 68. At paragraph [51] of his judgment he states:

> "I have concluded that the wording in the Scheme is so clear and the intended consequence of failure to comply so evident that it is unarguable that there is flexibility in the time limits."

I shall return to paragraph [62] and the decision in *Re LM.*

[7] By letter of 21 October 2013 the compensation services denied their claims. The basis for the refusal was that:

> "Your application for compensation cannot be considered as the applicant has already made a claim for compensation in respect of the same criminal injury. This application was reviewed on 2 May 2003 and the Agency issued its final decision on 23 March 2006. A copy of same was provided to the applicant and their nominated representative. No appeal request was submitted within the stipulated 90 day period and the file is now closed."

[8] An application for review dated 19 September was submitted to the Compensation Service on 2 January 2014 and by letter of 28 February 2014 the compensation services denied the review application relying upon the reasons previously provided.

[9] A Notice of Appeal dated 20 March 2014 was served upon the CICAPNI.

[10] The compensation services submitted a hearing bundle to the CICAPNI and in the "Hearing Summary" section it is stated that "compensation services believe that this is a duplicate application and therefore it cannot be considered". By letter dated 16 July 2014 the Appeals Panel Chairman of the CICAPNI wrote to the applicants' solicitor indicating that the applications would be listed in order that a preliminary legal argument be received. The hearing was on 22 October 2014. The CICAPNI dismissed the appeal. Written reasons were given on 18 December 2014. The essence of the decision is set out in paragraph 7 in the following terms:

> "Paragraph 19 of the 2002 scheme requires that claims must be submitted within 2 years after the date of the incident complained of. That time limit may be extended/waived in certain circumstances. The simple fact in this case is that the appellant's claim has already been dealt with and disallowed in March 2006. No appeal was lodged then. The matter is therefore at an end. There is no provision in the 2002 scheme for claims to be reopened in circumstances such as this."

**The Issue to be Determined**

[11] The applicant has brought an application by way of judicial review to quash the decision of the CICAPNI to disallow her appeal.

[12] The issue in this case is whether the 2002 Scheme permits, in any circumstances, a second application for compensation for the same criminal injury in respect of which application has already been made.

[13] The respondents accept that if the answer to this question is "yes" and that the Panel therefore had a discretion to accept the claims then the impugned decisions (refused appeals) should be quashed and the appeals remitted for reconsideration by a different Panel. If the answer is "no" then the refusal of the applicants' appeals was inevitable and the application for judicial review should be dismissed.

[14] In determining the issue I was greatly assisted by the excellent written and oral submissions from counsel in the case namely Mr Ronan Lavery QC and Phillip McEvoy for the applicant and Mr Phillip McAteer on behalf of the respondent.

**The 2002 Scheme**

[15] The starting point for the court's consideration is of course the scheme under which the applicant has applied for compensation namely the 2002 Scheme.

[16] Part II of the Criminal Injuries Compensation (Northern Ireland) Order 2002 ("the 2002 Order") makes provision for the design of a scheme for the payment of compensation from public funds for injuries sustained by persons as a result of criminal injury. The 2002 Scheme was made by the Secretary of State under Article 3 of the 2002 Order on 1 May 2002. Those who have suffered criminal injury between 1 May 2002 and 31 March 2009 in Northern Ireland may make an application for compensation under the said Scheme to the CA.

[17] Paragraphs 37 to 44 of the 2002 Scheme provides that compensation is payable to qualifying claimants in fatal cases.

[18] Pursuant to paragraph 59 of the 2002 Scheme if the applicant is dissatisfied with a decision of the CA a request can be made to have the CA review the decision.

[19] Pursuant to paragraph 61 of the 2002 Scheme an applicant who is dissatisfied with the decision taken on review by the CA may appeal against the decision by giving written notice of appeal to the CICAPNI. Appeals under the 2002 Scheme "must be received by the Panel within 90 days of the date of the review decision".

[20] Paragraph 62 of the 2002 Scheme goes on to provide that:

> "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
>
> (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 the 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 when the time limit is not waived."

[21] Paragraph 19 of the 2002 Scheme deals with the relevant time limits in relation to the bringing of an application. It provides that:

> "An application for compensation under this scheme in respect of a criminal injury ("injury") hereinafter in this scheme must be made in writing on a form obtainable from the Secretary of State. It should be made as soon as possible after the incident giving rise to the injury and must be received by the Secretary of State –
>
> (a) Within 2 years from the date of the incident, or
>
> (b) Where the applicant was under the age of 18 at the date of the incident, within 2 years of the applicant's 18th birthday.
>
> The Secretary of State may waive this time limit where he considers that, by reason of the particular circumstances of the case, it is reasonable in the interests of justice to do so."

**Interpretation of the 2002 Scheme**

[22] How then should I interpret the statutory scheme in the context of this case? The court's decision must be determined by what it considers to be the intention of Parliament as expressed in the statutory provisions. The essence of the interpretation of statutes is an earnest seeking after the intention of Parliament or perhaps more accurately the deemed intention of Parliament.

[23] The starting point is the statute itself. There is no express term dealing with the issue of a second application. The scheme put in place by the Secretary of State pursuant to statute is silent on the issue. In my view this is significant. If one looks at the 2001 scheme applicable in Great Britain paragraph 7 includes the following:

> "7. No compensation will be paid under this scheme in the following circumstances:
>
> (a) Where the applicant has previously lodged any claim for compensation in respect of the same criminal injury under this or any other scheme where the compensation of the victim of violent crime in operation in Great Britain; …."

The 2002 Scheme in Northern Ireland closely resembles the 2001 scheme in Great Britain and yet the legislators have chosen not to include a similar provision in the Northern Ireland scheme. Also of significance, in my view, the current scheme applicable in Northern Ireland namely the Northern Ireland Justice Compensation Scheme 2009 ("the 2009 Scheme") includes the following at paragraph 7(b).

> "No compensation will be paid under this scheme in the following circumstances:
>
> …
>
> (b) Where the applicant has previously lodged any claim for compensation in respect of the same criminal injury under this or any other scheme where the compensation of the victim of violent crime in operation in Northern Ireland;"

[24] It is clear from these provisions that it would have been open for the Secretary of State to include a provision similar to that in the 2001 GB scheme and the current 2009 Northern Ireland scheme. The failure to do so provides strong support in my view for an interpretation to the effect that the CICAPNI has a discretion to consider a second application.

[25] Further context for the consideration of the matter is contained in the guidance to the schemes issued by the CA. In the first guidance published – Issue No. 1 (5/02) the following is contained in the guidance:

> "2.2 We are unable to consider your application under this scheme if; …

> (b) You have already <u>applied</u> for compensation in respect of the same criminal injury under this or any other scheme operating in Northern Ireland (paragraph 7);" (my underlining)

[26] Thus at that stage certainly it appears that the CA's view was that second applications were prohibited. However the guidance was changed in Issue No. 2 (3/05) to read:

> "2.2 We are unable to consider your application under this scheme if; …
>
> (b) You have already <u>received</u> for compensation in respect of the same criminal injury under this or any other scheme operating in Northern Ireland (paragraph 7);" (my underlining)

[27] This somewhat inelegant drafting has remained in the subsequent guidance. In my view the change in wording must be significant. Of course I bear in mind that the guidance cannot override the scheme. It is an explanatory document and is not a substitute for the scheme itself. When Gillen J considered the guidance in *LM* he comments that the wording "*of the guide to the Northern Ireland Criminal Injuries Compensation Scheme 2002 might have been worded more felicitously*". It must not be forgotten that it "*is a mere guide couched in layman's terms published by the CA without legal force and does not dilute the effects of the Parliamentary intention evinced in the scheme itself*".

[28] Whilst these caveats are accurate and important in my view the guidance certainly supports the view that a discretion is available to the Panel in these circumstances. The change of the wording certainly suggests that those drafting the guidance on behalf of the CA were alive to the possibility of a discretion.

[29] Counsel for both parties did point out that paragraphs 56-57 of the scheme do provide for limited circumstances in which a case may be reopened after a final decision has been made.

> "Reopening of cases
>
> 56. A decision made by the Secretary of State and accepted by the applicant, or a decision by the adjudicators, will normally be regarded as final, except when appeal is reheard under paragraphs 78-82. The Secretary of State may however subsequently reopen a case where there has been such a material change in the victim's medical condition as a consequence of the injury that injustice would occur if the original assessment of

> compensation were allowed to stand, or where he has since died in consequence of the injury.
>
> 57. A case will not be reopened more than 2 years after the date of the final decision unless the Secretary of State is satisfied on the basis of evidence presented in support of the application to reopen the case, that the renewed application can be considered without a need for further extensive inquiries."

It seems to me that this deals with a specific situation where an assessment of compensation is inadequate because of a material change in the victim's medical condition and the provision of such an option would not preclude the possibility of a discretion to receive a second application under the scheme.

[30] Of interest in terms of the interpretation of the scheme is the decision of Weatherup J in the case of an *Application by Alan Cross for Leave to Apply for Judicial Review* which was delivered on 18 April 2008. I am obliged to Mr McAteer who quite properly referred this case to the court. That case involved an applicant who appealed a review decision outside the ninety day time limit for appeals. The case, inter alia, involved a consideration of the provisions of paragraph 62 of the scheme which I have referred to in paragraph 18 of this judgment above. It appears that at that time the view of the Appeals Panel was that it operated on the basis that the Chairman's consideration of requests for extension of time to appeal is not limited to those made within ninety days. Their view was that the scheme requires exceptional circumstances to obtain an extension of time for requests made within ninety days. If the request is made after ninety days it generally requires a higher level of exceptionality in order to obtain an extension of time. Thus although that paragraph clearly did not provide for discretion to extend time for requests made after ninety days the Panel interpreted it in such a way that it was open to the Chairman to do so. It may well be that Weatherup J was unsure about the basis of this discretion and I note that in paragraph 27 of his judgment he states:

> "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."

Nonetheless this clearly demonstrates a practice whereby the CA exercised a discretion in circumstances where none was specifically provided and where indeed the wording of the paragraph appears to the contrary.

[31] The decision in *Cross* was not drawn to the court's attention in the case of *LM* to which I have referred earlier. That case involved the interpretation of paragraph 59 of the scheme which is very similar to paragraph 62 and is a judgment which is relied heavily upon by the respondents in this matter. Gillen J clearly took the view that the effect of the ninety day time limit in relation to review (and presumably the

court would have taken an identical view in relation to paragraph 62) meant there was no discretion to extend the time limit for appeal. The key passages of his judgment are at paragraph [45] onwards:

> "[45] In addition to these principles, I have taken into account the elementary canon of construction that the words in a statute must not be interpreted out of their context. Thus, each section in a statute must be read subject to every other section, which may explain or modify it. This doctrine presupposes precision drafting rather than disorganised composition.
>
> [46] Applying these principles, I have come to the conclusion that there is no arguable case to be made, that Parliament intended in the instant legislation that the doctrine of substantial compliance applied or that the 90 day time limit was to be treated as other than binding. I consider that it must readily be inferred that Parliament intended the consequence of failure to comply to be that proceedings should not be valid if the review was sought outside the 90 day period save in the limited circumstances set out in paragraph 59. I have come to this conclusion for the following reasons.
>
> [47] First, there is no wording in paragraph 59 which lends itself to an interpretation that Parliament intended there to be discretion outside the exceptional circumstances postulated in paragraph 59 itself. Parliament had considered the possibility of waiving the time limit and had decided that it is only in the exceptional circumstances set out in paragraph 59 i.e. where the extension has been requested and received within the 90 day period and it is in the interests of justice to do so, that the extension should be given. Why would the draftsman have provided this one exception if he intended there to be a general discretion for any exception deemed reasonable?
>
> [48] Secondly, earlier in the Scheme, the draftsman has considered the possibility of a wider discretion at paragraph 19. That paragraph deals with a failure to comply with the two year time limit on the application for compensation. In that instance it is specifically stated that 'the Secretary of State may

> waive this time limit where he considers that, by reason of the particular circumstances of the case, it is reasonable and in the interests of justice to do so'. Far from constituting a mere decorative appendage, this provision is a crucial element in the discretion vested in the Secretary of State. If it had been the intention of Parliament that the same discretion should be vested in the Secretary of State in the case of a review, I consider that is inconceivable that the draftsman would not have used the same or very similar language in paragraph 59."

[32] It is Mr McAteer's contention on behalf of the respondent that the decision in *LM* would be rendered redundant and sterile if second applications were permissible. Thus the applicant *LM* could, even at the time of handing down of the court's judgment, simply have made a second claim for compensation, which, because of the applicant's age (less than 20) would have had to be considered under the terms of the scheme as if she had never previously applied. He argues that the construction of the scheme contended for by the applicants in this case would in essence render pointless the time limits relating to appeal.

[33] There is considerable merit in this submission and I have weighed it carefully in coming to a conclusion. However in my view the circumstances before the court in *LM* are different from the circumstances in this case. In *LM* the court was interpreting the meaning of a specific provision albeit within the context of the Act as a whole. In this case the statute is silent and the court has in effect been asked to "read in" words to the statute that prohibit a second application. The mischief which Mr McAteer correctly identifies namely the undermining of the express time limit as provided can be met by the proper exercise of a discretion if it exists. Thus when exercising any discretion the Panel could only exercise it in exceptional circumstances. It would be wrong for the court to set out an exhaustive list of criteria as to how such a discretion might be exercised. Any Panel considering the matter should look at all the circumstances of the case. Relevant considerations would include the length of the delay in bringing any application, the reasons for any delay, the extent to which the cogency of the evidence available in relation to the matter has been affected by any delay, whether any relevant new material has become available in relation to the matter, whether the application is still within the time period for bringing an application under paragraph 19 of the scheme and the likelihood of the applicant being successful.

[34] Having considered the scheme and the context provided by the guidance and the judgments in the cases of *LM* and *Cross* I have come to the view that the Panel does have a discretion under the 2002 scheme to consider a second application. Before finally coming to that conclusion I also stand back and look at the overall implications of such a decision to see if they produce a fair and reasonable result. A key consideration for me in coming to my conclusion is the fact that this case has

never been considered by a panel on its merits. Therefore no question of res judicata or estoppel *per rem judicata* arises. Ms McCaigue on behalf of the respondent points out at paragraph 23 of her most helpful affidavit that:

> "More generally no finality would be brought to the process if an unsuccessful applicant could at any stage simply launch a second, third or fourth application on the same criminal injury. Not only would this create on-going uncertainty but have practical consequences for resources and require on-going retention of papers in cases that would otherwise have been closed."

[35] I agree that the question of finality and certainty is important and I take this into account in my interpretation of the scheme.

[36] The important principle of finality in legal proceedings can be achieved in this context by the proper exercise of the discretion. Any concerns about a floodgate argument can be dealt with by the proper and rigorous application of the discretion, which of course will only apply to cases under the 2002 Scheme which has been expressly changed by the 2009 Scheme. It seems to me that the discretion which I hold exists would only be exercised in exceptional circumstances. Nonetheless the effect of the availability of the discretion is to permit meritorious applications to be considered in the interests of ensuring fair and just outcomes. Justice should not be sacrificed to procedure and convenience. This would be particularly so, it seems to me, in the cases of minors who are still within the time limit for an application in circumstances where they have not had an opportunity to have their case considered on the merits.

[37] I have therefore come to the conclusion that the 2002 Scheme does permit a second application for compensation for the same criminal injury in respect of which application has already been made.

[38] Accordingly I quash the decision of the CICAPNI made on 22 October 2014 and I direct that the applicant's appeal be remitted for reconsideration by a differently constituted Panel.