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*(subject to editorial corrections)**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

JUDICIAL REVIEW

Fitzpatrick's Application (2) [2008] NIQB 30

AN APPLICATION FOR JUDICIAL REVIEW BY ANTHONY FITZPATRICK (2)

GILLEN J

Application

[1] The applicant in this matter challenges the decision of a Criminal Injuries Compensation Appeals Panel ("the Panel") not to make an award of compensation under the Northern Ireland Criminal Injuries Compensation Scheme 2002 ("the 2002 Scheme"). Compensation was withheld because of the applicant's criminal convictions.

Background

[2] The applicant sustained a criminal injury on 1 January 2003. He applied for compensation from the Compensation Agency on 14 January 2003. This case came before the Panel on 13 March 2006 and a decision was given on 10 May 2006. The Panel concluded that an award should be withheld on account of the applicant's character as shown by his criminal convictions. The panel relied on three convictions. The first was on 29 January 2004 when he appeared before Down Magistrates' Court and was convicted of disorderly behaviour arising out of an incident that occurred on 24 January 2004. He was fined £50. Under the 2002 Scheme guidance this conviction attracted two points. The next conviction related to an appearance before Down Magistrates' Court on 30 June 2004 when he was convicted again of disorderly behaviour on 14 February 2004 and received one month's imprisonment suspended for twelve months. Under the 2002 Scheme guidance that conviction attracted ten points. The last conviction, which was

the real subject of the dispute in this case, related to a matter at the same court when he was bound over for two months arising out of an incident on 23 September 2002 (the "relevant conviction"). That attracted two points under the guide.

[3] The issue in this case was whether or not the relevant conviction became spent once the period of binding over lapsed. The two other convictions would have given rise to twelve penalty points which would have been sufficient to exclude the applicant but leave was obtained for the matter to continue before this court on the basis that the judge granting leave could not exclude the possibility that the panel might have approached the matter in a different way if the relevant conviction had been excluded.

The legislative framework

[4] The Criminal Injuries Compensation Order (NI) Order 2002(the 2002 Order) introduced the 2002 Scheme for the compensation of criminal injuries. It was an enabling provision and under it the Secretary of State introduced the Scheme which came into effect on 1 May 2002. On the same date the Secretary of State issued a guide to the Scheme.

[5] The provisions under which criminal injuries compensation is paid in Northern Ireland were helpfully set out by Girvan J In the Matter of the Application by Michael Snoddy for Judicial Review (an unreported decision reference GIRC5595 delivered on 23 June 2006 hereinafter referred to as" Snoddy's case"). I adopt his description of the operation of the scheme as follows:

> "**The Scheme**
>
> (5) Under the Criminal Injuries Compensation (Northern Ireland) Order 2002 which replaced the earlier compensation scheme a completely new legislative scheme was introduced by the Secretary of State who was empowered to introduce a scheme by way of delegated legislation. …. Paragraph 14 of the Scheme provides:
>
>> 'The Secretary of State may withhold or reduce an award where he considers that …
>>
>> (d) the conduct of the applicant before, during or after the incident giving rise to the application makes it

inappropriate that a full award or any award at all be made; or

(e) the applicant's character as shown by his criminal convictions (excluding convictions spent under the Rehabilitation of Offenders (Northern Ireland) Order 1978 at the date of the application) or by evidence available to the Secretary of State makes it inappropriate that a full award or any award at all be made."

"The Guide

(6) At the same time as the Scheme came into effect there was published a Guide to the Scheme. Paragraphs 8.15 to 8.16 of the Guide provide:

> 'Paragraph 14(e) of the Scheme provides that an award may be withheld or reduced on account of a victim's character as shown by his/her criminal convictions (excluding convictions which are spent under the terms of the Rehabilitation of Offenders (Northern Ireland) Order 1978). This is because a person who has committed criminal offences has probably caused distress and loss and injury to other persons and has certainly caused considerable expenses to society by reason of court appearances and the cost of supervising sentences even when they have been non-custodial, and victims may themselves have sought compensation, which is another charge on society. Even though a victim may be blameless in the incident in which the injury was sustained, Parliament has provided in the Scheme that convictions which are not spent under the 1978 Order should be taken into account.

> 8.16. The following scale of penalty points is an indicator of the extent to which any unspent convictions may count against an award. These points, which are based on the type and/or length of sentence imposed by the court together with the time between the date of the sentence and receipt of the claim, are a guide to the gravity of the criminal record in relation to a claim. Any sentence imposed after the claim has been received will also be taken into account'."

"There then follows a table setting out penalty points that apply in relation to particular sentences. Thus for example in the case of imprisonment for more than 30 months if the period between the date of sentence and receipt of application is a period of sentence or less there will be 10 penalty points. In the case of an absolute discharge less than six months before the application one penalty point will arise. Sentences imposed after the receipt of the application are to be treated as if they had occurred on the day before the application was received. The percentage of reductions attracted by various levels of penalty are set out in a table. Thus if there were ten penalty points or more the applicant would forefeit the entire award. If the penalty points amounted to 3-5 the award falls to be reduced by 25% and so forth.

(7) The guide expressly states that the Panel retains its discretion and is not bound to follow the terms of the penalty points tariff. Thus, in para 8.17 it is pointed out that the scale is intended to be a readily understood guide to the significance of the claimant's criminal record. A points total which indicates a reduction or a refusal of an award may be mitigated where the injury resulted from the applicant's assistance to the police in upholding the law or from genuinely helping someone under attack or there may be evidence of rehabilitation not otherwise indicated by the points system which may be taken into account. Conversely a low point score is no guarantee that an award would be made where, for example, the record contain offences of violence or

> sexual offences. It is clear that the Panel must approach its task with care to ensure a proportionate, fair and balanced result. Accordingly, it must consider all the circumstances of the individual case including the nature and extent of the applicant's past wrongdoing and the relevance of the wrongdoing to his character and to the injury sustained. A relevant decision based simply on a computation of penalty points without regard to the particular circumstances and facts of the case would result in an outcome in which the decision-maker failed to have proper regard to all the circumstances of the claim and related factors and would have failed to have properly appreciate the nature and extent of his discretion."

[6] Article 5 of the Rehabilitation of Offenders (NI) Order 1978 (the 1978 Order) where relevant provides as follows:

> "5.-(1) Subsequent to Articles 8 and 9, a person who has become a rehabilitated person for the purposes of this Order in respect of a conviction shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction; and notwithstanding the provisions of any other statutory provision or rule of law to the contrary, but subject as aforesaid –
>
> No evidence shall be admissible in any proceedings before a judicial authority exercising its functions in Northern Ireland to prove that any such person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which was the subject of a spent conviction; …"

[7] In the course of paragraph 8.16 in the guide, there is a table setting out the penalty points that apply in relation to particular sentences. It also records:

> "Sentences imposed after the date of receipt of your application will be treated as if they had occurred on the day before the application was received."

The applicant's case

[8] Mr Heaney, who appeared on behalf of the applicant, relied specifically on Article 5 of the 1978 Order. He argued that the spent convictions of a rehabilitated person cannot be admitted or used as evidence by a judicial authority in Northern Ireland. The Panel in discharging appellate functions under the 2002 Order and Scheme is a judicial authority. There is no provision in the 1978 Order that restricts the effect of rehabilitation to circumstances where the conviction is spent at the time of application to the judicial authority as opposed to the time of hearing. He submitted that a purposive reading of the 1978 Order indicates that Article 5 is specifically directed to the admission of evidence of convictions at the hearing itself. Consequently the applicant is to be regarded as a person who has not been convicted or sentenced in respect of the relevant conviction.

[9] Mr Heaney submitted that the Panel should not have considered the spent conviction at all or if it was to do so, it should have been on the basis of evidence available to the Secretary of State without regard to the table of penalty points. By having regard to penalty points it predisposed itself to the result it eventually arrived at and operated a system which treats conviction post application in an arbitrary manner.

[10] Counsel drew attention to the fact that whilst paragraph 8.16 of the guide does indicate that any sentence imposed after the claim has been received will also be taken into account, a subsequent note three records sentences "spent" under the Rehabilitation of Offenders (NI) Order 1978 do not attract penalty points. It was his argument that the draftsman of the guide clearly had in mind that whilst sentences imposed after the claim had been received will be taken into account, those sentences which were spent should not attract penalty points. Had the draftsman intended that such spent convictions were only to be excluded if spent at the date of application, it could have so said.

[11] Praying in aid the principle of statutory construction that the law should be altered deliberately that than casually Mr Heaney argued that the Parliamentary draftsman, when drawing up the 2002 Order, could have specifically stated that the spent conviction provisions in the 1978 Order required amendment or disapplication when applied to the 2002 Order or Scheme .

Conclusions

[12] I have come to the conclusion that the applicant's case in this instance must fail. I am of this view for the following reasons.

[13] It is well settled law that where the language of an Act is clear and explicit, the courts must give effect to it whatever may be the consequences because the words of the statute speak the intention of the legislature. The Scheme and the guidance are of not statutes. Whilst some caution should temper deployment of that doctrine to non statutory contexts nonetheless I think an analogous approach must be applied in this instance. In Regina (Rassi) v Secretary of State for the Home Department Times Law Report 22 February 2008 the Court of Appeal in England, considering the compensation scheme for those wrongfully detained in custody employed the test arrived in R v Criminal Injuries Compensation Board Ex parte Webb (1987) QB 74, 78 in construing the compensation scheme stated:

> "The court should not construe the scheme as if it were a statute but as a public announcement of what the Government was willing to do. This entails the court deciding what would be a reasonable and literate man's understanding of the circumstances in which he could under the scheme be paid compensation."

[14] I consider that the wording of the Scheme and the guidance are clear. Convictions which are spent at the date of the application are clearly to be ignored under 14(e) of the Scheme, paragraph 8.15 of the guide notes and paragraph 8.16 the guide.

[15] Equally so, any sentence imposed after the application was received will be taken into account per paragraph 8.16 of the guide. (See also Snoddy's case at paragraph 20).

[16] The guide unflinchingly states that sentences imposed after the date of receipt of the application "will be treated as if they had occurred on the day before the application was received". Simple forms provide the ideal lexicon and I regard this as an emphatic injunction. I consider these words to be a perfectly rational interpretation of the clear wording set out at paragraph 14(e) of the Scheme. It would seem entirely illogical that an offence committed by the applicant shortly before the application could be considered by the Panel even though it might be several years until the hearing before the Panel, but a much more recent conviction could not be entertained by the Panel simply because it had occurred after the application had been made and was spent by the time of the Panel hearing. That would run contrary to the policy which underlies for example the sliding scale in penalty points which is to the effect that the more recent the conviction the more seriously it should be treated. I consider that to be analogous in principle. On that issue, Girvan LJ In the Matter of an Application by

Anthony Fitzpatrick (unreported GIRC5955 delivered on 5 November 2007) in the Court of Appeal in Northern Ireland said at paragraph 12:

> "[12] Under the Guide it is clear that, as a matter of a policy, it has been determined that, for the purposes of the sliding scale taking account of the period between the date of sentence and the receipt of the application, a sentence imposed after the date of application will be deemed to have occurred on the day before the application. This means that the clear policy in the Guide is that post-application convictions will not be reduced by passage of time between the application and the date of the ultimate decision. The policy choice is a perfectly rational one reflecting the fact that the period between the application and the decision is a variable period depending on the particular circumstances of individual cases. There may be a considerable passage of time between the application and the decision and this may be attributable to delay caused by the applicant himself, by the Agency or by a decision making panel. The policy underlying the sliding scale in penalty points is that the more recent the conviction the more seriously it should be treated. The policy view clearly is that the post-application conviction should be treated as falling within the same category as the most recent convictions immediately before the application. Were the applicant's contentions correct the situation could arise that a person with a conviction 2 days before the application would receive maximum penalty points irrespective of any delay in the decision by the Compensation Agency or the relevant panel whereas an applicant with a conviction 2 days after the application could benefit from a reduction under the sliding scale if there is delay in the decision on his application."

[17] I consider that the same logic applies in the present instance. If the relevant date to consider whether a conviction was spent or not was the date of hearing by the Panel, an applicant could ensure that offences were spent by delaying the hearing by a process of adjournment. Determinations by the Panel would depend on random circumstances quite unconnected to the reasoning behind the legislation and the Scheme thereunder. The guide makes clear that the award is reduced because a person who has committed criminal offences has probably caused distress and loss and injury to other

persons and has caused considerable expense to society by reason of court appearances and the cost of supervising sentences. This is a quite different rationale from the context of the 1978 Order. I consider that Mr McAlister, who appeared on behalf of the respondent, is correct to submit that the 1978 Order is not the enabling provision from which the 2002 Scheme receives its authority. The Scheme's authority is derived from Articles 2-9 of the 2002 Order and that Scheme has been approved by both Houses of Parliament. The Scheme itself is specific and makes detailed provision for the consideration of unspent convictions. I find force in his submission that the relevant date for consideration of convictions is a matter for the specific legislation or Scheme dealing with this specific area. The 1978 Order is entirely silent on this. I find no inherent conflict between the two pieces of legislation.

[18] I am satisfied that the Scheme and the guidance are clear in determining that sentences imposed after the date of application will be deemed to have occurred on the date before the application. Paragraph 14(e) of the Scheme, which only excludes convictions spent under the 1978 Order at the date of the application, ensures that the relevant conviction in this case was not spent at the relevant time. Accordingly the Panel were correct to take it into account.

[19] In those circumstances it is unnecessary for me to consider the alternative argument of the respondent that in any event no reasonable Panel properly directing itself would have done anything other than refuse the award since the penalty points would only have been reduced to 12 rather than 14 in the event of the relevant conviction being excluded.

[20] I therefore dismiss the applicant's case.