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Judgment: approved by the Court for handing down | *Delivered:* **05/11/07**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY ANTHONY FITZPATRICK FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

GIRVAN LJ

[1] The appellant on 14 January 2003 applied for compensation under the Criminal Injuries Compensation Scheme ("the Scheme"), a scheme made by the Secretary of State under the Criminal Injuries Compensation (Northern Ireland) Order 2001. His application related to an incident which occurred on 1 January 2003 when he was attacked by a person unknown ("the relevant incident"). He sustained head injuries and he also alleged that he had suffered psychological injuries.

[2] The Compensation Agency decided that an award of compensation could not be made for two reasons. Firstly, it concluded that the applicant was guilty of unreasonable delay in reporting the incident to the police. Secondly, under paragraph 14(e) of the Scheme the Agency was required to take account of the applicant's character as shown by his criminal convictions. The Agency concluded that the application of the penalty points fixed by the Scheme resulted in 14 penalty points which led to a 100% reduction in any award. Under the Guide to the Scheme if an applicant has accrued more than 10 penalty points he is not entitled to receive an award.

[3] The convictions in question were:-

(a) A conviction on 29 January 2004 for disorderly behaviour in an incident which occurred on 24 January 2004 for which he was fined £50. Under the Guide that attracted 2 penalty points.

(b) A conviction on 30 June 2004 for disorderly behaviour on 14 January 2004. He received a sentence of one month imprisonment suspended for 12 months. Under the Guide to the Scheme that conviction attracted 10 penalty points.

(c) An order imposed on 30 June 2004 binding him over for 2 months arising out of an incident on 23 September 2002. This attracted 2 penalty points under the Guide to the Scheme.

[4] The appellant sought a hearing before the Criminal Injuries Appeals Panel ("the Panel"). The Agency did not seek to rely on the issue of delay but did seek to stand over the decision on the reduction of the award under paragraph 14(e). The Panel accepted the Agency's evidence in relation to the convictions. In paragraphs 9 and 10 of its decision it stated:-

> "(9) Our conclusion was that the record produced was accurate and that the convictions recorded were not spent under the Rehabilitation of Offenders (Northern Ireland) Order 1978 and should be taken into account. The sentences were imposed subsequent to the application for compensation. As such under the Scheme they are treated as if they have occurred on the day before the application was received. The application was made on 14 January 2003. Following the Guide the Agency have correctly worked out the relevant penalty points as outlined at page 20 of the Guide.
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> (10) The scale of penalty points is not binding upon us and is simply provided for guidance. We have borne in mind the nature of the offences outlined. We have not had the benefit of considering the offences in detail as the appellant has claimed ignorance of them. Consequently we have not been able to consider any mitigating circumstances. We consider the nature of the offences, the age of the offences and the amount of time between them, the sentences imposed and the lack of further offences since. Consistency of determination is, however, desirable and in the circumstances we see no reason for deviating on the facts available to use from the suggestions in the Guide. Having regard to all matters our conclusion was that the award should be withheld on account of the appellant's character as shown

> by his criminal convictions under paragraph 14(e)."

[5] The appellant challenged the Panel's decision in a judicial review application and contended that the Panel had fettered its discretion in its application of the Secretary of State's Guide to the Scheme. It was argued that the Panel was not entitled to take into account a spent conviction and was wrong not to allow some discount in the penalty points between the date of the convictions and the date of the hearing before the Panel.

[6] Paragraph 14(e) of the Scheme provides that the Secretary of State may withhold or reduce an award where he considers that:-

> "(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 application) or by evidence available to the Secretary of State makes it inappropriate that a full award or any award at all be made."

[7] Under the Guide to the Scheme paragraphs 8.15–8.16 provide specific guidance on the effect of convictions on eligibility for compensation. Paragraph 8.16 provides that the 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 a court together with the time between the date of the sentence and the receipt of the claim are a guide to the gravity of a criminal record in relation to a claim. For example, in the case of an order of imprisonment for 6 months or less the penalty points are 10 if the period between the date of sentence and receipt of application for compensation is the period of sentence or less. Where the period is more than the period of sentence but less than the sentence plus 2 years the penalty points are reduced to 5. The sliding scale continues depending on the relevant period. Sentences imposed after the date of receipt of the application under the terms of the Guide "will be treated as if they had occurred on the day before the application was received." In view of that deeming provision the maximum penalty points apply since there will be no reduction in the penalty points by effluxion of time between the date of sentence and the receipt of application. In Re Snoddy I explained the position in relation to paragraph 8.15 thus:-

> "A withholding or reduction on account of a victim's character as shown by his or her criminal convictions arises because a person who has committed criminal offences has probably caused distress and loss and injury to other persons, and

> has certainly caused considerable expense to society by reason of court appearances and the cost of supervising sentences, even when they have been non-custodial, and the 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 Rehabilitation of Offenders (NI) Order 1978 should be taken into account."

[8] In relation to post application convictions at paragraph 20 I stated:

> "In relation to the convictions which occurred after the application the Guide states clearly that they can be taken into account. The Scheme itself refers to convictions at the date of application but refers generally to evidence available to the Secretary of State making it inappropriate that a full award or any award be made. The Scheme thus permits the later convictions to be taken into consideration and it was thus not unlawful for the panel to do so."

[9] Mr Heaney on behalf of the appellant argued that the Scheme permits the withholding or reduction of an award only where the Secretary of State considers that the applicant's character makes it inappropriate that a full or any award is made by reason of (i) his criminal convictions ("route 1"); or (ii) evidence available to the Secretary of State ("route 2"). As all the appellant's convictions post-dated his application they could not be considered under route 1. The panel treated the convictions in accordance with the Guide which provides that sentences which post-dated the application are to be treated as if they occurred on the day before the application was received. By taking the Guide into account the Panel had regard to an irrelevant consideration and misdirected themselves. The Panel should not have considered post-application convictions at all or if it was to do so it should have been on the basis of route 2 alone without regard to the table set out in the Guide. Counsel argued that the suggestion in Re Snoddy that under the Scheme convictions occurring after the application was made could be considered by the Panel and taken into account by way of evidence available to the Secretary of State was not consistent with the wording of paragraph 14 of the Scheme which makes a clear distinction between what is shown by convictions and what is shown by evidence available to the Secretary of State.

[10] Paragraph 8.16 of the Guide provides that the scale of penalty points is based on the type and the length of the sentence imposed by the court

together with the time between the date of the sentence and receipt of the claim and they provide a guide to the gravity of the criminal record in relation to the applicant. There is in effect a system of graduated penalty points for pre-application convictions. Under the Guide post-application convictions are treated as occurring the day before the application. There is nothing in paragraph 14(e) of the Scheme which renders the Guide ultra vires in treating post-application convictions as relevant convictions giving rise to penalty points. The words in parenthesis in paragraph 14(e) "excluding convictions spent under the Rehabilitation of Offenders (Northern Ireland) Order 1978 at the date of application" refer to convictions which were spent at that date and the words "at the date of application" do not qualify the reference to the applicant's character as shown by his criminal convictions. Since the post-application convictions are to be treated under the Guide as occurring on the day before the application there can be no time graduated reduction in relation to post-application convictions.

[11] Morgan J in his judgment in the court below recorded that it was common case that the binding over conviction became a spent conviction after the period of binding over had lapsed. He concluded that the decision in Re Snoddy did not deal with the case where by the time of the hearing of the appeal a conviction was spent. He accepted that the applicant had an arguable case with a reasonable prospect of success on that issue in relation to the order binding the appellant over which became a spent conviction after the period of binding over had expired. He could not exclude the possibility that the Panel might have approached the matter in a different way if it had excluded that challenged conviction. He granted leave to apply for judicial review on that limited ground. However, he rejected as unarguable the contention that the Panel had erred in not allowing some discount between the date of the other convictions and the date of hearing. At paragraph [5] of this judgment he stated:-

> "The policy to the Guide is that maximum reduction (sic) should apply to convictions which were recent having regard to the date of application or alternatively which post-dated the applications. I entirely accept that the Panel is required to exercise its discretion in relation to every conviction but that decision must be made against a policy background that convictions subsequent to the application will generally attract maximum penalty points. Accordingly I do not give leave on this point."

The word "reduction" in the quotation above was obviously inserted in error and the judge was clearly making the point that convictions subsequent to the

application will attract maximum penalty points under the terms of the Guide.

[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.

[13] The conclusion reached by Morgan J on this aspect of the case is in our view correct. We dismiss the appeal against the refusal of leave on that aspect of the case.