

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered:	1.07.05
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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

**IN THE MATTER OF AN APPLICATION BY MICHAEL SKELLY FOR
JUDICIAL REVIEW**

Before Kerr LCJ, Campbell LJ and Sheil LJ

KERR LCJ

Introduction

[1] This is an appeal from a decision of Weatherup J, given on 9 September 2004, whereby he dismissed the appellant's application for judicial review. By that application, the appellant had challenged the decision of the Criminal Injuries Compensation Appeals Panel for Northern Ireland dismissing his appeal for compensation under the Northern Ireland Criminal Injuries Compensation Scheme. Although the Order 53 statement did not articulate it, a claim was also made that the adjudicator who determined the appeal on behalf of the panel should have referred the appeal to an oral hearing and this was the main focus of the hearing before Weatherup J and on the appeal.

Background

[2] The appellant sought compensation for injuries sustained in an incident that occurred on 4/5 August 2002. He had been attacked by his brother, Ciaran, and suffered injuries to his head and face. Although he had reported the incident to the police and made a statement about the attack on 9 August 2002, the appellant subsequently indicated that he did not wish the police to take any further action against his brother.

[3] The appellant's application for compensation was refused because, in the view of the Compensation Agency, the applicant "had refused to co-operate with the police because [he] withdrew [his] statement/complaint" and that he

had caused or contributed to the incident in which he was injured by fighting with his assailant before that incident. The appellant applied for a review of this decision, pointing out that in the earlier incident his brother had punched him because he had not been asked to a party to which the appellant had been invited and the appellant had struck back in self defence. The application for a review of the decision was refused on 30 October 2003 and the appellant appealed. In his appeal document he stated that he had withdrawn his complaint to the police because the assailant was his brother but that he had subsequently contacted the police through his solicitor and asked them to proceed with the prosecution. He renewed his denial of having contributed to the incident in which he was injured.

[4] The decision on the appeal was taken by an adjudicator, John Duffy, on behalf of the Appeals Panel. He concluded that there was no significant dispute as to the facts on which the review decision had been taken. He also decided that on the evidence available, no different decision could have been made. He came to the conclusion, therefore, that the appeal could be determined without an oral hearing and that there was no other reason that made such a hearing desirable. Mr Duffy considered that the appellant had “unequivocally signalled” non-cooperation with the police in bringing his brother to justice. He also decided that the appellant’s description of his actions immediately before he was attacked by his brother did not suggest that he was conducting himself appropriately or that he was acting in self defence.

The evidence available to the adjudicator

[5] The appellant’s statement on 9 August 2002 to the police described the incident on 4/5 August as follows:-

“On Sunday 4 August 2002 I was in my flat. I was having a few drinks with friends. I was very drunk. I don’t know what time it was but my brother Ciaran Skelly arrived round sometime in the early evening. We had a falling out the previous day, Saturday the 3 August 2002 and he came round to make up with me. I made up with Ciaran and we sat in my flat drinking. I have a very vague memory of what happened. I can’t really remember because I was drunk. At one stage in the evening or maybe into Monday 5 August 2002 I remember being outside the flat and Ciaran and me (*sic*) had a fight. That fight broke up and I went on and walked away from Ciaran. My friend, Briega McGaughey followed me. There was no sign of Ciaran. I then heard the sound of

bottles breaking. I went to look to see what was going on. I came round the side of the fence which leads to the flats at 91 Pegasus Walk. As I came round the fence I saw Ciaran. He ran at me and I ran towards him. I put my head down to drive at him. My friend shouted 'watch the bottle', but at that I felt pain in my face and then my head. After that I remember nothing until I woke up in hospital. I was treated for cuts to my chin, upper lip, left cheek, left ear and head and my right index finger. In total I have forty to forty five stitches in my head and face. I don't know why Ciaran my brother did this to me. The fight we had earlier was over and done with. He stabbed me with a bottle for no reason. I am willing to go to court if necessary. I am not too clear about what happened because I was very drunk. I had been drinking most of the weekend and sometimes when I drink I don't remember but I do know that Ciaran stabbed me with a bottle."

[6] In his application for compensation the appellant gave a further description of the incident as follows:-

"On 5/8/02 I was sitting in my house with my friend, Briege Megaghy (*sic*) and my brother Ciaran Skelly. We ended up outside. Ciaran and I started to fight. The fight was broke up. We went our separate ways. Briege and I went towards my house and heard bottles smashing. I seen my brother - he came running at me - I ran towards him. Someone shouted 'Watch, he's got a bottle'. The next think I got a bottle into left hand side of my face. The next thing I remember I was in hospital."

[7] On 8th November 2002 the investigating police officer completed a report to the Compensation Agency stating (i) that the police knew of no evidence that the appellant had behaved provocatively (ii) that the appellant had co-operated fully with police at all times (iii) that he had complied with all reasonable requests for information. Notwithstanding this the agency refused the appellant's application by letter of 6 July 2003 which contained the following passage:-

"I have considered carefully all the evidence available to me and I have concluded that you

refused to co-operate with the police because you withdrew your statement/complaint.

... [and] ... that your conduct before the incident caused or contributed to the incident concerned, in that you were involved in a fight with your assailant prior to this.

What this means to your claim is that you failed to co-operate with the police in that you withdrew your statement of complaint and you were fighting with your assailant prior to this incident, during this incident you confronted him and were subsequently injured as a result. In the circumstances we are unable to make an award of compensation."

[8] After the appellant received the notification of decision rejecting his application his solicitor submitted an application for review in the following terms:-

"I wish to request a review of the decision to refuse to make an award of compensation. Without prejudice to the generality of the foregoing I request a review on the following grounds:

(i) I was never contacted by police following the reporting of the incident.

(ii) I was in no way to blame or contributed to the injuries which I received. My brother punched me because he was not invited to a party. I hit him back in self-defence. He disappeared and when I heard glass smashing I thought he was smashing my windows. When I went to check he stuck a bottle in my face.

My brother suffers from psychiatric problems and is currently detained under the Mental Health Act. In the circumstances I believe that I should be entitled to compensation."

[9] On 30 October 2003 the review decision was issued rejecting the appellant's application on the same grounds as before *viz* that he had failed to

co-operate with the police in that he withdrew his statement of complaint and that he was fighting with his assailant and had confronted him and was subsequently injured as a result.

[10] On 4 November 2003 the appellant appealed, setting out the following grounds in his notice of appeal:-

“I wish to request an appeal of the decision to refuse to make an award of compensation. Without prejudice to the generality of the foregoing I request an appeal on the following grounds:-

(i) I made a statement of withdrawal to police as the assailant was my brother. I have since through my solicitor contacted the police and asked them to prosecute Ciaran Skelly.

(ii) I was in no way to blame or contributed to the injuries I sustained. My brother punched me because he was not invited to a party. I hit him in self-defence. He disappeared and when I heard glass smashing I thought he was smashing windows. When I went to check he stuck a bottle in my face.

(iii) My brother Ciaran Skelly suffers from psychiatric problems.

In all the circumstances I believe that I should be entitled to compensation.”

The statutory framework

[11] Article 3 of the Criminal Injuries Compensation (Northern Ireland) Order 2002 requires the Secretary of State to make arrangements for the payment of compensation to those who have sustained criminal injuries in Northern Ireland. These arrangements are to include the making of a scheme to be known as the Northern Ireland Criminal Injuries Compensation Scheme. The scheme is required to provide for claims to be determined and awards to be made by the Secretary of State (article 5); that the scheme shall make provision for the review of any decision taken in respect of a claim for

compensation (article 6); and that the scheme shall include provision for rights of appeal against decisions taken on review (article 7).

The compensation scheme

[12] The Secretary of State made the Northern Ireland Criminal Injuries Compensation Scheme 2002 on 1 May 2002. Paragraph 14 deals with eligibility to receive compensation and provides that the Secretary of State may withhold or reduce an award where he considers that specified grounds arise, including:-

“(a) ...

(b) the applicant failed to co-operate with the police or other authority in attempting to bring the assailant to justice; or

(c) ...

(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; ...”

[13] Paragraph 58 of the scheme provides for the review of decisions. An applicant may seek a review of any decision under the Scheme by the Secretary of State to withhold an award. Paragraph 61 deals with appeals against review decisions and provides that an applicant who is dissatisfied with a decision taken on review may appeal against the decision by giving written notice of appeal to the Criminal Injuries Compensation Appeals Panel. Paragraph 69 provides that a member of the staff of this panel may refer for an oral hearing any appeal against a decision taken on a review to withhold an award.

[14] Paragraph 70 makes further provisions on appeals. The relevant parts are:-

“70. Where a member of the staff of the panel does not refer an appeal for an oral hearing under the preceding paragraph, he will refer it to an adjudicator. The adjudicator will refer the appeal for determination at an oral hearing in accordance with paragraphs 72-78 where, on the evidence available to him, he considers -

(a) ...

(b) in any other case, that there is a dispute as to the material facts or conclusions upon which the review decision was based and that a different decision in accordance with this Scheme could have been made.

He may also refer the appeal for determination to an oral hearing in accordance with paragraphs 72-78 where he considers that the appeal cannot be determined on the basis of the material before him or that for any other reason an oral hearing would be desirable.”

The guide to the scheme

[15] The Secretary of State published guidance about the operation of the scheme. In relation to eligibility for compensation under paragraph 14(b) of the scheme, the guide provides:-

“8.10 If the incident has been promptly reported to the police we have discretion to reduce or withhold compensation if you subsequently fail to co-operate in bringing the alleged offender to justice.

8.11 We make a distinction between two situations:-

- (a) Where you refuse to co-operate with the police, for example, by refusing to make a statement or to attend court or by making a statement which you later withdraw we will normally make no award;
- (b) Where you were willing to co-operate but in the particular circumstances it was decided by police or the prosecuting authority that no further action should be taken or prosecution brought an award may be made, assuming that no other issues of eligibility are in question.

8.12 As with non-reporting, fear of reprisals will not generally be an excuse; if you at first refused to

co-operate with the police but subsequently changed your mind and assisted them in all respects then we may consider whether a reduction of the award in respect of the initial failure or refusal to co-operate is appropriate.”

[16] In relation to eligibility to receive compensation under paragraph 14 (d) of the Scheme, the guide provides:-

“8.14 In this context conduct means something which can fairly be described as bad conduct or misconduct and includes provocative behaviour and offensive language. Examples of the kind of conduct that we can take into consideration are shown below.

Fighting/provocation/abuse of alcohol/illicit drugs.

An award may be reduced or withheld in the following circumstances -

- (a) If your injury was caused in a fight in which you had voluntarily agreed to take part. This is so even if the consequences of an agreement go far beyond what you expected. If you invite someone ‘outside’ for a fistfight, we will not usually award compensation even if you ended up with the more serious injury. The fact that the offender went further and used a weapon will not normally make a difference;
- (f) Where your excessive consumption of alcohol or use of illicit drugs contributed to the attack which caused your injuries.”

Should an oral hearing have taken place?

[17] Weatherup J held that, in relation to the first limb of paragraph 70 of the scheme, there was clearly a dispute as to the material facts or conclusions upon which the review decision was based. The appellant was not merely disputing the review decision that he should be refused compensation; he contested the conclusions that had been reached on the basis of the second police statement and disagreed with the material facts and conclusions relating to his conduct during the entire incident. We agree with this analysis.

The appellant contended that he did not provoke or precipitate the attack on him. On the contrary during the first episode he claimed to have been defending himself from an unprovoked attack by his brother and on the second he was trying to prevent his brother from breaking the windows of the flat. This version of the incident differed significantly from the conclusion reached by the Compensation Agency on the review that he had caused or contributed to the attack on him by fighting with his assailant before the incident.

[18] Mr Treacy QC for the appellant submitted that the conclusions as to whether the appellant had failed to co-operate with the police were also in active dispute. The appellant had not “unequivocally signalled” a lack of co-operation with the police. He had merely said in his second statement that he wished the police to take no further action and that they should not speak to his brother because he was on medication. This did not amount to a failure “to co-operate with the police or other authority in attempting to bring the assailant to justice”. The second statement had been made more than six weeks after the appellant had first told the police about the incident. No police officer had approached the appellant’s brother during that time nor had the eyewitness to the assault been interviewed even though she had been identified in the appellant’s first statement to the police. It was by no means clear, therefore, that the police intended to bring Ciaran Skelly to justice. The appellant could only fall foul of this requirement, Mr Treacy argued, if the police were attempting to bring the assailant to justice and the appellant failed to co-operate with that attempt. In any event the appellant had subsequently informed the police through his solicitor that he wished his brother to be prosecuted.

[19] In our judgment therefore there was also a dispute on whether the appellant had failed to co-operate with an attempt by the police to prosecute. It appears to us that it is at least arguable that if the police do not intend to prosecute, an applicant for compensation cannot be said to have failed to co-operate simply by signalling that he does not wish the assailant to be prosecuted. Failure to co-operate involves something more than merely expressing a wish that a prosecution should not occur.

Could a different decision have been made?

[20] Weatherup J decided that the adjudicator had reached his conclusion not to refer the matter to an oral hearing on the basis that a different decision could not have been made if this step had been taken. This was a conclusion which, he considered, the adjudicator was entitled to reach. We find ourselves unable to agree with this view.

[21] The appellant made the case that he did not engage in fighting with his brother on the first occasion; rather, he defended himself when his brother

launched an unprovoked attack on him out of frustration at not having been invited to the party. At the later stage of the incident, according to the appellant, he saw his brother rush at him after he had gone to see whether Ciaran was breaking his windows. It was at that point that the appellant 'drove' at his brother. The adjudicator said on this issue, "It is clear that he was a voluntary participant in the fight with his brother". It appears to us, however, that another, equally tenable, view is that the appellant, realising that his brother was rushing forward to attack him, was seeking to forestall injury to himself. The conclusion that such an interpretation is at least feasible is reinforced by the fact that the police officer in charge of the investigation into the incident considered that the appellant had not acted provocatively. Moreover, an attempt by the appellant to stop his brother from breaking windows does not, in our judgment, amount to participating voluntarily in a fight. Even if it was concluded that the appellant 'drove forward' for this purpose, it appears to us that the view could be taken that this did not amount to behaviour that came within paragraph 14 (d) of the scheme.

[22] Likewise on the issue of whether the appellant had failed to co-operate with the police it appears to us that a different decision from that reached by the agency was plainly possible. If the police did not intend to prosecute Ciaran Skelly, the statement made by the appellant that he did not want his brother to be prosecuted could hardly be characterised as a failure to co-operate with the police or other authority in attempting to bring the assailant to justice. Moreover, even if it could be so portrayed, the appellant's retraction of the statement and his expressed desire that his brother should indeed be prosecuted *could* have led to a different view from that reached by the agency that this betokened a lack of co-operation. The purpose of the relevant provision in the scheme must surely be to encourage the bringing to justice of those who inflict injuries that are the subject of applications for compensation under the scheme. It seems to us clear that a different view could be taken of the appellant's change of mind from that formed by the agency and the adjudicator which seems to have been that once a desire that his brother should not be prosecuted had been uttered by the appellant he had placed himself in an irredeemable position of non-cooperation.

[23] Mr O'Hara QC for the respondent suggested that the conclusion of the adjudicator that no other decision could have been made was immune from challenge on any ground other than *Wednesbury* unreasonableness. He submitted that the view that no other decision could have been made was one that could reasonably be held and that the appellant's challenge to it must fail on that account.

[24] It is not necessary for us to express a concluded opinion on the question whether the only species of challenge to the adjudicator's decision available on this issue is one of *Wednesbury* unreasonableness for we are satisfied that

the only possible conclusion that the adjudicator could have reached was that a different decision from that of the agency could have been made. It was, in our opinion, unreasonable in the *Wednesbury* sense to have concluded otherwise.

Conclusions

[25] We have decided that the adjudicator should have concluded that there was a dispute as to whether the appellant had failed to co-operate with the police or other authority in attempting to bring the assailant to justice and as to whether the appellant had participated voluntarily in a fight with his brother. We have also concluded that he should have reached the view that it was possible that a different decision on these issues would have been taken from that formed on the review of the dismissal of the appellant's application for compensation. It follows that the matter should have been referred to an oral hearing.

[26] We will therefore allow the appeal against the learned judge's dismissal of the appellant's application and make an order of certiorari quashing the decision of the adjudicator refusing to refer the matter for an oral hearing. Such a hearing should now take place. We express no view as to what the outcome of the hearing should be. That will be a matter to be determined at the oral hearing itself.