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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Maguire's (Gerard) Application [2011] NIQB 8

IN THE MATTER of an Application by Gerard Maguire for Judicial Review

McCLOSKEY J

I INTRODUCTION

[1] The subject matter of this application for judicial review is a decision of the Criminal Injuries Compensation Appeals Panel ("*the Panel*") whereby compensation was awarded to the Applicant as a result of being attacked in his home but reduced by 50%. The Applicant contends that this reduction is unlawful. Specifically, he complains that he is the victim of impermissible double penalisation within the framework of the governing compensation code.

II DECISION MAKING FRAMEWORK

[2] The framework within which the impugned decision was made has three constituent elements:

(a) The Criminal Injuries Compensation (Northern Ireland) Order 2002 ("*the 2002 Order*").

(b) The Northern Ireland Criminal Injuries Compensation Scheme 2002 ("*the Scheme*").

(c) The Compensation Agency Guide to the Northern Ireland Criminal Injuries Compensation Scheme 2002 ("*the Guide*").

[3] In brief compass, the Scheme was made by the Secretary of State for Northern Ireland under Article 3 of the 2002 Order and has been in operation since 1st May 2002. It makes provision for the various matters addressed in Articles 4 – 7 of the

2002 Order. In accordance with Article 5(2)(a) of the latter, the Scheme also makes provision for the withholding or reduction of an award of compensation. Paragraph 14, under the rubric "*Eligibility to Receive Compensation*", provides:

> "*14 The Secretary of State may withhold or reduce an award where he considers that -*
> *(a) the applicant failed to take, without delay, all reasonable steps to inform the police, or other body or person considered by the Secretary of State to be appropriate for the purpose, of the circumstances giving rise to the injury; or*
> *(b) the applicant failed to co-operate with the police or other authority in attempting to bring the assailant to justice; or*
> *(c) the applicant has failed to give all reasonable assistance to the Secretary of State or other person or body in connection with the application; or*
> *(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 application) or by evidence available to the Secretary of State makes it inappropriate that a full award or any award at all be made.*"

This is the only provision of the Scheme which arises for consideration in these proceedings.

[4] The Guide also contains certain material provisions which featured in the parties' arguments. While this instrument purports to be made by the Secretary of State under the 2002 Order, I have been unable to identify any specific empowering provision therein. It is possible that Article 3(1) is couched in sufficiently broad terms to authorise the making of this instrument. It does not appear to fall within the ambit of Article 7(5), which provides:

> "*The Scheme shall include provision as to the giving of advice by adjudicators to the Secretary of State*".

By virtue of its structure and contents, it purports to be an information publication, addressed to the general population. This is clear from paragraph 1.2:

> "*The purpose of this guide is to explain the main provisions of the (2002) Scheme and to give you information about how the Scheme works. This should help you to apply for compensation with as little trouble as possible. The guide is not, however, a substitute for the Scheme itself and cannot cover every situation.*"

In the present context, I add merely that the *vires* of the Guide is not in dispute**. Furthermore, it is to the legislation and the Scheme that that the court must ultimately have resort.** Stated succinctly, the Guide cannot alter or dilute either.

[5] The Guide contains certain provisions which can be related to paragraph 14 of the Scheme. I shall outline these as they featured in argument *and* might possibly have some relevance to the decision making approach of the Panel impugned by the Applicant. Furthermore, the provisions of the Guide are of some objective utility, as they illuminate the aims and philosophy underpinning the Scheme generally and some of its specific provisions. Part 8 of the Guide begins:

> *"8.1 Payment of compensation for injury as a result of a crime of violence is intended to be an expression of public sympathy and support for innocent victims. The prior Scheme, introduced in 1988, envisaged that it would be inappropriate for those with significant criminal records or those whose own conduct led to their being injured, to receive compensation from public funds. It was also felt that people who failed to co-operate in bringing the offender to justice should not benefit from such payments. These provisions continue in this Scheme.*
>
> *8.2 Accordingly, we have the discretion to withhold or reduce an award which might otherwise be granted if one or more of the reasons which are set out in Paragraphs 14 (a)-(e) of the Scheme apply to your claim. These are explained below in parts 8.3 to 8.17."*

Paragraph 8.3 broadcasts the following warning:

> *"However, we attach great importance to the duty of every victim of crime to inform the police of all the circumstances without delay and to co-operate with their enquiries and any subsequent prosecution."*

The rationale of reporting the relevant incident to the police is explained in paragraph 8.4:

> *"8.4 It is particularly important that the incident should have been reported without delay, since it is our main safeguard against fraud. This also enables the police investigating to commence at the earliest possible opportunity increasing the prospect of apprehension and conviction of assailants. This also assists police in the prevention of further offences against others. If you have not reported the circumstances of the injury to the police, and*

> *can offer no reasonable explanation for not doing so, you should assume that any application for compensation will be rejected. Failure to inform the police is unlikely to be excused on the grounds that you feared reprisals, or did not recognise your assailant, or saw no point in reporting it.*"

Paragraph 8.5 contains an acknowledgement that a personal report to the police by the victim may not be imperative in every case, to accommodate the factor of injury. However, it emphasizes the importance of subsequent co-operation with the police. Paragraphs 8.6 and 8.7 stress the obligation to report "*all the relevant circumstances*" and to do so "*at the earliest possible opportunity*".

[6] Addressing the rationale of paragraph 14(a) of the Scheme in ***Re Winters' Application*** [2007] NICA 46, Girvan LJ stated:

> "*[18] … The evident purpose and policy of the requirements of paragraph 14A are to ensure that the police are informed promptly of criminal acts leading to injuries to ensure prompt and proper investigation of the alleged crime and to prevent the repetition of such offending if established*".

The rationale of paragraph 14(b) of the Scheme was considered by the Court of Appeal in ***Re Skelly's Application***[2005] NICA 31, where the Lord Chief Justice stated:

> "[22] …*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 …*".

These passages highlight the close affinity between the two provisions of the Scheme under particular scrutiny. The foundation of the Applicant's challenge rests on his contention that the impugned decision is vitiated by illegality because the Panel purported to make separate reductions of his award, each of 25%, under paragraph 14(a) and (b) of the Scheme on the same factual basis. The Applicant accepts that a sufficient basis exists for a reduction of his award by 25% under paragraph 14(b), but contends that his award cannot be reduced further, by the same or any percentage, under paragraph 14(a) for precisely the same reason. Therein lies the nub of this judicial review challenge.

III THE IMPUGNED DECISION

[7] By letter dated 16th April 2009, the Agency notified the Applicant of a decision refusing his application for compensation. The expressed reasons were twofold:

> "*I have considered carefully all the evidence available to me and I am satisfied that you did not report all relevant circumstances to the police …*
>
> *I have* [further] *concluded that you failed to co-operate with the police or other authority because from information received you could have provided the police with the identity of the attackers*".

In his Notice of Appeal, the Applicant stated:

> "*I wish to appeal the decision of the Agency as I co-operated fully with the police and provided them with all the information within my knowledge. Unfortunately, I was unable to give a full description of the attackers as they were masked during the incident. However, I did give a full description to the best of my ability of the events that took place at my home.*"

[8] Subsequently, on 9th August 2010, the appeal was held by the Panel. The appeal was duly allowed, as appears from a completed pro-forma dated 10th August 2010. This records, *inter alia*:

> "***Late reporting to police*** *– 25%.*
>
> ***Failed to co-operate with police –*** *25%.*
>
> ***Character and way of life*** *- 10%".*

The Applicant's overall award of compensation was £7,850, duly reduced by 60% to £3,140. The Applicant complains that the second of the two reductions constitutes unlawful duplication.

[9] The evidence includes the Panel Chairman's notes of the hearing. These recite, *inter alia*:

> "**Conclusion**
>
> *The Panel concluded that Mr. Maguire was not a credible witness. In his statement to the police, he did not give a description of those involved, limited by the fact that they were wearing balaclavas …*
>
> *He was also a poor historian …*
>
> *In addition, he told Dr. Armstrong at the Fracture Clinic on 25th September 2008* [two months post-incident] *that the*

> *person who caused his injury on that occasion was the same person who shot him* ["XY"]. *He could not explain this comment but agreed that he had not shared this information with the police …*
>
> *He also admitted that his wife had mentioned 15/20 names of suspects in hospital …*
>
> ***In the light of the above, the Panel did not feel they could accept his evidence and concluded that he had not in fact co-operated fully with the police. The Panel considered that the discretion could be exercised by a 50% reduction on*** [paragraph] ***14(a), (b) and 10% on 14(e)***."

[My emphasis].

This is the contemporaneous record of the impugned decision and it is framed in commendably clear and detailed terms. Notably, the recitation of a finding that the Applicant "*… had not in fact co-operated fully with the police*" can be readily related to the language of paragraph 14(b), but not so obviously to paragraph 14(a), of the Scheme. Furthermore, this finding is couched in terms fairly clearly suggestive of the Panel's view that this was a case of *partial lack of co-operation*.

[10] In an admirably composed pre-proceedings Protocol letter, dated 16th September 2010, the Applicant's solicitors challenged the reduction of 25% for late reporting to police. In response, the Panel forwarded the text of its "Written Reasons", a typescript document. This is dated 13th October 2010 and was evidently composed by the Chairman in response to the solicitor's letter. It purports to give "*more detailed, written reasons*". Referring to paragraph 14(a) of the Scheme, it is stated:

> "*It is the Panel's view that this imposes on the Applicant an obligation not merely to report the occurrence itself but all relevant circumstances giving rise to or surrounding it. It is the Panel's view that the Applicant knew from the outset the identity of at least one of his attackers*".

The text then elaborates on this assessment, adverting to the material elements of the available evidence – the evidence of the Applicant's wife, of Constable Pollock and of the Applicant himself, together with the medical records. In the ensuing paragraphs, the text rehearses the main elements of the contemporaneous record quoted in paragraph [9] above. It concludes:

> "*Against this background, the Panel were satisfied that there was significant non-disclosure at the outset by the Applicant which merited a reduction under paragraph 14(a)*".

The change of emphasis in these written reasons is noteworthy, with the spotlight switching from paragraph 14(b) to paragraph 14(a) of the Scheme. Furthermore, there is no acknowledgement here that the incident was reported not by the Applicant but by his wife, in circumstances where the Applicant had been admitted to hospital on account of the injuries inflicted.

[11] The affidavit sworn by the Panel Chairman recounts that, at the hearing, evidence was given by the Applicant, his wife and Constable Pollock. The Applicant described an attack in his home by three masked men who shot him in the legs. He provided a good general description of them but asserted that he had no way of identifying them. He was asked about his identification of a particular male person as the perpetrator of a subsequent assault on him and the medical history provided by him that this perpetrator was the same person who had shot him. When asked why he had not furnished this information to the police, he stated that he had no evidence. Constable Pollock's testimony was that Mrs. Maguire had told him that she knew who had carried out the shooting. The Applicant accepted that his wife had given him the names of fifteen to twenty people who might have done so. Again, he could not account for his failure to convey this to the police. The Chairman explains the double reduction under paragraphs 14(a) and (b) of the Scheme in these terms:

> "*The Panel found that there has been a significant and ongoing lack of co-operation with the police. The Panel formed the view that the award ought to be reduced under paragraph 14(a) because the Applicant had not reported all relevant information to the police to assist them in the investigation of all the circumstances giving rise to the injury …*
>
> *Further … the Panel considered that the Applicant had persisted in failing to co-operate with the police in their attempts to bring the assailant to justice. The Applicant had told a doctor on 25th September 2008 that the man who had shot him was the same man who had committed the assault against him. The Applicant had made a complaint about the assault to police but later withdrew it. The Panel considered that this was evidence of a persistent and ongoing failure to co-operate that separately warranted a further 25% reduction of award pursuant to paragraph 14(b)*".

In these averments, the deponent purports to identify two quite separate defaults: a failure to make a full report to the police initially and a persistence of the same failure. The basic question is whether this purported distinction is sustainable.

IV CONCLUSION

[12] Paragraph 14(a) of the Scheme requires the victim to make a prompt report to the police of "*the circumstances giving rise to the injury*". Paragraph 14(b) requires the victim "*… to co-operate with the police … in attempting to bring the assailant to justice …*". The Panel has found the Applicant guilty of a relevant misdemeanour in the context of paragraph 14 of the Scheme. This consists of his failure to provide information to the police about the identity of his attackers. There is no challenge to this finding, it being expressly (and properly) accepted that such a finding was open to the Panel on the basis of the available evidence. However, it is contended that the Panel erred in law by reckoning this misdemeanour twice, under paragraph 14(a) and (b).

[13] The aims and objectives underpinning paragraph 14(a) and (b) of the Scheme are readily ascertainable. In summary, as a corollary of receiving compensation from public funds for a criminal injury, the victim must assist the police in fulfilment of the public interest in apprehending, prosecuting and convicting the perpetrators of such crimes. This public interest merges with the corresponding duty imposed on the police under Section 32 of the Police (Northern Ireland) Act 1998. Furthermore, compliance by the victim with the duties imposed on him by paragraph 14(a) and (b) will further the due administration of the Scheme and the protection of public funds, as such a claimant is more likely to have a genuine claim for compensation. Those who infringe any of the requirements enshrined in paragraph 14 may suffer the penalty of compensation being withheld. That, however, is not this case. Rather, the Applicant has suffered the lesser penalty of having his compensation reduced.

[14] The question is whether the Panel erred in law in reducing his compensation twice, under paragraph 14(a) and (b), on the same factual basis and for the same reason. This is a question of construction, to be determined objectively, by reference to the aims and objectives of the Scheme. In my view, the intention underpinning paragraph 14 was to tabulate five separate types of default, or misdemeanour. This assessment is reinforced by the repeated use of the disjunctive "*or*". In the abstract, it is not difficult to contemplate that a failure to make true and full disclosure to the police of all material facts and evidence, at the reporting stage, would engage paragraph (a), while different forms of subsequent conduct – such as failing to attend police interviews or identification exercises or court hearings – would engage paragraph 14(b). I consider that, in such circumstances, separate and cumulative reductions of the victim's award would be permissible. However, it is my opinion that, as a matter of construction, paragraph 14 permits one reduction only for a single default, or misdemeanour. This, in my view, is the underlying intention and I consider that this construction sufficiently furthers the aims and objectives of the Scheme. I acknowledge that this construction can present difficulties for Panels, in cases where it is possible to assign the default to more than one of the listed grounds. In the present case, the finding that the Applicant failed to tell the police

all that he truly knew about the identity of his assailants partakes of the defaults enshrined in both paragraph 14(a) and (b): it can readily be labelled a failure to report all "*the circumstances giving rise to the injury*" and/or a failure "*… to co-operate with the police … in attempting to bring the assailant to justice …*", particularly as it became an enduring, or continuing, failure. However, in my view, there is no identifiable underlying legislative intent that, in such a case, the victim should be penalised twice. That the Applicant has been penalised twice for the same misdemeanour is an unassailable conclusion and, given my construction of paragraph 14 of the Scheme, I find that this betrays an error of law on the part of the Panel.

[15] To reflect the above conclusion, an appropriate remedy will issue against the Panel (which, rather than the Agency, is the correct Respondent). The Applicant seeks an order of certiorari quashing the impugned decision. This would appear to be the most practical and effective remedy in the circumstances, as it will require a reconsideration in accordance with the judgment of this court. The reconsideration should be undertaken by a separately constituted Panel. If they are minded to take the course dictated fairly obviously by this judgment, swift and final resolution, with minimal delay and formality, will be possible. On the other hand, if there is a real prospect of an outcome detrimental to the Applicant, all necessary procedural safeguards will be required.

[16] I should add that the Panel members are to be commended for the obvious care which they took in conducting the hearing and reaching their decision and, further, in subsequently compiling the written reasons. They cannot be faulted in this respect. Rather, their error is one of pure law relating to an issue of construction of the Scheme which, to my knowledge, has not arisen previously. Generally, Panel members should also be aware that in cases where (as here) there is some apparent disharmony between their contemporaneous notes and more elaborate reasons subsequently provided, in whatever form (including any sworn affidavit), relatively critical scrutiny of the texts on the part of both legal representatives and this court is likely to ensue.

[17] Costs will follow the event.