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COURT FINDS CRIMINAL INJURY COMPENSATION “SAME HOUSEHOLD BAR” NOT JUSTIFIED

Summary of Judgment

The Court of Appeal today concluded that a bar to applicants seeking criminal injuries compensation where their injury was sustained before 1 July 1988 and the victim and assailant were living together at the time as members of the same family (known as the “same household bar” was not justified in law.

Factual Background

Mary Meehan (“the applicant”) suffered physical and alleged sexual abuse when she was aged between 9-11 years in the period between February 1979 and October 1980. The assailant moved into the family home as the partner of the applicant’s father after her mother died in October 1977. The applicant’s father was imprisoned and the assailant remained living in the family home looking after her and the other children. The applicant asserts that she was subjected to appalling physical and sexual abuse and was taken into care in October 1980. In 2008 she reported her abuse to the police and the assailant pleaded guilty at Belfast Crown Court in July 2013 to several counts of child cruelty and assault occasioning actual bodily harm. Following her plea on these counts the charges relating to the alleged sexual abuse were ‘left on the books’ by the prosecution.

After the trial the applicant lodged an application for criminal injury compensation under the Northern Ireland Criminal Injury Compensation Scheme 2009 (“the 2009 scheme”). Her application was refused and her appeal against that decision was refused by the Criminal Injuries Compensation Appeals Panel for Northern Ireland (“the CICAPNI”). The CICAPNI concluded that the applicant and her assailant were living together in the same household as members of the same family at the time of the abuse and, in that circumstance, no compensation could be paid under the terms of paragraph 7(c) of the 2009 scheme which “acts as a complete bar to eligibility to apply for compensation where the injury was sustained before 1st July 1988 and the victim and assailant were living together at the time as members of the same family”. This finding reflects what is known in Northern Ireland as the ‘same household rule’, and it is this rule which was challenged in this case.

The Judicial Review

The applicant’s challenge was directed against both CICAPNI as the decision maker and against the Department of Justice (DoJ) which has been responsible for the terms of the scheme since devolution in 2010. She claims that the decision refusing compensation for her injuries because of the application of the same household rule “is inconsistent with and in violation of her rights at common law and/or under the ECHR.” The applicant claims that the same household rule constitutes an unlawful fetter on the discretion of the decision makers dealing with compensation claims and that it operates “contrary to the purpose of the legislation which is to compensate the victims of crime”. In terms of ECHR rights, the applicant claims that the operation of the same household rule unlawfully discriminates against her contrary to Article 14 in conjunction with Art 1 Protocol 1 (“A1P1”) ECHR as it is indirectly discriminatory against women and has a disproportionately adverse impact upon

Judicial Communications Office

female victims of crimes committed in the home. The applicant also claims that the rule discriminates against her on the basis of an “other status”, namely that she was a member of the same household and/or same family as the perpetrator of the crimes against her.

Background to the 2009 Scheme in Northern Ireland

The first criminal injury compensation scheme in Northern Ireland was set up by the Criminal Injuries to Persons (Compensation) Act 1968. It excluded claims for injuries inflicted on victims who were members of the same household as their assailant and provided that no compensation could be paid “if the victim was, at the time when the criminal injury was sustained, living with the offender ... as a member of the offender's household.” The 1968 Act was revised by the Criminal Injuries (Compensation) (Northern Ireland) Order 1977 but the new statute did not change the same household rule.

The first material change came in the Criminal Injuries (Compensation) (Northern Ireland) Order 1988 which provided that compensation could be paid if the Secretary of State was satisfied the assailant has been prosecuted or there is a sufficient reason why he has not been prosecuted; that the assailant and victim have ceased to live in the same household and are unlikely to do so again; and that no person who is responsible for causing the injury will benefit from the compensation. This change, however, only related to claims made from the date on which the 1988 Order entered into force. It did not operate retrospectively and therefore did nothing to address the total bar on same household claims which had been in place up to that time.

The Criminal Injuries Compensation (Northern Ireland) Order 2002 (“the 2002 Order”) introduced a tariff system for calculating the payments that should be made in respect of different categories of criminal injuries. In terms of eligibility to make claims, it states that “no compensation shall be paid under this Scheme in respect of a criminal injury sustained by a person before the coming into operation of this Scheme unless the requirements of paragraph 84 (transitional provision) are satisfied.” The transitional arrangements addressed some of the difficulties faced by childhood victims of sexual abuse by allowing those who had failed to lodge claims within the time limits set out in various earlier compensation systems to make new claims but made no change to the same household bar on eligibility.

The Criminal Injuries Compensation (Northern Ireland) Scheme 2009 which was introduced under the powers conferred in the 2002 Order explicitly re-stated the bar on eligibility for compensation of same household victims.

Rationale of the DoJ for maintaining the current bar

The DoJ’s rationale for maintaining the same household bar on claims arising between 1968 and 1988 was stated to be an acknowledgement of the difficulties in establishing the facts; and the difficulty of ensuring that compensation did not benefit the offender. On the question whether it may be possible to update the current scheme in a manner which would remove old eligibility bars and give access to persons currently excluded by the same household rule the DoJ stated that this would require an amendment to the 2002 Order to expressly enable such retrospective provision which may be subject to challenge as it would rebut the presumption against retrospective operation of the legislation.

The Court was referred to an enquiry conducted in 2003 by the Northern Ireland Affairs Committee into the effectiveness of the operation of the compensation system in which it noted the same

Judicial Communications Office

household rule in respect of claims of abuse before 1998 “has resulted in a serious flaw in the legislation” and it was “very concerned that flaws in the law governing compensation have resulted in some child sexual abuse victims being unintentionally barred from claiming compensation” The Committee urged the Minister to take steps as a matter of urgency to “remove this barrier.” A review by the DoJ concluded that “no matter how sympathetically one looks at the circumstances of these cases, it is not possible for this review to arrive at any other conclusion than the retention of the status quo. This is for three reasons: the difficulty in trying to establish the facts of a case ... the potential (unquantifiable) cost of claims ... and the general Government principle not to legislate retrospectively.” The DoJ further commented on the “significant financial pressures on departmental budgets” and claimed that “to introduce the change sought could therefore ... make the Scheme unaffordable”.

The judicial review judgment at first instance

The trial judge referred to a decision on the same point where the Scottish courts in 2017 had concluded that reasonable justification with the applicant’s ECHR rights had been established¹. When the Scottish scheme had been updated there was a concern that wholesale abolition of the equivalent provision would expose the scheme to an unknown number of new claims related to old injuries and gave rise to concerns that this would increase the administrative burden and difficulties in establishing causation between the offence and the injuries said to arise from it. On foot of these concerns the Scottish courts held that the setting of new eligibility conditions for the scheme was a policy decision which fell within the field of socio-economic policy and that there was a reasonable foundation for a policy decision that limited the extent of the abolition of the same roof rule, and the discriminatory provisions which resulted pursued a legitimate aim, namely to ensure the long term sustainability of the scheme.

The trial judge said there was no reason in principle why courts in Northern Ireland should not also follow and apply the ratio of the Scottish decision as the law in the two jurisdictions was essentially the same. He concluded that the applicant did have a claim under A1P1 in conjunction with Article 14 which was based on her “other status”, namely the fact that she was a member of the same family and the same household as her abuser. He did not however accept that a valid claim under A1P1 on the basis of indirect sex discrimination had been made out in the case. On the question of whether the discriminatory treatment had been justified the trial judge noted that the Scottish court had found that the discrimination did pursue a legitimate aim, namely the long-term sustainability of the scheme. He noted that opening the scheme up to claimants who could satisfy the prosecution condition would result in an “added administrative burden” and dismissed the applicant's case.

Discussion

¹ The Court of Appeal in E&W has recently decided that the applicant in a case of similar facts did have a proprietary interest capable of protection under A1P1 and that she had been excluded from enjoyment of that interest for reasons which constituted discrimination on the grounds of an “other status” contrary to Article 14 (that status was her membership of the same family as her assailant at the time the criminal injuries were sustained). The Court in E&W also held that there was no legal justification for her exclusion and, accordingly, she was entitled to access on the same basis as others in analogous situations to hers. This means that there are now two Court of Appeal level decisions, each of which reaches a different conclusion on the issue of justification.

Judicial Communications Office

The issues to be decided in the appeal were as follows:

- Does the applicant have an interest in accessing the benefits of the 2009 scheme which is sufficient to qualify as a 'possession' for the purposes of A1P1?
- If so, has she been excluded from access to that possession on a discriminatory basis?
- If so, what is the discriminatory basis?
- If she has been discriminated against, is the discriminatory treatment justified in all the circumstances of the case?

Does the applicant have a 'possession' for the purposes of A1P1?

The DoJ asserts that the payment of an award out of a discretionary compensation scheme that has been applied in accordance with its own terms is not analogous to a welfare benefit and therefore is not a "possession" capable of coming within the ambit of A1P1. The Court of Appeal, however, considered that the applicant's right to claim the protection of A1P1 does not depend on whether the benefit she claims is or is not correctly labelled a "welfare benefit", but depends on whether or not she has "an assertable right of an individual and economic nature to social benefits". The Court stated:

"The criminal injuries compensation schemes reflect the social realisation that victims of violence inflicted by criminals suffer an arbitrary injustice which could befall anyone and that their predicament is not of their own making and that such violence is a deeply upsetting experience for anyone to have to endure. At the most basic level such schemes express the society-wide sentiments "it wasn't fair that you had to go through that, and we are sorry that it happened to you." Access to the benefits of the fund is not related to the means of the victim. Criminal violence can be inflicted on anyone, and in each case the sense of injustice and of outrage is the same. The message of social solidarity with a person suffering an arbitrary injustice is equally valid for all victims and, we suspect, the healing effect of that social support is equally important to all."

The Court of Appeal concluded that the trial judge and courts in both Scotland and England were correct in holding that payments under criminal injuries compensation schemes are pecuniary rights which do qualify as 'possessions' for the purposes of A1P1.

Was the applicant excluded from access to her 'possession' on a discriminatory basis?

The DoJ argued that if the right to claim compensation under the 2009 scheme is a 'possession' for the purposes of A1P1, then the applicant was never 'excluded' from it: "She was a member of an excluded category and therefore she did not qualify to have her claim considered". In common law terms the DoJ claimed that the provisions of the scheme clearly excluded her from the start, and therefore she could never have had a legitimate expectation of receiving a benefit from this scheme. The applicant's view, however is that she would have had an assertable claim under A1P1 if domestic law had not prevented her from acquiring one on a discriminatory basis.

The Court of Appeal said the relevant test is whether, but for the condition of entitlement the applicant would have had a right enforceable under domestic law, to receive compensation payment from the criminal injuries compensation scheme.

Judicial Communications Office

The Court commented that the 2009 scheme in Northern Ireland provides that if applicants fulfil the eligibility criteria they will qualify for an award. The only discretion within the scheme relates to deciding whether the access criteria are satisfied or not. The scheme is such that once the eligibility criteria are shown to be satisfied an award of some kind will follow. The Court of Appeal therefore considered that the 2009 scheme does establish an entitlement “as of right” to an award for those claimants who meet the eligibility criteria of the scheme.

If the applicant was excluded on the basis of a discriminatory ground, what was the basis of the discrimination?

The only ground of discrimination seriously advanced on behalf of the applicant was that she was excluded on the basis of the same household rule. This rule makes it clear that a claim for compensation for criminal injuries will be excluded only if:

- the victim and the assailant habitually lived together in the same household at the time the injury was sustained; and
- they were living together as members of the same family at the relevant time.

The Court of Appeal said there was no doubt that the applicant fulfils the principle eligibility criteria governing access to an award and the sole obstacle to her achieving access to the scheme is the eligibility criterion which excludes her because of the same household rule. In order to be “discriminatory” in a manner that engages Article 14 an alleged “other status” must have provided a basis for distinguishing between two sets of people who have comparable circumstances to each other. The ‘other status’ must also cause one of these groups to be treated differently from, and less favourably than, the other group. In the present case the same household rule was used to segregate victims of violent crimes who lived with their assailants as members of the same family at the time their criminal injuries were sustained from all other victims of violent crimes. The group identified by the application of the rule was then “treated less favourably” because their claims were declared ineligible for consideration while the claims of the remaining group were allowed to proceed. It is quite clear that, so far, the same household rule has all the necessary features of a discriminatory “other status”.

The European jurisprudence requires that any claimed “other status”, must be based on a “personal characteristic” of the applicant if it is to engage Article 14. On the question whether “living together as a member of the same family as the assailant” is capable of being a “status” for the purposes of Article 14 the Court of Appeal concluded that condition undoubtedly embodies “a personal status of a kind which falls within Article 14” and said it could think of few better examples of what a “personal characteristic” might be. The Court concluded that the same household rule does create an “other status”, that the applicant was discriminated against on the basis of that status, and that the status is sufficient to engage Article 14 acting in conjunction with A1P1.

Justification

The final question for the Court of Appeal was whether the DoJ can show “objective and reasonable justification” for the less favourable treatment that the applicant received. The DoJ claimed there were good policy reasons for creating this bar when it was first introduced and those policy reasons continue to apply; the decision to retain the bar for cases pre-1988 was a conscious decision by a range of administrations which reviewed this matter repeatedly; no power exists to change this rule retrospectively and any such change would require a new enabling statute to be passed; and the DoJ

Judicial Communications Office

continues to believe that any change would give rise to “issues of unquantifiable cost and significant administrative difficulties”¹.

The Court of Appeal approached the question of justification by looking at whether there was an objective and reasonable justification for the difference in treatment; whether the justification has a legitimate aim and if so whether there is a “reasonable relationship of proportionality” between the aim and the means employed to realise it. A question also arises as to the discretion of legislators to decide for themselves how best to deliver social and economic policies within their own territories. The “manifestly without reasonable foundation” test has also been recognised as the appropriate test for domestic courts to apply when examining justifications advanced for differences in treatment of individuals in similar circumstances, especially when this occurs in the context of broad economic or social policy measures taken by domestic legislators.

Applying all of the above to the present case the Court of Appeal considered that:

- Concerns about the difficulties in establishing the facts of what happened in same household cases are real and valid concerns, as are the fears related to the risk of offenders benefitting from compensation awards made in same household cases. It is clear that making provision to cater for these difficulties and concerns is a legitimate aim for a legislative measure;
- The impugned measure is rationally connected to the legitimate aim identified above in that the measure absolutely obviates the risks that it addresses, just as the legislature intended that it should;
- A less intrusive measure could have been used to achieve the legitimate aim. Examples already exist in the 1988 Order in Northern Ireland, and in every compensation scheme issued in GB since 1979. These schemes all cater for the special risks of same household cases by requiring evidence that the assailant has been prosecuted or that there is a good reason why he/she has not been prosecuted, or that there is evidence that the claimant has cooperated fully with the police in their investigation of the allegations against the abuser, as well as evidence that the parties no longer live together and that there is no risk of an assailant benefitting. The DoJ have not explained why these less intrusive measures, considered adequate to address the legitimate aims of the legislature in cases arising since 1988, are not considered adequate to address the same concerns and achieve the same aims in cases arising before that date.
- The issue of “fair balance”/“proportionality”, has several limbs. The first is the “severity of the consequences” for the people targeted by the impugned measure. This applicant in this case is excluded from access to compensation forever in respect of the criminal injuries which she says were inflicted on her. No other form of effective redress or compensation is available to her. Whilst excluded due to “an historic provision long since abolished because it was recognised to create unjustifiable anomalies”, the applicant will regularly see and hear of other victims of similar, and in many cases lesser crimes, receiving compensation for the injuries and damage unjustly inflicted on them. The Court said:

“We can think of no reasonable foundation for a decision to maintain in being an arbitrary exclusion of this proven victim of criminal injuries from a compensation scheme which is specifically designed to compensate such victims. This is especially true when there is incontrovertible evidence that the

Judicial Communications Office

policy concerns which initially prompted the creation of the impugned measure that locks her out of the scheme, are not even applicable in her case. In reaching this conclusion we also have regard to the nature and purpose of the benefit she is excluded from. The initial trigger for the creation of this scheme was a wish to express social solidarity with victims of crimes of violence. Not only is this victim excluded from the financial benefits of the scheme, she is also excluded from the emotional benefits of accessing the support and sympathy of her community expressed in the pragmatic form of a compensation payment. We are acutely aware that the irrational exclusion of some victims from access to all the intended benefits of the compensation scheme may be actively damaging to the long-term prospects of recovery of these victims."

The Court further commented that the only substantive argument advanced by the DoJ to justify the maintenance of this exclusion in the face of its general abolition for victims in circumstances similar to the applicant was that the aim of the legislation is to provide a scheme which is both financially sustainable and administratively workable: "The inclusion of rules that advance that purpose but may on occasion result in an unsatisfactory outcome for some applicants does not undermine the purpose of the legislation overall." The Court of Appeal said it could not agree with that analysis:

"Financial sustainability and administrative workability may be necessary pre-conditions underpinning a viable scheme but they cannot be considered to be the 'purpose' of that scheme. The purpose of this scheme is to compensate the victims of violent crime. The applicant is a victim of violent crimes. Her assailant pleaded guilty to several counts of child cruelty, one count of assault occasioning actual bodily harm and following the assailant's plea the remaining charges relating to alleged sexual abuse were "left on the books". The grounds put forward to justify the apparently arbitrary exclusion of this victim would have to be very persuasive, especially when the practical and emotional consequences of her exclusion appear so perversely antipathetic to the purposes for which the scheme exists, and when there are so many other less intrusive measures available currently in operation which meet all the legitimate concerns that the legislators may have. Financial sustainability and administrative workability of the scheme, are very important considerations in any social package provided by legislators. However, in our view there is no justifiable, rational or lawful ground for requiring some victims of violent crime to forgo an otherwise valid claim for compensation in order that funds may be saved for distribution to other claimants whose circumstances are equally, or possibly less, deserving of support. We consider that a measure is not justifiable if it places irrational and disproportionate losses on some individuals, even if it does so in order to achieve greater benefits for others."

The Court of Appeal concluded that the applicant must succeed in her appeal and dismissed the cross-appeal by the DoJ. It said it would hear the parties on the alternative remedy.

NOTES TO EDITORS

Judicial Communications Office

This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (<https://judiciaryni.uk>).

ENDS

If you have any further enquiries about this or other court related matters please contact:

Alison Houston
Judicial Communications Officer
Lord Chief Justice's Office
Royal Courts of Justice
Chichester Street
BELFAST
BT1 3JF

Telephone: 028 9072 5921
E-mail: Alison.Houston@courtsni.gov.uk