

**Neutral Citation No.: [2008] NICA 53**

*Ref:* **GIR7346**

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

*Delivered:* **15/12/08**

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND  
ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND  
QUEENS BENCH DIVISION (JUDICIAL REVIEW)**

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**Fitzpatrick's Application (3) [2008] NICA 53**

**AN APPLICATION FOR JUDICIAL REVIEW BY ANTHONY FITZPATRICK (3)**

—————  
**Before Kerr LCJ, Girvan LJ and Coghlin LJ**  
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**GIRVAN LJ**

**Introduction**

[1] The appellant applied for compensation under the Criminal Injuries Scheme ("the Scheme") on 14 January 2003. His application related to an incident which occurred on 1 January 2003 when he alleged he was attacked by a person unknown and sustained head injuries alleged to have given rise to psychological injuries. The Compensation Agency having refused him compensation, he appealed to the Criminal Injuries Appeal Panel ("the Panel"). It heard evidence that subsequent to the application for compensation the appellant was convicted on three occasions, those convictions giving rise to penalty points under the Guide to the Scheme. On the basis of those penalty points, calculated by the Panel as 14 the Panel refused his claim for compensation.

[2] 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, in respect of which he received a sentence of one month's 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.

[3] The Panel accepted the Agency's evidence in relation to the convictions and 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.

(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 seen no reason for deviating on the facts available to us 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)."

### **The relevant provisions of the Scheme**

[4] Paragraph 14(d) and (e) of the Scheme provides that 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."

(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."

[5] At the same time as the Scheme came into force there was published a Guide to the Scheme. Paragraphs 8.15 to 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 for imprisonment for 6 months or less, the penalty points are 10, if the period between the date of sentence and the receipt of application for compensation is the period of the sentence or less. Where the period is more than the period of sentence but less than the sentence plus two 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 occurred on the day before the application was received." In view of that deeming provision the maximum penalty points applies since there will be no reduction on the penalty points by effluxion of time between the date of sentence and the receipt of application.

[6] In relation to convictions occurring after an application for compensation in Re Snoddy [2006] NIQB 45 the court 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."

### **The Judicial Review challenge**

[7] In his application for leave to challenge the Panel's decision the appellant contended that provisions of the Guide were inconsistent with the 2002 Scheme insofar as they permit consideration of convictions which post-date an application for compensation. He also contended that no consideration was given to the period of rehabilitation that occurred from the date of the convictions until the date of hearing before the Panel. It was argued that the Panel fettered its discretion by

calculating the tariff in a rigid and mechanistic manner. In paragraph 4(2)(d) and (e) of the Order 53 Statement the appellant also argued that the Panel's decision was procedurally improper in that the Panel interpreted paragraph 14(e) of the Scheme in a manner which was inconsistent with the clear legislative intent of the Rehabilitation of Offenders (Northern Ireland) Order 1978. The Panel had failed to resolve the conflict between the 2002 Scheme and the 2002 Guide in accordance with the provisions of the Rehabilitation of Offenders (Northern Ireland) Order 1978.

[8] At the leave stage Morgan J identified one issue upon which leave should be granted to the appellant. It was common case that the Order imposed on the appellant on 30 June 2004 binding him over for 2 months became a spent conviction for the purposes of the 1978 Order once the period of binding over came to an end. Morgan J considered that the appellant had demonstrated an arguable case with a reasonable prospect of success in relation to his contention that the Panel should have treated the binding over order as irrelevant since, by the date of its decision, that was a spent conviction. Morgan J recognised that the other 2 convictions under the Guide would have given rise to 12 penalty points which would have been sufficient to exclude the appellant, but he said that he could not exclude the possibility that the Panel might nevertheless approach the matter in a different way if it excluded the challenged convictions. Morgan J rejected the other challenges to the Panel's decision. He did not accept the argument that the Panel had fettered its discretion on the application of the Guide, nor did he accept the argument that the Panel had erred in not allowing some discount between the date of conviction and the date of hearing.

[9] The appellant appealed against Morgan J's restricted order granting leave. The respondent did not challenge the order granting leave on the limited ground permitted nor did it challenge Morgan J's conclusion that the Panel might possibly have approached the matter in a different way if it had excluded the challenged conviction. This Court having upheld on appeal that limited ground on which leave was granted the matter then proceeded to a substantive hearing before Gillen J.

### **The judgment of Gillen J**

[10] Gillen J considered that the wording of the Scheme and the Guide was clear. Convictions which were spent at the date of the application were clearly to be ignored under paragraph 14(e) of the Scheme, paragraph 8.15 of the Guide Notes and paragraph 8.16 of the Guide. Any sentence imposed after the application was received would be taken into account under paragraph 8.16 of the Guide. The Guide clearly stated that sentences imposed after the date of receipt of the application were to be treated as if they had occurred on the day before the application was received. He said:

"I consider these words to be a perfectly rational interpretation of the clear working set out in 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 underlines, for example, the sliding scale of penalty points which is to the effect that the more recent the conviction the more seriously it should be treated. ... 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. ... The Scheme's authority is derived from Article 2 to 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 the 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."

[11] Mr Michael Lavery QC who appeared on the appeal before this Court with Mr Heaney contended that the Scheme had been implemented under the enabling provisions of the 2002 Order which made specific reference to the effect of previous criminal convictions or eligibility for compensation. Article 5 of the 1978 Order directs that a rehabilitated person is to be treated for all purposes in law as a person who has not committed or been convicted of the offence in respect of which he has been rehabilitated notwithstanding the provisions of any statutory provision or rule of law to the contrary. Where a person has been rehabilitated in respect of an offence, evidence cannot be admitted in respect of his conviction or sentence in relation to the offence.

[12] In support of his argument Mr Lavery called in aid the English legislation relating to criminal injuries compensation and argued that it showed that if penalty points could be attributed to an otherwise spent conviction, that should be done by a clear and express modification of the 1978 Order. This did occur in the Rehabilitation of Offenders Act 1974 (Exceptions) (Amendment) (England and Wales) Order 2006 which exempted the recovery of compensation provisions under The Domestic Violence, Crime and Victims Act 2004 from the provisions of the 1974 Rehabilitation of Offenders Act, thereby permitting the consideration of a spent

conviction at the date when recovery is prescribed. Counsel contended that the 1978 Order was not amended in Northern Ireland to exempt any of its provisions in relation to the 2002 Scheme.

[13] Mr McAlister, on behalf of the respondent, argued that the wording at paragraph 14(e) was unambiguous. The Panel was correct in law in using the date of the application as the date for considering whether the claimant had become a rehabilitated person. The Scheme was approved by Parliament as required by the 2002 Order. The relevant date for consideration of the convictions was a matter for the specific legislation or Scheme dealing with a particular area on which the 1978 Order is silent. If, contrary to the respondent's submission, there is a conflict between the two pieces of legislation paragraph 14(e) of the Scheme is the more recent expression of Parliament's intention and should be followed in deciding the relevant date.

#### **The relevant provisions of the Rehabilitation of Offenders (Northern Ireland) Order 1978**

[14] Article 5(1) provides:

"Subject 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

(a) 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; and

(b) a person shall not in any such proceedings be asked and if asked shall not be required to answer, any question relating to his past which cannot be answered without acknowledging or referring to a spent conviction or spent convictions or in the circumstances ancillary thereto."

[15] Article 8(1) provides :

"Nothing in Article 5(1) shall effect -

- (a) ...
- (b) ...

(c) the operation of any statutory provision by virtue of which, in consequence of any conviction, a person is subject, otherwise than by way of sentence, to any disqualification, disability, prohibition or other penalty, the period of which extends beyond the rehabilitation period applicable in accordance with Article 7 to the conviction."

Article 8(4) provides that:

"The Secretary of State may by order exclude the application of article 5(1) in relation to any proceedings specified in the Order (other than proceedings to which article 9 applies) to such extent and for such purposes as may be so specified."

[16] Thus article 5(1) of the 1978 Order renders inadmissible evidence of a spent conviction before any judicial authority and treats the individual concerned as a person who was not convicted of the offence. This, however, is subject to article 8(1) which does not affect the operation of a statutory provision by virtue of which, in consequence of any conviction, a person is subject otherwise than by way of sentence to any "disqualification, disability, prohibition or penalty" the period of which extends beyond the rehabilitation period.

## **Conclusions**

[17] The Scheme was made under the provisions of article 3 of the 2002 Order. By article 3(2) the Scheme made by the Secretary of State may provide for the circumstances in which awards of compensation may be made and the categories of persons to whom awards may be made. Under article 5(2) the Scheme may include provisions as to the circumstances in which an award may be withheld or the amount reduced. Under article 9(1) the Secretary of State is required to lay a draft of the proposed Scheme before Parliament, and it requires the approval of a resolution of each House. The relevant Scheme was duly approved.

[18] Under article 8(4) of the 1978 Order the Secretary of State may by order exclude the application of article 5(1) in relation to any proceedings specified in the Order to such an extent and for such purposes as may be so specified. An order under the 1978 Order is subject to annulment in pursuance of a resolution of either House of Parliament. Although the Scheme clearly indicates the intention of the Secretary of State to exclude the application of article 5(1) of the 1978 Order to compensation claims, save to the extent expressly dealt with therein, the Scheme cannot be considered to be an order made under the 1978 Order as such. However, the wide power conferred on the Secretary of State by article 8(4) of the 1978 Order does not imply that article 5 (2) should be narrowly construed. There is no reason why article 5(2)(a) should not be interpreted as conferring a wide power on the Secretary of State to specify the circumstances in which compensation may be withheld or reduced. The Scheme required and obtained Parliamentary approval by

resolution of each House, a procedure giving rise to a heightened form of scrutiny compared to the negative resolution procedure under Article 11 of the 1978 Order. The appellant's argument that the Scheme was made outside the powers of the Secretary of State, having regard to the 1978 Order, must accordingly be rejected.

[19] Furthermore the Scheme falls within the definition of a statutory provision within the meaning of section 1(f) of the Interpretation Act (Northern Ireland) 1954. It clearly purports to subject an applicant for compensation to the imposition of penalty points leading to the potential for a reduction or loss of a right to compensation and it purports to do this beyond the rehabilitation period applicable. The question arises as to whether the statutory scheme subjected the appellant to a "disqualification, disability, prohibition or other penalty" for the purposes of article 8(1)(c) of the 1978 Order. As the Shorter Oxford English Dictionary makes clear, the word 'penalty' can refer to a punishment imposed for breach of a law, rule or contract. It can also refer to "a loss or disadvantage or some kind either prescribed by law for some offence, as agreed or in case of a breach of contract." It is a word which extends more widely to mean a disadvantage or loss resulting from an act or quality especially of one's own making. The word 'penalise' is defined as meaning "to subject to a penalty, to subject to some disadvantage." While the Scheme does not subject the applicant to a punishment, it does subject him to the disadvantage of having the previous conviction taken into account against him in relation to the determination of the question whether he is entitled to compensation and, if so, to what amount. The Scheme gives rise to a penalty in that wider sense. There is nothing in the wording of article 8(1)(c) to lead to the conclusion that the word falls to be narrowly construed. On this ground also the appellant's argument must be rejected.

[20] In view of these conclusions it is strictly unnecessary to address the question whether the appellant's case should in any event be dismissed since the omission of the two penalty points attributed to the third conviction would still leave the appellant with a number of penalty points which would disqualify him from recovering compensation. Morgan J, when granting leave in the case, said that one could not rule out the possibility that the Panel might have approached the matter in a different way if it had excluded the challenged conviction. He did, however, conclude that the Panel clearly did take into account its discretion and the application of the guidance and he accepted that the Panel's decision had to be made against a policy background that convictions subsequent to the application will generally attract maximum penalty points. Having regard to that policy consideration and having regard to the complete absence of any material adduced by the appellant in relation to mitigating circumstances pointing away from the application of the policy, there would, in fact, have been no logical basis for the panel to reduce the remaining twelve penalty points, assuming the omission of the two penalty points in respect of the spent conviction. The necessary conclusion is that the outcome would inevitably in that case have been the same even if the Panel had been bound to have left out of account the two penalty points in dispute.



[21] In these circumstances the appeal must be dismissed.