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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY JAMES IRWIN HEGAN FOR JUDICIAL REVIEW

KERR J

Introduction

This is an application by James Irwin Hegan for judicial review of a provisional assessment of compensation payable to him in respect of a period of imprisonment which he served following his conviction for murder, that conviction having been quashed by the Court of Appeal.

Background

On 1 July 1986 the applicant was convicted of the murder of Adrian Carroll. He was sentenced to life imprisonment. His appeal against conviction was dismissed by the Court of Appeal on 4 May 1988. On 25 July 1991, the Secretary of State for Northern Ireland referred his case back to the Court of Appeal and on 25 July 1992 that Court quashed the applicant's

conviction. He was immediately released. By that time, he had spent eight years and some eight months in prison.

Subsequent to his release the Secretary of State determined that the applicant had a right to be compensated for the period of time that he had spent in custody. On 18 December 1992, therefore, Nicolas Hanna QC was appointed by the Secretary of State to act as assessor of the compensation to be paid to the applicant and two of his co-accused, (referred to as Mr A and Mr B).

At the time of his arrest the applicant was a full time member of the Ulster Defence Regiment. Mr Hanna concluded that, if he had not been arrested and convicted, it was probable that he would have continued to serve in that capacity. He calculated the pecuniary loss aspect of the applicant's compensation on that basis and on the assumption that he would have achieved modest promotion before discharge from the army. The pecuniary loss element of the assessment is not under challenge in these proceedings.

Mr Hanna set out his evaluation of the applicant's non-pecuniary losses in paragraphs 15 and 16 of his assessment as follows :-

> "15. Under the head of non-pecuniary loss Mr Hegan must be compensated first and foremost for the loss of his liberty, for the deprivations of imprisonment, and for the hardship, mental suffering, indignity, humiliation and injury to his feelings caused by having been wrongly convicted and imprisoned for a period of eight years and eight months. He must also be compensated for the associated inconvenience and for the damage caused to his character and reputation. There is no evidence of any psychiatric illness as such, but I can accept that during this period in prison he suffered from periods of significant reactive depression, and that since his release he has suffered from sleep impairment, loss of concentration and lack of motivation and has had difficulties in adjusting to normal life. There has obviously been a sense of loss

and psychological pain which Mr Hegan has suffered as a result of this injustice, and it is extremely difficult to quantify this. In my opinion this is a very significant issue. Approaching the case as I do, on the clear and unqualified assumption that Mr Hegan is an entirely innocent man who has suffered a grave miscarriage of justice by being imprisoned for many years for a crime which he did not commit, I have to try to gauge the impact which such an injustice is likely to have on an individual, and on Mr Hegan in particular. In June 1996 I faced the same task in assessing the non-pecuniary loss in the case of Mr A. In making my award at that time I reviewed the then current case law, such as it was, and came to a general conclusion about the proper approach to take in assessing non-pecuniary loss in cases of this kind. The case of Mr A was the first case in which an assessment under section 133 has been made in Northern Ireland. I have set out in an appendix to this assessment an excerpt from my decision in the case of Mr A (omitting any personal details). Since June 1996 there have been further developments in the case law and it may be that if the matter were being considered afresh today a somewhat different scale might be applied. In particular the case of *Oscar -v- Chief Constable of the Royal Ulster Constabulary* [1992] NI 210 has been superseded by *Thompson -v- Commissioner of Police of the Metropolis* [1997] 2 All ER 762 at 774 (for England and Wales) and by *Dodds -v- Chief Constable of RUC* [1998] NI 393 (for Northern Ireland). The case of *Lunt* was not considered in either of these cases. More significantly, in 1997 the Judicial Studies Board for Northern Ireland published 'Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland'. These indicate a current level of awards for the most severe quadriplegic cases in Northern Ireland in the range of £250,000 to £400,000. In the circumstances this would probably justify an uplift on the scale for the basic sum (see paragraph 20 of the appendix - [in this paragraph Mr Hanna had explained his approach to the non-pecuniary element of the compensation was to award a basic sum and then add to that a sum to reflect the time spent in custody]) of possibly up to 50%. However, I have come to the conclusion that, so far as this case is concerned, it would not be fair or just to treat Mr Hegan any more favourably than Mr A. He ought not to gain an advantage over Mr A simply because there has been a very long delay in submitting details of his claim to me. I therefore intend to apply the same general approach to his case as I did in that of Mr A.

16. There is nothing about Mr Hegan's case to distinguish it from that of Mr A. for the same reasons that I gave in Mr A's case (see

> appendix) I think that the basic sum should be £120,000. Accordingly I propose to make a total award of £224,000, (which includes a time award of £104,000 to reflect 104 months in custody) for non-pecuniary compensation."

The judicial review application

Mr Hanna's assessment was challenged on two principal bases. It was suggested that he had erred in failing to apply the authorities and guidelines appropriate to an assessment of compensation which were current at the time that he made his determination. He ought not to have approached the evaluation of non-pecuniary loss on the basis that it should be identical to that made in the case of Mr A. Secondly, it was claimed that Mr Hanna had failed to properly reflect the difference in personal circumstances between the applicant and Mr A in his assessment of non-pecuniary loss in the applicant's case.

The statutory framework

In so far as it is material, section 133 of the Criminal Justice Act 1988 provides :-

> "(1) Subject to subsection (2) below, when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted.
>
> ….
>
> (4) If the Secretary of State determines that there is a right to such compensation, the amount of the compensation shall be assessed by an assessor appointed by the Secretary of State."

Schedule 12 to the 1988 Act sets out the qualifications required for a person to be appointed an assessor for the purposes of section 133. It does not provide guidance as to how the assessor is to carry out his assessment.

Section 28 of the Criminal Appeal Act 1995 added the following subsection to section 133 of the 1988 Act :-

> "(4A) In assessing so much of any compensation payable under this section to or in respect of person as is attributable to suffering, harm to reputation or similar damage, the assessor shall have regard in particular to -
>
> (a) the seriousness of the offence of which the person was convicted and the severity of the punishment resulting from the conviction;
>
> (b) the conduct of the investigation and prosecution of the offence; and
>
> (c) any other convictions of the person and any punishment resulting from them."

In Halsbury's Laws of England Volume 11(2) *Fourth Edition Reissue*, the authors state that in making an assessment of damages the independent assessor applies principles analogous to those governing the assessment of damages for civil wrong. The footnote to this passage refers to House of Commons Official Reports 916 (5th series) and 87 (6th series) and states :-

> "The assessment takes account of both pecuniary and non-pecuniary loss arising from the loss of liberty and any or all of the following factors may be relevant:
>
> (1) pecuniary loss including (a) loss of earnings as a result of the charge; (b) loss of future earning capacity; (c) legal costs incurred; (d) additional expense incurred in consequence of detention, including expenses incurred by the family;

> (2) non-pecuniary loss including (a) damage to character or reputation; (b) hardship including mental suffering, injury to feelings and inconvenience;
>
> (3) any expenses, legal or otherwise, incurred by the claimant in establishing his innocence or pursuing the claim for compensation".

It was accepted by the respondent that these principles should guide the assessment of compensation in the present case and that the assessment should be analogous to the evaluation of damages for civil wrong.

The parties contentions

For the applicant it was argued that Mr Hanna had failed to make a distinction between the personal circumstances of the applicant, who was a married man with young children, and Mr A, who was an unmarried man in his early twenties. While it was accepted that Mr A had lost the opportunity (during the years that he was in prison) of meeting and marrying someone, it was suggested that this loss was not nearly so acute as the applicant's actual loss of the society of his family. Mr Hanna was quite wrong to suggest (as he had done in paragraph 16 of his assessment report) that there was nothing to distinguish the applicant's case from that of Mr A, therefore.

Counsel for the applicant also argued that Mr Hanna was wrong to have based his assessment of non-pecuniary loss on that made in Mr A's case. That assessment had been carried out some three years previously. It was well settled, counsel submitted, that non-pecuniary loss should be assessed according to values current at the date of assessment. He relied on the commentary on this topic in McGregor on Damages 16th edition para 702.

Counsel for the respondent suggested that the appropriate question to be posed was :- "Does the adoption of an analogous system (to the evaluation of damages in civil wrong) allow for a departure from that system for good reason?" An analogous system, he argued, did not

mean an identical system to be slavishly followed on all occasions. The assessor in this case stated that he would adopt an analogous approach to the assessment of damages but he explained why, for good reason, he was departing from the rule that damages should be assessed according to figures which obtained at the date of assessment.

Counsel pointed out that the assessor had acknowledged that, if one were to apply contemporary values, an increased award would have been made. He had taken that factor into account, therefore, and his award could not be attacked on the basis that he had failed to have regard to all relevant circumstances. It was susceptible to challenge only on *Wednesbury* irrationality grounds and it could not be said that the assessor's decision to keep the level of the award at that made to Mr A was irrational. On the contrary, it was perfectly tenable to decide that the applicant should not benefit from the increase in the level of general damages guidelines which had been introduced since the award to Mr A had been made, because the delay in making the assessment was due to the failure of the applicant and his legal advisers to submit the necessary information and material to allow the claim to be evaluated.

Counsel for the respondent also claimed that Mr Hanna was mindful of the difference in the personal circumstances of the applicant and Mr A. He referred to paragraphs 9-11 of Mr Hanna's affidavit which dealt with this topic as follows :-

> "9. The second main ground of challenge … is that I allegedly failed to have regard to certain features of the applicant's case which, it is contended, distinguished it from that of Mr A. This assertion is incorrect. In making my determination, I was well aware of the personal and marital circumstances and I recited these in paragraph 3 of my determination. Further they were highlighted to me in the medical and other materials furnished in support of his claim. I recognised that there were factual differences between the case of the applicant and Mr A. However, in the overall context of the suffering which each had endured, I did not consider that these

differences merited or required a distinction in their awards of compensation for non-pecuniary loss.

10. I considered, in broad terms, that the quality of suffering endured by each was not, by virtue of their distinct personal and family circumstances, materially different. I was conscious that the applicant had lost the enjoyment of his family life during his period of imprisonment and had been absent during his children's' formative years. On the other hand, I recognised that Mr A had lost the enjoyment of a different, but no less important phase of his life during which he could have been expected to have enjoyed the social life of a young single man which would have included the opportunity to make friendships and relationships. But for his imprisonment he might well have become married. Accordingly, it was my judgment that each claimant had lost the enjoyment of important, though different, phases of their lives.

11. If there had been any individual features or circumstances of the applicant's case which, in my judgment, merited an approach differing from that which I adopted in the case of Mr A, I would have reflected this in my award."

The personal circumstances argument

In paragraph 16 of his assessment report, Mr Hanna stated that there was nothing about Mr Hegan's case to distinguish it from that of Mr A. At first sight this appears to suggest that their personal circumstances are, to all intents and purposes, the same. But it would be wrong to take this paragraph out of context. In earlier passages of his report Mr Hanna had dealt at some length with the applicant's family background and the particular effect that incarceration had had upon him. I do not consider, therefore, that it has been established that Mr Hanna failed to be mindful of the differences between the two in terms of their domestic situation and other personal circumstances.

Counsel for the applicant argued, however, that, if he had approached the question properly, Mr Hanna was bound to have concluded that, by reason of his enforced absence from his wife and family, the applicant must have suffered more than Mr A. Expressed in that way, it

is clear that this argument is based on the claimed irrationality of Mr Hanna's view that no distinction in terms of impact on the individual could be drawn between the applicant's personal circumstances and those of Mr A. I am quite unable to say that such a view is irrational. One can accept that some would consider that absence from one's children, especially during their formative years, would be a much worse experience to have to endure than the loss of a number of years of bachelor youth but that is a far cry from saying that the contrary view is irrational. I must reject the applicant's submissions on this point, therefore.

Assessment according to current values

Counsel for the respondent accepted that Mr Hanna was obliged to make his assessment by applying principles analogous to those governing the assessment of damages for civil wrong, if only because he had committed himself to that course. But he claimed that this is what Mr Hanna had done. The omission of one of the principles of the assessment of damages did not mean that Mr Hanna's approach could no longer be said to be analogous to common law principles relating to the evaluation of compensation, counsel submitted.

Before examining that argument, it is necessary to recall how well established is the rule that damages should be assessed according to contemporary standards. In *Mitchell -v- Mulholland (No 2)* [1972] 1 Q.B. 65, 83D, Widgery LJ said:-

> "No-one doubts that an award of damages must reflect the value of the pound sterling at the date of the award … "

Lord Denning MR took a similar view in *Cookson -v- Knowles* [1977] 1 Q.B. 913, 921 C/D where he said :-

> "The courts invariably assess the lump sum on the 'scale' for figures current at the date of the trial - which is much higher than the figure current at the date of the injury or at the date of the writ.

> The plaintiff thus stands to gain by the delay in bringing the case to trial."

McGregor suggests that this approach is now "generally accepted". The principle was, no doubt, at least partly instrumental in prompting the Judicial Studies Board for Northern Ireland to produce (and recently revise) the booklet, 'Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland'. I conceive this principle to be a fundamental rule in the assessment of damages for non-pecuniary loss, therefore.

It has been accepted by the respondent that, despite his aspiration to apply principles analogous to those governing the assessment of damages for civil wrong, this rule was not followed by Mr Hanna. It was suggested, however, that the abandonment of this particular principle did not make the approach to the assessment of the non-pecuniary loss element of the applicant's claim other than `analogous to the evaluation of general damages for civil wrong`.

If the applicant were pursuing his claim by civil action, however, he would be entitled to claim for non-pecuniary loss at contemporary rates and his damages would not be reduced because co-plaintiffs (in an equivalent position to his co-accused) whose cases had been heard earlier, had been compensated on a lower scale, appropriate at the time of assessment. Nor would he be penalised because he or his legal advisers had been dilatory in pursuing his claim. It is difficult to see how the approach of Mr Hanna can be said to be analogous to common law principles, therefore. There do not appear to any other relevant principles or rules which Mr Hanna did apply and which might be said to make this case analogous to a civil claim. Certainly, counsel for the respondent did not identify any other principle which governed the assessment of non-pecuniary damages which Mr Hanna had applied.

In its ordinary and natural meaning 'analogous' means 'similar or corresponding in some respect'. I can find nothing in the way that the applicant's compensation has been assessed which is similar to or corresponds with how it would have been estimated if he had been a plaintiff in a civil claim. His compensation has been linked to a scale of damages which is no longer applicable; he has had his compensation reduced to keep it in line with an earlier award to his co-accused and he has been penalised for the delay in submitting vouching details to support his claim. None of these effects would have accrued, if he had been pursuing a civil action. I cannot accept, therefore, that the assessment of compensation has been similar to or has corresponded in any respect with the way damages would have been assessed.

Conclusions

As it has been accepted on his behalf that Mr Hanna had as his purpose the application of principles analogous to those in the assessment of damages for a civil wrong, it is unnecessary to examine whether he was under any extraneous obligation to do so. It is clear that he set himself a task which, in my view, he failed to achieve. What is the effect of that failure? The matter can be looked at in a variety of ways.

Firstly, it appears to me that, although he averred that he had regard to assessment of non-pecuniary loss principles and although he may well have had these in mind, in fact he did not have regard to them in any real sense. In this context, having regard to the relevant principles involves more than bringing them to mind and then ignoring them. It requires the decision-maker to take a position on the matter which he was purporting to take into account. In other words he must decide whether he will apply those principles or not. This cannot happen where, as here, the decision-maker believes that he has followed an analogous course but has not in fact done so.

Secondly, it may be said that Mr Hanna had regard to irrelevant considerations *viz* the delay in producing the material necessary to allow the assessment to be made and the wish to make the applicant's compensation compatible with that received by Mr A. It was suggested that it was open to Mr Hanna to omit to apply a particular principle of damages assessment provided his approach to the question of compensation for the applicant was generally similar. By implication, it was being suggested that some matters which could not affect compensation in the civil claim context may be taken into account such as the factors just mentioned. But this argument must fail when confronted by the finding that Mr Hanna's approach did not approximate to an assessment of non-pecuniary damages. Indeed, the reason that it failed to do so was the fact that he took those considerations into account. By definition, therefore, they were irrelevant and should have been disregarded.

Another way of approaching the matter is to consider the purpose of the exercise performed by Mr Hanna. The purpose of the assessment was to apply principles analogous to those involved in the assessment of damages and was ostensibly designed to achieve that purpose. Indeed, as I have said, Mr Hanna believed that this was what he had done. In fact, however, the power to assess compensation has been exercised for different, collateral purposes *viz* to ensure that the applicant did not obtain compensation which was inflated because of his delay and to make his award consistent with that of Mr A.

However one regards it, the assessment cannot be sustained and the decision to make the award of non-pecuniary compensation must be quashed. I will accede to the application for an order of certiorari quashing that part of the determination which relates to the non-pecuniary loss element of the applicant's claim for compensation. The other determinations relating to pecuniary loss to date and future loss are not affected by this order.

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