

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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

WEATHERUP J

The application

[1] This is an application for judicial review of a decision dated 25 November 2003 made by the Criminal Injuries Compensation Appeals Panel for Northern Ireland dismissing the Applicant's appeal for compensation under the Northern Ireland Criminal Injuries Compensation Scheme.

[2] The Applicant sustained injuries on 4 August 2002. He made a statement to the police on 9 August 2002. He described how he had been drunk and became involved in a confrontation with his brother Ciaran with the result that he required 45 stitches in his head and face after being stabbed with a bottle. On 23 September 2002 the Applicant made a further statement to the police indicating that he wished the police to take no further action. The Applicant's brother had a history of psychiatric problems. The Applicant made an undated application for compensation under the Criminal Injuries Compensation Scheme.

[3] On this application for Judicial Review three particular issues have emerged in relation to the treatment of the applicant's compensation claim. The first concerns the impact of the Applicant's second statement to the police indicating that the police should take no further action. The second concerns the Applicant's conduct at the time of the incident. The third concerns the circumstances in which an appeal against a refusal of criminal injury compensation should be referred for an oral hearing.

The Criminal Injuries Compensation (Northern Ireland) Order 2002.

[4] The Criminal Injuries Compensation (Northern Ireland) Order 2002 provides at Article 3 that the Secretary of State shall make arrangements for the payment of compensation to or in respect of persons who have sustained criminal injuries in Northern Ireland and any such arrangements shall include the making of a scheme to be known as the Northern Ireland Criminal Injuries Compensation Scheme. The 2002 Order further provides that the scheme shall include provision for claims for compensation to be determined and awards and payments of compensation to be made by the Secretary of State (Article 5); that the scheme shall provide 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 Northern Ireland Criminal Injuries Compensation Scheme.

[5] 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; or
- (e)

Paragraph 49 provides for the determination of applications and payment of awards with an application for compensation under the Scheme being determined by the Secretary of State.

Paragraph 58 provides for the review of decisions and 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 the Panel may refer for an oral hearing any appeal against a decision taken on a review to withhold an award.

[6] Further provisions on appeals are as follows –

“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) [not applicable]

(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.

71. Where an appeal is not referred under paragraph 69 or 70 for an oral hearing the adjudicator’s dismissal of the appeal will be final and the decision taken on the review will stand. Written notification of the dismissal of the appeal giving reasons for the decision will be sent to the Appellant and to the Secretary of State”.

The Guide to the Northern Ireland Criminal Injuries Compensation Scheme 2002.

[7] Further, the Secretary of State has published guidance under the 2002 Order with the title “A Guide to the Northern Ireland Criminal Injuries Compensation Scheme (2002)”. In respect of eligibility to receive compensation under paragraph 14(b) of the Scheme, the Guide provides under the heading “Helping the police to prosecute (Paragraph 14(b))” as follows –

“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 2 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”.

[8] With reference to eligibility to receive compensation under paragraph 14(d) of the Scheme, the Guide provides under the heading “Conduct before, during or after the event” (Paragraph 14(d)) as follows –

“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 causing 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”.

The Grounds for Refusal of the Applicant’s Claim.

[9] By notification of decision dated 6 July 2002 the respondent refused the application for compensation. Reference was made to paragraph 14(b) of the Scheme and paragraphs 8.10-8.12 of the Guide and it was concluded that the Applicant had refused to co-operate with the police because he withdrew his statement/complaint. Further, reference was made to paragraph 14(d) of the Scheme and paragraph 8.14 of the guide and the conclusion stated that the Applicant’s conduct before the incident caused or contributed to the incident and that the Applicant had been involved in a fight with the assailant prior to this.

[10] The Applicant applied for a review of the decision and by notification of review decision dated 30 October 2003 the respondent affirmed the initial decision. The reasons stated were essentially the same as the original decision, and in respect of the Applicant’s conduct the review decision added that the Applicant had stated that he fought with the alleged assailant and had made a charge at him and was therefore a voluntary participant in the fight.

[11] The Applicant appealed against the review decision and by a notice of denial of appeal against the review decision dated 25 November 2003 the review decision was affirmed. The appeal had been referred to and considered by an adjudicator under paragraphs 70 and 71 of the Scheme and the adjudicator dismissed the appeal for the following reasons -

- “(a) Claimant failed to co-operate with the police in attempting to bring his assailant to justice. On 23/09/02 he made a statement of withdrawal, paragraph 14(b) of the Scheme refers;
- (b) Claimant’s conduct can be taken into account as part paragraph 14(d) of the Scheme refers. It is clear from page 4 of his claim form that ‘Ciaran and I started to fight’. ‘I ran towards him’. In his statement to the police on 09/08/02 he said that ‘I put my head down to drive at him’. It is clear that he was a voluntary participant in the fight with his brother.

In the circumstances it would be inappropriate to consider any award of compensation in this case and accordingly an oral hearing is denied”.

The Grounds for Judicial Review.

[12] The Applicant's grounds for Judicial Review can be stated as follows -

- (1) The decision not to refer the appeal for an oral hearing under paragraph 70 of the Scheme was ultra vires and in breach of the Applicant's legitimate expectation and unfair.
- (2) The finding that there was no dispute on the material facts or conclusions and that a different decision could not have been made was unreasonable and failed to take into account relevant considerations.
- (3) Failing to apply paragraph 8.12 of the Guide involved failure to take into account relevant considerations and was unreasonable.

The Application of Paragraph 70 of the Scheme.

[13] The first two headings concern Paragraph 70 of the Scheme and will be dealt with together. Under paragraph 70 an adjudicator will refer the appeal for determination at an oral hearing where on the evidence available to him he considers first that there is a dispute as to the material facts or conclusions upon which the review decision was based, and secondly that a different conclusion in accordance with the Scheme could have been made.

[14] The equivalent provision in the English Criminal Injuries Compensation Scheme was considered in *R -v- Compensation Board ex parte Dickson* (1997) 1 WLR 58. The Applicant applied for criminal injuries compensation and was refused on the grounds of his character as shown by his previous criminal convictions. The Criminal Injuries Compensation Board refused the Applicant an oral hearing. At first instance the Board's decision was quashed but the Court of Appeal allowed the appeal and upheld the Board's decision. Paragraph 24(c) of the English Scheme provides for an oral hearing if first of all "there is a dispute as to the material facts or conclusions upon which the initial or reconsidered decision was based" and secondly, if it is considered that if any facts or conclusions which are disputed were resolved in the Applicant's favour "it would have made no difference to the initial or reconsidered decision, or that for any other reason an oral hearing would serve no useful purpose" an oral hearing will be refused.

[15] Judge LJ giving the majority judgment adopted the approach of Lord Gill in the Outer House of the Court of Session in *Re Young* (unreported 9 August 1995). The references in paragraph 24(c) to "material facts" and to "conclusions" are references to the primary facts and to the conclusions of a factual nature which fall to be drawn from such primary facts. In cases where the compensation was refused

by reason of the Applicant's character as shown by his previous convictions, the convictions constituted the material facts on which the decision was based. The Applicant did not dispute those material facts but disputed the decision itself. Accordingly, the requirements of paragraph 24(c) were not made out as the Applicant's argument had failed to distinguish between the conclusions on which the decision was based and the decision itself.

[16] However in the present case the Applicant is not merely disputing the decision itself. He disputes the conclusions drawn from his second police statement and disputes the material facts and conclusions relating to his conduct during the incident. Accordingly, there is a dispute as to material facts and conclusions upon which the review decision was based and the first part of paragraph 70(b) is satisfied.

[17] The second limb of paragraph 70(b) requires that a different decision in accordance with the Scheme could have been made. The Applicant draws attention to the stricter test applied by paragraph 24(c) of the English Scheme, namely that the resolution of disputed facts and conclusions in favour of the Applicant would make no difference to the decision. I would interpret paragraph 70(b) as indicating that an oral hearing will be provided when the adjudicator considers on the evidence available to him that there is a reasonable possibility of a different decision in accordance with the Scheme. Paragraph 70(b) does not require the adjudicator to assume that the dispute on material facts and conclusions has been resolved in favour of the Applicant. Under paragraph 70(b) the adjudicator must make an assessment of the disputed facts and conclusions as an aspect of the decision as to the reasonable possibility of a different determination.

[18] There are two aspects of the process to be noted. The first is that an oral hearing will be arranged when "he (the adjudicator) considers" the conditions are satisfied, so under the Scheme the decision to refer to an oral hearing is stated to be a matter for the judgment of the adjudicator. Of course the adjudicator must make that judgment on proper grounds and in a proper manner. Secondly, that judgment is made "where on the evidence available to him" he considers the conditions are satisfied.

[19] The material facts and conclusions on the first part of the review decision were that the Applicant refused to co-operate with police because on 23 September 2002 he made a statement of withdrawal to the police. The Applicant contends that his obligation to co-operate with the police corresponds with the police obligation to bring the alleged offender to justice. In that regard there is no evidence of any action taken by the police against the defendant and no further inquiry was made with a witness named by the Applicant or with the Applicant or by reference to his medical records, which he had consented to disclose. Further, he contends that his second statement did not involve retraction of his evidence nor did it mean that he would not go to Court if necessary.

[20] I do not accept that the Applicant's obligation to co-operate with the police is affected by the character of the investigation undertaken by the police. The obligation is that of the Applicant and the response of the police to the incident is a separate matter. Nor do I accept that the Applicant's second statement signified other than an intention at that time to withdraw the previous co-operation with the police, and the adjudicator was entitled to regard the statement as such.

[21] However, the Applicant's notice of appeal did state that the Applicant had, through his solicitor, contacted the police and asked them to prosecute his brother. This had occurred by letter dated 22 October 2003. The appeal decision does not refer to this matter but merely refers to the Applicant's second police statement. By affidavit the adjudicator states that he took into account the Applicant's subsequent contact with the police through his solicitor but he did not consider that that factor could outweigh or significantly detract from the non co-operation unequivocally signalled by the Applicant's statement of withdrawal.

[22] The Applicant objects to the respondent's reasons for the decision being supplemented by affidavit. In *R -v- Secretary of State for Home Department ex parte Martin Lillicrop* (1996) EWHC Admin 281, Butterfield J dealt with a submission that it was inappropriate to seek to supplement ill-focused decision letters by affidavit evidence because of the risk of ex post facto rationalisation. At paragraph 35 it is stated -

“Accordingly we conclude that where evidence is proffered to elucidate correct or add to the reasons contained in the decision letter a Court should examine the proffered evidence with care, and should only act upon it with caution. In particular, a Court should not substitute the reasons contained in proffered evidence for the reasons advanced in a decision letter. To do so would unquestionably raise the perception, if not the reality, of subsequent rationalisation of a decision that had not been properly considered at the time”.

[23] The reasons for the adjudicator's decision of 25 November 2003 concerned the basis for the dismissal of the appeal rather than the reasons for not referring the appeal to an oral hearing. However, the decision letter does state that the appeal has been considered by an adjudicator in accordance with paragraph 70 of the Scheme, and that necessarily involves the adjudicator having decided not to refer the appeal for determination at an oral hearing. In any event the adjudicator concluded his reasons for dismissing the appeal by relying on those reasons as grounds for denying an oral hearing. In his affidavit the adjudicator avers that he took into account the solicitor's request for a prosecution and it is implicit that he did so in considering a reference for an oral hearing. To this extent the affidavit adds to the reasons contained in the decision both in relation to the oral hearing and in relation to the appeal. As cautioned by Butterfield J the Court examines that evidence with care and will only act upon it with caution. It is not considered to be a case where there is a

substitution of the reasons contained in the proffered evidence for the reasons advanced in the decision letter. The reference to the solicitor's request is an additional matter appearing in the decision letter and does not contradict the matter appearing in decision letter. The reference to the solicitor's request is an additional matter appearing in the affidavit and does not contradict the matters appearing in the decision letter. I accept that the adjudicator took into account the request made by the Applicant's solicitor. It is virtually inevitable that he would do so as it is referred to in the Applicant's notice of appeal on this point, which contains only two sentences.

[24] The material facts and conclusions in the second ground of the review decision concern the Applicant's conduct before the incident and his voluntary participation. Again the appeal decision of 25 November 2003 is concerned with the reasons for dismissal of the appeal where the adjudicator agreed with the review findings, but those reasons are also the basis of the decision not to require an oral hearing. The decision on the oral hearing is referred to in the adjudicator's affidavit where he did not consider that a different decision could have been made. I am satisfied that there was a significant dispute on the conclusion to be drawn as to the Applicant's conduct because he contested that he was a voluntary participant in the confrontation with his brother. Again it is implicit that as the adjudicator considered the matter under paragraph 70 of the Scheme, and as he stated the conclusion that there should not be an oral hearing. I am satisfied that he had concluded on this issue that a different decision could not have been made. This is a conclusion that the adjudicator was entitled to reach.

[25] Paragraph 71 of the Scheme provides for written notification of the dismissal of the appeal with reasons for the decision being sent to the Applicant and the Secretary of State. The Applicant contends that the "reasons" should extend to the reasons for refusing an oral hearing. However, I am satisfied that paragraph 71 is dealing with the dismissal of the appeal and that the reference to reasons is a reference to the reasons for the dismissal of the appeal. It will be apparent from the dismissal of the appeal that the adjudicator was satisfied that there were no grounds for an oral hearing.

[26] Accordingly, on the first ground in relation to paragraph 70 the adjudicator's decision was not ultra vires or in breach of legitimate expectation or unfair. Further, on the second ground I am satisfied that the decision not to refer for an oral hearing was not unreasonable and did not fail to take into account any relevant circumstances.

The Application of Paragraph 8.12 of the Guide.

[27] The third ground relates to paragraph 8.12 of the Guide where there is at first a refusal to co-operate with the police and then a change of mind and assistance provided to the police. In those circumstances paragraph 8.12 provides that the respondent may consider whether a reduction in the award is appropriate. The

decision dismissing the appeal on 25 November 2003 states that in the circumstances “it would be inappropriate to consider any award of compensation in this case”. It is apparent that the adjudicator considered a reduced award and rejected the same. The adjudicator’s affidavit confirms that he considered the reduction of an award and did not consider it to be appropriate.

[28] The Applicant contends that the adjudicator failed to take into account the Applicant’s changed attitude to co-operation with the police. There is no basis for this contention and it is rejected by the adjudicator on affidavit and this ground is unsustainable. Further, the Applicant contends that by failing to award reduced compensation under paragraph 8.12 the adjudicator acted unreasonably. The rejection of a reduced award was a decision that the adjudicator was entitled to make in the circumstances.

[29] The Applicant has not established any of his grounds for judicial review. The application for judicial review is dismissed.