Criminal Injury Compensation Scheme – applicant's record – whether conviction spent –Rehabilitation of Orders (NI) Order 1978 – effect of Art 7(4) – erroneous concession by chairman of panel – whether decision flawed

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2005 No. 45044

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY MICHAEL SNODDY FOR JUDICIAL REVIEW

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GIRVAN J

Background to the Application

[1] The applicant sustained an injury to his back and a severed tendon in his hand when struck by a sharp edged slate thrown at him by an unidentified male in a group of disorderly young people in the Graymount Road area of North Belfast. He lodged a claim for compensation under the Criminal Injuries Scheme on 9 August 2003. On 12 May 2004 the Compensation Agency refused compensation on the basis of delay on the part of the applicant in informing the police about the incidence. The applicant was also told that he had accrued 5 penalty points on foot of his criminal record and that any compensation would have been reduced by 25%.

[2] The applicant sought a review of the decision on 20 June 2004. After considerable delay he received a letter from the Compensation Agency on 3 March 2005 indicating that his application was refused on the ground of delay. This letter stated that he had accrued 9 penalty points and it further pointed out that if any award had been made a reduction of 75% would have applied having regard to the convictions which gave rise to 9 penalty points.

[3] On 24 May 2005 the applicant appealed against that decision to the Criminal Injuries Compensation Appeal Panel ("the Panel"). The Panel informed the applicant of its decision on 7 September 2005. The Panel decided that he was entitled to an award of compensation and assessed the award at £2,000 for the scarring to his hand and £600 for the damage to the extensor tendon. The Panel decided to reduce the award by 75% because of the penalty points attributed to his criminal record. This resulted in a net award of £650.

[4] The applicant in his judicial review challenge to the Panel's decision contends that the decision is flawed on the ground that the Panel incorrectly held against him past convictions which fell to be treated as spent convictions under the Rehabilitation of Offenders (Northern Ireland) Order 1978 ("the 1978 Order") and that the Panel incorrectly took into account convictions which post dated his application for compensation.

The Scheme

[5] Under the Criminal Injuries Compensation (Northern Ireland) Order 2002 which replaced the earlier compensation scheme a completely new legislative scheme was introduced by the Secretary of State who was empowered to introduce a Scheme by way of delegated legislation. The Scheme was duly made, laid before Parliament, approved and brought into force. Paragraph 14 of the Scheme provides:

> "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; or
>
> (e) the applicant's character as shown by his criminal convictions (excluding convictions spent under the Rehabilitation of Offenders (Northern Ireland) Order 1978 at the date of application) or by evidence available to the Secretary of State makes it inappropriate that a full award or any award at all be made."

The Guide

[6] At the same time as the Scheme came into effect there was published a Guide to the Scheme. Paragraphs 8.15 to 8.16 of the Guide provides:

> "Paragraph 14(e) of the Scheme provides that an award may be withheld or reduced on account of a victim's character as shown by his/her criminal convictions (excluding convictions which are spent under the terms of the Rehabilitation of Offenders (Northern Ireland) Order 1978). This is because a person who has committed criminal offences has probably caused distress and loss and injury to other persons and has certainly caused considerable expense to society by reason of court appearances and the cost of supervising sentences, even when they have been non-custodial, and victims may themselves have sought compensation, which is another charge on society. Even though a victim may be blameless in the incident in which the injury was sustained, Parliament has provided in the Scheme that convictions which are not spent under the 1978 Order should be taken into account.
>
> 8.16 The following 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 the court together with the time between the date of the sentence and receipt of the claim, are a guide to the gravity of a criminal record in relation to a claim. Any sentence imposed after the claim has been received will also be taken into account."

There then follows a table setting out penalty points that apply in relation to particular sentences. Thus, for example, in the case of imprisonment for more than 30 months if the period between date of sentence and receipt of application is the period of sentence or less there will be 10 penalty points. In the case of an absolute discharge less than six months before the application 1 penalty point will arise. Sentences imposed after the receipt of the application are to be treated as if they had occurred on the day before the application was received. The percentage of reductions attracted by various levels of penalty are set out in a table. Thus, if there were 10 penalty points or more the applicant would forfeit the entire award. If the penalty points amounted to 3 to 5 the award falls to be reduced by 25% and so forth.

[7] The Guide expressly states that the Panel retains discretion and is not bound to follow the terms of the penalty points tariff. Thus, in para. 8.17 it is pointed out that the scale is intended to be a readily understood guide to the significance of the claimant's criminal record. A points total which indicates a

reduction or a refusal of an award may be mitigated where the injury resulted from the applicant's assistance to the police in upholding the law or from genuinely helping someone under attack or there may be evidence of rehabilitation not otherwise indicated by the points system which may be taken into account. Conversely a low point score is no guarantee that an award would be made where, for example, the record contains offences of violence or sexual offences. It is clear that the Panel must approach its task with care to ensure a proportionate, fair and balanced result. Accordingly, it must consider all the circumstances of the individual case including the nature and extent of the applicant's past wrong doing and the relevance of the wrong doing to his character and to the injury sustained. A relevant decision based simply on a computation of penalty points without regard to the particular circumstance and facts of the case would result in an outcome in which the decision maker failed to have proper regard to all the circumstances of the claim and related factors and would have failed to properly appreciate the nature and extent of his discretion.

[8] Under article 5 of the 1978 Order, subject to articles 8 and 9, a person who has become a rehabilitated person for the purposes of the Order is to 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 in respect of the offence which was the subject of the previous conviction. No evidence shall be admissible in any proceedings before a judicial authority exercising functions in Northern Ireland to prove that such a person had committed or been charged with or prosecuted for or convicted of or sentenced in respect if any offence the subject of the spent conviction. This includes, by virtue of article 5(6), proceedings before any tribunal, body or person having power by virtue of any statutory provisions.

[9] Both parties accepted that in reaching its decision the Panel should not take into account spent convictions either in ascertaining the nature of the applicant's character generally or by the award of penalty points.

The applicant's record

[10] In reaching its decision the Panel referred to a table setting out the criminal record of the applicant. The table was as follows:

Date	Court	Conviction	Sentence Length (months)	Penalty Points
08/11/2004	Magistrates	Fine		2
08/11/2004	Magistrates	Fine		2
10/02/2000	Crown	Community Service Order		1
24/06/1999	Crown	Probation or Supervision Order	12	1

03/03/1999	Magistrates	Conditional Discharge	12	1
25/01/1999	Magistrates	Fine		1
20/07/1998	Magistrates	Bind Over	12	1

The Panel awarded nine penalty points as shown in the tabular form.

[11] The applicant argued that the decision was wrong in law for the reasons that:

(i) the Panel had taken into consideration convictions that were spent at the time of the application and;
(ii) the Panel had taken into account the convictions on 8 November 2004 which post dated the application which was lodged on 9 August 2003.

Counsel argued that the binding over on 20 July 1998 became a spent conviction after one year under article 6(4) of the 1978 Order. The conditional discharge for 12 months by virtue of article 6(2) is spent one year after the date of conviction and should not have been taken into account. The probation order imposed on 24 June 1999 was spent one year after the conviction and should have been left out of account. The community service order it was argued fell within para. 6(1) of Appendix 1 to the 1978 Order and was spent at the time when the penalty ceased to have effect and it should have been disregarded. It was argued that the convictions in November 2004 related to offences committed on 18 December 2003 and both offences and convictions occurred after the criminal injury and the lodging of the claim. It was argued that these convictions should have been disregarded.

The Panel's Concession

[12] The Chairman of the Panel in a replying affidavit purported to concede that the decision letter of 7 September 2005 was grounded on a fundamental error. At para. 27 he stated that the Agency had attributed penalty points to the applicant in respect of spent convictions. He stated that the Panel was aware that the penalty point system was only a guide and that the Panel had a discretion not to apply a reduction. He stated:

> "Nevertheless in the circumstances of the case we decided not to exercise our discretion in the applicant's favour."

[13] In para. 26 the Chairman continued:

> "We, therefore applied the same points and reduction which were applied by the Agency in their review decision. We did not calculate the

> penalty points in relation to each conviction nor did we consider whether or not each conviction was spent at the time of the application. To do so would be a very time consuming process and would mean that a panel would not be able to get through the considerable number of cases they must determine in any given day. As usual, we took the Agency's calculations of these matters at face value."

The fact that an exercise is time consuming cannot relieve a decision maker of the duty to properly carry out the exercise if that is called for in the circumstances.

[14] In para. 27 of the affidavit he stated that it now appeared that the Agency had contributed penalty points in respect of convictions which were spent. He accepted that the binding over on 20 July 1998 was spent, that the conditional discharge on 3 March 1999 was spent and that the probation order for 12 months for disorderly behaviour on 24 June 1999 was spent. It was contended that the community service was not spent since the relevant period was five years. The Chairman considered that the fine imposed on 25 January 1999 was not spent at the time of the application. He referred to two convictions which were erroneously left out of account altogether. These related to driving offences on 22 April 1999. Two fines of £25 each were imposed and each attracted one penalty point since they were not spent in the Chairman's view. The Chairman considered that correctly calculated the applicant ought to have been awarded eight penalty points. He considered that the Agency erred to the applicant's detriment in awarding him three penalty points which might not have been awarded but it had erred in not awarding him penalty points for two offences for which he was convicted on 22 April 1991. The correct total of eight points would have still resulted in a 75% reduction.

[15] Mr McGleenan argued that the Chairman's affidavit was objectionable as an ex post facto attempt to regularise an invalid decision which was flawed. He pointed out that in relation to the two additional offences which the Chairman said should be taken into account and given full penalty points the Panel had a discretion as to whether any penalty points should be applied or whether in the exercise of its discretion they might consider it appropriate to disregard them. By seeking to stand over its ultimate decision the Panel, through the Chairman, was seeking to make good errors in penalising the applicant and by failing to recognise that it should dispassionately consider the exercise of its discretion.

[16] Appendix 1 of the 1978 Order sets out the rehabilitation periods applicable to a sentence. Table A sets out the relevant provisions for adult offenders providing for a reduction of one half of the relevant periods for

persons under the age of 17 (now 18). In the case of a fine or other sentence subject to rehabilitation under the Order not being a sentence to which Table B applies the relevant period is five years. Under para. 6(8) it is provided that:

> "(8) Where in respect of a conviction an order was made imposing on the person convicted any disqualification, disability, prohibition or other penalty the rehabilitation period applicable shall be a period beginning with the date of conviction and ending on the date on which the disqualification, disability, prohibition or penalty (as the case may be) ceases or cease to have effect."

The provisions of Art 7 of the 1978 Order

[17] Article 7(4) of the 1978 Order is of relevance. It was left out of account by the Chairman in making the concession which he made in his affidavit. This provision provides:

> "(4) Subject to para. (5), where during the rehabilitation period applicable to a conviction –
>
> (a) the person convicted is convicted of a further offence; and
> (b) no sentence excluded from rehabilitation under this order is imposed on him in respect of the later conviction;
>
> if the rehabilitation period applicable in accordance with this Article to either of the convictions would end earlier than the period so applicable in relation to the other, the rehabilitation period which would (apart from this paragraph) end the earlier shall be extended so as to end at the same time as the other rehabilitation period."

This provision is succinctly explained in Blackstone's Criminal Practice (2006) thus:

> "The scheme of the legislation is that where an offender is sentenced to 30 months imprisonment or less for an offence, his conviction becomes spent on the expiry of the relevant period. That period runs from the date of the conviction and varies in length depending on the sentence imposed … Commission

> of a further offence during the rehabilitation period for an earlier one usually means that neither conviction becomes spent until the rehabilitation date for the later one. Thus, recidivist offenders rarely enjoy the advantages of their convictions becoming spent."

[18] Article 7(4) is subject to Article 7(6). It provides:

> "Subject to paragraph (7), for the purposes of paragraph (4)(a) there shall be discarded –
>
> (a) any conviction in Northern Ireland of an offence which is not triable on indictment;
>
> (b) any conviction by or before a court outside of an offence in respect of conduct which, if it had taken place in Northern Ireland, would not have constituted an offence under the law in force in Northern Ireland."

Sub-section (7) is not relevant.

Mr McAllister on behalf of the respondent accepted that the rehabilitation periods fixed for summary offences are only extended when the subsequent conviction is in respect of an offence which is capable of being tried on indictment. On this basis he accepted that the chairman's concession that the binding over in July 1998 was spent was incorrect since the relevant rehabilitation period applicable to it was extended by the conviction for possession of class B drugs which is an offence which is capable of being tried on indictment.

The Community Service Order

[19] In relation to the question of the community service order the question is whether it is a sentence under Table A having a five year rehabilitation period or whether it was a penalty under para. 6(8), the rehabilitation period ending on the completion of community service. Counsel for the respondent argued that the word "penalty" was to be read as ejusdem generis with the preceding words disqualification, disability and prohibition though he referred to no authority to support the proposition. Authority for the proposition is to be found in Power v Provincial Insurance [1998] RTR 60. Pill LJ stated in the context of the equivalent English legislation:

> "The words 'other penalty' should in my view be read ejusdem generis with the words that proceed

> them. The likely explanation of their insertion in my view was out of abundance of caution."

It is clear that the imposition of a community service order is a sentence and it is to be regarded as one of some of seriousness only to be imposed if the court considers the offence is serious enough to warrant it. (see article 8 of the Criminal Justice (Northern Ireland) Order 1996). It is clearly intended to be more serious than a probation order on its own. A probation order has a relevant rehabilitation period of one year. Where there is a conflict between determining whether a sentence falls within Table A or is merely a penalty falling within para. 6(a) one is entitled to have regard to the underlying policy of the legislation. It seems entirely unlikely that it was intended that a later court should be expected to disregard a community service order as spent immediately after it is completed. The English legislation spells out clearly that community orders of this nature fall to be treated as sentences attracting the five year rehabilitation period.

The Post-Application Convictions

[20] 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 the application but refers generally to evidence available to the Secretary of State making it inappropriate that an 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.

Conclusion

[21] In the circumstances the actual decision of this Panel on the question whether the convictions were spent or not was favourable to the applicant in that the Panel failed to take account of the additional convictions in April 1999. However, the Panel had admittedly erred in its original approach to the matter and misdirected itself. While it may be that another panel would arrive at the same conclusion approaching the matter correctly on the assessment of penalty points it is not inevitably so since another panel might properly consider that simply applying the totality of penalty points would produce a disproportionately unfair outcome taking account of the minor nature of some of the offences. The Chairman in his affidavit does not spell out the factors actually taken into account in the exercise of the Panel's discretion. In the circumstances the proper order is to quash the decision and remit the matter to a freshly constituted panel for consideration in the light of this judgment.