

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

Delivered: **30/05/2006**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY T FOR JUDICIAL REVIEW

WEATHERUP J

[1] This is an application for judicial review of a decision of the Criminal Injuries Compensation Appeals Panel for Northern Ireland dated 18 April 2005 by which the Panel dismissed the applicant's appeal against a refusal of compensation to the applicant for sexual abuse inflicted before 1988 by a person living in the same household as the applicant. Mr Lavery QC and Mr Torrens appeared for the applicant and Mr Maguire appeared for the respondent.

[2] The applicant was born in 1974 and was placed with a foster family in 1977. Between 1983 and 1988 the applicant was subjected to sexual abuse by a son of her foster parents. It transpired that the offender had also subjected his sister to sexual abuse. Some years later the offences against the applicant and her foster sister were reported and in 2002 the offender was convicted of offences against his sister and acquitted of offences against the applicant. In 2002 the applicant applied for criminal injury compensation and was refused on the basis that the compensation scheme excluded compensation for criminal injury sustained by an applicant who was living as a member of the same household as the offender at the time of the offence. The decision was subject to review and then to appeal to the Panel, which dismissed the appeal on 18 April 2005.

The Legislation.

[3] When the offences were committed against the applicant the scheme for criminal injuries compensation was contained in the Criminal Injuries Compensation (Northern Ireland) Order 1977. The 1977 Order excluded the payment of compensation "if the victim was, at the time when the criminal

injury was sustained, living with the offender as his wife or her husband or as a member of same household as the offender" (Article 3(2)(b)).

[4] The "same household" exclusion was amended by the Criminal Injuries Compensation (Northern Ireland) Order 1988 when the "same household" provision applied unless the Secretary of State was satisfied, first, that the offender had been prosecuted or there was sufficient reason why he had not been prosecuted; second that the offender and the victim had ceased to live in the same household and were unlikely to live in the same household again, or there were exceptional circumstances which prevented them from ceasing to live in the same household; and finally that no one responsible for causing the injury would benefit from any compensation paid.

[5] In August 1998 the Government announced a review of the Northern Ireland Criminal Injuries Compensation Scheme and Sir Kenneth Bloomfield published his report in 1999. The Bloomfield report recommended changes to the time limits for making compensation claims. The existing legislation contained a three year time limit for the making of claims, which in the case of minors ran from their eighteenth birthday. The Bloomfield report considered that the time limit should be reduced to two years and further that the fixed time limit caused injustice and that a discretion should be introduced to extend the time limit.

[6] There followed the Criminal Injuries Compensation (Northern Ireland) Order 2002 which provided for the introduction of the Northern Ireland Criminal Injuries Compensation Scheme which came into effect on 1 May 2002. Paragraph 7 of the Scheme provided -

"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 provisions) are satisfied."

Paragraph 84 provided:

"Notwithstanding the provisions of paragraph 7, compensation may be paid in accordance with this scheme in respect of a criminal injury sustained by a person before the coming into the operation of this scheme where -

- (a) that person sustained the injury as the victim of a sexual offence when that person was under the age of 18;

- (b) a claim is made in respect of the injury under the scheme;
- (c) when the claim is made, the time limits (under the 1977 Order) have expired;
- (d)
- (e)
- (f) had that person made a claim for compensation in respect of the injury under the Criminal Injuries (Compensation) NI Order 1988, the Criminal Injuries (Compensation) NI Order 1977 or the Criminal Injuries to Persons (Compensation) Act NI 1968 before the time limit for making such a claim had expired, compensation would have been payable under that Order or (as the case may be) that Act."

It will be noted that the changes to the time limits for making claims for compensation did not affect the operation of the "same household" provisions that applied to exclude all such claims under the 1977 Order or the qualified exclusion under the 1988 Order.

The Grounds for Judicial Review.

[7] The applicant's grounds for judicial review are –

(i) The Secretary of State and the Appeals Panel have acted in breach of the applicant's Articles 3 and 8 European Convention Rights taken together with Article 14 introducing and operating the Scheme that differentiates between applicants for compensation who were victims of criminal conduct prior to 1988 and lived in the same household as the offender and applicant's for compensation who were the victims for criminal conduct after 1988 and lived in the same household as the offender.

(ii) The Secretary of State and Appeals Panel have acted in a disproportionate manner in introducing and operating paragraph 84(f) of the Scheme.

(iii) The Appeals Panel when implementing Article 84(f) of this Scheme failed to take into consideration the applicant's Convention rights.

(iv) The Secretary of State when introducing paragraph 84(f) of the Scheme failed to take into consideration the applicant's Convention rights.

(v) The Secretary of State and the Appeals Panel have acted in breach of the applicant's Article 3 right to protection against inhuman and degrading treatment and her Article 8 right to respect private and family life.

(vi) The Secretary of State and the Appeals Panel have failed to provide the applicant with any or adequate reasons why the Scheme differentiates between applicants for compensation who were the victims of criminal conduct prior to 1988 and lived in the same household as the offender and applicants for compensation who were the victims of criminal conduct after 1988 and lived in the same household as the offender.

(vii) In any event the introduction of paragraph 84(f) of the Scheme by the Secretary of State and the operation of its provision by the Appeals Panel is unreasonable and irrational.

(viii) Articles 3 and 8 where they are taken by themselves or in conjunction with Article 14 require paragraph 84(f) of the Scheme to be interpreted so that the applicant is not excluded from criminal injuries compensation under the Scheme.

(ix) The Secretary of State failed to take account of the effect of the relevance of the 1977 Order in paragraph 84(f) of the Scheme namely that it could unintentionally operate to exclude the applicant from compensation.

[8] These grounds will be considered under four broad heads. First, issues relating to the European Convention, secondly, the intention of the Secretary of State in introducing paragraph 84 of the 2002 Scheme, thirdly, reasons for the continuation of the pre and post 1988 versions of the same household provision, and fourthly, the rationality of paragraph 84.

Articles 3, 8 and 14 of the European Convention.

[9] In Susan Stuart v United Kingdom (6 July 1999) the European Court of Human Rights declared inadmissible a challenge to a "same household" provision operating under the criminal injury compensation scheme in Scotland. In Clarke's Application (unreported 17 December 2004) I refused leave to apply for judicial review of a decision under the Northern Ireland Criminal Injuries Compensation Scheme to apply the "same household" provision in respect of sexual abuse of an applicant prior to 1988. Mr Lavery

QC for the applicant contends that Clarke's Application was wrongly decided and that Stuart v United Kingdom should not be followed.

[10] Article 3 provides that -

“No one shall be subjected to torture or inhuman or degrading treatment or punishment”.

Article 8 provides that -

“(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Article 14 provides that -

“The enjoyment of the rights and freedoms set in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

[11] In Stuart v United Kingdom the applicant relied on Articles 3 and 8 of the Convention to contend that the State is under a positive obligation to provide practical and effective protection against sexual abuse in the family and that the obligation extended to the provision of compensation when it could not be obtained from the offender. She also complained under Article 14 in conjunction with Articles 3 and 8 that the distinction between victims who were living in the same household as offenders and other victims was discriminatory. The Court considered the Article 3 right not to be subjected to torture or to inhuman or degrading treatment or punishment and the Article 8 right to respect for private and family life and stated that children and other vulnerable individuals are entitled to State protection in the form of effective deterrence from such ill-treatment as sexual abuse. The Court found that deterrent sanctions were in existence. Reference was made to the criminal law, the sanctions applied for sexual offences and the conviction and

imprisonment of the offender. Reference was made to the civil remedies available if proceedings were brought within the statutory time limits. The Court followed its decision in Stubbings v United Kingdom (22 October 1996) that the protection afforded by the domestic law against the sexual abuse of children satisfied the requirements of Article 8 and that the Article did not necessarily require that the State should additionally provide unlimited civil remedies in circumstances where criminal law sanctions were in operation. The Court concluded that for similar reasons it found that the State's positive obligations under Articles 3 and 8 could not be interpreted as requiring a State to provide compensation to the victims of ill-treatment administered by private individuals. In relation to the discrimination claim the Court found that as the denial of compensation did not fall within the scope of Article 3 or Article 8, Article 14 was not applicable.

[12] The applicant contends that measures for effective deterrence required from the State should extend to the provision of compensation in respect of sexual abuse, the absence of which amounts to a breach of the right to respect for family and private life. Petrovic v Austria [2001] 33 EHRR 14 considered the provision of parental leave allowances in Austria that were only available to mothers. On an application by a father who contended that the allowances scheme amounted to a breach of Article 14 taken with Article 8 of the Convention by reason of discrimination on the ground of sex, it was held by the Court that there was no violation. The Court stated (from paragraph 26) -

"In this connection the Court, like the Commission, considers that the refusal to grant Mr Petrovic parental leave allowance cannot amount to failure to respect family life, since Article 8 does not impose any positive application on States to provide the financial assistance in question.

Nonetheless, this allowance paid by the State is intended to promote family life and necessarily affects the way in which the latter is organised as, in conjunction with parental leave, it enables one of the parents to stay at home to look after the children.

The Court has said on many occasions that Article 14 comes into play whenever 'the subject matter of the disadvantage constitutes one of the modalities of the exercise of a right guaranteed,' or the measures complained of are 'linked to the exercise of a right guaranteed'.

By granting parental leave allowances States are able to demonstrate their respect for family life within the meaning of Article 8 of the Convention; the allowance therefore comes within the scope of that provision. It

follows that Article 14 – taken together with Article 8
- is applicable.”

[14] In Petrovic the Court found that while there was no positive obligation to provide parental leave allowance to fathers for the purposes of Article 8, nevertheless the provision of parental leave was one of the modalities of the exercise of the right to respect for family life and linked to the exercise of the right. Thus Article 8 was engaged and Article 14 was applicable. Further the Court found that for the purposes of Article 14 the differential treatment of fathers was justified.

[15] To apply that approach to the present case the question to be determined is whether the subject matter of the disadvantage in this case, namely State compensation for family abuse, constitutes one of the modalities of the exercise of the right guaranteed, namely respect for private and family life. Alternatively are arrangements for State compensation for victims of family sexual abuse linked to the exercise of the right to respect for private and family life? I am satisfied that the question must be answered in the negative. The proposed compensation scheme cannot be regarded as one of the modalities of, or linked to the exercise of, the right to respect for private or family life. I agree with the approach of the ECtHR in Stuart v United Kingdom and remain of the opinion expressed in Clarkes Application. I find that Articles 3 and 8 are not engaged and therefore Article 14 cannot be relied on.

[16] However if Article 14 were to be considered one approach has been to apply the questions formulated by Brooke LJ in Wandsworth London Borough Council v Michalak (2003) 1 WLR 617. The application of what has been called the “Michalak catechism” has been questioned and in R v The Secretary of State for Work and Pensions ex parte Carson and Reynolds (2005) UKHL 37 the House of Lords addressed the discrimination issue other than by adopting Michalak. Lord Walker stated that “the Michalak catechism, even in a corrected form, is not always the best approach” (paragraph 64). In the present case there is differential treatment of the victims of sexual abuse between those where the offender has been living in the same household before 1988 and those arising after 1988. This is illustrated by comparison with the applicant's foster sister who recovered criminal injury compensation for sexual abuse by the offender committed after 1988.

[17] Article 14 refers to discrimination on specified grounds that include “other status”. Whether Article 14 only applies if the discrimination was on the basis of a “personal characteristic” remains undecided (see Lord Hoffman in Carson above at paragraph 13). Assuming that Article 14 applies to the present case, the issue in the end is whether there is objective and reasonable justification for the differential treatment. The basis of the different treatment

under the present scheme is the longstanding Parliamentary choice made throughout the history of the same household provision. The reason for past Parliamentary choices concerns the difficulties perceived in relation to such claims that led to total exclusion of the same household cases in the 1968 Act and the 1977 Order as applied up to 1988. From 1988 the difficulties led to qualified exclusion in same household cases, again by Parliamentary choice. The Bloomfield report in 1999 proposed alterations to the law in relation to time limits and such changes had particular impact on cases involving sexual abuse of children, where claims had often not been made because disclosure of the childhood abuse did not emerge until adulthood and after the expiry of time limits. The Bloomfield report did not recommend any change in the law in relation to same household cases either in relation to the total exclusion prior to 1988 or qualified exclusion after 1988. The 2002 Scheme maintained the previous legal position involving the total exclusion of same household cases where the abuse had occurred before 1988, again by Parliamentary choice. Of course Parliamentary choice would not be sufficient to protect secondary legislation such as this, if it were otherwise liable to be set aside on judicial review grounds.

The Intention behind the introduction of paragraph 84 of the Scheme.

[18] However the applicant challenges the validity of reliance on Parliamentary choice on the basis that the continued exclusion of the applicant from compensation was not an intended effect of the 2002 Scheme. The applicant also relies on the unintended exclusion of the applicant as the failure by the Secretary of State to take into account a relevant consideration in presenting the Scheme for Parliamentary approval.

[19] After the Bloomfield report of 3 July 1999 the Government published its response in July 2000 and accepted the majority of the recommendations. On 22 November 2000 the Compensation Policy Unit of the Criminal Justice Services Division of the Northern Ireland Office sent instructions to Parliamentary Counsel for the drafting of a new Criminal Injuries Compensation Order and Scheme. The Government had accepted the Bloomfield recommendation that the statutory time limit for making a criminal injury claim should be reduced from three years to two years and that a discretion should be introduced to permit claims outside the statutory time limit. The instructions to Parliamentary Counsel included the incorporation of a two year statutory time limit and a discretion to extend that statutory time limit. A section of the instructions to Parliamentary Counsel dealing with the retrospective arrangements for child sex abuse cases stated at paragraph 19 that Ministers had agreed that the new legislation should allow a twelve month period to those who had been subject to sexual abuse while under the age of 18 and would either have not submitted a claim for compensation or had been refused compensation by the application of statutory time limits. Provision was to be made for payment of compensation

in such cases, however paragraph 20 made clear that this provision should exclude all claims from compensation if they had been refused for any reason under the 1988 Order other than time limits, and also should disallow new claims which would have fallen foul of the 1988 Order exclusions other than time limits. Of particular relevance to the present case are the concluding words -

"In particular claims should not be successful if they would have failed as a result of the 'same household' provisions in the 1988 Order, or the equivalent but more stringent provisions in the 1977 Order."

[20] It is apparent that several drafts of the new Order and Scheme were exchanged between the Parliamentary Draftsman's Office and the Compensation Policy Unit and by letter dated 1 May 2001 the Parliamentary Draftsman's Office explained its latest draft of the Order and Scheme. At paragraphs 32 and 33 of the letter reference was made to claims for pre 1 April 2002 child sex abuse. The Parliamentary draftsman explained that the draft had been completed so as to fall within the test of the Compensation Policy Unit that claims "would have been successful under the legislation then in place except for the fact that they missed the statutory deadlines." The comment is made that "the provisions in Article 5(2) (same household) ... of that (1988) Order are also applied, and a person who falls foul of them is denied compensation under the new Scheme". It is apparent from the above that the Compensation Policy Unit and the Parliamentary Draftsman's Office both understood and intended that the victims of child sex abuse to whom the same household provision had applied under the previous legislation would continue to be excluded under the new compensation scheme.

[21] The draft Scheme was considered in the House of Commons by the First Standing Committee on Delegated Legislation on 22 April 2002. During the debate the Parliamentary Under Secretary of State for Northern Ireland referred to the retrospective provision for child sex abuse cases and to the amendment of the provisions in relation to time limits. He stated in relation to the provision that "it will not permit applications that have already been refused compensation by any other reason - for example, because of the provisions of the 1977 or the 1988 Order, which placed certain restrictions on awards made to a victim living in the same household as the perpetrator. It is clear that the Parliamentary Under Secretary of State for Northern Ireland understood and intended that the Scheme should operate in a manner that would exclude compensation to those who had been excluded under the previous legislation by the same household provision and that he so informed the members of the First Standing Committee on Delegated Legislation.

[22] The House of Commons Northern Ireland Affairs Committee announced an inquiry into the Compensation Agency in July 2003 and took oral evidence in January 2004. In the Fourth Report of Session 2003-04 the Committee discussed child sexual abuse cases and referred to the changes made to the statutory time limits under the 2002 Order. The Committee noted that no changes had been made to any other provisions of the earlier legislation and that the same household provisions continued to apply and this was said to have resulted in a "serious flaw" in the legislation. The Committee concluded that this had resulted in some child sexual abuse victims being "unintentionally" debarred from claiming compensation and the Committee urged the Minister to take steps as a matter of urgency to remove the barrier. The evidence to the Committee from the Government and the Compensation Agency had not described the continuation of the same household exclusion as a flaw or as being unintentional and these appear to be the words adopted by the members of the Committee. The Government response to the Committee was contained in the Sixth Special Report of Session 2003 - 04 which stated that the Government recognised the concerns expressed by the Committee and undertook that the Department would again examine the legislation to ascertain how the concerns may best be addressed.

[23] Brian Grzymek the Head of the Criminal Justice Services Division of the Northern Ireland Office by affidavit in this application for judicial review stated in relation to the continuation of the same household provision under the 2002 Scheme that this had not come about by oversight or inadvertence and referred to the correspondence and the Hansard report on the Committee debates as outlined above. It is apparent from that material that the continuation of the same household provision under the 2002 Scheme was intended. Equally it is clear that the First Standing Committee on Delegated Legislation considered that the continuation of the same household provisions represented a "serious flaw". While the Committee also described the continuation of the same household provision as "unintended" it is clear that it was intended as far as the promoter of the Scheme was concerned, although the impact of the same household provision may not have been appreciated by those present at the debates. Mr Grymek stated that the further review of the legislation referred to in the Government response to the Northern Ireland Affairs Committee had not yet been completed.

[24] It is clear from the papers that the continuation of the same household provisions was intended by the Northern Ireland Office in promoting the 2002 Order and Scheme. The continuation of the same household provision has been described by the Northern Ireland Affairs Committee as a flaw in the legislation but that opinion does not invalidate the legislation. Amendment is ultimately a matter for Parliament.

The reasons for the continuation of the same household provisions.

[25] The applicant contended that adequate reasons had not been given for maintaining the different approach to same household cases arising before 1988 and those arising after 1988. The Secretary of State presented the Scheme to the Delegated Legislation Committee in Parliament and was obliged to persuade Parliament to approve its contents. The Secretary of State was answerable to Parliament as to the reasons for particular measures.

The rationality of paragraph 84.

[26] The applicant contends that the operation of the same household provision under the 2002 Scheme is irrational. This ground is unsustainable. The operation of the Scheme in relation to longstanding sexual abuse cases could have adopted any one of a number of approaches, some of which could have included the applicant and others would not. Any one of a number of options could be described as a rational choice. The choice made could not be said to be irrational.

[27] Further, in argument the applicant compared the position adopted in the Northern Ireland legislation with that adopted under the legislation in England and Wales. The applicant stated that persons in her position would have received criminal injury compensation under the scheme operated in England and Wales as a result of the effect of amendments made to the equivalent same household provision since the Criminal Injuries Compensation Scheme 1979. Again this is a matter of Parliamentary choice and scrutiny and each jurisdiction is entitled to determine the needs and priorities of its jurisdiction. The respondent relied on McBrides Application (Unreported 5 February 2002) where a scheme for the decommissioning of fishing vessels approved by the Northern Ireland Assembly containing what the applicants regarded as less favourable terms than those adopted in England and Scotland and it was held that the different legislatures are not comparable cases for the purposes of discrimination. That one Parliament might make a different choice and accord a different priority to a matter to that of another Parliament does not in itself amount to a basis for reliance on Article 14 to claim discrimination between the citizens of the different jurisdictions.

[28] I am not satisfied on any of the applicant's grounds and the application for judicial review is dismissed.