

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH (JUDICIAL REVIEW)

Mahood's Application [2009] NIQB 100

AN APPLICATION FOR JUDICIAL REVIEW BY

JOHN ALEXANDER MAHOOD

WEATHERUP J

Discretionary Criminal Damage Payments.

[1] This is an application for Judicial Review of a decision of the Secretary of State dated 9 October 2008 refusing to exercise discretion to make a payment to the applicant under Article 12(5) of the Criminal Damage (Northern Ireland) Order 1977. Mr Hutton appeared for the applicant and Mr Maguire QC and Mr McGleenan for the Secretary of State.

[2] In 1975 the applicant was convicted of terrorist offences for which he was sentenced to 15 years imprisonment. After his release he set up a successful taxi business in Belfast. The business came under attack from paramilitary groups and eventually the business was forced to close. The applicant made five criminal damage claims in 2005. The Compensation Agency refused compensation under Article 10(3) of the 1977 Order because of the applicant's terrorist convictions (*italics added*) -

"Without prejudice to Article 9(1), compensation shall not be payable to or for the benefit of any person-

(a) who has been a member of an unlawful association at any time whatsoever, or is such a member; or

(b) *who has been engaged in the commission, preparation or instigation of acts of terrorism at any time whatsoever, or is so engaged."*

[3] The applicant applied to the Secretary of State for the exercise of discretion under Article 12(5) of the 1977 Order which provides -

“Where, but for Article 10(3), compensation would be payable to or for the benefit of any person, the Secretary of State may, if he considers it to be in the public interest to do so, pay to him such sum as does not exceed the amount of that compensation.”

[4] Thus the basis of any payment will be the public interest. The criteria for the exercise of the statutory discretion include what are known as the “Bloomfield criteria”. The Bloomfield criteria refer to the seriousness of the terrorist convictions, age at the time of the offences and the time that has elapsed, subsequent behaviour as suggested by any criminal record, subsequent behaviour as suggested by any contribution to the welfare of the community, whether compensation was paid in respect of any offence committed, whether there was any connection between the criminal behaviour and the damage sustained, the circumstances that gave rise to the claim, that the amount of any payment should be appropriate to the particular circumstances of the case. The exercise of the Secretary of States discretion is not limited to consideration of the Bloomfield criteria.

[5] On 24 October 2007 the Minister of State refused a discretionary payment to the applicant. Further to a request for a review by the Secretary of State, by letter dated 29 April 2008, the applicant was informed that the Secretary of State had decided that no payment would be made to the applicant. Further to exchanges of correspondence with the Northern Ireland Office it was confirmed by letter dated 9 October 2008 that it was not in the public interest that a payment should be made to the applicant.

The Applicant’s ground for Judicial Review.

[6] On the application for leave to apply for Judicial Review the applicant advanced twelve grounds for Judicial Review. All were refused save one, which was stated as follows:-

“Insofar as the Secretary of State’s refusal to make a discretionary payment in the applicant’s case indicates that the Secretary of State did conclude that any such payment would be contrary to the public interest, any such conclusion was irrational as indicated by the fact that an offer was made to the applicant of a reduced payment by an NIO

official in the course of correspondence on the issue.”

Leave was granted on the basis of an arguable case that the making of such an offer of payment to the applicant would undermine the stated position of the Secretary of State that it was not in the public interest that a payment be made.

The Minister of State’s decision to refuse payment.

[7] Consideration of the nature and effect of any offer of payment made to the applicant requires a rehearsal of the Northern Ireland Office response to the applicant’s request for the exercise of discretion. For the purposes of the present case there are two particular themes that emerged during the deliberations about the exercise of the discretion. First of all the considerations included on the one hand the views of the Compensation Agency that a payment should not be made because of the seriousness of the applicant’s convictions and the precedent effect of the making of a payment. On the other hand there was the contribution of the applicant to the development of the Northern Ireland peace process by his engagement with loyalist paramilitaries in an attempt to involve them in wholly peaceful means.

[8] Secondly the considerations also included the potential value of the applicant’s claims. The Compensation Agency valued the claims at approximately £40,000 and the applicant’s value was approximately £400,000.

[9] Further to Judicial Review proceedings in 2005 a procedure was adopted in relation to discretionary payments whereby representations would be sought from the applicant prior to a submission being made by officials to the Secretary of State. Accordingly on 6 October 2006 the acting Chief Executive of the Compensation Agency set out reasons why he was minded to recommend to the Secretary of State that the application for the exercise of discretion should be refused and invited the applicant’s representations. The reasons for the recommendation for refusal were stated to be the seriousness of the terrorist related offences and the length of the sentences imposed. The applicant’s solicitors forwarded a submission on 15 October 2006 making the case for payment on behalf of the applicant.

[10] The resulting submission by the acting Chief Executive to the Minister, David Hanson, dated 27 October 2006 referred to the applicant’s terrorist past and his work in the peace process and referred to the desire of officials in the Political Directorate to consult with the Minister. The submission concluded by suggesting that the Minister might consider that it was not appropriate to exercise discretion or alternatively, if it was decided that a discretionary payment should be made, that further advice would be submitted in relation to

the amount that should be paid. The submission stated that it was difficult to calculate the amount of compensation that would otherwise have been paid. The submission to the Minister did not deal with the makeup of the applicant's claims or with the Compensation Agency's analysis of the claims. In the event the Minister did not make a decision in relation to the exercise of the discretion but rather asked for advice on the amount of compensation to which the applicant would have been entitled but for his convictions.

[11] Accordingly there was an exchange of correspondence about the compensation to which the applicant might otherwise have been entitled. By letter dated 11 December 2006 the applicant's solicitors forwarded figures received from accountants detailing the applicant's claim for actual and future loss of earnings. In addition loss adjusters were engaged. By letter dated 23 March 2007 the Compensation Agency assessed the value of the applicant's claims at £39,510 and by letter dated 26 April 2007 the applicant stated the value of the claim to be £400,000. By letter dated 31 May 2007 the Compensation Agency invited the applicant's submissions on a proposed recommendation to the Minister that the amount of the compensation payable to the applicant, were it not for his criminal record, would have been £40,360. This was made up of £22,360 for radio equipment as recommended by the loss adjuster and £18,000 for loss of rental, being 10 weeks at £75 per week for 24 cars. The difference between the parties concerned the period of loss of rental income, which the Compensation Agency assessed at 10 weeks whereas the applicant considered this to be an on-going loss. By reply dated 12 June 2007 the applicant accepted the figure of £22,360 for the loss of equipment. However in relation to the loss of rental the applicant rejected the 10 week period and proposed a period of 2 years 5 months with the total value of the applicant's claim remaining at approximately £400,000.

[12] A further submission was made to the Minister, then Paul Goggins, on 11 July 2007 containing the advice on the amount of compensation that the Compensation Agency would otherwise have paid, as requested after the previous submission to the Minister. This submission set out the Compensation Agency valuation of the applicant's claims and the applicant's valuation of the claims, referred to the Secretary of State's discretion under the legislation to award such sum as did not exceed the amount of the compensation and drew attention to the scale of reductions that had been made to compensation in previous claims. A recommendation was made that the Minister should meet with the Compensation Agency and with Mr Chris McCabe of the Political Directorate. This meeting took place. The Minister received a recommendation from the Compensation Agency that compensation should be refused to the applicant because of the seriousness of his terrorist convictions. On the other hand the Minister received advice from Chris McCabe in relation to the contribution of the applicant to the development of the peace process in Northern Ireland by the applicant's engagement with

loyalist paramilitaries in an attempt to secure their involvement in wholly peaceful means.

[13] By a decision letter of 24 October 2007 the Minister acknowledged the important contribution made by the applicant towards the development of a peaceful and politically engaged society in Northern Ireland but concluded that the seriousness of the applicant's terrorist convictions was such that a discretionary payment should not be made.

The Secretary of State's decision to refuse payment.

[14] Further to the Minister's decision representations were received by the Secretary of State on behalf of the applicant seeking a review of the decision to refuse a discretionary payment. As a result of those representations the Secretary of State convened a meeting on 14 January 2008 attended by Sir Jonathan Phillips, then Permanent Secretary at the Northern Ireland Office, and the Minister of State and others. A briefing note had been prepared by the acting Chief Executive of the Compensation Agency on 8 January 2008 setting out the background. A further strand in this process was mentioned in the briefing note to Sir Jonathan Phillips of 8 January 2008. The conclusion referred to the possibility that if a payment were to be made to the applicant there might be an application for Judicial Review on the grounds that the Compensation Agency had misdirected Ministers on the matter of quantum.

[15] At the meeting of 14 January 2008 the Secretary of State decided to explore further the applicant's positive contribution and proposed a meeting with Chris McCabe for that purpose. Sir Jonathan Phillips, in his affidavit on behalf of the Secretary of State, averred that at the same time the Secretary of State noted the substantial gulf that existed between the Compensation Agency's view and the applicant's view of the value of his claims.

[16] The meeting of the Secretary of State with Mr McCabe took place on 7 February 2008. Mr McCabe emphasised the applicant's role in the peace process and restated the points in favour of an award of compensation that he had previously made to the Minister of State. The Secretary of State asked Mr McCabe to speak to Jeffrey Donaldson MP, who had made representations on behalf of the applicant. Mr McCabe was to get Mr Donaldson to find out what the applicant's response would be if the Secretary of State were to be persuaded that a payment up to £40,000 could be made, in contrast to the much larger sum that the applicant was seeking. Mr McCabe avers that the Secretary of State was very clear that in making the request he had not formed a view on whether a payment should be made.

[17] As a result Mr McCabe met Mr Donaldson. Mr McCabe described the meeting in these terms - "I relayed to him the Secretary of State's desire that Mr Mahood should be sounded out about the possibility that the Secretary of

State might be persuaded to exercise discretion in his favour in the sum of £40,000. I asked Mr Donaldson to approach Mr Mahood and find out what his views would be as to the above." A few days later Mr Donaldson texted Mr McCabe to say that the applicant was not interested in £40,000.

[18] Mr Donaldson's version of the meeting is contained in a letter to the applicant's solicitors recording that Mr McCabe had explained that the Secretary of State was prepared to consider approving a compensatory payment of £40,000 and "the Secretary of State had asked Mr McCabe to make an approach to me to try and ascertain whether Mr Mahood would be willing to accept an offer of such a compensation payment should the Secretary of State be minded to proceed on this basis. Mr McCabe made clear that at that stage, the Secretary of State had not yet made a final decision on the payment of compensation but was anxious to ascertain if Mr Mahood would be willing to accept an offer of £40,000, if a decision was made to make such an offer of compensation."

[19] On 19 February 2008 the Chief Executive of the Compensation Agency met Mr McCabe in relation to his preparation of a written submission to the Secretary of State on a review of the Minister's decision in relation to the applicant's claim. Mr McCabe informed the Chief Executive of his contact with Mr Donaldson and of the applicant's lack of interest in the figure of £40,000.

[20] On 13 March 2008 the Chief Executive met Sir Jonathan Phillips to discuss his proposed submission to the Secretary of State and indicated that he was proposing to recommend no payment to the applicant because of the seriousness of his convictions.

[21] On 31 March 2008 the Chief Executive provided an oral briefing to the Secretary of State and followed this up with a written submission on 16 April 2009 by which he recommended that no compensation should be paid to the applicant.

[22] Sir Jonathan Phillips avers that the Secretary of State, having read the submission from the Chief Executive, decided that it would not be in the public interest to exercise discretion in favour of the applicant. By letter dated 29 April 2008 the applicant was informed that, while taking account of the applicant's peace building work and having regard to the gravity of his convictions, no payment would be made.

[23] An exchange of correspondence followed. The warning contained in the Chief Executive's briefing note of 8 January 2008, of Judicial Review on the quantum issue, proved well founded. The applicant's solicitors letter of 26 June 2008 referred to the Bloomfield criteria that made the quantum for compensation a relevant factor and stated the belief that the Secretary of State

had not properly considered the case in the proper context as regards quantum. The decision was said to be unreasonable to the extent that the advice on quantum to the Minister was based on the Compensation Agency's incorrect figure of £40,360. Further to the exchange of correspondence the decision that no payment would be made to the applicant was confirmed by letter dated 9 October 2008.

The assessment of the public interest.

[24] In his grounding affidavit the applicant stated that on 25 February 2008 he received a telephone call from Mr Chris McCabe advising that the Secretary of State would be willing to offer £40,000. The applicant stated that he advised Mr McCabe that this was not acceptable as it was only a fraction of the true value of the case and was less than he owed in tax at that point. In a later affidavit the applicant accepted that he had been mistaken in his recollection of the communication from Mr McCabe and he accepted that contact had been made through Mr Donaldson as stated above.

[25] Leave was granted on the basis of the applicant's contention that the Secretary of State had made an offer of £40,000 to the applicant. I find that no offer of £40,000 or any offer was made. The evidence of Sir Jonathan Phillips and of Chris McCabe and the letter from Jeffrey Donaldson all serve to establish that the enquiries instigated by the Secretary of State did not amount to any offer being made to the applicant.

[26] What occurred is perhaps best described by Mr McCabe as a "sounding out" of the applicant to establish what his reaction might be in the event that the Secretary of State were to be persuaded to make a payment to the applicant in the public interest.

[27] However the issue remains as to whether the 'sounding out' of the applicant, on the basis that a payment of £40,000 was a possibility, undermined the final decision of the Secretary of State that it was not in the public interest to make payment to the applicant.

[28] In weighing up the considerations relevant to the exercise of the discretion it is apparent that the Minister and the Secretary of State were mindful of the differences that existed in relation to the potential value of the applicant's claims. Officials were also mindful of the requirements of procedural fairness that had emerged from the previous Judicial Review of discretion decisions that had gone to the Court of Appeal, in that applicants were to be afforded an opportunity to make representations on adverse factors in advance of a decision. Thus there had been exchanges between the parties about quantum while the request for a discretionary payment was being considered. Further, officials were alert to the prospect of Judicial Review of a decision to make a payment based on the Compensation Agency value, which

created the prospect of the applicant advancing a case that the public interest had been established in favour of the applicant and the issue had become the amount of the payment.

[29] This raises the issue of the relevance of the amount of a discretionary payment as a consideration in the exercise of the discretion. Counsel for the respondent contends that the perceived public reaction to the level of a discretionary payment is a relevant criterion. Thus it might be considered to be in the public interest to make a small payment to an applicant while it could be considered not to be in the public interest to make a larger payment. Counsel for the applicant contends that consideration of the discretion is a two stage process, involving in the first place consideration as to whether it is in the public interest to make any payment and secondly, having decided to make a payment, then to consider the amount of that payment. In taking that approach the applicant refers to the decision of Kerr J in Creighton's Application (2001)NIQB 15 where it is stated:-

“It is to be noted that the Secretary of State may only make such a payment when he considers it to be in the public interest to do so. Even then he is not obliged to make the payment, although it is difficult to envisage circumstances in which, having decided that it was in the public interest that payment should be made, the Secretary of State would withhold that payment.”

[30] A statutory discretion may involve mandatory considerations, which must be taken into account, irrelevant considerations, which must not be taken into account, and discretionary considerations, which may be taken into account. I consider that the amount of a payment is in the last category. Accordingly I am satisfied that the amount of a payment is capable of being a relevant consideration in the exercise of the discretion in the public interest. I accept the respondent's contention that the perceived public reaction to the level of payment to an applicant is a relevant criterion. It might be considered to be in the public interest to make a small payment to an applicant while it could be considered not to be in the public interest to make a larger payment. To the extent that Kerr J was stating the position to be otherwise in Creighton's Application, which in any event I do not consider to be the case, I would not follow that decision.

[31] The Secretary of State made clear that Mr McCabe's sounding out of the applicant through Mr Donaldson did not amount to an offer of a payment and that no decision had then been made on the exercise of discretion. I am satisfied that such was the case on both counts. The explanation for the sounding out of the applicant, as offered by Sir Jonathan Phillips on behalf of the Secretary of State, was that the Secretary of State wanted to know whether

his review of the Minister's refusal was a worthwhile exercise, given the differences on the value of the applicant's claims. The applicant rejects this explanation. The applicant contends that, if no offer was made, what occurred was virtually an offer and served to illustrate the mind of the Secretary of State to make a limited payment to the applicant. The Court is invited to draw the inference that the Secretary of State had concluded that it was in the public interest to make a payment to the applicant. The Secretary of State agreed to review the Minister's decision and while it appears that the inclination was not to make a payment there was the possibility of the exercise of discretion in favour of the applicant after full consideration of the issues. If he had decided to make a payment there was the prospect of a dispute about the Secretary of State's approach to the value of the applicant's claims. Did such a prospect result in a decision that the Secretary of State was 'minded' to make in the applicant's favour being changed when it was learned that the applicant would continue a dispute about the full value of his claims? The applicant says that this is what happened.

[32] I have not been satisfied that this is what happened. The Minister had made the initial decision against the exercise of discretion in favour of the applicant. The Secretary of State was reluctant to reopen the issue. He was persuaded to do so by requests from political representatives. His initial approach to the exercise of discretion was negative. The submissions from the Compensation Agency were against the exercise of discretion. I am satisfied that in the final analysis the Secretary of State was not persuaded that it was in the public interest to make a payment to the applicant. The Compensation Agency view prevailed that despite the applicant's contribution to the peace process the seriousness of his terrorist convictions meant that the Secretary of State considered that it was not in the public interest that a payment should be made.

[33] I am not satisfied that the actions of the Secretary of State, in conducting a sounding out exercise with the applicant in the circumstances outlined above, were such as to undermine his decision that it was not in the public interest to make a discretionary payment to the applicant. Accordingly the application for Judicial Review is dismissed.