Neutral Citation No.: [2009] NIQB 45 | *Ref:* **WEA7496**

Judgment: approved by the Court for handing down | *Delivered:* **27/04/09**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

McCallion's Application (Anne-Marie) (No. 4) [2009] NIQB 45

AN APPLICATION FOR JUDICIAL REVIEW BY ANNE-MARIE McCALLION (No. 4)

WEATHERUP J

[1] This is an application for leave to apply for judicial review of a decision of the Secretary of State of 20 November 2008 not to exercise his discretion to make a payment to the applicant under Article 10(2) of the Criminal Injuries Compensation (Northern Ireland) Order 1988 in respect of the death of her husband, such payments being made where it would be in the public interest to do so, although compensation is otherwise excluded under the Order by reason of the terrorist convictions of the deceased. Mr McDonald QC and Ms Doherty appeared for the applicant and Mr Maguire QC and Dr McGleenan for the respondent, the Secretary of State.

[2] The applicant's husband died as a result of a criminal injury in 1988 leaving the applicant and their children. The deceased had terrorist convictions in 1978 for which he had received 18 years imprisonment. Accordingly the applicant was excluded from the payment of criminal injury compensation under Article 5(9) of the Order. The applicant applied for the discretionary payment in the public interest under Article 10(2) of the Order and was refused by the Secretary of State.

[3] There have been three previous applications for judicial review in relation to this matter. Kerr J dismissed the applicant's first application in McCallion, McColgan and McNeills Applications [2001] NI 401. I dismissed the applicant's second application in McCallion, McColgan and McNeills Applications [2004] NIQB 64. The applicant's appeal to the Court of Appeal was dismissed, [2005] NICA 21. In the third application Morgan J quashed the

decision to refuse a discretionary payment in McColgan's Application [2007] NIQB 76 on the basis of the operation of Article 2(2) of the United Nations Convention on the Rights of the Child. The matter was then reconsidered and the application for a discretionary payment refused on 20 November 2008.

[4] This fourth application for judicial review concerns the operation of Article 2(2) of the United Nations Convention on the Rights of the Child, which provides –

> "1. The States parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind irrespective of the child's or his or her parents or legal guardians race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
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> 2. States shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions or beliefs of the child's parents, legal guardians or family members."

[5] The applicant raises four grounds for judicial review. First of all that in reaching the decision the Minister erred in concluding that refusal to award compensation would not be a breach of Article 2(2). Secondly that in refusing to award compensation the Minister failed to take all appropriate measures as required by Article 2(2). Thirdly that the Minister's decision was unfair, unreasonable and unlawful. Fourthly that the Minister failed to give any or adequate reasons for his conclusion on Article 2(2).

[6] The applicant's position on Article 2(2) is that the State is in breach of the Convention and has not taken all appropriate measures to protect the children of the deceased against discrimination on the basis of the activities of their father, namely that, in respect of those who sustain criminal injuries, the children of those who have terrorist convictions are disadvantaged compared to the children of those who do not.

[7] On the other hand the respondent contends that the State's obligations under the Convention include the taking of all appropriate measures and that obligation is not concerned with individual decision makers but rather State decisions. If the focus is to be on State decisions that may relate to the operation of a statutory scheme that provides for this exclusion of compensation, but that is not the nature of the applicant's complaint. In any event the respondent contends that it can not be said that the impact of prison on the children of prisoners imposes any obligation under the Convention to

remove such penalties because there would inevitably be an impact on children when a parent is sent to prison. Thus there are two views on the application of the Convention to present circumstances. Ultimately the respondent contends that, as the convention is an unincorporated international Treaty, any obligations under the Convention arise in the international sphere and not in the domestic sphere.

[8] In the course of the previous applications for judicial review Kerr J in the first application stated that the circumstances did not involve a breach of Article 2(2). In the second application for judicial review I stated that the circumstances did not involve a breach of Article 2(2). On appeal to the Court of Appeal, Nicholson LJ, Campbell LJ and Coghlin J concluded that there was an arguable breach of Article 2(2). In the third application for judicial review Morgan J found that there was an arguable breach of Article 2(2). At paragraph 26 of his judgment Morgan J made a comparison between the 2002 Scheme for compensation and the 1988 Order and concluded that the applicant would have been subject to different treatment under the 2002 Scheme. This appears to be the foundation for the finding of an arguable breach of Article 2(2). However Mr Maguire for the respondent contends that Morgan J's foundation is mistaken and Mr Maguire produces an analysis of the operation of the 2002 Scheme which would indicate that the penalty points system that operates under the 2002 scheme would also result in no payment being made to the applicant. Whatever might be the position under the 2002 Scheme, different treatment emerges under the 1988 Order between the children of those parents with terrorist convictions, such as this case, and the children of those parents who do not have such convictions. In any event the Court of Appeal considered that there was an arguable breach of Article 2(2).

[9] The decision letter was issued on 20 November 2008. The Minister who decided the matter on behalf of the Secretary of State stated that he would consider the provisions of Article 2 of the Convention; the Minister was not persuaded that a decision not to exercise discretion would in fact result in a breach of Article 2; he considered that the obligations under the Convention was a factor in his decision-making, or as he put it at the conclusion of the letter, he was 'mindful' of his international obligations under Article 2. It is apparent that the Minister did not purport to exercise his discretion so as to comply with the Convention but rather, in reaching his decision, he took into account the Convention and his conclusion that a finding adverse to the applicant would not involve a breach of the Convention.

[10] What is the legal position in domestic decision making in relation to the provisions of an unincorporated international treaty? This has been considered recently by the House of Lords in R (Corner House Research) v Director of the Serious Fraud Office [2008] UKHL 60. The Director of the Serious Fraud Office decided to discontinue a criminal investigation into

allegations of corruption against BAE Systems plc in relation to an arms contract between the Government and Saudi Arabia, for which BAE was the main contractor. The Anti-Terrorism, Crime and Security Act 2001 makes it an offence triable in the UK for a UK national or company to make a corrupt payment or pay a bribe to a public officer abroad. The Act was introduced to give effect to the UK's obligations under the OECD Convention of 1997 on Combating Bribery of Foreign Public Officials in International Business Transactions. The Convention on Bribery at Article 5 provides –

> "Investigations and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved."

[11] It was concluded that there was a real and immediate risk of a collapse in UK/Saudi security intelligence and diplomatic cooperation, which was likely to have seriously negative consequences for the UK public interest in terms of national security and the UK's highest priority foreign policy objectives in the Middle East. The investigation therefore came to an end. Article 5 of the Convention excluded the taking into account of considerations of national and economic interest or the potential effect upon relations with another State and there was an issue as to whether the public interest considerations that were taken into account offended the terms of Article 5.

[12] Lord Bingham considered the effect of Article 5 of the Convention. It was common ground that had the Director ignored the Convention his decision could not have been impugned on the grounds of inconsistency with the Convention. However the Director publicly claimed to be acting in accordance with Article 5. The claimants accordingly made a number of contentions that the applicant in this case adopts. The contentions adopted by the applicant, each of which was described by Lord Bingham as 'problematic' are –

> (1) that it is open to the domestic courts of this country to review the correctness in law of the [Director's] self direction (on the meaning of the Convention);
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> (2) that our courts should themselves interpret (the Article);
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> (3) that the [Director's] interpretation should be held to be incorrect; and

(4) that the [Director's] decision should be quashed.

[13] In relation to the first contention Lord Bingham referred to two previous decisions where the domestic courts had interpreted international provisions, namely R (Launder) v Secretary of State for the Home Department [1997] 1 WLR 839 and R (Kebeline) v DPP [2000] 2 AC 326. Both cases concerned decision makers claiming to act consistently with the European Convention on Human Rights. The domestic courts in each case accepted the propriety of reviewing the compatibility with the Convention of the decisions in question. However in the first case there was no issue between the parties about the interpretation of the relevant Articles of the Convention and in the second case there was a body of Convention jurisprudence on which the domestic courts could draw in seeking to resolve the issue. Lord Bingham continued –

> "Whether, in the event that there had been a live dispute on the meaning of an unincorporated provision on which there was no judicial authority, the courts would or should have undertaken the task of interpretation from scratch must be at least questionable. It would moreover be unfortunate if the decision makers were to be deterred from seeking to give effect to what they understand to be international obligations of the UK by fear that their decisions might be held to be vitiated by an incorrect understanding."

[14] The second contention required consideration of another provision of the Bribery Convention that provided a mechanism for monitoring the operation of the Convention by means of a Working Group on bribery. Where such a structure is in place under a particular Convention the national courts should hesitate before undertaking a task of unilateral interpretation.

[15] There was a dispute in Corner House Research as to the effect of the terms of Article 5 of the Convention on Bribery relating to the potential effect upon relations with another Member State and whether the negotiators could have intended to include multiple loss of life within that description and deny to Member States the right to rely on the severe threat to national security. An affirmative answer was given in a publication by Yale Law School in 1997 and a negative answer was given by the Attorney General in the case under consideration. Lord Bingham stated that the extreme difficulty of resolving the problem on a principled basis underlined the desirability of resolving such an issue in the manner provided by the Convention. The decision of the Director was upheld on the basis first that it was clear that the Director based his adherence to the Article on the belief that it permitted him to take account of the threats to human life as a public interest consideration and secondly that he would undoubtedly have made the same decision in any event.

[16] Lord Brown at paragraph 65 stated that there are occasions when the Court would decide questions as to a State's obligations under unincorporated international law but this 'for obvious reasons, was generally undesirable'. For the Court to do so was said to be 'a remarkable thing, not to be countenanced save for compelling reasons', which did not exist in that case. There were 'very real differences' with Launder and Kebeline, namely that the decision makers sought to apply established Convention jurisprudence and would have taken different decisions had their understanding of the law been different. In Corner House Research the Attorney General believed the decision to be consistent with the Convention. This was 'at the very least obviously a reasonable and tenable belief'.

[18] This concept of a tenable belief emerged from an article in the Law Quarterly Review [2008] LQR at page 388, which discussed the circumstances in which domestic courts should intervene to interpret an international treaty. The article proposed that domestic courts should either decline to rule or to allow the executive a form of 'margin of appreciation' on the legal question and to examine only whether 'a tenable view' had been adopted on the point of international law, rather than ruling on it themselves as if it were a hard edged point of domestic law.

[19] At paragraph 67 Lord Brown stated –

> "It simply cannot be the law that, provided only a public officer asserts that his decision accords with the State's international obligations, the courts will entertain a challenge to the decision based upon his arguable misunderstanding of that obligation and then itself decide the point of international law at issue."

[20] A domestic decision maker may purport to make his decision in accordance the terms of an unincorporated international treaty. Or he may merely take into account the terms of the treaty in making his decision. Or he may declare that, having taken account of the terms of the treaty, the decision that he has made is in accordance with the treaty. Or he may declare that he will make his decision without regard to the terms of the Treaty. In the present case the decision maker concluded that a decision adverse to the applicant would not involve a breach of the Convention. Further in the present case, the decision maker did not purport to exercise his discretion in accordance with the Convention provision but rather, in reaching his decision, he took into account the Convention and his conclusion that a finding adverse to the applicant would not involve a breach of the Convention.

[21] The effect of Charter House Research is that in general the Court will not seek to interpret the terms of an unincorporated treaty nor will the Court adjudicate upon the correctness in law of a decision maker's conclusion on the meaning of the treaty. The Court may do so where there is no issue about the interpretation of the Convention and the Court is considering whether the interpretation is compatible with the terms of the treaty. The Court may do so where there is settled Convention jurisprudence which provides a particular interpretation. The Court will hesitate to do so where the treaty provides a forum for the resolution of a dispute as to interpretation.

[22] In the present case there is a dispute about the interpretation of Article 2(2) as reflected in the two views referred to above. In addition there is no settled Convention jurisprudence that I have been referred to in relation to the interpretation of Article 2(2). Further, as a factor pointing in the other direction, the Convention does not contain a provision that provides a forum for the interpretation of disputed terms.

[23] My conclusions in the particular circumstances of this case are these. First, in the light of the dispute at to the meaning of Article 2(2) and the absence of any settled Convention jurisprudence on the issue, the Court will not and should not seek to determine the correct interpretation of Article 2(2) and apply that interpretation to circumstances such as the present. Secondly, even if the Secretary of State had purported to exercise his discretion only in accordance with Article 2(2) the Court would not itself adopt an interpretation of Article 2(2), given that there is a dispute as to meaning of the provision and in the absence of any settled Convention jurisprudence. Thirdly, even on the basis that it is arguable that the action of the Secretary of State is in breach of Article 2(2), which I accept in the light of the judgments of the Court of Appeal, that does not establish that the Court should seek to interpret Article 2(2) nor does it make this an arguable case for the grant of leave. Fourthly, even if the tenable view approach outlined by Lord Brown is applied, the position expressed on behalf of the Secretary of State as to the meaning of Article 2(2) represents a tenable view and the Court would not and should not intervene. I am satisfied on the basis of the approach that has been taken in Corner House Research that it is not arguable in the circumstances of the present case that the Court should adopt a role in applying a domestic interpretation of Article 2(2). Leave to apply for judicial review is refused.