

Ref: WEAC5062

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

Delivered: 10/09/2004

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

**IN THE MATTER OF AN APPLICATION BY ANNE-MARIE
McCALLION, LORRAINE McCOLGAN and ANN McNEILL
FOR JUDICIAL REVIEW (No. 2).**

WEATHERUP J

The background.

[1] The applicants are widows whose husbands were unlawfully killed in separate incidents in 1998. In each case they applied for criminal injury compensation under the Criminal Injuries (Compensation) (Northern Ireland) Order 1988 and each was refused compensation under Article 5(9) of the 1988 Order that excludes victims who were members of unlawful associations or who had engaged in acts of terrorism. Each applicant then applied to the Secretary of State to exercise his discretion under Article 10(2) of the 1988 Order to pay compensation on the basis that it was in the public interest to do so. The Secretary of State refused to exercise his discretion in favour of the applicants and each applied for Judicial Review of that decision. On 9 July 2001 Kerr J quashed the decisions of the Secretary of State in respect of the second and third applicants and dismissed the first applicant's case. The judgment is reported as *In Re McCallion & Ors Application* [2001] NI 401.

[2] The Secretary of State reconsidered the cases of the second and third applicants under Article 10(2) and the first applicant reapplied to the Secretary of State for the exercise of discretion under Article 10(2). In each case the Secretary of State refused to exercise his discretion in favour of the applicants. Accordingly each applicant makes this second application for Judicial Review of the further decisions of the Secretary of State, which in each case was taken on 27 May 2003. Mr Treacy QC and Ms Doherty appeared for the applicants and Mr Maguire appeared for the respondent.

The Criminal Injuries (Compensation) (Northern Ireland) Order 1988

[3] Article 5(9) of the 1988 Order provides -

“... no compensation shall be paid to, or in respect of a criminal injury to, 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.”

Article 2(2) defines terrorism as “the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear”.

Article 10(2) provides: -

“Where, but for Article 5(9), compensation would be payable to 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.”

In Re McCallion & Oths Application [2001] NI 401.

[4] The second and third applicants were successful before Kerr J on the basis that they should have been informed of particular adverse factors that weighed against their applications before the decision was made. Mr McNeill was shot and fatally wounded on 17 April 1998 leaving a widow, the third applicant, and five children aged between 9 and 16 years. In March 1985 he had been convicted of possession of a firearm and ammunition in suspicious circumstances and had been sentenced to be detained in a Young Offenders' Centre for 4 months. Officials prepared a submission to the Minister who made the decision on behalf of the Secretary of State and that submission included the statement that police believed that Mr McNeill was a Republican

sympathiser and that his death was probably due to a feud between Republican terrorists. Kerr J found that Mrs McNeill was aware that the principal reason for the refusal to exercise the discretion was the deceased's conviction of terrorist offences but did not know that there was a particular factor about the circumstances of the death that was adverse to the application for the exercise of the discretion under Article 10(2), (page 414e). By reason of the failure to advise to Mrs McNeill of the adverse factors and to give her the opportunity to make representations, Kerr J acceded to the application to quash the decision (page 415c).

[5] At the hearing before Kerr J the third applicant challenged the taking into account of the statement that Mr McNeill was a "Republican sympathiser". Kerr J observed that "this is no more than a peripheral fact provided by way of background and there was no reason to suppose that it was an adverse factor." He did not accept that it was matter to be left out of account (page 416d).

[6] Mr McColgan was murdered on 24 January 1998 leaving a widow, the second applicant, and three children aged between 6 and 15 years. In August 1983 he had been convicted of riotous behaviour and ordered to be detained in a Young Offenders' Centre for a period of one month suspended for 2 years. In March 1987 he had been convicted of possession of explosives with intent to endanger life or property and possession of ammunition with intent and was sentenced to 2 years' imprisonment suspended for 2 years. In the officials submission for a decision on behalf of the Secretary of State Mr McColgan was described as the victim of a sectarian killing carried out by the Loyalist Volunteer Force and it was believed that he had been targeted probably because he had INLA traces. Kerr J stated that Mrs McColgan was aware that the principal reason for the refusal to exercise the discretion was the deceased's conviction of terrorist offences but she did not know that there was a particular factor about the circumstances of the death that was adverse to the application for the exercise of discretion under Article 10(2) (page 414e). By reason of the failure to advise her of the adverse factors and to give her an opportunity to make representations Kerr J acceded to the application to quash the decision (page 415c).

[7] Mr McCallion died as the result of injuries sustained on 31 December 1998 leaving a widow, the first applicant, and four children aged between 1 and 18 years. In 1978 Mr McCallion was convicted of attempted murder, possession of a firearm and ammunition with intent to endanger life and property and belonging to an illegal organisation and was sentenced to 18 years' imprisonment. In the officials submission for a decision on behalf of the Secretary of State no particular factors were mentioned that were unknown to the first applicant and were adverse to the application for the exercise of the discretion under Article 10(2). Accordingly Kerr J did not

accede to the application to quash the decision as he had done in the case of the second and third applicants.

Decisions of the Secretary of State.

[8] Further to the decision of Kerr J, and by letters dated 11 September 2001, notice was given to the second and third applicants solicitors of intention to reconsider the claims for the exercise of discretion under Article 10(2) of the 1988 Order. The letters invited representations on adverse factors and in relation to the third applicant stated, "I refer, in particular, to the police advice provided to the agency that despite the fact that Mr McNeill had no further terrorist convictions, the police believed that Mr McNeill was a sympathiser and that his death was probably due to a feud amongst Republican terrorists."

[9] In relation to the second applicant the letter stated, "I refer, in particular, to the police advice provided to the agency that police believed that Mr McColgan was the victim of a sectarian killing carried out by the Loyalist Volunteer Force probably because he had INLA traces."

[10] The applicants solicitor did not respond directly to the request for representations but under cover of letters dated 7 February 2002 made extensive written submissions on behalf of all three applicants in relation to discretionary payments under Article 10(2). The covering letter focussed on other cases where the Secretary of State had exercised discretion under Article 10(2) and sought details of convictions, age at the time of offence, numbers of years between offence and decision to pay compensation and the sex of the victim. By reply it was confirmed that since the commencement of the 1988 Order the Secretary of State had exercised his discretion to make a full award in 8 cases and it was stated that the average age at the time of the conviction was 20 years, the average length of time between conviction and application was 14 years and sentences ranged from an absolute discharge to imprisonment for 4 years.

[11] Ultimately, by letters dated 22 May 2003, the applicants' solicitors were informed that the Minister of State, on behalf of the Secretary of State, had decided not to make payment under Article 10(2) of the 1988 Order.

The Applicants Grounds for Judicial Review.

[12] In the course of these proceedings there were various alterations to the grounds on which the applicants sought Judicial Review and they resolved to-

(1) The decision was procedurally unfair in the case of Mrs McNeill in that what had previously been described as peripheral fact became a primary ground of refusal without notice.

(2) The decision was procedurally unfair as the applicants were unable to make informed representations in the absence of particulars of those cases where the Secretary of State had exercised his discretion in favour of the applicants and in the absence of the information furnished by police concerning the deceased.

(3) The decision was contrary to the United Nations Convention on the Rights of the Child.

(4) The decision was irrational by reason of an absence of consistency and equality of treatment.

(5) Reasons for the decisions were not given.

Disclosure of adverse factors to the third applicant.

[13] First the position of the third applicant, Mrs McNeill. In the submission for the first decision the principal reason for refusal to exercise the discretion was the deceased's conviction of terrorist offences. However there were two particular factors referred to, of which Mrs McNeill was unaware, that were being taken into account namely the police view that her deceased husband had been a Republican sympathiser and that his death was probably due to a feud among Republican terrorists. The first matter was described by Kerr J as a peripheral fact and not an adverse factor. The second matter was presumably the adverse factor upon which it was held that the applicant ought to have had the opportunity to make representations. The status of the particular factors as peripheral is borne out by a letter to the applicant's solicitors dated 6 July 2000 explaining the first decision in terms related to the deceased's convictions for terrorist offences. After the first Judicial Review the applicant's solicitors were invited to make representations on both factors. In the event their written submissions focussed on the principal reason for refusal to exercise the discretion, namely considerations relating to the deceased's conviction of terrorist offences.

[14] The submission for the second decision gave as a reason for not recommending the granting of a discretionary payment the absence of a response to the allegation based on police intelligence that the deceased was a sympathiser and that this death was probably due to a feud among Republican terrorists. The recommendation was not based on the seriousness of the deceased's convictions (as was the case with the other applicants), although the fact of the convictions was obviously a critical factor. Here there is an alteration of the respondent's approach. While the applicant's solicitors

concentrated on the principal reason for refusal to exercise the discretion on the first occasion, namely the deceased's conviction of terrorist offences, the particular factors of the deceased being a sympathiser and his death probably due to a feud among Republican terrorists are elevated to a reason to refuse to exercise the discretion. At this stage it appears that the deceased's Republican sympathies have become more than a peripheral fact and have become an adverse factor. That his death was probably due to a feud among Republican terrorists has become more than an adverse factor and appears to have become the reason for refusing to exercise the discretion. The applicant was unaware of this approach until the respondent's replying affidavit was filed in this Judicial Review.

[15] The respondent contends that all of the matters above are to no effect because the third applicant was invited to make submissions on the two particular factors and failed to do so. It is contended on behalf of the third applicant that she was misled by the respondent as to the significance attached to the particular facts. No doubt it was not intended that the third applicant be misled as to the factors that influenced the decision on the exercise of the discretion. However I accept the third applicant's submissions on this point. While the third applicant was aware that the particular factors were being taken into account she was not aware that the particular facts had moved to centre stage. Had she been so aware, the third applicant, as developed by Counsel on her behalf at the hearing of this Judicial Review, could have pursued an issue about the basis on which the police had formed the opinion on the two particular facts. Instead the third applicant and her solicitors fixed their attention on different issues. That they elected to do so arose out of the manner in which they had been led to believe the respondent was approaching the application. I accept that this amounted to procedural unfairness.

Disclosure of the particulars of successful cases.

[16] In general the applicants contend that informed representations on the exercise of discretion requires disclosure to the applicants of the particulars of those other cases where the Secretary of State has exercised discretion in favour of applicants. The respondent has furnished general particulars about those cases. These decisions are in the category of an "inexpressible value judgment" based on published criteria. The Secretary of State cannot be expected to publish tables of decisions so as to identify the factors of particular cases that warranted the exercise of discretion. Nor can the publication of the information sought by the applicants provide support for the exercise of the discretion in favour of the applicant in a particular case without regard to the basis for the particular decision. The applicants recognise that they cannot expect to receive the particular information that would enable them to examine the basis for the decision in particular cases. Publication of the criteria by which the Secretary of State exercises that

discretion together with notice of adverse factors in particular cases meets the requirements of fairness to enable an applicant to know the case he has to meet and to respond.

Disclosure of police advice.

[17] Further the applicants contend that there should be disclosure of the police advice. However the police advice, in the manner in which it was presented to the decision-maker, was disclosed to the applicants. Such disclosure was sufficient to enable the applicant to make representations. Had the applicants wished to challenge material in the police advice such as whether a death was connected with a Republican feud or whether a deceased was a member of a parliamentary organisation then that challenge might be taken up with the police. If those details had been furnished to the decision-maker then disclosure to the applicant of the gist of the particulars might have been appropriate, subject to public interest issues. But that is not the position in any of the present cases.

The Convention on the Rights of the Child.

[18] The applicants rely on the Convention on the Rights of the Child. Article 2.1 provides that States shall respect and ensure the Convention rights to each child without discrimination of any kind irrespective of a parents status. Further, Article 2.2 requires that States “shall take all appropriate measures to ensure the child is protected all forms of discrimination or punishment on the basis of the status or activities of a parent.” By Article 3 it is provided that in all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. The applicant contends that the respondent failed to take into account the Convention on the Rights of the Child and that had the best interests of the child been a primary consideration of the respondent the discretion would have been exercised in favour of the families. Further the applicants contend that the absence of the exercise of discretion in favour of the families constituted discrimination on the basis of the status and activities of the deceased fathers.

[19] Parliament has implemented Article 10(2) and invested the respondent with a discretion to determine whether payments should be made in the public interest. It has not provided that it would be in the public interest to make payment in cases involving dependent children. To take account of the Convention on the Rights of the Child and to regard the best interests of the child as a primary consideration need not in all circumstances require payment in cases involving dependent children. Nor does the discrimination provision result in a requirement that payments be made in cases of dependent children.

[20] Reliance was placed on the Convention on the Rights of the Child in the first Judicial Review. Kerr J stated at page 417d-e that it is permissible to have regard to international standards but not obligatory to do so and in any event he was not persuaded that there had been a breach of any of the precepts laid down by the Convention.

[21] In *R v Lyons* [2002] 4 All ER 1028 the House of Lord considered the provisions of the European Convention on Human Rights on a trial concluded before the commencement of the Human Rights Act 1998. Lord Hoffman at page 4040d-f stated that there is a strong presumption in favour of interpreting domestic law (whether common law or statute) in a way that does not place the United Kingdom in breach of an international obligation. However the sovereign legislator in the United Kingdom is Parliament and if Parliament has plainly laid down the law it is the duty of the Courts to apply it whether or not that would involve the breach of an international treaty.

[22] The applicants rely on a legitimate expectation that applications under Article 10(2) would be dealt with in accordance with the Convention on the Rights of the Child, which they submitted would have resulted in payment being made to the applicants. Reliance was placed on *The Minister of State for Immigration and Ethnic Affairs v Teoh* [1994-1995] 183 CLR 273 and *Ahmed & Ors v Secretary of State for the Home Department* [1999] IMMAR 22 to advance the proposition that ratification of an international treaty gave rise to a legitimate expectation that it would be taken into account by decision makers, absent any indication to the contrary by the State. *R v Uxbridge Magistrates Court, ex parte Adimi* [1999] 4 All ER 520 concerned the Convention on Refugees and Simon Brown LJ stated that refugees generally had become entitled to the benefit of provisions in the Convention "in accordance with the developing doctrine of legitimate expectations.." The issue of legitimate expectations arising from international treaties was reconsidered by the Court of Appeal in *European Roma Rights Centre & Ors v Immigration Officer at Prague Airport* [2003] 4 All ER 247. Simon-Brown LJ at paragraph 51 stated that his conclusion in *Adimi* with regard to legitimate expectation was "suspect". Laws LJ at paragraphs 95-101 rejected the proposition that the act of ratifying a treaty could *without more* give rise to enforceable legitimate expectations as it seemed "to amount, pragmatically, to a means of incorporating the substance of obligations undertaken on the international plane into our domestic law without the authority of Parliament."

[23] Like Kerr J I am not persuaded that there has been a breach of any of the precepts laid down by the Convention. In any event the ratification of the Convention does not create any enforceable legitimate expectations. Further, if there are any legitimate expectations arising from the Convention I am not satisfied that they include any legitimate expectations in relation to payments being made to the applicants with dependant children.

Equality of treatment.

[24] The applicants contend that the decision not to exercise the discretion in favour of the applicants offends the principle of equality of treatment. Reliance is placed on the statement of principle by Girvan J in *Re Colgan's Application* [1996] NI 24 and *Re Wright's Application (No 1)* [1996] NI 83. At page 44b in *Re Colgan's Application* Girvan J stated the principle in terms that the decision which results in an unjustifiable inequality of treatment is open to challenge on the ground of unreasonableness since if there is no logical difference between two situations justifying a differential treatment logic and fairness require equality of treatment. This statement of principle was applied by Girvan J in *Re Wright's Application* at page 105b-106c in the context of comparable consistent treatment in the field of sentencing offenders being one of the guiding sentencing principles. In that case the decision-maker had details of comparable cases.

[25] Equality of treatment is an aspect of Wednesbury unreasonableness. The present cases involve a value judgment based on published criteria by which the applicants are excluded or included in the scheme. This is not a grading exercise where the applicants are placed on a scale in the manner of sentenced offenders. The difference in treatment between those included and those excluded is based on an assessment of all the circumstances of each case. It cannot be concluded that the refusal to exercise the discretion in the cases of the applicants was irrational.

Reasons

[26] There is no general duty to give reasons. However when there are adverse factors being taken into account then, as Kerr J put the matter in the first Judicial Review "...the duty to alert the applicants in advance of the decision marches hand-in-hand with the obligation to explain the decision after it is made" (page 415h). In this second Judicial Review the affidavits set out the reasons for the second decisions to an extent that has enabled the applicants to make their representations in relation to those reasons and the obligation on the respondent has been satisfied.

[27] For the reasons outlined above I quash the decision in the case of the third applicant, Ann McNeill, and dismiss the applications of the first and second applicants, Anne Marie McCallion and Lorraine McColgan.