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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Tohill's (Robert) Application [2015] NIQB 48

IN THE MATTER OF AN APPLICATION BY ROBERT TOHILL FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

and

IN THE MATTER OF A DECISION BY THE CRIMINAL INJURIES COMPENSATION APPEALS PANEL FOR NORTHERN IRELAND

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TREACY J

Introduction

[1] By this application the Applicant challenges a decision of the Criminal Injuries Compensation Appeals Panel for NI ("the Panel"), whereby it refused his appeal against a review decision, which upheld a decision to make no award under the Northern Ireland Criminal Injuries Compensation Scheme 2009 ("the 2009 Scheme").

[2] On the basis of the decision in Re Darley [1997] NI 384 Mr Phillip McAteer, counsel for the Panel, contends that the appropriate party to contest a judicial review of its decision is normally the opposing party at the original hearing. In this case it is submitted that the appropriate party to contest the judicial review is therefore the Compensation Services (formerly the Compensation Agency) as it said that they were the opposing party and there are no circumstances such as to require that the panel is separately represented.

[3] Mr Sayers counsel for the Compensation Services submits that it is proper and appropriate for the Panel to be involved in the defence of the challenge to its decision under the 2009 Scheme and that the decision in Darley should not be read as leading to a contrary conclusion.

[4] The issue which therefore arises is which party is ordinarily the appropriate party to appear in response to a judicial review challenge to a decision of the Panel under the 2009 scheme – the Panel or the Compensation Services?

[5] It is a little unusual that the Panel have chosen to raise this issue now founding upon the Darley decision which was given almost 20 years ago. Unusual because until the point was raised in these proceedings Panels have appeared and defended judicial reviews of its decisions. None of the parties has suggested that this practice has given rise to any particular problems. In the absence of particular reasons for adopting a different course in an individual case I can see no reason in principle or practice why Panels should not continue to appear and defend applications for judicial review of their decisions.

[6] The suggestion of the Appeals Panel is founded on the following passage of the decision in Darley at p387 letters b-e:

> "The employer, the respondent to the original proceedings before the industrial tribunal, did not appear and was not represented in the judicial review application, either in the Queen's Bench Division or in this court. The tribunal itself appeared to defend the application in the court below and pursued the appeal, in order, as counsel informed us, to defend the challenge to its procedures. Counsel submitted that this was an appropriate course for the tribunal to adopt, but we are unable to agree. In our opinion the proper party to contest an appeal from a decision of an industrial tribunal or an application for judicial review is normally the opposing party in the proceeding before the tribunal whose decision is challenged. There may be circumstances when it is appropriate for a tribunal to be separately represented, for example if there were an allegation of personal misconduct on the part of the members of the tribunal, but such cases will be very rare. In the ordinary way we consider that the opposing party is the correct person to undertake the task of upholding the tribunal's decision and putting forward any necessary defence of its procedures. If in any case the opposing party does not appear to contest the appeal, it will be for the appellate court to determine whether it wishes to ask for other representation in some form so that the contrary case can be properly argued".

[7] It is common case that this statement is not reflective of the practice *post*-Darley of judicial reviews of decisions in respect of criminal injuries

compensation. Mr Sayers cited by way of example Re Skelly's Application [2005] NICA 31 and Re Winters' Application [2007] NICA 46 where the respondent Panels participated in defence of the challenge to its decision. The Panel frankly acknowledged that it has in the past appeared and defended applications for judicial review of its decisions.

[8] Mr Sayers drew my attention to the suggestion that the statement – which does not form part of the *ratio decidendi* of Darley – is confined in its application to proceedings derived from industrial tribunals:

> "There is authority to suggest that, where an industrial tribunal's decision is challenged by way of judicial review, the opposing party in the substantive proceedings is the proper party to appear in defence of the tribunal's decision; and that the tribunal itself should only be separately represented in rare circumstances, for example if there was an allegation of personal misconduct on the part of its members. The same authority suggests that if the opposing party does not appear to defend the decision under attack, it is for the Court to determine whether it wishes to ask for representation in some form so that the contrary case can be properly argued. This decision appears to address itself to the industrial tribunal only. As to courts, it is also open to a court which is judicially reviewed to take a neutral stance in relation to the outcome of the proceedings. However, in current judicial review practice it is not uncommon for courts whose decisions are challenged by judicial review to appear and seek to defend those decisions even where the attack is simply founded on breach of procedural fairness or error of law rather than any allegation of actual bias or bad faith". [Larkin & Scoffield: Judicial Review in Northern Ireland: A Practitioner's Guide (2007) para11.08]

[9] Whether or not the statement is confined in its application to Industrial Tribunals I agree with Mr Sayers that Darley should not be considered to be of general application in cases in which the underlying proceedings do not involve a purely adversarial *lis inter partes*.

[10] In the field of coronial law, the statement in Darley is read as advisory rather than prescriptive. Mr Sayers made good this point by reference to the very recent decision of the Court of Appeal in Re Jordan's Applications (Preliminary Issue) [2014] NICA 36 in which it considered (and rejected) an objection to the participation of the coroner in adversarial judicial review proceedings, raised on the basis of *Darley*. The Court of Appeal did not accept:

> "… that the court should prohibit the coroner from becoming involved as an adversarial party other than in circumstances where the court considers that there is some important aspect of coronial law to be decided or there is no opposing party" [19].

[11] The Court of Appeal observed that Darley:

> "… was a case in which the court was giving *guidance* to inferior courts about the manner in which they should generally participate in judicial review proceedings. The respondent was the industrial tribunal. Proceedings before the tribunal are invariably adversarial so there is normally an opposing party. The circumstances in which the tribunal would wish to actively participate in the judicial review proceedings are, therefore, even rarer than those in which the coroner may feel it necessary to intervene. Having given advice indicating that tribunals should normally not intervene in support of any party the court did not strike out the appeal but went on to deal with the merits. That supports the view that it is for the tribunal to determine how it should participate taking into account the advice. Where the tribunal does intervene it leaves itself open to orders for costs and the possibility of a hearing before a different tribunal being directed by the court. We agree with all of that.
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> The respondent in these proceedings was the coroner who heard the inquest. It was his responsibility to decide whether to appeal the judicial review decision and if so on which grounds. It would be quite inappropriate for that decision to be made by the Coroner's Service since in certain circumstances that might debar all of the coroners from hearing any further proceedings in respect of this death. In our view the same position would apply to an appeal by any inferior court or tribunal" [21] – [22].

[12] Mr Sayers submitted that it is apparent from these paragraphs that the statement in Darley is considered by the Court of Appeal to have constituted advice against a tribunal intervening *in support of any party*.

[13] Counsel however did not accept that such a concern properly arises in respect of criminal injuries compensation adjudications. In support of that contention the court was referred to Kerr v Department for Social Development [2004] UKHL 23, where it was noted by Baroness Hale at [61] – [62] that:

"Ever since the decision of the Divisional Court in *R v Medical Appeal Tribunal (North Midland Region), Ex p Hubble* [1958] 2 QB 228, it has been accepted that the process of benefits adjudication is inquisitorial rather than adversarial. Diplock J as he then was said this of an industrial injury benefit claim at p 240:

> 'A claim by an insured person to benefit under the Act is not truly analogous to a lis inter partes. A claim to benefit is a claim to receive money out of the insurance funds . . . Any such claim requires investigation to determine whether any, and if so, what amount of benefit is payable out of the fund. In such an investigation, the minister or the insurance officer is not a party adverse to the claimant. If analogy be sought in the other branches of the law, it is to be found in an inquest rather than in an action.'

What emerges from all this is a co-operative process of investigation in which both the claimant and the department play their part. The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But where the information is available to the department rather than the claimant, then the department must take the necessary steps to enable it to be traced".

[14] Counsel also relied on a passage which he submitted is to similar effect albeit in a quite different context. Considering the determination to be made by the Sentence Review Commissioners under section 3 of the Northern Ireland (Sentences) Act 1998, Lord Carswell in Re McClean's Application [2005] UKHL 46 observed:

"Although the prisoner obviously wants the Commissioners to find that the conditions have been satisfied, it is not a *lis inter partes*, and it is not the function of the Secretary of State to prove the case for keeping him in custody. The Commissioners will seek the information on which to make their decision from whatever source it may be obtained. That will include the prisoner, who will be concerned to show in relation to the fourth condition that his future behaviour is likely to constitute no danger to the public. It may also include information from the prison and security services about his past and present activities and associations, which will not necessarily be

> unfavourable to him. When they have assembled the information which they deem necessary the Commissioners determine whether the four conditions have been satisfied".

[15] I accept the submission that Compensation Services is not properly to be regarded as a party adverse to the applicant. Its function is to make an administrative decision in accordance with the 2009 Scheme, not to prevent the applicant from obtaining compensation. Furthermore, Mr Sayers contended that the powers of the appeal Panel enable an approach that is in part inquisitorial as the Scheme mandates that the procedure at hearings will be as informal as is consistent with the proper determination of appeals; that adjudicators will not be bound by any rules of evidence which may prevent a court from admitting any document or other matter or statement in evidence; that the appellant, the DOJ *and the adjudicators* may call witnesses to give evidence and may cross-examine them" (2009 Scheme, paragraph 77).

[16] Against that background there is force in the contention that the Panel should therefore be placed in a category more readily comparable to social security benefit adjudications and inquests than to purely adversarial proceedings involving a *lis inter partes* before an industrial tribunal or a Magistrates' Court.

Conclusion

[17] In Auburn, Moffett & Sharland "*Judicial Review: Principles and Procedure*" (2013) at para 24.54 the approach to identifying the proper respondent in judicial review proceedings is set out:

> "The defendant to a claim for judicial review will be the public body whose enactment, decision, action, or failure to act is the subject of the challenge, or the public body that has legal responsibility for the matter" [Judicial Review – Principles and Procedure (2013) para 24.54].

[18] As counsel pointed out the respondent, rather than a notice party that did not take the impugned decision, is generally the party to whom a defence of the judicial review challenge naturally falls. It is that respondent against whom an award of costs will generally be made if the challenge to the impugned decision is successful. This has been the practice over many years specifically in the context of judicial review challenges to decisions in respect of criminal injury compensation.

[19] In the context of criminal injuries compensation, application of the statement in Darley would reverse the longstanding *post*-Darley practice and result in another body –the Compensation Services - who did not take the impugned decision having to take over the defence of that challenge and being exposed to an adverse costs order for a decision it did not make.

[20] The artificiality of such a situation counsel submitted may be particularly pronounced where (as in the present case) Compensation Services would be required to defend an Appeals Panel decision which departed in part from the reasoning of Compensation Services in its earlier decision-making.

[21] The *post*-Darley practice of Panels defending their impugned decisions is now of some vintage and there is no suggestion that the prevailing practice has given rise to any problems. It appears therefore to have worked and be working well. Darley is merely advisory not prescriptive and does not appear to have been extended beyond the context in which it arose. In any event I do not consider Darley to be of general application to cases such as the present not involving a purely adversarial *lis inter partes*.

[22] Accordingly, I hold that there is nothing in principle inappropriate or objectionable about Panels being involved in the defence of challenges to its decisions under the 2009 Scheme.