

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 53 J.R.]

BETWEEN

ALWYN BYRNE

AND

APPLICANT

CRIMINAL INJURIES COMPENSATION TRIBUNAL, DEPARTMENT OF JUSTICE AND EQUALITY, IRELAND AND ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice White delivered on the 27th day of January 2017

1. The applicant filed an *ex parte* docket on 5th February, 2015, together with a statement of grounds.

2. On 9th February, 2015, Noonan J. granted leave to bring an application for judicial review seeking the following reliefs:-

(i) an order of *mandamus* directing the first named respondent to make a final determination in accordance with law on the applicant's application for compensation under the scheme of compensation for personal injuries criminally inflicted;

(ii) a declaration by way of an application for judicial review that the delay in progressing the assessment of the applicant's claim for compensation is in breach of the duty on the respondents and/or each and/or either of them to provide for the determination of her claim in vindication of the applicant's right to constitutional justice in the manner in which the scheme is operated;

(iii) a declaration by way of an application for judicial review that the first named respondent, by reason of delay in concluding its assessment of the applicant's claim for compensation under the scheme of compensation for personal injuries criminally inflicted, is in breach of duty in failing to exercise its powers under the scheme in a fair and reasonable manner;

(iv) a declaration by way of an application for judicial review that the second named respondent by reason of delay in appointing members to the first named respondent to permit the conclusion of the applicant's claim for compensation under the scheme of compensation, is in breach of duty in failing to discharge its functions in a fair and reasonable manner;

(v) a declaration by way of an application for judicial review that the delay in progressing the applicant's claim to conclusion under the term of the scheme results in a breach of the applicant's right to fair procedures and/or constitutional justice in the administration of the scheme;

(vi) a declaration by way of an application for judicial review that the failure of the State to provide and/or ensure the proper functioning of the first named respondent is in breach of its duty to provide for the vindication and/or protection of the applicant's fundamental rights as a victim of crime to bodily integrity and/or health and/or an effective remedy and/or access to justice and her compensation for damages;

(vii) a declaration by way of an application for judicial review that the State is in breach of its duty to provide for the protection of the constitutional rights of the victims of crime by reason of the failure to provide for the effective operation of the scheme of compensation for criminally inflicted injuries and/or to broaden the terms of such scheme to fair and appropriate compensation including compensation for pain and suffering;

(viii) damages for breach of rights to constitutional justice by reason of the delay in progressing the applicant's application under the scheme of compensation;

(ix) damages for breach of rights to protection and vindication of the applicant's right to bodily integrity and/or to health and/or access to justice and/or compensation for damages as the victim of crime protected as a personal right of the applicant under Article 40.1 and/or 40.3 of the Constitution;

(x) damages pursuant to s. 3 of the European Convention on Human Rights Act 2003 for a breach of Article 6 and/or 8 and/or 13 of the Convention; and

(xi) a declaration pursuant to s. 5 of the European Convention on Human Rights Act 2003, that the scheme of compensation for criminally inflicted injuries as incompatible with the provisions of the European Convention on Human Rights.

3. The application was grounded on the affidavit of the applicant sworn on 2nd February, 2015. A motion was issued on 11th February, 2015, originally returnable for 14th April, 2015. The statement of opposition was filed on 29th April, 2015, together with a supporting affidavit of Sean Hegarty, sworn on 29th April, 2015. The applicant swore a further replying affidavit on 13th October, 2015, and her solicitor, James McGuill, swore an affidavit on 6th May, 2016. The matter was at hearing before this court, on 26th, 27th, and 28th October 2016, and judgment was reserved.

4. The applicant was the victim of a serious assault on or about 5th May, 2002, when a stranger John Patrick Joyce entered the residence she was staying in, and attacked her by hitting her over the head with an iron bar. He was convicted of assault contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997 and at Cavan Circuit Court on 16th November 2004 was sentenced to

four years imprisonment.

5. The applicant made an application to the first respondent soon after the event in 2002, for recovery of her out of pocket expenses including a substantial claim for loss of earnings. The scheme does not provide for compensation for pain and suffering or future pain and suffering.

6. An interim award was made by the first named respondent on 21st December 2009, broken down as follows, loss of earnings €73764, out of pocket expenses, €2080.29, cost of further studies, €6950. The loss of earnings covered 2002 to 2009, and was calculated based on gross earnings for the year ended 5th April 2001.

7. A final decision was made on 5th February, 2015, when she was awarded a further €80,000 making a total award of €162,794.29.

8. There is some concern on the respondent's part that the application for leave was made at a time when the applicant was aware that a final decision had been made, and that an email of 26th January 2015 from the first respondent to the solicitor for the applicant was not opened to the court. I am satisfied that when the ex parte docket and statement of grounds were filed on behalf of the applicant, on 5th February 2015, and the leave order granted on the 9th February the applicant was not aware that a final decision was either imminent or made. The email of 26th January 2015 was exhibited in the leave application.

9. The applicant had been dealing with her own claim to 30th November, 2010, when MacGuill & Company Solicitors began to act for her. It is difficult for the court to establish if there was any culpable delay on the part of the first named respondent from the time of the application to the period MacGuill & Company started to act for her. There are huge gaps in the correspondence exhibited before the court which it had to place in order.

10. The statement of grounds while referring briefly in para. 5 to the delay of seven years from the date of submission of the claim to the date of the interim award, thereafter concentrated on the periods subsequent to 30th November, 2010, up to the date of filing of the statement of grounds for leave to apply for judicial review on 5th February, 2015.

11. From the documentation the court has considered, it has concern that an applicant who had serious injuries as a result of a grievous assault had to wait seven years for an interim award. That does not reflect well on the First Respondent.

12. The applicant alleges further delay on the part of the first named respondent from 30th November, 2010, to 5th February, 2015, a total period of four years and two months.

13. By letter of 6th January, 2011, the first named respondent wrote to the solicitor for the applicant requesting an actuarial report. The actuarial report was sent on 7th June, 2012.

14. The Tribunal then wrote requesting further particulars on 30th October, 2012, and this was replied to on 16th July, 2013. The delay the responsibility of the first named respondent was from 16th July, 2013, up to the date of application for leave on 5th February, 2015, and also the date of the final decision. It was not contributed to by the applicant.

15. In a conversation with Mr. Hegarty of the Tribunal on 12th July, 2014, the solicitor for the applicant was informed that it appeared to be a case for a three member Tribunal and that presently there was only a chairperson and no members. Again on 29th July, 2014, Mr. Hegarty noted in a conversation with Mr. MacGuill that an oral hearing had been requested but that there were no members presently to hear the case.

16. A warning letter was sent to the first named respondent and the second named respondent on 15th January, 2015, threatening that on the expiry of seven days to apply for judicial review. On 26th January, 2015, the first named respondent sent an email to the solicitor for the applicant indicating that the Tribunal chairman was reviewing the papers and that as soon as a decision was reached that they would be informed.

17. The letter of 6th February, 2015, notifying the applicant through her solicitors that a final decision had been made by a single member was received by the solicitors on 10th February, 2015.

18. The applicant has lodged an appeal to a three person member of the Tribunal as she is not satisfied with the final decision. The court has been informed by a letter of 13th January, 2017, that the applicant's appeal has been fixed for Monday, 6th February, 2017.

Mootness and the Appropriateness of Judicial Review as a

Remedy for the Applicant

19. The respondents have argued that as the final decision has been made, these proceedings are moot. The claim for *mandamus* is moot, but the other reliefs sought by the applicant are not moot as she seeks a number of declarations on the impact of delay, on the structure and resourcing of the tribunal and a declaration pursuant to the European Convention on Human Rights Act 2003.

Compensation for Pain and Suffering

20. At VII of the leave order, the applicant seeks:-

"A declaration by way of an application for judicial review that the State is in breach of its duty to provide for the protection of the constitutional rights of the victims of crime by reason of the failure to provide for the effective operation of the scheme of compensation for criminally inflicted injuries and to broaden the terms of such scheme to fair and appropriate compensation including compensation for pain and suffering."

In this context the court has considered the judgment of this Court in *A.D. v. Ireland*, judgment of Carroll J. of 29th July, 1992, [1994] 1 I.R. 369, it was held by Carroll J.:- in rejecting the plaintiff's claim, 1, that the plaintiff had an unenumerated constitutional right to "bodily integrity" which right had been violated by the crime committed against her.

Ryan v. Attorney General [1965] I.R. 294 applied.

2. There was no constitutional right to compensation for criminal injuries.

3. The State had not failed to vindicate the plaintiff's constitutional right to bodily integrity as far as practicable by failing to

compensate her for the pain and suffering resulting from criminal injury; that the question of compensation for such injury was a matter of policy to be determined by the government and the Oireachtas.

Per curiam : That where a constitutional right was being ignored by the State the courts would find a remedy in the absence of the State undertaking to observe that right.

21. Insofar as this judgment decided that the lack of provision for compensation for pain and suffering in the scheme, does not impinge on the constitutional rights of a victim of crime, this court agrees.

EU Council Directive 2004/80/EC

22. On 29th April, 2004, the European Council adopted a Council Directive 2004/80/EC relating to compensation to crime victims, which provided that crime victims in the European Union should be entitled to fair and appropriate compensation for the injuries they have suffered regardless of where, in the European community, the crime was committed.

23. Article 1 of Chapter 1 of Directive 2004/80/EC required Member States to ensure that the victim of a violent and intentional crime committed in a Member State in which the victim was not habitually resident had the right to submit an application for compensation in that State.

24. The applicant has submitted that the Directive requires the State to have in place a compensation scheme for victims of violent crime under which victims are entitled to fair and appropriate compensation (Recital 6 and Article 12.2 for the injuries they have suffered. The applicant went on to submit that the scheme properly applied should provide compensation for the full extent of the special damages associated with all injuries, physical and psychological, such compensation to be measured by reference to the actuarial evidence and in accordance with normal standards applying under the Civil Liabilities Act and that this Court had the jurisdiction to identify for the benefit of the Tribunal, the proper parameters of its jurisdiction.

25. This Court accepts that the fact of the scheme being ex gratia does not change the nature or weaken the rights of the applicant's rights derived as they are from an obligation on the State under the Constitution and under international law.

26. However, this Court is not of the opinion that the Directive gives this Court the right to set out the proper parameters of the Tribunal's jurisdiction or how it should deal with an award of compensation. That is a matter for the Tribunal itself. If on appeal, the applicant is dissatisfied that the Appeals Tribunal did not consider her claim properly by not giving due weight to the actuarial evidence advanced on her behalf or the nature of her injuries it is open to her to apply by way of judicial review in respect of that decision. However, it is not a matter for the court at this stage.

27. The court accepts the submission of the respondents that the failure of the State to place a Tribunal on a statutory footing does not amount to any breach of the applicant's rights.

28. On reading Directive 2004/80/EC, it relates more so to cases with a cross border element and the obligation upon the State to provide for compensation to EU citizens who fall victims to crime while in the territory of another Member States. The applicant relies on the EU judgment of the Grand Chamber of 11th October, 2016, Council v Italy. In the court's opinion that judgment does not place an obligation on this Court to set out the manner and scope of a scheme for the compensation of victims of crime.

Rights Defeated by Delay: Right to Constitutional Justice and Fair Procedures.

29. The court accepts the submission of the applicant that the jurisprudence dictates that the Criminal Injuries Compensation Scheme attracts the protections of constitutional justice in its administration. Finlay C.J. in *State (Creedon) v. Criminal Injuries Compensation Tribunal* [1988] 1 I.R. 51 at p. 55, stated:-

"I feel I should add that for a tribunal of this nature, even though it is not of statutory origin and is set up by an administrative decision by the Government, to reach a conclusion rejecting in full the claim of an applicant before it and not to give any reason for that rejection is not an acceptable and proper form of procedure."

30. The court also accepts that it is a well established principle of administrative law that the entitlement to a reasonably prompt decision is an aspect of constitutional justice and approves the dicta of Edwards J. in *KM & DG v. Minister for Justice, Equality and Law Reform* [2007] IEHC 234, when he stated:-

"I am satisfied that the entitlement to a prompt decision is an aspect of constitutional justice. Moreover, quite aside from constitutional justice it is clear from the authorities that the idea of substantive fairness includes a duty not to delay in the making of a decision to the prejudice of fundamental rights."

31. The final decision of the first respondent was close to 13 years after the assault. This Court when it takes into consideration its concern about the delay from the initiation of the claim to the interim award and the further delay from 16th July, 2013 to 5th February, 2015, decides that the applicant is entitled to a declaration in accordance with para. 2 of the leave order that is:-

"A declaration by way of an application for judicial review that the delay in progressing the assessment of the applicant's claim for compensation is in breach of the duty on the respondents and/or each and/or either of them to provide for the determination of her claim in vindication of the applicant's right to constitutional justice in the manner in which the scheme is operated."

32. As the Tribunal made an interim order on 21st December, 2009, of €82,794.29, paid on 15th February 2010, and as a final decision was made on 5th February, 2015, just as the leave application was made, and as the appeal is about to be heard on 6th February, 2017, the court in its discretion declines to make any award of damages in favour of the applicant.

33. As the court has determined the issue on Irish constitutional principles, it is not required to consider the applicant's claim of breach of the European Convention on Human rights.