

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 214 J.R.]

BETWEEN

PAUL DOYLE

APPLICANT

AND

THE CRIMINAL INJURIES TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND THE ATTORNEY GENERAL

RESPONDENTS

[2016 No. 597 J.R.]

BETWEEN

GARY KELLY

APPLICANT

AND

THE CRIMINAL INJURIES TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND THE ATTORNEY GENERAL

RESPONDENTS

**JUDGMENT of Ms. Justice Murphy delivered on the 30th day of April, 2019**

1. The applicants, Paul Doyle and Gary Kelly, have both lodged claims for compensation for personal injuries criminally inflicted, with the first named respondent, the Criminal Injuries Tribunal. Both applicants have significant criminal records, and are thus liable to have their applications for compensation either rejected or reduced, in accordance with para. 14 of the Criminal Injuries Compensation Scheme, which provides that:-

*"No compensation will be payable where the Tribunal is satisfied that the conduct of the victim, his character or his way of life make it inappropriate that he should be granted an award and the Tribunal may reduce the amount of an award where, in its opinion, it is appropriate to do so having regard to the conduct, character or way of life of the victim."*

2. In lodging their respective applications for compensation, each of the parties signed a certificate of authority that was addressed to the Criminal Injuries Tribunal, which stated as follows:-

*"To the Criminal Injuries Tribunal,*

*a) The statements in Sections 1-8 are true to the best of my knowledge and belief. I understand that I must notify the Tribunal of any change to my circumstances and that any such change may affect the Tribunal's decision as to my entitlement to the assessment of compensation.*

*b) I accept that any discrepancy identified in my Tax affairs may reduce or cancel my entitled to compensation.*

*c) I accept that if I provided false information for the purpose of inflating the amount of compensation payable, the Tribunal may reduce the amount of any award made to me or reject my application entirely.*

*d) I accept that personal details to my application may be retained both as a computer record and as a hard copy record by the Tribunal. I understand that this information will not be used in a manner other than for the reasons identified at (1) to (8) below. Any personal details which I submit in relation to my application with the Tribunal can not be released to be a third party without my prior written consent. This information may, however, be used to generate statistics in relation to administrative reports and to the Tribunal's Annual Report.*

*e) I agree to give the Tribunal all reasonable assistance, particularly in relation to any medical reports which they may require.*

*f) I accept that the Tribunal will take the provisions of Articles 13 and 14 of the Scheme into consideration when deciding my application and this may reduce or cancel my entitlement to compensation.*

*g) I agree to accept any reasonable time-limits which the Tribunal may request for the return of correspondence or in respect of lodging an appeal against the decision of a single Tribunal Member and to state the reason why an appeal is being lodged.*

*h) I accept that any reports, whether medical or financial, paid for by the Tribunal in advance of a decision either by a single Tribunal Member or by a three member appeal hearing offers no guarantee that an award will be made in my case. I also accept that the Tribunal has the right to seek recovery of any such costs in the event that no award is made on foot of my application.*

*i) I authorise:*

*The Doctor(s) and Dentist(s) and the Hospital(s) which I attended as a result of the injuries which I suffered to furnish the Tribunal at their request with a report as to my injuries and treatment.*

*(1) The Gardaí to provide to the Tribunal all information relevant to my application, including a copy of*

*any statement(s) that I have made to them and a list of any convictions which may be recorded against me and details of any cases outstanding against me.*

*(2) The Public Departments from which I receive(d) Social Welfare Benefits and the Health Authority from which I receive(d) free health services to provide the Tribunal with information relevant to my application.*

*(3) The Revenue Commissioners to provide the Tribunal with a statement in respect of my Tax affairs.*

*(4) My employer(s) to provide the Tribunal with a statement of my earnings and other matters relevant to my application.*

*(5) Any Training or rehabilitation Unit which I have attended to provide the Tribunal with any information relevant to my application.*

*(6) My Health Insurance Provider to provide to the Tribunal with all information relevant my application.*

*(7) My Accountant to provide to the Tribunal any information requested by them in relation to my loss of earnings.*

*(8) I understand that the Tribunal may notify the authorities mentioned above and the other State Compensation Bodies, including the Office of the Chief State Solicitor that I have submitted an application to the Tribunal and may inform them of the Tribunal's decision."*

3. In its guidance notes for applicants, the Tribunal sets out the background to the compensation scheme; the nature and membership of the Tribunal; and guidance on completion of the application for compensation to the Tribunal. It points out to any intending applicant that the Tribunal is obliged to request a report from the Gardaí in relation to all applications. It goes on to state the following:-

*"the relevance of the Garda Report to the Tribunal is;*

- a. To ascertain whether or not the applicant has suffered personal injuries as a result of a crime of violence.*
- b. Whether the applicant contributed by his/her conduct to the incident which resulted in his/her injuries.*
- c. Whether his/her character is such as it makes it inappropriate for compensation to be awarded, and*
- d. Whether he/she has co-operated with the Gardaí in the investigation of the crime."*

The guidance note advises applicants that a Tribunal Member, when considering an application, will read the garda report, and must then consider the provisions of Article 13 and 14 of the Scheme as they relate to the application.

#### **Paul Doyle**

4. Having received an application for compensation made by Donal Doyle on behalf of his son, Paul, the Tribunal received a garda report dated 9th June, 2015. The report indicated that the applicant had been injured at his residence in the early morning hours of 6th April, 2014, when in the course of an altercation with his girlfriend's brother, the applicant received three blunt force injuries to the head. The injuries were suspected to have been caused by an axe, which resulted in a serious brain injury, leaving the applicant with very limited speech and severe challenging behaviour, with daily rage episodes. The Gardaí reported that he is wheelchair dependent as a result of the injuries sustained. The Gardaí also provided the Tribunal with a list of the applicant's previous convictions, which is extensive, and dates from 1989 when he was fourteen years of age, up to January 2014, three months before the event giving rise to his application. The range of his offending includes convictions under the Misuse of Drugs Act ; the Larceny Act; the Theft Act; the Criminal Damage Act; the Non-Fatal Offences Against the Person Act; and the Firearms and Offensive Weapons Act, as well as numerous public order offences. He has served a number of custodial sentences, the most significant being a ten-year sentence which was imposed on 13th November, 2000, for offences under the Larceny Act, and the Non-Fatal Offences Against the Person Act.

5. Upon receipt of the garda report, the Tribunal forwarded same to the applicant's solicitor, drawing his attention to para. 14 of the Scheme. The Tribunal invited the applicant to comment further regarding that aspect of his application.

6. By letter dated 18th December, 2015, the applicant's solicitor wrote to the Tribunal and, having adverted to the fact that legal costs are not recoverable under the Scheme, his solicitor stated:-

*"In those circumstances there is little reality in our client being in a position at this juncture to raise funds to pay for the preparation of his claim. This is especially so, when, as appears to be the case here, it may well be that, regardless of the extent of our client's claim and the cost of the preparation of same, he appears to be exposed to a serious risk that under the terms of the scheme, he may receive no compensation at all because of his 'conduct', 'character' or 'way of life'.*

*In these circumstances we require the following:*

*(a) Details of any policy or guidelines whether published or otherwise under which the Tribunal member deciding the application will operate under in relation to the consideration of Article 14 issues.*

*(b) Your confirmation that you will make available to us, prior to any decision being made on our client's application, copies of relevant previous decisions of the Tribunal in relation to the application (and non-application) of Article 14. Our client accepts that such decisions should be redacted to preserve the confidentiality of previous applicants.*

*We will not be in a position to reply fully to your letter of 15th July 2015 until the above is satisfactorily dealt with. We would respectfully suggest that natural and constitutional justice and fair procedures entitles our client to the above, as, inter alia, otherwise the Tribunal would effectively be operating in secret."*

7. After some further correspondence, the Criminal Injuries Tribunal replied on 11th February, 2016. The Tribunal pointed out that applications under the Scheme are considered and decisions made, on an individual basis, and that *ex gratia* compensation may be awarded on the basis of any vouched out of pocket expenses, including loss of earnings, experienced by the victim. The letter confirmed that the Tribunal does not pay legal costs and that it is a matter for the party concerned as to whether they retain legal representation.

8. In response to the request for guidelines in the operation of para. 14 of the Scheme, the Tribunal responded:-

*"In this regard, I wish to advise you that Tribunal members are guided simply by the text of paragraph 14 of the Scheme of Compensation for Personal Injuries Criminally Inflicted which states.*

*'No compensation will be payable where the Tribunal is satisfied that the conduct of the victim, his character or his way of life make it inappropriate that he should be granted an award and the Tribunal may reduce the amount of an award where, in its opinion, it is appropriate to do so having regard to the conduct, character or way of life of the victim.'"*

In respect of the request for copies of previous decisions, the Tribunal stated:-

*"In your correspondence you request that copies of relevant previous decisions of the Tribunal in relation to the application (or non-application) of Article 14 be made available to you.*

*The Tribunal does not keep records in a fashion that would allow for the easy extraction of the information concerning paragraph 14 of the Scheme. Attempting to find any applications matching the criteria outlined in your correspondence would involve the reading of all files held by the Tribunal. The Tribunal does not have the resources to carry out such an extensive task. Your request would also require the staff of the Tribunal to engage in a degree of cross-consideration of applications i.e. of those already finalised with that of your client, whose application has not yet been considered by a Tribunal member. There is no provision in the Scheme for an advance ruling on the application of paragraph 14.*

*It is for Tribunal members to make decisions on claims for compensation. As stated above, in relation to paragraph 14 of the Scheme, members are simply guided by its text in each case and decisions are made on an individual basis.*

*Given the above, the Tribunal is not in a position to provide the copies of decisions requested."*

#### **Gary Kelly**

9. The second applicant, Gary Kelly, applied to the Criminal Injuries Compensation Tribunal on 18th May, 2016 for compensation for injuries sustained in a criminal assault on him, which occurred at his flat at 66 Basin Street, Dublin 8. It appears that as a consequence of the assault, Gary Kelly was hospitalised in Saint James Hospital from the date of the incident, which was late March or early April, 2016 to 16th May, 2016. According to the garda report dated 13th April, 2016, while Gary Kelly was hospitalised, his flat at 66 Basin Street was burgled; the front door was forced in; and his flat, which he shares with his partner, was completely ransacked. The Gardaí are of the view that the assault and the ransacking of the flat are linked. On 25th May, 2016, the Criminal Injuries Compensation Tribunal acknowledged receipt of Mr Kelly's application, and informed his solicitor that they would in due course, request that the Gardaí provide a report into the incident. They advised that once the applicant's condition had stabilised, that they would require certain documentation in order to process his application. The letter from the Tribunal made no reference to para. 14 of the Scheme.

10. Nonetheless on 27th May, 2016, the applicant's solicitor wrote to the Tribunal, stating:-

*"We note that it appears possible that the Tribunal Member deciding this application will consider Article 14 of the Scheme when making a decision on compensation."*

The applicant's solicitor reserved his position on the question of legal costs, and asserted that the failure to provide for legal costs was, in effect, a breach of the requirements of European law. Furthermore, this applicant's solicitor asserted that para. 14 of the Criminal Injuries Compensation Scheme is *"unlawful, inter alia, because it constitutes unlawful discrimination of persons who are unfortunate enough to have criminal records."* The applicant's solicitor also asserted an entitlement to damages in respect of pain and suffering, which damages are specifically excluded under the Scheme. As in the case of Paul Doyle, he sought details of any policy or guideline, whether published or otherwise, under which the Tribunal Member will operate in relation to the consideration of para. 14 issues. He also sought confirmation that the Tribunal would make available to him, prior to any decision being made on his client's application, copies of relevant previous decisions of the Tribunal in relation to the application (and non-application) of para. 14 of the Scheme.

11. Finally, the letter requested that the Tribunal would make a decision on a preliminary basis, as to whether it intended to apply para. 14 in whole or in part, to the applicant's claim. Judicial review proceedings were threatened in the absence of a satisfactory response. Gary Kelly, who was born on 10th March, 1978, also has a significant history of criminal offending, which dates back to 1993 when he was 15 years old. According to the garda pulse record exhibited, he has 30 previous convictions and two foreign convictions, for a range of offences including larceny; robbery; and misuse of drugs, as well as a number of public order offences relating to intoxication in a public place. He appears to have served time in custody, particularly in the late 1990s and early 2000s.

#### **Proceedings**

12. On 11th April, 2016, Paul Doyle applied *ex parte* for leave to apply by way of an application for judicial review for the following reliefs:-

*(i) An order of mandamus compelling the first respondent to make available to the applicant and his legal advisors copies of previous decisions of the first respondent relating to claims such as that being made by the applicant, and in particular, copies of decisions relating to the application or non-application of Article 14 of the "Scheme of Compensation for Personal Injuries Criminally Inflicted".*

(ii) A declaration by way of application for judicial review that the Scheme for compensating victims of criminally inflicted injuries in the State known as the "Scheme of Compensation for Personal Injuries Criminally Inflicted" is inadequate by its terms to provide such benefit to the applicant as is his entitlement under European law.

(iii) A declaration by way of application for judicial review that the State has failed to properly transpose into national law and/or implement the provisions of Council Directives 2004/80/EC and 2012/29/EC.

(iv) A declaration by way of application for judicial review for the failure by the State to provide for an effective remedy to be available to the applicant in respect of any decision made by the first respondent in respect of the applicant's claim for compensation is in breach of European law, in particular Article 47 of the Charter of Fundamental Rights of the European Union and in breach of the applicant's rights pursuant to the Constitution, in particular, the combined effect of Article 34.1, Article 34.3.1 and Article 40.3.2 thereof.

(v) Such further or other relief as to this Honourable Court may seem meet.

(vi) An order providing for an award of the costs of these proceedings to the applicant.

13. On Monday 25th July, 2016, Gary Kelly, sought and was granted leave to apply for the same reliefs sought by Paul Doyle. In addition, Gary Kelly sought and was granted leave to apply by way of judicial review for the following reliefs:-

(i) A declaration by way of application for judicial review that "fair and appropriate compensation" provided for in Article 12.(2) of Council Directive 2004/80/EC must be interpreted as comprising of or including general damages for pain and suffering, or, in the alternative, a declaration that Article 12.(2) of Council Directive 2004/80/EU is invalid.

(ii) A declaration by way of application for judicial review that the failure of the first named respondent to assume responsibility and pay the applicant's reasonable legal costs and expenses upon the successful completion of a claim is incompatible with Article 47 Charter of Fundamental Rights of the European Union.

(iii) A declaration that para. 2 of the Scheme of Compensation for Personal Injuries Criminally Inflicted is incompatible with Article 47 Charter of Fundamental Rights of the European Union.

(iv) A declaration that fair procedures and the principle of effectiveness require there to be in place a system or regime whereby the applicant is entitled to have dealt with as a preliminary issue the questions of:-

(a) Whether an extension of time will be provided within which to claim compensation under the Scheme of Compensation for Personal Injuries Criminally Inflicted, and

(b) Whether Article 14 of the Scheme of Compensation for Personal Injuries Criminally Inflicted will be applied to the applicant's claim.

14. The court notes that at the time of the application for leave to seek judicial review, the Tribunal had no notice of any previous convictions of Gary Kelly, and had not given any indication that para. 14 of the Scheme was in play. The fact and extent of his previous convictions only emerged in the course of the proceedings.

### **Statement of opposition**

15. The respondents raised a number of preliminary objections in respect of each of the applications as follows:-

a. that the declaratory reliefs sought are premature in that no decision has been made in respect of either applicants' application;

b. that the declaratory reliefs sought in respect of general damages are outside the scope of O. 84 of the Rules of the Superior Courts;

c. that the declaratory relief claimed in respect of Directive 2012/29/EU was not grounded in any plea contained in the statement of grounds and does not concern the payment of damages for pains and suffering or the provisions of legal costs. This objection was accepted by the first named applicant and any claim pursuant to that Directive was discontinued;

d. that the applicants were not within the personal and/or material scope of Directive 2004/80/EC and the applicants lack locus standi to invoke same, because each is an Irish citizen residing in Ireland, and the physical injury complained of was sustained in Ireland, and therefore the applicants cannot rely upon that Directive to invoke rights in EU law, which rights were in any event denied. The respondent also objected that the materials scope of Article 12 of Directive 2004/80/EC extends only to injury sustained by a Union citizen in a Member State other than the Member State of nationality.

16. Subsequent to the hearing of the case, but prior to judgment, Barrett J. in the High Court delivered his decision in the case of *Sultan Chakari v The Criminal Injuries Tribunal & Ors* [2018] IEHC 527. In a succinct decision, Barrett J. found in favour of the respondents on their preliminary objections, which were those set out at a. and b. above. He held:-

*"If Mr Chakari wishes to challenge the Criminal Injuries Compensation Scheme, the correct course of action is to commence plenary proceedings. If he wishes to challenge a decision of the Tribunal, then he must progress his application to the point where there is a decision that is susceptible to judicial review. Order 84 of the Rules of the Superior Courts 1986, as amended, ('Judicial Review and Orders Affecting Personal Liberty') has no application in respect of decisions that have yet to be taken. What Mr Chakari cannot get, with respect, is what he has sought, which is a review of nothing. There being nothing for the court to review, there is nothing further for the court to do, save to refuse all reliefs sought."*

It was accepted by the parties that the same issues and identical legal arguments had been advanced in the *Chakari* case, as had been advanced to this court on these two applications.

The applicants then advanced an argument that notwithstanding the decision of Barrett J., the principle of judicial comity, and the

desirability of consistency in High Court decisions, the court should, in effect, convert these proceedings to plenary proceedings and deliver judgment on that basis.

17. In this instance, the court does not need to adjudicate on the circumstances in which it might be appropriate to convert judicial review applications into plenary proceedings: first, because the court agrees with the findings of Barrett J.; and second, because the court has come to its own conclusion that these applications are fundamentally misconceived.

### **Misconceived applications**

18. These applications are premised on the contention that persons who suffer injury as a result of a criminal act, have a *right* to compensation for that injury, both under Irish law and European law. Ancillary to that *right*, is the applicants' claimed right to legal representation and the costs thereof; general damages for pain and suffering; the right to be furnished with precedents of decisions made pursuant to para. 14 of the Scheme; and the right not to be discriminated against on the basis of criminal convictions. The fact is that there is no such *right* to compensation, either in Irish law or in European law and accordingly, all the claims for ancillary relief are without foundation.

19. As has been clear since the judgment of Carroll J. in *A.D. v Ireland* [1994] I.R. 369, there is no constitutional right to compensation for criminal injuries. The Scheme of Compensation for Personal Injuries Criminally Inflicted was introduced by the Irish Government in 1974 as a matter of social policy. The Scheme introduced, is *ex gratia* and non-statutory. Social policy is liable to change, at the option of the Government. One such change was introduced in 1986, when the Scheme, which had originally included provision for compensation for pain and suffering, was changed to exclude such compensation. That change was challenged unsuccessfully, in *A.D. v Ireland*. The plaintiff in that case (like these applicants) claimed a right to compensation for pain and suffering in vindication of her right to bodily integrity. Carroll J. held that:-

*"The question of compensation is a matter of policy for the Government and the Oireachtas. It seems to be a question on which many States have already made a policy decision to have a scheme of compensation. It is an area in which the Government did have a policy which included pain and suffering and have resiled from it since 1986. But no matter how desirable such a policy might seem, it is essentially a matter for the Government and accordingly the plaintiff must fail in her claim."*

This decision, as well as disposing of the applicants' claim to be entitled to damages for pain and suffering, makes it clear that the existence of a scheme is a matter of social policy, and is not one of legal right.

20. What rights do the applicants enjoy? They have, so long as the Scheme subsists, the right to *claim* compensation under the Scheme, and to have that claim dealt with in accordance with the provisions of the Scheme. In their applications, as set out above, this is acknowledged by or on behalf of, each of them. Having as part of their applications, accepted the terms of the Scheme, they now in mid-application, seek to challenge its terms. This simultaneous approbation and reprobation of the Scheme, is not permissible in law.

As Barrett J. observed:-

*"...the Tribunal is not free to act other than in accordance with the Scheme pursuant to which it was established and in accordance with which it is required to operate. The Tribunal has not 'decided' to act in accordance with that Scheme; it must do so."*

21. The scheme to which the applicants submitted their respective claims, specifically provides at para. 6(e) *"...that compensation will not be payable in so far as injuries sustained on or after 1st April, 1986 are concerned in respect of pain and suffering."*

It provides at para. 27 that:-

*"An applicant may be accompanied by his legal adviser or another person but the Tribunal will not pay the costs of legal representation."*

Paragraphs 9 to 16 of the Scheme provide for 'Limitation and restriction of compensation'.

Paragraph 14 provides:

*"No compensation will be payable where the Tribunal is satisfied that the conduct of the victim, his character or his way of life make it inappropriate that he should be granted an award and the Tribunal may reduce the amount of an award where, in its opinion, it is appropriate to do so having regard to the conduct, character or way of life of the victim."*

Such a limitation is common to all the schemes opened or mentioned to the court in the context of this application. Such a limitation is entirely rational in the context of social policy. Compensation for injuries criminally inflicted, is directed at blameless victims of crime, who, but for the social intervention of states, might otherwise go uncompensated. It is permissible, as a matter of social policy, that those who by their conduct or lifestyle, set themselves against the common good, should be excluded from such a scheme.

22. These applicants claim an entitlement to see previous decisions taken by the Tribunal to refuse or reduce compensation, pursuant to para. 14. At present, the Tribunal does not retain the factual details of specific cases in which compensation has been refused or restricted. It maintains that each decision turns on its own facts. The range of circumstances which might give rise to a refusal or reduction of compensation is, in any event, so varied that previous decisions on particular sets of facts would be of doubtful value to an intending applicant. The fact that one criminal convicted of a serious offence, was awarded compensation, would not mean that every applicant convicted of that same offence would be entitled to compensation. The surrounding circumstances in each case could differ widely so as to result in one being compensated and the other not.

23. There is of course, the requirement that the scheme be operated according to the constitutional norms of fair procedures. Any decision to refuse or reduce compensation taken by the Tribunal would have to be supported by reasons, so that the applicant would be left in no doubt as to the basis on which the decision was reached. Such a decision would be amenable to judicial review.

24. While the Scheme does not require the Tribunal to maintain or disseminate details of previous decisions, that does not mean that intending applicants are left bereft of information as to the operation of the Scheme. Paragraph 19 of the Scheme provides:-

*"The Tribunal will submit annually to the Minister for Justice a full report on the operation of the Scheme together with their accounts. The report and accounts will be laid before both Houses of the Oireachtas. In addition, the Tribunal may, in connection with its annual report or otherwise, publish such information concerning the Scheme and decisions in individual cases as may, in its opinion, assist intending applicants for compensation."*

Every applicant is entitled to access each of the annual reports on the operation of the Scheme, since its inception. The provision of a report is mandatory, as is the requirement that it contain a full report on the operation of the Scheme. It is to be expected that a full report in any given year will contain details of the numbers of claims refused or reduced by virtue of the provisions of para.14.

25. The court notes the second limb of para. 19, which though not mandatory, empowers the Tribunal to publish decisions in individual cases, as may assist intending applicants. The type of decisions which might assist intending applicants are decisions in individual cases which may be of general application. Publication of decisions to grant, refuse, or reduce awards, particularly pursuant to paras. 13 and 14 of the Scheme, might well assist applicants in assessing the consistency of the Tribunal's approach to such claims. However, the article makes it clear that publication of decisions is a matter for the Tribunal's discretion, to be exercised if, in the Tribunal's opinion, it would be of assistance to intending applicants.

### **European dimension**

26. Contrary to the applicants' submissions, as matters stand, there is no *right* to compensation for injuries criminally inflicted, in European Union law. Just as Ireland in 1974, introduced as a matter of social policy, a scheme for the compensation of victims of intentional violent crime, so too has the European Union developed such a policy.

27. The genesis of that policy appears in the 'European Convention on the Compensation of Victims of Violent Crimes' (24 November 1983) (Strasbourg, 24.XI. 1983) ("the 1983 Convention"). While Ireland has neither signed the Convention nor ratified same, the Convention appears to be one of the foundation stones of European Union policy in respect of victims of crime.

28. In its recitals it sets out the basis and objectives of the policy:-

*"Considering that for reasons of equity and social solidarity it is necessary to deal with the situation of victims of intentional crimes of violence who have suffered bodily injury or impairment of health and of dependants of persons who have died as a result of such crimes;*

*Considering that it is necessary to introduce or develop schemes for the compensation of these victims by the State in whose territory such crimes were committed, in particular when the offender has not been identified or is without resources;*

*Considering that it is necessary to establish minimum provisions in this field;"*

Having set out the objectives, the Convention sets out the basic principles of the Convention, in articles numbered 1 to 11.

Article 4 sets out the minimum provisions:-

*"Compensation shall cover, according to the case under consideration, at least the following items: loss of earnings, medical and hospitalisation expenses and funeral expenses, and, as regards dependants, loss of maintenance."*

Articles 7 and 8 set out circumstances in which compensation may be reduced or refused. Of particular interest in the context of this case, is article 8, which provides:-

*1. Compensation may be reduced or refused on account of the victim's or the applicant's conduct before, during or after the crime, or in relation to the injury or death.*

*2. Compensation may also be reduced or refused on account of the victim's or the applicant's involvement in organised crime or his membership of an organisation which engages in crimes of violence.*

*3. Compensation may also be reduced or refused if an award or a full award would be contrary to a sense of justice or to public policy (ordre public).*

Thus from the inception of the social policy of compensating victims of crime, it has been accepted that the provision of compensation to certain victims may not be appropriate.

### **Directive 2004/80/EC**

29. In pursuance of the social policy of providing compensation that is fair and appropriate for the victims of crime, and more particularly to ensure that such compensation was available to Union citizens in cross-border situations, the Union adopted Directive 2004/80/EC. The Directive specifically references the above quoted 1983 Convention at Recital (8):-

*"Most Member States have already established such compensation schemes, some of them in fulfilment of their obligations under the European Convention of 24 November 1983 on the compensation of victims of violent crimes."*

30. Directive 2004/80/EC does not give victims of crime a free standing *right* to compensation for injuries criminally inflicted. Rather, like the Irish Scheme, it gives them the right to *claim* compensation from the national scheme of the state in which they were criminally injured. To give effect to this *right of access to claim compensation in cross-border scenarios*, the Directive requires that each Member State have a scheme, which guarantees fair and appropriate compensation to victims (See Recital (7) and Article 12 of the Directive). Note that the heading to Chapter 1 of the Directive is: '*ACCESS TO COMEPNSATION IN CROSS-BORDER SITUATIONS*'.

31. The operation of the Directive is overseen by the European Commission, and anyone aggrieved by the contents of a particular scheme can make a complaint to the Commission. Thus, the Commission successfully took Italy to the European Court of Justice, because its internal Scheme did not cover all crimes of intentional violence. (*Commission v Italy* (Case C-601/14) [ECLI:EU:C:2016:759])

32. In their submissions, the applicants laid particular emphasis on Recital (3) of the Directive. That states:-

*"At its meeting in Tampere on 15 and 16 October 1999, the European Council called for the drawing-up of minimum*

*standards on the protection of the victims of crime, in particular on crime victims' access to justice and their rights to compensation for damages, including legal costs."*

The Tampere programme of the European Council proposed political guidelines for the establishment of an Area of Freedom, Security and Justice. Under Title V, headed 'Better access to justice in Europe', it does recommend and aspire to the 'minimum standards' set out in Recital (3).

33. Recital (3) certainly seems to envisage the adoption by the Union of minimum standards as a matter of Union law. However, as is clear from the judgment of the ECJ in *Commission v Italy* (cited above), that objective was in fact, abandoned during the legislative procedure which led to the adoption of the Directive. At para. 25 of its judgment, the court states:-

*"Furthermore, the Italian Republic refers to the legislative procedure which led to the adoption of Directive 2004/80, in which it had initially been envisaged that specific rules would be laid down relating to, inter alia, the setting of minimum standards for compensation for victims of crime. However, that initial objective was abandoned."*

It follows that the Directive does not impose on Member States any obligation to meet minimum standards in the provision of compensation to victims for damages, or for legal costs. What the state must provide to victims of crime, is access to a scheme of compensation which is 'fair and appropriate'. The fairness and appropriateness of Member States' schemes is monitored by the European Council and the European Commission. Ireland's Scheme has been submitted to the Commission and to date, no issue has been taken with its fairness or appropriateness.

34. Article 19 of the Directive required that the Commission report on the application of the Directive no later than 1st January, 2009, to the European Parliament, the Council and the European Economic and Social Committee. That report is instructive in that it reviews the national schemes mandated by Article 12, in the context of the requirement to have a scheme which guarantees 'fair and appropriate' compensation to victims. (Section 3.4). While there was variation in the national schemes, for example, a majority of schemes impose an upper limit on the total of compensation available in any one case, "*virtually all schemes contain a provision that reflects the Commission's view that victims who in some way contribute to the circumstances in which they were injured may have their compensation reduced or their claim rejected altogether. By contrast, a substantial majority (4:1) takes the view (not proposed in the minimum standards) that victims who have a criminal record should not for that reason be precluded (in whole or in part) from compensation.*"

Paragraphs 13 and 14 of the Irish Scheme appear to be entirely in line with the schemes operated by other Member States.

## **Conclusion**

35. There is no constitutional right to compensation for injuries criminally inflicted.

There is no free standing right in European law to compensation for injuries criminally inflicted. Victims of crime do have a right to access a scheme of compensation for injuries criminally inflicted. To that end, European law obliges Member States to have schemes which guarantee fair and appropriate compensation to victims. What amounts to 'fair and appropriate' compensation is a policy matter for government, national and/or European, not the courts.

36. The applicants' claims, predicated as they are on the non-existent right to compensation, are therefore, in the court's view, fundamentally misconceived. In light of the court's finding that these applications are both premature and misconceived, the court does not consider it necessary or appropriate to rule on the issue of the applicants' *locus standi* to invoke the provisions of Directive 2004/80/EC. The court does however note the decision of the ECJ in *Paola C. v Presidenza del Consiglio dei Ministri* (Case C-122/13) [EU:C:2014:59], in which an Italian citizen sought to make her government answerable for its failure to implement the Directive 2004/80, and in which the ECJ ruled that it did not have jurisdiction under the Directive to adjudicate on an internal dispute, similar to the one which arises in this case.

37. For the reasons set out in this judgment, the court refuses the reliefs sought by the applicants.