The Criminal Injuries Compensation Scheme.

1. Historical background to The Criminal Injuries Compensation Scheme.

1.1. On 17th May 1974, at the height of the Troubles in Ireland, three bombs exploded in Dublin during the evening rush hour. A fourth bomb exploded in Monaghan almost ninety minutes later. These bombs killed 33 civilians and a full-term unborn child, and injured almost 300 people.[1] The Criminal Injures Compensation Scheme(hereafter referred to as the Scheme) was introduced in 1974 as a response to the tragic events in 1972 now known as the "Dublin Monaghan bombings".

1.2. The overall purpose of the drafted Scheme was to facilitate an applicant with little or no legal knowledge bringing an application to the Tribunal without the necessity of legal assistance. It is the Criminal Injuries Compensation Tribunal that administers the Scheme.

2. The European development of Victim's right to compensation for damages

2.1. On the 29th April 2004 Council Directive 2004/80/EC was introduced. This Directive dealt with compensation to crime victims. However there remained doubt and uncertainty of if Directive 2004/80/EC could be relied upon by a citizen of the European Union against his or her member state of residence because it seemed the Directive concerned only cross-border situations.

2.2. In July 2020 the Grand Chamber of the Courts of Justice of the European Union(CJEU) in the case of Italian Presidency of the Council of Ministers v.

[1] Simon Carswell, "UK urged to Release Dublin and Monaghan Bombing Files" *The Irish Times (*Dublin May 2017)

B.V[2](Hereafter the B.V case) made it clear that there is a right to compensation for citizens against their member state in respect of injuries criminally inflicted under Directive 2004/80/EC.

2.3. The judgment in the B.V case arose on foot of a request for a preliminary ruling under Article 267 TFEU from the Supreme Court of Cassation, Italy in connection with Directive 2004/80/EC. In 2005, an Italian citizen residing in Italy had been the victim of violent sexual crimes committed on Italian territory. The perpetrators of the crimes were convicted and received prison sentences but since their whereabouts was unknown, the sum of €50,000 damages ordered by the court could not be recovered.

2.4. In 2009, B.V. brought a claim in the District Court of Turin against the Presidency of the Council of Ministers in order to establish the liability of the Italian republic for failure to fully and correctly implement the Directive, in particular Article 12(2) of the Directive. She was successful. The Presidency of the Council of Ministers brought an appeal on a point of law, arguing that the Directive was not a source of rights that could be relied on by a citizen of the European Union against his or her member state of residence because the Directive concerned only cross-border situations the compensation established in Italy for the victims of violent intentional crimes (and in particular the crime of sexual violence) in the fixed sum of €4,800 could be regarded as "fair and appropriate compensation to victims" within the meaning of Article 12(2) of Directive 2004/80[3].

2.5. The Grand Chamber ruled that, Article 12(2) of Directive 2004/80 imposes on each Member State the obligation to provide a scheme on compensation to victims of violent intentional crimes committed in its territory[4].

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[2] Case C-129/19 *Presidenza del Consiglio dei Ministri v BV* (2020)

[3] Court of Justice of the European Union Press Release No 94/20*, Member States must grant compensation to all victims of violent intentional crime*, (Luxembourg, 16 July 2020)

[4] Ibid

2.6. Hence the B.V decision now shifts focus onto the Irish Scheme and if it is compatible with Directive 2004/80. The remaining body of this paper will discuss this and if there is need for reform of the Scheme.

3. The scheme can no longer be characterised as an ex gratia scheme

3.1. As a result of the B.V case an Irish resident has a right to fair and appropriate compensation under the Directive 2004/80/. The identification of this right has significant consequences for Scheme which was until the B.V case conceived of as an ex gratia scheme which fell squarely within the range of executive discretion[5]. It is submitted that this is now incorrect and consequently urgent reform is needed in this area to give recognition to the B.V. case. Moreover, in the recent (unapproved) judgement of Judge Ni Raifeartaigh in Kelly & Doyle v Criminal Injuries Tribunal & Ors[6](hereafter the Kelly & Doyle case), concerning the consequences of the B.V case on the Scheme, at paragraph 81 the judge stated:

> *One of the effects of the decision must be that while the Irish Scheme was previously conceptualised in domestic legal terms as a mere non-statutory ex gratia scheme (and indeed so describes itself on its face), which was introduced by the executive as a matter of policy choice (at least insofar as "purely domestic" crimes with no cross-border element were involved),* ***its character must now be conceived of differently****; it must now be seen as the means by which the State gives effect to its obligations under the Directive both as regards cross-border and purely domestic scenarios[7].*

[5] Kelly & Doyle v Criminal Injuries Tribunal & Ors, 2020 IECA 342(COA, 04th December 2020)

[6] Ibid

[7] Kelly & Doyle v Criminal Injuries Tribunal & Ors, 2020 IECA 342,(COA, 04th December 2020), 81

3.2. Hence, as set out in paragraph 1 of the Scheme that it is ex gratia in nature and can be expanded or contracted in its scope as a matter of executive policy is wrong and requires urgent reform.

4. Paragraph 6(e) of the Scheme: Pain and suffering are excluded from compensation

4.1. As a result of the B.V case the issue arises as to if paragraph 6(e) of the scheme means that Directive 2004/80 is inadequately transposed and that an applicant's EU rights are inadequately protected, given that Article 12(2) of the Directive states that:

> *'All Member States shall ensure that their national rules provide for the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories, which guarantees fair and appropriate compensation to victims*[8]'.

As a result of the B.V case once must consider if this paragraph 6(e) of the scheme is consistent with Article 12(2) of the Directive. Must Article 12(2) be interpreted as comprising of or including general damages for pain and suffering?

4.2. The case of B.V did not directly consider the issue of 'pain and suffering' however the CJEU stated that compensation should not be purely symbolic or manifestly insufficient having regard to the seriousness of the consequences for the victims both as regards compensation for material and non-material loss, whereas the Scheme excludes pain and suffering regardless of the consequences of the crime for the victim[9].

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[8] Official Journal of the European Union, *council directive 2004/80/ec of 29 April 2004 relating to compensation to crime victims* (OJ L 261, 6.8.2004) p. 15–18

[9] Kelly & Doyle v Criminal Injuries Tribunal & Ors, 2020 IECA 342(COA, 04th December 2020)

4.3. Justice Ní Raifeartaigh considered this issue in the Kelly & Doyle case:

> *"I am of the view that the B.V. case offers much guidance on what constitutes "fair and appropriate" compensation, but it does not signal definitively whether a member state must provide some compensation for pain and suffering. References in the judgment to the discretion afforded to member states, the need to ensure financial viability of national schemes, the fact that compensation need not be the same as that which would be required of the actual perpetrator, that what is prohibited is something that is "purely symbolic" or "manifestly insufficient", and the approval in principle of schemes that include a fixed-rate approach, all tend to support the State's position. However, the clear and repeated references to "non-material" as well as material loss might be thought to support the appellants' view that compensation for pain and suffering cannot be entirely excluded from the outset. The matter may well ultimately require a reference to the CJEU to indicate the correct interpretation of the Directive*[10]".

4.4. Hence the CJEU reference to compensation for non-material damage seems that Paragraph 6(e) of the scheme may be in contravention of the Directive. Justice Ní Raifeartaigh in Kelly & Doyle case did not refer such a question to CJEU in circumstances were she felt the appellants were too premature in their action, in that neither appellant's case had received consideration by the Tribunal yet

5. 'Conduct of the victim, his character or way of life'

[10] Kelly & Doyle v Criminal Injuries Tribunal & Ors, 2020 IECA 342(COA, 04th December 2020)

5.1. Paragraph 14 of the scheme states no compensation is payable should the claimant, in the opinion of the Tribunal, live a way of life or have such a character that would make payment inappropriate. [11]

5.2. Following the decision of the Grand Chamber in B.V. one may argue that the Directive applies to all victims of violent intentional crime without distinction and as a result so should the scheme. One might argue that paragraph 14 of the Scheme lacks the necessary characteristics of legal certainty mandated by the obligation to provide effective protection to the victims of crime and that vagueness and lack of certainty in the provision offends against principles of legality and respect for the rule of law and the guarantee of effective legal protection enshrined in EU law pursuant to Article 19 of the Treaty of European Union and Article 49 of the Charter[12].

5.3. In the case of Kelly & Doyle Judge Ni Raifeartaigh stated that it was

5.3.1. '*Suppose a man who has a lengthy record of drug-dealing and murder receives injuries in the course of an assault by one of the many enemies he has generated in the course of his criminal lifestyle. I am absolutely persuaded that the Directive does not require that all member states are mandated to give an award of compensation which completely disregards his criminal history and lifestyle, particularly when the Directive in its recitals refers to the 1983 Convention, Article 8 of which suggests a number of situations in which a refusal of compensation might be considered appropriate. The refusal of an award to such a man would not, in my view, constitute a form of discrimination prohibited by the Treaty provisions cited by the appellant[13]'.*

[11] Scheme Of Compensation for Personal Injuries Criminally Inflicted

[12] Kelly & Doyle v Criminal Injuries Tribunal & Ors, 2020 IECA 342(COA, 04th December 2020)

[13] Kelly & Doyle v Criminal Injuries Tribunal & Ors, 2020 IECA 342(COA, 04th December 2020)

6. Absence of legal aid/costs

6.1. Paragraph 27 of the Scheme provides that an applicant may be accompanied by his legal adviser or another person *"but the Tribunal will not pay the costs of legal representation"*. The Tribunal may at its discretion pay the necessary and reasonable expenses of witnesses.

6.2. The question that may arise here is that, in circumstances where the B.V case has stated there is an EU right to fair and appropriate compensation for violent intentional injuries criminally inflicted, there must also be an ancillary procedural right either to have legal aid to mount one's claim for compensation or to have the costs of mounting a successful claim awarded at the conclusion of the process.

6.3. Therefore, one must consider whether the absence of legal aid/possibility of an award of costs constitutes a limitation on the right of access to the Tribunal which impairs the core of the right to compensation. However, one must take into consideration that the scheme designed to be as simple as possible and its purpose it to be available to a lay person. The process under the Scheme is not an adversarial one; the Tribunal is willing to organize and pay for any necessary reports with regard to an applicant under the Scheme and there is no question of a costs award being made against the applicants at the conclusion of the process.

6.4. In the case Kelly & Doyle Judge Ni Raifeartaigh stated:

6.4.1. *'the proceedings are relatively legally straightforward, even if the medical evidence might be complex. Presumably the appellant would suggest that the application or non-application of paragraph 14 and the "character, conduct or way of life" clause introduces a level of legal complexity into the proceedings, but again I do not see that as being of*

such a level that it brings the case over the line into a category of case where Article 6 of the ECHR or EU law mandates dictates that legal aid be provided. Accordingly, I have reached the conclusion that Article 47 of the Charter, Article 19 TEU, and the principle of effectiveness in EU law, do not require that legal aid must be provided to the appellants in order to vindicate their right under the Directive to receive fair and appropriate compensation by bringing a claim before the Tribunal; nor that the Tribunal must make an award of costs in the event of a successful claim'.

7. The right of access to the previous decisions of the Tribunal?

7.1. No database of decisions is currently maintained by the Tribunal regarding decisions concerning paragraph 14.

7.2. Yet, there is a general principle that a person affected by a decision is entitled to sight of material upon which the decision may be based, Similarly, where a decision-maker's discretion is informed by a policy, the person is entitled to have access to that policy.[14]

7.3. In P.P.A v. Refugee Appeals Tribunal[15] the Supreme Court upheld a decision of the High Court to the effect that the constitutional right to fair procedures required that there be access to previous decisions of the Refugee Appeals Tribunal. In contrast, in the case of Jama v. Minister for Social Protection[16], the High Court refused to grant similar relief in the context of an appeal under the Social Welfare Consolidation Act, 2005. The case concerned an appeal in which there was an issue as to the calculation of the period of time for which the applicant was eligible for child benefit, in circumstances where she was a Somali national whose son was born after she arrived in the State but before she was granted refugee status The High Court (Hedigan J.) accepted the State's argument that the information on

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[15] *P.P.A v. Refugee Appeals Tribunal* [2006] IESC 53, [2007] 4 IR 94
[16] *Jama v. Minister for Social Protection* [2011] IEHC 379

such a database would pose considerable problems in terms of personal and confidential information, and that anonymizing such a large database would be a very costly exercise.

7.4. In Kelly & Doyle Judge Ni Raifeartaigh stated:

> *'while the courts must of course be careful not to trespass into areas of executive function in breach of the separation of powers, the courts may and must sometimes make decisions which have cost, sometimes significant cost, implications for the executive but which may be required as a matter of constitutional fair procedure. If the present case falls within the P.P.A. principle, which was grounded on a requirement of constitutional fair procedures, the court cannot shirk its duty to say so, irrespective of the cost implications. The question then arises, if there is in Irish constitutional law a dividing line between the types of decision-making at issue in P.P.A. and Jama respectively, on which side of the line does the present case fall is consistency in the application of paragraph 14 of the Scheme in different cases an important element to ensure that decisions of the Tribunal are fair rather than arbitrary?'*

8. Judge Ni Raifeartaigh then set out a pertinent hypothetical:

> *'suppose the Tribunal had before it three claimants; and that all their cases were the same in all material circumstances; and that all their criminal records were likewise the same. Suppose, further, that the first claimant received a substantial award of compensation, the second only 50% of that award, and the third no compensation at all. It would seem to me that such inconsistency would be considered unfair. It is in my view the type of matter which is and should be susceptible of a consistency of approach. Accordingly, I would take the view that the Tribunal should strive for a measure of consistency in the application of paragraph 14, even if it currently does not. I pause to say observe that to require of a decision-maker, such as the Tribunal, that it strive for a*

measure of consistency is not the same thing as suggesting that it should be bound by precedent; this was made clear in P.P.A[17]'.

9. Furthermore, one can also look at paragraph 14 of the Scheme through the lens of European Union law and the principle of effectiveness. It could not be said that the right to fair and appropriate compensation under EU law could not be adequately vindicated if the Irish system of compensation allowed room for arbitrary and inconsistent awards because paragraph 14 of the Scheme was applied in an inconsistent manner on the issues of conduct, character and way of life. This is what Judge Ni Raifeartaigh considered in the Kelly & Doyle Judgement. She stated that 'as a matter of fairness of procedure, the claimant should have some idea of how the Tribunal applies paragraph 14 in practice'. She considered the lack of access to previous decisions of the Tribunal to be both a breach of constitutional fair procedures and a failure to protect, effectively, the exercise of an EU right[18]'.

[17] Kelly & Doyle v Criminal Injuries Tribunal & Ors, 2020 IECA 342(COA, 04th December 2020)
[18] Kelly & Doyle v Criminal Injuries Tribunal & Ors, 2020 IECA 342(COA, 04th December 2020)

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2. Court of Justice of the European Union Press Release No 94/20, Member States must grant compensation to all victims of violent intentional crime, (Luxembourg, 16 July 2020)

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7. P.P.A v. Refugee Appeals Tribunal [2006] IESC 53, [2007] 4 IR 94

8. Scheme Of Compensation for Personal Injuries Criminally Inflicted