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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JR123
FOR JUDICIAL REVIEW

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Mr Hugh Southey QC appeared with Mr Steven J McQuitty (instructed by the Northern Ireland Human Rights Commission) for the Applicant
Dr Tony McGleenan QC appeared with Mr Philip McAteer (instructed by the Departmental Solicitors Office) for the Respondent

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COLTON J

[1] I am obliged to counsel for their able written and oral submissions.

Introduction

[2] The court gave a written judgment in relation to the substantial issues raised in this application on 1 November 2021 (*JR123* [2021] NIQB 97). The court granted a judicial review against the Department of Justice ("the Department") and declared that Article 6(1) of the Rehabilitation of Offenders (Northern Ireland) Order 1978 ("the 1978 Order") is incompatible with the applicant's rights under article 8 of the European Convention on Human Rights ("article 8") by reason of a failure to provide a mechanism by which he can apply to have his conviction for a criminal offence considered to be spent, irrespective of the passage of time and his personal circumstances. This judgment should be read in conjunction the substantive judgment.

[3] The court permitted the parties some time, following the judgment, to consider the question of any further relief, particularly with regard to the applicant's pleaded claim for damages. The parties were unable to agree a position. The applicant argues that he is entitled to damages against the Department for the breach of his article 8 rights as declared by the court. The Department resists that submission.

Factual Background

[4] In November 1980, when the applicant was aged 21 he was involved with a group of young men in the petrol bombing of a house. As a consequence he was convicted of possession of a petrol bomb, for which he received a 4 year prison sentence and arson for which he received a 5 year prison sentence. He was released from custody in or around September or October 1982. Since that time he has had no involvement with the criminal justice system and has no further convictions.

[5] In these proceedings he challenged the legality of Article 6(1) of the 1978 Order, the effect of which was to prevent his previous convictions from ever becoming "spent". As set out above the court found in his favour. Paragraph [6] of the judgment sets some of the consequences for the applicant as a result:

> "… He has sought since his release from prison to build a life for himself, completing various qualifications and starting a business. He is actively involved in his local community and has had a partner for about the last 14 years although he has felt too ashamed of his past to tell her about the convictions. He has experienced a number of difficulties and negative consequences of his convictions over the years, for example, in securing employment and insurance. He finds the process of repeatedly having to disclose the convictions to be oppressive and shaming."

[6] At paragraph [14] the court set out the adverse consequences alleged by the applicant as a consequence of Article 6(1):

> "(a) He can never apply to the independent reviewer under Schedule 8A of the Police Act 1997 for a decision that his conviction should not be disclosed as part of criminal record checks.
>
> (b) He needs to disclose his conviction when applying for insurance. He asserts that this has resulted in insurance being refused and which prevents him from obtaining competitive quotes.
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> (c) He has found it difficult to obtain employment in the past. As a result he started his own business.
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> (d) Others may ask for details of previous convictions. For example, the Universities and Colleges, Admission Service ("UCAS"), mortgage providers

and landlords will or may ask about unspent convictions.

(e) He will never be permitted to be fully rehabilitated in law."

[7] At paragraphs [26]-[28] the court held that:

"[26] In his affidavit evidence the applicant has set out the circumstances in which he has in the past been compelled to disclose his conviction and also the potential adverse consequences arising from the impossibility of his conviction becoming `spent' under the 1978 Order. Dr McGleenan on behalf of the respondent does not say that the applicant has failed to establish an interference with his Article 8 rights but submits that any interference is limited. He says that the applicant has not been denied the opportunity to rehabilitate. He points out that he has obtained qualifications and employment. He has established permanent and stable relationships and has not reoffended. He is not uninsured. Any interference he submits is at the lower end of the scale.

[27] In reply Mr Southey suggests that the interference is significant and points to the importance afforded by the ECtHR to rehabilitation in cases such as *Dixon v United Kingdom* [2008] 46 EHRR 41 and *Murray v Netherlands* [2017] 64 EHRR 3 – which dealt with persons sentenced to life imprisonment. He adopts the pithy description of Lord Wilson in the *R(T)* case at paragraph 48 when he (Mr Southey) describes the effect of Article 6 as:

> `A regime which condemned people to suffer, like an albatross which they could never shake off, permanent adverse consequences of ancient wrongdoing notwithstanding completion of the ostensible punishment (if any) and irrespective of its continuing significance.'

[28] The court concludes that there has been an interference with the applicant's Article 8 rights and accepts his evidence that the interference has had a significant effect on him."

The legal framework

[8] Section 8 of the Human Rights Act 1998 provides:

> "(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.
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> (3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—
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> (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and
>
> (b) the consequences of any decision (of that or any other court) in respect of that act,
>
> the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.
>
> (4) In determining—
>
> (a) whether to award damages, or
>
> (b) the amount of an award,
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> the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention."

[9] The legal principles to be applied were summarised by the Court of Appeal in *Jordan* [2019] NICA 61 as follows:

> "[19] The application of the principles on the award of damages for breach of Convention rights was considered by the House of Lords in *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14. That was a case where the issue arose in the context of Article 6 breaches but the House was able to give general guidance:
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> (i) Domestic courts when exercising their power to award damages under section 8 should not apply domestic scales of damages.

(ii) Damages did not need ordinarily to be awarded to encourage high standards of compliance by member states since they are already bound in international law to perform their duties under the Convention in good faith.

(iii) The court should be satisfied, taking account of all the circumstances of the particular case, that an award of damages is necessary to afford just satisfaction to the person in whose favour it is made and it follows that an award of damages should be just and appropriate.

(iv) Section 8(4) of the HRA required a domestic court to take into account the principles applied by the ECHR under Article 41 not only in determining whether to award damages but also in determining the amount of the award.

[20] Greenfield was considered in *R (Faulkner and Sturnham) v Secretary of State for Justice and Another* [2013] UKSC 23 which was a case concerned with breaches of Article 5. Lord Reed, giving the majority judgment, provided some further guidance at [39]:

> '39. Three conclusions can be drawn from this discussion. First, at the present stage of the development of the remedy of damages under section 8 of the 1998 Act, courts should be guided, following Greenfield, primarily by any clear and consistent practice of the European court. Secondly, it should be borne in mind that awards by the European court reflect the real value of money in the country in question. The most reliable guidance as to the quantum of awards under section 8 will therefore be awards made by the European court in comparable cases brought by applicants from the UK or other countries with a similar cost of living. Thirdly, courts should resolve disputed issues of fact in the usual way even if the European court, in similar circumstances, would not do so.'"

[10] In short the court needs to be satisfied that an award of damages is necessary to afford just satisfaction to the applicant. In deciding whether an award of damages is necessary in accordance with section 8 the court should be guided by any clear and consistent practice of the European Court under article 41 ECHR.

[11] The dilemma faced by the court in seeking to identify a clear and consistent practice is exemplified by the judgment of Lord Woolf CJ in *Anufrijeva v Southwark LBC* [2004] QB 1124.

[12] Having quoted Lester & Pannick, Human Rights Law and Practice (1999) to the effect that the case law of the European Court of Human Rights lacks coherence, and advocates and judges "are in danger of spending time attempting to identify principles that do not exist." He goes on to say:

> "59. Despite these warnings it is possible to identify some basic principles the Court of Human Rights applies. The fundamental principle underlying the award of compensation is that the court should achieve what it describes as restitutio in integrum. The applicant should, in so far as this is possible, be placed in the same position as if his Convention rights had not been infringed. Where the breach of a Convention right has clearly caused significant pecuniary loss, this will usually be assessed and awarded. The awards of compensation to homosexuals, discharged from the armed forces in breach of Article 8, for loss of earnings and pension rights in *Lustig-Prean and Beckett v United Kingdom* (2000) 31 EHRR 601 and *Smith and Grady v United Kingdom* (2000) 31 EHRR 620 are good examples of this approach. The problem arises in relation to the consequences of the breach of a Convention right which are not capable of being computed in terms of financial loss.
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> 60. None of the rights in section 1 of the Convention is of such a nature that its infringement will automatically give rise to damage that can be quantified in financial terms. Infringements can involve a variety of treatment of an individual which is objectionable in itself. The treatment may give rise to distress, anxiety, and, in extreme cases, psychiatric trauma. The primary object of the proceedings will often be to bring the adverse treatment to an end. If this is achieved is this enough to constitute `just satisfaction' or is it necessary to award damages to compensate for the adverse treatment that has occurred? More particularly, should damages be awarded for anxiety and distress that has been

> occasioned by the breach? It is in relation to these questions that Strasbourg fails to give a consistent or coherent answer."

[13] None of the parties could refer to a case that was directly on point. Mr Southey in his customary exhaustive review of the Strasbourg jurisprudence referred to a number of cases which he described as comparable and on the basis of which the court could be satisfied that an award of damages was necessary in this case. In particular he referred the court to the following decisions: *Rotaru v Romania* App 28341/95; *Z v Finland* [1998] 25 EHRR 371; *Agapov v Russia* App 52464/15 and *SW v United Kingdom* App 87/18 (judgment delivered in Sept 2021). It is trite law, but nonetheless true, that decisions of this nature are very much fact specific. It is difficult to extract principles from decisions of the European Court.

Reasons for decisions under Article 41

[14] In the court's view the circumstances of the cases relied upon by the applicant can be readily distinguished from the circumstances of this case. Analysing those cases one can see why the court came to the conclusion that damages were necessary to provide just satisfaction to the claimants.

[15] Thus, in *Rotaru* the court was dealing with information held by the Romanian Intelligence Service about the applicant's private life, some of which was false and defamatory. Under the civil code provisions on liability and tort he claimed damages for the non-pecuniary damage he had sustained. He also sought an order, without relying on any particular legal provision, that the Intelligence Service should amend or destroy the file containing the information on his supposed past. The domestic court declared the alleged defamatory information null and void however it refused to rule on the matter of the applicant's claim for compensation for non-pecuniary loss on the grounds that the claim was not a civil one within the meaning of domestic legislation.

[16] The European Court concluded that the domestic court's failure to consider the claim infringed the applicant's right to a fair hearing under article 6 of the Convention.

[17] The court also found a breach of article 13 because of the lack of any effective remedy whereby the applicant could apply for the destruction of the relevant file.

[18] On the question of damages under article 41 the court concluded at paragraph 83:

> "It notes, further, that the Bucharest Court of Appeal declared the allegedly defamatory information null and void, thereby partly meeting the applicant's complaints. The court considers, however, that the applicant must

> actually have sustained non pecuniary damage, regard being had to the existence of a system of secret files contrary to Article 8, to the lack of any effective remedy, to the lack of a fair hearing and also to the fact several years elapsed before a court held that it had a jurisdiction to declare the defamatory information null and void.
>
> It therefore considers that the events in question entail serious interference with Mr Rotaru's rights and the sum of Fr50,000 (this has been calculated at approximately £7,500) will afford fair redress for the non-pecuniary damage sustained."

[19] Mr Southey contrasts this case with the decision in *Marper v UK* [2009] 48 EHRR 50 which involved the retention of sensitive personal data by police. In that case no non pecuniary damages were awarded by the ECtHR. In *Rotaru* in addition to the retention of the data the Ministry of the Interior had disclosed the disputed information to the court in his litigation.

[20] It will be seen that *Rotaru* involved the interface between article 6, 8 and 13. It involved specific disclosure by the state of information which he established to be false and defamatory, in circumstances where the information could not be expunged.

[21] In *Z v Finland* the court was dealing with the disclosure of sensitive medical records relating to the applicant which had been widely disseminated by the press. The court found at paragraph 122 that:

> "Sufficient just satisfaction would not be provided solely by the finding of a violation and that compensation has thus to be awarded."

[22] In *Agapov* the court was dealing with a situation where the applicant was wrongly labelled a criminal by the State despite being never convicted.

[23] In *SW* the court was dealing with a situation where a Family Court judge made adverse findings about a social worker when she gave evidence as a professional witness during a fact finding hearing. He directed that his findings should be disseminated to relevant local authorities and professional bodies without providing her with the opportunity to meet the allegation. Her rights under article 13 had also been breached because she had no access to an effective remedy at the national level capable of addressing the substance of her article 8 complaint; although the domestic court set aside the impugned findings, the social worker had no real prospect of a successful claim for compensation for the loss or damage which flowed from the disclosure to local authorities and professional bodies. The court awarded approximately €24,000 in non-pecuniary damages (approximately £20,000).

[24] The applicant's loss of opportunity to bring a claim for damages in the court's view warranted monetary compensation. The court also recognised that she suffered non pecuniary damage through anxiety and distress.

[25] Mr Southey relied on these authorities on the basis that they were examples where private material was unlawfully disclosed. He submits that these cases demonstrate principles applied by the ECHR under article 41 which would justify making an award in this case consistent with clear and consistent practice of the European Court.

[26] The court accepts that it is open to it to award damages for what might be described as upset, distress and frustration. The court also accepts that the fact that this may not be capable of precise calculation in the way of pecuniary damages is not a bar to the court assessing damages if it considers it necessary to provide just satisfaction to an applicant.

[27] However when the court considers the particular circumstances of this claim it is not persuaded that the cases to which it has been referred establish that the applicant is entitled to compensation by way of damages in accordance with section 8 and the guidance of the Court of Appeal in *Jordan*.

[28] The court is not dealing here with pecuniary loss. At its height the applicant has lost the opportunity to have his conviction regarded as "spent." As a result he has been obliged to disclose it in limited circumstances which it is accepted has caused him distress and frustration.

[29] In the court's view this is a classic public law challenge to a statutory scheme of universal application. It does not involve a case, as was the situation in the decisions relied upon by the applicant, where the State had disclosed specific information relating to the claimant alone. The scheme challenged in this application is in the process of reform. There is a live legislative process in train and it is expected that this judgment will inform that process.

[30] It will be noted that this case was properly supported by the Northern Ireland Human Rights Commission which further demonstrates the public nature of this claim. That alone of course is not determinative of the issue as the applicant contends that the provisions about which he complains have had a particular bite on his personal life and circumstances.

[31] The court considers the approach of Mr Justice Swift in the case of *SXC v Secretary of State for Work and Pensions v Equality and Human Rights Commission* [2019] EWHC 2774 (Admin) is the correct one in this case. That case involved a finding that regulations made by the Secretary of State which made transitional provision for benefits claimants who had transferred to Universal Credit, were unlawful, relying

on article 14 ECHR read together with article 1 of Protocol 1 to the ECHR. At paragraph 12 of his judgment he says:

> "12. In some circumstances a claim under the Human Rights Act 1998 is the vehicle to vindicate rights equivalent to those recognised in private law. The circumstances of *Alseran and D* are examples of such a situation (see per Leggatt J in *Alseran* at paragraph [933]). In such instances, compensation may be the primary if not sole way in which just satisfaction can be afforded for the breach of Convention rights. But the present claim is not of that nature. Rather, the circumstances of this claim are a classic example of an instance where the Human Rights Act is relied on for the purposes of a purely public law challenge. The claim was brought on the premise that when Regulations 3(7) and 3(8) of the Original Regulations were given effect, they would fail to ensure lawful treatment of a class of persons including SXC who had already migrated to Universal Credit. The central objective in this case was to quash the secondary legislation on transitional payments, and require the Secretary of State to think again. The New Regulations have made new provision for transitional payments. Overall, this claim is indistinguishable from the overwhelming majority of public law claims in which one or the other of the remedies specified in Section 29 of the Senior Courts Act 1981 is sought, and in which the grant of that remedy is sufficient to address the wrong alleged. In this case, those remedies are sufficient also to provide just satisfaction for the breach of Convention rights that has occurred."

[32] Returning to the case of *Greenfield* per Lord Bingham at paragraph 19:

> "First, the 1998 Act is not a tort statute. Its objects are different and broader. Even in a case where a finding of violation is not judged to afford the applicant just satisfaction, such a finding will be an important part of his remedy and an important vindication of the right he has asserted. Damages need not ordinarily be awarded to encourage high standards of compliance by member states, since they are already bound in international law to perform their duties under the Convention in good faith, although it may be different if there is felt to be a need to encourage compliance by individual officials or classes of official. Secondly, the purpose of incorporating

> the Convention in domestic law through the 1998 Act was not to give victims better remedies at home than they could recover in Strasbourg but to give them the same remedies without the delay and expense of resort to Strasbourg. Thirdly, section 8(4) requires a domestic court to take into account the principles applied by the European Court under article 41 not only in determining whether to award damages but also in determining the amount of an award. There could be no clearer indication that courts in this country should look to Strasbourg and not to domestic precedents."

[33] At this stage the court notes that it is difficult to identify any directly applicable domestic tort analogous to this situation. One might look at the tort of misuse of private information but it seems this would be somewhat of a stretch. In any event the authorities are clear that that is not the proper approach.

[34] The court also bears in mind the *Ullah* principle recently reiterated by Lord Reed in delivering the unanimous decision of the Supreme Court in *R(on the application of AB (Appellant) v Secretary for Justice (Respondent)* [2021] UKSC 28. Lord Reed pointed out that the approach laid down in *Ullah* has "been repeatedly endorsed at the highest level" – see paragraph 58. At paragraph 57 referring again to the *Ullah* principle Lord Reed says.

> "57. As Lord Browne explained, the intended aim of the Human Rights Act – to enable the rights and remedies available in Strasbourg also to be asserted and enforced by domestic courts – is particularly at risk of being undermined if domestic courts take the protection of Convention rights further than they can be fully confident that the European Court would go. If domestic courts take a conservative approach, it is always open to the person concerned to make an application to the European Court. If it is persuaded to modify its existing approach, then the individual will obtain a remedy and the domestic courts are likely to follow the new approach when the issue next comes before them. But if domestic courts go further than they can be fully confident that the European Court would go, and the European Court would not in fact go so far, then the public authority involved has no right to apply to Strasbourg, and the error made by the domestic court will remain uncorrected."

[35] Having analysed the decisions to which the court has been referred it could not be confident at all that the European Court would conclude that damages were necessary in this case to afford the applicant just satisfaction.

[36] Therefore, taking account of all the circumstances of this case the court is not satisfied that an award of damages is necessary to afford just satisfaction to the applicant. That has already been achieved by the declaration granted by the court. In the court's view the declaration of incompatibility adequately deals with the infringement of the applicant's human rights in the factual context of this case.

[37] The court therefore declines to award damages.