Appeals - Guidance Note on Time limits, fresh evidence and oral hearings.

This Guidance Note sets out the general approach which will be adopted by the single judicial member in respect of certain recurring issues which arise in the context of appeals against the determination of a Redress Board panel. These matters have emerged from the series of appeals against Redress Board panel decisions which have been considered to date by the Right Honourable Sir John Gillen. Much of what is set out below applies equally to Redress Board panels (at first instance). The specific issues covered are;

a. **Extension of the time limit for lodging an appeal;**
b. **Admission of fresh evidence on appeal.**
c. **Direction to hold an oral hearing**

This Guidance Note is made by the President further to Parts 4(2) & 5(6) of Schedule 1 of the Historical Institutional Abuse (NI) Act 2019.

1. Background

The Historical Institutional Abuse Redress Board was established formally on 31 March 2020, further to the recommendations of the Inquiry into Historical Institutional Abuse, which published its Report on 20 January 2017.

2. Function

The principal function of the Historical Institutional Abuse Redress Board is to receive and assess applications for compensation made by or in respect of a person who suffered abuse while a child and while resident in an institution in Northern Ireland, at some time between 1922 and 1995, and to make awards of compensation.

3. Interpretation

In this Practice Direction;

(a) "the Act" means the Historical Institutional Abuse (Northern Ireland) Act 2019;

(b) "the Rules" mean the Historical Institutional Abuse Redress Board (Applications and Appeals) Rules (Northern Ireland) 2020;

(c) "the Hart Report" means the Report of the Inquiry into Historical Institutional Abuse, also known as "the Hart Inquiry";

(d) "the President" means the President of the Redress Board, as described in the Act;

(e) "judicial member" and "other members" of the Board have the meanings ascribed to them in the Act;

(f) "panel" means a panel duly appointed by the President under section 8 of the Act;

4. Statutory Framework

The right to appeal is set out at section 16 of the Act

16 (1)A person who applied for compensation under this Part may appeal against a determination under section 8—

(a)that no compensation is to be awarded to the person, or

(b)as to the amount of compensation to be awarded to the person.

(2)The person bringing the appeal must, when doing so, set out in writing the grounds of the appeal.

(3)An appeal under this section must be made in accordance with such provision as may be made in rules…

The extension of time periods is set out at Rule 20 of the Rules

20(1) The panel appointed under section 8 of the Act to determine an application may, if it considers it necessary do so, extend the duration of a time period provided for by these Rules in relation to the application.

(2) A single judicial member selected under section 16 of the Act to determine an appeal may, if the member considers it necessary to do so, extend the duration of a time period provided for by these Rules in relation to the appeal.

The admission of fresh evidence is dealt with at section 9(3) of the Act

9(3) The panel may, if it considers that there are exceptional circumstances which make it necessary to do so in the interests of justice -

(a) allow fresh evidence to be admitted …

5. General Approach of the single judicial member

(a) Time limits

Rule 12(3) of the Rules provides as follows:

> "An appeal under Section 16 of the Act –
>
> (b) must be submitted to the Board by electronic communication, by post or by direct delivery to the Board (including delivery by courier or messenger service), so that the Board receives the appeal before

the end of the period of 21 days beginning with the notification issue date (as defined by Rule 11(2)).”

Rule 11(2) of the Rules provides:

> “The secretary of the Board must stamp each notification under Section 9(7) of the Act (determination of application) with the date on which the determination is made (‘the notification issue date’) and must ensure that the notification is issued by such means (electronic or otherwise) as the Board may decide.”

Rule 11(3) of the Rules provides

> “The notification must include –
> (a) an explanation of the consequences of failing ,within the period of 21 days beginning with the notification date ,either to give the Board written acceptance of the award or to bring an appeal under section 16 0f the Act

Rule 20 of the Rules provides as follows:

> 20.—(1) The panel appointed under Section 8 of the Act to determine an application may, if it considers it necessary do so, extend the duration of a time period provided for by these Rules in relation to the application.
>
> (2) A single judicial member selected under Section 16 of the Act to determine an appeal may, if the member considers it necessary to do so, extend the duration of a time period provided for by these Rules in relation to the appeal.”

It is very important, particularly in the case of appellants who are legally represented, that the Rules be followed unless there is some reasonable explanation given as to the cause of the delay and that those reasons are sufficient to persuade the single judicial member selected under section 16 of the Act to determine the appeal to extend the period granted for appeal, if the member considers it necessary to do so.

The context of Rule 20 is different from that of section 9(3) of the 2019 Act dealing with the admission of fresh evidence and the grant of oral hearings which permits these only where the panel “considers that there are exceptional circumstances which make it necessary to do so in the interests of justice “.Parliament could easily have imposed the same strictures on extension of time but has clearly chosen not to

do so. Accordingly the single judicial member does not need to find exceptional circumstances in determining to extend time.

On the other hand the word “necessary” has been chosen over more flexible terms such as for example “desirable “ or “preferable. “ The Oxford English dictionary defines “necessary” as “needed to be done, achieved or present; essential”. The word “necessary “is to be found in a plethora of statutes and regulations in a variety of contexts. Hence it is crucial to recognise that its use in this instance is set in legislation that is victim based and which aims to provide a right to compensation for those who have suffered abuse.

The single judicial member will interpret the word “necessary” in the context of its use in cases arising out of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 as set out in Sch. 1 to the Human Rights Act 1998.

In Corporate Officer of the House of Commons v Information Comr [2009] 3 AER 403 at [43] the Divisional Court said:

“It was common ground that “necessary “within para 6 of sch 2 to [the Data Protection Act] should reflect the meaning attributed to it by [the ECHR] when justifying an interference with a recognised right ,namely that there should be a pressing social need and that the interference was both proportionate as to means and fairly balanced as to ends”

The object of the rule in this instance is to give the panel, or the single judicial member determining the appeal, a discretion to extend time with a view to the avoidance of injustice to the applicant /appellant and that this needs to be determined in a proportionate and balanced manner.

Nonetheless it is for the applicant / appellant to persuade the panel that it is necessary to extend time and, for that purpose, may rely on any relevant circumstance.

Time limits are clearly set out in the Rules and on the Determination Notification. This is not merely a time target to be attempted. It is a rule to be observed and followed. It is extremely important, and reflective of the legislative intent that time limits for appeals be honoured. It is not permissible for an appellant to simply transfer to another solicitor sometime after the award has been made and hope that a more effective application can be made by way of appeal long after the time for appeal has been spent.

It is unlikely that time will be extended in the absence of an acceptable explanation for the delay. Delay that has been substantial , procedural abuse, contumelious or repeated or persistent default provide some clear examples of instances where a panel will not find it necessary to extend time. While mere oversight alone will rarely constitute a reasonable explanation for delay, the single judicial member may take account of the fact that we are living in wholly exceptional times in light of the pandemic. The pressures on all businesses, including solicitors’ practices, are enormous, particularly during the recent “lockdown”. Managing a full complement of litigation when staff had been furloughed at times must have presented a herculean task. It would be disproportionate and an unfair balance to visit an inflexible attitude

to the time limits in such circumstances. However, it is likely that a stricter attitude will be adopted even in the case of short delays outside the relevant time limit in future cases when normal, post-pandemic life has resumed.

(b) Fresh evidence

Section 9(3) of the Act states that the panel may, if it considers that there are exceptional circumstances which make it necessary to do so in the interests of justice….allow fresh evidence to be admitted.

Fresh evidence is the phrase which has doubtless been chosen carefully by Parliament. It is not new evidence. Fresh evidence is that which existed at the time of the initial hearing but for various reasons could not be put before the court. New evidence is that which has become available subsequent to the hearing and generally speaking is much harder to gain admissibility as evidence than is fresh evidence. (See *Struck v Struck* [2003] BCCA 623 at paragraph [37]).

"Exceptional circumstances" is a phrase in wide use throughout the law. It is impossible to issue a prescriptive list of circumstances that ought to be considered exceptional circumstances. Each case must be assessed on its own facts and in the context of the relevant legislation. Sensibility and practicality must inform this stringent test.

In *MF Nigeria* [2013] EWCA Civ 1192, Lord Dyson interpreted "exceptional circumstances" as a phrase that entails a test of proportionality rather than a test of exceptionality. Searching for a unique or unusual feature was unnecessary.

In *Hesham Ali* [2016] UKSC 60, Lord Reed said that "exceptional" does not mean unusual or unique but means circumstances in which refusal would result in unjustifiably harsh consequences for the individuals such that refusal of the application would be disproportionate. Although this was spoken in a case involving deportation of foreign criminals, nonetheless a similar principle probably operates in the context of the victim based legislation that governs this compensation.

Equally so, "fresh evidence" must not become a vehicle for those disposed to consider the initial hearing before the Panel as a dry run, and upon dissatisfaction, generate more preparation and more evidence before the appeal. "Exceptional circumstances" will rarely, if ever, embrace a situation where an appellant has simply decided to adopt a new tack or approach in light of his previous effort which has failed to give him the satisfaction he sought. Each original application must be thoroughly prepared in the expectation that no further evidence will be permitted at a later stage.

Unlike the Rules governing the extension of time limits, under s.9(3) it is the exceptional circumstances which must make it "necessary "in the interests of justice to allow the fresh evidence. There is no compelling reason why the "evidence" itself should not be confined to that embraced by Section 9(1) (a), (b), (c) and (d) of the 2019 Act.
The phrase "in the interests of justice" is again a phrase in common usage across a number of contexts in the law. Given the context of this legislation, where the aim is to compensate children who have been abused, the phrase should be intended to

place a broad requirement on the Panel to act with fairness in deciding whether to admit fresh evidence. The aim of Section 9(3) is undoubtedly to focus attention on circumstances which relate to the performance by the Panel members to determine appropriate compensation in a fair manner.

(c) Oral Hearing

The exceptional circumstances test for the admission of fresh evidence also applies to directing an oral hearing. Section 9(3) of the 2019 Act provides as follows:

> "The panel may, if it considers that there are exceptional circumstances which make it necessary to do so in the interests of justice –
>
> (a) allow fresh evidence to be admitted.
>
> (b) direct an oral hearing to be held with the evidence to be given on oath."

The case law and principles set out above (at 5a) in relation to the exceptional circumstances in which fresh evidence may be admitted, applies equally to when a panel / single judicial member may direct an oral hearing.

In determining an application for compensation, the panel may direct that sworn evidence is given at an oral hearing, but can only do so if it considers that there are *"exceptional circumstances"* which make it *"necessary to do so in the interests of justice*" – section 9(3). This is a triple hurdle – "exceptional circumstances" are not defined by the Act, but whatever they are, they must such that it is "necessary" (not desirable or preferable) to hold an oral hearing, and that to do so would be in the interests of justice. What exactly is meant by "the interests of justice" is not defined in the Act either. However, both "the interests of justice" and the "exceptional circumstances" are clearly tied to the performance, by the panel, of its primary task, namely to determine an application for compensation, encompassing both (i) deciding if an award should be made and (ii) if so, how much.

In the case of R (Prathipati) v SSHD (Discretion on Exceptional Circumstances) [2018] UKUT 427 Kerr J rejected the government's submission that exceptional circumstances were restricted to list of examples provided in the relevant guidance. He held that each case depends on its specific facts and that it was, in principle, a question of fact and degree whether exceptional circumstances could be made out.

There are various circumstances in which a panel, or single judicial member might consider holding an oral hearing, however, the plain meaning of "exceptional circumstances" points strongly towards something beyond what is normal**. It is difficult is envisage a scenario where a panel could agree to hold an oral hearing which it did not believe would in some way advance or improve the evidence already available to it in documentary form.** This is the real test of whether there are exceptional circumstances which require an oral hearing to be held. Section 9 of the 2019 Act is based on the assumption that in the majority of cases the panel will be

able to make its determination on the basis of the papers available. Victims / survivors simply wanting to have their 'day in court' is unlikely to amount to an "exceptional circumstance". Any application for an oral hearing should explain precisely why the relevant evidence could not be given just as effectively in written form.

In making its decision on whether or not there are exceptional circumstances requiring a hearing, the panel will have to assess the likelihood of useful oral evidence actually being elicited, bearing in mind the following factors;

- the passage of time;

- the age, health and mental state of the likely witness(es);

- the fallibility of memory, particularly after long periods of time;

- the fact that the witness may be asked to recall events from early childhood;

- the possible impact on the witness in terms of distress / re-traumatisation.

Dated: 6th January 2021

Signed:_____ ___

Historical Institutional Abuse Redress Board

The Honourable Mr Justice Colton
President of the Historical Institutional Abuse Redress Board