Medical reopening - chairman's discretion
-Wednesb - t
Judicial review - not appeal -
proper approach

In those circumstances this application is refused.

DISPOSITION:
Application refused

SOLICITORS:
Cornish & Co, Ilford; Treasury Solicitor

LEVEL 1 - 1 OF 1 CASE

R v Criminal Injuries Compensation Board ex parte Brown

Queen's Bench Division (Crown Office List)

CO/64/87, (Transcript:Marten Walsh Cherer)

HEARING-DATES: 12 November 1987

12 November 1987

COUNSEL:
JA Hooper for the Applicant; N Pleming for the Respondents

PANEL: Macpherson J

JUDGMENTBY-1: MACPHERSON J-

JUDGMENT-1:

MACPHERSON J: In this case Cornelius Walter John Brown seeks judicial review of the decision of the Criminal Injuries Compensation Board made on 14th November 1986. By letter of that date Mr Michael Ogden, QC refused to reopen Mr Brown's case which had been before the Board in 1981 and 1982.

The short history of the matter is as follows. On 19th February 1977 the applicant was shot in the left leg while on duty as an employee of Securicor Limited. In the summer of 1977 he applied to the Board for compensation, as he was entitled to do under the ex gratia scheme set up by the Government a number of years ago now, by which victims of violent crime may be compensated.

On 3rd November 1981 the Board made a final award of compensation to him, and in 1982 that award was accepted. There was no reference or appeal to the three-man tribunal. The decision was made by a Scottish Queen's Counsel called Mr Law. The amount of compensation awarded for the injury and for the risks of future trouble, as then envisaged, was L22,500.

There is no doubt that in 1985 the applicant had further trouble with his left leg. I will return to the nature of that trouble later, but the fact is that he was found in April 1985 to have a sinus which discharged pus. He was re-admitted to hospital and he underwent several operations before he was again cleared for full activity by the doctors, "full activity" meaning of course the activity of which he was capable, bearing in mind the injuries which he had unfortunately suffered in 1977.

Before turning in some more detail to the medical reports and the facts I will read paragraph 13 of the Criminal Injuries Compensation Board Scheme,

since it seems to me important that the whole paragraph should be enshrined in this judgment. Paragraph 13 of the 1979 Scheme reads as follows: "Although the Board's decisions in a case will normally be final, they will have discretion to reconsider a case after a final award of compensation has been accepted where there has been such a serious change in the applicant's medical condition that injustice would occur if the original assessment of compensation were allowed to stand, or where the victim has since died as a result of his injuries. A case will not be re-opened more than three years after the date of the final award unless the Board are satisfied, on the basis of evidence presented with the application for re-opening the case, that the renewed application can be considered without a need for extensive inquiries. A decision by the Chairman that a case may not be re-opened will be final."

There is no appeal against the Chairman's decision. There is no other route therefore by which an applicant can challenge the Chairman's decision, other than the route of judicial review.

This is not a case in which there was evidence that further extensive inquiries were needed, so that the case turns upon the earlier part of that paragraph. What the Chairman had to do was to sit down and look at all the evidence, both that from 1977 up to 1982 and that of 1985 and 1986, and consider whether, in his discretion, the matter should be re-opened because there had

been "such a serious change in the applicant's medical condition that injustice would occur if the original assessment of compensation were allowed to stand."

Those themselves are strong words. It is not said by paragraph 13 that you simply see whether there is a change or indeed a serious change. You have to see whether there is "such a serious change that injustice would occur if the original assessment of compensation were allowed to stand." That is the task set to the Chairman, and according to his affidavit, which is amongst the papers, it is the task which he set about performing in 1986. He looked at the decision that had been made, he looked at all the medical reports, and then he said in paragraph 9 of his decision: "Inevitably, some of these cases are borderline. In the exercise of my discretion, I have to decide on which side of the line such a case falls. I regard this case as a fairly borderline case but concluded that, on the totality of the evidence, I was not satisfied that there had been such a serious change in the Applicant's medical condition that injustice would occur if the original assessment were allowed to stand."

Later he reconsidered the matter, because as he says, he had no wish to deprive the applicant of compensation to which he was entitled and no wish to incur unnecessary legal costs. It appears that he put the matter to another Board member. In my judgment that should be ignored, since the test that I have to apply must be applied to Mr Michael Ogden's reasoning.

CO/64/87, (Transcript:Marten Walsh Cherer)

In those circumstances I must look first at the test that this court has to apply and then at the facts themselves. I have underlined the words "this court" in that earlier phrase, since it is vital to remember and always to remind oneself that this is not a court of appeal from Mr Michael Ogden's decision. I am not reviewing his decision and saying to myself: "Well, I or X or Y might have reached a different decision, or perhaps probably would have reached a different decision." That is simply not the test.

Far too many cases come into this Division of the High Court in which although lip service is paid to the existence of that trap, the trap is in fact ignored. I am not saying that this is one, since Mr Hooper has put the matter with much skill and applied the proper test, but it is vital to recall that is the way in which this court must look at a case of this kind.

The test which I have to apply is indeed the Associated Provincial Picture Houses v Wednesbury Corporation [1948] KB 223, [1947] 2 All ER 680, unreasonableness test. That is of course a shorthand and well-known abbreviation for the full measure of the test which is applied in cases of this kind. There is quite a body of law now, to some of which I see I have myself been a party as an advocate in the past, showing that the Criminal Injuries Board is capable of being judicially reviewed by this court. There is no contest about that. If there is an error of law or any breach of natural

CO/64/87, (Transcript:Marten Walsh Cherer)

justice in reaching a decision the Board will be subject to review.

In this case it seems to me that Mr Pleming has absolutely correctly summarised the question which the court has to ask itself. I read from his helpful written indication of that question. "In the light of the applicant's known medical history, and the reports of Mr Innes made in 1986, has the applicant succeeded in establishing that no reasonable Board, properly directing itself, could have come to the conclusion that there had not been 'serious change' in the applicant's medical condition?"

That is a re-hash, if that is not too colloquial an expression, of the test set out by the court in many cases. I cite simply as one example Mr Justice

Hodgson's decision in R v Criminal Injuries Compensation Board, ex parte Crangle The Times 14 November 1981 where the learned judge said this: "The court will interfere if there is an error of law on the face of the record. It will also interfere if the decision arrived at by the Tribunal is one which no reasonable Tribunal, properly directing itself, could have arrived at."

I have been referred by Mr Pleming to the Annual Practice at page 797, and to the quotations from the well-known case of R v Hillingdon London Borough Council, ex parte Puhlhofer [1986] 1 All ER 467, [1986] AC 484. Lord Brightman in that case disapproved of the prolific use of judicial review in the

circumstances set out in that case. The general remarks which he made were these: "The ground upon which the courts will review the exercise of an administrative discretion is abuse of power -- eg, bad faith, a mistake in construing the limits of the power, a procedural irregularity, or unreasonableness in the Associated Provincial Picture Houses v Wednesbury Corporation [1948] KB 223, [1947] 2 All ER 680 sense -- unreasonableness verging on an absurdity." Then he referred to the speech of Lord Scarman in another case. "Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely."

Those citations introduce the two adjectives "absurd" and "perverse." Mr Hooper is unsure whether such adjectives should be applied in the particular case. To some extent I see the force of his submission in that regard, and I prefer to stick to Mr Pleming's analysis of the test which this court has to apply, which stems more directly perhaps from the line of cases to which I have referred, of which R v Criminal Injuries Compensation Board ex parte Crangle, The Times 14 November 1981 is a good example. That then is the test which I have to apply.

It can be looked at in a slightly different way by imagining a body of reasonable men or reasonable lawyers, if such animals exist, observing Mr Michael Ogden at work, reaching the decision which he reached in this case. Unless, in Mr Pleming's helpful and graphic expression, those gentlemen were forced back into their chairs to say: "Well, no reasonable person could have come to that conclusion," then the applicant fails.

Let us then look at the facts. I do not propose to set out what the doctors have said in great detail, since the medical reports are all amongst the papers and it would be tedious so to do. The fact is, however, that the unfortunate Mr Brown suffered very serious injuries in 1977. I stress that, since the nature of the original injuries and the consequences of those injuries must be looked at when deciding whether the Chairman has gone off the rails in reaching the conclusion that he did as to what occurred in 1985.

There were many operations and much treatment was needed in 1977, and thereafter, in order to reach the position which ruled when this case came before the Board. The reports at that time are before the court. The two important reports are those of Mr Innes dated 12th December 1979 and that of Mr Sewell dated 18th November 1980. Those are the reports to which counsel on both sides have referred in this case.

The full injuries were of course detailed. The present position of the unfortunate Mr Brown was detailed. The injuries and their consequences were set out, as was the history of the prolonged treatment which resulted after 1977. Mr Innes said this at the foot of page 2 of his 1979 report (page 16 of the bundle): "No further plastic surgery operations should be required, but it is possible that small pieces of bone sequestra may yet be extruded from time to time, and it is likely also that pieces of gunshot, many of which are still embedded in the tissues, will also come to the surface and be extruded. These minor disturbances, however, should not inconvenience Mr Brown much and it is very unlikely that re-admission to hospital will be required."

Mr Sewell at the top of page 5 of his report (page 22 of the bundle) said this: "Although the fracture has soundly united with some deformity there is a tiny sinus adjacent to the fracture site. This may continue to discharge intermittently for the rest of his life. There is a small possibility that he may have flares of infection at the fracture site."

Factually it must be accepted that at that stage the sinus was tiny, and factually I suppose it has to be accepted that the forecast of those two doctors was incorrect: not wholly incorrect, I stress, since Mr Sewell foresaw exactly that which Mr Brown eventually suffered in 1985 and 1986. He foresaw it in the sense that he indicated that there might continue to be discharge from the

sinus, and that there was at least the possibility that there might be flares up of infection at the fracture site. In so far as he was wrong – and I would not dream of criticising him for this – he was wrong in his assessment of the possibility or perhaps probability of what occurred, because it did occur. I am not even sure that he was wrong in his assessment, since possibilities do occur, and here what has occurred might still be said by Mr Sewell, looking backwards, to have been only a possibility which has realised itself.

However, be that as it may, I look at the case in the most favourable light from the applicant's point of view and assume that there was a measure of wrong assessment by the doctors. In 1985 the sinus did discharge, as predicted. There was a flare up of infection at the fracture site and there was prolonged treatment by doctors, involving three visits to hospital. The first two were not serious visits, in the sense that there was no great operative activity. On the second occasion Mr Brown must have been unpleasantly frightened by being told that he might lose his leg. The real trouble occurred later, in October 1985, when there is no doubt that there had to be performed a fairly serious operation to explore the sinus and the bone infection. Thereafter there were a number of procedures followed by the surgeons, resulting eventually in Mr Brown's discharge from hospital on 6th January 1986, again with a favourable prognosis from Mr Innes.

Mr Innes has set all this out in a report of 10th February 1986. He said at page 4 of his report (page 26 of the bundle): "The infection which developed in the bone cavity last spring seems to have been completely cured and it is hoped that the bone cavity has now been completely obliterated by the muscle flap which was put in to it. It is, however, impossible to be absolutely sure of this."

Mr Innes was asked by the Board to write a further report or letter, and

before Mr Ogden, when he considered this case, was the letter of 2nd August 1986. That sets out Mr Innes's confirmation of what happened and his continued optimism that the work which had been done would lead to complete and permanent elimination of the bone infection was repeated.

Those are the medical details in somewhat shorthand form which appear amongst the papers. I trust that no abbreviation of those details will be taken by anyone to mean that I have not considered the whole of the reports, because I have, both separately in my own reading of them and in argument.

In those circumstances Mr Hooper says that this is a plain case in which there has been, in the words of paragraph 13, "a serious change in the applicant's medical condition." He must argue as well that injustice would occur if the original assessment of compensation were allowed to stand. He says,

going beyond that, as he has to, that not only is that so but that Mr Michael Ogden acted in a way which was wholly unreasonable in the Associated Provincial Picture Houses v Wednesbury Corporation [1948] KB 223, [1947] 2 All ER 680 meaning of that word in reaching the conclusion that he has done.

I say at once that I am wholly unpersuaded by the applicant's argument. It seems to me that it is impossible, looking at all the facts of this case and at the affidavit of Mr Ogden, to conclude that no reasonable tribunal could have come to the conclusion that there had not been such serious change in the applicant's medical condition that injustice would occur if the original assessment of the compensation were allowed to stand. It is perfectly true that there has been change, and nobody denies that, but looking at the original injuries and the amount of compensation which was awarded in 1977, and bearing in mind that the doctors foresaw the possibility of the occurrence of the trouble which did occur, it seems to me that the original compensation contemplated that possibility and compensated Mr Brown for it, in accordance with the doctors' then opinions.

If each time there was a change of this nature, in the sense that the doctors' prognosis turned out to be unfortunately incorrect, it could be said that there was going to be injustice if that change were not compensated, then in my judgment that would apply in very many cases. Of course the fact that

many cases would be affected is not of itself something which should move the court, but it is something at which, in my judgment, I must look. Each case must be looked at upon its own facts.

The Scheme only contemplated the re-opening of cases where there was a strong smell of injustice should there not be a re-opening of the case. I am bound to look at the case to some extent as the Board looked at it. It seems to me that I ought to say that I do not myself feel that I would have reached a different conclusion from Mr Ogden, on the papers, but I stress yet again that that is not the test. I must look to see what Mr Ogden did, and see whether the applicant has succeeded in establishing that no reasonable board, properly directing itself, could have come to the conclusion that there had not been serious change in the applicant's medical condition.

I do not believe it is helpful in the event to look at the "damages" in detail and try to work out how much the applicant might recover if he went back to the Board today, and so on. There is a risk in investigating those figures. It seems to me that the colloquy between myself and Mr Hooper during argument

established that that risk exists. We cannot say how much the Board might award if the matter went back before the Board. We do not know exactly the extent to which the future was taken into account by Mr Law when he decided this case in 1981.

CO/64/87, (Transcript:Marten Walsh Cherer)

Looking at the matter in the round and taking into account what actually did occur, balanced against the possibility which was foreseen by the doctors, I am wholly unable to conclude that Mr Michael Ogden went so far off the rails in this case that he should be caught by the condemnation of the Associated Provincial Picture Houses v Wednesbury Corporation [1948] KB 223, [1947] 2 All ER 680, unreasonable test.

That really is the end of the matter. These cases are cases in which the matter must be looked at in the round, and in which all the risks to which the court is subject must be borne in mind. It will be no comfort whatsoever probably to Mr Brown to say that I am very sorry to have to reach this result. I would have dearly liked to be able to add something to the award which he has received, but he will understand that I can do no more than implement the principles which are set out in judicial review, and furthermore, that Mr Michael Ogden can do no more than his duty in accordance with the Scheme in reconsidering a case of this kind in the light of paragraph 13.

In all the circumstances, therefore, with reluctance in the sense that I sympathise with Mr Brown's renewed trouble, but at the end with the sure feeling that my decision is correct, I am unable to assist the applicant, and his application for judicial review of the Criminal Injuries Compensation Board decision must be dismissed.

CO/64/87, (Transcript:Marten Walsh Cherer)

DISPOSITION:
Application dismissed with costs

SOLICITORS:
Hextall Erskine & Co; the Treasury Solicitor