IN THE COURT OF APPEAL
QUEEN'S BENCH DIVISION
CROWN OFFICE LIST

C0-2556-94

Royal Courts of Justice,
Strand,
London, WC2.

Monday, 27th March 1995.

B E F O R E:

MR. JUSTICE SEDLEY

EX PARTE APPLICATION
ANTHONY GARNER

(Computer Aided Transcript of the Stenograph Notes of John Larking, Chancery House, 53/64 Chancery Lane, London, WC2. Telephone: 0171-404-7464.)

MR. A. GARNER appeared in person.

MR. J. HOLDSWORTH appeared on behalf of the RESPONDENT.

JUDGMENT (As approved)

Monday, 27th March 1995.

MR. JUSTICE SEDLEY: Mr. Garner seeks leave to challenge a decision of the Criminal Injuries Compensation Board to refuse him any award of compensation for injuries which there appears to be no doubt he sustained while a serving prisoner. He was not serving a sentence for crimes of violence; he was serving one of many sentences that he has served for a large number of crimes of dishonesty. However, paragraph (6), subparagraph (c) of the 1990 Criminal Injuries Compensation Scheme permits the Board to withhold or reduce compensation if they consider that:

> "...having regard to the conduct of the applicant, before, during or after the events giving rise to the claim, or to his character as shown by his criminal convictions ..... it is inappropriate for the full award or any award at all to be granted."

It is well-established that it is not necessary that there be a causal connection between the criminality of the applicant and his injuries in order for paragraph (6)(c) to operate. Equally, it must not

be operated arbitrarily; the Board's powers are constrained by the ordinary principles of public law in that regard.

In order to avoid arbitrariness, the Board publishes a guide, the material paragraph of which, paragraph 38, says this:

> "The Board may completely reject an application if the applicant has..."

Then (a), (b) and (c) are subparagraphs setting out various kinds of conviction, not material to the present case, followed by:

> "(d) numerous convictions of dishonesty."

Paragraph 39 then begins:

> "Each case is judged on its merits, and in some circumstances even a conviction for a serious crime of violence will be regarded as a complete bar."

This is a good example of how a body with public duties has on the one hand to consider each case on its merits, and on the other hand in doing so to avoid partiality or arbitrariness between one case

and another. It is a difficult line to tread.

In the present case the Board's powers were exercised, as they are now able to be, by a staff member. The staff member concluded that because of his convictions Mr. Garner should have no award under paragraph (6)(c). Mr. Garner sought, as he was entitled to do, to challenge this decision before the full Board. Pursuant to paragraph 24 of the scheme a staff member, again under delegated powers, first considered whether it was likely that the application for an oral hearing before the Board would fail the paragraph 24 criteria. The material criterion was that an applicant will be entitled to an oral hearing only if:

> "(c) No award or a reduced award was made, and there is a dispute as to the material fact or conclusions upon which the initial or reconsidered decision was based, or it appears that the decision may have been wrong in law or in principle."

The decision there referred to is of course the

initial decision, sometimes of a single member, sometimes of a staff member on the Board.

Nothing in that provision limits the powers or duties of the Board members themselves, whose obligations are then defined in paragraph 24:

> "An application for a hearing which appears likely to fail the foregoing criteria may be reviewed by not less than two members of the Board, other than any member who made the initial or reconsidered decision."

Such a decision is then said to be final.

The form of review is not in its terms limited to a search for some error of law or principle in the decision which is under review -- which, be it remembered, is simply a decision, possibly taken by a staff member, that the application for an oral hearing appears likely to fail the criteria set out in paragraph 24.

Mr. Garner, when he initially sought leave, drew attention to the case of another

prisoner, named Dowling, who had secured an oral hearing in similar circumstances. Popplewell J., adjourned his desk application into open court directing the Board to produce the papers in Mr. Dowling's case. The Board have responded with a body of evidence claiming public interest immunity in relation to Mr. Dowling's papers, but also with an affidavit of Mr. Badams, solicitor and advocate of the Board itself, which in paragraph 14 says,

> "Mr. Dowling's case has been looked at both by myself and the Board's operations manager. We each independently concluded that an administrative error occurred where the case was not identified as suitable for a paragraph 24 review. In other words, the member of staff who considered the papers should, in our view, have submitted the case to two members of the Board for them to consider whether the case failed the paragraph 24 criteria."

What is being said, therefore, in relation to Mr. Dowling, is that the staff member who gave him an oral hearing ought to have decided, on the contrary, that it was an application that was likely to fail and have referred the matter to the full

Board as Mr. Garner's application has been referred to the full Board.

In my judgement, the Board cannot have it both ways. It cannot both take its stand on the confidentiality of the papers in Mr. Dowling's case and withhold them from the court and, on the other hand, depose, without any verifying or sustaining material at all, to a view of Mr. Dowling's case derived by officials of the Board from the papers in the Dowling case.

It seems to me that the only proper course on principle, if public interest immunity prevents the production of the Dowling papers, is for the point to be dropped, and nothing that I go on to decide is predicated on the substance or merits of Mr. Dowling's case.

What is known now is that contrary to what Mr. Garner had supposed, Mr. Dowling did not secure an award. It was this allegation, made in good

faith I have no doubt, that prompted Popplewell J to make the order he did. Mr. Dowling, having been granted an oral hearing, did not turn up for it, and his application was dismissed, not on the merits but on his non-appearance.

There the matter ends, except for Mr. Garner's submission that the grant of an oral hearing to Mr. Dowling in itself is indicative of partiality and unfairness in relation to Mr. Garner.

This, it seems to me, is not a sustainable allegation on the bare facts which I have recited. It is perfectly possible for a decision-making body in the exercise of an undoubted discretion to come to different conclusions in cases which, although they are proceeding down the same path, will always differ one from another in point of their constituent facts.

Nothing before this court shows any such

parity of facts between the Dowling case and Mr. Garner's case as can lead to a prima facie inference that there has been partiality in the disposal of the one as compared with the other.

It is an inevitable incident of discretion and fact-finding that even closely similar cases may be differently decided by different decision-makers, without either decision-maker being able to be shown to be wrong in law or in principle or to have been guilty of partiality or arbitrariness. It is in the nature of the exercise that these differentials will occur.

What has, however, also given me concern is this: in the affidavit of Mr. Donald Buchanan Robertson, Queen's Counsel, one of the three Queen's Counsel who constituted the Board that reviewed the staff member's decision -- the staff member's prediction, which is what it is -- under paragraph 24, it appears that the Board concentrated for the most part on whether either staff member had made an

error of law or of principle.

This in my judgement, if it had been the totality of the evidence, would have been grounds for giving leave, because it appears to me plainly arguable that the Board's function under paragraph 24 is not so limited. However, in paragraph 9 of his statement of reasons, Mr. Robinson also says, having described how they found no error of law or principle,

> "On the contrary, we were satisfied that we would each have exercised our discretion in the same way."

By this means, and in a form which arguably is residual where it ought to have been primary, the Board has nevertheless addressed the question that it was for the Board to address, namely, whether under paragraph (24)(c) the decision which was made by a staff member to withhold any award was either erroneous in point of fact or in the conclusions drawn from the facts, or wrong in law or in principle.

As to that, the Board have now looked again at the entirety of the merits and concluded, albeit contingently, that there was nothing which would have moved them to take any different decision on any of the criteria of paragraph (24)(c).

For that reason there is, on the evidence now before the court, no basis for the grant of leave. The decision of the Board, unwelcome as it undoubtedly has been to Mr. Garner, is not arguably one which it was outwith the Board's powers, duties and discretions to arrive at under the procedures laid down by the 1990 scheme. Accordingly, this application fails. Thank you, Mr. Garner, for your help.
