IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
CROWN OFFICE LIST
(MR JUSTICE SEDLEY)

QBCOF 1998/0978/4

Royal Courts of Justice
Strand
London W2A 2LL

Friday 23rd April 1999

Before
LORD JUSTICE HENRY
LORD JUSTICE SWINTON THOMAS
LORD JUSTICE SCHIEMANN

REGINA

v.

CRIMINAL INJURIES COMPENSATION BOARD — Respondent

ex parte GEORGE CLAYTON MOORE — Applicant

(Computer Aided Transcription of the Stenograph Notes of
Smith Bernal Reporting Limited, 180 Fleet Street
London EC4A 2HD Tel: 0171 421 4040
Official Shorthand Writers to the Court)

MR RABINDER SINGH (instructed by Messrs Bindman & Partners, London WC1X 8QF) appeared on behalf of the Applicant.

MR HUGO KEITH (instructed by The Treasury Solicitor) appeared on behalf of the Respondent.

JUDGMENT
(As approved by the court)

LORD JUSTICE HENRY: The applicant, Mr Moore, sought by judicial review to quash a decision of the Criminal Board, refusing him compensation for injuries he sustained following an assault on him whilst he was at work. The relief sought was refused by Mr Justice Sedley. The applicant now appeals to us with the leave of the trial judge, who gave no reasons for granting leave.

Mr Moore's initial and final difficulties in relation to his attempt to get compensation stem from his previous convictions. Paragraph 6 of the scheme reads:

> "6. The Board may withhold or reduce compensation if they consider that—
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> (c) 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 or unlawful conduct... to the conduct or character as shown by the criminal convictions or unlawful conduct, of the deceased and of the applicant — it is inappropriate that a full award, or any award at all, be granted."

On 24 August 1992 his compensation claim came before a single member of the Board, Miss Beryl Cooper QC. Under paragraph 6(c) of the scheme quoted above she refused his claim on the ground that it would be inappropriate because of his previous convictions to make any award. She would have been bound to give her reasons for having refused his application under paragraph 22 of the scheme.

The applicant was not satisfied with that decision and so under the same paragraph 22 applied for an oral hearing before the full board. He came before a three-person panel presided over by Miss Shirley Ritchie QC. The panel had before it a list of four convictions

which they believed applied to Mr Moore: one in 1980, one in 1987 and two on the same court occasion in 1988. Mr Moore, rightly as it turned out, contested the 1988 convictions and eventually was able to show that those convictions did not apply to him.

It was held by the Board that the applicant was entitled to an award but that that award would be reduced by 25 per cent by virtue of paragraph 6(c) of the scheme. The Board directed that the case was to be adjourned for financial considerations. They made an interim payment of £500 to Mr Moore and ordered:

> "Once the special damage calculation has been obtained, this case is to be submitted to Miss Shirley Ritchie QC by way of paragraph 25 for finalisation."

Before Miss Ritchie had done the calculations and had the financial material necessary to make a final award, something happened. The applicant in applying to the Board for an award undertakes:

> "...to tell the Board of any changes that might affect their decision on whether I am entitled to compensation and, if I am, to what amount."

Pursuant to that undertaking to keep the Board informed, after the full board hearing, but before any hearing in front of the single member, the solicitors for Mr Moore wrote to the Board to inform them that their client had been convicted before the Coventry Crown Court of possessing £4,000 in counterfeit money with intent to supply and had been sentenced to 21 months imprisonment. He was also punished for driving whilst disqualified, his earlier disqualification having been unknown to the Board. The fact of that conviction ended the

involvement of the single board member because it brought back the question of the eligibility of Mr Moore for compensation. Accordingly, the matter was relisted before a two-member panel, Miss Diana Cotton QC and Miss Ann Curnow QC.

The summary prepared by the Board for that hearing stated under "Issues to be decided by the Board":

> "Whether the applicant's character as shown by his criminal convictions or unlawful conduct, makes a full award or reduced award of compensation inappropriate."

Under the heading "Note" it states:

> "You are reminded that the Board at a hearing looks at the application afresh and may take into account matters not mentioned in this summary."

Then under "Financial loss" at the bottom:

> "To be determined if eligibility is established."

At that hearing the applicant was represented by counsel and the Board's advocate was present as, we understand, he always is at such hearings. The 1988 convictions played a large part in the hearing. The applicant contested that they were attributable to him. As the Board's advocate's note shows, when Miss Cotton gave the Board's decision, she gave reasons for it. The applicant's counsel should also have made a note of the judgment. No-one knows whether in fact he did, nor is the evidence that he has ever been asked for his note.

Then an unfortunate thing apparently happened. At some unspecified time we are told that

Mr Moore's solicitors approached the Board — we do not know whether that was by telephone or by letter — and asked the Board for their reasons. Those solicitors have said (not directly to the court but as reported by others) that the Board refused to give those reasons. If the Board did refuse to give those reasons they had no business to do anything of the kind. It is clear that Miss Cotton was not consulted. That is clear because, after these judicial review proceedings had started and she had seen what the allegations were, she promptly informed the respondents that she had a written record of the reasons she had given orally. She swore an affidavit, the truthfulness of which is accepted, setting out what her reasons had been. In the body of her affidavit she said:

> "Having reached our decision we announced it to the Applicant and his representative. I made a note at the time of what I said and my note reads as follows:
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> > 'We are satisfied that we have power to consider convictions again at this stage and we are satisfied that we are entitled to have regard to the conviction of 1987 but in any event, the 1994 convictions and the conviction for drink driving which according to the evidence the Applicant must have been recorded against him in the three years prior to his arrest in 1993/1994, are in themselves sufficiently serious and sufficiently recent to make any award inappropriate. These convictions were not previously known to the Board. We have not had regard to the conviction recorded in 1988, which the Applicant denies is his. We have considered whether we could make a reduced award but in the exercise of our discretion we have decided in all the circumstances to make no award'."

That then was the history of this case.

Mr Singh for the applicant takes two points. He says, first, that under the rules of the scheme the full board had no power to reconsider the application in the light of the recent conviction. The first ground which he relies on in support of that submission is that the Board had made a final decision to award 75 per cent of the full claim and simply remitted

assessment of the sum to the single board member. It was a simple matter of calculating the correct amount, their having made a final decision.

The answer given by the judge to that submission was to the point:

> "This cannot be right. Not only does the Scheme plainly keep the Board's appraisal of eligibility alive at least until the applicant has accepted a final award; paragraph 12 expressly permits a reappraisal of eligibility after an interim award has been made. Given the purposes of the Scheme there is nothing unfair or indeed unexpected about this. In fact it might be thought to be unfair if public funds were given to an individual who, after establishing his eligibility but before receiving an award, committed a serious crime which, had he committed it earlier, would have made him ineligible."

His reference to paragraph 12 of the scheme is a reference to these words:

> "In a case in which an interim award has been made, the Board may decide to make a reduced award, increase any reduction already made or refuse to make any further payment at any stage before receiving notification of acceptance of a final award."

He could also have referred to the last sentence in paragraph 22:

> "An applicant will have no title to an award offered until the Board have received notification in writing that he accepts it."

Those words make it absolutely plain that the Board had not made a final decision in this case. That is what one would expect the scheme to say given the requirement to disclose all pre-final decision convictions as a change in the factual situation that might affect the Board's decision in relation to compensation. The authority of ex parte Thomas [1995] P.I.Q.R. 99 makes it clear that the Board can properly have regard to convictions subsequent to the date of the injury up until the final award. Here there had been no final award when the Board remitted the matter to Miss Ritchie for calculation of the quantum, and so that part of Mr

Singh's submission fails.

Mr Singh next says that there is no route in the rules whereby the single board member can remit the matter back to the main board. He relies here on the wording of paragraph 22, to which I will come. He says that, once the Board has remitted matters to the single member for quantification of the declared award, the single member cannot refer it back to the Board: only the applicant can. It is right that in paragraph 22 provision is made for the applicant "to remit from the single member back to the main board", but is silent as to the single member doing this.

The difficulty in Mr Singh's way are the clear words of paragraph 12, quoted above, which make it quite clear that in a case where an interim award has been made, and as normally would be the case where there had been a remission to the single member, the Board may refuse to make any further payment at any stage before receiving notification of acceptance of a final award. Therefore, if Mr Singh is right in his submission, what is envisaged by those clear words, namely "the Board's power after an interim order to make a reduced award or refuse to make any further payment", could not be implemented. Happily that is not the case. In my judgment the route is clear and is to be found in paragraph 22, headed "Procedure for determining applications". That reads:

> "It will also be open to a member of the Board, or a designated member of the Board's staff, where he considers that he cannot make a just and proper decision himself to refer the application for a hearing before at least two members of the Board one of whom may be the member who, in such a case, decided to refer the application to a hearing."

What happened here was the new conviction raised again the question of the applicant's eligibility. That question was beyond the remit of the single member; she had no jurisdiction to entertain it. Therefore she felt she could not or should not decide it and it was open to her to refer it back under paragraph 22. She could not make a just and proper decision herself because she had no jurisdiction and it was beyond her remit.

In my judgment the answer is clearly there in the rules. I reject Mr Singh's submission that paragraph 25 contains the entire remission and it is not permitted to look at paragraph 22. If I were wrong in the conclusion that I have reached, it still would not matter. It seems to me that the Board is the master of its own procedure. The scheme (see paragraph 22) and other places clearly envisage a reference back if the claimant is convicted after the interim order but before the award is finalised. If no route in fact existed under the scheme as published, in my judgment there certainly be would inherent powers to create one.

That deals with Mr Singh's first point. His second point is, he says, that reasons must be given in writing and the reasons were given orally with no backup recording, as I understand him.

Paragraph 22 of the scheme deals with the duty to give reasons as provided for in the scheme. The part of that paragraph necessary to understand this point must be quoted in full:

> "The initial decision on an application will be taken by a single member of the Board, or by any member of the Board's staff to whom the Board has given authority to

determine applications on the Board's behalf. Where an award is made the applicant will be given a breakdown of the assessment of compensation, except where the Board consider this inappropriate and were an award is refused or reduced, reasons for the decision will be given. If the applicant is not satisfied with the decision he may apply for an oral hearing which, if granted, will be held before at least two members of the Board excluding any member who made the original decision."

I have taken those words to mean that, whenever the award was refused or reduced, whether by the single member or by the full board, reasons should be given. Mr Keith for the Board submits that the words do not say that and the underlined "board" is an infelicitous reference to a single member of the Board and this supports him in his submission. If the two underlined words "decision" are taken to refer to the same decision, that submission is made good. He also refers us to a decision of this court supporting his submission under the scheme.

I reluctantly accept his submission as to the construction of the scheme. But however that may be, it seems clear to me as a matter of common law that the Board should give reasons when they refuse or reduce an award. The position seems to me to be a fortiori the single member. I am reinforced in my conclusion that we are told that under the scheme as administered by the Board the full board does in practice give reasons where an award is refused or reduced, as I would expect it to do. This award was both refused and reduced and Miss Cotton gave her reasons. She gave those reasons orally as is the way in the courts of this country.

Two people at the hearing before the Board had a duty to make a note of those reasons.

First. there was the Board's advocate. He did make a note of the reasons. albeit an imperfect one in that it did not specifically refer to the 1988 convictions. Secondly, counsel for the applicant: we do not know whether he made a note, but we do not need to because Miss Cotton had a verbatim note. This was not an oral decision with no record of it.

No criticism is made that the reasons she gave are inadequate. All that is criticised is that the judgment was not given in writing. It is said that that offends the common law though it is conceded that this would be new territory for the common law in that it would be a novel requirement for the common law as opposed to statute to make.

Mr Singh's submission retreated from that stance to one that the reasons had to be recorded in some accessible fonn. They were; they were recorded in the judge's notebook, in the Board's advocate's notes and they probably were also (they certainly should have been) in the notes of counsel for the appellant.

The way the judge dealt with that is this:

> "Mr Singh puts forward a powerful case for holding that some of the principal purposes served by the giving of reasons are subverted if no permanent record is made of them at the time when they are given. It does not matter for the purpose of his submission whether the reasons are handed down in writing, given orally from a text which is then made available, or spoken in the knowledge that some permanent record is being made, possibly by mechanical or stenographic recording [and I rely on these words] possibly by counsel or solicitors who are present, possibly by a clerk. All of these, however, are counterposed to words which are spoken without being recorded."

Interposing there. that was not this position.

> "Such purely oral reasons, Mr Singh submits, cannot be taken by the disappointed

party to a solicitor or an adviser for a reliable opinion as to their amenability to challenge; and if challenged, they create the real risk that the applicant's account of what was said will be contested by the tribunal itself or by the opposing party in adversarial proceedings, or by both, with all the attendant problems of competing ex facto versions. A court of judicial review, in turn, may be presented with an invidious fact-finding task in order to decide what the true reasons were for the decision under attack."

Here we are not dealing with words which are spoken without being recorded. Here we are dealing with words which are spoken in circumstances where two of the listeners had a legal duty to record them. So the counterposing, it is clear on the judge's finding, is on the right side of the balance, namely words that are recorded by legal advisers who are present. Mr Singh's alternative category never arose on the facts.

But the judge went on to ask himself the unnecessary question as to whether the common law for the first time should require a decision properly reasoned to fail because the decision was read out and not given in writing. He then concluded that this could not be done without legislation and that conclusion was challenged, albeit with more enthusiasm in the skeleton argument. It seems to me that that entire question was plainly obiter, as the question did not arise on the facts. Appeals lie against orders and not against the reasons. The Board members who took this decision did everything right and nothing wrong. There can be no question of quashing the reasons — recorded both by counsel and by the Board's advocate and, most accurately of all, by the judge in her own note — as not being proper reasons because they were not delivered in writing.

Accordingly for those reasons, in my judgment, this appeal should fail.

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LORD JUSTICE SWINTON THOMAS: I agree entirely with the judgment just given by Lord Justice Henry.

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On the issue in relation to which we called on Mr Keith representing the Board, although it is true that the actual wording of paragraph 22 of the scheme is not very felicitous, I am quite satisfied that the plain import of that paragraph is that the full board, and not only the

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single member, must give reasons for the decision when an award is refused or reduced. That conclusion also accords with fairness and justice to enable the applicant to know why the decision was made and will enable him or her to take further proceedings in rare cases

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where that is appropriate. That is also the position, in my judgment, at common law.

Furthermore, I understand that such a requirement accords with present practice. I am also

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satisfied that the Board's oral reasons are sufficient and that written reasons are not required. In an appropriate case the Board should subsequently be prepared to provide the applicant or his legal advisers with the reasons for the decision in writing.

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I agree that this appeal should be dismissed for the reasons given by Lord Justice Henry.

LORD JUSTICE SCHIEMANN: I also agree that the appeal should be dismissed for the

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reasons given by my Lord. I only add something in relation to the second point raised by

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Mr Rabinder Singh.

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The applicant in a reasoned oral decision was denied the relief which he requested. Thereafter in the present case reasons in writing were requested after the reasoned decision had been given. That request was refused. In such circumstances there are two separate

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decisions which have been taken: the substantive reason to deny the applicant the substantive relief for which he was asking the decision taker, and the procedural decision to refuse to give him the written reasons for that substantive decision. It is important to keep in mind

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that we are concerned with two decisions taken at different times.

I agree that the Board is obliged to give reasons in short form for a decision to refuse or to

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reduce an award. While there are sometimes good reasons for reducing those reasons to writing before the announcement of the decision, there is obligation to do so in every case. Whether that is done in any particular case is a matter for the discretion of the Board. If the

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reasons are not initially produced in writing the person affected may ask for them to be produced in writing. That will sometimes be a perfectly reasonable request. The present general practice of the Board to furnish reasons in writing when these are asked for ought, in

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my view, to continue to be followed.

It should have been followed in the present case. But evidently was not because of some slip, misunderstanding or misjudgment to the nature of which we are not privy. If the

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reasons are furnished to the court it is at that stage in a position to see whether the

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substantive decision is legally defective. If the decision reveals no error of law the court will still enquire whether it had been fairly arrived at. One of the reasons why judicial review provides a remedy for a decision which has been unfairly arrived at is that the quality of the decision may thereby be adversely affected.

There was here an initial failure to furnish a document from which the decision taker was reading as she announced the decision and setting out the reasons for the decision. Such a failure is not capable of affecting the fairness or the quality of the substantive decision. In the present case, and I would suppose the usual case, such a failure would not justify the court in striking down the substantive decision.

As for the procedural decision to refuse to furnish the written reasons the court would have the power to strike that down and order the recalcitrant decision taker to furnish the reasons. But there was no point in doing that once the decision taker has voluntarily furnished the reasons. I regard the continuation of these proceedings after that time as being wholly unwarranted save possibly for the recovery of the costs necessitated before the written reasons were furnished.

Order: Application refused; order nisi against legal aid fund; detailed assessment of applicant's costs.