IN THE HIGH COURT OF JUSTICE

CO/574/82

QUEEN'S BENCH DIVISION

Royal Courts of Justice,

Friday, 19th November, 1982.

Before:

MR. JUSTICE WOOLF

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Crown Office List

THE QUEEN

-v-

THE CRIMINAL INJURIES COMPENSATION BOARD

Ex parte STEPHEN JOHN PRIOR

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(Transcript of the Shorthand Notes of Marten Walsh Cherer Ltd., 36/38 Whitefriars Street, London, EC4Y 8BJ. Telephone number: 01-583 7635. Shorthand Writers to the Court.)

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MR. P. SHERIDAN, Q.C. and MR. P. RALLS (instructed by Messrs. Lickfolds Wiley & Powles, London, W1) appeared on behalf of the Applicant.

MR. SIMON BROWN (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

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J U D G M E N T

(As approved by Judge)

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MR. JUSTICE WOOLF: This is an application for judicial review in respect of a decision of The Criminal Injuries Compensation Board. The grounds of the application can be summarised under two headings: first of all that the Board misdirected themselves as to the proper standard of proof to apply; and secondly, that there was no proper material on which the Board could come to the decision which it did.

This is an application which has caused the court some difficulty and I regard the decision which I have come to as being very much a border-line decision on the material before me.

The facts of the matter have to be ascertained from a series of documents. When I say the facts of the matter, I am not referring to what actually happened when the Applicant received his injuries, but I am referring to the evidence which was before the Board. This is due to the fact that the Board does not take a transcript of the proceedings and, therefore, notes taken by various people have to be relied upon for what occurred. It was agreed, in view of the second issue to which I have referred, that this was an appropriate case in which I should have regard to those notes. Complications were, however, created because the Applicant only exhibited the notes of evidence which were taken by his solicitor very shortly before the hearing and at a stage when it was impossible for the Respondents to take full instructions upon those notes and, in particular, when they were unable to communicate with the Clerk of the Board who had been present at the hearing.

The Clerk had prepared, on a date subsequent to the hearing, a resumé of what occurred, that resumé bearing a date some four days later than the hearing. Reluctantly, Mr. Sheridan, in the circumstances, felt he had no alternative but to allow that note to go before me as part of the material on which to consider this application. But I should make it abundantly clear that I really have paid little, if any attention to that note and, indeed, I have fully in mind its rather unreliable

provenance on the material before me.

The circumstances which gave rise to the claim for compensation, in essence, are not in dispute. On Sunday, 27th May, 1979, at 10 p.m. a man came to the Applicant's house near Leatherhead and asked the Applicant whether he was Mr. Prior. The Applicant said that he was and the man pretended he had come to deliver a letter to the Applicant and gave him an envelope. The man then produced a sawn-off shot gun and shot the Applicant in the leg. The incident had all the hallmarks, therefore, of being a professional "hit-job", which is the phrase used in the decision in writing, to which I shall refer hereafter. On that description, the inference is drawn that the Applicant was acquainted with the man who shot him.

Regrettably, the Applicant sustained serious injuries and there can be no doubt that if he has a claim against the Criminal Injuries Board, then it is a substantial claim. So there is, depending on the outcome of this application, a large sum by way of compensation at stake.

The entitlement - and that is almost an appropriate word to use in relation to a claim against the Board - is dependent upon the Scheme. The relevant parts of the Scheme which was in existence at the time of the decision are as follows.

Paragraph 5 of the Scheme reads: "The Board will entertain applications for ex gratia payment of compensation in any case where the applicant or in the case of an application by a spouse or dependant ..... the deceased sustained in Great Britain ..... personal injury attributable to a crime of violence ....." I do not need to read the remainder of that paragraph for the purposes of this case.

The other relevant paragraph is paragraph 17: "The Board will reduce the amount of compensation or reject the application altogether if, having regard to the conduct of the victim, including his conduct before

and after the events giving rise to the claim, and to his character and way of life it is inappropriate that he should be granted a full award or any award at all."

In connection with those two paragraphs, I should just refer to paragraph 22, which, for the present purpose, says: "At the hearing, it will be for the applicant to make out his case ....."

There is an explanatory statement which has been prepared by the Board, which can be read with the Scheme. So far as paragraph 17 is concerned, the explanation is: "The observations which follow are intended to indicate the approach which the Board has usually adopted in various circumstances but the Board's discretion is in no way limited by what is stated and each case will be decided in the light of its own particular circumstances. A. Conduct. 1. Conduct in this Paragraph means something which is reprehensible or provocative, something which can fairly be described as bad conduct or misconduct. 2. There is no limitation upon the sort of conduct that may be taken into consideration but the Board will not think in terms of contributory negligence when acting under this clause."

Later on in that paragraph, under the heading "Failure to Co-operate with the Police", it reads: "1. The Board attach importance to the duty of the victim of crime to co-operate with the police with a view to the offender being apprehended and convicted. Failure to co-operate with the police usually results in no award being made, but each case will be considered on its merits. 2. Fear of reprisals is not as a general rule a valid excuse for failure to co-operate with the police."

The application for compensation made by Mr. Prior was rejected by the single member of the Board on two grounds. The first was on the basis of his previous character and the second was that Mr. Prior had failed to disclose all he knew about the matter. The way the single

member put it was that he was not at all satisfied that the Applicant had disclosed all that he knew about this mysterious incident.

So far as the Applicant's previous character is concerned, there is no need for me to make any reference to it because the full Board, before whom the application was renewed, paid no regard to it. The full Board heard the application on the 22nd March last. There were three members to that Board: Mr. Michael Ogden, Q.C. (Chairman of the Board), Mr. Charles Whitby, Q.C. and Mr. Hugh Morton, Q.C. The Board, therefore, was made up of an experienced team.

Having heard the application and the evidence which was called before them, which primarily consisted of evidence from the Applicant himself and that of a senior police officer, Chief Inspector Richardson, the full Board dismissed the application. They gave an oral decision there and then. So far as that oral decision is concerned, I take as being an accurate account of that decision what is said about it by Mr. Eales, the Applicant's solicitor, who, from the notes that he made and the notes of junior counsel, reconstructed as far as he could the determination as announced by the Chairman of the Board, Mr. Ogden.

That determination reads: "The Applicant has lived out his previous conviction and we pay no attention to that whatsoever. But we can't make an award in this case. We come to the same conclusion as the single member. The applicant said that he thought that the Binstock mob had done it. We reject the idea that this can possibly be as a result of these two articles in the financial weekly. Why should he have been singled out on the basis of a newspaper article alone. If not it must be something else. If that be so why do you think the Binstock mob did it. It must have been something else. At the end of the day we are not satisfied he has disclosed all he knows about the background." Mr. Eales also says that as to the reference to "singled out" no one could be certain of its place.

In relation to what was said, the only other material I have is a very short note by the junior member of the Board, but I do not really find that note of any assistance. It seems to me dangerous to rely on a very truncated note of that nature when I have got an attempt by both counsel and solicitor to reproduce the actual words used by the Chairman.

Subsequent to that oral decision, a request for a transcript was made. As I have already indicated, there was no transcript, but as a result of that request, a written decision was handed down. That written decision was subsequent in events to the initiation of this application and was dated the 18th June, 1982. It was signed by the Chairman.

So far as the first argument to which I have referred is concerned, that largely, if not exclusively, turns on a passage in the decision to which I must refer straight away. It reads: "We considered that the facts in this case required us to consider both of these matters. The burden of proof in respect of each of them was on the Applicant (R v. CICB ex parte Lloyd. Judgment of the Divisional Court 4 July 1980); it is the civil burden of proof, namely, balance of probabilities."

The reference to "both matters" is clearly a reference to the matters which are relevant to the issue under paragraph 17. So, it seems to me, that the decision is reciting that the burden of proof in respect of those matters was on the Applicant. That is a surprising statement, bearing in mind that this was a very experienced Board who could be expected to be very familiar with the case of Lloyd, because that decision makes it clear that whereas the onus is upon an Applicant to show that he comes within the Scheme, that is, within paragraph 5 of the Scheme, the onus, and I here insert legal onus, is not on the Applicant to show that paragraph 17 does not apply to the case.

I have been provided with a transcript of the decision in the case of Lloyd. In that case, the Lord Chief Justice recited the argument of counsel, Mr. Wright, that the Board were in error in the way they had in that case approached the provisions of paragraph 17. Mr. Wright had submitted that in placing, as the Board clearly did, the burden of proof in respect of paragraph 17 upon the Applicant, the Board was wrong. It was his contention that to apply a burden of proof to the exercise of a discretion did not make sense. He said nor did it make sense to require the applicant to prove that the Tribunal "should not make an award".

Having recited that argument, the Lord Chief Justice said: "In our judgment, the submissions of Mr. Wright are correct. It is for the applicant to satisfy the Board under paragraph 5 that the various ingredients of the claim are made out. If the Board are so satisfied, then they must ask themselves whether, on the facts they have found, they consider that it would be inappropriate to make an order by reason of any of the various matters under paragraph 17. If the paragraph 17 matters are evenly balanced, then it will not be inappropriate to award the full amount and they will compensate the applicant accordingly. The same considerations apply to a possible reduction of the amount of compensation.

"It is only on rare occasions that any question of the legal burden of proof will arise. Occasions when there is no evidence at all on the paragraph 17 matters, or when the evidence is evenly balanced, are exceptional. Moreover, the legal burden must not be confused with the evidential burden. If there is prima facie evidence against the applicant under paragraph 17, it is up to him to discharge the resulting evidential burden."

The effect of what the Lord Chief Justice was saying in those paragraphs is agreed by counsel appearing before me, that is, that so far

as paragraph 17 is concerned, initially there is no legal burden on the Applicant. But, if evidence is put before the Board which shows a prima facie case on circumstances which would make paragraph 17 applicable, then there is an onus on the Applicant to show, on the balance of probabilities, that those facts are not such as to bring paragraph 17 into operation.

Having indicated that that is the proper approach, as laid down by the Divisional Court in the case of Lloyd, I return to what the Board said in this case.

Mr. Brown submitted that because the decision was so obvious after the decision on Lloyd and bearing in mind that the Board actually referred to that decision, I should assume that they were referring only to the evidential burden and not getting the burden back-to-front in relation to the legal burden under paragraph 17.

I am bound to say that it would be extrememly surprising if this extremely experienced Board were in fact mistaken as to the burden of proof in this matter with which they must have been exceedingly familiar. However, it seems to me that on a matter of this significance, when there is a bold statement that the burden of proof in respect of this matter is on the Applicant contained in a formal written decision, it would be wrong of me to infer that that statement is not to be given its normal meaning and that the Board were referring to the rather sophisticated position in relation to the evidential burden.

On this argument, I would find in favour of the Applicant and the question has to be considered hereafter as to whether or not, in the circumstances of this case, that error, as I so treat it, is one which means that this decision should be quashed.

I now turn to the second issue which is before me, which is, is there material on the basis of which it was open to the Board to come to the decision which they did?

With regard to the approach in this matter, I return again to the decision in Lloyd and to the passage in the Lord Chief Justice's judgment where he refers to the case of R. v. Deputy Industrial Injuries Commissioner, ex parte Moore, (1965) 1 Q.B. 456. At page 487, Diplock, L.J. said: "These technical rules of evidence, however, form no part of the rules of natural justice. The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than it must be based on material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event, the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above. If it is capable of having any probativ value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue. A supervisory jurisdiction of the High Court does not entitle it to usurp this responsibility and to substitute its own view for his."

I have already referred to the oral decision which was given by the Chairman, so I will now refer to what was said in the written decision: "We concluded that the Applicant knew more about the incident than he had told the police. Two of us considered that the shooting had probably been carried out by the 'Binstock mob' as the Applicant told the police, and that the Applicant knew it. The third Board Member had no view about the identity of the people responsible for the shooting; he considered that it was possible that the Applicant may have remained silent for what he regarded as 'security reasons'. We unanimously decided that the Applicant had deliberately withheld information from the police. Of course, it was impossible to conclude why the Applicant was shot and whether or not it was because of conduct on his part which would cause

us to refuse an award on that account.

"Having concluded that the Applicant did not co-operate with the police in that he withheld information from them, we decided that it was inappropriate that he should receive compensation from public funds."

Before proceeding further, I should draw attention to the fact that there are clear and obvious differences between what was announced orally, according to the notes before me, and what is said as to the conclusion of the Board in the written decision. Bearing in mind that the Board is an informal body, it appears to me that my primary concern should be with the written decision, which is a much fuller decision, rather than with the oral decison. With a body of this nature, if they had been asked, as sometimes is the case, for further reasons, one could look at those further reasons. Having given an initial decision, the Board took the trouble to set out their reasoning in detail. It seems to me, therefore, that I must have regard to the detailed, written decision. That does not mean to say that I should pay no attention to the oral decision. Mr. Sheridan was entitled to draw attention to inconsistencies between the oral decision and the written decision and rely on the oral decision to persuade me that this was a case where the court should interfere with the decision on the second basis to which I have made reference.

What Mr. Sheridan says, with regard to the written decision, is that there just was not anything more than, at the most, suspicion here, and no material upon which, the Board, if they directed themselves properly in relation to the onus of proof, could have come to the conclusion which they did. In relation to that conclusion, it is of course the majority decision to which he primarily devotes his argument because it is the reasoning of the majority which must prevail over that of the minority.

The evidence before the Board on this matter came partly from

the Applicant and partly from the Chief Inspector to whom I have made reference. In giving his evidence (and here again I return to the notes prepared by Mr. Eales, on which I propose to rely for further consideration of this matter) the Applicant told the Board of his immediate reaction to the shooting. The notes say: "After the shooting his immediate reaction he expected the envelope to contain a telegram but it was blank. He still does not know who did it. He did say 'It's the Binstock mob'. He repeated this to the police. The reason why he said this was the article in the Financial Weekly. He had come back on Saturday morning. He said that this was at the front of his mind. He was worried about it. His interviews with the police had gone on for a long time and were still continuing. He was pressing them to try and find out who did it. The interviews with the police went on for some two months after the shooting. There was an armed police guard on the door of the hospital for some time. The police asked all about his background etc. He never refused to talk to the police but since the police appeared not to be interested. He said he definitely did not know who did it. He kept nothing back from the police. The Head of Surrey C.I.D. accepts this and has apologized to him."

The recitation of the evidence in the written decision is as follows. "Immediately after the shooting, as he lay injured on the floor, the Applicant told the police that 'the Binstock mob' had done it. We attach importance to this; the truth is often told at a time immediately after an injury, either criminal or accidental, before the speaker has decided that another story will suit his purposes better."

When one compares that explanation with the note taken by the solicitor, it is clear that there is no dispute that the Applicant did say that it was the "Binstock mob" who had in fact done it. The only issue is whether he said that prior to saying that to the police, or

whether he said it immediately to the police. The notes suggest that he repeated it to the police later. The comment made by the Board which would be equally applicable whether he said it to the police or whether it was to someone else. The important thing is that the Applicant's immediate response was that the Binstock mob had done it.

In giving his evidence, the Chief Inspector described the Binstock mob as being "heavy". He went on to say: "Logically this is a punishment and a person who is punished normally knows why." However, he added, "But Prior has been at length to put it to us that he has no idea. For some months I was of the opinion that he must know, but there is no evidence now who did it or what it was about. I spoke to him a lot since and now I am sure he probably does not know what it is all about."

So far as the last sentence is concerned, again, there is a slight difference between what is said in the solicitor's note and what appears in the decision. According to the decision, the Chief Inspector had said that "he was almost coming to the conclusion that he probably did not know". What is more, that is put in quotation marks, which suggests that in giving that account of the Inspector's evidence, the Board were citing from their own note of the evidence. They certainly were not citing from the other note which I have, namely, the note prepared by the Clerk to the Board, because that is in different terms from both that which appears in the Board's decision and that in the solicitor's notes.

For the purposes of this argument, I will consider the matter on the basis that the note is right. I would, however, emphasise that where the actual decision, as here, sets out a version, in the normal way one would regard the version in the decision as being the one which must be acted upon, because the onus is upon the Applicant to establish his case and where there is a conflict of that sort, one will always rely

on the decision and will not allow that to be contradicted in normal circumstances by extraneous evidence.

In addition to the evidence about the Applicant's immediate reactions, the Chief Inspector also said that "he thought that the dollar premiums business was a complete red herring and Prior never got close enough to the real villains to be involved". When he was questioned by Mr. Sheridan, the Chief Inspector said that he had "spoken to Prior at length and Prior had never refused to talk, not holding back. The only thing about which he was reticent was when he was asked whether he owed anybody any money, and he admitted that he had two County Court judgments against him." The Inspector continued: "Everything that Prior said had been borne out by the police investigations." He also amplified that by saying that "he was satisfied that he was then and possib is now reporting to Special Branch. They know all about Mr. Prior's way of life and all the facts given to them by Prior will prove to be true". The Inspector concluded by saying that so far as other persons were concerned, they could not be the ones responsible.

I can summarise the Chief Inspector's evidence to the Board in this way. It was the Chief Inspector's view that there had not been a concealment by Prior. Certainly, on the balance of probabilities, if the decision as to whether paragraph 17 applied was to be that of the Inspector, he would have dealt with the matter on a basis which was favourable to the Applicant.

However, the decision was not that of the Chief Inspector; it was that of the Board. The Board must be entitled, if there is material before them which justifies them in doing so, to come to a conclusion which is different from that of a witness, even if the witness is as responsible as the Chief Inspector, particularly where it must largely be based on the opinion of the individual as supported by investigations, in this case

carried out by the police over a substantial period of time.

A The way Mr. Brown puts the case on behalf of the Board is as follows. He says, first of all, that it is not in dispute that Prior initially said that it was the Binstock mob who did it. That was a statement which was made in conditions when it could have been an B immediate and honest reaction of somebody who knew the circumstances. Secondly, he says, this was undoubtedly a "punishment job" and, as the Chief Inspector confirmed, normally a person who is subject to such a shooting will know who is responsible because, as the Board said, adopting C the evidence of the Inspector, usually in a punishment shooting, the person who was the victim would know who could be responsible, otherwise it was pointless to do it.

D To that has to be added the fact that undoubtedly the explanation which the Applicant put forward for his making the remark about the Binstock mob was one which the Board did not accept. Perhaps that matter appears most clearly from the oral decision when it deals with his E explanation to the Board that he thought the Binstock mob might have been responsible because of newspaper articles about the mob.

In their oral decision, the Board said: "We reject the idea that this can possibly be as a result of these two articles in the financial F weekly." There, there is a reference to two articles. I have only seen one, but certainly with regard to that one, I can well understand how the Board should treat as unsatisfactory a suggestion that that article could be in any way an explanation for his immediate reaction that it G was the Binstock mob who were responsible.

It is inherent in the Board's discretion that they did not accept the evidence of Mr. Prior. They clearly regarded him as a witness whose evidence was unacceptable; a witness who was not speaking the truth. They H

having formed that conclusion and having seen the Applicant, there is no way I can go behind it. That is a factor which must be taken into account in deciding whether or not this man co-operated with the police.

What the situation amounts to is this. On the one hand, there is the Chief Inspector's evidence and, on the other, there is the approach which the Board adopted. The man had used the words relating to the Binstock mob and he could be expected to know who was responsible for this shooting. He gave an explanation for mentioning the Binstock mob which was wholly unacceptable to them; they did not regard him as speaking the truth. In a situation where he could be expected to know who was responsible, the explanation for his not speaking the truth at least was likely to be that he was concealing the true facts.

It seems to me that although I could very well understand another tribunal taking a different view, it cannot be said, directing myself on the approach adopted by Lord Justice Diplock to which I have referred, that there was no material to justify this decision by the Board. They had seen the witness, they had the statement with regard to the mob and, on that statement, they could take the view that they were satisfied, as they said they were, that the matter - and here I refer to the majority - was the responsibility of the mob, that Prior knew it was and that that is why he made the remark. If they came to that conclusion and there was material which entitled them to come to that conclusion, then they could also go on to make the findings that they did.

I emphasise with regard to that conclusion the limited role I have to play in relation to the second submission which is made. It is confined to doing no more than Lord Justice Diplock indicated. It is confin to ensuring that there is evidence which is based on material which tends to logically show the existence of facts relevant to the issue to be

determined. Having come to that conclusion with regard to the second ground of this application, what is the conclusion to which I come on the first ground?

It seems to me that if the Board misdirected themselves, that would only be a ground for interferring with the decision if it might otherwise have been different if the Board had not so misdirected themselves. When one looks at the written decision, you find this is not a case where the Board were saying they were not satisfied with deciding the matter on the onus of proof (it is true that those words were used in the oral decision but, as I have already indicated, it is the written decision with which I regard myself as having to deal.)

The Board say they came to a specific conclusion. Once they came to that specific conclusion, as the Lord Chief Justice made clear in the passage to which I have referred, the legal burden of proof in relation to the application of paragraph 17 is really not important. This was a case, once it was accepted that Mr. Prior had said that he knew who was responsible at the outset, then, prima facie, he was obliged to co-operate and tell the police all he knew. On the approach that was adopted by the Board, he did not satisfy that onus. Indeed, they came to a decision that he in fact knew more than he said. It seems to me that although I have come to a decision adverse to the Board with regard to that statement as to the onus of proof, it does not affect the decision, because the onus of proving - here again referring to the legal onus - his case does not affect their reasoning, and their decision would be exactly the same, applying strictly what the Lord Chief Justice said both with regard to the legal onus of proof and with regard to the evidential burden of proof.

Accordingly, it seems to me, that this application should be dismissed.

MR. SIMON BROWN: Would your Lordship dismiss the application with costs?

MR. SHERIDAN: That I can say very little about, except that there are perhaps strange circumstances. At the end of the day it does not matter, if he succeeds on part of the appeal, but your Lordship has full discretion and can bear in mind the effect. In those circumstances, I would ask your Lordship to make such an order as would in your discretion be right.

MR. JUSTICE WOOLF: I regard this as a case which it was very proper to bring before the court and I propose to make no order as to costs.

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