OPINION OF LORD GILL

in Petition of

SCOTT YOUNG (A.P.)

Petitioner;

for

Judicial Review of a
Decision of the Criminal
Injuries Compensation Board

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9 August 1995

Introduction

The petitioner applied unsuccessfully to the Criminal Injuries Compensation Board ("the respondents") for compensation under the Criminal Injuries Compensation Scheme 1990 ("the Scheme") in respect of injuries suffered by him when he was assaulted and stabbed in a club in Dunoon in April 1992. The application followed the normal course. In October 1992 the petitioner completed a medical questionnaire at the request of the respondents. Thereafter his solicitors received from the respondents a formal Notification of Determination dated 17 November 1992. It stated, *inter alia*:

"I am writing to inform you that I have considered this application and have concluded that the applicant is not eligible for an award.

Under Paragraph 6(c) of the Scheme, compensation may be withheld if it seems inappropriate that an award should be made from public funds on account of the appellant's character as shown by his criminal convictions. Having regard to the applicant's list of convictions I have concluded that no award can be made ..."

The petitioner then submitted a formal request dated 30 November 1992 for a hearing before the respondents in accordance with paragraph 22 of the Scheme. The request was made on the respondents' official form in accordance with paragraph 23 of the Scheme. The request was in the following terms:

"I ... do not accept the decision of the Board on my application for an ex-gratia payment of compensation. My reasons are as follows:

The locus was my work place. I had been employed there for approximately one month prior to being attacked. Although I was off duty I could not stand back and watch my employer being robbed. My assailant had been trying to steal money from the

till. The fact that I tried to stop him was deemed sufficient 'provocation'.

Although I do have a previous conviction for assault, this was several years ago. There were absolutely no knives involved on that occasion. I do not have any previous convictions for offences reflecting the gravity of the injury I sustained. I therefore request a Hearing before the Board in accordance with the provisions of Paragraph 22 of the Scheme."

Although the petitioner's request for an oral hearing does not make the matter entirely clear, I understand from counsel for the petitioner that the schedule of previous convictions that was before the respondents was accurate and that it included two convictions in respect of which the petitioner had received custodial sentences.

The respondents sent a letter dated 2 December 1992 to the petitioner's solicitors acknowledging receipt of the petitioner's request and stating that they would contact his solicitors in due course to inform them of the decision concerning the procedure to be adopted in his case.

The respondents thereafter sent to the petitioner's solicitors a letter dated 5 February 1993 in the following terms:

> "I am writing to inform you that your [client's] application for an oral hearing was reviewed by the Board under the terms of Paragraph 24(c) of the Scheme and refused.
>
> A decision to refuse an application for a hearing is final."

The petitioner seeks judicial review of the decision which this letter communicated to him. Counsel agreed that if I were minded to grant the petition the appropriate order would be to reduce the decision and to remit the petitioner's application to the respondents for them to convene a hearing.

The Scheme and the Guide

The key texts in this case are paragraphs 22 to 24 of the Scheme and paragraphs 37 to 39 of the February 1990 edition of the respondents' document "Victims of Crimes of Violence: A Guide to the Criminal Injuries Compensation Scheme" ("the Guide") which was in force at the relevant date.

Paragraphs 22 to 24 of the Scheme set out the procedure for the determination of applications for compensation.

Paragraph 22 provides first for the making of the application for compensation and of the decision upon it. It then provides that:

> "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...".

Paragraph 23 provides, *inter alia*, that:

> "Applications for hearings must be made in writing on a form supplied by the Board and should be supported by reasons together with any additional evidence which may assist the Board to decide whether a hearing should be granted. If the reasons in support of the application suggest that the initial decision was based on information obtained by or submitted to the Board which was incomplete or erroneous, the application may he remitted for reconsideration by the member of the Board who made the initial decision or, where this is not practicable or where the initial decision was made

by a member of the Board's staff, by any member of the Board. In such cases it will still be open for the applicant to apply in writing for a hearing if he remains dissatisfied after his case has been reconsidered ...".

Paragraph 24, so far as it is relevant to this case, provides as follows:

"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 facts or conclusions upon which the initial or reconsidered decision was based or it appears that the decision may have been wrong in law or principle.

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. If it is considered on review that if any facts or conclusions which are disputed were resolved in the applicant's favour it would have made no difference to the initial or reconsidered decision, or that for any other reason an oral hearing would serve no useful purpose, the

application for a hearing will be refused. A decision to refuse an application for a hearing will be final."

Paragraphs 37 to 39 of the Guide are as follows:

"*'Character as shown by criminal convictions'*

37. This part of paragraph 6(c) of the Scheme gives the Board discretion to refuse or reduce compensation because of the applicant's (or the deceased's) past record of criminal offences, whenever committed. The Board can take account of convictions which are entirely unconnected with the incident in which the applicant was injured. Any attempt the applicant has made to reform himself will also be taken into consideration.

38. The Board may completely reject an application if the applicant has -

a. a conviction for a serious crime of violence, e.g. murder, manslaughter, rape or sexual abuse, wounding or inflicting grievous bodily harm

b. a conviction for some other serious crime e.g. drug smuggling or supply, kidnapping or treason

c. more than one recent conviction for less serious crimes or crimes of violence e.g. assault, burglary or criminal damage or

d. numerous convictions for dishonesty.

39. Each case is judged on its merits and in some circumstances even a conviction for a serious crime of violence will not be regarded as a complete bar. For example the Board will be likely to approach sympathetically an application from a person with a bad record of convictions who had been injured while assisting the police to uphold the law or genuinely giving help to someone who was under attack."

The case for the petitioner

Counsel for the petitioner argued (1) that the decision to refuse the request for an oral hearing contravened the Scheme; (2) that the decision was vitiated by a failure to give reasons, and (3) that the provision in the Scheme which enabled the respondents to deny the petitioner an oral hearing was contrary to natural justice. I think that counsel for the respondents was right in saying that the third argument has no proper foundation on record but I need not reject it on that technicality since I have decided that it is not a good argument anyhow.

The refusal of a hearing

The starting point in the first argument for the petitioner is the letter of 17 November 1992 containing

the Notification of Determination. In that letter the writer stated that he had "concluded" that the petitioner was not eligible for an award and that having regard to the petitioner's list of convictions he had "concluded" that no award could be made. Counsel for the petitioner argued that in his request for an oral hearing the petitioner had made clear that he challenged that conclusion. Therefore, she argued, there was at once a dispute as to the conclusion upon which the decision was based. That being so, it followed that in terms of paragraph 24(c) of the Scheme the respondents were obliged to grant an oral hearing.

In my opinion, this argument is flawed. The flaw lies in the misinterpretation of the word "conclusions" in paragraph 24(c) of the Scheme. In making a decision under paragraph 24(c) the respondents had to ask themselves two questions; namely, whether there was a dispute as to the material facts or conclusions on which the decision to refuse compensation was based, and whether it appeared that the decision to refuse compensation might have been wrong in law or in principle. Counsel for the petitioner accepted that in this case only the first of these questions was in issue.

In my opinion, it cannot be said that there was a dispute as to the material facts or conclusions on which the decision to refuse compensation was based. The references in paragraph 24(c) to "material facts" and to "conclusions" are references, in my view, to the primary facts and to the conclusions of a factual nature which fall to be drawn from such primary facts. For example, the injuries suffered by an applicant are material facts. A conclusion might be drawn from those facts as to the degree of disfigurement or disability resulting from the injuries. The facts and the surrounding circumstances of an assault would be material facts. A conclusion might be drawn from those facts that the victim provoked the assault or that the victim was acting in self-defence.

In the present case compensation was refused by reason of the petitioner's character as shown by his previous convictions. The convictions constituted the material facts on which the decision was based.

The petitioner did not dispute these material facts. He disputed the decision itself. Accordingly the requirements of paragraph 24(c) were not made out. It follows therefore that the petitioner was not entitled to an oral hearing.

The argument for the petitioner is founded on the unfortunate use of the expression "I have concluded" in the Notification of Determination dated 17 November 1992. In my opinion, the words "I have concluded" mean, in that context, "I have decided". That is to say, these words do not set out a conclusion of the kind which paragraph 24(c) contemplates. The petitioner's argument fails to distinguish between the conclusions on which a decision is based and the decision itself. This distinction becomes clear in the latter part of paragraph 24 which provides, *inter alia*, that the application for a hearing will be refused "if it is considered on review that if any facts or conclusions which are disputed were resolved in the applicant's favour it would have made no difference to the initial or reconsidered decision ...".

Failure to give reasons

Counsel for the petitioner submitted that the respondents in intimating the decision complained of failed to give proper reasons. She argued that in terms of the second part of paragraph 24 the respondents had available to them a range of reasons for which they could refuse the petitioner's application. From the respondents' letter of 5 February 1993 it was impossible

for the petitioner to know whether the respondent's reason for refusal was good or bad. Counsel further argued that the question of reasons was of some importance in this case because paragraph 39 of the Guide states that "... the Board would be likely to approach sympathetically an application from a person with a bad record of convictions who had been injured while assisting the police to uphold the law or genuinely giving help to someone who was under attack."

In my opinion, this argument is fallacious. Paragraph 39 of the Guide is not relevant to the decision complained of. It relates to the stage of an application at which the respondents have to make the initial decision whether to grant compensation in full or under reduction, or to refuse it altogether. If they decide to make a reduced award or to refuse an award, the respondents are obliged to give reasons (Scheme, para.22). This case is concerned with the procedural decision made at a later stage whether or not to allow an oral hearing. It is therefore distinguishable from *R. v Criminal Injuries Compensation Board, ex p. Chalders* (Forbes J., 3 February 1981, unrepd.) on which counsel for the petitioner relied. That case was concerned only with the duty to give reasons for an adverse decision on

the initial application. It also related to an earlier version of the Scheme.

I agree with counsel for the respondents that when considering the petitioner's request for an oral hearing the respondents did not have a range of decisions or reasons open to them. It is conceded on behalf of the petitioner that the decision to refuse an award was not wrong in law or in principle. Therefore in deciding whether or not the petitioner was entitled to an oral hearing, the only question which the respondents had to consider was whether there was a dispute as to the material facts or conclusions on which the decision to refuse compensation was based.

The petitioner was not disputing the material facts on which that decision was based. He was asking the respondents to base the decision on other facts, namely that he had sustained his injuries while trying to prevent a robbery at his place of work.

It would be apparent therefore to the respondents that the qualifying conditions of paragraph 24(c) were not made out and that the request for an oral hearing was bound to fail (cf. *R. v Criminal Injuries Compensation Board ex p. Cook*, Potts J, 12 October 1994, unrepd.)

In this case the respondents had the request for an oral hearing reviewed in terms of paragraph 24. I infer that they did so on the basis that the request appeared "likely to fail" the relevant criterion in paragraph 24(c). Assuming that the respondents were under any obligation to have such a review at all, I consider that it must have been immediately apparent to the reviewing members that there could be only one decision, namely that the application be refused. In these circumstances, in my view, the question of their giving reasons did not arise.

On the view that I have taken on this point, it is unnecessary for me to consider the question, touched upon in the debate but not explored in any depth, as to the extent to which there is a duty to give reasons in cases where, on a review held under paragraph 24, the reviewing members refuse the application for a discretionary reason of the kind set out in the second part of that paragraph.

Natural justice

The third ground on which the petitioner seeks judicial review is that the Scheme itself, in making it possible for the respondents to refuse an application for review without giving the applicant a hearing, is contrary to natural justice. In support of this ground,

counsel for the petitioner argued that paragraphs 37 to 39 of the Guide demonstrate that previous convictions are not *per se* a bar to compensation. It followed therefore that as soon as it became clear that the applicant's previous convictions were a decisive consideration, it was the duty of the respondents to give the petitioner a hearing so that he could have an opportunity to explain why the convictions should not count against him. Since the Scheme entitled the respondents to decline such a hearing, it was unfair on that account.

This ground implies that there is a structural unfairness in the Scheme itself. If that were so, the Scheme would contravene natural justice no matter how reasonably the respondents attempted to apply it.

In my opinion, the argument for the petitioner on this ground too is flawed. It fails to distinguish between a right to a hearing and a right to be heard.

In administrative procedures such as this, the refusal of a hearing is not *per se* a denial of natural justice (cf. *Pearlberg v Varty [1972] 1 WLR 534; Furnell v Whangerei High Schools Board [1973] AC 660)* and in my view there is nothing in the Scheme that would have that effect.

The Scheme is non-adversarial throughout. When applying for an award the applicant has the opportunity to give the respondents all relevant information (para.22). He may even have a positive obligation to do so (paras. 6(b), 14; cf. Guide, paras. 49, 53, 54). If he is dissatisfied with the initial decision he is entitled to apply for an oral hearing. His application for an oral hearing should be supported by reasons and by any additional evidence on which he may rely (Scheme, para.23). In submitting his reasons and any additional evidence he can take account of the reasons for the initial decision, which the respondents are obliged to give (para.22).

It follows, in my view, that nothing in the Scheme deprives the applicant of a reasonable opportunity of presenting his case (cf. *Russell v Duke of Norfolk [1949] 1 All ER 109*, Tucker L.J. at 118). The Scheme therefore involves no denial of natural justice.

Decision

I conclude therefore that the petitioner has failed to make out a relevant ground of challenge to the decision complained of.

I shall therefore repel the petitioner's plea-in-law, sustain the respondents' first and third pleas-in-law and refuse the prayer of the petition.

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Act: McColl
Drummond Miller W.S.

Alt: Tyre
Solicitor to the
Secretary of State

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