HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

REGINA

v.

CRIMINAL INJURIES COMPENSATION BOARD (RESPONDENTS)

EX PARTE A (A.P.) (APPELLANT)

ON 25 MARCH 1999

LORD SLYNN OF HADLEY

My Lords,

Lord Slynn of Hadley
Lord Mackay of Clashfern
Lord Nolan
Lord Clyde
Lord Hobhouse of Woodborough

A applied to the Criminal Injuries Compensation Board on 20 November 1991 for compensation claiming that, in the course of a burglary at her house by two men on 25 May 1991, she had been assaulted, raped and buggered. That application was refused orally on 31 August 1993 and the refusal was confirmed by letter dated 9 December 1993. On 14 February 1995 Carnwath J. gave her leave to move for judicial review of the decision, but on 15 December 1995, Popplewell J. refused relief and A's appeal was dismissed by the Court of Appeal on 16 May 1997. Simon Brown L.J. in the Court of Appeal said: "The issues raised on the appeal are many, various and difficult." With the leave of the House, she now appeals to your Lordships.

Three broad questions arise, a negative answer to any one of which may make an answer to the subsequent questions unnecessary, viz.: (a) should her application for judicial review have been allowed to proceed since she was so long out of time in applying; (b) if it should, were there grounds for setting aside the decision of the Board; (c) if there were, is it right now to set aside the decision and to send it back for further consideration?

The Grant of Leave

An application to move for judicial review cannot be granted unless leave is obtained. Two provisions are relevant to the incidence of delay. In the first place, R.S.C., Ord. 53, r. 4 provides:

> "(1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, unless the court considers that there is good reason for extending the period within which the application shall be made."

Such an application may be made, as it was here, ex parte.

The second provision is section 31 of the Supreme Court Act 1981 ([1998] Q.B. 659, at 670):

> "(6) Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant - (*a*) leave for the making of the application; or (*b*) any relief sought on the application, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration. (7) Subsection (6) is without prejudice to any enactment or rule of court which has the effect of limiting the time within which an application for judicial review may be made."

The co-existence of these two provisions is perhaps curious and has led to differences of interpretation and practice. In *Reg. v. Dairy Produce Quota Tribunal for England and Wales, Ex parte Caswell* [1990] 2 A.C. 738, 746-747, *per* Lord Goff of Chieveley, the House considered, however, that the two can be read together. Thus, even if an application is not made promptly (and in any event within three months from the relevant date) the court may extend the period if it finds good reason for extending the time to make the application (Order 53, r. 4(1) and section 31(7)). There is undue delay for the purposes of section 31(6) if the application for leave is not made promptly or within three months of the relevant date. But even if it considers that there is good reason for extending the period, the court may refuse leave or may refuse the relief sought if in its opinion to grant relief would be likely to cause hardship or prejudice or would be detrimental to good administration.

In this case, Carnwath J. on an ex parte application granted leave and said: "I think I couldn't shut this out on delay because that is a point that can be taken in the proceedings if leave is granted" and "It seems to me that you should have leave, but I think that the question of delay - Board may want to raise that." The actual order he made was "Leave Granted." He clearly thus contemplated that there would be an opportunity for the Board to raise the

question of delay and he did not in terms rule that there was "good reason for extending the period within which the application shall be made" nor did he extend the period.

It seems to me, however, that his intention in giving leave must have been to extend the period, otherwise he would have had to rule that the application was out of time and to have refused leave, and that the Board would have the opportunity to raise the issue of hardship, prejudice or detriment to good administration on the inter-partes hearing. He may, however, also have had in mind that the issue of "good reason for extending the period" could be re-opened at the substantive hearing.

Popplewell J. on the substantive hearing rejected a contention that there was here any hardship, prejudice or detriment to good administration. Leave or relief could not therefore be refused under section 31(6) of the Act of 1981. He ruled, however, that he was entitled to reconsider the question of delay on the basis that no good reason had been shown for extending it within the meaning of Order 53, r. 4(1), especially it seems "if the matter has, indeed, been reserved for full argument." He treated it in effect as a "conditional leave," subject to fuller argument and he refused to extend the time.

This approach has, your Lordships were told, been followed in practice in other cases, though the only reported decision directly in point to which we were referred was *Ex parte Worth* [1985] S.T.C. 564. In that case, Webster J. ruled that the giving of leave did not amount to an extension of time. The judge's task on the ex parte application was to do no more than to decide that there was an arguable case for judicial review and not to "determine any issue finally in favour of the applicant." He said:

> "In short I conclude, while recognising that the conclusion does not follow inevitably from the express wording of the rules in the Act (sic) that the granting of leave to move does not preclude the respondent from objecting that the application has been made out of time."

This view is reflected obiter in *Patterson v. Greenwich London Borough Council* (1993) 26 H.L.R. 159, *per* Evans L.J.

It seems to me that the two provisions produce the following result:

(a) On an ex parte application, leave to apply for judicial review can be refused, deferred to the substantive hearing or given.

(b) Leave may be given if the court considers that good reason for extending the period has been shown. The good reason on an ex parte application is generally to be seen from the standpoint, as here, of the applicant. Thus the reason for the delay here was "the practical difficulties [the applicant's solicitors] have

encountered in trying to bring this matter before the court" (counsel for the applicant before Carnwath J.) It is possible (though it would be unusual on an ex parte application) that if the court considers that hardship, prejudice or detriment to good administration have been shown, leave may still be refused even if good reason for an extension has been shown.

(c) If leave is given, then an application to set it aside may be made, though as the Court of Appeal stressed, this is not to be encouraged.

(d) If leave is given, then unless set aside, it does not fall to be re-opened at the substantive hearing on the basis that there is no ground for extending time under Order 53, r. 4(1). At the substantive hearing there is no "application for leave to apply for judicial review," leave having already been given.

(e) Nor in my provisional view, though the matter has not been argued and the question does not arise here, is there a power to refuse "to grant . . . leave" at the substantive hearing on the basis of hardship or prejudice or detriment to good administration. The court has already granted leave; it is too late to "refuse" unless the court sets aside the initial grant without a separate application having been made for that to be done. What the court can do under section 31(6) is to refuse to grant relief.

(f) If the application is adjourned to the substantive hearing, the question under both Order 53, r. 4(1) (good reason for an extension of time) and section 31(6) (hardship, prejudice, detriment, justifying a refusal of leave) may fall for determination.

On this first question, it is not necessary to consider whether good reason for an extension of time had been shown on the facts. That issue was concluded by the decision of Carnwath J. I have no reason to think that that is a wrong result; on the contrary, like Simon Brown L.J., prima facie, I think it was the right result.

I would accordingly, as did the Court of Appeal, overrule *Ex parte Worth* and hold that Popplewell J. did not have jurisdiction to reconsider the question of an extension of time and whether good grounds had been shown under Order 53, r. 4(1) and to hold that they had not.

Application to Quash the Board's Decision

The Board, set up under the Prerogative in 1964, entertains "applications for ex gratia payments of compensation in any case where the applicant . . . sustained . . . personal injury directly attributable - (a) to a crime of violence . . . " (1990 Scheme, paragraph 4). By paragraph 6 of the Scheme, the Board may withhold or reduce compensation if they consider that "(*a*) the applicant has not taken, without delay, all reasonable steps to inform the police, . . . of the circumstances of the injury . . . (*b*) the applicant has failed to give all reasonable assistance to the Board or other authority in connection with the application." By paragraph 25, it is for the applicant to make out his case at the hearing. "The Board will be entitled to take into account any relevant hearsay, opinion or written evidence, whether or not the author gives oral evidence at the hearings. The Board will reach their decision solely in the light of the evidence brought out at the hearing, and all the information and evidence made available to the Board Members at the hearing will be made available to the applicant at, if not before, the hearing." Legal aid is not available, but an applicant may be legally represented.

It has long been established that the Board's decisions are subject to judicial review (*Reg. v. Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 Q.B. 864 D.C.).

A's case, which was referred by a single member to a board of three members was that on 25 May 1991, when she was alone at home, two men came to her house. When she opened the door, one of them said "C.I.D., love" and both walked in. They assaulted her and damaged property in the house, marking red crosses on the walls. When they left, they took money and other property with them. Twenty minutes after they had left, she telephoned the police who came straight away. As she said was obvious, she told the police that she had been beaten up, particularly around the head and face, and that property had been stolen. She did not tell the police on this occasion of any sexual attack because she was distressed and embarrassed. On the same day the police took her to the North Middlesex Hospital where a doctor found bruising, though the notes of that examination by the doctor were not before the Board.

Subsequently, A contacted Victim Support and was advised to go to the police again. She did so on 28 May. She then gave details of the alleged rape and buggery and a statement was taken from her which she signed on 30 May. On that day she was examined by Dr. Susan West, a Police Doctor, at the request of the police.

At the hearing before the Board, A confirmed her statement in many respects, but gave further evidence as to the damage to her property and to her face. Detective Constable Saunders, in his evidence in chief, confirmed the damage to property, but said that there was no obvious physical injury to her, that he would have remembered if her face was red and swollen.

W.P.C. Richmond, who took A's statement dated 30 May 1991, also confirmed the damage to the furniture - the bed and cushions on the sofa had been slashed - and that it was difficult to get A to talk about the incident. This Officer accompanied A to Dr. West for a medical examination. The Officer gave evidence: "The Doctor could only see trauma to the back passage - the applicant had haemorrhoids."

The witness further stated that the investigating team was sceptical about the allegation. Further, Detective Constable Saunders gave evidence that from all inquiries, including "medical inquiries," nothing at all was discovered in support of the applicant's account.

The Tribunal did not find A a convincing witness and where her evidence differed from that of the police, they preferred the police evidence.

> "We directed ourselves that the onus was on the applicant to satisfy us initially that she was the victim of a crime of violence as alleged and in our consideration of the whole evidence including the delay in reporting and the destruction of the forensic evidence we concluded that she had failed to discharge that burden."

It was really for these two reasons, the delay and the destruction of the forensic evidence, that they recorded that the police investigating the alleged offence had in the end been sceptical about the allegations made.

The Board did, of course, have to evaluate the evidence and they were entitled to accept one side rather than the other, so that in the ordinary way the court would not interfere with their finding on an application for judicial review. The application for judicial review is not an appeal on fact. Moreover, the Board were right to put the onus on the applicant to establish that she was the victim of a crime of violence.

One aspect of the hearing, however, is disturbing. As has been seen, the Woman Police Constable who took A to see the Police Doctor clearly gave the Board the impression that the "trauma" in the rectum was due to haemorrhoids. Nobody - the police, the Board's Advocate, the Board itself - it seems asked whether there was a record by the Doctor of that interview. Nor of course did A, but, having been told that she should not ask for police statements as they would be produced at the hearing, it would not be surprising that she assumed that if there was a report from the Police Doctor, it would be made available with the police report.

In fact there was a report from the Police Doctor which the Board did not see and which, having described the Doctor's findings on examination of the anus and the vagina, recorded:

"The anal findings are consistent with the allegation of buggery. The vaginal findings neither confirm nor exclude vaginal intercourse".

It is not suggested that the officer gave her inaccurate evidence deliberately, let alone fraudulently. Yet it is plain that in a matter of crucial importance, the Board was led to proceed on evidence which was wrong and they did not have the true facts.

Popplewell J. rejected contentions that the Board should have obtained the notes of 25 May 1991 from the North Middlesex Hospital and that the Board had not taken into account the effect on her of rape when considering her evidence. He was, however, clear that if the Board had had Dr. West's report, "it would have been very difficult for them to come to the conclusion that her credibility was nil." He did, however, conclude that "in fairness, the Board, alerted to the fact that there had been this report, should, of their own volition, have sorted out, or at least invited the applicant's view as to whether there should be an adjournment to obtain it."

Simon Brown L.J. ([1998] Q.B. 659, 677-678) rejected any suggestion that there was a duty on the Board to obtain evidence (on the basis of *Reg. v. Chief Constable of Cheshire, Ex parte Berry* (unreported), 30 July 1985, *Reg. v. Criminal Injuries Compensation Board, Ex parte Parsons* (unreported), 17 January 1990, *Reg. v. The CICB, Ex parte Milton* [1997] P.I.Q.R., P74) or to adjourn the case to obtain Dr. West's evidence since they had evidence from W.P.C. Richmond, though erroneous, as to what Dr. West had found. Moreover, he refused to apply as he saw it by extension the line of cases laying down that fraud, collusion or perjury provide grounds for judicial review, even though there has been no error or misconduct on the part of the Tribunal itself, and that a challenge may also lie when unfairness in the conduct of proceedings results from some failure on the prosecutor's part, even where no one had been guilty of fraud or dishonesty; that failure itself may be regarded as analogous to fraud. He referred to cases from *Reg. v. The Leyland Justices, Ex parte Hawthorn* [1979] Q.B. 537 to *Ex parte Scally* [1991] 1 Q.B. 537, 556.

Peter Gibson L.J. also refused to accept that there was any duty on the Board to obtain evidence. It was up to the applicant to prove her case and it was not impossible that the applicant could have obtained Dr. West's report herself. The Board were not alerted to the fact that there had been a report, merely that there had been a medical examination, and there was no evidence that it had been seen by the police by the time of the hearing. It was impossible to say that the Board's decision was vitiated because they did not adjourn or take steps to obtain a report. "The question that arises is whether the innocent misrepresentation of a material fact by a mere witness renders the decision of the Board unfair . . . I am not prepared [so to hold] on the facts of this case" (p. 799E).

Your Lordships have been asked to say that there is jurisdiction to quash the Board's decision because that decision was reached on a material error of fact. Reference has been made to "*Administrative Law*" (*Wade and Forsyth* (7th edition)) in which it is said at pp. 316-318 that:

> "Mere factual mistake has become a ground of judicial review, described as 'misunderstanding or ignorance of an established and relevant fact,' or acting 'upon an incorrect basis of fact.' . . . This ground of review has long been familiar in French law and it has been adopted by statute in Australia. It is no less needed in this country, since decisions based upon wrong fact are a cause of injustice which the courts should be able to remedy. If a 'wrong factual basis' doctrine should become established, it would apparently be a new branch of the ultra vires doctrine, analogous to finding facts based upon no evidence or acting upon a misapprehension of law."

"*Judicial Review of Administrative Action*" *de Smith, Woolf and Jowell* 5th ed., at p. 288:

> "The taking into account of a mistaken fact can just as easily be absorbed into a traditional legal ground of review by referring to the taking into account of an irrelevant consideration, or the failure to provide reasons that are adequate or intelligible, or the failure to base the decision on any evidence. In this limited context material error of fact has always been a recognised ground for judicial intervention."

For my part, I would accept that there is jurisdiction to quash on that ground in this case, but I prefer to decide the matter on the alternative basis argued, namely that what happened in these proceedings was a breach of the rules of natural justice and constituted unfairness.

It does not seem to me to be necessary to find that anyone was at fault in order to arrive at this result. It is sufficient if objectively there is unfairness. Thus I would accept that it is in the ordinary way for the applicant to produce the necessary evidence. There is no onus on the Board to go out to look for evidence, nor does the Board have a duty to adjourn the case for further enquiries if the applicant does not ask for one. I accept as a general proposition the statement of Hutchinson, J. in *Reg. v. Criminal Injuries Compensation Board, Ex parte Parsons* (unreported) [17 January 1990]:

> "Provided reasonable steps are taken to obtain material and place it before the Board, and provided the material that has been obtained is fairly deployed and there is no concealment or unfair advantage taken, then . . . the Board has fulfilled its proper function."

Nor is it necessarily the duty of the police to go out to look for evidence on particular matters.

But the police do have a special position in these cases. The applicant accepted that the police had initially been supportive, even though she later criticised the evidence of D.C. Saunders, and there is no doubt that in the 10,000 or so decision hearings a year, the Board is very dependent on the assistance of and the co-operation of the police who have investigated these alleged crimes of violence. Thus your Lordships were told that:

> "The Board has an informal understanding with the police that relevant documents will be brought to the hearing by the police officers concerned, inspected by the Board's advocate and relevant material disclosed to the applicant at the hearing." (Appellant's case, paragraph 5).

> "The Board rely heavily on the co-operation of the police in providing evidence (often hearsay and sometimes opinion, both permitted under paragraph 25 of the 1990 scheme) in relation to the question whether a crime of violence has been committed". (Respondent's case, paragraph 11).

In the present case, the police and the Board knew that A had been taken by the police to see a Police Doctor. It was not sufficient for the police officer simply to give her oral statement without further inquiry when it was obvious that the Doctor was likely to have made notes and probably a written report. When the subsequent report dated 19 January 1992 of consultations on 13 November 1991 and 18 December 1991 which was available to the Board and which referred to the alleged rape and in which it is reported that "It is likely that the bleeding is associated with an injury to the anal sphincter at the time of rectal rape"; and that "Anal intercourse, particularly if traumatic, causes long-standing injury to the anal sphincter mechanism is taken into account," it seems even more necessary that inquiries should have been made as to the existence of Doctor West's report and an adjournment taken to obtain it.

It is true that the medical report does not prove the buggery and that the Board might still have not been satisfied as to her claim. Yet it seems to me that, if the report had been produced, it would not have been possible for the Board to say:

> "We considered the medical evidence but concluded that it gave no assistance in determining whether she had been raped and buggered, as alleged."

It seems to me also that it is highly likely that the Board would not have been so ready to take an adverse view of the fact that she had washed her clothing (which she said was because she did not want to report the attack

and which the Woman Police Constable treated as having been done in order to destroy forensic evidence) or of the fact that she did not mention the rape on 25 May 1991 when she first saw the police (which she said was due to the fact that she did not want to tell the police because of a previous sexual humiliation and which the Board seems to have accepted made the police sceptical about the allegations she was making).

There are other features about the case which are troublesome. In the first place Detective Constable Saunders denied that there had been "any medical arrangement" on 25 May 1991 and that he had called the ambulance. He said that he could not remember going with A to the hospital, but later, after checking with the hospital, he confirmed that A did go to the hospital on 25 May and it was likely that he went too. He also said that she had no obvious injury, which seems surprising in view of the fact that she was taken to the hospital on the basis of her complaints that she had been hit on the head and face. Moreover, the same officer gave evidence that "nothing at all was discovered in support of the applicant's account," yet on his own and on WPC Richmond's evidence, there was clear evidence of damage to walls and to the furniture, cushions and the bed had been slashed and there were red marks on the walls. Moreover, if Dr. West's evidence had been available, he could not have said that nothing was discovered in support of the applicant's case.

There is one other matter of less significance, but which seems to have weighed with the Board. They found that there was an inconsistency between A's evidence that her knickers were pulled down by one of the attackers and then note "I was wearing a shirt and T-shirt. No bra. Knickers." If knickers is read with "I was wearing," as seems the more natural meaning, though the note is ambiguous, then there was no inconsistency. In this, it seems to me, the Board were in error, which may have been due in part to the adverse view they had formed of A in the absence of the important medical evidence.

I consider therefore that, on the special facts of this case and in the light of the importance of the role of the police in co-operating with the Board in the obtaining of evidence, that, there was unfairness in the failure to put the Doctor's evidence before the Board and if necessary to grant an adjournment for that purpose. I do not think it possible to say here that justice was done or seen to be done.

That leaves the third question which in one way is the most difficult. The events happened and the Board's hearing took place a long time ago and the difficulties of re-opening the matter now are obvious. On the other hand, the only new evidence involved is documentary and it is possible for the Board to consider whether Dr. West's report changes the picture in the applicant's favour. Despite the difficulties, a breach of the rule of natural justice having been established, I would quash the decision and remit the matter to the Board for reconsideration in the light of that report.

LORD MACKAY OF CLASHFERN

My Lords,

I have had the advantage of reading in draft the speech of my noble and learned friend Lord Slynn of Hadley and agree that this appeal should be disposed of as he proposes for the reasons he has given.

I wish to add that I particularly agree with what Simon Brown L.J. said in the Court of Appeal [1997] 3 W.L.R. 776, 788H-789E about the object of rule 4(1) and the consequences that follow.

LORD NOLAN

My Lords,

I too have had the advantage of reading in draft the speech of my noble and learned friend Lord Slynn of Hadley, and I too agree that this appeal should be disposed of as he proposes for the reasons which he gives.

As regards the first question raised by the appeal I think it of particular importance as a practical matter that the judge hearing the initial ex parte application should be entitled to defer the resolution of the rule 4(1) issue until the substantive inter partes hearing. I suspect that this was the result which Carnwath J. intended to achieve. It would have been in line with the practice frequently followed over the years by the judges taking the Crown Office list, and sanctioned by Webster J. in *Ex parte Worth* (1985) S.T.C. 564. There was much to be said for the practice. Ex parte applications for leave often have to be prepared hastily, especially if the applicant is running late. Even when all proper care and diligence has been exercised it is possible that the applicant's affidavit may over-state or mis-state the grounds upon which he submits that there is "good reason" for extending the time limit. If the judge is minded to grant leave on the merits but retains some doubt about the rule 4(1) issue it is only right that he should be able to defer it for determination at the full hearing. I accept, however, that the order "leave granted" which Carnwath J. made was unambiguous, and was not open to reconsideration by Popplewell J. More generally I would now regard it as settled law that the approach adopted by Webster J. in *Re Worth* did not give effect to the different functions to rule 4(1) and section 31(6). The result which these three very experienced judges sought to achieve can, however, be attained in appropriate cases by means of a deferment. Now that the position has been clarified by my Lord I trust that no further problems will arise in this area.

As regards the second and third questions raised by the appeal, the features of the case to which my noble and learned friend has referred are in my judgment sufficiently disturbing to justify the exceptional course which he

proposes. The appearance of unfairness is accentuated in the circumstances by the Board having given weight to the adverse view formed by the police of the merits of the appellant's claim.

LORD CLYDE

My Lords,

I have had the advantage of reading in draft the speech of my noble and learned friend Lord Slynn of Hadley and agree that this appeal should be disposed of as he proposes for the reasons he has given.

LORD HOBHOUSE OF WOODBOROUGH

My Lords,

I have had the opportunity of reading in draft the speech prepared by my noble and learned friend Lord Slynn of Hadley. I agree that this appeal should be allowed and that the decision be remitted to the Criminal Injuries Compensation Board as he proposes.

I also agree with the reasons which he gives for arriving at that conclusion. There was an inadequate observance of the principles of natural justice. As Lord Slynn has pointed out, it is not necessary for the determination of the present appeal to enter upon the question whether error of fact can without more be relied upon as a ground for judicial review. I will therefore on this occasion express no opinion about the problems to which the acceptance of such a ground would give rise nor discuss the soundness of the views expressed in the passages he has cited from the leading textbooks. Such consideration will have to await a case which requires their decision.

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
CROWN OFFICE AND DIVISIONAL COURT
(MR JUSTICE POPPLEWELL)

QBCOF 96/0605/D

Royal Courts of Justice
Strand
London WC2

Friday, 16th May 1997

B e f o r e:

LORD JUSTICE SIMON BROWN
LORD JUSTICE PETER GIBSON
SIR IAIN GLIDEWELL

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REGINA

- v -

CRIMINAL INJURIES COMPENSATION BOARD

EX PARTE AVRAAM

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(Transcript of the Handed-down Judgment of
Smith Bernal Reporting Limited, 180 Fleet Street,
London EC4A 2HD
Tel: 0171 831 3183
Official Shorthand Writers to the Court)

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MISS ELIZABETH WOODCRAFT (instructed by Messrs Miller Parris, Worthing BN14 8JB) appeared on behalf of the Appellant/Applicant.

MR KENT QC and MR J EVANS-TOVEY (instructed by Treasury Solicitor, London SW1H 9JS) appeared on behalf of the Respondent/Respondent.

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J U D G M E N T
(As approved by the Court)

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LORD JUSTICE SIMON BROWN: On 25th May 1991 the applicant was alone at home in Edmonton when she let in two men pretending to be CID officers. They assaulted her, stole her money and valuables, and before leaving vandalised the premises. She dialled 999 and, when DC Saunders responded to her call, told him of the assault and burglary and showed him the damage. He took her by ambulance to the North Middlesex Hospital where on examination she was found to be bruised. Three days later, on 28th May, she contacted the police again and told them that in the course of the burglary she had not only been assaulted but also raped and buggered.

On 20th November 1991 the applicant applied for compensation to the respondent Board (the Board). This was not her first such claim; she had been raped in 1986 and had received for it some £7,000 compensation.

On 31st August 1993, following an oral hearing before three Board members, the applicant's application was refused. Put shortly, the Board were not satisfied that the applicant had in fact been raped and buggered as she alleged.

On 17th October 1994 the applicant applied for leave to challenge that decision. On 14th February 1995 Carnwath J granted leave to move for Judicial Review. On 15th December 1995 Popplewell J dismissed the substantive application. He did so, as will appear, solely on the ground of delay; but for that he would have allowed the challenge. Before us now is the

applicant's appeal against that decision, leave to appeal having been granted by this court on 1st May 1996.

A

The issues raised on the appeal are many, various and difficult. Before, however, they can even be identified, it is necessary first to set out rather more of the factual background. This I shall do as briefly as may be.

B

When, on 28th May 1991, the applicant made her complaint of rape and buggery, WPC Richmond became involved in the police investigation and over the course of the next few days took from the applicant a very detailed statement about the whole incident. Towards the end of this statement the applicant explained why she had not at first reported the sexual assaults. This was, she said, because of the earlier rape which had caused her great distress and upset. Doris Wright, a Victim Support Scheme volunteer, had comforted her then. Immediately after this further incident the applicant contacted Ms Wright again, and it was on her advice that she decided to tell the police the whole story.

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On 30th May 1991, once the applicant's statement had been completed, WPC Richmond took her to be medically examined by Dr Susan West, a GP used by the police in such cases. The applicant gave Dr West an account of the incident consistent with what she had just told the police, recounted a history of haemorrhoids during pregnancies, and said that she had passed

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blood with every motion since the attack five days earlier. Anal examination revealed two skin tags. Full examination, however, was prevented by the internal sphincter being in spasm. Dr West's eventual (undated) report, faithfully reflecting her contemporary notes, concluded thus:

> "The anal findings are consistent with the allegation of buggery. The vaginal findings neither confirm nor exclude vaginal intercourse."

As will appear, it is central to the applicant's challenge that Dr West's conclusion was not made available to the Board.

On 3rd June 1991 the applicant went to her own GP complaining of depression. On 13th November 1991 she was seen at the North Middlesex Hospital for rectal bleeding which she said had continued ever since the incident. A report from that Hospital to the Board dated 19th January 1992 expressed the view that:

> "It is likely that the bleeding is associated with an injury to the anal sphincter at the time of rectal rape."

Later reports from that Hospital show that the applicant was treated unsuccessfully for her haemorrhoids in March 1992 and that she underwent further operations in February 1993. A prognosis of 13th April 1993 reads:

> "I think she is chronically constipated and this difficulty with haemorrhoids and rectal mucosal prolapse is likely to recur."

Meantime, on 20th November 1991, the applicant had with Ms Wright's assistance made her application to the Board. It was, indeed, by reference to the information she provided in the

section of the claim form headed 'Details of Injuries and Medical Treatment' that the Board requested the various medical reports to which I have referred. Understandably the applicant had not mentioned her examination by Dr West: regarding the incident itself she simply stated "Please see police statement for details", by which she presumably meant her own full account given on 30th May 1991.

On 25th September 1992 the applicant was notified that her claim had been referred by the single Board member for oral hearing by a full panel of three members. A year later, on 26th July 1993 she was sent a summary of the case with a schedule of documents to be used and was told that the hearing was to take place on 31st August. The summary identified as the issues:

> "1. Whether the applicant sustained injury directly attributable to a crime of violence [i.e. whether she really had been raped and buggered].
>
> 2. Whether the applicant informed the police of the circumstances of the injury without delay (paragraph 6(a) of the scheme)"

Paragraph 6(a) entitles the Board to withhold or reduce compensation if they consider that:

> "(a) The applicant has not taken without delay all reasonable steps to inform the police ... of the circumstances of the injury and to cooperate with the police ... in bringing the offender to justice."

The summary also notified the applicant that the Board would be inviting a police officer as a witness and continued:

> "The applicant should invite any other witnesses whose evidence she wishes the Board to hear. If there is a person to whom the applicant made an immediate complaint of rape or there is a witness to the applicant's immediate distress or who inspected the damage to property and belongings which the applicant states took place, these witnesses may assist the applicant's case. It is for the applicant to make out her case at the hearing."

She was told not to ask for "copies of police statements" which could only be produced at the hearing. "Police statements" I take to include statements made to, as well as by, the police and thus to include Dr West's medical report (assuming, although this is by no means clear, the police ever had a copy of that report). The schedule of documents consisted simply of the summary itself, the applicant's application form, and the various medical reports which the Board had gathered in.

At the hearing on 31st August 1993 the applicant was accompanied by Ms Wright. The applicant gave oral evidence as did the two police officers, DC Saunders and WPC Richmond. A full account both of the hearing and of the basis of decision appears from the (10 page) 'Written Reasons' eventually prepared by the three- member Board (Barry Chedlow QC, Donald Robertson QC and Diana Cotton QC) in May 1995 in response to the challenge; routinely, because of the pressure of work, the Board only provide full reasons once leave to move has been obtained.

I shall not attempt here any summary of the evidence; clearly there were a number of points to be made both for and against the claim on the central issue. What, however, it is essential to note for present purposes is the evidence given with regard to Dr West's examination of the applicant on 30th May 1991. As to that the Board's Reasons record that:

> "[WPC Richmond] took the applicant for an examination for medical evidence. The Doctor could only see trauma to the back passage - the applicant had haemorrhoids."

(That, I should note, matches what the applicant herself had deposed as to WPC Richmond's affidavit in her evidence in support of the challenge: "WPC Richmond told the panel that she had taken me to her police doctor but said that the bleeding I was suffering anally was due to haemorrhoids.")

"[DC Saunders] confirmed that the police would start with support for the complainant and an open mind and that there would be a full investigation, as there was in this case, with photofits, house-to-house enquiries, medical enquiries, but from all this nothing at all was discovered in support of the applicant's account." (my emphasis)

The essence of the Board's reasoning for rejecting this claim is to be found in the final two paragraphs of their Reasons:

> "36. We considered the Applicant's explanation for her initial denial of any sexual interference and delay in reporting the rape and buggery and weighed that against the other evidence available to us. The Board was mindful of the distress which would be felt by a woman suffering the experiences described by the Applicant and the reluctance in some cases to make immediate disclosure. We considered the medical evidence but concluded that it gave no assistance in determining whether she had been raped and buggered, as alleged. We considered the evidence of WPC Richmond and in particular her evidence that although the Applicant knew from past experience the importance of early reporting and of preserving all potential evidence, by the time the sexual offences were reported the Applicant had washed her clothing and examination of the scene found no forensic evidence at all. We noted that WPC Richmond considered that the delay in reporting was material because of the importance of finding forensic evidence and that the police investigating the alleged offence had, in the end, been sceptical about the allegations made. We also noted that WPC Richmond said that while she was trying to take a statement from the Applicant she had cried a lot and avoided answering questions.
>
> 37. Where the Applicant's evidence differed from that of the police, we preferred the police evidence, and we did not find the Applicant a convincing witness. We found that the Applicant was well aware of the need to report the alleged offences to the police straightaway and to preserve her clothing as potential evidence and that her failure to do so amounted to a failure to co-operate with the police. We directed ourselves that the onus was on the Applicant to satisfy us initially that she was the victim of a crime of violence as alleged and in our consideration

of the whole evidence including the delay in reporting and the destruction of the forensic evidence we concluded that she had failed to discharge that burden. Consequently, while taking into account her explanation for her failure to co-operate with the police in these matters, we decided that no award should be made on the basis that we were not satisfied that she was the victim of a crime of violence as alleged. The question of withholding compensation or making a reduced award under the discretionary provisions of Paragraph 6(a) did not directly arise. The delayed reporting and failure to co-operate were factors which with the rest of the evidence and our assessment of the Applicant caused us not to be satisfied, on the balance of probabilities, that the crime of violence occurred."

Where in paragraph 36 the Board said: "we considered the medical evidence but concluded that it gave no assistance in determining whether she had been raped and buggered as alleged", that must, I think, refer to the medical reports obtained by the Board, most particularly perhaps that dated 19th January 1992 to which I have referred, rather than WPC Richmond's account of Dr West's examination. But that matters not. What Mr Blake QC submits - and to this I shall have to return - is that had the Board had in addition Dr West's near-contemporaneous report or an accurate account of it, then this would have put a very different complexion on the case. It is, he submits, one thing to reject a medical opinion seven months later suggesting that "it is likely that the bleeding is associated with an injury to the anal sphincter at the time of rectal rape"; quite another to reject Dr West's view as to consistency expressed just five days after the incident.

Before turning to the argument, however, I must first complete the chronology of events.

After the hearing, the Applicant instructed solicitors, Barnes & Partners, who wrote to the Board on 27th October 1993:

> "Can you please let us know the basis upon which the claim has been rejected and whether or not the Board found that [Mrs Avraam] had been the subject of a rape on the 25th May. The Board should have had before it a police surgeon's report but Mrs Avraam has never seen a copy of this report and in the event that the Board found that she had not been raped we would be grateful if you could forward us a copy of that report so that we can consider the matter further."

The Board's reply, dated 9th December 1993, came from their Advocate, Mr Foster, who had appeared at the hearing. He said nothing as to Dr West's report but concluded - not entirely accurately as the Board's eventual Written Reasons revealed:

> "The application was refused under paragraph 6(a) of the Scheme, the applicant having delayed three days in informing the police of the allegation of rape whereby the whole investigation had been prejudiced. The Board emphasised the importance of prompt reporting so that the police had the earliest opportunity to commence investigation."

A further ten months elapsed before the judicial review challenge was launched. I shall summarise only very briefly what was happening during this period. First, Barnes & Partners sought to persuade the Board to re-open the matter. This they refused to do. Barnes & Partners then told the Applicant that nothing further could be done. In March 1994, with the help of the Victim Support Scheme, the applicant's present solicitors were instructed. Legal Aid was sought and granted, limited initially to obtaining Counsel's advice. In April 1994 counsel advised *inter alia* that the police doctor's report and the North Middlesex Hospital notes of the Applicant's original attendance on 25th May 1991 must be obtained. The Hospital notes were received on 24th May 1994; Dr West's notes, however, despite the solicitors' continuous efforts, were not received until 27th July 1994 and her report not until 14th August 1994, both directly from Dr West herself, the police having been unable to produce them. In the light of these

documents counsel advised favourably on 1st September 1994 and the limitation was removed from the Legal Aid certificate on 3rd October 1994. As stated, the application for leave to move was finally made on 17th October 1994. That ten month delay was ultimately found fatal to the challenge.

It is time now to indicate something of the legal basis on which it is sought to impugn the Board's decision. Essentially two alternative grounds of challenge are advanced. First it is said that the Board itself acted unfairly in not of its own initiative obtaining Dr West's report. Clearly the Board would have expected there to be such a report: the Applicant's statement as well as her GP's report both referred to the police surgeon's examination and in any event such an examination is routinely undertaken whenever an allegation is made of serious sexual assault. The Board would know too that the Applicant would be unlikely, probably unable, to obtain it for herself. Not only is there no equality of arms in these cases - no Legal Aid, no representation, no discovery, no advance knowledge on the Applicant's part as to what documents the police witnesses will bring to the hearing - but in reality, as the long established arrangements between the Board and the police recognise, police cooperation is essential to the proper working of the Scheme. At the very least, submits Mr Blake, once it appeared to the Board at the hearing that Dr West's report was missing, they should have adjourned the hearing for it to be obtained. This ground of challenge I shall call the 'primary unfairness

argument.' It involves, of course, criticism directed at the Board itself, including its investigating staff and Advocate.

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The alternative ground of challenge focuses on the unfairness of the evidence given here by the police witnesses at the hearing. If the Board are not open to criticism perhaps because they were entitled to rely on the police evidence (misleading though it has turned out to be) as to Dr West's report, then, submits Mr Blake, their decision is nonetheless unfair and open to legal challenge under the principle established by a line of authority culminating in R v Bolton Justices ex parte Scally [1991] 1 QB 537. This I shall call the Scally argument, and I shall return to it in substantially more detail later in this judgment.

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Meantime I should note that it was the primary unfairness argument in its narrow form - the failure to adjourn the hearing - which Popplewell J accepted below. He was, he said:

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> "... clear that if [the Board] had had Dr West's report it would have been very difficult for them to come to the conclusion that [the Applicant's] credibility was nil. The Board could, of course, have rejected Dr West's report, but that would, in the circumstances of the case, seem to me to have been a perverse decision. Dr West's report came to this: this lady has complained within the last three [he must have meant five] days she has been buggered; I found evidence which is consistent with that. [I have re-punctuated this] Absent any other suggestion that she had been buggered earlier in her life, it could only, in my judgment, have led the Board to take a much more favourable view of the Applicant's credibility."

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A little later in his judgment, having referred, as later I shall have to refer, to a trilogy of first instance decisions on the point, Popplewell J said this:

> "It is submitted that ... the Board were put on enquiry that there had been a medical examination by a police doctor very

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> shortly after these events. Quite clearly, having seen the report, it was germane to the very heart of the case. ... In my judgment the word 'fairness' is the hallmark by which this case should be determined. It seems to me that there is a proper ground for complaint and that in fairness the Board, alerted to the fact that there had been this report, should, of their own volition, have sorted out, or at least invited the Applicant's view as to whether there should be an adjournment to obtain it."

Having reached that conclusion, it was unnecessary for Popplewell J to consider the Scally argument. Instead he proceeded directly to the issue of delay which he discussed at some length and finally resolved against the Applicant in these terms:

> "I am satisfied, in my mind, that there has been undue delay, that there has been no good reason for it, that there is no reason for extending time and accordingly I will not grant relief in this case for that reason."

He had, I should note, rejected the Board's argument that the grant of relief here "would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration" within the meaning of section 31(6) of the Supreme Court Act 1981. In particular it had been the Board's contention, only finally abandoned in the course of argument before us, that it "would be detrimental to good administration" to quash this decision. For convenience hereafter I shall refer to this limb of section 31 (6) compendiously as 'hardship, prejudice or detriment'.

The first and main issue arising on the appeal is whether, absent hardship, prejudice or detriment, it is open to the court on the hearing of a substantive judicial review motion, for which leave has been granted, to dismiss the challenge on the ground of undue delay as Popplewell J did here.

Clearly this is an issue of very considerable general importance. Somewhat surprisingly, it has not hitherto been the subject of decision save only by Webster J at first instance in R v Tavistock General Commission ex parte Worth [1985] STC 564, a decision later approved *obiter* by Evans LJ in this Court in Patterson v London Borough of Greenwich (1993) 26 HLR 159. In considering the issue it is, of course, necessary to keep in mind the two legislative provisions governing delay:

First, Order 53 rule 4 of the Rules of the Supreme Court:

> "4(1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made."

The words in the first line "leave to apply for" were added by amendment in 1987 to reflect the decision of the Court of Appeal in R v Stratford on Avon District Council ex parte Jackson [1985] 1 WLR 1319 which had in any event construed the word "application" to mean the application for leave.

Next, the material parts of section 31 of the Supreme Court Act 1981:

> "(6) Where the High Court considers that there has been undue delay in making an application for judicial review, the Court may refuse to grant (a) leave for making the application, or (b) any relief sought on the application, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.
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> (7) Sub-section (6) is without prejudice to any enactment or rule of law which has the effect of limiting the time within which an application for judicial review may be made."

The inter-relation between these various provisions was considered by the House of Lords in R v Dairy Tribunal ex parte

Caswell [1990] 2 AC 738 where Lord Goff, in the single reasoned speech, expressed these conclusions:

> "... as I read rule 4(1), the effect of *the rule* is to limit the time within which an application for leave to apply for judicial review may be made in accordance with its terms, i.e. promptly and in any event within three months. The court has however power to grant leave to apply despite the fact that an application is late, if it considers that there is good reason to exercise that power; this it does by extending the period. This, as I understand it, is the reasoning upon which the Court of Appeal reached its conclusion in *Reg. v. Stratford-on-Avon District Council, Ex parte Jackson*. Furthermore, the combined effect of section 31(7) and of rule 4(1) is that there is undue delay for the purposes of section 31(6) whenever the application for leave to apply is not made promptly and in any event within three months from the relevant date.
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> It follows that, when an application for leave to apply is not made promptly and in any event within three months, the court may refuse leave on the ground of delay unless it considers that there is good reason for extending the period; but, even if it considers that there is such good reason, it may still refuse leave (or, where leave has been granted, substantive relief) if in its opinion the granting of the relief sought would be likely to cause hardship or prejudice (as specified in section 31(6)) or would be detrimental to good administration. I imagine that, on an ex parte application for leave to apply before a single judge, the question most likely to be considered by him, if there has been such delay, is whether there is good reason for extending the period under rule 4(1). Questions of hardship or prejudice, or detriment, under section 31(6) are, I imagine, unlikely to arise on an ex parte application, when the necessary material would in all probability not be available to the judge. Such questions could arise on a contested application for leave to apply, as indeed they did in *Reg. v. Stratford-on-Avon District Council, Ex parte Jackson;* but even then, as in that case, it may be thought better to grant leave where there is considered to be good reason to extend the period under rule 4(1), leaving questions arising under section 31(6) to be explored in depth on the hearing of the substantive application.
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> In this way, I believe, sensible effect can be given to these two provisions, without doing violence to the language of either. Unlike the Court of Appeal, I do not consider that rule 4(3) and section 31(7) lead to a circulus inextricabilis, because 31(6) does not limit 'the time within which an application for judicial review may be made' (the words used in rule 4(3)). Section 31(6) simply contains particular grounds for refusing leave or substantive relief, not referred to in rule 4(1), to which the court is bound to give effect, independently of any rule of court."

Although Caswell does not directly address the present issue, Evans LJ in Patterson, and indeed Popplewell J in the present case, appear to have found in it support for the view that mere delay can warrant refusal of relief even at the

substantive hearing, even that is if relief would occasion no hardship, prejudice or detriment.

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That certainly had been Webster J's conclusion in Worth - decided, of course, before Caswell or even Jackson. At page 569 of the report he said this:

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> "Sometimes, when leave is given, it is given without prejudice to the question of time. But, in my view, even where such words are not used, the giving of leave does not amount to an extension of time. The object of imposing the requirement of obtaining leave to move, before actually moving, for judicial review, is to require the applicant to show and the judge who grants leave to decide that there is an arguable case for judicial review before the substantive hearing of the motion and before the other side is heard.
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> The function of the judge in that situation, under the rules, is therefore to decide whether the applicant is arguably entitled to the relief he seeks by way of judicial review. It is not his function to determine any issue finally in favour of the applicant if only because he has not heard the respondent.
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> I am quite satisfied that on a proper construction of the provisions, and in accordance with the recognised practice, the giving of leave to move for judicial review means no more than that the applicant is arguably entitled to the relief that he seeks. If the judge who considers the application is of the view that there is no arguable case on the merits, then he will refuse leave in the first instance, whether the application be made on paper or orally. I apprehend that if he comes to the conclusion that there is no arguable case for extending time, where the application for leave is made out of time, then again he would refuse leave.
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> In short I conclude, while recognising that the conclusion does not follow inevitably from the express wording of the rules in the Act [*sic*,] that the granting of leave to move does not preclude the respondent from objecting that the application has been made out of time."

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Evans LJ in Patterson at page 165-6, expressed the same view:

> " ... the granting of leave to make the application does not imply that leave to extend the period has been given, for the purposes of Order 53, r.4. This is because the court is only concerned, when leave to make the application is sought under
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> Order 53, r.3(1) with the question whether the applicant shows prima facie grounds for making the application, or for making it after expiry of the time limit, as the case may be: compare *R v Tavistock General Commissioners ex p. Worth* [1985] STC 564 at 568-9 per Webster J."

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A little later he said this:

> "The effect of the House of Lords' judgment in *Caswell*, as I read it, is that the court which determines the application for judicial review, in a case where the applicant has exceeded the time limits imposed by Order 53, r.4(1) and therefore is guilty of undue delay for the purposes of section 31(6), has to consider and apply the two statutory provisions separately, though not strictly in parallel because both might lead to the same conclusion. The question under Order 53, r.4(1) is whether there was good reason for the delay; if so, the court may, or perhaps must, extend the period for making the application accordingly. Even if it does so, the court as a matter of discretion may refuse to grant relief if substantial hardship or prejudice to the rights of third parties would be likely to be caused thereby, or the interests of good administration harmed. Section 31(6) specifies the circumstances in which relief may be refused; Order 53 r.4(1) imposes time limits and specifies the circumstances in which the limits may, or must, be extended."

All that, however, was *obiter*. Evans LJ concluded on this part of the case:

> "As regards the legal issues, it is unnecessary to decide them, in my judgment, because the appellant does show 'good reason' within Order 53 r.4(1) and it is not a case where relief should be refused under section 31(6). Alternatively, if the statutory provisions require one overall exercise of discretion, then the appellant should be granted the relief to which she is otherwise entitled."

Popplewell J said in the present case:

> "It is difficult to know what the purpose of sub-section (7) [of section 36] is unless it is to enable the court, on the full hearing, to decide whether leave should have been granted in the first place."

He then cited from Caswell most of the passage I have already cited, and continued:

> "It seems to me that if a court takes a view, as I do, that there has been undue delay, that there is no good reason shown, and there is no reason why time should be extended, that is a matter which, on a full hearing after an ex parte application, the court is entitled to take into account and deal with either by way of a setting aside of the original leave or, in fact, by hearing argument on the issue. I have heard argument on the issue."

Mr Kent QC for the Board seeks to uphold Popplewell J's decision on two alternative bases. First, in reliance on Worth and Patterson, he contends that the initial grant of leave decides nothing finally as to whether there was good reason for

extending time, and thus as to the propriety of the grant of leave, so that the judge at the substantive hearing is entitled to decide that matter afresh *inter partes* without even having before him an application by the respondent to set the leave aside. (Mr Kent did not seek to justify Popplewell J's reliance on section 31(7).) Second, on the particular facts of this case, he submits that Carnwath J never actually did extend time but rather, in the manner envisaged by Webster J in Worth, gave leave "without prejudice to the question of time." This, therefore, he argues, was to be regarded as a conditional grant of leave, i.e. leave conditional upon the judge at the substantive hearing finding good reason to extend time. In this regard he relies upon two comments made by Carnwath J during the course of the short oral hearing before him on 14th February 1995:

> "I think I could not shut this out on delay because that is a point that can be taken in the proceedings if leave is granted."

And later:

> "It seems to me that you should have leave, but I think that the question of delay - Board may want to raise that."

Although Mr Blake submits that that may well have been a reference only to the Board's undoubted right to raise delay at the substantive hearing if they were to assert hardship, prejudice or detriment, I reject that view. Rather it seems to me altogether more probable that Carnwath J, in common I think with many of us exercising this jurisdiction, supposed that it would indeed be possible for the respondents at the subsequent *inter partes* hearing to argue mere delay. The question is:

was he right in that supposition (Mr Kent's point 1) or, if not, does the way in which he dealt with this particular application mean that he never extended time but merely granted conditional leave (Mr Kent's point 2)?

Whatever be the answer to point 1 - to my mind the critical question - I would certainly reject point 2. There is no provision in the rules for a conditional grant of leave (save only as to costs and security under order 53 rule 3(9)), and clearly Carnwath J was intending no such thing. The order was "Leave granted." He may or may not have been right in his supposition on point 1 but, even if wrong, that cannot in my judgment affect the nature of the leave he gave. In short, I see no more reason than did Webster J in Worth to distinguish between the general run of cases where leave is given despite delay and those where it is given, in whatever terms or belief, "without prejudice". The same rule must apply to both. The question is: what rule? We are back to point 1.

That is not to say, of course, that a judge at the leave stage is unable to adjourn the leave application to be heard later *inter partes* to be followed immediately, if successful, by the substantive motion. Such a course would obviously leave open until the later hearing the possibility of refusing leave on grounds of mere delay. Generally speaking, however, I can see little advantage in such a course, at any rate so far as the issue of delay is concerned. To my mind the whole object of rule 4(1) is that both the court and the proposed respondent may

be spared the need to deal with late challenges except only for good reason. Once the application is listed *inter partes* and contingently for a full substantive hearing that object has ceased to be attainable.

Similarly, it is convenient to point out at this stage, there is nothing to stop a respondent who wishes to rely on mere delay and who believes that there was no good reason why the applicant should have had his time extended in the first place, from applying to set aside the grant of leave. Paragraph 53/1-14/2 of the Annual Practice states:

> "Discharge of leave - it is open to a respondent (where leave to move for judicial review has been granted *ex parte*) to apply for the grant of leave to be set aside ... but such applications are discouraged and should only be made where the respondent can show that the substantive application will clearly fail."

Of course, if Mr Blake's argument is correct, the substantive application itself could not fail on grounds of mere delay and there would need to be added to that paragraph words such as "or that leave should not have been granted having regard to delay." That said, respondents should by no means be encouraged to make such applications. Quite the contrary: only rarely will they be able to assist the court on the rule 4(1) issue - whether good reason exists for extending time - only perhaps when they themselves are said to have contributed to the delay. If, moreover, such an application is made, then clearly it should be made sooner rather than later. As was held by the Divisional Court in R v Derbyshire County Council ex parte Noble [1989] COD 285:

> "Where it was sought to make an application either under Order 32 rule 6 or under the inherent jurisdiction of the court to set aside a grant of leave, the application should be made timeously. If it was not made before the substantive hearing there was no point in making the application at all since it saved no costs and was to no one's advantage. In R v Governor of Pentonville Prison ex parte Herbage No. 2 [1987] 1 QB 1077 Purchas LJ had given adequate guidance as to the proper course to be adopted, even if his observations on that occasion were *obiter*."

I come at last to the central question, Mr Kent's point 1. The one other authority said to be relevant to its determination is this court's decision in R v Secretary of State for Health ex parte Furneaux [1994] 2 AER 652, on which Mr Blake seeks to rely. The second respondents there had been added as a party to the challenge after the applicants had obtained leave to move against the first respondent. At the substantive hearing the first respondent was content to submit to an order that his decision be quashed. The second respondents, however, contended that there had been undue delay in making the application and that the grant of relief would cause them prejudice. They relied upon both Order 53 r.4(1) and section 31(6) in arguing that relief should accordingly be refused. In allowing their appeal, Mann LJ said at page 658:

> "I regard the existence of the unexplained delay as being decisive in exercising discretion against granting relief in this case, the foundation of the exercise of discretion having been laid by the conceded, and as I think, demonstrable prejudice to the second respondent."

Peter Gibson LJ and Butler-Sloss LJ agreed. Mr Blake submits that by necessary implication it was held there that absence of good reason (i.e. unexplained delay) by itself is an insufficient basis on which to refuse relief at the substantive hearing. Were it sufficient, it would have been unnecessary for the court there even to refer to the prejudice to the second

respondents, let alone to decide, as it did, that the prejudice in question is that which would be caused by the grant of relief, not that resulting from the undue delay. For my part, although I recognise the strict logic of this submission, I have the greatest doubt whether the court was really applying its mind to the present issue and am accordingly loath to place much reliance on the decision. Rather I prefer to return to the governing provisions and, in the light of Lord Goff's speech in Caswell, to consider their overall purpose and effect.

On this approach I have reached the clear conclusion that Mr Blake is correct in his central submission. Certainly I can find nothing in Lord Goff's speech to support the contrary view; rather a passage (already cited) which perhaps supports Mr Blake:

> "... even then [on a contested application for leave to apply] ... it may be thought better to grant leave where there is considered to be good reason to extend the period under rule 4(1), leaving questions arising under section 31(6) to be explored in depth on the hearing of the substantive application."

There is no indication there that Lord Goff was envisaging the possibility of revisiting at the substantive hearing the question whether originally there had been good reason for extending the period within which to apply for leave. And that to my mind is hardly surprising, not least for the reason I have already suggested in connection with adjourned applications for leave and late applications to set aside leave, namely that the real point of rule 4(1) is to avoid the respondent having to contest, and the court having to hear, challenges brought out of time unless there is good reason for doing so. Once one reaches the substantive hearing and, as in this very case, determines the

substantive merits of the challenge in favour of the applicant, there is little to be said for then refusing relief, unless of course the relief itself would cause the respondent or some third party hardship, prejudice or detriment.

It therefore seems to me logical to construe these provisions as Mr Blake invites us to do: to treat the application for leave and the substantive hearing as two distinct stages; to grant leave unless (a) there is no good reason for extending time (rule 4(1)), or (b) it is already apparent that the eventual grant of relief would be likely to cause hardship, prejudice or detriment (section 31(6)(a)); and to accept that once one reaches the substantive hearing delay is only relevant on section 31(6)(b) grounds. Once time has been extended by the grant of leave then that, unless the leave is later set aside, is that. There will, of course, by definition have been undue delay in making the application (see Caswell), so that at the substantive hearing relief can be refused under section 31(6)(b) if it would cause hardship, prejudice or detriment. Absent any of those, however, the court cannot as it were simply cancel the earlier extension of time for all the world as if leave had never been given and the substantive application had never been made.

If, of course, at the substantive hearing it appears that the grant of relief would be likely to cause hardship, prejudice or detriment, then clearly the reasons for the earlier delay may come back into play. But by that stage the applicant will have established his substantive challenge (else he will in any event

himself to implement a planning permission before it is challenged but after it could have been challenged), then the applicant can hardly complain if that delay weighs heavily against him in the final balance.

(iv) Whether the applicant can be shown to have misled the court when he obtained leave. If he did, then again he can hardly complain if it weighs heavily against him. Indeed, if the extension of time is shown to have been obtained in bad faith, then the court in its discretion can properly refuse relief irrespective of whether the respondent makes out a case of hardship, prejudice or detriment.

In short, quite different questions arise with regard to delay depending upon whether the point is raised at the leave stage or at the substantive hearing. At the leave stage (putting section 31(6)(a) aside), the question is whether there is "good reason" for extending time and allowing the substantive application to be made. This involves consideration both of the reasons for the delay and the apparent merits of the challenge: the better the prospects of success, the readier will the court be to extend time even where the delay is unjustifiable i.e. the merits themselves can contribute to or even supply the "good reason". At the substantive hearing, however, the question is whether, in a case where there was initially "undue delay" (which may have been wholly justifiable), the merits of the challenge (by now actually established) should be overridden by the hardship, prejudice or detriment that would result from the grant of relief.

It follows from all this that I regard Worth as having been wrongly decided and Popplewell J to have erred in dismissing the present challenge on grounds of delay. I would, incidentally, have concluded for my part that good reason was shown at the leave stage here for extending time - and, moreover, that it is open to this court (just as on a renewed application for leave to move) to exercise a fresh discretion in the matter. Given, however, that these questions do not in the event arise for decision I shall say no more about them.

I turn rather, as now I must under the respondent's notice, to the substantive grounds of this challenge i.e. to consider whether the judge was right to accept the appellant's primary unfairness argument and, if not, whether the alternative Scally argument succeeds.

The Primary Unfairness Argument

I have already indicated the essential basis of this argument and Popplewell J's conclusion upon it. The three earlier such challenges to the CICB - none of them in the event successful - were ex parte Berry (unreported, 30th July 1985), ex parte Parsons (unreported, 17th January 1990), and ex parte Milton [1997] PIQR 74.

In Berry, Nolan J said this:

> "It is ... the duty of the ... Board's Advocate to bring out all relevant evidence in the Board's possession whether it is for or against the applicant. The proceedings are inquisitorial in nature."

In Parsons, the complaint was that the Board did not have the notes of the police interview with the alleged rapist. The applicant argued:

> "that the Board has an investigatory function which extends to gathering the relevant evidence, and that they should have appreciated that probably an interview would have taken place and should, failing [the police inspector's] production of it, have exerted themselves to obtain it. ... [The applicant] contends, implicitly at any rate, that the statement [of Nolan J in Berry] is not framed widely enough because the Board's obligation is not merely to put before the members the information and evidence in its possession, but to ensure that there is in its possession all the relevant evidence which it can reasonably deduce exists."

Hutchison J, however, preferred the Board's argument that:

> "While undoubtedly the Board, as Berry establishes, has a duty to present fairly and impartially the evidence through its representative, that duty does not extend to evidence-gathering in the sense that [the applicant] contends for. Provided reasonable steps are taken to obtain material and place it before the Board, and provided the material that has been obtained is fairly deployed and there is no concealment or unfair advantage taken, then ... the Board has fulfilled its proper function."

In Milton, where it was being contended that the Board should have searched out a variety of old hospital records, Buxton J said, at page 81:

> "... the provisions of the Scheme, which are not in issue in this case, that is to say that it is for the applicant to make out her case, mean what they say. It is, of course, possible that there might be circumstances in which either the applicant persuaded the Board, or it became clear to the Board, that an applicant had particular difficulty in obtaining information or evidence about which it needed the Board's assistance. That is a different matter. But I cannot accept that it is the duty of the Board, of its own motion, if it considers that a case has not been made out on the matter put before it, then to consider whether the applicant's case might be better put than she had put it herself, and itself go out and seek evidence to support that case."

I agree with all those judgments and accordingly reject Mr Blake's submission here that the Board were themselves under a duty to procure Dr West's report in advance of the hearing. If they were, then, as Mr Blake accepted, such a duty would arise in every sexual case. The obligation that "reasonable steps are

taken to obtain material and place it before the Board" (Parsons) does not in my judgment extend that far.

A

What then of Mr Blake's narrower submission, that accepted by Popplewell J, that once the Board found at the hearing that Dr West's report was not being produced by the police, they should have adjourned the hearing or at any rate offered an adjournment? With great respect to the Judge I find that an impossible conclusion. Perhaps, had nothing at all been said as to Dr West's examination and its findings, the Board would have been obliged to offer an adjournment before it could properly conclude that there was no medical support for these allegations. As it was, however, the Board had, and to my mind were perfectly entitled to rely upon, WPC Richmond's evidence that "the Doctor could only see trauma to the back passage - the applicant had haemorrhoids" - the apparent implication being that the trauma was due to the haemorrhoids - , and DC Saunders' evidence that there was nothing in the "medical enquiries" to support the applicant's account.

B

C

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I would therefore accept the Board's case on the primary unfairness argument.

F

The Scally Argument

This, in my judgment, is the most difficult part of the case.

G

H

It has long been established that fraud, collusion, perjury and the like provide grounds for judicial review even though there has been no error or misconduct on the part of the tribunal itself. The principle established by the line of cases culminating in Scally is that a challenge may also lie when unfairness in the conduct of proceedings results from some failure on the prosecutor's part even where no one has been guilty of fraud or dishonesty; that failure itself may be regarded as analogous to fraud.

Amongst the main cases which fall to be explained on this basis are:

1. R v Leyland Justices ex parte Hawthorn [1979] QB 283, where a motorist successfully challenged his conviction for careless driving - as later explained by Lord Bridge in R v Secretary of State for the Home Department ex parte Al-Mehdawi [1990] 1 AC 876 at 896:

> "... because of a failure by the prosecutor, in breach of a duty owed to the court and the defence, to disclose the existence of witnesses who could have given evidence favourable to the defence. Although no dishonesty was suggested, it was this *suppressio veri* which had the same effect as a *suggestio falsi* in distorting and vitiating the process leading to conviction, and it was, in my opinion, the analogy which Lord Widgery CJ drew between the case before him and the cases of fraud, collusion and perjury which had been relied on in counsel's argument, which identified the true principle on which the decision could be justified."

2. R v Blundeston Prison Board of Visitors ex parte Fox-Taylor [1982] 1 AER 646, where a Board of Visitors' finding of guilt against a prisoner was quashed because the prison authorities had failed to disclose to him the existence of a potential witness who might have supported his case.

3. R v Knightsbridge Crown Court ex parte Goonatilleke [1986] QB 1, where a visiting Sri Lankan police officer was convicted of shop-lifting on the evidence of a store detective who had represented himself as a man of good character but who was later discovered, after the dismissal of the applicant's Crown Court appeal, to have left the Metropolitan Police under a cloud and to have been convicted of very serious offences.

4. R v Kingston-upon-Thames Justices ex parte Khanna [1986] RTR 364, where the applicant pleaded guilty to driving with excess alcohol although, as later emerged, the intoximeter calibration check had been beyond the limits of tolerance so that there was in truth no evidence at all to support the charge.

5. R v Liverpool Crown Court ex parte Roberts [1986] Crim LR 622, where the applicant was convicted of assault on the police, a police sergeant having inadvertently failed to enter in his witness statements the note in his notebook that the police victim had admitted that the assault was an accident.

6. Scally itself, where each applicant had pleaded guilty to driving with excess alcohol in his blood, it being discovered subsequently that the swabs used for taking their specimens had themselves been contaminated with alcohol.

As to the part played by those responsible for the unfairness in these cases, one notes the following:

the processes being undertaken. The present form of proceeding, requiring an applicant to make good a claim for compensation under the prerogative (now under a statutory scheme), appears to me strikingly different from the essentially criminal processes considered in all the other cases. Not only is the role of the police before the Board clearly different from that of any conventional prosecutor, but, no less important, the result of any unfairness here is (at worst) a failed claim rather than a criminal conviction - or, in Hawthorn, a disciplinary offence punished by ninety days loss of remission. It seems to me one thing to find an analogy with fraud in the unfairness of a prosecutor which corrupts the criminal process; quite another to extend that analogy to encompass unfairness (consisting of unintentionally misleading evidence) by a witness assisting a statutory tribunal to administer a compensation scheme. Materiality too - the second of Hutchison J's 'three particular features' in Scally - will generally be far clearer in the criminal context: there the onus lies on the prosecutor to prove the case beyond reasonable doubt; here, by contrast, the applicant has to satisfy the Board that he or she is the victim of a crime of violence.

Mr Blake's final submission was that the decision here should be quashed because these proceedings were tainted by a material error of fact: the Board took into account an immaterial consideration because in truth there was a medical foundation for this claim. But that argument ignores the whole basis of the Scally principle, namely that it is only in certain

narrowly defined circumstances that the rule against judicially reviewing decisions by reference to fresh evidence is tempered. Were the Scally argument to prevail here then in truth we would be " treating judicial review as a sort of cure-all for every kind of perceived injustice".

In my judgment, therefore, the applicant fails to make good either ground of her substantive challenge with the result that her appeal must fail, albeit for very different reasons to those given by the judge below.

LORD JUSTICE PETER GIBSON: I agree, but as we are differing from the judge, who has vast experience in this field, on two major points and in deference to the admirable argument of Mr. Blake Q.C. for the Appellant, I add a few words of my own.

I start with the first issue, whether it is open to the court at the substantive hearing following the grant of leave to dismiss the motion for judicial review on the ground of undue delay. The result arrived at by the judge is at first sight a surprising one, holding as he did at the inter partes hearing after leave had been granted ex parte that the decision of the Board was vitiated by procedural unfairness, that the grant of relief sought would not be likely to cause hardship or prejudice nor would it be detrimental to good administration, but nevertheless that the application would be dismissed because of the delay without good reason. There having been "undue delay" by virtue of the expiry of the period of 3 months before the

application was made, that ground for dismissal covers what Lord Goff in R v Dairy Tribunal, Ex p. Caswell [1990] 2 A.C. 738 at p.747 thought would be the question most likely to be considered by the single judge dealing with the ex parte application. Every applicant knows or must be taken to know that he or she must give an explanation for that delay if the application is not to be dismissed. At that stage in the judicial review process the court is primarily concerned with the position of the applicants, and the intention underlying the rules must be that there should be a filter for those applicants, the court reaching its decision whether to give leave on the material which they provide and which will relate primarily if not exclusively to their own circumstances (see the Law Commission's report on Administrative Law: Judicial Review and Statutory Appeals, Law Com. No. 226 (1994) para. 5.23). If the filter operates as it should, then those applicants who have not provided good reason for their delay will be denied leave and neither the court not the respondent need be troubled with the application. The filter will not have performed its function if leave is granted but the court is to consider afresh at the substantive hearing whether the applicant had good reason for the undue delay. Of course it is right that the grant of leave ex parte, like any other ex parte order affecting others who have not had a chance to be heard on it, can be challenged by them. They have the right to seek to set aside that leave. Equally obviously that is not a course to be encouraged in the circumstance that the challenge goes only to whether the applicant had good reason for the delay.

The position in the present case is complicated by the fact that Carnwath J. in granting leave appears to have thought the question of delay could be dealt with at the substantive hearing. That thinking is understandable in the then existing state of the authorities. Indeed in R. v Secretary of State for Health, Ex p. Furneaux [1994] 2 All E.R. 652, in which that judge was counsel and to which I was a party, Mann L.J. (at p.657) thought it plain that at the hearing of the application for substantive relief it was open to examination whether or not the application was made promptly and if not whether there was good reason for the delay. But having regard to the issues in that case and the way they were decided, I do not consider that decision to be determinative of the first issue before us. To my mind it is clear that Carnwath J.'s order simply granting leave was not a conditional grant of leave.

I have been persuaded by Mr. Blake that at the substantive hearing it was not open to Popplewell J. to dismiss the application on the ground of unexplained delay. It is not the function of the judge at that hearing to determine the question whether leave should have been refused on that ground by the judge who heard the ex parte application. Delay at that hearing is only relevant in connection with hardship, prejudice or detriment under s.31(6)(b) Supreme Court Act 1981 in the manner explained by Simon Brown L.J.

I turn next to the question of fairness. Mr. Blake alleged failures by the Board and the police. In relation to the Board

he suggested that there had been two failures. First he submitted that even before the hearing by the Board there was a duty on them to obtain the relevant medical evidence, it being apparent from the papers which they did have that the Appellant had been taken to visit a police surgeon, yet there being no report or other documentary evidence of what the surgeon had found. Mr. Blake relied on the fact that the Board of their own motion do obtain documents and he submitted that what he called their investigating arm should have investigated further. Popplewell J. found no such failure by the Board, his decision being based on a failure by the Board at the hearing. In my judgment this argument is an impossible one. Para.25 of the 1990 Scheme expressly imposed on an applicant the burden of making out his or her case at the hearing. The applicant is not required in advance of the hearing to give details of his or her evidence, oral or documentary, and the Board does not know before the hearing what witnesses he or she will call. The Scheme does not impose any duty on the Board to obtain evidence or to make enquiries. That they choose to obtain some documents to assist them in the performance of their task does not shift from the applicant the burden of establishing his or her case. In the present case it was not impossible (though I accept unlikely) that the Appellant, who knew that she had been examined by a police surgeon and who could see that the schedule of documents before the Board did not on its face disclose that the Board had any medical report dating from around the time of the examination by the police surgeon, could have obtained for herself the very evidence that Mr. Blake says it was the duty of the Board to

obtain before the hearing. If there was a duty in this case, there was a duty in every case, and for my part I cannot see how in logic the duty could be limited to sexual cases. In my judgment such a duty would be inconsistent with the Scheme.

The second failure alleged against the Board is that found by the judge: "the Board, alerted to the fact that there had been this report, should, of their own volition, have sorted out, or at least invited the Applicant's view as to whether there should be an adjournment to obtain it." In fact the judge was not right to say that the Board was alerted to the fact that there had been a report by Dr. West to the police. What the Board knew was that there had been a medical examination of the Appellant by a police surgeon 5 days after the alleged rape and buggery. The undated and unsigned document with no addressee shown on it which has been referred to before us as Dr. West's report was sent to the Appellant's solicitors by Dr. West in August 1994 in response to their request for a copy of her report, but there is no evidence that it was received by the police, still less that it was seen by the police officers who gave evidence to the Board. Indeed in response to the solicitors' request by letter dated 25 April 1994 for the Appellant's statement to the police and all notes and records taken in connection with her examination at what was called the Police Clinic, WPC Richmond on 7 June 1994 sent the Appellant's statement but said that the police did not have copies of any of the other "statements" which the solicitors had requested but gave Dr. West's name and address. I take "statements" there to refer to the notes and records of the

examination by Dr. West requested by the solicitors. It has not been suggested by Mr. Blake that WPC Richmond or DC Saunders lied in giving their evidence to the Board and it has not been established that the police did receive Dr. West's report.

Was there a duty on the Board, knowing that there had been a medical examination, to do what the judge said should have been done at the hearing? I regret that I am unable to agree with the judge that there was. Para.25 of the Scheme provides that the Board will reach their decision solely on the evidence brought out at the hearing, and whilst I do not doubt that the Board had power to adjourn the hearing, in my judgment it is impossible to say that their decision is vitiated because they did not adjourn the hearing, although not asked to do so, or did not pursue the matter further at the hearing of their own volition. I repeat that the Scheme required the Appellant to make out her case at the hearing. The Board heard evidence from WPC Richmond and DC Saunders as to what was the result of Dr. West's examination and the medical enquiries, and I accept the submission of Mr. Kent Q.C. for the Board that there was nothing to indicate to the Board that what Dr. West found was other than what it had been represented by the police witnesses to be.

Mr. Blake's further ground of attack was that there had been a failure of the part of the police to give accurate evidence. He said that the police had a public duty to produce such evidence to the Board, the object of the scheme being to give compensation to victims of crime, and that reliance by the Board

on an inaccurate statement made by a police officer, who should have been able to inform the Board of the police surgeon's findings, rendered the decision unfair. I have considerable doubt whether Dr. West's report, had it been available to the Board, would have caused the Board to reach a different conclusion; it was of no help whatever to the Appellant in her claim that she had been raped and on its most favourable interpretation only amounted to saying that Dr. West had found what she would expect to find if the Appellant's allegation of buggery were true. As against that, there were other facts which cast doubt on the Appellant's credibility. But like Simon Brown L.J., I accept that it might have caused the Board to reach a different conclusion. The question that arises is whether the innocent misrepresentation of a material fact by a mere witness renders the decision of the Board unfair. So to hold would go a good deal further than any of the authorities to which we were referred, all of which are readily distinguishable, as Simon Brown L.J. has demonstrated. I am not prepared to do so on the facts of this case. The ability of the court to review judicially a decision reached entirely properly by a tribunal because of circumstances external to the tribunal but affecting that decision must be closely confined.

For these as well as the reasons given by Simon Brown L.J. I too would dismiss this appeal.

SIR IAIN GLIDEWELL: For the reasons given in the judgment of Simon Brown LJ, which I have read in draft, I agree that this appeal should be dismissed.

This appeal raises two issues of general importance, namely, the proper relationship between RSC O.53 r.4(1) and s.31(6) of the Supreme Court Act 1981, and the Scally point, on the first of which we are disagreeing with Popplewell J and (it seems) Carnwath J also. Despite this, the reasoning in Simon Brown LJ's judgment accords so completely with my own, that it is unnecessary for me to seek to add to it.

ORDER: Appeal dismissed; legal aid taxation; leave to appeal refused.

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(CROWN OFFICE LIST)

CO/3031/94

Royal Courts of Justice
Strand
London WC2

Friday, 15th December 1995

B e f o r e:

MR JUSTICE POPPLEWELL

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REGINA

-v-

CRIMINAL INJURIES COMPENSATION BOARD
EX PARTE AVRAAM

- - - - - -

(Computer Aided Transcript of the Stenograph Notes of John Larking, Chancery House, Chancery Lane, London WC2
Telephone No: 071 404 7464
Official Shorthand Writers to the Court)

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MISS E WOODCRAFT (Instructed by Messrs Miller Parris, W. Sussex BM4 8JB Braintree CM7 6AJ) appeared on behalf of the Applicant.

MR M KENT (Instructed by the The Treasury Solicitor) appeared on behalf of the Respondent.

J U D G M E N T
(as approved)

Friday, December 15th 1995

MR JUSTICE POPPLEWELL: This is an application to judicially review a decision of a panel of members of the Criminal Injuries Compensation Board, on 31st August 1993, and a decision in a letter of 29th December 1993 setting out the reasoning.

The application was refused on paper by Brooke J on 4th November 1994. It was renewed ex parte in front of Carnwath J and I am told that he expressly indicated that the question of delay was a matter to be considered thereafter. I can set out quite shortly the history of this case, which is somewhat unusual. The Applicant contends that, on 25th May 1991, two men came to her house and committed rape, buggery and burglary. The incident was reported by her to the police as an incident of burglary. She was taken to the North Middlesex Hospital where she was examined, to a limited extent, arising out of an allegation that in the course of the burglary she had suffered some injury.

On 28th May 1991 the Applicant reported that she had been raped and buggered on the 25th. On the 30th the police took a written statement from her and, more importantly, took her to see a Dr West, who was a police surgeon. She made notes of her examination and she made a report which is in the papers before me. She described the Applicant as being extremely distressed and tearful and gave an account of the allegation and her medical history which was recorded.

I need not set out the findings of either the genital examination or the anal examination but go to the conclusions. The conclusions were:

> "The anal findings are consistent with the allegation of buggery. The vaginal findings neither confirm nor exclude vaginal intercourse."

I read that report as coming to this conclusion: she complained of being buggered three days ago. There was evidence which was consistent with that not merely had she been buggered, but that it was of recent origin.

The Applicant made an application to the Board. Mr Evan Stone QC was the single member. He read the papers and decided that it was a matter for a full oral hearing. Some reliance is placed on that, on behalf of the Applicant, by Miss Woodcroft, because it is said that the Applicant did not have the opportunity of having Mr Stone's comments on the papers that were necessary, and accordingly she had not prepared herself fully for the application before the Board. I do not attach any significance to that fact.

The matter came before the Board on 31st August 1993. Three very experienced members of the Bar sat on the hearing, which was presided over by Mr Barry Chedlow QC, accompanied by Mr Donald Robertson QC and Miss Diana Cotton QC. There is a complaint by the Applicant that she was accompanied by a lady from the Victim Support Unit but that she was not well treated by the Advocate on behalf of the Board and that she did not have the opportunity properly to present her case or to make a final speech. It is impossible to resolve

that complaint. I simply note it. I think it is exceedingly unlikely that a Board consisting of those three members would have done other than to assist a litigant in person who was, no doubt, in a distressed state.

There were before the Board a number of Medical Reports which did not include a Medical Report from the North Middlesex Hospital, which she had attended on the 25th, and, more importantly, did not contain the notes or the report of Dr West.

There was included in the reports a note from her GP which said:

> "Date of consultation 3rd June 1991 alleged rape seen by police surgeon and referred to UCH."

There is also a report, dated 19th January 1992, from, I think, the hospital, making reference to the fact that there had been anal intercourse and that there was a long-standing injury to the anal sphincter mechanism. At the hearing before the Board a woman police officer gave evidence which is recorded as follows:

> "The witness took the Applicant for an examination for medical evidence. The doctor could only see trauma to the back passage - the Applicant had haemorrhoids."

The tribunal, in its written reasons dated 9th December 1993, giving the explanation as to why the application was refused (and this is a letter not from the Board itself or from the Chairman or the members but from the Advocate), said as follows:

> "The Board in particular needed to be satisfied that the applicant had been raped as alleged...

and that the applicant had informed the police of the circumstances of the injury without delay (Paragraph 6(a) of the Scheme)."

Paragraph 6(a) of the Scheme reads:

"The Board may withhold or reduce compensation if they consider that-

(a) the applicant has not taken, without delay, all reasonable steps to inform the police, or any other authority considered by the Board to be appropriate for the purpose, of the circumstances of the injury and to co-operate with the police or other authority in bringing the offender to justice"

Mr Foster went on to say:

"It was the evidence before the Board that although the applicant had contacted the police on 25 May 1991, the day of the alleged incident, it had been reported as a burglary and not as a rape. Three days later on 28 May, the applicant informed the police that she had been raped. By that time the applicant had cleaned all clothing items which would have constituted valuable forensic evidence in the case and as a result the police were without forensic evidence of the allegation.

The application was refused under Paragraph 6(a) of the Scheme, the applicant having delayed 3 days in informing the police of the allegation of rape whereby the whole investigation had been prejudiced. The Board emphasised the importance of prompt reporting so that the police had the earliest opportunity to commence investigation."

Thereafter the Applicant pursued some inquiries and managed to obtain Dr West's report and brought judicial review proceedings. The Chairman set out, exhibited to an affidavit, what the Board's decision was:

"We considered the Applicant's explanation for her initial denial of any sexual interference and delay in reporting the rape and buggery and weighed that against the other evidence available to us. The Board was mindful of the distress which would be felt by a woman suffering the experiences described by the Applicant and the reluctance in some cases to make immediate

disclosure. We considered the medical evidence but concluded that it gave no assistance in determining whether she had been raped and buggered, as alleged"

I repeat that at that time they did not have Dr West's report:

"We considered the evidence of WPC Richmond and in particular her evidence that although the Applicant knew from past experience the importance of early reporting and of preserving all potential evidence, by the time the sexual offences were reported the Applicant had washed her clothing and examination of the scene found no forensic evidence at all. We noted that WPC Richmond considered that the delay in reporting was material because of the importance of finding forensic evidence and that the police investigating the alleged offence had, in the end, been sceptical about the allegations made. We also noted that WPC Richmond said that while she was trying to take a statement from the Applicant she had cried a lot and avoided answering questions.

Where the Applicant's evidence differed from that of the police, we preferred the police evidence, and we did not find the Applicant a convincing witness. We found that the Applicant was well aware of the need to report the alleged offences to the police straightaway and to preserve her clothing as potential evidence and that her failure to do so amounted to a failure to co-operate with the police. We directed ourselves that the onus was on the Applicant to satisfy us initially that she was the victim of a crime of violence as alleged and in our consideration of the whole evidence, including the delay in reporting and the destruction of the forensic evidence, we concluded that she had failed to discharge that burden. Consequently, while taking into account her explanation for her failure to co-operate with the police in these matters, we decided that no award should be made on the basis that we were not satisfied that she was the victim of a crime of violence as alleged. The question of withholding compensation or making a reduced award under the discretionary provisions of Paragraph 6(a) did not directly arise. The delayed reporting and failure to co-operate were factors which with the rest of the evidence and our assessment of the Applicant caused us not to be satisfied, on the balance of probabilities, that the crime of violence had occurred.

Mr Kent, who is very experienced in these matters, is not able to afford any explanation as to why there should have been a difference of explanation for the reasons given by the Advocate and given by the Chairman but he points out, and I accept, that the Advocate's view of the decision is not the Board's view of the decision. Therefore I proceed on the basis that in this case the Board have refused her claim because, to put it perfectly simply, they did not believe her, of which the failure to report was an element but was not itself decisive in the refusal under 6(a). What is urged upon me by the Applicant is that the Board had before it material upon which they could, and should, have made further inquiries to enable them to test the credibility of the Applicant in relation to the buggery and rape. Firstly, they should have got the report from the North Middlesex Hospital. I do not accept that submission. I do not believe that the report from the North Middlesex Hospital, on the day of this incident, could have assisted the Board at all. Equally clear, I am, that if they had had Dr West's report it would have been very difficult for them to come to the conclusion that her credibility was nil. The Board could, of course, have rejected Dr West's report but that would, in the circumstances of the case, seem to me to have been a perverse decision. Dr West's report came to this:

> "This lady has complained within the last three days she has been buggered. I found evidence which is consistent with that and, absent any

other suggestion that she had been buggered earlier in her life, it could only, in my judgment, have led the Board to take a much more favourable view of the Applicant's credibility."

The question that arises, however, is whether there was any obligation on the Board to pursue that inquiry. To that end I have been provided with two decisions in relation to this point. What Mr Kent, on behalf of the Board, says is this: The burden of proving the case under the Board's rules is always on the Applicant before them; that although it is, at the hearing, an inquisitorial process the Board are not bound, before the hearing, themselves to go out in the highways and byways and seek evidence. They hear the evidence which is presented to them and they may dismiss the claim for want of proper evidence. If they do have evidence it is accepted that their duty is to provide that to all the parties.

Mr Kent observes that, during the course of the hearing, there may come a point where it becomes apparent that fairness demand an adjournment so that further evidence can be obtained and that it is impossible to lay down a hard and fast rule as to when those occasions will be where fairness is demanded. That submission seems to me to accord broadly with such decisions as there are on the matter. The most recent is that of Buxton J, reported in the Times on 12th December, which reads as follows:

"There was no duty on the part of the Criminal Injuries Compensation Board when hearing a case to obtain evidence on its own initiative.

...

> MR JUSTICE BUXTON said, applying the case of R v Criminal Injuries Compensation Board, Ex parte Parsons (unreported, January 17, 1990)...if it had material before it before relying upon it, that was different from a requirement to make inquiries of its own initiative. There was no duty on the board to look for evidence but it was for the applicant to take the initiative."

That which is pointed out was in the context of a case where the Applicant was legally represented. The decision of Parsons is a decision of Hutchison J, as he then was, on 17th January 1990. He was referring to what Nolan J, as he then was, had said in the case of R v The Chief Constable of Cheshire and Another, ex parte Berry, unreported on 30th July 1985, where he said this:

> "The applicant may bring with him a legal adviser to assist him in putting his case at his own expense. It is, however, the duty of the member of the Board's staff referred to in paragraph 23 -- generally known as the Board's Advocate -- to bring out all relevant evidence in the Board's possession, whether it is for or against the applicant. The proceedings are inquisitorial in nature. They are as informal as is consistent with the proper determination of applications, and are generally held in private."

Hutchison J said this, at page 13, reporting the submission of the Applicant:

> "She contends, implicitly at any rate, that the statement that I have cited from the judgment of Mr Justice Nolan is not framed widely enough because the Board's obligation is not merely to put before the members the information and evidence in its possession, but to ensure that there is in its possession all the relevant evidence which it can reasonably deduce exists. As to that submission Miss Foster, on behalf of the respondent, contends that the Board's duty has been stated much too high. Central to her submission is the contention that it is fairly and squarely stated in the Scheme that it is for the applicant to prove her case. Miss Foster contends that while undoubtedly the Board... has duty to

present fairly and impartially the evidence through its representative, that duty does not extend to evidence gathering in the sense that Miss Lang contends for. Provided reasonable steps are taken to obtain material and place it before the Board, and provided the material that has been obtained is fairly deployed and there is no concealment or unfair advantage taken, then, she submits, the Board has fulfilled its proper function.

It seems to me that, in the light of the provisions as to the burden of proof and in the light of the passage of Mr Justice Nolan, Miss Foster's submissions are to be preferred. Nowhere can I find any indication that the obligations of the Board extend to the making of full inquiries on its own initiative or the gathering of evidence, in the sense to which Miss Lang contends. Accordingly I reject her first submission."

It is submitted that this is not a case of making full inquiries or gathering evidence, but it is a case where the Board were put on inquiry that there had been a medical examination by a police doctor very shortly after these events. Quite clearly, having seen the report, it was germane to the very heart of the case. No one wants to place on the Board any greater burden than that which they already carry, or carried, because of the volume of work which they have to undertake. It is a burden in many cases because Applicants appear before them who do not get Legal Aid, who have little or no knowledge of how the procedure is to be carried out, and to that extent the Board do have to obtain documents themselves.

General principles are easy to state and much more difficult to apply. In my judgment the word "fairness" is the hallmark by which this case should be determined. It seems to me that there is a proper

ground for complaint and that in fairness the Board, alerted to the fact that there had been this report, should, of their own volition, have sorted out, or at least invited the Applicant's view as to whether there should be an adjournment to obtain it. I do not accept that what the Woman Police Constable said, to which I have already referred, was sufficient to deal with that aspect of the case.

The Applicant's further complaint, by way of amendment, is that the Board did not take into account the effect of rape upon the Applicant when considering the Applicant's evidence and credibility thereof. I am quite satisfied from what the Board said that they have taken that into account. Finally, it is said that, having been informed of the existence of Dr West's report, they failed to reconsider the Applicant's application. The Scheme does not provide for that reconsideration. It may be a failure in the Scheme but the grounds on which reconsideration can take place is governed by paragraph 13, which deals with compensation:

> "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..."

However, that is not an end of this case because the Board take the point of delay. I can set out the factual position in relation to delay which appears,

very helpfully, in the chronology prepared on behalf of the Applicant. The Board's oral decision was given on 31st August 1993 and the letter setting out the decision was on 9th December 1993. I will assume, for the purpose of this case, that the latest date is 9th December and not in September. That may be being unduly lenient to the Applicant. What then happened was that the Applicant consulted Victim Support and they made inquiry of Barnes & Partners and in March 1994 some solicitors consulted counsel. They saw the Applicant in interview, an application for Legal Aid was made and by 18th March the Legal Aid Certificate was granted.

There was a further conference with counsel in April, who advised that reports be obtained and reports were finally obtained, certainly from Dr West, on 15th August. Legal Aid was apparently granted on 5th October and the application was made on 17th October. The application was either made 13 months after the oral decision or some 10 months after the written decision.

Applications for leave are governed by Order 53, r. 4:

> "An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made."

I am clearly of the view that there are no grounds for extending the period and that the application for leave

was not made within three months nor was it made promptly.

An application for leave, and delay in relation to it, is dealt with differently. It is still a very curious position that they are dealt with separately and by different procedures. The Applicant's delay in an application for leave, as I have indicated, is governed by Order 53, r. 4. When leave has been granted the application is governed by Section 31 of the Supreme Court 1981. It provides by subsection (6):

> "Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant-
>
> (a) leave for the making of the application; or
>
> (b) any relief sought on the application,
>
> if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantial prejudice to the rights of, any person or would be detrimental to good administration.
>
> (7) Subsection (6) is without prejudice to any enactment or rule of court which has the effect of limiting the time within which an application for judicial review may be made."

An application for leave in this case was made ex parte. It is clear that the matter of delay was quite properly drawn to the attention of the single judge who, as I have indicated, expressed the view that that should be dealt with on the full hearing. That creates some problem, in my judgment, because the grant of application for leave is dealt with separately for the reasons that I have indicated. Although in the Crown Office work this is something that frequently happens,

it can, in my judgment, give rise to difficulty. Strictly, the way forward for the Respondent thereafter is before the full hearing, for which leave has been granted, to apply to set the leave aside on the ground that it should never have been granted by reason of the delay. No such application has been made in this case but it seems to me that there is no objection in principle on the hearing of the full leave if the matter has, indeed, been reserved for full argument.

Section 31(6), on the face of it, suggests that once leave has been given, and in this case there has been undue delay, the only matters which the Court can consider are whether the granting of relief sought would be likely to cause substantial hardship to, or substantially prejudice, the rights of any person or would be detrimental to good administration.

I am clear in my mind that none of these three headings apply in the instant case. It was said, and properly said, that by the delay it was very much more difficult for the Board to piece together the evidence that was given and the conclusion of the Board. That is not prejudicing the rights of any person, nor is it detrimental to good administration. In the case of R v Dairy Tribunal, Ex parte Caswell, reported in 1990 2 AC 738, the House of Lords decided that they were not going to try and formulate any precise definition or description of "detriment to good administration", though in that case they upheld a decision that there had been detriment to good administration.

It is difficult to know what the purpose of subsection (7) is unless it is to enable the Court, on the full hearing, to decide whether leave should have been granted in the first place. There is a passage in the decision in Caswell, per Lord Goff, which makes some reference to this. At page 746 he said this:

> "... as I read rule 4(1), the effect of the rule is to limit the time within which an application for leave to apply for judicial review may be made in accordance with its terms, ie promptly and in any event within three months. The court has however power to grant leave to apply despite the fact that an application is late, if it considers that there is good reason to exercise that power; this it does by extending the period."

He goes on:

> "... the combined effect of section 31(7) and of rule 4(1) is that there is undue delay for the purposes of section 31(6) whenever the application for leave to apply is not made promptly and in any event within three months from the relevant date.
>
> It follows that, when an application for leave to apply is not made promptly and in any event within three months, the court may refuse leave on the ground of delay unless it considers that there is good reason for extending the period; but, even if it considers that there is such good reason, it may still refuse leave (or, where leave has been granted, substantial relief) if in its opinion the granting of the relief sought would be likely to cause hardship or prejudice... or would be detrimental to good administration... the question most likely to be considered by [the single judge] if there has been such a delay is whether there is a good reason for extending the period under rule 4(1). Questions of hardship or prejudice, or detriment, under section 31(6) are, I imagine, unlikely to arise on an ex parte application, when the necessary material would in all probability not be available to the judge. Such questions could arise on a contested application for leave to apply..."

It seems to me that if a Court takes a view, as I do, that there has been undue delay, that there is no

good reason shown and there is no reason why time should be extended, that is a matter which, on a full hearing after an ex parte application, the Court is entitled to take into account and deal with either by way of a setting aside of the original leave or, in fact, by hearing argument on the issue. I have heard argument on the issue. I am satisfied, in my mind, that there has been undue delay, that there has been no good reason for it, that there is no reason for extending time and accordingly I will not grant relief in this case for that reason. Accordingly, I shall dismiss this application.

MR KINA: In view of the Legally Aided status of the applicant I do not believe I will be instructed to ask for any costs.

MR JUSTICE POPPLEWELL: Very well. Thank you very much. You should have Legal Aid Taxation. I am grateful for your arguments.