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Case No: 1729/98

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19th October 2000

Before:

THE HON MR JUSTICE MAURICE KAY

THE QUEEN ON THE APPLICATION OF
"T"
v.
CRIMINAL INJURIES COMPENSATION BOARD

Mr Mahie Abey (instructed by Evans and Company) for the Applicant)
Mr Hugo Keith (instructed by The Treasury Solicitor) for the Respondent)

JUDGEMENT: APPROVED BY THE COURT FOR HANDING DOWN
(Subject to editorial corrections)

Mr Justice Maurice Kay:

1. Late at night on the 26th February 1994 the Applicant was shot in his left leg when he was in area of south London. Because of the seriousness of his injuries he remained in hospital until June 1994. He spent a further month in hospital in September 1994 and towards the end of 1995 the injured leg had to be amputated. On the 9th March 1994 the Applicant applied to the Criminal Injuries Compensation Board ("the Board") for compensation. Although the Board has recently become the Criminal Injuries Compensation Authority, I shall refer to it by its name at the time of the events with which this case is concerned. His application was first considered on the papers by Derek Bradbeer OBE, a member of the Board. He refused the application stating:

> "Under paragraph (c) of the Scheme the Board has discretion to withhold or reduce compensation if it considers that, having regard to the Applicant's character as evidenced by his criminal convictions, it is not appropriate to make a full award, or any award, of compensation from public funds. There does not require to be any causal connection between the Applicant's criminal convictions and the assault on him and the Board is entitled to take into account any type of conviction and not just those which involve violence. Having regard, therefore, to the Applicant's character as shown by his particular criminal convictions, I have concluded, in the exercise of my discretion, that it is inappropriate to make a full award, or any award, and the claim is therefore disallowed under paragraph 6(c) of the Scheme."

The list of the Applicant's previous convictions showed that in 1982 he had been sentenced to a total of three years imprisonment for 12 offences comprising four thefts, two deceptions, an attempted deception, two offences of allowing himself to be carried in a stolen vehicle, one offence of handling and two robberies. The robberies themselves each attracted sentences of 3 years. In July 1984 he was again before the courts for an offence of robbery, on which occasion he was sentenced to 4 years

imprisonment. He was made the subject of community service orders for theft on two occasions in 1991. He is now 40 years of age.

2. Following the initial refusal of his application the Applicant then applied for an oral hearing pursuant to paragraph 22 of the Criminal Injuries Compensation Scheme ("the Scheme"). The oral hearing took place on 23 April 1997 and at the end of it the application was refused. Solicitors acting on behalf of the Applicant sought written reasons by a letter dated 9 May 1997. These were provided (with apologies for delay) in a letter dated 29 August 1997, which stated:

> "It is for the Applicant to satisfy the Board that he had given a full and true account of the incident. The Board are not so satisfied and even if we were so satisfied, we would have made a heavy reduction or possibly disallowed his claim in view of his convictions. Paragraphs 4(a) and 6(c) of the Scheme ....."

3. Paragraph 4 of the Scheme sets out its scope. It is concerned with payments of compensation where the applicant has sustained personal injury

> "directly attributable -
>
> to a crime of violence (including arson or poisoning)....."

Paragraph 6 provides:

> "The Board may withhold or reduce compensation if they consider that -
>
> .....
>
> (c) having regard to the conduct of the applicant before, during or after the events giving rise to the claim or to his character as shown by his criminal convictions or unlawful conduct.....it is inappropriate that a full award or any award at all be granted."

4. At this stage it is necessary to examine more closely what is known of the circumstances in which the Applicant sustained his grievous injuries. He made a

witness statement to the police on 9 March 1994 in it he described leaving his home at about 11.15. p.m. with his three dogs. His account of the shooting was in these terms:

> "I looked towards the gate. There was a person standing virtually in the gateway about three feet from me; very close. From the person's build I would say the person was a man. He looked as though he was wearing a balaclava because I could see the white oval of his face; but I did not distinguish any feature. I suppose it could have been some sort of hat rather than a balaclava. He was wearing a dark (possibly black) jacket and pale blue jeans. I am 6 feet 2 inches and he was standing on the same level as me; he was shorter, about 5 feet 8 to 5 feet 9 inches and stocky build. He was holding a long barrelled gun which was pointing down at such an angle that at first I thought he must be pointing it at one of the dogs. There was a flash and I was hit in the left leg which gave way under me. I fell facing him and the gate. I saw him lift up the gun and run back through the gateway up onto the grass."

The brief account which the Applicant gave in his application to the Board was consistent with that. It added:

> "I don't know who or why I was shot. I have no known enemies."

The person who reported the incident to the police was Mr. Edward Rathbone who lived nearby. He made a statement on 1 March 1994 (although apparently wrongly dated 1993). The material part stated:

> "I think it was about 11.30p.m. that I heard men's voices outside.....I could not hear what was being said. The voices were raised and it sounded like an argument. I only heard them for a few seconds, then I heard what sounded like an explosion. I looked out of the sitting room window ...., I could not see anything unusual so I went to the front door.....I went inside and dialled 999.....when I had finished on the phone I went out of the house and had to look over a wall to be able to see....I could see a man laying on the ground. .....We have got double glazed windows which were closed. So for me to hear what sounded like a couple off guys having an argument their voices must have been very loud."

There is no more direct evidence available about the incident. No one was ever arrested, charged or prosecuted for the shooting.

5. The pre hearing procedure operated by the Board is set out in a document headed "Hearing: Notes on Procedure". It is addressed to an Applicant. Paragraph 17 of it states:

> ".....You will receive a summary of your case prepared by the Board's staff. The summary sets out the matters which appear to be in issue in your case and which the Board will have to decide at the hearing. However, this will not prevent the Board from taking into account any other matters which they consider apply in your case. The summary also states which witnesses, if any, are to be invited to attend."

The pre-hearing summary in the present case, under the heading "Issues to be decided by the Board", stated:

> "Whether the Applicant's character as shown by his criminal convictions or unlawful conduct makes a full or reduced award of compensation inappropriate (paragraph 6(c) of the Scheme).
>
> Whether the Applicant sustained injury directly attributable to a crime of violence (paragraph 4(a) of the Scheme)."

The summary then reminded the Applicant that:

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

So far as witnesses were concerned, the only one named in the summary was DS Christopher Harper of the Metropolitan Police.

6. At the hearing the Applicant was represented by Counsel (not Mr. Abey). In the event DS Harper did not attend. He had retired at some point between the shooting and the date of the hearing which took place more than three years later. Another officer attended the hearing, namely DC Mark Remon. He made a statement about the hearing. It is dated 29 January 1998. It was obtained by the Applicant's solicitors. In it, DC Remon stated that his involvement arose from a telephone call from the Board

to Southwark Police Station on the morning of the hearing requesting the attendance of an officer. DC Remon was tasked to go to the hearing. His statement recounted how he collected the file in which there was a single sheet of paper namely the crime report. He had not been involved in the case previously and had only worked at Southwark since 1996. His account of the hearing is as follows:

> "I did of course study the crime report which I recall gave very brief details of the crime, for example its time and date, the name of the victim and the fact that DS Harper was leading the investigation. It is fair to say that as there was so little information on the crime report I formed the view that the victim may not have been forthcoming with information. In giving evidence to the Board I notified them that I had no knowledge of the case apart from what was written on the crime report. This notwithstanding I was surprised to be asked of my opinion regarding the case.....
>
> I recall that I was asked a question the gist of which was to enquire whether in my opinion the man who was shot would normally know who shot him. I believe that I replied that in nine cases out of ten the victim would know who shot him, especially if the shooting was drugs related.
>
> I believe that I was also asked whether in my opinion judging from the crime report, (the Applicant) had assisted in the investigation. In my reply I recall that I said that it did not appear as though very much had gone on between the investigating officer and the victim. I was then asked why there may have been so little contact and I believe I replied that this was because the victim might have been being evasive. .....
>
> All the evidence which I gave to the Board was based on my own general opinion having worked on similar cases and I was surprised that these opinions were being sought in relation to the specific case.....about which I knew nothing."

The only other witness who gave evidence to the hearing was the Applicant himself. It is to be inferred that his evidence was in similar form to his witness statement and to a statement dated 13 February 1995 which had been prepared by his solicitors.

7. There is a further account of the hearing. Its source is one of the three members of the Board who heard the case on 23 April 1997, namely Mr. Peter Weitzman QC.

From the summer of 1997 the solicitors for the Applicant had been pressing the Board for written reasons for the decision. No such written reasons were provided (apart from the letter of 29 August 1997) until early 1999, that is to say after the issue of the present proceedings on 7 May 1998 and following the grant of permission to apply for judicial review which was granted by Mr. Justice Turner on 30 November 1998. The written reasons provided by Mr. Weitzman were apparently committed to paper on 12 June 1998, that is to say some fourteen months after the hearing. The written reasons include the following passages:

> "The Board reached this decision having heard the Applicant in full, having considered all that he said in evidence, having heard the oral evidence of DC Remon and having considered all the papers, including a police witness statement from Edward Rathbone dated 1 March 1993.
>
> The Applicant's evidence was that he was shot whilst out walking his dogs. The Board was asked to accept his evidence that there was only one gunman, that nobody else was present and that nothing was said before the shot was fired. This aspect of the Applicant's evidence was contradicted by the evidence of Edward Rathbone, who stated in his witness statement....that although he could not hear all that was being said, shortly before the shooting he heard raised voices and what sounded like an argument. DC Remon gave evidence at the hearing that DS Harper believed that Edward Rathbone, who appeared to be an independent witness, was telling the truth.
>
> The Applicant gave evidence at the hearing that his only explanation for the shooting was that it was a case of mistaken identity. DC Remon gave evidence at the hearing that it was DS Harper's view that the Applicant could have provided a motive for the shooting. That evidence was of limited value, but taken together with the discrepancy between the evidence of the Applicant and Mr. Rathbone, was not wholly to be rejected.
>
> Taking into account the whole of the evidence and having regard in particular to the material discrepancy between the evidence of the Applicant and Mr. Rathbone's statement, the Board was not satisfied that the Applicant had given a full and true account of the circumstances.
>
> Given that the Board was not satisfied as to the Applicant's credibility in a material respect, the Board was of the view that the Applicant had not discharged the burden of proof on the balance of probabilities that he had been

the innocent victim of a crime of violence, as required by paragraphs 4(a) and 6(c) of the Scheme. Accordingly it was not appropriate to make a full award; nor, in spite of the severity of the injury, was it appropriate in the exercise of the Board's discretion to make a reduced award.

In those circumstances it was not necessary to reach a concluded decision as to the effect of the Applicant's convictions but it seemed appropriate, having heard relevant evidence, to express a provisional view. That view did not, however, form part of the reasons for the Board's rejection of the claim."

I now turn to the grounds of challenge.

Ground 1: taking into account irrelevant evidence and/or evidence of no probative value

8. This ground of challenge relates to the evidence of DC Remon that "in nine cases out of ten the victim would know who shot him, especially if the shooting was drugs related" and that "it did not appear that very much had gone on between the investigating officer and the victim.....because the victim might have been being evasive". On behalf of the Applicant, Mr. Abey submitted that the Board placed undue weight on this evidence which was of no probative value. DC Remon had no knowledge of the case apart from what was contained in the brief crime report; he had not seen the Applicant's witness statement; his reference to the hypothesis that the shooting was drug-related was entirely speculative. Mr. Keith, on the other hand, emphasised the passage in paragraph 25 of the Scheme which states:

> "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 hearing."

He submitted that the Applicant can have no legitimate complaint about the absence of DS Harper or the presence of DC Remon. His counsel had not sought an adjournment

and, as Lord Slynn of Hadley said in **Regina v. CICB, ex parte A** [1999] 2 AC 330 at, p345:

> "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 inquiries if the applicant does not ask for one."

Lord Slynn also accepted as a general proposition the statement of Hutchison J in **Regina v. CICB, 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 is obtained is fairly deployed and there is no concealment or unfair advantage taken, then.....the Board has fulfilled its proper function."

Thus, submitted Mr. Keith, the evidence was "relevant hearsay, opinion evidence"; it was a matter for the Board to assess its weight; and the written reasons provided by Mr. Weitzman point to the evidence of DC Remon having played, at the most, a minor part in the decision.

9. In my judgment, this approach does not do justice to the circumstances of the present case. I do not consider that DC Remon's emergence from obscurity is in itself cause for concern. The parts of his evidence which are now criticised by Mr. Abey were impromptu replies to questions from the Board or its staff advocate. Although DC Remon had indicated that he had no knowledge of the case beyond what was contained in the crime report, he was invited to express opinions which were potentially very damaging to the Applicant. Neither counsel was minded to show me the crime report but there is no suggestion that it referred to the shooting as "drugs-related". While it is not disputed that DC Remon gave the evidence to which exception is taken, it does not appear in that form in Mr. Weitzman's reasons.

Although Mr. Keith invited the inference that that illustrated that it was accorded little or no weight, I do not consider it right so to infer. Mr. Weitzman's written reasons were not formulated until over a year after the hearing and that, in my view, undermines their claim to comprehensiveness. Nor am I satisfied that the adverse view which the Board formed of the Applicant's conduct before, during and after the shooting could reasonably have been based substantially on a perceived discrepancy between his witness statement and that of Mr. Rathbone. In my view it was probably influenced to a significant extent by the evidence about drugs-related shootings and evasiveness, which lacked eligibility for such or any weight. In other words, it was unreasonable in the public law sense to accord that evidence the weight which it was probably given and that was unfair.

10. I have reached this conclusion after some hesitation, mindful of the informality and flexibility of the Board's procedures, but, in the circumstances of this case, I am satisfied that the first ground of challenge is established.

Ground 2: procedural impropriety in relation to DC Remon's evidence

11. As Mr. Abey was constrained to concede in the course of submissions, this ground adds little to Ground 1. It is really parasitic upon the earlier ground and it is unnecessary for me to consider it further.

Ground 3: consideration of a reduced award

12. This ground of challenge relies on the wording of the first written reasons briefly set out in the letter of 29 August 1997. Mr. Abey submitted that the language, properly construed, does not show that consideration was given to whether a reduced award (rather than a nil award) might have been appropriate, even though the Board

was not satisfied that a full and true account had been given by the Applicant. In my judgment, there is nothing in this ground of challenge. Quite apart from the fact that the more extended reasons later provided by Mr. Weitzman suggest that consideration was given to a reduced award (and, on this issue, the later reasons seem to me to be permissible as elucidation rather than alteration of the later reasons: **Regina v. Westminster City Council, ex parte Ermakov** [1996] 2 All ER 302, 315), the insuperable difficulty standing in the way of this ground of challenge is **Regina v. CICB, ex parte Cook** [1996] 2 All ER 144, in which Aldous LJ departed from the approach which Sedley J had formulated in **Regine v. CICB, ex parte Gambles** [1994] P1QR P314. Aldous LJ said (at p.152):

> "I believe that the reasoning and the conclusion reached by Sedley J in **ex parte Gambles** is wrong. A decision that no award was appropriate out of public funds is equivalent to deciding that the award should be nil. The question that the Board had to ask was the equivalent of the third question suggested by the judge - should the applicant receive an award and, if so, what amount? It is only if the Board comes to the conclusion that the applicant should recover an award that it need go on to decide whether it should be a full award or some other figure.....Their duty is to consider the material circumstances and to arrive at a decision whether there should be an award out of public funds and, if so, what. That requires judgment not a complicated step-by-step approach."

(See also Hobhouse LJ at p. 157).

13. In the present case, the Board concluded that the Applicant should not receive an award. If that conclusion had been in all other respects unassailable, there would therefore have been no need to give further consideration to the possibility of a reduced award.

Ground 4: inadequacy of reasons

14. This ground of challenge is directed at the form of the given reasons rather than the question whether the reasoning itself is susceptible to challenge. Although there is no statutory obligation placed upon the Board (as opposed to a single member) to provide reasons, it is now clear that, as Schiemann LJ said in **Regina v. CICB, ex parte Moore** (unreported, 23 April 1999, Transcript p.10):

> "the Board is obliged to give reasons in short form for a decision to refuse or to reduce an award."

He went on to express the view that

> "the present general practice of the Board to furnish reasons in writing when these are asked for ought, in my view, to continue to be followed."

In **ex parte Cook** (above), Aldous LJ said (at p.150):

> ".....it is clear that the Board's reasons should contain sufficient detail to enable the reader to know what conclusion has been reached on the principal important issue or issues, but it is not a requirement that they should deal with every material consideration to which it has had regard."

And Hobhouse LJ (at p. 160) adopted the statement of Sir John Donaldson Mr in **Union of Construction, Allied Trades and Technicians v. Brain** [1981] ICR 542,551, that the reasons

> "must tell the parties in broad terms why they lose or, as the case may be, win."

Applying those principles to the present case, I am satisfied that, as a matter of form, the reasons given orally at the end of the hearing and repeated in the letter of 29 August 1997 made it clear that the Board were not satisfied that the Applicant had given a full and true account of the incident. The extended reasons provided by Mr. Weitzman, whatever may be their other shortcomings, made it clear that the Board

> "was of the view that the Applicant had not discharged the burden of proof on the balance of probabilities that he had been the innocent victim of a crime of violence, as required by paragraph 4(a) and 6(c) of the Scheme."

In these circumstances, the given reasons enabled the Applicant to know why he had lost and enabled him to challenge that decision in these proceedings. The "reasons" challenge therefore fails.

Ground 5: natural justice

15. The essence of this ground is a submission that the Applicant was misled by the prehearing notice and summary. The notice informed the Applicant that the summary would "indicate precisely how the Scheme is considered to apply" in his particular circumstances; that its purpose was "to set out the matters which the Board will have to decide at the hearing"; and that it would state "which witnesses, if any, are to be invited to attend". The summary put in issue the Applicant's character "as shown by his criminal convictions or unlawful conduct" and whether he had sustained injury "directly attributable to a crime of violence". However, it also added (as the notice had foreshadowed) that the Board "looks at the application afresh and may take into account matters not mentioned in this summary". In addition, it indicated that DS Harper would be invited to attend as a witness, although the notice had warned that the Board has no power to compel the attendance of a witness who is unwilling or unable to attend.

16. Mr. Abey submitted that the Applicant had been unfairly wrongfooted by all this. He knew nothing of DC Remon or what his contribution to the case might be before he was called, nor did he know that his own truthfulness was to be put in issue on the basis of DC Remon's evidence. In this way, the Board conducted the hearing

in such a way as to fail to give the Applicant a fair opportunity to rebut DC Remon's evidence or to prepare his case in response.

17. In my judgment this ground of challenge is without substance. The summary had made it clear that there were issues as to whether the injury was attributable to a crime of violence and whether his own unlawful conduct made a full or reduced award inappropriate. The reference to "unlawful conduct" was made specifically by reference to paragraph 6(c) of the Scheme, which concerns such conduct "before, during and after" the incident. The truthfulness of the account he had given in his witness statement and his application was clearly being put in issue. It is difficult to see how he could have dealt with these issues save by his own evidence. It is noteworthy that counsel who represented the Applicant at the hearing did not seek an adjournment. I do not consider that he was materially disadvantaged by the fact that the evidence which was adduced before Turner J and is before me in a restricted transcript was not before the Board. I am satisfied that the hearing before the Board was in accordance with the prescribed procedure and with the rules of natural justice.

Ground 6: irrationality

18. In the pre - hearing summary, the reasons contained in the latter dated 29 August 1997 and the extended reasons provided by Mr. Weitzman there are recurrent references to paragraph 4(a) of the scheme. That is not a requirement, in terms, that an Applicant must give a "full and true account". It is a requirement that, to succeed, an Applicant must satisfy the Board that his injury was "directly attributable to a crime of violence". Mr. Abey submitted that, if the Board were not satisfied about that, their decision was irrational because no reasonable decision-maker could conclude on the

evidence that the injury was self-inflicted or the consequence of consent, self-defence by the armed assailant or accident. Even if paragraph 6(c) had a rational basis, paragraph 4(a) did not.

19. Mr. Keith's response to this was to submit that the Board was simply endeavouring to summarise the net effect of, and the link between, paragraphs 4(a) and 6(c) and that the references to paragraph 4(a) were clearly intended to assist the Applicant in identifying why his conduct under paragraph 6(c) was relevant. I am unable to accept these submissions. Paragraph 4(a) does not illustrate why the Applicant's conduct under paragraph 6(c) was relevant. If the Applicant failed to surmount paragraph 4(a) - and, in my judgment, the Board must be taken to have come to that conclusion - that was the end of the matter. No issue under paragraph 6(c) arose. Moreover, I do not consider that, having regard to the clear and repeated references to paragraph 4(a), I can properly conclude that the references to paragraph 6(c) show that paragraph 4(a) was in fact found to have been satisfied. I read the reasons, both short and extended, as embracing an unequivocal finding that the Applicant did not satisfy the Board under paragraph 4(a) and I conclude that that was indeed an irrational finding.

Conclusion

20. By way of summary, the first and sixth grounds of challenge succeed but the second, third, fourth and fifth grounds fail. I shall hear counsel on the subject of relief but my provisional view is that I should simply quash the decision of 23 April 1997. If that were done, I have no doubt that the Board would, without further order, convene a fresh hearing before a differently constituted panel. However, in view of

the time that has elapsed, the costs that have been incurred and the fact that the parties have made no secret of their involvement in apparently meaningful but ultimately unproductive negotiations earlier this year, I express the hope that a fresh hearing may be avoidable. In saying this, I am not to be taken as expressing any views as to what the outcome of a fresh hearing might be. That is not my province.