CRIMINAL INJURIES COMPENSATION AUTHORITY Ex parte WAYNE LEE LEATHERLAND & CRIMINAL INJURIES COMPENSATION BOARD Ex parte GWENDOLINE MARY BRAMALL and CRIMINAL INJURIES COMPENSATION PANEL Ex parte TIMOTHY GEORGE KAY, R v. [1998] EWHC Admin 406 (4th April, 1998)

CO/1767/2848/5003/99
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
CROWN OFFICE

Before:
MR JUSTICE TURNER

R
-v-
THE CRIMINAL INJURIES COMPENSATION AUTHORITY
Ex parte
WAYNE LEE **LEATHERLAND**
&
THE CRIMINAL INJURIES COMPENSATION BOARD
Ex parte
GWENDOLINE MARY BRAMALL
&
THE CRIMINAL INJURIES COMPENSATION PANEL
Ex parte
TIMOTHY GEORGE KAY

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(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr J Crow & Mr S Kovats (instructed by Treasury Solicitor) for the first Respondent
Mr D Wolfe (instructed by Barratts) for the first applicant
Mr R Clayton (instructed by Howells) for the second applicant
Miss H Mountfield (instructed by Irwin Mitchell) for the third applicant

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Judgment
As Approved by the Court

TURNER J

Introduction

1. These three applications for judicial review are brought with leave and raise issues which are broad similar. This is to say how far the former non-statutory Criminal Injuries Compensation Board (the Board), its statutory successor the Criminal Injuries Compensation Authority (the Authority) and the Criminal Injuries Compensation Appeals Panel (the Appeals Panel) should respond to requests for evidence upon which any of them have relied for the purpose of arriving at decisions which it is their function to make, and whether any of them are required to provide reasons in support of those decisions.

The schemes for the compensation of victims of criminal violence

2. The Board. This was set up under the Royal Prerogative originally in 1964, but was subject to a number of modifications before it reached its final form in the revised scheme of 1990. By paragraph 4 of that scheme it was provided that the Board would entertain applications for payments of compensation

In any case where the applicant ... sustained in Great Britain ... personal injury directly attributable - (a) to a crime of violence ...

As to procedure, it was provided by paragraph 25 of the scheme that

It will be for the applicant to make out his case ... and where appropriate this will extend to satisfying the Board that compensation should not be withheld or reduced under the terms of paragraph 6 or paragraph 8. The applicant and a member of the Board's staff will be able to call, examine and cross-examine witnesses. 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. 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. The board may adjourn the hearing ... [emphasis supplied, see later].

Paragraph 6 makes provision for withholding or reducing the award if there has been a failure to notify the police, the applicant has failed to give all reasonable assistance to the Board or (b) having regard to the conduct of the applicant before during or after the events giving rise to the claim or his character as shown by his criminal convictions ... it is inappropriate that a full award or any award at all be granted.

Paragraph 8 has no application to the circumstances in any of these applications. In an administrative document headed **NOTES ON PROCEDURE** the applicant is provided with information about the practice of the Board when a hearing is to take place. Paragraphs 6 and 7 make provision with greater particularity, thus:

6. Witnesses You will be told which witnesses the Board intends to invite to the hearing when you are sent the Summary. Usually they will include a police officer involved in the investigation of the incident in which you were injured.

7. Some witnesses may be unwilling or unable to attend, and the Board cannot make them do so. Whether or not they attend, any statements they may have made will be shown to the Board. Please note that copies of witness statements obtained by the police can only be made available on the day of the hearing itself, and then only for the purpose of the hearing. The Board's practice in this respect stems from a long standing agreement with the Association of Chief Officers of Police which has been approved by the High Court.

3. The Criminal Injuries Compensation Scheme. This was set up under the auspices of the Criminal

Injuries Compensation Act 1995. In its simplest outline, the scheme provides for initial consideration of an applicant's claim by a "single member", who is a claims officer; if rejected at that stage then "review". If review is not satisfactory to the applicant, then a right of appeal is conferred to the Appeal Panel. Section 1 of the Act of 1995 empowers the Secretary of State to make a scheme for the payment of compensation to persons who have sustained criminal injuries. By comparison with the non-statutory scheme, the Scheme provides for the standardisation of awards in accordance with a tariff. Like its non-statutory predecessor, the Act permits the Scheme to make provision as to the circumstances in which an award may be withheld or reduced. Section 4 of the Act makes specific provision for " the review ... of any decision taken in respect of a claim for compensation" by "a person other than the (one) who made the decision under review". Section 5 provides for rights of appeal to "adjudicators" appointed by the Secretary of State. The Scheme itself is a comprehensive document extending to no less than 87 clauses. It is to some of those clauses to which it is now necessary to turn. For present purposes it will only be necessary to turn to the following parts:

4. **Eligibility, Consideration of Applications, Determination of Applications, Review of Decisions, Appeals** and **Oral hearing of Appeals.** These must be considered in turn.

5. **Eligibility:**

§13. A claims officer may withhold or reduce an award where he considers that:

(a) the applicant failed to take ... all reasonable steps to inform the police ... of the circumstances giving rise to the injury;

(b)

(c)

(d) the conduct of the applicant before, during or after the incident giving rise to the application makes it inappropriate that a full ... or any award ... be made; or

(e) the applicant's character as shown by his criminal convictions ... or evidence available to the claims officer makes it inappropriate that a full ... or any award ... be made.

6. **Consideration:**

§21. A Guide to the operation of this Scheme will be published by the Authority. In addition to explaining the procedures for dealing with applications, the Guide will set out, where appropriate, the criteria by which decisions will normally be reached.

7. **Determination:**

§50. An application for compensation under this Scheme will be determined by a claims officer, and a written notification of the decision will be sent to the applicant or his representative. The claims officer may make such directions and arrangements, including the imposition of conditions, in connection with the acceptance, settlement, payment, repayment and/or administration of any award as he considers appropriate in all the circumstances. Subject to any such arrangements ... and to paragraphs 53 - 55 (reconsideration of decisions), title to an offer will be vested in the applicant when the Authority has received notice in writing that he accepts the award.

8. **Review:**

§58. An applicant may seek a review of any decision under this Scheme by a claims officer:

(a)

(b)

(c) to withhold an award ...

(d) to make an award, including a decision to make a reduced award ...

§59. An application for the review of a decision by a claims officer must be made in writing to the Authority and must be supported by reasons together with any relevant additional information. ...

§60. All applications for review will be considered by a claims officer more senior than any claims officer who has previously dealt with the case. The officer conducting the review will reach his decision in accordance with the provisions of this Scheme applying to the original application, and he will not be bound by any earlier decision either as to the eligibility of the applicant for an award or as to the amount of the award. The applicant will be sent notification of the outcome of the review, giving reasons for the review decision, and the Authority will, unless it receives notice of appeal, ensure that a determination of the original application is made in accordance with the review decision.

9. **Appeal:**

§61. An applicant who is dissatisfied with a decision taken on review under paragraph 60 may

appeal against the decision by giving written notice of appeal to the Panel ... . Such notice of appeal must be supported by reasons for the appeal together with any relevant additional material which the applicant wishes to submit ... . The panel will send to the Authority a copy of the notice of appeal and supporting reasons which it receives and of any other material submitted by the applicant.
§63. ... . Where the Panel receives notice of an appeal against a review decision relating to a decision mentioned in Paragraph 58(b) or (d) ..., the appeal will be dealt with in accordance with paragraphs 69 - 71 ... and may under those provisions be referred for an oral hearing in accordance with paragraphs 72 -78.
§64. The standard of proof to be applied by the Panel in all matters before it will be the balance of probabilities. It will be for the claimant to make out his case including, where appropriate:
(a)
(b) satisfying the adjudicator or adjudicators responsible for determining his appeal that an award should not be reconsidered, withheld or reduced under any provision of this Scheme. Subject to paragraph 78 ... the adjudicator or adjudicators concerned must ensure, before determining an appeal, that the appellant has had an opportunity to submit representations on any evidence or other material submitted by or on behalf of the Authority.

§69. A member of the staff of the Panel may refer for an oral hearing in accordance with paragraphs 72 -78 any appeal against a decision taken on review:
(a) to withhold an award, including a decision made on a reconsideration of an award under paragraph 53 -54;
(b) to make an award, including a decision to make a reduced award whether or not on reconsideration of an award under paragraphs 53 -54; or
(c)
§70. ... The adjudicator will refer the appeal for determination on an oral hearing in accordance with paragraphs 72 - 78 where, on the evidence available to him, he considers:
(a)
(b) in any other case, that there is a dispute as to the material facts or conclusions upon which the review decision was based and that a different decision in accordance with the Scheme could have been made.
He may also refer the appeal for determination on an oral hearing in accordance with paragraphs 72 - 78 where he considers that an appeal cannot be determined on the basis of the material before him or that for any other reason an oral hearing would be desirable.
10..**Oral Hearing of Appeals**
§72. Where an appeal is referred .. for an oral hearing, the hearing will take place before at least two adjudicators. ... . Subject to the provisions of this Scheme, the procedure to be followed for any particular appeal will be a matter for the adjudicators at the hearing.
§73. ... Any documents to be submitted to the adjudicators for the purposes of the hearing by the appellant, or by or on behalf of the Authority will be made available at the hearing, if not before, to the Authority or the appellant respectively.
§75. The procedure at the hearings will be as informal as is consistent with the proper determination of the appeals. The adjudicators will not be bound by any rules of evidence which may prevent a court from admitting any document or other matter or statement in evidence. The appellant, the claims officer presenting the appeal and the adjudicators may call witnesses to give evidence and may cross-examine them.
11. The Guide which is issued as part of the Scheme contains provisions which require to be noted. Under Part 4 **How we deal with your application** the following are relevant:
4.1 We will normally make enquiries of the police, medical authorities and other relevant bodies to enable your claim to be assessed.
4.2 It is important that you give all reasonable help to us in connection with your application.
4.22 You will be told of our decision in writing and, in cases where an award has been reduced or withheld, you will be given reasons. Any award made by us may be made subject to directions and arrangements considered by us to be appropriate, taking into account the circumstances of the case.
12. Under Part 5, **Review of decisions** the following is relevant:
5.1 If you consider that you have grounds to disagree with our decision you may apply for it to be

reviewed. If you decide to do this you should apply in writing ... giving your reasons. .... On review of the decision a claims officer may increase, reduce or withhold an award.
13. Part 6 deals with appeals and provides for the power of adjudicators to be similar to those of a claims officer on review, that is to say they may increase, reduce or withhold an award. It is otherwise of no relevance to the issues which arise on these applications.
14. Part 8 **Eligibility to receive compensation** records the fact that the object of the Scheme is intended to be an expression of public sympathy and support for innocent victims (§8.1). Paragraph 8.14, on the other hand is of significance. It provides:
Conduct before, during or after the event
An award may be reduced or withheld in the following circumstances:-
(a) If your injury was caused in a fight in which you had voluntarily agreed to take part. This is so even if the consequences of such an agreement go far beyond what you expected. If you invited someone 'outside' for a fist fight, we will not usually award compensation even if you ended up with the most serious injury. The fact that the offender went further and used a weapon will not normally make any difference.
(b) If without reasonable cause you struck the first blow, regardless of the degree of retaliation or the consequence.
(c) If the incident in which you were injured formed part of a pattern of violence in which you were a voluntary participant; for example, if there was a history of assaults involving both parties where you had previously been the assailant.
(d) Where you were injured whilst attempting to take revenge against the assailant.
(e) If you used offensive language or behaved in an aggressive or threatening manner which led to the attack which caused you injuries.
Criminal convictions
8.15 We have discretion to withhold or reduce an award on the basis of the applicant's character as shown by his .. criminal convictions, even where these are unrelated to the incident ... .
8.16 We will assess the extent to which the convictions may count against you by reference to the system of penalty points below. ...
15. Part 9 is entitled **VIOLENCE, INCLUDING SEXUAL OFFENCES, WITHIN THE FAMILY.** Under the heading **General** appears
9.1 It is a condition of the Scheme that any person who causes an injury (whether or not the victim is a member of the same family) must not benefit from an award payable to the victim.
Adults
9.4 If you and the person who injured you were in the same household at the time of the incident, we will not award compensation unless:-
(a) the person who injured you has been prosecuted (unless there were good reasons why this could not happen); and
(b) you and the person who injured you have stopped permanently living together.
It is at this stage relevant to set out the facts in relation to each of the cases now before the court.
The individual cases
16. **Leatherland**: The background to this case is that on 4 April 1998, he sustained a serious head injury during an assault which is alleged to have taken place outside a public house in Nottingham. As a result of those injuries, the applicant has no recollection of the circumstances in which they were caused. On 18 May 1998, the applicant applied to the Authority for compensation but his application was refused on 1 February 1999 on the grounds that
Under paragraph 13(d) of the Scheme, the Authority is required to take into consideration your conduct before, during and after the incident giving rise to the application. In this case it is considered that your own conduct caused or contributed to the incident. In these circumstances it is inappropriate that you receive a full award or any award for compensation from public funds.
The point of complaint in support of this application is that the 'conduct' and the evidence on which the applicant's actions were supposed to have been based were neither of them identified by the letter from the Authority. In consequence the applicant's solicitors requested a review and asked for 'copies (sic) of the evidence on which' the Authority had based its decision. The Authority was unwilling to comply with this request and informed the applicant's solicitors, as they recorded it, that it
Could not send out police information they would have to obtain it from the police. Due to an

agreement with the Data Protection Act and the police. [See memo dated 2 March 1999, bundle p151].
It is clear that this message was somewhat garbled by the recipient, but its meaning was clear. That is that there was some agreement between the police and the Authority which meant that the Authority would not release evidence which it had itself obtained from the police in connection with its enquiries into the relevant incident. On 29 April, the solicitors wrote threatening to commence proceedings for judicial review arising out of the failure of the Authority to provide them with the grounds of the decision. Pending the result of the present application, no step has been taken to proceed with the Review.
17. The nature of this application is that the applicant is entitled to know the gist of the allegations made against him and should also be provided with the evidence upon which the decision of the Authority was based. The stance adopted by the Authority is apparent from its letter to the applicant's solicitors dated 7 May 1999
(It) is precluded from disclosing police witness statements or the police report by virtue of a long-standing agreement it has with the police to the effect that they will only provide witness statements subject to an undertaking by the Board/Authority that they will not be disclosed prior to an oral hearing. The same agreement provides that the actual police report must not be disclosed at any time to the applicant, unless and until the police provide written permission for us to disclose.
In evidence filed in response to the application, the Authority confirmed its position as being that
It would be neither necessary nor desirable to disclose witness statements to an applicant while his claim is being considered by the claims officer. To do so would make the process of considering applications for compensation undesirably legalistic and would delay the decision making process which would be contrary to the interests of both applicants and the CICA. It would also erode the difference between the consideration of a claim by a claims officer and consideration of oral evidence by adjudicators on appeal. Furthermore, early disclosure of witnesses' identities could result in undue pressure being put upon them.
Nothing which had been divulged by the Authority provided any indication of the reasons, as distinct from the grounds, of the refusal of an offer of compensation. Thus it was the case which the applicant sought to make, at the stage before review took place, that he was not in a position to respond with reasons why the decision made by the claims officer was wrong or ought to be reviewed.
18. After proceedings had been launched by, and leave granted to, the applicant, the Authority provided some further information, which was to the following effect
In this case, it is considered that your conduct was such as to make either a full or a reduced award of compensation inappropriate in that you, having drunk a considerable amount of alcohol, engaged in a voluntary fight with 2 men outside a night club, in the course of which you received your injuries. [See letter 21 January 2000, bundle p229].
19. In addition to the matters already identified, the Authority relies upon the evidence provided by Lord Carlisle of Bucklow QC in the case of Bramall (see later). In his witness statement, Lord Carlisle propounds a number of reasons why statements obtained by the police from witnesses of an incident giving rise to a claim are routinely not sent to claimants. These, slightly condensed, are as follows:
(1) If witnesses knew that statements which they might make might be disclosed, it is likely that many would decline to co-operate in case of reprisals;
(2) Because many claimants do not have a secure address, the statements could not be safely delivered; in cases where sexual abuse has occurred, the statements might be circulated in prison as 'pornographic' material;
(3) Claimants might seek to influence the makers of the statements;
(4) Such statements frequently contain information about police informants;
(5) The requirement for disclosure would impose an intolerable and unjustified burden on the Authority;
(6) Early disclosure would encourage legalism and lead to 'more and unnecessary representations' being made;
(7) Claimants might be tempted to tailor their own evidence so as to be consistent with the other evidence.

As against these reasons, it was submitted, on behalf of Mr **Leatherland**, that if his case proceeded to appeal, reason (1) would cease to apply since the statement(s) would be made available on the day of his appeal. As to (2), the applicant not only had a secure address, but also has solicitors acting for him; the reason could have no relevance to his case. It has never been asserted that the applicant might improperly approach any witness. In the present case, it has not been suggested that there are any informants involved, so this reason is irrelevant. As for the remaining reasons, they are robbed of any validity by the fact that if the applicant's case goes to appeal, he would in any event see the statements at that stage. In the light of the evidence which had been filed on behalf of the Authority, the applicant's solicitors asked whether, if the case were to progress to the appeal stage and in the light of the disclosure of witnesses' statements he would be granted an adjournment, the Authority stated, through the Treasury Solicitor, that if an application was made, to enable him to prepare his case it would be granted. This concession was later retracted and, properly, it was stated that any decision in relation to an application would have to be made to the appeal panel.

20. Thus, it was the case for the applicant that, unless the present application was successful, he would have to pass through the review stage to the appeal stage, without having a proper opportunity to respond to the basis of the claims' officer's decision. Even then, in ignorance of the true basis upon which the claims' officer had made his decision, the applicant would probably be unable to prepare his case for appeal adequately without ready access to the material upon which the Authority had made its decision. By that time, it was said that the applicant would have incurred costs which might have been unnecessary and which, in any event would be irrecoverable. In addition delay would have been incurred, again, which might have been quite unnecessary.

21. Kay: This application for compensation is based on an incident which occurred in a public house on 15 June 1998. As a consequence of the injuries which he then received, Mr Kay now suffers from tetraplegia. The case for the applicant is that he had been in a public house which was known to be a 'rough' one, watching a football match on television. The applicant claims that he was challenged by another man in a threatening manner. The nature of the allegation made against him related to the applicant and the girl friend of a third man (Stephenson). Stephenson was also behaving aggressively and was surrounded by his friends. Being thus threatened the applicant head-butted Stephenson and tried to get away. He failed and some three or four men set upon him punching, kicking and dragging him along the ground. It is inherent that in acting as he did he was acting in self-defence. There was no prosecution, it was said, because of insufficiency of evidence in relation to the identity of the assailants.

22. The claim was made by letter on 16 July 1998. The Authority rejected the claim by letter dated 24 March 1999 on the grounds that the applicant had voluntarily participated in the incident. The solicitors for the applicant sought a review under the Scheme and, in order to enable them properly to advise the applicant also sought disclosure of the documents which led to the formulation of the decision of the Authority. This request was declined on the grounds that the documents which formed the basis of the Authority's decision had been made available to them in confidence by the police. The applicant's solicitors sought disclosure from the police. Except for the interview notes of the applicant himself, this was refused. The Authority proceeded with its review and, on 27 September, affirmed its original decision. The grounds of this refusal were that

(the applicant's) own conduct provoked the incident (and that he had) voluntarily participated in the incident.

The solicitors once more sought disclosure of the information upon which the Authority had reached its decision. They received no reply until after the application for permission to bring proceedings had been issued. The reply when it came was a refusal. In the meantime, an appeal was lodged with the Authority. By letter dated 24 November 1999, the Authority wrote to the applicant's solicitors stating

Your application for a hearing before the Panel has been ... granted. ... . The Presenting Officers' Unit (POU) of the (CICA) will now be responsible for collecting the relevant information on your case. **If you wish to provide any further information or additional medical evidence, you should contact the POU immediately ...** Once you have agreed the documents to be used ...we shall notify you of the date, time and location of the hearing.

You should note that once your case is listed for a hearing it will only be adjourned in exceptional circumstances.

23. The basis of this applicant's case was that there was procedural unfairness on the part of the respondent to refuse to disclose to him the factual and evidential basis of its refusal to award him any compensation. The consequence of this unfairness is that in prosecuting his appeal, the applicant does so at a disadvantage because he does not know, with sufficient particularity, the basis upon which his claim and application for review were turned down. If the applicant must wait for disclosure of the police report and statements until the morning of the appeal hearing, his solicitors will have to take rushed instructions with the possible result that points may be missed or supporting evidence not discovered and certainly not made available. Even if an adjournment is granted, this would result in costs being incurred which are irrecoverable under the Scheme. More specifically, the Authority had not given adequate reasons when refusing the claim since it merely identified the Scheme grounds for the refusal without providing the underlying reasons. This is particularly unfair in the light of the fact that the Authority requires that an applicant should state the reasons why he has applied for either a review or to prosecute an appeal.
24. The applicant also complains that the claim raised for confidentiality of the police file and statements is based upon an erroneous reliance on the asserted agreement between the Authority and the police. Finally, the applicant contends that the practice of the Authority to withhold the police file and statements until the morning of the appeal hearing renders the hearing itself unfair.
25. Bramall The applicant alleges that she was the subject of serious sexual and physical abuse between 1985 and 1993 at the hands of one of her brothers. There was considerable delay between the occurrence of the abuse and any complaint being made to the police or the authorities. In case of intra-family abuse, this phenomenon is not at all uncommon. The history of the claim against the Board is that it was first made on the 1st June 1996. The Single member of the Board rejected the claim on 23 October 1996 in the terms that
(He was) not satisfied on all the evidence that the applicant had suffered injury directly attributable to a crime of violence and, therefore (was) unable to make an award of compensation under paragraph 4 of the Scheme.
The applicant's solicitors failed to obtain from the police a summary of the case. On 9 April 1999 the Board orally declined to disclose the witness statements which it had in its possession or even to permit the applicant's solicitors to see a summary of those statements. In refusing that request the Board relied upon the cases of R v. Criminal Injuries Compensation Board ex p. Brady and R v. Chief Constable of Cheshire ex p. Berry. The general nature of the claim in these proceedings is that the Board failed to act fairly by refusing to disclose in advance of the Appeal hearing either the statements of the witnesses or the gist of the reasons upon which it relied for its decision to refuse the applicant's claim. Alternatively, the Board acted unfairly in refusing to provide a summary of the statements before the Appeal hearing. In the further alternative the Board fettered its discretion by failing to consider whether or not to disclose the statements or a summary before the hearing took place.
Summary of the Applicant's cases
26. It can be seen, generally, that all three cases have a number of common elements. These may be tabulated as:
1. A lack of reasons for refusing a claim as originally made, or upon review coupled with "reasons" which are no more than a statement of the Scheme grounds for refusal;
2. A refusal to disclose the factual or evidential basis of the decision;
3. Refusal to permit the applicant to see the evidence upon which the Board or the authority had reached its decision which amounted to an unlawful fetter on the exercise of its discretion;
4. In cases where an applicant for compensation was legally aided this inevitably leads to an increase in the costs incurred by the applicant which would be irrecoverable;
5. The absence of proper reasons provides encouragement for applicants to proceed to the stages of review and appeal when such might be wholly unnecessary.
In terms of public law, the jurisprudential concepts in play are procedural unfairness, irrationality and failure to observe the principles of natural justice.
27. The respondent's position is that it is sufficient for an applicant if he can understand the basis of the refusal (or reduction) of an award so that the case can be effectively prepared for any appeal and that, at the initial and review stages, the applicant is not entitled to receive any of the documents

sought. It is sufficient that disclosure of witness statements at the oral hearing of an appeal provides all the protection required. The position is summarised and confirmed in paragraphs 27 and 28 of the affidavit of Lord Carlisle QC as Chairman of the Board, thus

27. The Criminal Injuries Compensation Board recognise that applicants have legitimate reason to know why they have been refused prior to an oral hearing. This concern is, I believe, generally satisfied by the giving of adequate reasons pursuant to paragraph 22 and/or by the possibility of seeking disclosure directly from the police. Further, this practice has been consistently upheld by the courts over the years. Balancing these considerations militating against advance disclosure, I believe, and respectfully ask the court now to find,that the present arrangements are lawful.

28. The practice of the Criminal Injuries Compensation Board and the fresh decision letter in the present case [Bramall] do, I believe, satisfy the third limb of the relief sought by the applicant [Gist of the matters relied upon by the Authority]. The Criminal Injuries Compensation Board would be content for the court to make a declaration in those terms, on the understanding that paragraph 22 of the Scheme already provides for this. In view of the fact that the Criminal Injuries Compensation Board have now issued a fresh decision letter, I would respectfully ask the court to make no order ...

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28. In the original Scheme no provision was made for disclosure of any material to claimants at the stage of the initial determination. It was the practice at an oral hearing for the Board to make available to the claimant evidence which was available to the Board. As the original Scheme developed in practice, the Board requested the police who had investigated the incident to prepare a report for its consideration at the initial stage. The report would not be disclosed to the appeal panel unless the police gave their consent to that happening. So it was that the report would only contain material which could be substantiated at a hearing before the Board. In a consolidated Circular to Police issued by the Home Office in 1986, specific provision was made for police reports prepared in connection with claims made on the Board. Among other matters, it was stressed that the reports should only contain information "that ... is such as can be openly substantiated at a hearing when all the information available to the Board is available to the applicant"; Paragraph 21.5 of the Circular. Paragraph 21.6 went on to provide:

The Board rely to a considerable extent on the information they receive from the police, and are greatly assisted if each police report contains items on the following:-

a. brief factual account of the incident which led to the injury;

b. information on when and by whom the incident was brought to the attention of the police;

c. information whether criminal proceedings were taken and if so the result including, where conviction resulted, whether the offender was ordered to pay compensation to the victim;

d. copies of a statement or statements i. by the applicant, and ii. Where it may be helpful because, for example, it is not clearly established that the injuries were directly attributable to a crime of violence, by witnesses (relying on the general understanding of the witness at the time of making his statement that it is likely to be used in legal proceedings of some kind).*

*NB. Following the decision of the Court of Appeal in Nielson v. Laugharne ... witness statements taken during an investigation under section 49 of the Police Act 1964 or section 84 of the Police and Criminal Evidence Act 1984 are the subject of public interest privilege and may not be acquired on discovery by a plaintiff in civil proceedings. The practice of supplying the Board witness statements taken during (such) investigations will continue: these will be seen by a single member of the Board on a confidential basis. However, in the comparatively rare cases where the application is not dealt with at the initial stage and the applicant requests a hearing before three Board members, (such) statements will not be placed before the hearing unless the Chief Officer ... and the maker of the statement consent. In these cases, therefore, the Board will formally request the consent of Chief Officers to disclosure and (they) are ... asked to seek the consent of the maker of the statement.

29. The Authority was unable to produce any documentary record of the terms of the agreement. It relied upon conduct as the foundation for its assertion. Such conduct was to be gleaned from a number of documents to which the court was referred on the hearing of these applications. These may be summarised as follows:

1. Letter 26 August 1964 Home Office to Chief Officers of Police. *Pro forma* letter requesting information to assist the Board in dealing with claims under the Scheme;

2. Letter 18 March 1965 Home Office, as before, containing *pro forma* consent of the applicant to

release of his/her statement to the Board;
3. Letter 6 March 1969 Home Office recording the agreement of the Association of Chief Officers of Police to the adoption of the procedure referred to in the last letter, above;
4. Letter 30 May 1969 Home Office to Chief Constables outlining practical difficulties which occur when a witness does not give consent to the use of his statement. Then in paragraph 6 of the letter there appears the observation:
As a result of representations made by the Chairman of the Board, the Commissioner of Police of the Metropolitan Police has agreed as a normal practice to supply copies of witnesses' statements in individual cases on request without the consent of the witnesses being first obtained, relying on the general understanding of the witness, at the time of making the statement, that it is likely to be used in legal proceedings of some kind; in agreeing to this procedure the Commissioner made it clear that it may be necessary for him, in exceptional cases, to decline to follow the new procedure. The Central Conference (of Chief Officers of Police) agreed to the adoption of the same practice ... a statement might be supplied to the Board for use at a hearing without reference to the witness.
5 April 1972, Extract from Board minutes for this day
The Chairman said that soon after the commencement of the Scheme he gave an undertaking to Chief Constables that police reports should be treated as confidential and their contents would not be shown to applicants. That confidentiality applied to the report itself including references to the trial and conviction of the offender, and also statements of the applicant and other witnesses. Discussions were about to begin ... but it was agreed that the undertaking would be observed until these discussions were completed.
It is now possible to turn to the submissions made in the individual cases.
Leatherland
30. The first submission was that the Authority has not identified upon which of the seven reasons advanced by Lord Carlisle (paragraph 19 above) the Authority relies nor why those reasons should be considered to be a sufficient basis for refusing the information sought by the applicant's solicitors on his behalf in relation to his case. These submissions are most readily considered against the numbered paragraph of the reasons advanced by the Authority (as above). Thus:
1. Since the applicant will be entitled to receive copies of all witnesses' statements on the morning of the appeal, the fear of a lack of co-operation cannot be realistic;
2. The applicant has a secure address, indeed he has solicitors acting on his behalf;
3. There is no basis for suggesting that the applicant will seek to influence witnesses;
4. It is not suggested that there are any police informers in this case, indeed the case suggests witnesses who are generally adverse to the interests of the police;
5. It is far from clear how a 'paper' burden ("intolerable and unjustified") can be a reason for the Authority to refuse to supply statements;
6. and 7. The statements will be seen in due course.
In summary, therefore, the reasons advanced are not relevant to the case which this applicant seeks to make. If the case proceeds to the appeal stage, the applicant would only see the statements on the day of the hearing and he may, or may not, be successful in his application for an adjournment. The result of not disclosing the evidence before may well be that irrecoverable costs will have been incurred as well as inconvenience and delay.
31. It was contended that the true basis of the applicant's right to see the statements lay in the principle of natural justice which is to the effect that a party to judicial or quasi-judicial proceedings is entitled to be informed of any adverse point in advance in order that he may be in a position to answer them. The present cases were not being presented on the basis of perversity as was the case of R v. Chief Constable of Cheshire ex p. Berry (Transcript 30 July 1985) in which Nolan J (as he then was) said
What I have to decide is whether the manner in which (the Chief Constable) has exercised that discretion is perverse. ... The critical question is whether the respondent has behaved perversely in limiting his disclosure of the witness statements to the Board, and denying them to (the claimant), knowing that the Board will only show them to (the claimant) on the morning of the hearing.
The reasonableness of the respondent's general policy of preserving the confidentiality of witness statements (and lists of convictions) is .. indisputable. ...
The question, therefore, is whether the disadvantage expected to be suffered by (the claimant) at the

hearing before the Board amounts to a denial of natural justice and a breach of his common law rights which in the mind of any reasonable Chief Constable should outweigh the public interest in withholding witness statements from members of the public such as (the claimant). To that question ... the only possible answer is no. In the first place, according to the evidence of Mr Ogden ... any disadvantage suffered by applicants because of the Board's procedure does not prejudice those with valid claims. (That) evidence may not wholly reassure (the claimant), but in my judgment the Chief Constable is entitled to accept it and rely upon it. Secondly, granted that applicants are given adequate time, by way of an adjournment if necessary, to study the witness statements before their case is heard, it cannot be maintained that the Board's procedure conflicts with the rules of natural justice. Finally, it is impossible for (the claimant) to establish at this stage that he will, in fact, suffer a denial of natural justice when his hearing takes place. If he were to do so, then he would have a remedy against the Board and not against the respondent.
It was submitted that this case could not assist the Board here because of its policy on adjournments. But also, since the Board was not itself the respondent, the argument in relation to natural justice had no real relevance in that case. A second case was cited in which the Board was on this occasion the respondent. It was successful. The case is R v. Criminal Injuries Compensation Board ex p Brady (Transcript 4 December 1986). As distinct from the position in the present case, however, Nolan J who was also the judge found that the applicant knew exactly what case he had to meet (see transcript p20F) and also that
(T)he Board are entitled to take the view that the agreement contained in the Home Office letter of 30th May 1969 is an agreement to supply the statements to the Board and the Board alone. It is clearly implicit in that statement that the Board will throughout retain custody and control of the statements and will not release them into other hands. The reasons of public policy which lie behind that agreement are more fully set out in the judgment ... in Berry ... .
Further I do not think that the result of non-disclosure of the statements is one which breaches the rules of natural justice, so long as the Board are prepared to consider any reasonable request for an adjournment so that the statement can be challenged. .... The fact remains that in the present case no application for an adjournment was made.
The application for review of the decision of the Board failed.
32. Counsel then referred to the statement of principle on the topic made by Lord Diplock in Hadmor Productions v. Hamilton [1983] 1 AC 191 in which at p 233, he said:
Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice: the right of each to be informed of any point adverse to him that is going to be relied upon by the judge and to be given the opportunity of stating what his answer to it is.
33. In the later case of R v. Secretary of State for the Home Department ex p. Doody and others [1994] 1 AC 531 Lord Mustill said at p 560
What does fairness require in the present case? ... It is unnecessary to name or quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal administrative system within which the decision is taken. (5) Fairness will often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or that after it is taken, with a view to procuring its modification, or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.
At p563, Lord Mustill continued

It has frequently been stated that the right to make representations is of little value unless the maker has knowledge in advance of the considerations which, unless effectively challenged, will or may lead to an adverse decision. The opinion of the Privy Council in *Kanda v. Government of Malaya* [1962] AC 322, 337 is often quoted to this effect. The proposition of common sense will in many instances require explicit disclosure of the substance of the matters on which the decision maker intends to proceed. Whether such a duty exists, how far it goes and how it should be performed depend entirely on the circumstances of the individual case that I prefer not to reason from any general proposition on the subject.

34. In support of this general ground in the application, counsel for the applicant also cited from the case which has a vastly different factual background, namely the case of R v. Thames Magistrates Court [1974] 1 WLR 1371. It is unnecessary to cite any passage from the case since, in my judgment it does not set out any new principle but merely provides an example of the circumstances in which the rules of natural justice may come into play.

35. Much reliance was placed by Lord Carlisle, and his predecessor, on the agreement made between the police authorities and the Board by virtue of which it was contended that the Board was unable to divulge the contents of witnesses' statements to applicants for compensation under either the old or the new Schemes. When the matter came to be investigated on the hearing of these applications it was submitted that the basis and extent of any such agreement became a matter more for speculation than certainty. In this context reference was made to pp170-1 in the bundle where the case of Berry (above) where Nolan J said

Research has failed to reveal any record of an express undertaking in these terms, but in paragraph 6 of his second affidavit Mr Ogden states that he has always understood, and has advised his Board Members, that such an undertaking forms part of the agreements between the Board and the Police. .... (H)e strongly suspects that an express undertaking in the precise terms given to him was given to the Association of Chief Officers on behalf of the Board in the 1960's.

There was, however, no good evidence that this was ever the case. Neither Lord Carlisle nor Kathleen McQuillan have been able to provide convincing evidence to the contrary; see the documents referred to in paragraph 29 above, which are inconsistent with the existence of any agreement to the effect for which the respondents have contended.

36. Reference was made to the cases of R v. Secretary of State for the Home Department ex parte Hickey and others (No.2) [1995] 1 WLR 734 in support of the proposition that there was no longer a general principle of confidentiality for the statements of witnesses made to the police. The Secretary of State had been pursuing a line which bears a striking similarity to that taken by the Board and the Authority in these cases. At p745 Simon Brown LJ said:

The next public interest concern urged by the Secretary of State is that of confidentiality. ... . The Secretary of State's evidence warns of grave difficulties in adopting the procedures proposed by the applicants. It is said that they would risk compromising an implicit duty of confidentiality to witnesses who assist the Secretary of State's enquiries, that witnesses have expectations of privacy, and that

If the Secretary of State were to operate a procedure involving, overall, a significantly greater degree of openness towards petitioners, expectations [of witnesses] would be different. Whatever formal safeguards for confidentiality were adopted under such a procedure, it seems likely that in fact potential witnesses and informants would be altogether more cautious, and that some would be reluctant to come forward or to answer questions.

I confess to finding all this wholly unpersuasive, and certainly an insufficient basis for maintaining in place what I regard as the significantly too closed procedure presently operated. I have no doubt that fairness requires not merely prior disclosure but a substantial increase in the level of disclosure made. The Secretary of State accepts that in none of the present cases was any specific assurance of confidentiality given to anyone participating in the police inquiries. As it seems to me, it seldom will be. We are told indeed that lay witnesses in these inquiries make formal witness statements: they must accordingly recognise at least the possibility of being called in further legal proceedings. A plea for some general principle of confidentiality to encourage co-operation with police inquiries is thus

unconvincing. Essentially, as the applicants submit, it invites the creation of something akin to the very public immunity class claim which the House of Lords so recently abolished in (ex p Wiley above).
I accept (the respondent's) submission that the courts will not impose a greater requirement for openess and disclosure than fairness actually demands; ....
37. Finally, reliance was placed on the principal adumbrated in the case of R v. Chance ex p. Coopers and Lybrand and others 7 ALR 821 at 829 where Henry LJ said
It is common ground between the parties that this court is required to conduct the balancing exercise of weighing the public interest in the prompt and efficient administration of the Scheme against the risk of serious prejudice to the fairness of the trial or other proceedings, which may result in injustice. This court is not, therefore, concerned with a *Wednesbury* review of the respondent's decision not to stay proceedings under the Scheme. And in that balancing exercise the court will take into account all the evidence before it, including such evidence as results from matters subsequent to the respondent's decision not to stay the proceedings.
Counsel submitted that in carrying out that balancing act in the present case, the decision should come down heavily in favour of requiring the Authority to disclose the material to which it, but not the applicant, had had access. Among other reasons to be put into the balance was the fact that if early disclosure were made that would have an effect in reducing the numbers of appeals being brought in which the main purpose of the appeal was to gain access to the statements which had been made to the police. The same argument was of particular relevance where the procedural step of review was in contemplation. Lastly, the Scheme required the claimant to give reasons for proceeding to review. A step which was rendered virtually impossible without knowing either the gist of the reasons for the declinature or the evidence upon which it had been based.
Bramall
38. An additional ground for relief was made by amendment to the Form 86a by including the refusal of the Authority to disclose witness statements prior to an appeal hearing as constituting an unlawful fetter of the discretion of the Chairman to disclose such material. In relation to the decision not to do so, it was contended that disclosure at the hearing was unfair to the claimant because it gave her insufficient time to prepare her case and the submissions which she would wish to make in support of it. There was no certainty that the Panel would adjourn if such were sought for the purpose of investigating any material of which the claimant had been previously ignorant. It was then submitted that it was unfair to applicants who were probably suffering from the effects of their injuries to expect them to make judgments whether to ask for an adjournment and how best to present their case on the new material. Adjournment if granted would add to a claimant's irrecoverable costs and to the delay before final adjudication of their claim without, at the same time significantly providing any advantage over the existing practice.
39. Fair procedure, which is the principle at issue, is a matter in respect of which the courts are the sole arbiter. The earlier authorities cited above, and upon which the respondents so heavily rely are out of date and neither need, nor should, be followed in the light of the decision in the case of Doody (above). The applicant invited the court not to follow the earlier cases of Berry, Brady and Gould (above). Furthermore, Berry (above) turned on the reasonableness of the policy relied upon by the police not to disclose the statements of witnesses. This it was submitted was based on the earlier decision of Neilson v. Laughgarne [1981] 1 QB 736 which is a decision no longer good law in the light of R v. Chief Constable of the West Midlands ex p Wiley [1995] 1 AC 274. In this case the decision of their Lordships' House as reflected in the holding was that:
(I)n the absence of any clear and compelling evidence that it was necessary, there was no justification for imposing a general class immunity on all documents generated by an investigation into a complaint against the police under part IX of the Police and Criminal Evidence Act 1984.
The leading speech was given by Lord Woolf. At pp292-293 of the report Lord Woolf discussed the reasons which had been formulated in the Court of Appeal in support of the existence of class immunity of the kind instanced above. At p305, he said
Between the hearing in the Court of Appeal and the hearing before this House ... the authority has accepted that in general the class immunity created by the *Neilson* decision can no longer be justified. However, in my opinion, this is the case, not because of any change in the balance of public interest or change in attitudes since the *Neilson* decision, but because establishing a class of public

interest immunity of this nature was never justified. This lack of justification is part of the explanation for the problems which the courts have had since in finding a logical limit to the application of the class and creating a sensible balance between the interests of those involved in subsequent legal proceedings and the interest of those involved for conducting investigations into police complaints.
The recognition of a new class-based public interest immunity requires clear and compelling evidence that it is necessary. Yet as this case has demonstrated, the existence of this class tends to defeat the very object it was designed to achieve. ... . (I)n my opinion no sufficient cause has ever been made out to justify the class of public interest immunity recognised in *Neilson*.
40. The other cases in which the Board had been involved as respondent could all be distinguished on their facts. Albeit in different formulation from that adopted in the case of **Leatherland**, this applicant submitted that the reasons advanced in Lord Carlisle's affidavit did not stand up to analysis. Alternatively, if the applicant was not entitled to see copies of the statements themselves, the concept of fairness required that the Board at least disclose the gist of any statement upon which it relied as well as the gist of the reasons for its decision. The letter from the Board dated 16 January 2000, was couched in so general terms as not to be capable of conveying either the gist of the evidence which it had considered or the reasons for the decision to reject the applicant's claim. This had not simply depended on the account of the abuse given by her, but also included statements from her younger brother, as well as her sister who had also been the subject of abuse from her elder brother and made no reference to the psychological evidence which was strongly in favour of the fact of some abuse having occurred. Consequently it was submitted that the applicant in coming to the appeal fell squarely within the concept advanced by Lord Diplock in Mahon v. Air New Zealand [1984] 1 AC 808 at 821 where he said
(A)ny person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce any additional material of probative value which, had it been placed before the decision maker, *might* have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result.
In short, it might be said that the rules of natural justice require that a party to a dispute is entitled to know what is the case which the other party is likely to deploy.
41. As to the policy decision not to disclose witness statements before the appeal hearing, here too, this applicant closely followed the submissions in **Leatherland** as showing that the Board had irrationally fettered its discretion whether or not to release the statements. It was, however, additionally submitted, or in the alternative, that while it might not be unlawful to fetter the discretion, it was irrational if in exercising that discretion, no account was taken of the particular circumstances of the case which the Board was being required to consider. There was no indication that the Board had considered the particular circumstances of the instant case. It was that feature which rendered the exercise of the policy irrational.
Kay
42. The background to this case is the refusal of the claim following the review stage by the Authority without giving any reasons other than Scheme grounds or even the gist of the evidence upon which the Authority relied for its decision. The claimant had sought reasons and the evidence upon which the Authority had based its original decision, but these were refused. The case proceeded to the review stage, when again the decision went against the applicant. Again, the applicant sought reasons for the decision and, again, they were refused. As with the two other applications, the present applicant contends that the refusal to disclose the evidence underlying, and reasons for, the decision is that of procedural unfairness.
43. The first ground upon which this applicant relies is that paragraph 60 of the Scheme requires the Authority to give reasons for its decision. In other words reasons which would enable the applicant to understand why his application had been refused. The actual decisions had not identified what conduct on the part of the applicant had provoked the incident in which he was injured nor what conduct was said to have constituted voluntary participation. It will be recalled that "The applicant will be sent written notification of the outcome of the review, giving reasons". It did not indicate what decision it made in regard to the issue of self-defence. It was contended that the reasons were insufficient to enable the applicant to know on what basis the Authority had reached its decision on

the issues of fact which were relevant to the decision. No more did the Authority provide the gist of the evidence which was available to it for the purpose of reaching its decision. It was submitted, in reliance on the case of R v. Criminal Injuries Board ex p Cook [1996] 1 WLR 1037 that there was a duty so to do. The relevant passage from that case is to be found at p1049 in the judgment of Hobhouse LJ, as he then was, where he said

It follows that this case does not come into that category of cases where the decision requires some special justification. To use an analogy, if a court makes an order for costs which follow the event, that order requires no special justification and no special reasons need be given; if, on the other hand, some special order for costs is made which does not follow the event, the court needs to give reasons which justify such an order, otherwise it may be inferred that the decision was irrational or arrived at on some wrong basis. What reasons it has to cover depends on the application which is being made and the character of the decision.

Thus the reasons for the decision of the single member (and, when relevant, the Board) must be such as disclose a decision which is irrational or arrived at on the wrong basis. The decision of the single member to refuse to make any award to (the applicant) was not on its face irrational. The reasons, therefore, did not need to rebut a *prima facie* inference of irrationality. As regards the making of the decision on the right basis, the facts were not in dispute.

It may be interpolated, respectfully, here that this part of the decision in Cook is entirely consistent with the guiding principle in relation to the giving of reasons, which is that, they must be 'proper, sufficient and intelligible'; see Megaw J in Poyser and Mills Arbitration [1964] 2 QB 467. In the absence of reasons, it was contended that the applicant had to go to appeal without knowing what case he would be required to meet. It was insufficient, and potentially unfair, that at that stage with his case probably not prepared with sufficient evidence to rebut whatever case the Authority proposed to mount that he was left to guess what was the evidential basis upon which the Authority had decided his case on review; contrast the case of Cook (above).

44. It is to be noted at this stage that the letter in which the decision of the Appeals Panel to grant an appeal ended with the sentence

You should note that once your case is listed for hearing it will only be adjourned in exceptional circumstances.

The applicant's solicitors protested but were met with the response dated 3 December 1999

The Authority has an agreement with the police that the reports they submit will not be released to the applicants or there (sic) representatives.

A police officer is invited to attend the hearings so any questions concerning the police report can be answered directly.

Furthermore any witness statements released to the Authority are only available on the day of the hearing.

If an applicant or representative wishes to view the witness statements, they normally arrive before the hearing where they can look at them.

On 14 April 2000 the Chairman of the Appeals Panel wrote to the applicant's solicitors stating that the arguments on behalf of the Panel in relation to disclosure were covered in the evidence in the two previous cases and that it was accepted, in principle, that the public interest in disclosure was capable of outweighing the duty of confidentiality in a particular case. However, the circumstances where this would be so would be exceptional. In the view of the Panel, there were no such exceptional circumstances in this case. There was then a reference to the case of Berry (above) and the letter continued:

It was the Board's practice to adjourn a case in such circumstances and continues to be the Panel's. ... When (the applicant) or his advisers see (the statements) and the applicant considers that he is prejudiced by not having an opportunity to deal with the contents, the Panel will consider an adjournment. Alternatively I could arrange to list the case without witnesses, so your representative can read and note (but not take copies of) the statements, which will be made available there.

It was submitted that although statements provided to the police may be given in confidence, such confidence extends to police purposes but this does not mean that such statements cannot be used for any purpose in the public interest. A challenge was mounted by this applicant to the proposition which featured so largely in the respondents' evidence that there was in fact an agreement between the police and the Board of the kind asserted and of which the successor Authority was also entitled

to claim the benefit. The senior solicitor (Kathleen McQuillan) employed by the Authority in her affidavit sworn on 3 September 1999 deposed to the relevant facts. She drew attention to the fact that the Act made no provision as to the disclosure of documents; see paragraph 3. It was to be remembered that under paragraph 64(b) of the Scheme (above) the appellant "has had an opportunity to submit representations on any evidence or other material submitted by or on behalf of the Authority". To be of any value, it was submitted that the opportunity must be one which was fair and was such as to enable an applicant to make reasoned representations as well as to submit relevant evidence to meet the case. Such was the minimum which, consonant with observance of the principles of natural justice, the law would imply.

45. As to the agreement with the police, the solicitor deposed

It would be neither necessary nor desirable to disclose witness statements to an applicant while his claim is being considered by the claims officer. To do so would make the process of considering applications for compensation undesirably legalistic and would delay the decision making process which would be contrary to the interests of both applicants and the CICA. It would also erode the difference between consideration of the claim by a claims officer and consideration of oral evidence by adjudicators on appeal. Furthermore, early disclosure of witnesses' identities could result in undue pressure being placed upon them.

As to the agreement itself, no document had been produced which would enable the court to conclude that such had ever been made. The Circular, referred to at paragraph 28 (above) did not evidence an agreement, let alone one which provided support for the tenor of the agreement as asserted. While there was an additional affidavit sworn by an Assistant Commissioner of the Metropolitan Police this did not materially add to the strength of the respondents' case on this issue. This applicant adopted the submissions on the other points made by the other applicants.

46. By way of comment on the detailed submissions on the case made by the respondent, it was submitted that before an appeal could properly take place the applicant needed to know what were the findings of fact made by the Authority which supported the Scheme ground of the decision. So too, it was submitted that, an applicant was entitled to view the evidence which was available to the decision which was impugned. Such, indeed was implicit from the provisions of paragraph 61 of the Scheme which requires the applicant to support his "reasons for the appeal", which is a meaningless requirement unless the applicant knows what the reasons are, and not just the grounds, for the decision made on review. In this case, the decision which was challenged merely stated that:

1. Your own conduct provoked the incident;
2. You voluntarily participated in the incident;

without identifying what conduct and what amounted to provocation or constituted voluntary participation. This was a case which was unlike that of Cook (above) where the Scheme ground was a sufficient indication of the basis of the decision. It was a case in which the reasons given were neither "proper" nor "sufficient".

47. Counsel also cited a number of recent decisions in which the courts have recently extended the scope of the duty of disclosure in relation to material coming into the possession of the police for the purposes of criminal investigation; see for example Taylor v. Serious Fraud Office [1998] 3 WLR 1040, R v. Chief Constable of the North Wales Police and others [1998] QB 396 and Woolgar v. Chief Constable of Sussex Police [2000] 1 WLR 25. It was then submitted that if fairness requires the disclosure of material obtained by the police at the appeal hearing, then the issue of confidentiality could not logically be invoked at any prior stage. If fairness requires disclosure at the appeal stage, then it also requires that the claimant should be able to see those same documents at a stage at which they can serve a purpose useful to the process which is in hand.

48. Counsel then raised a separate argument based on the provisions of Article 6 of the European Convention for Human Rights. For reasons which will emerge, I do not propose at this stage in the judgment to consider this submission separately. It may be that the common law is capable of producing the result for which all the applicants contend.

The respondents

49. Their overall position was as contained in the skeleton argument submitted on their behalf. It was accepted that a claimant was entitled to understand the basis upon which an award has been refused, that is, that he should receive the gist of any adverse decision, the purpose of this was to enable him to prepare the case for any appeal. However, an applicant was not entitled to disclosure of any

document at the initial determination or review stages. The present arrangements for disclosure at the appeal hearing provide all the protection which a claimant requires.
50. It was accepted that considerations of natural justice and fairness were at the root of all three applications. However, what was demanded by way of natural justice and fairness would depend according to the circumstances of each individual case. In order to determine where the balance lay in any given case, the following propositions were relevant:
1. The context of the situation and the context in which it was to be exercised had to be examined;
2. The context in which the requirements of natural justice fall to be judged includes such matters as the proper administration of the arrangements in question;
3. It may be sufficient if a person is given an opportunity to make representations *after* a decision has been taken with a view to its subsequent modification; [emphasis supplied];
4. The requirements of natural justice may be satisfied by disclosure of the gist of the relevant (grounds of refusal) without disclosing the underlying documents;
5. To succeed, an applicant must satisfy the court that the procedure was, in fact, unfair. Merely to show that other procedures might be more fair was insufficient;
6. In the context of unfairness, it was relevant to consider the availability of an appeal process. The court should look to see if the whole process was unfair, and not that just one aspect of it may have been.
51. It was submitted that the history of cases which had previously been brought against the Board claiming that aspects of its procedures were unfair demonstrated that its procedures were in fact fair. All that was required was for the applicant to know what conclusion had been reached on the principal issues. Cook (above) was relied on for the proposition that there was no requirement to deal with each issue which had been considered. For present purposes, all that was necessary for decision in cases to which the Scheme applied, was that the following matters had to be considered:
1. There is no inherent or vested right in any person to compensation for criminal injuries; this right is qualified by the terms in which the Scheme "chooses" to confer; but he does have a right to expect that the Scheme will be implemented.
2. Although the Scheme is intended to provide compensation, for the designated purpose, the protection of the public purse, in particular against fraudulent claims, is always an important consideration.
3. While preserving and protecting the proper administration of the Scheme, unnecessary formality, if not positively necessary in the interests of achieving a fair result "in each case", should be avoided.
4. Because of the annual volume of cases, approximately 72,000, and the fact that only some 9 per cent of these proceed to an oral hearing, it would impose an unnecessary burden on the administration of the Scheme if documentary disclosure was to be required before the appeal stage.
5. Because neither the Board nor the Authority have powers of compulsion on any person to provide either oral or written evidence, the question what is fair to an individual applicant has to be conditioned by the need to continue to secure co-operation from potential witnesses, particularly the police.
6. The regime for disclosure which has been adopted by the Authority and its predecessor has been agreed with the police, to whom they owe a duty of confidentiality. That duty would be broken if they were required to provide disclosure in any other way. The issue in the present cases was whether or not the court should require the respondents to breach that duty and undertaking.
52. It was submitted that the manner in which the original prerogative Scheme and the present statutory Scheme both was, and is, operated was generally fair. Thus, it was observed that:
1. Where an award was either refused or reduced, reasons were always given;
2. Flexible procedures were adopted at each stage and the appeals panel had the power of adjournment;
3. If it appeared that evidence at an initial hearing was incomplete or erroneous, the case could be remitted for re-hearing;
4. The claimant was able to submit additional material at the stage of either review or appeal;
5. Appeal, is by way of a fresh hearing and the claimant was entitled to legal assistance or help from a friend;
6. At appeal, the claimant would be informed of the witnesses upon whom the Authority would rely and all the evidence upon which the Authority would rely was made available to the claimant;

7. The claimant, at appeal, could both call and cross-examine witnesses;
8. Rules of evidence are not strictly enforced;
9. Any determination made in the absence of a claimant can be re-opened;
10. The conduct of the Authority falls within the jurisdiction of the Parliamentary Commissioner for Administration.

In the above circumstances, it was submitted that no disclosure was needed at the stages of either initial determination or on review. Moreover, were it to be otherwise, both cost (presumably of administering the Scheme) and delay would be incurred if disclosure were to be required at either of those stages. Because, it was submitted that a number of cases were disposed of without proceeding to appeal, and that an appeal was, in any event, a fresh hearing on the basis of evidence which is made available to the appellant, there could be no unfairness in not making disclosure before the appeal itself. It would also be both wrong and unnecessary for the police report to be made available to a claimant without the agreement of the police because of the existence of the agreement which, it was claimed, meant that neither the Authority, nor the Board, would do so. It was said to be common ground that both the Board and the Authority owed the police a duty of confidentiality in respect of the police report which was not, in any event, disclosed to the Appeals' panel unless also released to the appellant. In these circumstances there could be no public interest which could override the duty of confidentiality which rested on the Authority.

53. While it might be "fairer" if witness statements were disclosed before, rather than at, an appeal hearing, the existing practice could not be said to be unfair. In any event the practice of the Authority was embodied in the Scheme which had been expressly sanctioned by Parliament and had the approval of the courts in the cases in which the Board and the Authority had been previously successful. Finally, on this aspect, it was always open to the claimant to apply to the police for individual permission to be granted in individual cases. It was submitted that as against all of this, there was no purpose in disclosing statements if an award was accepted. Further there was a serious risk that witnesses would not co-operate if they knew that their statements would be sent to applicants, "many of whom are criminals". Also, it was said that it was impossible to secure delivery of statements to the claimant, there were risks involved in the documents reaching "the wrong hands" and that if witnesses' names were made available, there was a risk that they would be improperly approached, presumably to change their evidence. Some witnesses were police informers whose names and identities should not be divulged. There would be a heavy administrative burden involved in the editing and copying of the statements which was disproportionate to any benefit which would flow from disclosure. Any earlier disclosure would encourage "legalism" and thereby prolong hearings and detract from the informal and flexible procedures which were in place. Early disclosure might enable claimants to fabricate their own evidence.

54. The respondents submitted that the applicant in Kay had misunderstood the basis upon which the Authority had refused disclosure in advance of the appeal hearing. The applicant's submission that disclosure of material generated as the result of police enquiries was required if a hearing was to be fair had to depend upon the facts of the particular case. Here there were no exceptional circumstances which required there to be any prior disclosure which would involve breaching the agreement made between the Authority (Board) and the police. In determining how the interests between disclosure and withholding the material should be balanced, it was necessary to consider the likely impact on the willingness of the police to co-operate with the Authority in future if witness statements were routinely disclosed. It was submitted that the power of the Appeal Panel to grant an adjournment was sufficient protection to an appellant who needed time to respond effectively to what was revealed by the statements when they were made available to him at the hearing. There was thus no inherent unfairness in the Scheme as it is at present formulated and run. Whether additional costs might be incurred by the grant of an adjournment would in practice depend on whether or not the appellant was legally assisted and accordingly it cannot reasonably be said to constitute an objection founded on a principle which would be applicable in all cases.

55. It was first contended that, insofar as **Leatherland** was concerned, the case should be regarded as if it was at the stage of initial determination. For that purpose, no disclosure was necessary and his claim should fail. All that he was entitled to know was what would enable him to understand the reasons why his claim had failed. So, he could take his case to the appeal stage if it became necessary at which stage he would then get to see the evidence. It is said that the refusal

letter contains sufficient information by way of gist. No further information need be given.
56. Next, in relation to Bramall it was submitted that the evidence in support of this application had failed to demonstrate that unfairness would result from having to apply at the appeal hearing for an adjournment if such proved to be necessary. The fact that an adjournment might or might not be granted did not affect the issue as it had been formulated. As to the argument advanced on the basis that the respondents had fettered their discretion in relation to earlier disclosure of witness statements, it was inaccurate to describe the decision of the Authority to abide by its general policy as a "fetter". The Authority was always at liberty to depart from it if it thought fit. Here, the applicant had not shown that there were any reasons why it should have departed from that policy. Accordingly this ground could not be substantiated.
57. It was then submitted that the letter from the Board of 18 January 2000 supplied enough information to constitute the gist of the reasons for the refusal. Quite simply, the applicant had failed to discharge the burden of proving that her case fell within the provisions of the Scheme. The facts that there had been no prosecution, the alleged perpetrator had denied the allegations and the absence of corroboration provided a sufficient basis for the applicant to know why her claim had been declined and to enable her to prepare for an appeal. The applicant, it was said had not identified any additional evidence which she might wish to adduce to support an appeal. Thus, there was nothing unfair about the Board's procedures.
58. In the case of Kay, it will be recalled that he suffered his injuries at or outside a public house. In the incident he was rendered unconscious. As a consequence he is unable to provide a first hand account of what happened. The refusal of his claim was on the dual grounds of his voluntary participation in the incident and his provocative conduct in causing the incident. In addition, it was pointed out that by his own witness statement, the applicant's real problem is that no one will support his version of events; see paragraph 20. It was submitted that no prior disclosure of the witness statements would assist him in overcoming this difficulty. The fundamental problem which faces the applicant is that such evidence as he has been able to submit is fragmentary and not inconsistent with his own role in continuing, if he did not actually start, the incident. In these circumstances, it was submitted that the reasons given for declining his claim were sufficient and that he knows that it was because there is "no witness who can corroborate his version of events"; see skeleton paragraph 42.

59. More generally, it was submitted that the review stage under the current Scheme should be regarded as part of the initial determination. In consequence, there was no question of the need for disclosure at the review stage. All that was required of the Authority was that its reasons were sufficient at each stage to enable the applicant to respond adequately. With regard to the appeal stage, it was important to keep clearly in mind the difference between the police report on the one hand and witness statements obtained as the result of police enquiries. The report is prepared explicitly on the basis that it will not be disclosed to applicants. On the other hand, witness statements are prepared for the purposes of criminal investigation which gives rise to a duty of confidence between the police and the witness. There is public interest in maintaining that confidence, albeit that it may be overruled by a higher public interest, as for example, when a claim for compensation is made. It was not within the power of either the Board or the Authority to compel police to make either their report or witness statements available to claimants. The view which the police have expressed about disclosure was not a matter upon which it was proper for the Board or the Authority to question. The court has, therefore, to proceed on the basis of the arrangements as they stand. It follows that it is not for this court to question the validity of the agreement or its reasonableness. The limit of the court's ability is to assess whether or not fairness demands that the provisions of the agreement be overridden.
60. In the course of submissions, counsel for the respondents referred to R v. Secretary of State for the Home Department ex p. McAvoy [1998] 1 WLR 790, a case which was concerned with the procedural requirements of fairness in the process of categorisation of a prisoner. The essence of the decision in that case is that the determination of what is fair, in any case, has to depend on the nature of the decision and the circumstances in which it comes to be made. In the later case R v. Secretary of State for the Home Department and anor ex p. Allen (transcript QBCOF 1999/1267/C) Laws LJ, having referred to Lord Mustill's speech in Doody (above) said:
38. This is an area of the law which is becoming overburdened with case references. I will only add

these short points which are all well vouchsafed in the books:
1. There are many cases in which it is enough to give the affected party the gist of what is said about him rather than all the *ipssima verba;*
2. Where there is a procedure which includes two or more inherent stages the court looks to see whether overall fairness is shown to be established; and
3. In some circumstances a later procedural stage may cure a defect in an earlier one.
39. In my judgment the learned judge has gone too far in holding that all the relevant documentation must be disclosed at the assessment stage. All the more so if, with respect, he meant that that should happen in every case. The principle is that the affected prisoner must know enough about the case against him to respond to it. The gist of the documents will often be enough. But I would go further. In my judgment, the right of appeal, as it has been called, to the governor here is integral to the administrative process of arriving at HDC decisions. If at that second stage the case against the prisoner is (a) made known to him and the gist of any relevant documents explained and (b) the actual documents are provided if requested and (c) he is of course allowed to make representations, then, as I see the matter, fairness is satisfied.
It was argued by analogy that the initial assessment and the review processes in the present cases provided a claimant with adequate procedural fairness since they were not in any sense adversarial processes, consequently disclosure of gist, let alone the underlying documents, were neither of them required.
61. It was, nevertheless recognised by the respondents that witness statements are now released to applicants without the specific permission of either the police or the makers of the statements on the morning of appeal hearings. It was not made clear to the court, however, what was the legal or factual basis of any such arrangement. It was contended however that the Authority had no control over documents, its position was quite unlike that of a party to civil proceedings.
62. The exercise which it was for the court to perform at the stage of an appeal was to assess what was fair by seeking answers to the questions: 1. Under what terms did the Authority hold documentary evidence? And 2. In the context of the cases before the court, has there been, or will there be, unfairness to any of the claimants if they are not provided with any of the material which they now seek? It was submitted that there was no such unfairness in any of these cases. Moreover, if a case was to go to appeal, the only unfairness which might occur would be if an applicant decided that an adjournment was needed and one was refused by the Appeal Panel. There was no unfairness in not making statements available to appellants before the day of the hearing of their appeals.
63. In the case of **Leatherland**, it was said that he was not disadvantaged by the absence of the material which he sought because he has no memory of what happened and cannot provide any further material at the stage of the review. A review is no more than an internal validation of the original decision. As such, following the reasoning of Laws LJ in Allen (above), there is no requirement for reasons to be given. Notwithstanding which, the 'Boards Advocate for the Board', who is the deponent K McQillan, gave the reasons of the claims officer in the letter of 21 January 2000.
64. In the case of Bramall, it was said that she knew perfectly well why her claim had been disallowed in that she had not discharged the burden of proof. Since the applicant had not identified any further evidence upon which she wanted to rely, there could be no unfairness and she was not disadvantaged in the preparation of her appeal.

65. In the case of Kay, the rejection of his claim inevitably meant that the Authority had considered and rejected the possibility that he could have relied on self-defence to get over the problems otherwise caused by his claim as asserted in his application. He will suffer no unfairness in not seeing the statements of witnesses upon whom the Authority had relied in coming to its decision to reject his claim. If he is embarrassed, then he can apply for an adjournment.
Conclusions
66. It is clear that the Board, and now the Authority, considers that in matters of procedure it was and is master in its own house and answerable hardly at all to the requirements of public law. The several cases in which attempts have been made to persuade the Board to modify its procedures all failed. It might have been hoped that the intervention of Parliament in 1995 would have had, among its effects, that of encouraging the Board and the Authority to be more open in their procedures. Any

such hopes, as these cases show, will have been in vain. It might just have been acceptable for a body which was concerned to dispense private charity to operate in such a closed and defensive mode. But we now have, as the creature of statute, a public body charged with the duty of paying compensation to those who have sustained injury or death at the hands of criminals. The Authority operates with a detailed Scheme and published procedure which appear to be firmly rooted in the shadow of its former emanation and oblivious of the extent to which there have been important developments in the field of public law. It is also apparent that, in some important respects, those who are called upon to operate the present Scheme have a lack of understanding of the consequences of some of its provisions.

67. It seems appropriate to start with those parts of the current Scheme which are in play in these applications. It will be recalled that section 4 of the Act provides for the review of a decision taken in respect of a claim for compensation. It will probably be only in those cases in which an award has been withheld or reduced that a claimant will wish to proceed to the review stage. At that stage the claimant will have submitted his claim on the form provided for his use. The Authority will have a police report and access to statements which have been obtained by the police. If the claimant wishes to challenge the decision of the claims officer he must do so in writing "and must be supported by reasons together with any relevant additional information"; §58. It is at once apparent that an applicant who wishes to proceed to review will be in difficulties in providing "reasons" if he does not know the basis of the decision which he is seeking to have reviewed. The position is the same with regard to the provision of "any additional relevant information". In order sensibly to be able to decide what additional information might be of persuasive effect on the reviewing officer, the claimant needs to know why his claim has not been accepted.

68. The Scheme makes no positive requirement on the claims officer to give reasons for his decision although the Guide (§4.22) states that, in a case where an award has been reduced or withheld, the applicant will be given reasons, yet the obligation on a claimant to comply with paragraph 59 must import an obligation on that officer to give such reasons for his decision which will enable the applicant to comply with his obligation under that paragraph so that his claim may proceed to review. If no such requirement had been imposed, then it could be argued, respectably, that review was an internal procedure which did not give rise to public law concerns; contrast Allen (above). As it is, the respondents' submissions on this point must fail, because on a proper construction of the provisions of the scheme review is not simply an internal administrative procedure. Adjudication of a claim is not merely a matter of administration, since the making of a decision is capable of affecting the rights of a person who is seeking to benefit from the provisions of the Scheme.

69. The matter cannot be allowed to stand there. On the premise that review is more than a simple administrative step which gives rise to no public law involvement, any reasons with which the claims officer justifies his decision will have to conform to the requirement of 'sufficiency', at the least. In order that the reasons will satisfy this simple requirement, it will probably be necessary that the gist of the evidence considered by the claims officer will need to be identified. In my judgment, this need not constitute a significant burden on him since, if, as must be assumed, the claims officer has performed his duties properly, he will have had to articulate to himself those matters which he has taken into account in reaching his decision. Among other matters this will give rise to transparency in, and better, decision making. In my judgment, the mere recital of what I would term 'Scheme grounds' would not, except in the simplest of cases, constitute 'reasons' which would satisfy the test of 'sufficiency', they would also probably fail on the ground of 'intelligibility'. There may, of course, be cases where reasons, if expressed simply on the basis of Scheme grounds, would suffice. Such, for example, would be a case in which there was evidence that the claimant's injuries were self-inflicted. None of the present cases are of such a simple pattern.

70. On review, there is express requirement that the (more senior) claims officer will give reasons for his decision; see §60. Such reasons will again have to be proper, sufficient and intelligible. By the same token, a decision justified solely by reference to Scheme grounds will probably fail on the grounds of lack of sufficiency. So too will there be a need for the evidential basis for the decision to be demonstrated. This can probably be satisfied by reference to the gist of the evidence found to provide justification for the decision. But here, as in the case of the initial decision, the fact that the Scheme requires a claimant who wishes to appeal to give reasons, it means that the decision itself must have condescended to sufficient detail to enable a reasoned notice of appeal to be given.

Similarly it will also be required if an applicant is to know what additional relevant material he should submit for the purposes of the adjudication on appeal. It is to be noted that the denial of access to the material available to the Authority places the claimant at this stage at a disadvantage when compared with the position of the Authority. A position which, arguably, may be said to be unfair. While it was submitted that the fact that the claimant was so disadvantaged involved a breach of the principles of natural justice, in my judgment, it is unnecessary to go so far. Provided sufficient reasons are given for the decision and the gist of the evidence is also made available, there is nothing inherently unjust about the fact that the Authority has not made the information available to the claimant in identical form as that in which it is available for itself.

71. The effect of the appeal provisions is that the Authority will of necessity be in possession of the applicant's original application and any additional evidence upon which he may wish to rely. In addition it will have access to the police report and any witness statements which have been provided to it. In accordance with paragraph 73 of the Scheme, the appellant will only have made available to him the material available to the Authority at the hearing of his appeal, if not before.

72. The principal reason advanced by the respondents for withholding the witness statements made to the police, namely the existence of the agreement or undertaking, has not been made good. It is clear that Nolan J had some difficulty in finding that there ever was such an agreement. I go further and find that the documents on which the respondents have relied do not point to the existence of an agreement whether formal or informal. That there may have been some understanding between one of the former chairmen of the Board and Chief Officers of police, I do not doubt. The factual and legal basis for such an understanding have long since ceased to exist. There is no longer any blanket public interest immunity in respect of statements made by witnesses. That this is so was made plain by Simon Brown LJ in Hickey (above). It is no longer open to bodies operating in the public law field generally to advance arguments against disclosure of documents which are essential to their decision making process. The basis of the respondents' stance in regard to (non)disclosure of statements was said to be the duty of confidentiality towards witnesses. Such was found to be wholly unpersuasive and not to have provided a sufficient basis for what Simon Brown LJ considered was a "significantly too closed procedure". It is the general expectation of witnesses who provide statements to the police that they may later become involved in legal proceedings of one kind or another. Why otherwise is a statement being made? The Home Office circular which was exhibited to the affidavit of Kathleen McQuillan expressly referred to the decision in Neilson v. Laugharne which was overruled, in trenchant terms, in ex p Wiley (above) by Lord Woolf when he said that, in his opinion, "no sufficient cause has ever been made out to justify the class of public interest immunity recognised in Neilson". It is hard to understand the basis upon which the Board/Authority can still rely upon it to justify their present reluctance to disclose statements. It is more than ever puzzling since the practice is, as has been seen, to make disclosure at the appeal hearing, if not before. If the statements can be disclosed at that stage, there can be no sensible basis for the supposed reliance on the so-called agreement or understanding. In my judgment, for the Chairman of the Appeals Panel to have written on 14 April 2000 that public interest in disclosure was capable of outweighing the duty of confidentiality only in exceptional cases, he can only have been poorly advised. The true position is directly at odds with this statement. The public interest in disclosure means that such should take place unless there are circumstances which can justify the withholding of documents.

73. Any practice which leads to the withholding of material until the day of any judicial or quasi-judicial hearing is calculated to be to the significant disadvantage of the party from whom they have been withheld. In a case in which an award has been either withheld or reduced for any Scheme ground, any such practice conflicts with the principles set out by Lord Diplock in the passage of his speech in Mahon v. Air New Zealand (above) quoted in paragraph 37 of this judgment. The argument that any injustice can be cured by the grant of an adjournment is nothing to the point. An adjournment may, or may not be granted, and even if granted will involve a represented appellant in extra costs and delay before final resolution of his appeal. It was suggested that, if an adjournment was improperly refused, that decision could then be challenged on judicial review. This is an astonishing proposition. So much so that, were it not for the sincerity with which it was put forward, it would have been tempting to have regarded it as one not intended to be taken seriously. When the straightforward step can be taken of making available to a party to the appeal material which, it is

conceded he will be entitled to receive in any event, it makes no sense at all to say that he must wait and take his chance with obtaining an adjournment of his appeal from the Panel. There is no countervailing advantage in favour of the existing and proposed arrangement in this respect. Accordingly, in the case which has reached the stage of appeal, and the Authority has refused to disclose the matters which it will be placing before the Panel, that decision is susceptible to judicial review on the grounds that the decision conflicts with the requirements of procedural fairness. It is an elementary principle of procedural fairness, as was made clear in both Kandala and Doody, any person who may be adversely affected by a decision should be in a position effectively to prepare their own case as well as to meet the case presented by the opposing party. The opposing party here is the Authority itself. It secures to itself a wholly unjustifiable advantage by adopting the practice which it has. The effect is, in my judgment, that in many cases there is a risk that the integrity of the decision of the Appeal Panel may be imperilled by lack of preparation on the part of appellants and their representatives. This is a proposition which is incompatible with a developed system of public law.

74. One of the consequences of the failure of the Board/Authority to provide reasons for its decision, together with access to the evidence, or at least a gist of it, is that a claimant may be persuaded that he should continue to prosecute his claim for the purpose of discovering the basis upon which his claim has been rejected. A reasoned decision may well persuade a claimant that he has no reasonable prospect of success and therefore will not pursue his claim. In such a case, not only the claimant, but also the Board/Authority will have been put to inconvenience and expense which could have been avoided. This is an example of bad administration. It provides additional material to lead to the conclusion that that the absence of reasons is an omission which should be regarded as a form of procedural unfairness.

75. It was submitted on behalf of the respondents that the procedure of the Authority was not adversarial and, in consequence, the observations made by Lord Mustill in Doody (above) can have no application to decisions which are essentially administrative in character. It is clear that if the decision which a claims officer has to make is a judicial one, then Lord Mustill's six numbered propositions will have some relevance to the decision in this case. It is certainly true of his sixth proposition, which , as will be recalled, is that

Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.

The short answer to the respondents' submission on this point is to be found in paragraph 13 of the Scheme which puts the claims officer under a duty to take decisions in relation to eligibility to receive compensation. Since the result of the application depends on the conduct of applicants, the decisions which have to be made are inherently judicial in character.

76. It remains to consider whether the reasons advanced by the respondents to justify their practice should influence the court's approach to the issues which arise for decision in the present cases. These are to be found set out in paragraph 19, above. It will not have escaped attention that all the reasons put forward are general in character and do not obviously bear upon the circumstances of the individual cases now before the court. It must be a matter of considerable doubt how far these reasons will ever apply to the general run of cases. However, that may be, it is necessary to give separate attention to those reasons.

77. (1) This is of doubtful validity given the extent to which the courts have moved away from acceptance of the proposition that witnesses will not co-operate in case of reprisals. There is nothing but the bare assertion which can substantiate this ground. (2) Since all the applicants in these cases are, and have been, represented by solicitors, the point about secure addresses can have no validity. (3) On the facts of these cases, there is no reason to suppose that any of the claimants would attempt to influence the witnesses. Even if such were to happen in other cases, the fact of a change in evidence would be readily apparent and no doubt a factor which it was relevant for a decision-maker to take into account. (4) Police informers will fall into an exceptional category and can be dealt with on their own individual facts as, and when, the situation arises. (5) The burden on the Authority if disclosure were required is said to impose an intolerable and *unjustified* (my emphasis) burden on the Authority. It is simply illogical to say that such burden as may be imposed is *unjustified* if the law requires that it should be done. Of the extent of the burden, little evidence is provided to show

what that would be. As has already been said, the fact that the decision maker will have to provide reasons for his decision cannot justify the assertion that the act of so doing will impose a burden, since that is what the law requires. If having to comply with the law imposes a burden, then so be it.
(6) The imagined threat of 'legalism' has its origins in textbooks which treat with the issue of procedural fairness. This was the supposed justification why, it was said that, administrative decisions need not always be supported with reasons.
78. The fear of excessive legalism is, I believe, unfounded. Given the nature of the Scheme, a claimant is entitled to apply for a review without having to examine in detail the reasons which underpin the original decision. He is presently required to say why he is dissatisfied with the original decision, or the decision reached on review, before he proceeds to the next stage. There is little scope for legalism if at the stages of review and appeal the process which is to take place is in effect a fresh hearing. The evidence is simply considered afresh. The scope for detailed argument in respect of the original decision is very limited. The risk that the Authority will be overburdened with an exercise in generating huge quantities of paper is one which may encourage it to provide a gist rather than all the available witness statements.
79. In *Principles of Judicial Review*, De Smith, Woolf & Jowell it is stated at paragraph 8-058
The courts having developed a preference for the use of the term "fairness" to that of "natural justice" will now invariably infer a requirement of fairness in the decision-making process, in the absence of a clear contrary intent manifest in the relevant statutory or other framework. It is part of that requirement of fairness that the obligation to give reasons is being extended by the courts pragmatically from one situation to another. ... In this way the absence of a general requirement should in time become progressively less important.
This may be taken as a precise statement of the law. I have endeavoured to explain why, within the Scheme as it exists, there is a duty to give reasons which are proper sufficient and intelligible for the initial and review decisions of the Authority. It is also a requirement of fairness, or in accordance with the principles of natural justice, that a claimant who is appealing to the Appeals Panel should be provided, in advance of the day of the hearing, with access to the evidential material which the Authority, through its presenting officers, will be relying upon at the hearing of the appeal.
80. Having regard to my conclusions as set out above, I have not found it necessary to decide whether or not the claimants, or any of them, need to have recourse to the ECHR in order to obtain the relief which they seek.
81. Having made this judgment available in draft to the parties, I will hear submissions as to the precise form in which relief should be granted to the applicants consonant with its terms.
