

Regina - v- Army Board Of The Defence Council,

Ex parte Anderson

[Divisional Court]

[1992] QB 169

[1992] 1 QB 169, [1991] 3 All ER 375, [1991] 3 WLR 42, [1991] ICR 537

Hearing - Dates : 23, 24, 25, 26, October, 9 November 1990

9 November 1990

Headnote:

The applicant, who was black, went absent without leave while serving as a soldier in the British Army. He was arrested and sent back to his unit. He then complained to his commanding officer that he had suffered racial abuse and physical assault from other soldiers before going absent. The commanding officer arranged for his complaint to be investigated by the Special Investigation Branch of the Military Police which reported on the applicant's allegations. He was given a summary of the report, which showed that certain soldiers had admitted racial abuse but stated that the applicant had sought to exploit the racial issue and that he had abused others. The applicant made a formal complaint of racial discrimination, which by virtue of section 75(8) and (9) of the Race Relations Act 1976 was not to be heard by an industrial tribunal but by the commanding officer under the provisions of section 181 of the Army Act 1955.^[1] The commanding officer rejected the complaint of racial discrimination and stated that the matter had been fully investigated and the appropriate action had been taken, which took the form of disciplining two soldiers for using racially abusive language. The subsequent referrals of the complaint to brigade and district levels also resulted in refusals of redress. The applicant then sought redress from the Army Board whose duties could be performed by any two of its members. The procedure adopted was that one member considered the papers, made his own inquiries and then passed the papers with his conclusions to the second member, who then made his own inquiries before coming to a decision. The board's decision was that the applicant's "request for redress of grievance has been denied."

On an application for judicial review:-

Held, granting the application, that, although the applicant's complaint of unlawful racial discrimination was being heard under section 181 of the Army Act 1955, the Army Board had to give effect to the substantive provisions of the Race Relations Act 1976 and, therefore, the board was under the duty to make a specific finding whether there had been unlawful discrimination and to consider compensation or the form of redress for the applicant on his complaint being proved; that the board in controlling its own procedure had to act fairly and it was essential for a fair decision that the two members of the board met together to consider the evidence and contentions before coming to a decision; that the board was wrong to adopt an inflexible policy of not having an oral hearing but, whether or not the board decided on an oral hearing, fairness required that all material before the board, other than that subject to public policy immunity, should be disclosed to

the applicant and the applicant given an opportunity to respond before the board came to a decision; and that the errors of law and procedure were in aggregate such that the board's decision would be quashed (post, pp. 184G-185B, 187E-188A, D, G, 189A-B, F).

Introduction:

Application for judicial review.

The applicant, Stephen Anderson, applied for judicial review of the decision of the Army Board of the Defence Council dated 14 December 1989 denying redress of the applicant's grievance that while a serving soldier he was discriminated against on racial grounds by being subjected to abuse, harassment and assault. He sought an order of *certiorari* to quash that decision and an order of *mandamus* requiring the Army Board to hear and determine the applicant's complaint of racial discrimination according to law.

The grounds of the application were, *inter alia*, (1) that the Army Board in considering the applicant's grievance had failed to act lawfully, fairly or judicially; (2) that in so far as any investigation was conducted as required by section 181(3) of the Army Act 1955 it was defective, ultra vires and of no effect in that (a) the applicant was not interviewed following the submission of his written complaint on 30 March 1988, (b) he was given no opportunity to answer on certain damaging allegations made against him, which were themselves indicative of racial hostility, (c) the Army Board failed to apply or to have regard to the law laid down by the Race Relations Act 1976; (3) that neither the Army Act 1955 nor the Queen's Regulations prevented the Army from according the applicant fair and judicial consideration in the like manner as would be accorded to a civilian complainant before an industrial tribunal, adopting the procedural norms laid down by decisions of the Employment Appeal Tribunal, the Court of Appeal and the House of Lords in order to give the Act its proper effect; (4) that the purpose and effect of section 75(8) and (9) of the Race Relations Act 1976 were that the Defence Council was required to apply and to give effect to the substantive provisions of the Act in adjudicating on any complaint which the subsections placed within its jurisdiction; the Army Board of the Defence Council entirely failed to do so; (5) that the Army Board failed to conduct any investigation into the matters complained of but purported to exercise an appellate jurisdiction and denied redress; and (6) that the two members of the Army Board appointed to hear and determine the complaint (a) had relevant documents before them which the applicant had not seen, (b) individually and without the applicant's knowledge made further private inquiries, (c) failed to meet to discuss the complaint before purporting to adjudicate on it.

The facts are stated in the judgment of Taylor L.J.

Counsel:

Stephen Sedley Q.C. and Goolam Meeran for the applicant. The minimum legal standard required of anybody called upon by law to come to a decision includes an obligation (a) to understand what the question is which it is required to answer; (b) to ascertain what is said about any relevant issue by those affected; (c) to come to a decision which is (1) the tribunal's own, (2) based on facts as found by the tribunal, and (3) answers the question

posed: see *Local Government Board v. Arlidge* [1915] A.C. 120; *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147.

Whatever standards may be permissible in exercising other functions of the Defence Council, the constitution of the council by the Race Relations Act 1976 as the sole tribunal for the enforcement of the right not to suffer discrimination places them on a par with the other courts and tribunals set up to deal with such matters elsewhere for other citizens. They must therefore (i) conform with the substantive law, i.e. apply their mind to the provisions of the Act of 1976; (ii) inquire whether the complaint was made out and, if so, what redress could and should be given; (iii) act with procedural propriety, i.e. inquire sufficiently to allow them to adjudicate fully and impartially; (iv) not take into account material not known in full to the complainant or other properly interested persons; (v) ensure that all members of the tribunal hear and read the same evidence; (vi) hear any relevant oral evidence the complainant wishes to give or call; (vii) permit him to challenge any contrary evidence and hear his submissions on law or fact and (viii) consider together, i.e. jointly, the totality of the evidence and argument. [Reference was made to *Lloyd v. McMahon* [1987] A.C. 625, 702H-703B and *Ridge v. Baldwin* [1964] A.C. 40, 68-69.]

A tribunal which exercises the judicial power of the state, as distinct from one which acts in aid of the executive power, is additionally required to conform to judicial standards of procedure and in return is protected by the law of contempt and by absolute privilege for the testimony of its witnesses: see *Attorney-General v. British Broadcasting Corporation* [1981] A.C. 303, 339H-340D, 352B-360D; *Trapp v. Mackie* [1979] 1 W.L.R. 377, 378H-383C; *Dawkins v. Lord Rokeby* (1873) L.R. 8 Q.B. 255, 265-270; *Currie v. Chief Constable of Surrey* [1982] 1 W.L.R. 215 and *Ridge v. Baldwin* [1964] A.C. 40, 72-76.

A statutory provision which (a) confers on a tribunal exclusive jurisdiction to adjudicate on and grant redress for breaches of a fundamental civil right, (b) confers collateral jurisdiction in relation to breaches of the same right on judicial bodies from which a full series of appeals lies, (c) makes that particular tribunal the final arbiter of fact and (subject only to judicial review) of law, (d) does so notwithstanding that it is thereby making the tribunal judge in its own cause, and (e) lays down no special procedures (save as to the making of inquiries), is conferring on that tribunal the judicial power of the state and calls into play high procedural standards akin to those of a court of record: see *Lloyd v. McMahon* [1987] A.C. 625, 705D-G and *Reg. v. Secretary of State for the Home Department, Ex parte Tarrant* [1985] Q.B. 251, 296H-297A.

The requirement of judicial hearing means that (a) the tribunal must consider in each case whether fairness requires evidence to be taken and tested orally; and (b) where an oral hearing is not accorded, an equivalent written procedure must be adopted: see *Local Government Board v. Arlidge* [1915] 120, 134; *Lloyd v. McMahon* [1987] A.C. 625 and *Rex v. Housing Appeals Tribunal* [1920] 3 K.B. 334. An adjudicative body with an unfettered mandate to grant redress, which finds that a legal right of a complainant within its jurisdiction has been violated, is under a duty to grant such redress as it considers appropriate. As with awards of damages and with sentencing, the exercise is one of judgment, not of discretion: *Thomas v. University of Bradford* [1987] A.C. 795, 823E-824C.

The investigation by the S.I.B. was a process of fact finding and did not include reaching a conclusion. Wherever the Army Board investigates facts it does so by means of its own devising and does not have to open a board of inquiry. It is not in every case under section 181 that the holding of a board of inquiry makes sense. Here, there was no contest as to fact because the board decided without hearing Anderson. The absence of an oral hearing meant that the board was not exposed to any questioning of the report or counter argument: see *Reg. v. Immigration Appeal Tribunal, Ex parte Ekrem Mehmet* [1977] 1 W.L.R. 795.

As to redress, the matter was treated as no more than a disciplinary proceeding for the misconduct of others. The infringement of a right not to be mistreated on racial grounds was not comprehended or therefore dealt with.

In relation to the Defence Council, complaints under the Race Relations Act 1976 have a unique status under section 181 of the Act of 1955. A complaint of racial discrimination is a claim for the enforcement of a fundamental legal right over which the Army has exclusive jurisdiction. The procedure set up under the Act of 1976 has made the Army judge in its own cause, where senior officers decide whether the Army is guilty.

The Army Board cannot fairly come to the necessary conclusions without knowing what the complainant has to say about the material they are considering. The complainant also needs to know in full what that material is, so as to answer the allegations made against him: see *Reg. v. Deputy Industrial Injuries Commissioner, Ex parte Moore* [1965] 1 Q.B. 456. [Reference was also made to *Reg. v. Knightsbridge Crown Court, Ex parte Goonatileke* [1986] Q.B. 1.] Testimony does not always have to be oral but a full opportunity to respond to it is essential: see *Reg. v. Immigration Appeal Tribunal, Ex parte Ekrem Mehmet* [1977] 1 W.L.R. 795. The commanding officer and the board were not entitled to delegate their fact-finding function: see *Barnard v. National Dock Labour Board* [1953] 2 Q.B. 18.

As to damages, *Alexander v. Home Office* [1988] 1 W.L.R. 968 made it clear that damages for racial discrimination could include aggravated damages. [Reference was also made to *Hurley v. Mustoe (No. 2)* [1983] I.C.R. 422, 425G.]

It must be assumed that Parliament did not pass the Act with the intention of countermanding the effect of the provisions of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969).

David Pannick for the Army Board. Section 181 of the Army Act 1955 entails a duty to act fairly. The concept of fairness has to be flexibly applied according to the context: see *In re Pergamon Press* [1971] Ch. 388, 400F-H and *Wiseman v. Borneman* [1971] A.C. 297, 311E, 314G. In each case to determine the requirements of fairness regard must be had, in particular, to the source of the jurisdiction, the statutory context and the nature of the proceedings. In respect of an authority created by Parliament the courts will only impose additional procedural requirements where these are necessary to achieve fairness and where there is a clear intention that such criteria be observed: see *Reg. v. Race Relations Board, Ex parte Selvarajan* [1975] 1 W.L.R. 1686, 1693H and *Reg. v. Commission for Racial Equality, Ex parte Cottrell & Rothon* [1980] 1 W.L.R. 1580, 1587B.

The court should be slow to impose procedural requirements for the exercise of functions under section 181. Parliament has deliberately provided, by section 75(9) of the Race Relations Act 1976, for the use of the section 181 process in the knowledge that this section gives the broadest discretion to the Army Board. It imposes a duty to have a complaint investigated (passive not active: *cf.* section 180); and it speaks of an investigation, not of an appeal or a hearing. It is for the discretion of the authorities to take such steps for redress as are necessary. Parliament could have required, by section 75(9) of the Act of 1976, that use be made of the more legalistic procedures under the Act of 1955, e.g. section 135 (board of inquiry), section 137 (regimental inquiries) or sections 92 to 102 (courts martial.) Instead, the highly discretionary investigation procedures of section 181 were chosen.

It has been considered appropriate to leave it to the Army, with as little external intervention as possible, to deal with complaints of race discrimination (as with complaints of other kinds), given the sensitivity likely to be aroused in the disciplined circumstances of military life. The courts have long recognised the need not to allow the duty of fairness to be used as a means of regulating matters in which the courts have much less expertise than those charged with the relevant responsibility: see *McInnes v. Onslow-Fane* [1978] 1 W.L.R. 1520, 1535F-H. It has been held that the courts have no jurisdiction to intervene in military matters: *Rex v. Army Council, Ex parte Ravenscroft* [1917] 2 K.B. 504. The source of the relevant powers is in the prerogative: *Halsbury's Laws of England*, 4th ed., vol. 41 (1983), para. 2.

The applicant is not the victim of any adverse decision by the board depriving him of any property or his liberty: see *Reg. v. Race Relations Board, Ex parte Selvarajan* [1975] 1 W.L.R. 1686, 1694B-C. The allegations of racial abuse made by the applicant were accepted and action was taken, so to an extent he succeeded.

Those conducting the investigation under section 181 are masters of their own procedure save that they must act fairly. In the present context this means no more than that they should act *bona fide* to have the complaint investigated, and not to act capriciously or with bias, and genuinely give such redress as is appropriate: see *Reg. v. Race Relations Board, Ex parte Selvarajan* [1975] 1 W.L.R. 1686, 1687C-F, 1693H-1694D; *McInnes v. Onslow-Fane* [1978] 1 W.L.R. 1520, 1533F; *In re Pergamon Press* [1971] Ch. 388, 400G, 407H; *Bushell v. Secretary of State for the Environment* [1981] A.C. 75, 94F-95D and *Local Government Board v. Arlidge* [1915] A.C. 120, 132-134.

The applicant was not entitled to the specific procedural rights claimed. There was no right to an oral hearing: see *Reg. v. Race Relations Board, Ex parte Selvarajan* [1975] 1 W.L.R. 1686, 1694C; *McInnes v. Onslow-Fane* [1978] 1 W.L.R. 1520, 1536A-D; *Reg. v. Immigration Appeal Tribunal, Ex parte Ross Jones* [1988] 1 W.L.R. 477, 481B-F and *Lloyd v. McMahon* [1987] A.C. 625, 696C-697A, 706C-G, 709F, 714D-715B. There was no right to cross-examine: see *Reg. v. Commission for Racial Equality, Ex parte Cottrell & Rothon* [1980] 1 W.L.R. 1580, 1587B-F, 1588B-E; *In re Pergamon Press* [1971] Ch. 388, 400B-C, 406C, 407E. There was no statutory right to discovery of documents: see *Reg. v. Race Relations Board, Ex parte Selvarajan* [1975] 1 W.L.R. 1686, 1694C and *In re Pergamon Press* [1971] Ch. 388. There was no duty to put to the applicant every piece of information obtained by the board in the course of their handling of the matter: see *Reg. v. Secretary of State for the Home Department, Ex parte Mughal* [1974] Q.B. 313, 325B-E,

327H-328D, 330G-331C; Reg. v. Secretary of State for the Home Department, Ex parte Santillo [1981] Q.B. 778, 795B-F and Reg. v. Monopolies and Mergers Commission, Ex parte Matthew Brown Plc. [1987] 1 W.L.R. 1235.

The board may rely on information obtained by those who have carried out an investigation on its behalf: Reg. v. Commission for Racial Equality, Ex parte Cottrell & Rothon [1980] 1 W.L.R. 1580, 1588H-1589A and Reg. v. Race Relations Board, Ex parte Selvarajan [1975] 1 W.L.R. 1686, 1694C-D, 1695F-H. There is no duty to order a further investigation where the board is satisfied that the one carried out was full and satisfactory. The substantive principles to be applied in investigating complaints under section 181 are (a) that the board accepts that the substantive provisions of the Act of 1976, as interpreted by the courts and with the guidance provided by the Commission for Racial Equality's Code of Practice^[2] are applicable to the armed forces; and that, therefore, wherever there is a complaint of racial discrimination made pursuant to section 75(9) of the Act of 1976 and section 181 of the Act of 1955, the Army Board will receive relevant legal advice on the content and application of the Act of 1976 and the code of practice; (b) that the board must work within whatever statutory framework exists at the time it is faced with a complaint. Section 75(9) of the Act of 1976 does not entitle an applicant to any particular form of redress in relation to a complaint under section 181. The board is to decide what steps are necessary to provide redress.

On the facts the board has acted *bona fide* to have the complaint investigated in a manner far from capricious or biased. The applicant has not been denied a fair hearing. It was for the board to decide how the respective members should consider the issues. If they wished to look at the papers separately then that was a matter for them as masters of their own procedure. The board did not fully consider all the matters raised by the applicant. The board has therefore decided to establish a board of inquiry to reconsider all relevant matters and to report to the board. There is no suggestion by the applicant that the board of inquiry and the board will do other than consider all the issues in a *bona fide* manner. It is therefore inappropriate for the court at this stage to grant any relief in the proceedings. If it is found that the Army Board erred in the procedure it adopted, it will be open to the Defence Council to institute a fresh board of inquiry to review the matter. [Reference was made to Jowett v. Earl of Bradford[1977] I.C.R. 342.]

Sedley Q.C. in reply. The submission that in section 181 Parliament chose an informal and discretionary procedure proves nothing. Justice and informality are on speaking terms: see the Industrial Tribunal (Rules of Procedure) Regulations 1985 (S.I. 1985 No. 16). Discretion is not the antithesis of due process but a means by which a tribunal is empowered, and often obliged, to accord due process. Fairness is required wherever rights or interests are affected: see Wade, Administrative Law, 6th ed. (1988) and Wiseman v. Borneman [1971] A.C. 297.

The description of the duty under section 181 as passive and not active is misleading. It is an active duty to institute an investigation, to evaluate the evidence, to reach a conclusion about the facts and decide what consequences ensue in law. There is no reason to presume that Parliament was "aware" that section 181 would involve an informal procedure since the section leaves procedure at large and is broad enough to allow the Defence Council to adopt proper judicial procedures.

That the military context undoes or diminishes the norms of due process is a fiction. The duty to ensure that no disadvantage, compared with civilians, is suffered by service men and women remains. The exigencies of service life cannot logically affect what fairness requires; they may make it impractical to deliver all that is required, in which case the court has full discretion to withhold leave or relief. There is no judicial policy of non-intervention in the proceedings of inferior tribunals. *Rex v. Army Council, Ex parte Ravenscroft* [1917] 2 K.B. 504, 510 went off on the ground that the substantive issue was not one of general law but of the Army's own domestic law.

Cur. adv. vult.

9 November.

Coram: Taylor L.J. and Morland J

Taylor L.J.: read the following judgment. Stephen Anderson is black. He claims that whilst serving in the British Army he was abused, assaulted and mistreated by other soldiers on racial grounds. A civilian making similar claims of racial discrimination in the course of his employment would be able to seek redress from an industrial tribunal under the detailed provisions of the Race Relations Act 1976. That Act, however, expressly provides that complaints of unlawful discrimination by serving soldiers cannot be taken before an industrial tribunal. They are to be determined through Army procedures. So, Mr. Anderson addressed his complaint to his commanding officer who refused redress. He pursued the matter to brigade level, to district level and eventually to the Army Board of the Defence Council. He failed at each stage and now seeks judicial review of the Army Board's decision dated 14 December 1989, denying him redress. We are told that this is the first time a complaint of racial discrimination contrary to the Act of 1976 has had to be considered in an Army context. The question raised is therefore novel: how should such a complaint by a soldier be investigated and the issues it raises be decided under Army procedure so as lawfully to comply with the requirements of fairness?

Facts

Mr. Anderson joined the Devon and Dorset Regiment in September 1983 when he was 17. After a period with another regiment where he trained as a drummer, he rejoined his own regiment in February 1985 in Berlin. He was the only black soldier in his platoon. One night shortly after his arrival, he claims he was pulled out of bed at 1.30 a.m. by a lance-corporal and two privates who proceeded to punch and kick him. He was called a "nigger" and otherwise orally abused. Two or three days later this treatment was repeated. He was called a "black bastard" and was verbally abused in other racially offensive terms. There were further incidents during one of which Mr. Anderson alleges the lance-corporal held a knife to his throat. Quite separately, he alleges that a drill sergeant used similar racial abuse to him on the parade ground on a number of occasions as well as picking on him to perform a disproportionate number of unpleasant tasks. By October 1986, Mr. Anderson says he was so desperate that he destroyed his civilian clothes and possessions.

In early 1987 the regiment returned to Bulford barracks. On 7 April 1987 Mr. Anderson had an argument with another soldier and punched him whereupon the same sergeant put him

on extra duty. Instead, Mr. Anderson decided to go absent without leave. He remained absent from April until September 1987 when he was arrested in London. He was taken to the Household Cavalry Barracks in Kensington and kept in custody there for 96 hours during which he went on hunger strike. As a result, he had to be taken to hospital where he remained for five days before being returned to Bulford and charged with the offence of being absent without leave. At that stage, he explained to his commanding officer that a major factor causing him to absent himself had been the racial abuse already described. He had made two statements on 3 September. His commanding officer called in the Special Investigation Branch ("S.I.B.") of the Royal Military Police to inquire into the alleged racial discrimination. Mr. Anderson made a further statement to the S.I.B. on 8 September and, after interviewing other soldiers involved, the S.I.B. presented their report on 24 September.

In October Mr. Anderson sought the assistance of the Commission for Racial Equality. They requested disclosure of the S.I.B. report but were refused although they were promised a summary of the report after Mr. Anderson's court martial. On 16 December 1987 Mr. Anderson pleaded guilty before a court martial to absenting himself without leave. His solicitor made a plea in mitigation which relied largely on the racial abuse as having driven Mr. Anderson to commit the offence. He was sentenced to 112 days' detention.

In January the Ministry of Defence provided a summary of the S.I.B. report from which it was clear that some of the allegations made by Mr. Anderson had been borne out by admissions from other soldiers - the use of racially abusive words, but not the assaults, the use of a knife or other matters of complaint. However, the report also made adverse comments about Mr. Anderson, alleging that he sought to exploit the racial issue and that he abused others.

On 30 March 1988 a formal complaint of racial discrimination was made in writing by fresh solicitors on Mr. Anderson's behalf to his commanding officer. This written complaint involved more incidents and more detail than had been contained in the oral complaint Mr. Anderson originally made in September 1987. Meanwhile, the question of discharging Mr. Anderson from the army on medical grounds (he had flat feet) had been under consideration for some time and on 25 April 1988 he was discharged.

On 20 July 1988 the commanding officer rejected the complaint of racial discrimination. In his letter he said:

"His complaints of racial abuse and attacks have all been fully investigated by the Special Investigations Branch of the Royal Military Police, and appropriate action has been taken where necessary."

It seems that two soldiers who admitted using racial abuse to Mr. Anderson were disciplined. Annexed to the letter of 20 July was a schedule purporting to deal with each item of Mr. Anderson's written complaint. Apart from the substantive allegations, they included requests for disclosure of all relevant documents, including the S.I.B. report, an oral hearing and compensation. Mr. Anderson was denied access to the documents. As to an oral hearing, the commanding officer wrote:

"Oral hearings are not part of the process of redress as outlined in section 181 of the Army Act 1955. He had every opportunity to raise whatever matters were thought appropriate at his district court martial."

As to compensation, the commanding officer wrote:

"The Ministry of Defence have no liability to pay compensation. The statements from platoon members, including those not the subject of allegations by Anderson, make it clear that he was an offensive, idle and sloppy soldier who sought to shirk work and place the burden of that work on the other members of the platoon. It would be entirely appropriate to regard him as the author of his own misfortune and as a person who provoked whatever happened to him. If racial equality means anything, then Anderson cannot use his colour to shirk work, call other platoon members 'white trash,' 'honki' and in particular Private M 'half caste' and 'Paki' and then be heard to complain when others in the platoon found that behaviour and language offensive and either protested or replied in kind."

Through his solicitors, Mr. Anderson replied to the commanding officer's letter repeating his requests and denying the counter-allegations. As a result, the complaint was referred up the hierarchy to brigade level. Again redress was refused. Mr. Anderson pursued the matter to district level with a similar result and finally to the Army Board of the Defence Council whose refusal of redress is now under challenge. The refusal was communicated to Mr. Anderson's solicitors both by his former regiment (on 13 December 1989) and by the Ministry of Defence (on 14 December 1989). The ministry's letter said:

"I write to advise you that after full consideration by the Army Board of the Defence Council your client's request for redress of grievance has been denied."

Leave to apply for judicial review was granted on 19 March 1990. On 21 May, Sir Kenneth McDonald, second permanent under secretary of the Ministry of Defence and a member of the Army Board which considered Mr. Anderson's complaint, swore an affidavit in response to the application. Tribute has rightly been paid to the total candour of that affidavit. Sir Kenneth set out the approach adopted in regard to procedure. As to disclosure of the S.I.B. report, he said:

"such reports normally consist of witness statements and a covering commentary. The commentary usually summarises the contents of the witness statements and will often on a confidential basis also include comment on matters of interest or concern to the commanding officer, to whom the report is addressed, for example the strengths or weaknesses of the case against the soldier reported. The Royal Military Police commentary is, like other police reports, regarded as protected from disclosure on public interest immunity grounds."

In fact, Mr. Pannick has not sought to justify the non-disclosure of the S.I.B. report on public interest immunity grounds, but simply on the ground that the Army Board is master of its own procedure, that a summary of the report was disclosed and fairness did not require more.

Sir Kenneth listed the documents seen by the Army Board but not disclosed to Mr. Anderson. Apart from the S.I.B. report, they included internal analyses and recommendations, the transcripts of interviews with Mr. Anderson, a statement by the drum major and the commanding officer's character and welfare report on Mr. Anderson.

As to the request for an oral hearing, Sir Kenneth said:

"It is not and never has been the practice of oral hearings involving the calling of witnesses and cross-examination when dealing with complaints under section 181 of the Army Act 1955. The provision contained in section 181 requires investigation as a matter of law but it is respectfully asserted that this

does not as a matter of law entail any rights or procedures analogous to an adversarial process. It is important that these investigations, not least because they involve the chain of command at various stages, should be carried out economically and expeditiously. There will be operational difficulties peculiar to service life concerned with the whereabouts and other duties of soldiers in adopting anything which approached an oral procedure of an adversarial kind. Complaints are investigated and the relevant papers considered in detail. Oral hearings are not regarded as necessary in terms of fairness given the nature of the section 181 duty to investigate. It is considered that the methods of investigation which are employed are adequate to establish effectively issues of fact which fall to be determined, providing they are correctly applied."

Thus, it would seem that the approach adopted was not merely that an oral hearing was unnecessary in the present case, but that oral hearings were never required in regard to complaints under section 181.

Letters patent provide that any powers or duties of the Army Board can be exercised or performed by any two members. It emerged from Sir Kenneth's affidavit that Mr. Anderson's complaint was considered by two members - the Quartermaster General and Sir Kenneth himself. However, they did not meet to consider or discuss the complaint. Each considered the papers separately and wrote his own conclusion separately. The Quartermaster General went first. He then passed the papers together with his written conclusions to Sir Kenneth who independently reached and wrote his conclusions. Moreover, each member quite separately sought and obtained extra information additional to the papers before them. The Quartermaster General sought information as to what disciplinary action had been taken following the S.I.B. investigation. Sir Kenneth sought advice on the handling of the allegations of racial abuse, on the provision governing disclosure of documents and oral hearings and as to terminal benefits due to Mr. Anderson following his medical discharge. None of that was shown or known to Mr. Anderson.

In the final part of his affidavit Sir Kenneth stated that on reconsideration of the case the Army Board accepts there are areas where the procedures were not satisfactory. In particular, the board did not have transcripts of all the interviews with soldiers complained against nor those of six others from the same unit. One of Mr. Anderson's complaints was that he had been wrongfully held in custody for 96 hours on his arrest in September 1987. This was not investigated. Thirdly, no additional investigations were made after the S.I.B. report dated September 1987 although Mr. Anderson's written complaints of March 1988 were more extensive and detailed.

Accordingly, it was proposed in the affidavit and subsequently in correspondence that a board of inquiry under section 135 of the Army Act 1955 should be convened and that its report should be considered by different members of the Army Board who would then give fresh consideration to Mr. Anderson's complaints. On Mr. Anderson's behalf it was contended that this should not happen and certainly should not do so before the application for judicial review was heard and determined. Expedition of this application was sought and obtained from the court and the respondents agreed to defer the holding of any board of inquiry until this application has been heard and determined.

The statutory provisions

Section 1 of the Race Relations Act 1976 provides:

"(1) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if - (a) on racial grounds he treats that other less favourably than he treats or would treat other persons; . . ."

Section 4 of the Act deals with discrimination by employers. It provides, so far as is relevant:

"(1) It is unlawful for a person, in relation to employment by him at an establishment in Great Britain, to discriminate against another . . . (c) by refusing or deliberately omitting to offer him that employment. (2) It is unlawful for a person, in the case of a person employed by him at an establishment in Great Britain, to discriminate against that employee . . . (c) by dismissing him, or subjecting him to any other detriment."

Section 32 provides for vicarious liability by an employer for the acts of his employee. Section 33 provides for liability of a person who knowingly aids another person to do an act made unlawful by the statute. Section 75(2)(c) applies the substantive law in Part II of the Act (which includes section 4) to service in the armed forces. However, section 54 draws a distinction in regard to enforcement between the procedure for civilians in employment and that applicable to soldiers. The section provides:

"(1) A complaint by any person ('the complainant') that another person ('the respondent') - (a) has committed an act of discrimination against the complainant which is unlawful by virtue of Part II; or (b) is by virtue of section 32 or 33 to be treated as having committed such an act of discrimination against the complainant, may be presented to an industrial tribunal. (2) Subsection (1) does not apply . . . to a complaint to which section 75(8) applies."

Section 75(8) and (9) provides:

"(8) This subsection applies to any complaint by a person ('the complainant') that another person - (a) has committed an act of discrimination against the complainant which is unlawful by virtue of section 4; or (b) is by virtue of section 32 or 33 to be treated as having committed such an act of discrimination against the complainant, if at the time when the act complained of was done the complainant was serving in the armed forces and the discrimination in question relates to his service in those forces. (9) Section 54(1) shall not apply to a complaint to which subsection (8) applies, but any such complaint may be made, and if made shall be dealt with, in accordance with . . . section . . . 181 of the Army Act 1955 . . ."

Section 181 of the Army Act 1955, as amended by section 66(2) of the Armed Forces Act 1971, provides so far as is relevant:

"(1) If a . . . soldier thinks himself wronged in any matter by any . . . non-commissioned officer or soldier, he may make a complaint with respect to that matter to his commanding officer. (2) If . . . a soldier thinks himself wronged in any matter by his commanding officer, either by reason of redress not being given to his satisfaction on a complaint under the last foregoing subsection or for any other reason, he may, in accordance with the procedure laid down in Queen's Regulations, make a complaint with respect thereto to the Defence Council. (3) It shall be the duty of a commanding officer or, as the case may be, the Defence Council to have any complaint received by him or them under this section investigated and to take any steps redressing the matter complained of which appear to him or them to be necessary."

The Defence Council was empowered to delegate the discharge, *inter alia*, of its duties under section 181(3) by section 1(5) of the Defence (Transfer of Functions) Act 1964 and the Army Board Directions 1989.

Main submissions

Mr. Sedley relies on a number of grounds, but essentially they all flow from his main contention that the Army Board in considering Mr. Anderson's complaint was exercising a judicial function. That being so, its members had to act as a single body, to have specific regard to the provisions of the Act of 1976, to consider all the relevant material and to make an express finding on the validity of the complaint. Procedurally, they were bound, he submits, to disclose all the material they saw to Mr. Anderson, to hold an oral hearing, to allow cross-examination and to hear submissions on law and fact on Mr. Anderson's behalf. The Army Board failed, it is said, to comply with each and all of these requirements.

Mr. Pannick contends that the Army Board was not exercising a judicial function. Had it been doing so, a number of Mr. Sedley's suggested requirements, but not necessarily all of them, would have applied. As it was, however, Mr. Pannick contends the board did properly consider the Act of 1976, they disclosed the gist of the material adverse to Mr. Anderson so that he had and took the opportunity to consider and answer it, albeit in writing, and no further disclosure, no oral hearing or cross-examination was necessary. It was, he conceded, unsatisfactory that the board failed to consider the complaint of illegal custody, failed to see the transcripts of interviews with other soldiers, and failed to have investigated those matters in Mr. Anderson's written complaint not covered by the earlier S.I.B. investigation. It would also have been desirable for the two board members to have consulted one another. It is intended to cure these defects by holding the proposed board of inquiry which can report to a differently constituted Army Board so that the latter can reconsider Mr. Anderson's complaints as a whole.

Function of the Army Board

To resolve these rival contentions, it is first necessary to consider what function the Army Board was performing. There can be no doubt that even if Mr. Anderson's first oral complaint to his commanding officer of racial abuse was primarily relevant to his impending court martial, as mitigation for going absent without leave, the written complaint of March 1988 was not. By then, the court martial was over, he had served his sentence and the written allegations were clearly a free-standing complaint under the Act of 1976. That Act required such a complaint be "dealt with" under section 181 of the Army Act 1955, and the latter required that it be investigated and that any necessary steps for redressing the matter be taken.

Sections 1 and 4 of the Act of 1976 clearly define a legal right of an employee not to be subjected to discrimination on racial grounds or, put positively, to receive equal treatment. Enforcement of that right would usually, in the case of civilians, be by reference to an industrial tribunal under section 54(1). In that event the remedies available would be those set out in section 56:

"(1) Where an industrial tribunal finds that a complaint presented to it under section 54 is well-founded, the tribunal shall make such of the following as it considers just and equitable - (a) an order declaring the rights of the complainant and the respondent in relation to the act to which the complaint relates; (b) an order requiring the respondent to pay to the complainant compensation of an amount corresponding to

any damages he could have been ordered by a county court or by a sheriff court to pay to the complainant if the complaint had fallen to be dealt with under section 57; (c) a recommendation that the respondent take within a specified period action appearing to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any act of discrimination to which the complaint relates."

Mr. Sedley submits that the same remedies must be available and should be granted on the same criteria to a soldier notwithstanding that the machinery for considering his complaint is different. This argument seeks to brush aside the fact that Parliament expressly excluded soldiers from access to the industrial tribunal and provided for their complaints to be considered under the less specific and more discretionary provisions in section 181 of the Army Act 1955. Nevertheless, it must, I think, be a minimum requirement that a complaint considered under that section should be declared proven or not and that there should be a proper consideration of whether some redress additional to that declaration should be granted.

In the present case, Sir Kenneth McDonald wrote in his findings:

"It would be normal practice to state simply that redress is denied but in the circumstances a cross-reference might be appropriate to the commanding officer's letter of 20 July 1988 since this covers the point [that on racial abuse and attacks in Berlin, there was an S.I.B. inquiry, and subsequent action by higher authority in the Army] . . . which I believe is worth repeating since it is important not to leave the impression that his claims of racial abuse have not been accepted."

The Quartermaster General whilst accepting there was "some truth in the allegations" made no recommendation in favour of saying so. In the result, a decision letter from the Minister of Defence followed "the normal practice" merely stating, "Your client's request for redress of grievance has been denied." Thus, although Mr. Anderson's complaint was proved (at least in part) no such finding was pronounced. At best, it was left to be inferred from the disclosure that "appropriate action has been taken where necessary."

As to compensation, the Quartermaster General said:

"I now turn to the question of racial abuse in Berlin. As a result of the complaint by Anderson, a full investigation was carried out by the Special Investigation Branch. It is clear that, although the incidents were of a relatively minor nature, there was some truth in the allegations made by the complainant. I am satisfied after detailed investigations that appropriate action was taken in respect of those who were involved . . . This leaves the question of compensation and apology. In the light of the action that has been taken and Anderson's attitude to service life, I can see no grounds for either."

Sir Kenneth said:

"(a) On racial abuse and attacks in Berlin, there was an S.I.B. inquiry, and subsequent action by higher authority in the army . . . (e) On the request for compensation for injury to feelings, I can see no argument to justify such compensation. The actions at (a) have discharged the Army's management responsibility to Anderson."

These remarks imply that the board considered the action taken against those responsible obviated or satisfied the need to remedy the breach of Mr. Anderson's right. The board appears to have regarded the complaint as one requiring disciplinary action against the offenders rather than redress for the victim. The Quartermaster General further considered Mr. Anderson's "attitude to service life" (presumably based on his

commanding officer's assessment quoted above) as akin to contributory negligence expunging any claim he might otherwise have had.

In my judgment this approach suggests that the nature of the complaint under the Act of 1976 and the proper issues for the board's consideration were not fully appreciated. Before this court it has been common ground that the Army Board was obliged to give full effect to the substantive provisions of the Race Relations Act 1976 in regard to the complaint before them. It was thus necessary for the board to give specific consideration to the relevant provisions of the Act and to consider whether there had been unlawful discrimination within the terms of the Act. A specific finding ought then to have been made and communicated as to whether the complaint was proved. This was not done. Proper consideration should also have been given to the question whether compensation or other redress ought to be granted. On this latter question, the fact that disciplinary action had been taken against the wrongdoers was irrelevant. For Mr. Anderson, such action could not even have a protective or deterrent effect in the future since he had left the Army. Thus, the board's approach was in my judgment seriously defective.

The failure to have all the allegations in the written complaint investigated, to see the transcripts of evidence from other soldiers and to consider the complaint of unlawful detention were further flaws in the board's handling of this case. They were clearly under a duty to have all the allegations investigated, to have all the relevant material before them and to consider each head of complaint.

Procedural requirements

What procedural requirements are necessary to achieve fairness when the Army Board considers a complaint of this kind? In addressing this issue, counsel made much of the distinction between judicial and administrative functions. Were it necessary to decide in those terms the functions of the Army Board when considering a race discrimination complaint, I would characterise it as judicial rather than administrative. The board is required to adjudicate on an alleged breach of soldiers' rights under the Act of 1976 and, if it be proved, to take any necessary steps by way of redress. It is accepted that the board has the power, *inter alia*, to award compensation. A body required to consider and adjudicate upon an alleged breach of statutory rights and to grant redress when necessary seems to me to be exercising an essentially judicial function. It matters not that that body has other functions which are non-judicial: see *Reg. v. Secretary of State for the Home Department, Ex parte Tarrant* [1985] Q.B. 251, 268.

However, to label the board's function either "judicial" or "administrative" for the purpose of determining the appropriate procedural regime is to adopt too inflexible an approach. We were referred to many decided cases, but the principles laid down in *Ridge v. Baldwin* [1964] A.C. 40 are well summarised by Sir William Wade in his *Administrative Law*, 6th ed. (1988), pp. 518-519:

"[Lord Reid] attacked the problem at its root by demonstrating how the term 'judicial' had been misinterpreted as requiring some superadded characteristic over and above the characteristic that the power affected some person's rights. The mere fact that the power affects rights or interests is what makes it 'judicial,' and so subject to the procedures required by natural justice. In other words, a power which affects rights must be exercised 'judicially,' i.e. fairly, and the fact that the power is administrative

does not make it any the less 'judicial' for this purpose. Lord Hodson put this point very clearly: '... the answer in a given case is not provided by the statement that the giver of the decision is acting in an executive or administrative capacity as if that were the antithesis of a judicial capacity. The cases seem to me to show that persons acting in a capacity which is not on the face of it judicial but rather executive or administrative have been held by the courts to be subject to the principles of natural justice.' "

This approach was echoed by Lord Lane C.J. in *Reg. v. Commission for Racial Equality, Ex parte Cottrell & Rothon* [1980] 1 W.L.R. 1580, 1587, He said:

"It seems to me that there are degrees of judicial hearing, and those degrees run from the borders of pure administration to the borders of the full hearing of a criminal cause or matter in the Crown Court. It does not profit one to try to pigeon-hole the particular set of circumstances either into the administrative pigeon-hole or into the judicial pigeon-hole. Each case will inevitably differ, and one must ask oneself what is the basic nature of the proceeding which was going on here."

What, then are the criteria by which to decide the requirements of fairness in any given proceeding? Authoritative guidance as to this was given by Lord Bridge of Harwich in *Lloyd v. McMahon* [1987] A.C. 625, 702. He said:

"My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

Applying these principles to the present case, the character of the Army Board and its role in this context have already been described. It is pertinent however, to note that its decision is final apart from the possibility of judicial review. There is no appeal from its findings. The kind of decision it has to make has also been described. Mr. Sedley argues from that and from the statutory framework, that all the procedural features to be found in a court trial are required; full discovery of documents, an oral hearing and cross-examination. As to the statutory framework, he points out that complaints of racial discrimination under Part III of the Act relating to goods and services go before the county court with all the incidents of court procedure. Most civilian complaints of racial discrimination contrary to section 4 of the Act go to an industrial tribunal under section 54(1). There they are subject to rules requiring the procedures Mr. Sedley claims here. Thus, if Mr. Anderson had been seeking entry to the Army, and had been turned down on allegedly racial grounds, his case could have been presented to the industrial tribunal under section 4(1)(c), and he would have enjoyed all the procedures claimed here. Why should he be worse off simply because he is actually in the Army and section 54(2) requires his complaint to be considered by a different body?

Against this, Mr. Pannick contends Parliament has expressly provided that a soldier's complaint shall not go before an industrial tribunal but shall instead be subject to the Army procedures pursuant to section 181 of the Act of 1955. Parliament must, he submits, have been aware of the procedures normally followed in regard to other complaints under that section. Moreover, had Parliament wished to impose a more rigid and rigorous procedure, still in an Army context, it could have directed that complaints of racial

discrimination should be subject to section 135 (board of inquiry), section 137 (regimental inquiry) or even sections 92 to 103 (court-martial). Process under each of these sections would have afforded the complainant the procedural formalities contended for here. I should say that the existence of those forms of inquiry and their procedure undercuts Sir Kenneth's suggestion that exigencies of the service would make oral hearings impracticable.

In my judgment, there is force in Mr. Pannick's argument. Since Parliament has deliberately excluded soldier's complaints from industrial tribunals and thus from the procedures laid down for such tribunals, it cannot be axiomatic that by analogy all those procedures must be made available by the Army Board. Had Parliament wished to impose those detailed procedures on the Army Board, it could have done so.

However, Mr. Pannick went on to contend that the Army Board's duty of fairness required no more than that they should act *bona fide*, not capriciously or in a biased manner, and that they should afford the complainant a chance to respond to the basic points put against him. In my judgment, this does not go far enough. The Army Board as the forum of last resort, dealing with an individual's fundamental statutory rights, must by its procedures achieve a high standard of fairness. I would list the principles as follows.

(1) There must be a proper hearing of the complaint in the sense that the board must consider, as a single adjudicating body, all the relevant evidence and contentions before reaching its conclusions. This means, in my view, that the members of the board must meet. It is unsatisfactory that the members should consider the papers and reach their individual conclusions in isolation and, perhaps as here, having received the concluded views of another member. Since there are 10 members of the Army Board and any two can exercise the board's powers to consider a complaint of this kind, there should be no difficulty in achieving a meeting for the purpose.

(2) The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision-making bodies other than courts and bodies whose procedures are laid down by statute, are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing: see *Local Government Board v. Arlidge* [1915] A.C. 120, 132-133; *Reg. v. Race Relations Board, Ex parte Selvarajan* [1975] 1 W.L.R. 1686, 1694B-D and *Reg. v. Immigration Appeal Tribunal, Ex parte Jones (Ross)* [1988] 1 W.L.R. 477, 481B-G. Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made. It will also depend upon whether there are substantial issues of fact which cannot be satisfactorily resolved on the available written evidence. This does not mean that whenever there is a conflict of evidence in the statements taken, an oral hearing must be held to resolve it. Sometimes such a conflict can be resolved merely by the inherent unlikelihood of one version or the other. Sometimes the conflict is not central to the issue for determination and would not justify an oral hearing. Even when such a hearing is necessary, it may only require one or two witnesses to be called and cross-examined.

Mr. Sedley submits that whatever the position regarding other complaints under section 181, an oral hearing should be obligatory where the complaint is of race discrimination.

He submits that experience shows proof of discrimination to be elusive. Discriminatory motivation can be innocent and subconscious. Without cross-examination at an oral hearing it may not emerge. I recognise the difficulties of proving discrimination in many cases, but I do not accept that a general rule requiring oral hearings must be applied by the Army Board to all complaints of discrimination. In the present case, for example, the direct and crude nature of the alleged racial abuse hardly raises any specially subtle possibility of subconscious motivation. Either the racial attacks, oral and physical, took place or they did not. Whether, when the Army Board see all the statements and transcripts, they consider it necessary to hold an oral hearing to decide that issue or whether they can resolve it on the written material, will be for them to decide in their discretion. What they cannot do, at the other extreme from Mr. Sedley's submission, is to have an inflexible policy not to hold oral hearings. The findings of the two members in this case suggest that is what they did.

The Quartermaster General said: "Elements of the complaint can be dismissed on technical grounds. There is no provision for disclosure of documentation or for an oral hearing in a complaint of this nature." Those observations suggest that the board fettered its discretion and failed to consider the request for an oral hearing in the present case on its own merits.

(3) The opportunity to have the evidence tested by cross-examination is again within the Army Board's discretion. The decision whether to allow it will usually be inseparable from the decision whether to have an oral hearing. The object of the latter will usually be to enable witnesses to be tested in cross-examination, although it would be possible to have an oral hearing simply to hear submissions.

(4) Whether oral or not, there must be what amounts to a hearing of any complaint under the Act of 1976. This means that the Army Board must have such a complaint investigated, consider all the material gathered in the investigation, give the complainant an opportunity to respond to it and consider his response.

But what is the board obliged to disclose to the complainant to obtain his response? Is it sufficient to indicate the gist of any material adverse to his case or should he be shown all the material seen by the board? Mr. Pannick submits that there is no obligation to show all to the complainant. He relies upon three authorities: *Reg. v. Secretary of State for the Home Department, Ex parte Mughal* [1974] Q.B. 313; *Reg. v. Secretary of State for the Home Department, Ex parte Santillo* [1981] Q.B. 778 and *Reg. v. Monopolies and Mergers Commission, Ex parte Matthew Brown Plc.* [1987] 1 W.L.R. 1235. However, in each of those cases, the function of the decision-making body was towards the administrative end of the spectrum. Because of the nature of the Army's Board's function pursuant to the Race Relations Act 1976, already analysed above, I consider that a soldier complainant under that Act should be shown all the material seen by the board, apart from any documents for which public interest immunity can properly be claimed. The board is not simply making an administrative decision requiring it to consult interested parties and hear their representations. It has a duty to adjudicate on a specific complaint of breach of a statutory right. Except where public interest immunity is established, I see no reason why on such an adjudication, the board should consider material withheld from the complainant.

In the present case it is true that Mr. Anderson was shown a summary of the S.I.B. report, though not the report itself. He also received the commanding officer's letter of 20 July which summarised points made against him, but he did not see the statements of other soldiers. Nor was he shown the information obtained individually by each of the board members. Thus, the response he made to the commanding officer's letter was hampered by a lack of full information.

This was the first time that the Army Board had to consider under section 181 a complaint of discrimination contrary to the Act of 1976. It is therefore understandable that the full implications of the duty thus imposed upon them were not appreciated. However, as indicated above, their handling of the matter was flawed in a number of respects.

Mr. Pannick invites the court not to quash the board's decision but to leave it to the proposed board of inquiry to investigate the matter further and report to a freshly constituted Army Board so that it may reconsider the complaint. Mr. Sedley submits that the Army Board is *functus officio* so that to obtain a fresh consideration of the complaint their decision must be quashed. I do not find it necessary to decide whether technically the Army Board is *functus officio*. In my judgment the errors of law and procedure in their handling of this complaint when viewed in the aggregate are such as requires the court to quash their decision. Accordingly, I would grant an order of *certiorari*. I conceive it to be unnecessary in those circumstances to grant an order of *mandamus*, since I am confident that the complaint will be reheard by a freshly constituted Army Board.

MORLAND J: I agree.

Application granted.

End Notes:

1. Army Act 1955, s. 181, as amended: see post, p. 182A-C [[Return](#)]
2. First published in 1984 [[Return](#)]