



Neutral Citation Number: [2007] HWCA 983

Case No: C1/2006/2019

ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
THE HON MR JUSTICE LANGSTAFF

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/05/2007

Before :

LORD JUSTICE WARD
LORD JUSTICE LATHAM
and
SIR PETER GIBSON

Between :

R ON THE APPLICATION OF DOST MOHAMMED **Appellant**
- and -
SECRETARY OF STATE FOR DEFENCE **Respondent**

Rabinder Singh QC & Aileen McColgan(instructed by Public Interest Lawyers) for the
Appellant
Clive Lewis QC, Martin Chamberlain & Victoria Wakefield (instructed by the Treasury
Solicitor) for the **Respondent**

Hearing dates : 17th/18th January 2007

Lord Justice Latham:

Introduction

1. It has been the policy of successive British Governments over many years not to pay compensation to former British service personnel for the fact of having been made prisoners of war in any conflict. But, perhaps stimulated by the fact that the Canadian Government made payments to its former far east prisoners of war, the Government looked once again at the particular position of those who had suffered the appalling hardships resulting from being captured by the Japanese. Almost one in four of those who were captured died or were killed in captivity. On the 10th April 2000, the Prime Minister and Dr Lewis Moonie, the Under Secretary of State for Defence, met a delegation from the Royal British Legion at Downing Street. The suggestion was that there should be a one-off ex gratia payment for far east prisoners of war. The estimate was that the number of ex-servicemen and their widows who would be eligible for such a payment was in the region of 10,000 consisting of 7,000 former prisoners of war and 3,000 widows. As a result, in the summer of 2000, the policy was reconsidered in relation to far east prisoners of war; and discussions took place between the Ministry of Defence, the Foreign and Commonwealth Office, the Department of Health, and the Department of Social Security. A working group under the chairmanship of Mr Tom McKane was set up, and produced a scheme, to be administered by the War Pensions Agency. This was announced by the minister in a statement to the House of Commons on the 7th November 2000 in the following terms:

“I am very pleased to be able to inform the House that, as a result of the review, the Government has decided to make a single ex gratia payment of £10,000 to each of the surviving members of the British groups who were held prisoner by the Japanese during the second world war, in recognition of the unique circumstances of their captivity. In cases in which a person who would have been entitled to payment has died, the surviving spouse will be entitled to receive it instead.

.....

Those who will be entitled to receive the payment are former members of Her Majesty's armed forces who were made prisoners of war, former members of the Merchant Navy who were captured and imprisoned, and British civilians who were interned. Certain other former military personnel in the colonial forces, the Indian Army and the Burmese armed forces who received compensation in the 1950s under United Kingdom auspices will also be eligible.....

We estimate that up to 16,700 people may be eligible for the ex-gratia payments, which will accordingly cost up to £167 million to make.....”

2. He concluded the statement by stating that further details of the scheme were being published in a leaflet a copy of which would be placed in the Library of the House.

brought in the county court. This court dismissed appeals against both decisions in a combined judgment: *R (Elias) –v- Defence Secretary* [2006] 1 WLR 3213.

5. As I have said, we are not concerned in the present case with those criteria. The appellant is a citizen of Pakistan who served in the Indian Army during the Second World War, was captured and became a prisoner of war of the Japanese. It is accepted on his behalf that he does not meet any of the criteria set out in the statement or the leaflet. But he submits that the criteria are racially discriminatory by reason of the inclusion in category (b) of those who received payments after the Treaty of Peace with Japan in 1951. As was expressly stated in the ministerial statement and the leaflet, these were only a small proportion of those who served in particular in the Indian Army; and, it is said, the basic criterion for their receipt of payment was that they were “European”, a description to which I will return. He claims that, as a result, he is the victim of direct discrimination which renders the scheme, as promulgated, unlawful at common law, in that it is infected by unlawful discrimination, and by virtue of the provisions of the Race Relations Act 1976.
6. In *R (Gurung) –v- Ministry of Defence* [2002] EWHC 2463 (Admin), McCombe J held that the criterion was discriminatory, and therefore unlawful, in the sense contended for by the appellant in this case, in relation to Gurkhas who were not citizens of India or Pakistan. This decision was not appealed by the Secretary of State. Instead, a further statement was made to the House of Commons on the 5th November 2003 in the following terms:

“The Parliamentary Under-Secretary of State for Defence (Mr Ivor Caplin):

The Government have carried out a detailed review of the eligibility for the ex gratia payment scheme established in 2000 for far east prisoners of war. This follows the ruling in the High Court by Mr Justice McCombe in November 2002.

I am now able to announce that, in accordance with the principles set out in the judgment of the Court, the scheme will be formally extended to include those Gurkha far east prisoners of war (FEPOW) who were held captive by the Japanese in the Second World War and who in 1951 when the peace treaty between the United Kingdom and Japan was signed were citizens of Nepal. Claims can be made by the FEPOW or by their surviving spouse with the payment of £10,000.....”

7. Strictly, the appellant’s challenge is to the scheme as amended in that statement. The context of this case is accordingly different from the context in *Gurung*. But both parties rely on the reasoning of McCombe J to which I will return, for their own purposes. The context of the present case is startling. The material before us establishes that the maximum number of former members of the Indian and Burmese Armies who were entitled to receive monies under the Treaty was 861, although contemporaneous documents identify only 618 as having received relevant payments. Of those 618, there are detailed records of 429, all of whom recorded their nationality as British. By the 2nd May 2006, when Mr Jonathan Iremonger made his first witness

statement in these proceedings on behalf of the respondent, 50,000 expressions of interest had been received from individuals resident in the Indian sub-continent.

8. Langstaff J dismissed the application. He set out his conclusions as follows:

“83. The claimant’s case rests on two pillars. The first is that, as a matter of fact, the available evidence shows that the exclusion from compensation under Article 16 the San Francisco Treaty of those former members of the (British) Indian Army who had become nationals of Pakistan was one based on race or colour, rather than nationality. If that is wrong, but the exclusion was on grounds of nationality then the second pillar is that since the enactment of the Race Relations Act 1976 it has been unlawful to discriminate on grounds of nationality in conferring benefits under the Treaty.

84. I do not accept either. Though not without its difficulty of interpretation, the evidence shows that the ground for exclusion was one of nationality. The discrimination that this would otherwise have constituted, following the adoption in 2000 of criteria by reference to whether claimants for benefits had received a distribution under Article 16, and thus adopting the approach then, and which in any event is explicit in the current policy, was and is not unlawful because it is required by the arrangements made, which despite the deficiencies in their promulgation are sufficiently clear. The defence in section 41(2)(d) is thus available to the defendant, and renders the discrimination not unlawful.”

9. On behalf of the appellant, Mr Rabinder Singh, QC submits that the judge came to the wrong conclusion as to the grounds upon which a distinction was made between the appellant and those who received payments under the treaty. He submits that the contemporaneous documents make it abundantly plain that the underlying justification for the receipt of monies under the treaty was that the member of the Indian or Burmese Army had to be European, and that accordingly, there was clear direct discrimination on racial grounds. In coming to the conclusion that the distinction was based on nationality and not race, the judge was either simply wrong, or had applied the wrong burden of proof. In his submission, the burden of proof was, and is, on the respondent, in accordance with Article 8 of Council Directive, 2000/43 to prove that there had been no breach of “the principle of equal treatment”. He further submitted that the judge applied the wrong test when determining upon what grounds the distinction was made between those who received monies under the Treaty and those who did not. Then, finally, he submits that even if the judge was correct in deciding that the distinction was on the grounds of nationality, the judge was wrong to conclude that the ministerial statements to which I have referred amounted to arrangements approved by a minister of the Crown for the purposes of section 41(2) of the Race Relations Act 1976 (the Act).

The Judge’s Approach to the Law

10. It was common ground before the judge, and is common ground before us, that, subject to the argument on burden of proof, the appellant will succeed if the criteria give rise to a distinction between those who will obtain the ex-gratia payment and those who will not, which is made on racial grounds. This is so at common law, and by virtue of section 19B of the Act which makes it unlawful for a public authority to

do any act which constitutes discrimination, unless it falls within section 41(2) of the Act. The relevant provisions of the Act are as follows:

“1(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 other persons;

.....

- 3. In this Act, unless the context otherwise requires “racial grounds” means any of the following grounds, namely colour, race, nationality or ethnic or national origins;

.....

41.

- (2) Nothing in Parts II to IV shall render unlawful any act whereby a person discriminates against another on the basis of that other’s nationality or place of ordinary residence or the length of time for which he has been present or resident in or outside the United Kingdom or an area within the United Kingdom if that act is done –

.....

- (d) in pursuance of any arrangements made (whether before or after the passing of this Act) by or with the approval of, or for the time being approved by, a Minister of the Crown;

.....”

- 11. The judge recorded in his judgment that there was no controversy before him as to the law to be applied. He cited passages from the speeches of Lord Nicholls in *Nagarajan –v- London Regional Transport* [2000] 1 AC 501 at pp510 and 512, and *Chief Constable of West Yorkshire Police –v- Khan* [2001] 1WLR 1947 at para 29. He also cited passages from the speech of Baroness Hale in *R (European Roma Rights Centre and others) –v- the Immigration Officer at Prague Airport and another* [2005] 2 AC1 at paras 73, 74 and 82. Before us, however, Mr Rabinder Singh has submitted that these passages do not contain a complete or necessarily appropriate statement of the way in which the courts should approach the question of direct discrimination, particularly when discrimination may be unconscious discrimination, and the question of the relevance of the purpose or intent of the decision maker is in issue. That is so in the present case, as both parties accept, because the avowed intent of the scheme was clearly to provide ex gratia payments to “British groups”, which is the phrase used in both the ministerial statement on the 7th November 2000 and the leaflet. I will return to the test applied by the judge later in this judgment.
- 12. The judge, in paragraph 25 of his judgment, having set out the relevant parts of the Act, and the citations from authority to which I have referred, said this: