

Before:

MR JUSTICE MACPHERSON OF CLUNY

REGINA

- v -

SECRETARY OF STATE FOR SOCIAL SECURITY

Ex parte COLIN FOE

MISS H WILLIAMS (instructed by Messrs Palmer Hodgson and Edwards, Fleetwood) appeared on behalf of the Applicant.

MR R JAY (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

Tuesday 7th November 1995

MR JUSTICE MACPHERSON: This is an application for judicial review of a decision made by the Secretary of State for Social Security, contained in a letter dated 5th September 1994. The decision was that following consideration of information and representations supplied in a letter dated 19th July 1994 and late Mr Goodman Foe's war pension entitlement would not be backdated to the date of his original claim in 1941 or to any period before 6th June 1985.

Leave to bring this case was granted by Brooke J on 26th January 1995. A very sad aspect of the case is that Mr Foe died in 1994, on 12th February. He was of some age then but he did not live to see the result of this case. Perhaps I should say at the outset, since I do not wish to raise any hopes, he would have been disappointed because I am unable to find that there are grounds upon which the Secretary of State's decision can be reviewed.

There is a long history to the case. It is not necessary to rehearse the full facts in this judgement because they are familiar to those involved in the case. Anybody who has to survey this case later, or elsewhere, can find the chronology and the dates most usefully set out in the affidavits and in the arguments which have been provided for the assistance of the court.

Quite shortly then, the situation is that the late Mr Foe enlisted in the Royal Fusiliers on 12th December 1940. I shall refer later to the medical documents in the case, but I stress that it is apparent that even at that stage he was indicating that he had had nervous trouble. I use that compendious phrase which everybody will understand. The details of what he told the medical authorities are amongst the papers. He was subjected to heavy bombing whilst serving with the Royal Fusiliers in London. Again, there is no need to detail his account of the matter because it is set out fairly vividly in the papers. He went to hospital and he spent the bulk of the period from 1st May 1941 until the time he was sent on leave pending discharge in hospital.

I shall refer later to the medical conclusions reached at that time. Eventually he was discharged as permanently unfit for any form of military service in consequence of "depression - recovered". That is a phrase or combination of words which appears several times in the medical notes. He applied for a pension in October 1941 because

he said he was suffering from a nervous or anxiety condition which he attributed to stress of the bombing of London docks. His claim was rejected. He applied for a review. The rejection was confirmed in 1943. Later on he made further representations. In 1986 he applied for a further review. The review upheld the rejection of the claim. He applied to the Pensions Appeal Tribunal and apart from changing the nomenclature of the trouble which had been diagnosed to psychoneurosis, again he was unsuccessful.

A tribunal found, in 1988, that Mr Foe's psychoneurosis was aggravated by service but that he was not still suffering from the aggravation at the date of discharge. He was given leave to appeal that decision by the President of the tribunal. After that date, 27th June 1991, the whole picture, effectively, changed in his favour because a report of Dr. Molodynski, a consultant psychiatrist, came into existence and was submitted in 1991, on Mr Foe's behalf, to the authorities. His appeal, in the light of that document, was allowed by consent. The respondent acknowledged in 1993 that Mr Foe was entitled to a war pension on the basis of aggravation of an anxiety state. His solicitors asked that the pension should be backdated to the date of the original claim, on the basis that the earlier rejections of the claim had been wrong. But, as I have already indicated by reference to the decision letter, the respondent indicated that he had determined Mr Foe's claim should be backdated to 6th June 1985, being five years before the submission of his appeal. He asked for leave to move for judicial review. He was given leave because of the terms of the decision letter of 1993. There is no need for me to refer to that. It is available in the documents.

The respondent conceded, in November 1993, that the previous decision letter had been inadequate and indicated that the decision had been reconsidered to backdate beyond the 6-year period but was, however, again rejected on the grounds that as the recognition of Mr Foe's entitlement was caused by the further medical evidence submitted in 1991 the earlier decisions were correct when made and, for good measure, that Mr Foe had not experienced severe financial hardship during the material period.

This case has been carried on after the death of Mr Foe, in February 1994, by his family. Mr Colin Foe is the executor of the estate of his late father. The solicitors indicated that they believed that the later decision was also flawed and the respondent indicated that, having reconsidered his decision, he would maintain the six-year backdating.

These proceedings were lodged in February 1994 and here we are today considering the case. I should add that Drake J, who was my predecessor as the nominated judge under Order 101 of the Rules of the Supreme Court, had allowed this deceased applicant's appeal on 5th October 1992 and remitted the case for a rehearing by a differently constituted Pension Appeal Tribunal, but the Secretary of State acknowledged Mr Foe's entitlement to a war pension before that rehearing could take place.

The late Mr Foe's case is governed by Article 4 of The Naval, Military and Air Forces Etc (Disablement and Death) Service Pensions Order 1993. The burden is on the Secretary of State to show beyond reasonable doubt that Mr Foe's disablement, classed as psychoneurosis, was neither attributable to service nor that it existed before or arose during service and has been or remains aggravated thereby. The right of appeal, incidentally, is governed by section 1 of the Pensions Appeal Tribunals Act 1943. Under Article 67(1) of 1993 Order, to which I was referred by Miss Williams, the Secretary of State may review any decision rejecting a claim for pension. In cases where an applicant's appeal is determined by the Pensions Appeal Tribunal or the High Court the general rule is that pension is not to be backdated in respect of any period preceding a date six years before the date of the granting of leave to appeal.

The Secretary of State, in this case, applying the correct paragraphs of Schedule III and the law as it is agreed to be, has decided that he should not depart from his own policy in this case. His policy exists by analogy with Schedule III, paragraph 2 and Schedule III, paragraph 3(a). It is that unless certain conditions are satisfied the pension will only be backdated for 6 years.

The principal ground of the Secretary of State's decision in the present case is that the original decision to reject was reasonable on the evidence available at the time that it was made. The Secretary of State acts, of course, in his discretion. He may extend the period back if he decides so to do, taking into account all the conclusions.

The first ground of this application relates to the respondent's conclusion that Mr Foe's claim should not be backdated because the earlier rejections of his claim were correct. Those are the words used by Miss Williams in argument and in her skeleton argument which is before me.

The applicant submits that the line of reasoning of the Secretary of State in this regard is flawed and that it does not follow logically when it is analysed. The situation, as I have indicated, was that Dr. Molodynski's report changed the whole atmosphere of the case and, in my judgement, that is true and it is of great significance in this case to see how the medical history did, in fact, develop. I have already indicated that Mr Foe, when he was examined for enlistment, indicated that he had suffered from a nervous breakdown and from some nervous instability. The medical notes, in particular those at about the time of his discharge in 1941, indicate that by the time of his discharge he was, in the compendious phrase to which I have referred, recovered from the depression from which he had been suffering. It is evident, looking at those documents, that those who examined him at the time believed that while his condition had been aggravated by, for example, worry over business affairs, his degree of disability was no more at the time of his discharge than it had been on entry.

Mr Foe, of course, did not accept that that was so and he wrote, in 1941 and later, indicating his dissatisfaction with the failure of the authorities to grasp his point, namely that he attributed what had happened to "the horrible night of 19th April" during the bombing of the docks.

What the respondents say about this first aspect of the case is perfectly simple. They say that at the time the original decision was made it was a perfectly reasonable decision upon the information which was available to those who made it at the time. Mr Jay accepted that in one sense the decision could be argued to have been wrong, with the advantage of hindsight. I am not sure that is an appropriate analysis of the situation. It seems to me that a proper approach is that set out in the affidavits in this case on behalf of the Secretary of State, which indicate that the decision was reasonable upon the facts known to the decisions-maker at the time. Mr Jay does rightly point out, however, that this case is somewhat special. What happened, perhaps surprisingly, and certainly most helpfully, so far as Mr Foe was concerned, was that a doctor appeared who was prepared to give a totally different opinion than that which had been given by the doctors in 1941. It is not a case of looking back to the 1941 decision and pointing to the findings of the doctors and indicating that they must have and should be found to have made a wrong decision at the time. It is a case in which later discovered evidence, which arrived only in 1991, enabled the Secretary of State, looking at the whole picture, to accept the 1991 doctor's opinion in distinction to the opinions of the doctors in 1941. That seems to me to be a very valid distinction. The appellant says that any evidence arising later can be, so to speak, related back to 1941 and must be taken into account, as at that date. Mr Jay argues that because of its late arrival it is perfectly justifiable for the Secretary of State to say, as he does through Mr Alexander Adams, that the original decision to reject was reasonable on the evidence available at

the time at which it was made. In my judgement the Secretary of State's argument prevails. It does not seem to me that he can be criticised for failing to exercise his discretion to backdate to the original date of claim upon the facts of a case of this kind and, in particular, upon the facts of this case involving Mr Foe. I do not believe that there is illogicality in the first basis upon which the decision was made, which is attacked in ground one by Miss Williams.

The second ground relates to the respondent's failure to apply to Mr Foe's case what is said to be a stated policy of backdating pensions to the date of the claim in the case of post-traumatic stress disorders and anxiety states. Again, I read from the summary of the argument put before me by Miss Williams in her skeleton argument:

"In the decision letter of 5th September 1994 the respondent acknowledged that the general policy in respect of cases of conditions attributable to service is to back-date to the date of the claim."

But a distinction was drawn between aggravation and attributability cases. That distinction is not espoused now by the Secretary of State nor by Mr Jay, although he did refer to it at one stage in his skeleton argument.

The basis of this argument seems to be by reference to answers given by Miss Widdecombe in 1992, both in June and July, in answer to Mr Alfred Morris who posed the questions on behalf of the British Legion to the Secretary of State. He asked the Secretary of State, in June 1992, what would be the total cost of paying full arrears for war pensions to those claimants now considered by virtue of a diagnosis of post-traumatic stress disorder, calculating those arrears as from the date of their disability instead of from 1980. The significance of 1980 is that is a date which has been adopted by the Secretary of State for the payment of arrears of war pension in so far as claims in respect of schizophrenia are concerned. The answer which was given was as follows:

"Awards of war pension in respect of condition's as attributable to service which could be described as 'post-traumatic stress disorder's for instance, conditions formerly diagnosed as 'anxiety state' or neurasthenia - have normally been made from the date of claim."

Reading that answer and the subsequent answer of 16th July 1992, it seems to me that too much is read into it by the applicant or the applicant's advisers. It is perfectly true, and it may well be that in most cases where there has been a finding of attributability or aggravation normally the payments will be decreed to run from the date of claim. But this case has the special feature which governs ground one, namely, that at the outset the decision was, as I have concluded, reasonably made that there was no attributable or aggravated condition existing in the case of Mr Foe. We return, then, to the first argument and, in my judgement, there is no legal flaw or unreasonableness in the Secretary of State's decision, taking into account all the facts and the arrival on the scene of the later evidence in his decision that the backdating should only be until 1985.

In respect of ground two, Miss Williams argues that in failing to consider or to apply the policy of backdating referred to in the Parliamentary Answer, the Secretary of State failed to take into account a relevant consideration, namely that policy as there set out, and arrived at a decision that was unreasonable in a Wednesbury sense in determining not to apply that policy to this case. In so far as the policy is a declared one, it seems to me that there must be instances, such as the present, where it need not be applied. It does not seem to me that it can be truly argued that the Secretary of State failed to take into account the policy or the matters set out in the Parliamentary Answer, or that there

was any shadow of irrationality in the decision which he reached. That disposes, in my judgement, of the second ground.

The third ground relates to the respondent's subsidiary basis for determining not to backdate the late Mr Foe's claim beyond six years, namely that there was no satisfactory evidence that Mr Foe's financial circumstances disclosed sufficient hardship to warrant backdating the claim. The complaint is that, in determining the late Mr Foe's financial position, the respondent failed to take into account relevant considerations, namely the materials set out in the documents and in the letters which were written on Mr Foe's behalf and, in particular, what he said in 1941 and later to the doctors; and, secondly, in failing to act fairly in that the criteria for adjudging the claimant's financial position was altered from that earlier stated without affording the claimant, or those acting on his behalf, an opportunity to make representations. Again, the submission is that the Secretary of State arrived at a conclusion that was Wednesbury unreasonable or irrational in all the circumstances. I am unable to accept the third and final submission.

It seems to me that while there is evidence that Mr Foe had trouble and difficulty in connection with his work, both before and after the war, it would have been wrong for the Secretary of State to have divined from the information which has been put before him that he did, without any preadventure, suffer financial hardship as a result of any condition which was caused by his war service. It is significant that from time to time Mr Foe himself referred to conditions which are, or appear to be, separate from his purely nervous condition, for example, he complains at one stage that he suffered from a severe migraine which prevented him from working. It is of significance also that the number of times that Mr Foe claimed any form of benefit during the long years for which he continued to work after the war until he was in his 60s were few. He may well have had time off work. He may well not have prospered in the hairdressing activities which he pursued after the war. It does not seem to me that there is any unfairness in the way in which that part of his case was judged or any irrationality in the conclusion which the Secretary of State had reached. It is of course very difficult to reach a decision on a matter of that kind in the absence of the applicant himself who is, unfortunately, dead. To make a decision upon things said as far back as 1941 and on a long history of employment punctuated by some gaps is not easy. I am not able to fault the conclusion reached by the Secretary of State who indicates, again through Mr Alexander Adams, that in addition to the representations made the Secretary of State has considered all aspects that have been put before him in reaching his final conclusion. Serious consideration, he says, was given to all of the representations which had been made on the late Mr Foe's behalf by his solicitors. But, on balance, the Secretary of State concluded that the late Mr Foe had at no time experienced severe financial hardship and, in any event, even had a different decision on this aspect of the case being taken, the result would have been the same. That, unfortunately, disposes of the third ground of this application.

Of course I have very considerable sympathy with anyone in Mr Foe's position who is now found to have had during his lifetime, an aggravation of his psychoneurosis as a result of what happened to him during the war. He may have been fortunate to find a doctor to substantiate his claim, even to the extent to which it was ultimately substantiated, because the medical opinions back in 1941 were very clear and emphatic and no decision, other than reached at that time, could, as it seems to me, possibly have been reached other than to reject his claim. Mr Foe is not and would not have been, since 1994, here to enjoy the fruits of success even if he had succeeded. If I could have found in his favour, so that the family would benefit from the money which would come to his estate, perhaps I may be allowed to say that I would have done so

because I look at the case the same way round as I do have to look at cases of this kind when considering pension appeals with a favourable condition in mind as to my approach in respect of the pensioner. It is only right that that should be done. But it has to be tested, of course, according to the law and according to the principles upon which judicial review can be decreed in this court. It is only if there is unlawfulness or impropriety in procedure or breach of natural justice or true irrationality, to the point of perversity, that a decision of this kind can be upset in judicial review proceedings. I am sure that the family and those involved realise that is so. In spite of all the arguments eloquently put before me by Miss Williams I am unable to accept that this is a case for judicial review and this application must be refused.