

IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION  
CROWN OFFICE LIST

PA 18/93

Royal Courts of Justice  
Strand  
London WC2

Tuesday, 21st December 1993

Before:

MR JUSTICE DRAKE

-----

GRACE HUNT

-v-

THE SECRETARY OF STATE FOR SOCIAL SERVICES

-----

JUDGMENT

MR JUSTICE DRAKE: This is an appeal from a decision of the Pensions Appeal Tribunal given on 3rd March 1992. The tribunal rejected an appeal by the Appellant against the decision of the Secretary of State that her husband's death on 2nd August 1989 was neither due to nor hastened by any wound, injury or disease which was attributable to or aggravated by service in the Royal Marines. To use non-technical language, the Appellant's husband died from lung cancer caused by excessive cigarette smoking. He had served in the Royal Marines from February 1940 to March 1946. The claim for a pension was made on the basis that his excessive smoking may have been caused by his experiences during his war service and by the pain and suffering from conditions of his feet which are accepted to have been attributable to his war service.

At first sight the Appellant faced a very formidable and almost hopeless task to establish any possible connection between death due to excessive smoking in 1989 and the conditions experienced by her husband when he was a Royal Marine well over 40 years earlier. That was my first reaction to this case. It was the considered and final decision of both the Secretary of State and of the Pensions Appeal Tribunal.

On closer consideration of the facts of this particular case, I found them to be far from easy. It was the president of the tribunal who gave leave to appeal to the High Court. He did so without holding out any prospects of success to the Appellant widow, but at the same time he considered that renewed guidance might be helpful on this type of claim.

The president correctly stated that smoking is normally accepted as a basis for a claim only if the serviceman was ordered to smoke (which is not the case here) or if the pain of some accepted disability was so unendurable that smoking was the only way of relieving it. That is the possible basis for the present claim.

My attention was drawn to two previous decisions of the Pensions Appeal Tribunal where it was found that the claimant had sufficiently shown a causal link between smoking and service as to entitle him to a pension. Those cases are Crossley, 28th July 1992, which was an Article 4 case, and Lees, 13th August 1992, which, like the present appeal, was an Article 5 case. That means that the onus of proof lies on the Appellant but only to raise a reasonable doubt based on reliable evidence in favour of facts which lead to entitlement.

I have also considered the decision of the High Court of Australia in Repatriation Commission v Law (1981) 36 ALR 411 where it was held, applying similar provisions to those in the English legislation but to the equivalent of an Article 4 case, that the widow was entitled to a pension because it could not be proved that there was not a connection between her husband's war service between 1940 and 1946 and his death from lung cancer in 1976. Murphy J pointed out with force and clarity that this legislation requires the tribunal to grant a pension even if they find that there are probably insufficient grounds unless they can go further and properly find that it is beyond reasonable doubt that the claim must fail.

This burden and standard of proof, very unusual under English civil law, was applied to all pension cases as a matter of government policy. The policy is aimed at ensuring that no valid claim is likely to be rejected, although the price paid to achieve that end is that some invalid claims will be allowed. A parallel exists under criminal law where the standard of proving guilt beyond reasonable doubt is justified on the basis that it is better that many guilty escape conviction than that any innocent be convicted.

The present case falls under Article 5. That means that because this claim is made long after the Appellant's husband finished his service, the burden of proving the claim does to an extent rest on her. However, she does not have to prove that the lung cancer was probably linked to her husband's service. All she has to do is to raise a reasonable doubt based on reliable evidence that there may be such a link.

In the present case the facts are very exceptional. Mr Hunt enlisted as a Royal Marine on 15th February 1940 at the age of 21. He had previously worked in a newsagents. In 1941 he was landed in Crete. There he endured 14 days of fighting and bombing. On 31st May 1941 he was taken prisoner of war. He was taken to the mainland and force-marched as a prisoner through the Balkans to Germany. His boots had worn out and because he had no proper footwear, he started having trouble with his feet. He endured burning pain in the balls of all his toes. During his four years as a prisoner of war he had to wear wooden sabots. On his repatriation in 1945 he was admitted to a Royal Naval hospital. His experience as a prisoner of war coupled with the pain he had suffered from his feet had made him psychiatrically unfit to undergo the operation needed to treat his feet. He was diagnosed as suffering from chronic anxiety hysteria reactive to his experiences in the war.

Subsequently he underwent operations first in October 1945 on his left foot, then in 1947 on his right foot. He continued to have further operations in 1948, but the condition of his feet remained very poor. He suffered considerable pain right through until 1982 and beyond. He had to have treatment to his feet about every six weeks throughout his life. This afforded him some mild relief, but disability from his feet caused problems with his hips and

eventually he required both hips to be replaced. Eventually there were indications of developing lung cancer. Mr Hunt had been a smoker before enlisting in the Royal Marines. By the time the war had finished and after the war he had become an addicted cigarette smoker. After his death his general practitioner reported: "No doubt his time in the armed forces and as a prisoner of war reinforced the habit", that is to say the smoking habit.

It is common knowledge, as well as being within my personal experience, that cigarettes were very cheap and often given free to servicemen during the war, certainly when serving overseas. It is likely that they were also available very easily to prisoners of war. There were no warnings in those days of the likely or even possible risks of lung cancer from cigarette smoking.

The opinion of the Medical Division of the Department of Social Security, relied on by the Respondent and accepted by the tribunal, is that smoking is a matter of personal choice and there is no evidence that the condition of the Appellant's feet caused him to smoke or to continue smoking. I cannot accept that. There is acceptable evidence that this Appellant underwent considerable hardship and suffered very great pain from the condition of his feet. This probably lasted from about the time he was taken prisoner of war in May 1941 until he was demobilised and then continued whilst he underwent repeated operations and treatment for his feet. Indeed, thereafter he continued to require foot treatment about every six weeks throughout his life.

It seems to me highly likely and certainly not free from reasonable doubt that smoking would have given him some relief from that suffering. It is easy to say that it was a matter of personal choice that he did not give it up. As a young prisoner of war, suffering pain without receiving full care and treatment to alleviate it, I do not think that it is realistic to hold that he had a true free choice. Having, as I find quite reasonably, smoked for many years to alleviate pain, it is likely that he became addicted to the extent that he was unable to give up the habit. He lost the freedom of choice.

I fully accept that the evidence to support the Appellant's case is far from strong. However, having considered it with very great care, I do not think it is possible to say that any tribunal, properly directing itself on this evidence, could find beyond reasonable doubt that there was no causative connection between Mr Hunt's war service and the addiction to smoking which led to his death. In my judgment the evidence does raise a reasonable doubt in the Appellant's favour. Accordingly, this appeal will be allowed.

I will end, however, with a very strong caution against using this decision as a precedent. It depends very much indeed on the facts of Mr Hunt's wartime experience and the pain he continued to suffer for long afterwards as a direct result of his service life. Despite these exceptional facts, I have found this to be very much a borderline case. It is very unlikely that there will be many other cases where a claimant will be able to raise any reasonable doubt of entitlement to a pension based on a sufficient link between service factors and smoking as a cause of death or disease.

I must also stress once more the very special rules which apply to claims by ex-servicemen or their widows. I would not wish this decision to raise any false hopes of likely success in other claims made by ex-servicemen, let alone by those who have not served in the armed forces.

Accordingly, the appeal will be allowed.

MR BROWN: My Lord, I am instructed to make one request. I make it in the knowledge that Christmas is nearly upon us and judgments arrive in whatever time it takes to produce them. But this is a point of considerable importance, and if there is any way at all in which a decision could be produced earlier rather than later, we would be very grateful for that. I do not know whether it is in your power to assist in that or not.

MR JUSTICE DRAKE: Certainly I will ask that it be expedited.

MR BROWN: I am grateful, my Lord.

-----