

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

No: PA/0012/93

Royal Courts of Justice
Strand
London WC2

Friday 12th November 1993

Before:

MR JUSTICE DRAKE

THE SECRETARY OF STATE FOR SOCIAL SECURITY

-v-

HENRY JORDAN

JUDGMENT

MR. JUSTICE DRAKE: Mr Jordan, who is the respondent on this appeal, is aged 67 and was employed in the Mercantile Marine between 13th February 1947 and 14th July 1949. He claimed a pension under the War Pensions (Mercantile Marine) Scheme 1964, which is Statutory Instrument number 2058 of 1964, and he pursued the claim under the provisions of Article 3(5) of that Scheme, which meant that he had to show a reasonable doubt existing in his favour that he is entitled to a pension, but the benefit of any reasonable doubt that he raised would be given to him.

He was injured in 1947 or 1948 in Haifa harbour. What happened was that he was serving as an engineer on board a Merchant Navy ship which was moored in the harbour at that time, and at that time there was a fear that terrorists engaged in anti-British activity might be trying to attach mines, or plant mines, in the harbour. Therefore, the Royal Navy dropped charges in order to discourage such attempts, and it was during the dropping of those charges that he suffered the injury in respect of which he claimed a pension. The injury, in broad terms, being deafness and headaches.

The Secretary of State rejected his claim, and his reasons were these. First of all, he noted that Mr Jordan claimed that his deafness and headaches were caused by a lump of coal hitting his head in the engine room and also because the Navy were dropping explosive charges. However, Mr Jordan did not join the Merchant Navy until 13th February 1947, which is after the hostilities of the war ended. Therefore, his deafness and headaches cannot be classed as a war injury or war risk injury, as no enemy action was involved.

The reference to the injury caused by a lump of coal hitting Mr Jordan on the head is not a matter in respect of which his claim was pursued.

The reasons given by the Secretary of State, to which I have just referred, I do not find wholly clear, but the conclusion is clear. Namely, that his deafness and headaches cannot be classed as a war injury or war risk injury, as no enemy action was involved. It may be, in view of the reference to the fact that the hostilities of the war had ended, which is a clear reference to the Second World War, that the Secretary of State was saying claims under the Scheme are restricted to those which occurred during the hostilities of the Second World War and do not allude to what happened thereafter, whether in Palestine or anywhere else. It may be simply that the Secretary of State was saying there was not an enemy involved here. There was no enemy action involved. Therefore, the deafness and headaches cannot be classed as a war injury.

He appealed to the Pensions Appeal Tribunal and they allowed his appeal and stated their decision in terms which I find very confusing. They refer, to begin with, to the fact that Mr Jordan did not suffer detention by reason of the existence of a state of war and, therefore, his disablement was not due to detention. That seems to be repeating something that the Secretary of State had found. But as I am not aware that Mr Jordan ever made any suggestion that he had been detained, that seems to be a wholly irrelevant finding.

The Tribunal then referred to the facts that war injury and war risk injury are defined in Articles 1 and 2 of Schedule 1 to the Scheme. Then they state: "The state of war with Germany did not formally end until the 9th July 1951." Then, accepting the appellant's evidence that the charges which were dropped were to deter terrorists, that that would come within the definition of war injury and war risk injury.

It seems to me, looking at that, that all the Tribunal have done is to say, 'well, the Minister decided that the injuries would have to have occurred during conditions of the war against Germany, the Second World War, and because the formal state of war with Germany was not ended until 9th July 1951, that is enough to reverse the Secretary of State's decision and allow the appeal.' No one on this hearing attempts to uphold the decision on that ground.

However, it seems clear that the Tribunal came to a decision that this injury was a war injury, and a war risk injury, within Articles 1 and 2 of Schedule 1 to the Scheme without further saying why.

As I have just said, if they merely decided it fell within the Scheme because the war with Germany did not formally end until 1951, then their reason is wrong and bad. If they decided that it came within the definition of war and war risk for another reason, namely, that there was a war on in Palestine at the time and that there was an identifiable enemy in respect of whom action was being taken, then, again, I would hold that they were wrong.

I do not think that there was a sufficiently identifiable body of opposition to make it definable as an enemy. On that I follow the reasoning in the case of Laird v Minister of Pensions, decided in the Court of Session in 1946, in which it was held that the word 'enemy' is restricted to normal armed forces in uniform, and does not extend to other persons or agents hostile to the British. I also find that there would be no grounds on which the Tribunal could have found that the conditions existing in Palestine in 1947 and 1948 amounted to a war when defining that in an ordinary common sense way. This was considered to be the correct approach when dealing with civil contracts in both Kawasaki Kisen Kabushiki Kaisha of Kobe v Bantham Steamship Company (1939) 2 KB 544, a decision of the Court of Appeal and, again, in Spinney's v Royal Insurance (1980) 1 QB 406, a judgment of Mustill J.

I would hold that the Tribunal erred in law in finding that this injury was one which came within the definitions of war and war risk injury within Schedule 1 to the Scheme.

It has been submitted on behalf of the Secretary of State on this appeal that there is a broader ground on which the appeal should be allowed, namely, that Article 28 of this Scheme provides that the minister shall be the sole administrator of this scheme and subject only to a challenge of Wednesbury unreasonableness, his determination that Palestine was not, in 1948, covered by the Scheme, is one which cannot be challenged and that is, itself, an overriding answer to the claim.

The trouble there is that I find difficulty in finding when the Secretary of State made any such determination. It may be that by the wording of the decision to which I have referred it was intended to state that the Scheme ceased to apply when hostilities ceased in 1945, and could only be revived at some later date on a ministerial determination, as I am told was done during the Falklands and Gulf wars.

I do not find there is a sufficient determination put before me either from the decision itself, or by any other means, to enable me to give a ruling on that matter. I think that if the Secretary of State wishes to rely on that approach then he should take the point specifically. He should state it in clear terms when the decision is given and argue the points specifically before the Pensions Appeal Tribunal and obtain their ruling upon it in the future.

However, for the reasons I have given otherwise, I hold that this is an appeal which must be allowed.