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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY X THE MOTHER OF Y FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

GILLEN J

[1] The Applicant in this case is a minor who has alleged that she was the victim of a sexual attack. I have anonymised all references to her identity in this judgment. No report of this case should contain any material which would serve to identify this child or any member of her family.

Application

[2] This is an application to judicially review a decision of the Criminal Injuries Compensation Appeals Panel for Northern Ireland ("the Panel") given in writing on 12 March 2008, concluding that the Applicant was not entitled to an award of compensation under the Northern Ireland Criminal Injuries Compensation Scheme 2002 ("the 2002 Scheme") . There were five grounds upon which the relief was sought. First that the Panel had misdirected itself as to the nature of consent, secondly that it had failed to consider the concept of submission, thirdly that it had failed to require the investigating police officer to disclose a recommendation, fourthly that it had failed to effectively secure the right to cross-examination and finally the Panel had fallen into error by failing to afford adequate consideration to a number of relevant factors.

The 2002 Scheme.

[3] Compensation is only paid under the 2002 Scheme to a person who has sustained a "criminal injury". That is defined in paragraph 8 as an injury sustained in Northern Ireland and directly attributable to "(a) A crime of violence …".

[4] Under paragraph 10 of the Scheme personal injury includes "physical injury …, mental injury … "Paragraph 10 goes on to record that "compensation will not be payable for mental injury .. without physical injury, or in respect of a sexual offence unless the applicant … (c) in a claim arising out of a sexual offence, was the non-consenting victim of that offence (which does not include a victim who consented in fact but whose consent does not, in law, prevent an act being an assault)".

Legal Authority on the construction of "crime of violence".

[5] It was common case in this matter that the two leading authorities relevant to this case were *R v Criminal Injuries Compensation Board Ex parte Piercey* [1997] CLYB 1191("Piercey's case") and *Regina (August) v Criminal Injuries Compensation Appeals Panel* [2001] QB 774 ("August's case").

[6] In Piercey's case, the offence committed against the applicant was that of having unlawful sexual intercourse with a girl under the age of 16. McCullough J held that in the circumstances of that case no "crime of violence" was committed. There was evidence of a bruise on the middle of the girl's thigh but "the medical evidence did not negate her consent, and the board clearly believed that she had not established that she did not consent". The judge said:

> "It does not, however, follow that to commit either offence against a girl of that age involves the use of violence. Each case must be decided on its own merits. Not every application of force is violence. Just as sexual intercourse between a man and a woman would not normally be regarded as a violent act, so it is with a girl under the age of 16. The offender's admission that he had had intercourse with the applicant did not amount to an admission that he had been violent towards her."

[7] In August's case, at the age of 13 the applicant committed consensual buggery as the active party with a 53 year old man who was subsequently convicted of that and other offences. The Court of Appeal, dismissing the applicant's appeal, held that the panel had been justified in thinking that the issue of the applicant's consent was relevant to the construction and application of "crime of violence" and was the only live issue before them.

[8] At paragraph 78 Sir Anthony Evans laid out useful guidance to determining whether or not a crime of violence has been committed for the purposes of the scheme. His approach was:

> "First, to identify the crime that was committed, and then to consider whether in the circumstances of the particular case the crime can properly and naturally be described as a crime of violence taking into account the following factors in particular:
>
> (1) `Crime of violence' includes personal injury caused by arson and by poisoning;
>
> (2) The statutory definition implies a non consenting victim …;
>
> (3) It also implies a non consenting victim in fact as distinct from any deemed lack of consent in law …; and
>
> (4) `Non consenting' means the absence of `real' consent freely and voluntarily given".

[9] At paragraph 80 Sir Anthony Evans went to say:

> "So, for example, the offence of rape negatives consent by the victim and I doubt whether rape could ever not be a `crime of violence' committed towards her. Sexual intercourse is not an offence unless the girl is aged less than 16, and her consent is not relevant as a matter of law … . But I would not hold that it can never be a crime of violence against her, and in the absence of real consent freely and voluntarily given I would hold that invariably it is, notwithstanding that the offence of rape was not charged or proved".

[10] At paragraph 95 Pull LJ said:

> "In considering whether there was a real consent, it was necessary to consider all the circumstances, including his age, background history and personality".

Background facts.

[11] It was the Applicant's case that on the night of 11 August 2004, when she was 14 years of age, she had been raped by a youth, identified as S, in Enniskillen ("the incident"). This youth was subsequently arrested on

suspicion of rape. Subsequently on the direction of the Public Prosecution Service, he was dealt with by the administration of an informed warning for unlawful carnal knowledge.

[12] The Applicant made a statement to the police in which she said that on the evening of the incident she had been in the company of a number of young people when she had met S and some of his friends. In the course of her statement the applicant indicated that she had consumed a considerable amount of vodka. She had left her friend to go off alone to a nearby lakeside with S. She claimed that when they had gone to the lakeside area he had raped her.

[13] Interviewed under caution by the police S had confirmed that sexual intercourse had taken place but stated that the applicant had told him she was 16 years of age and had consented. In an affidavit by Mr Connor Heaney, the solicitor on behalf of the Applicant, he relied upon the following matters at paragraphs 6 et seq:

> "The suspect stated that:
>
> `I asked her, do you want are you sure you want it it's up to you, its all your choice, I asked her about that 4 or 5 times. She didn't say no'.
>
> The suspect further stated that:
>
> `.. she got on top of me and she didn't say anything I asked her are you sure you want to do this, it's all up to you, she didn't say no or anything'."

[14] Mr Heaney further relied upon the following matter in his affidavit:

> "The following further exchange took place between police and the suspect:
>
> `Q – And you say you asked her 4 or 5 times?
>
> A – I asked her quite a few times.
>
> Q – What was her reply?
>
> A – She didn't that's why I asked her the first time I didn't hear a reply or anything and I asked her again and again, she didn't say no or anything she just sort of mumbled and carried on'."

[15] The hearing before the Panel took place on 11 February 2008. On that date the Panel gave oral reasons for the decision confirmed by a decision notice issued to the parties on that day. A more detailed written account of the reasons was given on 12 March 2008 ("the written decision").

[16] In the course of the written decision, the chairman confirmed that the Applicant herself had not attended the hearing but she was represented by Mr Heaney Solicitor. It was explained to Mr Heaney that in the proceedings before the Panel it was the responsibility of the appellant to make out her case and that in this respect her absence might be disadvantageous to her. Her solicitor however had confirmed that he wished to proceed with the hearing and had authority to do so.

[17] The Panel considered the documentary evidence before it, the oral evidence of Constable Hood who had been the Investigating Officer of the incident and submissions made by the Presenting Officer and Mr Heaney Solicitor on behalf of the applicant. In the course of that hearing the Investigating Officer did not wish to disclose a police recommendation made in relation to the disposal of the matter and was not compelled to do so by the Panel. Mr Heaney did not require the answer to be given.

[18] The written reasons provided by the Panel, at paragraph 10, noted that:

> "(i) Although in her statement to police the Applicant said that she did `not really like S' when she first met him she `didn't pull away' when he had kissed her in the street but had `kissed him also'.
>
> (ii) MF (*a witness who had been in S's company)* said in his police statement that `S and her were all over each other, they were standing face on to each other and he had his arms around her with his hands on her bum. She had her arms around him also. They were both kissing each other'.
>
> (iii) In her statement the Applicant provided no meaningful explanation as to why she had left her friend to go off alone to the lakeside with S.
>
> (iv) MF stated that he noticed out of the corner of his eye that the blond girl and S were crossing the road to the riverside. She was holding his hand walking in front of him leading him across

> the road and they disappeared walking through an opening and down to the riverbank'.
>
> (v) The mud stains on S's clothing were consistent with his allegation that the Applicant was `completely in control' and had been on top of him when the intercourse took place."

I observe that the Panel had recorded oral evidence from Constable Hood describing the various mud stains on the back of S.

[19] The panel then concluded that, on the balance of probabilities, the Applicant had consented to sexual intercourse with S. It then considered the cases of Piercey and August. At paragraph 14 the panel stated:

> "Having concluded that the Applicant had in fact consented to sexual intercourse with S, the Panel considered whether or not there was anything in the circumstances which suggested that consent was not informed and freely given. The Panel concluded that on the available evidence the Applicant had, on the balance of probabilities, freely consented to sexual intercourse and had fully understood the nature of the act to which she was consenting."

Conclusion.

[20] At the leave stage the judge needs to be satisfied that there is a proper basis for claiming judicial review. It is wrong to grant leave without identifying an appropriate issue on which the case can properly proceed. It is not enough that a case is potentially arguable or for the papers to disclose what might on further consideration turn out to be an arguable case. What is meant by an arguable ground in judicial review is one having a real or a sensible prospect of suspect. Whether there is an arguable ground for judicial review includes whether there is some properly arguable vitiating flaw such as unlawfulness, unfairness or unreasonableness.

[21] Mr Sayers, who appeared on behalf of the Applicant, submitted that the Panel had misdirected itself as to the concept of consent. It had, he contended, adopted an improper two stage approach to the concept reaching a conclusion first on the question of whether the applicant had consented to sexual intercourse with the offender, and thereafter considering the question of whether the consent was informed and freely given. I do not find that an arguable matter. It is clear that this Panel had carefully considered both Piercey and August. Whilst a sound approach to considering whether or not

`a crime of violence' has been committed, is that laid down by Sir Anthony Evans at paragraphs 78 and 80 of August (see paragraph 8 of this judgment), I am satisfied that the Panel in this instance adopted a correct approach. It is clear that paragraph 11 of the written decision refers to the factual background i.e. whether in fact the applicant gave consent and then, properly relying on Piercey and August, the Panel asked whether that factual consent had been freely given and was informed. I am satisfied that that was a correct approach and I reject the submission by Mr Sayers to the contrary.

[22] Mr Sayers also submitted that there was an arguable case that the Applicant had merely submitted rather than freely consented. He drew attention to the fact that the Panel had not made any mention of the concept of submission. Counsel relied upon the fact that the Applicant had failed to answer the offender's requests for an expression of consent (see paragraph 14 of this judgment). I do not consider this to be an arguable point. The Panel had the full statement of the Applicant before them, together with the statement of S, the evidence of the investigating officer and the witness MF. The members had clearly read August's case. At paragraph 77 of that judgment Sir Anthony Evans deals specifically with the issue of where a victim submits to the sexual act but does not consent voluntarily to it. It is in this paragraph that the judge expressly refers to the consent being "real", freely and voluntarily given. I am satisfied that the Panel had fully considered this aspect of the law and applied it to the facts in this case (see paragraph 14 of the Panel's decision set out in paragraph 19 of this judgment). It seems clear to me that they were well aware of what constituted informed consent freely given and therefore obviously understood the distinction between that and submission. The express reference to a consent that was "not informed and freely given" satisfies me that they were aware of the correct test. A decision maker must be given a certain latitude in how he expresses himself in giving a decision (see R v Brent ex Baruwa(19971029 H.L.R915 @ 929). Courts should not scrutinise reasons given for the decision with the analytical rigour employed on trusts or statutes. Reasons need not necessarily deal with every material consideration (see South Bucks (2004)1 W.L.R.1953 at [36]).

[23] I reject the argument that the Panel failed to adequately discharge its duty of inquiry by failing to require the police officer in charge of the case to disclose the police recommendation made in relation to the disposal of the matter. In the first place I do not consider that a police officer's opinion on whether or not S ought to have been prosecuted was in any way relevant and probably would have been objectionable as a matter of evidence. Secondly, it is noteworthy that Mr Heaney the solicitor for the Applicant did not require the Panel to ask the police officer to give this answer. I am certain he was correct in so doing and reflected his knowledge of the law.

[24] Finally, Mr Sayers argued that the Panel had fallen into error in concluding that the Applicant gave real and informed consent to sexual intercourse without giving any or adequate consideration to relevant factors including the age of the applicant, evidence that alcohol had been taken by both parties, the possibility of the suspect's evidence being self-serving, the possibility that the Applicant's consent was limited to a degree of sexual activity other than sexual intercourse, evidence of the distress of the Applicant, the Applicant's prompt complaint of rape and the fact that MF had been a friend of S. I do not find any of these matters arguable grounds for review. The Panel members knew the age of this Applicant and expressly referred to it in paragraph 5 of the written decision. They had read the statement of both parties wherein there was clear reference to the drink taken by both. In so doing they would have been aware of the possibility of the suspect's evidence being self-serving; that there might only have been limited consent and that she was allegedly distressed and complained of rape. It was also obvious in the papers that MF had been in the company of S. The fact of the matter is that the Applicant's solicitor was present at the hearing, had the opportunity to cross-examine, and made submissions doubtless drawing all of these matters to the attention of the Panel. As I have indicated in paragraph 22 of this judgment it is well accepted that a decision does not have to specify each and every fact upon which it relies for its reasons provided it is clear from that the matter has been carefully considered. I am satisfied that the Panel followed the proper procedure in this case. In August's case Sir Anthony Evans set out the following suggestions for panels to adopt at paragraph 86:

> "I would suggest that some reasons ought to be given for the board's decisions, their nature and extent, depending on the circumstances of the case, and that sufficient reasons should be prepared soon after the hearing, rather than many months later as occurred here, though apparently this has been the accepted practice to date".

[25] I am of the view that the Panel followed the spirit of this guideline and that the reasons set out in this instance were more than adequate for the purpose. It must be borne in mind that the Applicant did not attend the hearing and Mr Heaney confirmed that he had authority to continue in her absence. The Panel therefore was relying purely on the statements before it and the evidence of the hearing. In my view there is no reason to believe, or basis to argue, that all the relevant material was not taken into account by the Panel members.

[26] In the circumstances I therefore refuse leave to apply for judicial review.