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Judgment: approved by the Court for handing down | *Delivered:* **03/04/09**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Y's Application (The mother of X) [2009] NICA 22

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

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AND IN THE MATTER OF A DECISION OF THE CRIMINAL INJURIES COMPENSATION APPEALS PANEL FOR NORTHERN IRELAND

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Before: Higgins LJ, Girvan LJ and Morgan J

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GIRVAN LJ

Introduction

[1] This is an appeal from the decision of Gillen J refusing the appellant leave to apply for judicial review of a decision of the Criminal Injuries Compensation Panel for Northern Ireland ("the Panel"). The Panel by its decision of 11 February 2008 refused her application for compensation for mental and nervous shock and physical injury which it was alleged she sustained as a result of being raped on 11 August 2004. The Panel provided more detailed written reasons subsequent to its decision at the request of the appellant on 12 March 2008.

The relevant provisions of the scheme

[2] The Northern Ireland Criminal Injuries Compensation Scheme 2002 ("the Scheme") makes provision for the payment of compensation to a person who has sustained a criminal injury. To qualify as a criminal injury an injury

must have been sustained in Northern Ireland and fall within paragraph 8(a) or (b). Paragraph (b) is irrelevant in the present case. Paragraph 8(a) requires the injury to be directly attributable to "a crime of violence". The term "crime of violence" is not defined in the Scheme but the relevant Guide to the Scheme published by the Compensation Agency to which regard must be had makes clear, if it were not already evident, that it includes a sexual offence. Paragraph 10 of the Scheme provides that personal injury includes physical and mental injury. Paragraph 10 further provides:

> "Mental injury or disease may either result directly from the physical injury from a sexual offence or may occur without any physical injury, but compensation will not be payable for mental injury or disease without physical injury, or in respect of a sexual offence, unless the applicant
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> …
>
> (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).

The factual background

[3] The appellant alleged that on the night of 11 August 2004 when she was 14 years of age she was raped in Enniskillen by an English youth (identified as S). Although the youth was arrested and questioned on suspicion of rape, the Prosecution Service concluded that he should be dealt with by the administration of an informed warning for unlawful carnal knowledge.

[4] It was the appellant's case that she had been in the company of a number of young people when she met S and some of his male friends. She said that she had consumed a considerable amount of vodka. She left her friends to go off alone to a nearby lakeside with S where she alleged she was raped by him. In her statement in support of her application for compensation she stated that soon after she met S and before she went to the Lakeside with him they were kissing. When he took her to the secluded area within a short time he pushed her down on the grass and she struggled but he held her down, removed her underwear and raped her once. She got up and ran away. She described the incident as a terrifying sexual attack. Her statement to the police provided further details of her version of events. In her statement she described S bringing her down steps to the waterside and asking her how far did she want to go with him. She told him that she was

going with somebody else but S persisted and starting having sex with her. When her friend called to her she ran off and told her friend everything that had happened.

[5] F, a 20 years old young man who was coming out of a nearby bar struck up a conversation with one of the three men who were outside the bar talking to two girls. He noted that S and one of the girls were all over each other standing face to face. He had his arms around her with his hands on her bottom. They were kissing each other. As he and the others walked up the road he noticed that S and the girl were crossing the road to the riverside and he saw her holding S's hand. They went down to the waterside. F later received a text message from one of the other males telling him that S had been arrested. F came to the police and stated that he had never met S or his friends before that night and had no reason to lie.

[6] When interviewed under caution S confirmed that sexual intercourse had taken place. He said that the appellant had told him that she was 16 and that she had consented. He said "I asked her are you sure you want it its up to you its all your choice". He said he asked her that 4 or 5 times and she did not say no. He also alleged that she got on top of him and she did not say anything. He asked her if she was sure she wanted to do this and that it was up to her. She did not say anything in reply. He further said that he asked her quite a few times. He did not hear a reply or anything and he asked her again and again. According to S she did not say no or anything else, she just sort of mumbled and carried on. He alleged that she was fully in control of herself and of the situation.

[7] PC Hood who gave evidence before the Panel stated that there was some marking on the applicant's skirt but because it had an elasticated waistband it was not obvious whether it was back or the front. However, mud was found on the back of S's shirt and the back of his underpants.

The Panel's decision

[8] The Panel, which was chaired by Professor Wallace, decided that the appellant was not entitled to an award of compensation. The appellant did not attend before the Panel and thus did not give oral evidence and submit to cross-examination. The Panel did point out to her solicitor that the absence of the appellant might be disadvantageous to her case. The appellant's solicitor confirmed that his instructions were to proceed. The solicitor submitted that by accepting an informed warning S had accepted that a criminal offence had occurred and that in consequence the appellant was entitled to compensation. He submitted that the issue of consent was irrelevant. In making this submission the appellant's solicitor failed to have regard to the provisions of paragraph 10(c) of the Scheme.

[9] On the day of the hearing on 11 February 2008 the Panel decided to dismiss the application. In its written record of the decision on that date the Panel stated:

> "Having considered all of the evidence available to it the Panel concluded that on a balance of probabilities the applicant had consented to sexual intercourse and that, although she was a minor, her consent was real and informed and therefore precluded an award for compensation under the Scheme."

[10] Following a request for more detailed written reasons the Panel provided reasons on 12 March 2008. Paragraphs 10 to 14 of the written reasons set out the Panel's reasoning thus:

> "10. The Panel considered the documentary evidence before it, the oral evidence of Constable Hood and the submissions made by the Presenting Officer and Mr Heaney. In particular the Panel noted that:
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> (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) (F) 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) (F) stated that he 'noticed out of the corner of his eye that the blonde 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 intercourse took place.

11. Having considered the available evidence the Panel concluded that, on the balance of probabilities, the applicant had consented to sexual intercourse with S.

12. The Panel noted that in R v CICB ex parte Piercey (1997) CLYB 1191, it had been held that the consent of a 12 year old girl to sexual intercourse with an older man meant that she was not the victim of a 'crime of violence' within the meaning of the prevailing English criminal injuries scheme. The Panel also noted that in R v CICAP ex parte August [2001] QB 774 it was held by the Court of Appeal that an act of buggery of a 53 year old man against a 13 year old boy was not a 'crime of violence' for criminal injury purposes because the boy had consented to it.

13. The Panel recognised that, whilst highly persuasive, the above authorities are not binding in Northern Ireland. However, it concluded that issue was put beyond doubt by Paragraph 10 of the Scheme which stipulates that compensation is not payable in respect of a sexual offence unless the applicant:

> "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).'

14. Having concluded that the applicant 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."

Submissions

[11] Mr Sayers in his well marshalled argument submitted that on the evidence before the Panel the disputed issue of the applicant's consent required detailed and expressed consideration of factors including the age of the parties, particularly the applicant, the alcohol consumed by both and the effect thereof, the extent of any consent given and whether such consent was in fact withdrawn at a time prior to the commencement of the offence. Counsel argued that the Panel adopted a flawed approach to the question of consent in paragraph 11 and 14 of its written reasons. The concept of consent is indivisible. In adopting a two stage approach there was a clear risk that the answer, improperly reached, to the first question (*did the applicant give consent?)* might infect the answer to the second question (*did anything suggest that consent was not informed or freely given?*). The written reasons contained no reference to the issue of voluntary intoxication and consent and no reference to S's indication that the consent had not been clear or expressed. The Panel had failed to direct itself on the question of the effect of alcohol on a 14 year old girl's capacity to consent despite evidence that the applicant failed to respond to repeated requests for express consent and just sort of mumbled and carried on. Consent in fact must be distinguished from consent in law. It is not however correct to view consent in fact as being vitiated by the quality of the purported consent, that is, that it was real, freely and voluntarily given. In such a case there is no consent in fact. Counsel called in aid what Hallett LJ stated in Hysa [2007] EWCA Crim. 2056:

> "In case of rape where there was evidence of drink and the issue was consent 'the critical question is not how she came to take the drink but whether she understood her situation and was capable of making up her mind. … Attention should have been focused upon the state of her understanding and her capacity to express judgment in the circumstances."

The trial judge was wrong to conclude that the matters raised were not arguable and counsel argued that the threshold test for arguability was clearly established.

[12] Mr Scoffield in his clear and succinct submissions argued that Gillen J had applied the correct threshold test for leave. Whatever the propriety of applying a heightened arguability threshold (requiring a reasonable or realistic prospect of success) at first instance, there is authority for the court doing so at the appeal level (Re Omagh District Council v Minister of Health [2004] NICA 10). Counsel argued that the Panel correctly directed itself to paragraph 10(c). It is for the claimant to establish her entitlement to

compensation. The burden was on the appellant to prove that she did not consent to the sexual intercourse. The submission of the applicant's solicitor before the Panel that the consent was irrelevant was misconceived. The issue of consent was central. There was no obligation on the Panel to deliberate on the issue since this was not an issue raised on behalf of the applicant (Re Winters [2007] NICA 46). In relation to the question of consent the Panel did ask itself whether consent was freely given. Read fairly and in bonam partem this is what the Panel decision discloses. The court should only intervene if there was a material error of law. Even if the two stage analysis was wrong given the Panel's conclusions in paragraph 14 of its reasons it simply formed an ultimate view on the question of consent. The failure to conclude the analysis proposed by the appellant could not be said to be a material error of law which would give rise to the granting of relief. There was no evidence to suggest the Panel failed to consider the issue of mere submission. The level of enquiry was a matter for the Panel subject to Wednesbury irrationality. The Panel was clearly aware of her age and the evidence of intoxication and paragraph 10 of the ruling makes clear that the Panel conscientiously considered all the relevant evidence.

Discussion

The leave threshold

[13] An applicant for judicial review must have leave to bring proceedings. The requirement for leave serves a number of purposes. It deters or eliminates ill-founded claims without the need for a full hearing of the matter. It provides a mechanism for the efficient management of judicial review cases. It is also advantageous in enabling the litigant. expeditiously and cheaply, to obtain the views of the court on the merits of the application at the outset.

[14] The threshold to be passed at the leave stage has been described as a "modest hurdle" per Kerr J in Morrow and Campbell's Application [2001] NI 261. In Re UK Waste Management's Application [2002] NI 130 the Court of Appeal stated that where a matter is sufficiently difficult to require argument from both parties it is ordinarily appropriate for leave to be given if the matter cannot be clearly resolved against the applicant. Gordon Anthony points out in "Judicial Review in Northern Ireland" at page 67 that how the test of arguability is applied will depend on the material available at the leave stage and on the view of the judge hearing the application. The corresponding modesty of the hurdle may vary accordingly. In appropriate cases when a court is in possession of all the relevant material and is in a position, in the light of the argument, to reach a clear view as to the inability of the applicant to make out his case for judicial review then the threshold of arguability will not have been established. The court may refuse leave or alternatively it may treat the matter as a rolled up hearing, grant leave and

dismiss the application. In the present instance the judge, having had full argument and being in possession of all the relevant material (as is this court) concluded that the appellant was bound to fail in her challenge to the decision. For the reasons set out below we consider that Gillen J was right to refuse the application for leave. Having reached the conclusion which he did in the light of the full argument presented to him he was entitled to refuse leave on the basis that the applicant was bound to lose. He could alternatively have granted leave and refused the application.

The appellant's challenge to the Panel's decision

[15] The Panel's decision must be read as a whole and in bonam partem. Due credit must be given to the fact that the chairman of the Panel is legally qualified and its reasoning must be read bearing in mind that not every issue which is considered and discounted needs to be addressed. The reasons given must be "intelligible and adequate and should enable the reader to understand what conclusions were reached on the principal issues." (Re Waide's Application [2008] NICA 1). The court in Re Waide made clear that adverse inferences against the Panel's decision should not readily be drawn. Lord Hope in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11 at paragraph [59] set out the proper approach to an analysis of the reasoning of a lower tribunal in words which are equally applicable to the reasoning adopted by the Panel in this case:

> "The quality which is to be expected of its reasoning is not that to be expected of a High Court judge. Its reasoning ought to be explained but the circumstances in which a Tribunal works should be respected. The reasoning ought not to be subjected to an unduly critical analysis."

Where it is alleged that the decision-maker such as the Panel did not have regard to a material factor (such as in this case the degree of the appellant's intoxication) the appellant must adduce some evidence or a sufficient inference that it failed to do so (per Carswell LCJ in Re SOS (NI) Limited [2003] NIJB 252.

[16] The Scheme required the appellant to prove that she was the victim of a crime of violence. The Scheme pre-concludes compensation for mental injury in regard to a sexual offence if the appellant is in fact a consensual participant in what is otherwise a crime. While paragraph 10(c) of the Scheme is dealing with mental injury and the reference to a consensual victim is not expressed in terms relating to personal injuries in respect of a crime of violence, the concept of a crime of violence itself points to a victim who is not a consensual participant. The mere fact that a girl under the age of 17 was the victim of a crime because in law she could not consent to sexual intercourse,

does not mean that she has been the victim of a violent crime if in fact she was consenting to the act. "Consenting" in this context means, as Sir Anthony Evans points out in Re August [2001] QB 774, real consent, freely and voluntarily given.

[17] In paragraph 11 of its reasons the Panel concluded on the available evidence that the appellant consented "to sexual intercourse with S". In paragraph 14 it went on to consider as a separate question whether the consent was not informed and freely given. Since that question had to be asked in any event before a finding of consent could logically have been made for the purposes of paragraph 11 the Panel's finding at paragraph 11 suggests that the Panel considered at that stage of its reasoning that "consent" meant something less than consent informed and freely given. To that extent there is force in Mr Sayers argument that in answering the question implied in paragraph 11, the Panel failed to understand what had to be established in order to show real consent. While it is possible that the Panel in paragraph 11 was focusing on the question whether there was a crime of violence, nevertheless if the consent of the complainant was not free and informed, the rape would have been a crime of violence. However, the Panel's decision must be read in its entirety and even if, at the stage of answering the question implied in paragraph 11, the Panel misdirected itself on the meaning of consent when it came to consider the question implied in paragraph 14, it clearly asked itself the right ultimate question and reviewed the question of consent in the light of that properly formulated question. Reading paragraphs 10 to 14 as a whole it is clear that the Panel did not fail to address the proper question which was whether the sexual intercourse was truly a consensual act with the appellant giving her free and informed consent. There was a clear evidential basis upon which the Panel was entitled to conclude that the appellant had failed to show that she was a non-consensual participant in the sexual intercourse.

[18] There is nothing to suggest that the Panel in reaching its conclusion left out of account the age of the appellant, the amount of alcohol which she and S had consumed and the weight to be attached to the evidence of F. Its finding of a true and informed consent showed that the Panel had been satisfied that the appellant was not merely submitting to non-consensual sexual intercourse but was a fully consenting participant therein.

[19] Accordingly we conclude that Gillen J was correct in his conclusion and we dismiss the appeal.