NEUTRAL CITATION NUMBER: [2004] EWHC 1674 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 July 2004

Before :

THE HONOURABLE MR JUSTICE SILBER

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Case No: CO/2690/2000

Between :

THE QUEEN ON THE APPLICATION OF CD **Claimant**

- and -

CRIMINAL INJURIES COMPENSATION APPEAL PANEL **Defendant**

- and -

Case No: CO/2128/2001

THE QUEEN ON THE APPLICATION OF JM **Claimant**

- and -

CRIMINAL INJURIES COMPENSATION APPEAL PANEL **Defendant**

- -

Carolyn Hamilton (instructed by **Joan Vis Solicitors** for CD) and (instructed by **Jackson and Canter**) for JM
Jason Coppel (instructed by **Treasury Solicitor**) for the defendant in both cases

Hearing date : 25 May 2004

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JUDGMENT : APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

Mr Justice Silber:

I Introduction

1. These two judicial review applications both raise the issue of how the Criminal Injuries Compensation Appeals Panel ("the panel") should have approached these claims for compensation by two girl applicants who have claimed to be victims of a "crime of violence" in circumstances in which it is contended that the girl applicants consented to the conduct complained of.

2. CD sought compensation under the terms of the Criminal Injuries Compensation Scheme ("the Scheme") because of an act of unlawful sexual intercourse, which had been committed against her by RW. Her claim was rejected and she appealed to the panel, who rejected her appeal on the grounds that she had not been the victim of a "crime of violence".

3. JM also sought compensation under the terms of the Scheme on the grounds that she had been sexually assaulted by ST. Her claim was also rejected and she also appealed to the panel, which also rejected her appeal on the grounds that it was not satisfied that she had been the victim of a "crime of violence".

4. Scott Baker J (as he then was) gave CD permission to apply for judicial review while I gave JM permission to apply for judicial review. Both of these applications raise similar issues on whether the decision of the panel can be quashed on the basis that the decisions to deprive JM and CD of any right to compensation under the Scheme cannot be justified by the reasoning given in each case by the panel. Both of these applications were heard together.

II The Scheme

5. **The Criminal Injuries Compensation Act 1995** ("the 1995 Act") authorised the Home Secretary to introduce or amend the previous non-statutory Scheme under which criminal injuries compensation was paid. The Scheme with which these applications are concerned and to which reference will be made in this judgment came into effect on 1 April 1996.

6. Under paragraph 6 of the Scheme, compensation may be paid to:-

> "An applicant who has sustained a criminal injury …".

7. A "criminal injury" is defined by paragraph 8 of the Scheme as, with my italicisation added:-

> "For the purposes of this Scheme, "criminal injury" means one or more personal injuries as described in the following

> paragraph, being an injury sustained in Great Britain and directly attributable to:
>
> (a) *a crime of violence …*".

8. A "crime of violence" is not defined. Guidance has been given on its nature in the Court of Appeal's decisions in **R v. Criminal Injuries Compensation Board, ex parte Webb** [1987] 1 QB 74, **R (August) v. The Criminal Injuries Compensation Appeal Panel** [2001] QB 774 and **R (on the application of JE) v. The Criminal Injuries Compensation Appeals Panel** [2003] EWCA Civ 237, to which I shall return.

9. A "personal injury" is defined by paragraph 9 of the Scheme. That paragraph states, with my italicisation added, that:-

> "For the purposes of this Scheme, *personal injury* includes physical injury (including fatal injury), mental injury (that is, a medically recognised psychiatric or psychological illness) and disease … Mental injury or disease may either result directly from the physical injury or occur without any physical injury, but compensation will not be payable for mental injury alone unless the applicant … (c) was the *non-consenting victim of a sexual offence* (which does not include a victim who consented in fact but was deemed in law not to have consented) …" (emphasis added).

10. Paragraphs 18 and 64 of the Scheme place the burden of proof on the applicant to show that on the balance of probabilities he or she has suffered a "criminal injury".

11. In **JE**, Lord Woolf CJ giving the judgment of the Court of Appeal set out an invaluable account of how claims under the Scheme were usually dealt with and a copy of this account is to be found in the Appendix to this judgment.

III What is a "Crime of Violence"?

12. As I have explained, the central issue on both these applications was whether CD and JM were the victims of a "crime of violence". Eight important general propositions emerge from the decision of the Court of Appeal in **August** and they are that:-

> "(i) the concept of "crime of violence" is not a term of art" (per Buxton LJ [21]);
> (ii) "the issue for the panel of whether a crime of violence has taken place is a jury question. As it was put in **Ex p Webb** [1987] QB 74, 78 it depends on a "reasonable and literate man's understanding of the circumstances in which he could under the scheme be paid compensation" for personal injury caused by a crime of violence" (ibid);

(iii) "that question is not technical or complicated: as it was put in **Ex p Webb**, the panel, at paragraph 80:

> "will recognise a crime of violence when they hear about it, even though as a matter of semantics it may be difficult to produce a definition which is not too narrow or so wide as to produce abused consequences …"" (ibid);

(iv) "the correct approach is not to classify particular offences, i.e. particular crimes such as "buggery" or "assault", as crimes of violence. Rather, the task of the panel is to decide whether the events that actually occurred were (i) a crime; (ii) a crime of violence" (ibid);

(v) "in performing that task, the panel has to look at the nature, and not at the results, of the unlawful conduct" (ibid);

(vi) "it also implies a non-consenting victim in fact as distinct from any deemed lack of consent in law" (per Sir Anthony Evans [78]);

(vii) "non-consenting means the absence of "real" consent, freely and voluntarily given" (ibid).

(viii) A sexual offence committed against a person who is *deemed* to be incapable of giving consent in law, will not usually constitute a crime of violence if the victim did in fact consent (per Pill LJ [104]).

13. In **JE**, Lord Woolf CJ reviewed the authorities on the meaning of consent and he then explained that:-

> "In our judgment properly understood, the court in **August** recognised that a crime could be a crime of violence as long as there was not "real consent". Real consent may exclude a crime from eligibility under the Scheme. Consent that is not real will not do so. Nor will submission, which is not the same thing as consent. It is always important to assess whether the applicant can still properly be regarded as a victim. In each case, the panel has to ask itself whether the proper conclusion on the facts is that the applicant was, in relation to what happened, a victim of a crime of violence. This will be the situation if there was no real consent" [28].

14. Miss. Carolyn Hamilton for JM and CD contends that the decisions of the panels to deprive JM and CD of their right to compensation under the Scheme cannot be justified by the reasoning which was given in each case by the panels because in each case, there was a failure to consider properly whether each claimant gave her "real consent" rather than submitted to the wishes of the perpetrators.

IV Two Preliminary Points

15. Before turning to the facts of the cases, it is appropriate to deal with two preliminary submissions of Miss. Hamilton. First, she contends that in considering those applications, I should take into account any changes of *statutory* law, which occurred after the offences in question were committed and even after the panel had made its decision. In support of that contention, she relies on the comment made by Lord Woolf CJ in **JE** that "in relation to the law, we are not necessarily confined to the legal position as it was when the panel came to their decision" [11].

16. Mr. Coppel submits, correctly in my view, that this comment only relates to subsequent court *decisions* and not to subsequent statutory changes. This submission is borne out by the next sentence in Lord Woolf's judgment in **JE** in which he said, with my italicisation added, that "we are entitled to take into account *decisions of the courts* that have clarified the law since that time" [11]. Statutory changes of criminal law cannot be taken into account because the panel's task was to see if CD and JM were victims of any "crime of violence" and this has to be a "crime of violence", which was a crime as at the time of the alleged wrongdoing. My task is to see if those decisions are impugnable on recognised public law grounds.

17. A second preliminary point relates to the use in these proceedings of the more detailed reasons, which have been given by the chairmen of the panels in order to explain to this court for the purpose of the present proceedings the reasons for those decisions, even though these detailed reasons have been supplied some years after they had made their decision under challenge. No transcripts of the proceedings in front of this panel are available. At the conclusion of each hearing, the Chairmen of the respective panels gave brief oral reasons. These were then developed in a letter in JM's case, which was later sent to the claimant's solicitor in response to a request for more detailed reasons from them. Subsequently, after the present proceedings had been commenced, the two Chairmen of the panels who dealt with CD's case and with JM's case have each made witness statements in which they explained in greater detail their reasoning.

18. Initially, Miss. Hamilton objected to me considering the reasoning in the two witness statements but then, later in her submissions, she herself sought to rely on the reasons in the witness statements of the Chairmen. In **August**, Pill LJ expressed "misgivings" [125] about the procedure adopted in those conjoined appeals of giving reasons eight months and seven months after the decision. The delay in CD's case was 7 months and in JM's case the delay was of three years. The delay in JM's case is particularly long and I will have to consider its significance later in this judgment.

19. Eventually, Miss. Hamilton agreed, correctly in my view, that the proper approach of this court to those more detailed reasons supplied after the hearing was, as stated by Lord Bingham CJ in **R v. The Parole Board and another ex parte Oyston** (unreported 1 March 2000 – CA), in which he said in relation to material submitted to the court after a decision had been made to justify a parole decision that:-

> "It is accepted that the court may receive additional material to elaborate and expand the reasons given in the decision letter such as this, but the reasons for caution are obvious" [46].

20. Latham J (as he then was) pointed out that "the court will be alert to ensure that the affidavit [seeking to justify an earlier decision] is genuinely directed to telling the court what happened at the time the decision was taken and not merely to giving the court an ex post factor rationalisation, which could not be admissible" (**S v. Special Educational Needs Tribunal** [1995] 1 WLR 1627, 1637). This approach is consistent with the long established concerns of the courts about reasons taken after a decision has been given (see for example **R v. Westminster City Council ex p Ermakov** [1996] 2 All ER 302, 312, 315-6). The degree of caution required in considering reasons given to justify an earlier decision depends on all the circumstances and they will include first, the length of the period between the hearing and the supply of the reasons, second, the correlation between the reasons in the witness statement and the original reasons given at or close to the actual hearing and third, if the reasons are only put forward after the commencement of proceedings (**R (on the application of Nash) v. Chelsea College of Design** [2001] EWHC Admin 538).

IV CD's Application

21. CD, who was born on 27 August 1983, contends that she was the victim of "a crime of violence" because she did not give her real consent to sexual intercourse with RW which took place on 17 August 1996. Approximately one year later and without informing the claimant, the claimant's mother claimed compensation under the Scheme. Her claim was refused by the Criminal Injuries Compensation Authority and an appeal was brought before the panel, which on 13 March 2000 heard and dismissed the appeal. It is that decision which is the subject of the present challenge.

22. The members of that panel were His Honour Eric Stockdale, a distinguished retired Circuit Judge, Dame Anne Poole, a former nurse who became the Government Chief Nursing Officer, Mr. Alexander McIlwain, a former President of the Law Society of Scotland and Mr. David de Peyer, a former Under-Secretary in the Department of Health and Social Security, who was also a former Director-General of Cancer Research Campaign.

23. CD gave evidence to the panel and she was initially asked by the Authority's presenting officer about what she had said in interview to the police about some comments contained in her friends' statements as well as assertions made by RW in his interview with the police. CD explained that before the incident complained of, she had drunk alcohol as she and her friends used to buy a litre bottle of cider. CD's case was that the two men, GN and RW had driven to Wendover Woods with CD and her two girlfriends. The men provided CD with Ice Dragon, which has a high alcohol content and which had been consumed on the way to Wendover Woods. CD said upon reaching the woods, GN walked off with the other girls leaving the claimant and RW alone. She said that she had consumed three-quarters of the bottle by this time and that was more than she normally drank with the result that CD said before she had sexual intercourse that she had been drunk, that she could hardly walk and that she had been slurring her words.

24. CD stated that RW repeatedly asked her for sex when they were alone but she was feeling the effects of the strong lager as she was intoxicated at this time to the extent that she could hardly stand up. She said that she refused sex and that she attempted to run away from RW.

25. CD said that she ran up a hill but that she fell over with RW following her and continuing to pressure and pester her for sex. CD said she finally gave in and that she allowed RW to have sex with her believing that he would stop pestering her if she agreed.

26. CD did not disclose this sexual assault immediately as she said that she had been told not to do so by RW of whom she was frightened. In addition, she said she was afraid of anyone knowing what had occurred. The episode came to light when CD informed her mother seven days later. The police were informed on 24 August 1996. RW was then charged with having unlawful sexual intercourse with CD a girl under the age of 13. He pleaded guilty to that charge and he was duly sentenced to one year's imprisonment.

27. In front of the panel, CD said she was prepared to kiss and cuddle with an older man who, like RW, thought she was pretty but she did not want to have sexual intercourse with them. CD's mother told the panel that she did not think CD had been mature enough to give informed consent. Ms. Chloe Willets, a retired teacher told the panel that she knew the applicant, but she thought that no 12 year old who she knew was capable of understanding sex or was ready for it. She considered that it was impossible for a 12 year old to sustain saying "no" to demands for sexual intercourse.

28. The appeal panel considered the applicant's claim and rejected it. The reasons that were then given orally were that:-

> "The applicant claimed that she had been raped shortly before her 13th birthday by a man aged 21, who was subsequently sent to prison for 12 months on being charged with and pleading guilty to unlawful sexual intercourse. We were urged to find that the applicant had not consented to intercourse, and indeed that she could not have consented because of her youth and the alcohol she had consumed.
>
> We did not find the applicant to be a reliable witness. She had lied to her mother both before and after the incident. We did not accept her account of having had ¾ of a litre of cider. We were satisfied that she had had intercourse when 12½ with a boy a year older than herself.
>
> We find also that the applicant had gone voluntarily into the woods with the man, leaving her girlfriends behind; the man had neither used nor threatened violence and there is no evidence that he manipulated her in any way; the applicant had gone into the woods and emerged happily, according to her

> girlfriends, and she stated in her diary she had enjoyed intercourse. In all the circumstances we agree with the view of the police that the applicant consented to intercourse and that there was no rape. That being so we cannot find that there was any crime of violence and so cannot make any award (paragraph 8(a) of the Scheme)".

29. Subsequently, the chairman of the panel made a witness statement in October 2003 which, as I have explained, I will approach with caution. It is noteworthy first, that what is said in the witness statement is consistent with the fairly detailed reasons given orally at the time of the decision by the panel and second, that the chairman's witness statement was made on 18 October 2000, which was only seven months after the hearing which took place on 13 March 2000. In all the circumstances, I conclude that I can attach importance to what the Chairman wrote in his witness statement.

30. The Chairman's reasoning in his witness statement was that:-

(a) The main issue for the panel was the credibility of CD and the reliability of her interview and her evidence, but this was not straightforward as she had made several inconsistent and contradictory statements; examples were telling the panel that she had not liked intercourse while telling her friends and writing in her diary that she had enjoyed it. Another example of her inconsistent and contradictory statements was that CD had told the panel that she had no intention of doing anything with RW and walked away from him, but she agreed that she spoke to him about the "shag bands" which she wore on her wrists and about which she had said to RW that he would have to "shag her" if one broke and that she had told him that she had had sex with four or five other boys. Furthermore, the panel did not find it easy to know what her evidence really was about having had sexual intercourse previously as there was discrepancy between on the one hand, what CD had told the police and the claimant's mother and, on the other hand, what CD told the panel;

(b) CD explained that when she smiled when she returned after having had intercourse, she attributed her smiling demeanours to drink and embarrassment. At the time CD said and wrote that she enjoyed her sexual intercourse with RW because that is what she wanted her friends to think and so that she was better than them;

(c) RW's answers when being interviewed by the police had to be treated with caution but there were two striking matters with which CD agreed, of which the first was the conversation about the shag bands referred to in paragraph (a) above and the second was that CD told RW that she had previously had sex with four or five boys;

(d) the panel concluded that CD had had intercourse when about 12 and a half years of age with a boy who was about a year and a half older than her. This conclusion was reached in the light of the detail CD had given to the police and what CD had told her mother. The panel accepted that CD's vagina had been penetrated by a boy's penis but that it had slipped out after about 30 seconds;

(e) the panel considered the diary entry of CD that she enjoyed the act of intercourse to be significant because no member of the panel could recollect any true rape case in which the victim had made a contemporaneous statement that she had enjoyed the act of intercourse. That was a matter of some significance to the panel.

31. Miss. Hamilton contends that the panel erred by:-

(a) failing to give any adequate consideration to the degree of culpability of RW;
(b) failing to undertake the exercise of considering the relationship between CD and RW and, in particular, that in that relationship, CD was at a significant disadvantage by reason of her age, her vulnerability and her consumption of alcohol; and
(c) focussing on whether there had been a rape without then considering whether CD had given her "real" consent to the act of unlawful sexual intercourse.

32. Mr. Coppel for the defendant contends that the panel considered properly and carefully whether CD had given "true consent" and concluded that she had, which was a decision to which the panel was entitled to come.

V Discussion of CD's complaint

33. The starting point is to determine if CD was vulnerable because as Lord Woolf explained in **JE**:-

> "If it were not for [the claimant's] vulnerability, this inquiry [namely whether despite the fact the claimant consented that consent was real so as to prevent her being a victim] would not be necessary" [32].

This enquiry into determining the vulnerability of CD entails considering what facts were found and were considered by the panel.

34. CD agreed with RW about first, the conversation about the shag bands and second, the fact that CD had told RW that she had previously had sex with 4 or 5 other boys.

35. The panel explained in its reasons given orally at the end of the hearing that:-

(a) CD was not found "to be a reliable witness";
(b) CD had lied to her mother both before and after the incident;
(c) CD's account of having consumed three-quarter litres of cider was not accepted;
(d) CD had previously had intercourse when she was 12½ years with a boy older than herself;
(e) CD had gone voluntarily into the woods with RW leaving her girlfriends behind;
(f) RW had neither used nor threatened violence;
(g) "there was no evidence that [RW] had manipulated [CD] in any way";

(h) CD had emerged happily from the woods;
(i) CD stated in her diary that she had enjoyed intercourse.

36. In my view, CD was not to be regarded as "vulnerable" in the sense used by Lord Woolf not merely because of those findings which showed that she knew from her previous experience what sexual intercourse entailed and she was not manipulative in any way, but also because she had made clear her willingness to consent to intercourse by the reference to shag bands in her conversation with RW and the contemporaneous evidence, both in her diary and her demeanour show that she enjoyed it. In reaching that conclusion, I have borne in mind the fact that at 21, RW was much older than CD, who was only almost 13 years of age at the time when they had intercourse..

37. Even if CD was vulnerable, the panel did consider matters relevant to the issue of whether CD gave "real" consent. The panel found that she had gone voluntarily into the woods and that she had had intercourse with RW without the use of violence, threats of violence or manipulation by RW and after which she had emerged happily stating in her diary that she had enjoyed intercourse. It is noteworthy that the panel rejected CD's allegation that she had drunk three quarters of a litre of cider and it considered that she had gone voluntarily into the woods. It is not easy to imagine any more evidence which might indicate real consent, especially as the panel stated at the end of the haring that it "did not find [CD] to be a reliable witness".

38. CD's application is therefore very different from that of **JE** in four important ways. First, **JE** was a" defective", who had been exploited by a sexually experienced man more than twice **JE's** age, while CD had sexual intercourse with RW knowing what it entailed from her previous experience. Second, in **JE** [34], the victim had no interest in and no experience of the sexual activities complained of, but there is evidence that CD had previously shown an interest in and had experience of a sexual relationship. Third, the evidence was that CD enjoyed her intercourse with RW, while **JE** complained at the first opportunity [33].

39. Fourth, the apportionment of liability in this case was very different from that in **JE** [35]. It is important in determining whether true consent was given to consider the responsibility of the parties. In **JE**, Lord Woolf said that "if the panel had considered the relative responsibility, they would have very likely come to the conclusion that the perpetrator of the buggery of **JE** was substantially, if not entirely to blame for what occurred" [35]. In this case, the responsibility for CD having sexual intercourse with RW was considered by the panel as was shown by the matters set out in paragraphs 30 and 35 above. They show first that CD showed her willingness, if not her desire, to have intercourse first, by her reference to the shag bands, second by her deliberate decision to have intercourse with RW having had previous sexual intercourse with the result that she knew what it entailed, third by CD having intercourse in the absence of any threats, manipulation or violence by RW and finally, by her statement that she enjoyed it. Thus, responsibility between CD and RW was likely to be even or at least very different from the case of **JE** in which "the panel would have very likely come to the conclusion that [the person with whom **JE** had sexual activity] was substantially if not entirely to blame for what occurred" [35].

40. It follows that I am unable to accept Miss. Hamilton's submissions because the panel did consider the degree of culpability of the parties when it referred to matters such as the lack of manipulation by RW, the comments made by CD to RW about shag bands, her previous sexual experience and her enjoyment of the intercourse. The panel also rejected CD's claim about how much she had drunk.

41. In reaching these conclusions, I have not overlooked the evidence of Ms. Stringer, a social worker which concerned the effect on CD first, of the incident with RW, second of the ensuing court case and third of the subsequent teasing of her by other pupils. I have also borne in mind the evidence of Dr. Van Rooyen, a clinical psychologist who saw CD in about November 2003 and who concluded that in 1996, CD "would have been unable to give in form (sic) consent". The difficulty with her evidence and that of Ms. Stringer is that they reached their conclusions without the benefit of the helpful and thoughtful legal submissions which I have received on the meaning of "real" consent and the application of the important Court of Appeal decisions to which I have referred.

42. Thus, I am unable to accept CD's complaint that the panel's decision can be quashed on public law grounds.

VI JM's application

43. JM, who was born on 29 December 1967, contends that she was the subject of a "crime of violence" because she did not give her real consent to various acts of sexual assault which were committed against her on very many occasions by ST when JM was living in the home of her foster mother, JT, who was ST's mother during the period from about 1979 to 1981.

44. **Section 14(1)** of the **Sexual Offences Act 1956** provides that:-

> "(1) It is an offence … for a person to make an indecent assault on a woman;
>
> (2) A girl under the age of sixteen cannot in law give any consent which would prevent an act from being an assault for the purposes of this section".

45. JM contended that ST regularly and frequently put his hands inside her clothing and that he touched her breasts and her vagina; she contends that ST threatened her with violence if she told anybody. JM also said that ST regularly grabbed her hand and he then forced it down the front of his trousers making JM touch ST's bare penis, which sometimes was hard and sometimes was not. Another complaint is that ST regularly touched JM on her breasts and on her vagina in the garage and also when she got out of the bath because the bathroom did not have a lock.

46. JM stated that she could not give an exact estimate of the number of occasions on which ST had touched her or forced her to touch him, but she believes that over a period of about 12 to 18 months, this behaviour occurred four or five times a week. This means that it must have taken place at least on 200 occasions and on as many as 350 occasions. JM says that in consequence she has suffered serious psychological damage.

47. In 1981 when JM was aged 14, she told her social worker that she wished to leave the foster home because her sister had left and she "had had enough of [ST]". She was duly moved to Beechcroft Children's Home in Huyton. In 1984 when JM was aged about 16 or 17 (see para. 57 – change makes both paragraphs consistent) , she met up with MH who had also been living in JT's home as a foster child at the same time as JM was. Then in a discussion, JM revealed to MH that she had also been sexually abused by ST, MH informed JM that the same had happened to her and to her sister.

48. JM and MH both then went to see a social worker and they informed her of the sexual abuse by ST. The response of the social worker was that no further action would be taken as these matters happened so long ago, as first JT was no longer fostering and as second, JT and ST had emigrated to Australia. There is a letter written on 14 December 1998 which records that JM had reported ST's sexual assault.

49. In 1997, JM was approached by Merseyside Police conducting an investigation into the treatment of children in North West Children's Homes and they sought information from JM, who informed the police that she had been sexually abused. Statements were duly taken from JM, but as JT has lived in Blackpool, it seems that JM's complaint did not fall within the remit of any of these police inquiries and so the police did not investigate the offences further. Subsequently, it was said that the reason why no further action was taken was that the alleged perpetrator, ST, was then living in Australia.

50. After the police visit, JM sought advice from solicitors and on 17 April 1998, she made an application to the Criminal Injuries Compensation Authority. Her application was refused on 30 September 1999 because:-

> "… the evidence available in your case is not sufficient to satisfy me that on the balance of probabilities, your injuries were directly attributable to a crime of violence".

51. JM applied for a review and on 30 September 1999, the Criminal Injuries Compensation Authority rejected the claim for review on the basis that the claim did not fall within paragraph 8(a) of the Scheme, which I have quoted in paragraph 7 above.

VII The panel's decision on JM's application

52. A Notice of Appeal was duly served on 20 October 1999 and the panel heard the appeal on 6 February 2001, which it rejected.

53. The grounds given subsequently by the panel in a letter dated 26 February 2001 were that:-

> "The considerable lapse of time that occurred between these alleged incidents and when they were reported and a claim for compensation was made, makes any investigation difficult. Having carefully considered the relationship described by [JM] between herself and the alleged abuser, the Panel was not satisfied on her account that what occurred between her and the son of her foster parents ever amounted to a crime of violence. The appeal is dismissed under paragraph 8(a) of the Scheme".

54. JM's solicitors (she has only ever had one set of solicitors – Jackson Canter) requested a payment or a re-hearing but this was rejected in a letter dated 25 May 2001 from the panel to the solicitors of JM, in which it was stated that:-

> "At appeal, the panel was concerned with events that had occurred over 20 years before and of which no recorded complaint was made for some 17 years. There was of course no corroborative evidence of [JM's] allegations.
>
> The details of what occurred was relevant, as was the issue whether [JM] consented to what occurred. She had first become involved in the sexual activity of which she complained when she was about 13, and the boy, who was her foster mother's son, was variously described as a year to 4 years older than she had been.
>
> [JM's] credibility both on what had occurred and whether the sexual activity had or had not been consensual was important. Her credibility on the effect this alleged abuse had had on her was also important.
>
> During her evidence, [JM] said she had been abused by 2 men before she met the foster mother's son. These had been men and not boys. She complained about them and one had been prosecuted and acquitted. She described her relationship with the boy which varied from being nice to her to one where he beat her up. In particular, she said that when he was abusing her she found him to be nice, but at other times she was scared of him. He had been her sister's boyfriend for a time and then had moved to her. Her sister was a year or 2 older than she was. A girl under 16 can of course consent to sexual activity.
>
> The panel of 4 members included a Consultant Psychiatrist and a very experienced female General Practitioner. In deciding

> that the relationship that she described with the boy meant that what had occurred between them did not amount to a crime of violence, the panel reached a decision it was entitled to".

55. In a written statement made in March 2004, which was more than three years after the hearing, Mr. Michael Lewer QC, who was Chairman of both the panel and also of the particular panel which heard and determined JM's appeal, explained the approach of the panel. The panel had consisted of Dr. Ian Christie, a Consultant Psychiatrist, Mr. Anthony Summers, a former senior partner of a firm of solicitors in Liverpool and Dr. Frankie Walters, a General Practitioner working in Newcastle. Mr. Lewer explained that although Mr. Summers was present for the hearing of the evidence, he did not participate in the decision as he was called away to attend another hearing.

56. According to Mr. Lewer, the only issue for the panel was whether the injuries suffered by JM were "directly attributable to a crime of violence". JM gave evidence and she was questioned by her representative, by the Authority's presenting officer and by members of the panel. The only other witness was a police officer, namely DC Barras.

57. Mr. Lewer explained that the difficulty for JM and for the panel was that there had been no contemporaneous complaint so that by the time the complaint was made to social services in about 1984 and to the police in 1998, ST was in Australia and social services records were no longer available. No statement was provided from JM's sister or from her friend MH, who had also been fostered in ST's home and who, according to JM, had also claimed to have suffered similar abuse at the hands of ST.

58. Thus, there had been no previous investigation of JM's allegations and the only allegation of any sexual contact had come from JM and so the panel's views on the facts depended on what view it took of JM's credibility. DC Barras was asked about the credibility of JM and she explained that she had no reason to disbelieve JM, but she had not come on to the scene until 1998. Having considered the oral evidence by JM, the chairman explained that:-

> "the panel did not believe her testimony that the sexual familiarities in which she engaged with [ST] were unwanted such that they could be considered to amount to a crime of violence".

59. It was pointed out that the presenting officer and the panel members asked questions of JM which were directed to the issue of the true nature of the relationship between herself and ST. Mr. Lewer said that there were a number of facts adduced in evidence, which suggested that there was a boyfriend-girlfriend relationship in which the consent given to sexual familiarities was real consent, rather than one of abuser and victim, with the abuser taking advantage of his more powerful position.

60. Mr. Lewer explained that the facts considered by the panel were that:-

(a) ST had fancied the older sister of JM and that he had followed her around until he was told to leave her alone, at which point he desisted;
(b) JM's older sister was living in the same house for most if not all the time during which it was alleged the sexual abuse occurred;
(c) despite only being 12 or 13 years of age, JM had earlier experience of sexual familiarities at the time when the advances were made to her by the alleged assailant. JM had made complaints of earlier abuse by two men and one of them had led to a criminal trial in which the man concerned had been acquitted by a jury;
(d) JM said in evidence that ST was nice to her but that he was a Jekyll and Hyde character. JM said that "when he was abusing me he was nice, but at other times he was nasty. It was only when he was nasty that she apparently disliked him";
(e) JM appeared to accept that there had been a boyfriend-girlfriend relationship. The Chairman pointed out that in answer to JM by the direct question as to whether ST was her boyfriend, she did not deny it but she said that "he did not have the right even if so, when people say no". The panel rejected the submission by JM's representative that it was irrelevant whether JM and ST were boyfriend and girlfriend during the time during the period over which the alleged offences occurred;
(f) one member of the panel, Dr. Christie, questioned JM about a passage in her statement that she was lying on ST's bed and that he was lying on top of her. His point was that the statement suggested that JM had laid down on the bed voluntarily on that occasion. He asked her what she was doing on the bed at that time. JM gave an explanation, which the panel considered to be improbable, that JM had not worded the statement properly and that JM had meant that she had been pulled onto the bed.

61. Mr. Lewer also explained that although the panel's decision pre-dated **JE**, the panel's questions and deliberations were in substance directed towards the issues highlighted in **JE**. He stated the panel considered that there was no imbalance in the relationship nor any vulnerability or disadvantage of JM and that she had opportunities to complain but that she did not take advantage of this.

62. The panel found that there had been a form of sexual relationship between JM and ST and that there had been a boyfriend/girlfriend relationship between them.

63. As in the case of CD, the hearing by the panel took place before the Court of Appeal had given its decision in **August** and **JE**. Miss. Hamilton contends first that the panel failed to consider properly whether JM gave "real consent" rather than submitting to ST and second that if she had submitted, the panel could not have justified its decision to deprive JM of her right to compensation as a victim of a "crime of violence".

64. Miss. Hamilton's submission is that the panel failed to consider properly (i) the difference in age between JM and ST, (ii) her vulnerability due to her age, (iii) that she was at a substantial disadvantage with no family network to support her, (iv) her

vulnerability as being in the care system and (v) the difference in status between ST, who was the son of her foster mother and JM, who was a child in care.

65. Mr. Coppel for the panel contends that the panel did consider properly whether JM gave "real" consent. He points out that JM could have asked to leave and indeed she eventually did do so. He submits that it is significant that in interview with Ms. Lesley Cohen, a Chartered Clinical and Forensic Psychologist, it was stated that JM had told her that a positive figure in her life was her social worker who visited JM regularly and who was trusted by JM. Ms. Cohen notes in her report that JM:-

> "felt she could tell [her social worker] anything. [JM] could not remember if she complained about anything at the [JT's] household to the social worker".

66. Mr. Coppel contends that the question of real consent was a jury question in respect of which the panel had reached a decision to which it was entitled to come.

VIII Discussion of JM's Complaint

67. As I have already explained, the task for the panel was, as Lord Woolf pointed out in **JE**,

> "to ask itself whether the proper conclusion on the facts is that the applicant, was in relation to what happened, a victim of a crime of violence. This will be the situation if there was no real consent" [28].

68. A matter of substantial significance in the present case was whether JM could be regarded as so vulnerable as not to be able to give real consent. The panel did not refer to JM's vulnerability as being a child in a very subservient position and without any form of support in the reasons given at the end of the hearing and to which I have referred in paragraph 53 above or in the letter of 25 May 2001, which gave further reasons three and a half months after the hearing and which are quoted in paragraph 54 above.

69. There is, however, some reference to the vulnerability of JM in Mr. Lewer's statement but five matters do not appear to have been properly considered. It is important to recall that as Lord Woolf explained in **JE** where there is an assertion of vulnerability, "then to ask whether [the victim] consented makes no allowance for [her] vulnerability" [32]. At this juncture, I will assume that I can take into account the witness statement of Mr. Lewer.

70. The first point of importance is that the panel did not appear to have considered the relative degrees of responsibility of JM and ST for what happened. The panel attached great, if not crucial, importance to the fact that there was a boyfriend-

girlfriend relationship between JM and ST. In my view, the existence of such a relationship does not automatically or even probably show consent by a girl of twelve or thirteen years of age to what ST was doing. The panel did not appear to have gone on to consider (as it should have done) the effect of the oral evidence of JM which was apparently accepted by the panel that ST "did not have the right even if so when people say no". The panel did not consider the effect of this comment or carry out its task of determining whether this was a case of submission or real consent.

71. Second, the panel did not appear to take into account the vulnerability of JM because her mother was unavailable to support her at the time of the abuse. The panel did, however, attach importance to the facts that first JM's older sister was in the same household and second that she had been fancied by ST who had followed her around until she told him to leave her alone. There was no discussion or consideration of whether JM's elder sister had been sexually abused by ST or whether she was at that time able to give any protection to JM. There was no finding by the panel to that effect.

72. A third feature showing the vulnerability of JM was that she was in a weak position when exploited by the son of her foster mother. In **JE**, the Court of Appeal attached "particular importance to the fact that the panel did not consider the imbalance in [the] relationship" [33]. That point should have been considered in the present case in order to determine the reality of the consent.

73. Fourth, the panel did not consider if JM *could* have complained when the abuse occurred but did not complain. It must not be forgotten that like JM, her sister was in a foster home and the panel should have considered whether being in that position either JM or her older sister *could* then have complained. The Chairman points out that "it was also suggested to [JM] that she could have complained to [ST's] mother". The panel attached importance to the fact that JM did not ask social services if she could leave the household during the assaults or until her sister had left. The panel did not consider JM's position throughout the period of ST's sexual misconduct in order to determine whether JM *could* then during that period have complained. It must not be forgotten that although JM asked to leave ST's home when she was 14 years old, that fact does not show that she *could* have adopted the same course when the sexual abuse started to occur 12 to 18 months earlier when JM would only have been 12 or 13 years old. That significant point was not considered by the panel.

74. Finally, there is the matter of JM's previous sexual abuse and it is very significant that Ms. Cohen reported that it:-

> "is likely that [JM's] earlier sex abuse rendered her vulnerable to the later abuse by [ST]. By then she thought that this was the way she was to be treated. She had begun to feel a sense of personal shame, that it was something about herself which had attracted abuse. It is also the case that the abuse by [ST] re-awakened her distress from earlier experiences of abuse" (paragraph 16.3).

75. The panel did not consider that possible consequence of the previous sexual abuse suffered by JM. The Chairman in his explanation of the decision three years after it was given stated that JM "was not unknowledgable in sexual affairs and so vulnerable on that point". Ms. Cohen suggests that the contrary is the case. Each of these points is relevant on the issue of whether JM was vulnerable. None were properly considered. Finally, Dr. Cohen points out that JM considered that she would not have been believed if she had made any complaints. That is a point, which also might well have been considered, but in the light of my other findings, it does not form the basis of my decision.

76. Until now, I have assumed that I could take into account Mr. Lewer's reasons given in March 2004 more than three years after the hearing. I have no doubt that he tried to give a characteristically fair and accurate statement of his reasons, but he was having to think back to recall his reasoning three years earlier and in that period, he is likely to have heard very many other cases in his capacity as chairman of the panel.

77. If I had been in any doubt about the outcome of this application, it is quite likely that, after inviting submissions on this point, I might have concluded that I could not take Mr. Lewer's statement into account because of the interval of more than three years between the hearing and the production of the written statement and also because, unlike the position in CD's case, the written reasons are different from the contemporaneous reasons.

78. As I have explained, Pill LJ in **August** said that "an attempt to express reasons long after the event, especially when four members are involved will, … inevitably create difficulties when clarity is sought" [128]. I wonder if too much is expected of chairmen of panels or any party who performs a judicial function to recall the reasoning of themselves and their colleagues three years later, when they did not give their reasons at the time of the decision.

IX Conclusion

79. Although I consider that the decision of the panel should be quashed because its decision to refuse JM's claim cannot be justified by its reasoning, I am not being in any way critical of the panel, who did not have, as I have had, the benefit of the decisions in **August** and **JE**, as well as helpful and thoughtful submissions, which I have received.

80. The application in JM's case succeeds while that in CD's case must be dismissed.

APPENDIX

The Procedure under the Criminal Injuries Compensation Scheme[1]

A. The Criminal Injuries Compensation Authority is a public body which has been established to administer the Scheme. Decisions made by the Authority whether to award compensation are essentially administrative decisions. The award of such compensation is a disbursement from public funds in circumstances in which Parliament has decided that it is in the general public interest to do so. The Authority has a general duty to the public at large to make payments where they are provided for by the Scheme, and a corresponding general duty to the public not to make payments which are unnecessary or unjustified.

B. Initially, such decisions are made by claims officers, as provided by **section 3(4)(b)** of the **1995 Act**. The **1995 Act** also requires that provision be made for reviews of first instance decisions. Such reviews are also conducted by claims officers. There is nothing akin to litigation at either of these stages.

C. The Panel becomes involved if an applicant wishes to appeal from a decision of a claims officer. Appeals are determined by adjudicators appointed under the 1995 Act. The Panel's members are carefully selected to reflect the experience and expertise necessary to deal with cases which are often complex and difficult.

D. In discharging its functions, the Panel adopts an inquisitorial approach, consistent with the administrative nature of the Scheme and with its fundamental purpose of disbursing public funds in the circumstances prescribed or authorised by Parliament. The Scheme also provides that hearings should be informal. The Panel is assisted in its task by Presenting Officers. Unlike the 'Board Advocates' under the previous non-statutory scheme, Presenting Officers are not required to be (and generally are not) qualified lawyers. They are in general civil servants of (or acting at) Higher Executive Officer grade.

E. Presenting Officers are trained and encouraged to act impartially, and to explain to applicants that their function is to act impartially but, as part of doing so, to test the facts and evidence by asking questions which are sometimes "difficult".

F. It would not be in the general interests of applicants for the Panel to adopt a more adversarial approach to its hearings. Many applicants are unrepresented or represented by non-professionals. An inquisitorial approach is more likely in these circumstances to ensure that all the relevant facts are brought out into the open for proper consideration.

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[1] As explained by the Court of Appeal in **JE** – see paragraph 11 above.