Case No: CO/568/2000

NEUTRAL CITATION NUMBER: [2000] EWHC 1050 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 May 2002

Before:

THE HONOURABLE MR JUSTICE SILBER

THE QUEEN ON THE APPLICATION OF JE — Claimant

- and –

THE CRIMINAL INJURIES COMPENSATION APPEAL PANEL — Defendant

Mr. Paul Bowen and Ms. Henrietta Hill (instructed by **Leonard & Swain of Southampton** for the claimant)
Mr. Jason Coppel (instructed by **the Treasury Solicitor** for the defendant)

JUDGMENT AS APPROVED BY THE COURT

Introduction

1. JE ("the claimant") sought compensation under the terms of the Criminal Injuries Compensation Scheme 1996 ("the Scheme") for sexual assaults, which he alleged had been committed against him in January 1998 by a fellow inmate, Kenneth Fleet while they were both in Winchester Prison. His claim was rejected and he appealed to the Criminal Injuries Compensation Appeal Panel ("the Panel") who rejected his appeal on the grounds that he had consented to the sexual activity and that he therefore failed to meet an essential pre-condition that had to be satisfied before an award could be made, namely that the injury complained of was "directly attributable to a claim of violence" as required by paragraph 8(a) of the Scheme. The Panel also found that the claimant was the perpetrator of some other acts of buggery committed on Kenneth Fleet.

2. In the light of its finding that the claimant had consented to the assaults complained of by him, the panel also disallowed his claim for mental injury as paragraph 9(c) of the Scheme precludes the payment of compensation for mental injury alone save, inter-alia, where the claimant was a "non-consenting victim of a sexual offence".

3. The claimant seeks to judicially review both these decisions of the Panel but Mr. Bowen for the claimant accepts that if he cannot succeed in respect of his complaint in respect of the ruling under paragraph 8(a) of the Scheme, he will also be unsuccessful in respect of his further complaint under paragraph 9(c) of the Scheme. I will therefore concentrate on the complaint under paragraph 8(a) as counsel did.

4. On 27 April 2000, Owen J gave the claimant, who was an adult when the alleged offences were committed, permission to apply for judicial review but he ordered that the claimant's "name and identity are not to be published or included in the case title without leave of the court". No such leave has been given. It is now appropriate to set out some details of the Scheme and then to explain the pre-conditions for an award under it before considering the applicability of those principles to the present claim and the submissions of counsel.

Criminal Injuries Compensation Scheme

5. The Criminal Injuries Compensation Act 1995 authorised the Secretary of State for the Home Department to introduce and amend a Criminal Injuries Compensation Scheme, subject to the approval of Parliament. On 16 November 1995, the Government laid before Parliament a draft Scheme for approval under s.11 (2) of the 1995 Act. This received approval and the document concerned setting out the Scheme regulates all applications for criminal injuries compensation received on or after 1 April 1996.

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

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

7. The burden of proof is on the applicant to show he has suffered a 'criminal injury': see paragraph 25.

8. "Criminal injury" is defined by paragraph 8, which states with emphasis added that:

> **"8. 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....*** **".**

9. "Personal injury" is further defined by paragraph 9, which states with emphasis added that:

> **"9. 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) ..."**

10. In order to ascertain if the claimant suffered a criminal injury, which entitles him to an award under the Scheme, I must now consider the critical issues on this application, which are whether the conduct complained of by the claimant constitutes "a crime" and if so, if it constitutes "a crime of violence" within paragraph 8 of the Scheme.

The Criminal Offences

11. It seems that the claimant complained to the panel of two types of sexual offence. The first was buggery, contrary to s. 12 of the Sexual Offences Act 1956 ("the 1956 Act"), which states that:-

> (1) **It is a felony for a person to commit buggery with another person otherwise than in the circumstances described in subsection (1A) [or (1AA)] below or with an animal.**
>
> (1A) **The circumstances [first] referred to in subsection (1) are that the act of buggery takes place in private and both parties have attained the age of sixteen.**
>
> (1AA) **The other circumstances so referred to are that the person is under the age of sixteen and the other person has attained that age.**

12. The Panel held that the claimant's Intelligence Quotient was sufficiently low to indicate that he could not consent at law to the acts of buggery upon him. The Court of Appeal in **R v. Criminal Injuries Compensation Panel ex p August** [2001] 2 WLR 1452 ("**August**") has recently made it clear that section 12 was intended to prohibit what was regarded as "unnatural behaviour", rather than to protect any of the parties involved. As such, the consent of either party is irrelevant to the offence (see per Buxton LJ at paragraph 18 of **August**). The correct analysis of the offence alleged by the claimant was that no offence of buggery took place because any acts of buggery took place in private between parties over the age of sixteen. There is no special exception designed to protect defectives and, as I will explain in paragraphs 12 and 13 below, this is different from the crime of indecent assault (because of the terms of section 15(3) of the 1956 Act). Mr. Bowen accepted correctly that the crime of buggery had not been committed against the claimant.

13. The second offence complained of was indecent assault upon the claimant, contrary to s. 15 of the 1956 Act, which provides that:

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

> **(3) A man who is a defective cannot in law give any consent which would prevent an act being an assault for the purposes of this section, but a person is only to be treated as guilty of an indecent assault on a defective by reason of that incapacity to consent, if that person knew or had reason to suspect him to be a defective.**

14. The Panel accepted that the claimant was defective and that he could not consent in law to an indecent assault; this meant that he had been the victim of indecent assault contrary to section 15, as there was no issue but that Fleet knew or should reasonably have suspected the claimant to be defective. It remained to be decided by the Panel whether those crimes constituted "crimes of violence" as stipulated in paragraph 8 of the Scheme and I will return in paragraph 18 below to consider the Panel's approach to this issue

15. It is appropriate now to refer to the offence of rape as although no mention was apparently made of it before the Panel, the Form 86A and skeleton argument on behalf of the claimant refer to it. The relevant statutory provisions in respect of rape are set out in s. 1 of the 1956 Act, which provides that:

> **(1) It is an offence for a man to rape a woman or another man.**
>
> **(2) A man commits rape if**
> **(a) he has sexual intercourse with a person (whether vaginal or anal) who at the time of the intercourse does not consent to it; and**
> **(b) at the time he knows that the person does not consent to the intercourse or is reckless as to whether that person consents to it.**

16. Absence of consent is therefore an essential element of the offence of rape, and consent means consent in fact as Mr. Bowen for the claimant accepted. There are specific provisions dealing with intercourse with those who are unable to consent in law (ss. 5-7 of the 1956 Act).

17. Therefore, had the offence of rape been put to the Panel, the consequence of its finding that the claimant had consented in fact to intercourse with Fleet would have been that it would have had to conclude that no crime of rape had been committed. The assertion in para. (2) of the claimant's skeleton argument that the claimant was "the victim of rape" is not, therefore, an accurate reflection of the Panel's decision. I now have to turn to see if the offences alleged amount to "crimes of violence" so as to give a right to compensation under the Scheme.

"Crime of violence"

18. There is no statutory definition of a "crime of violence" and the correct approach to the identification of a crime of violence for the purposes of paragraph 8(a) of the Scheme is now contained in the judgments of the members of the Court of Appeal in **August**. Five important general propositions were laid down by Buxton LJ (paragraphs 21-22), namely that:-

> **(a) The concept of "crime of violence" is not a term of art. (b) 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". (c) 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 absurd consequences ..."**
>
> **(d) 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.**
>
> **(e) In performing that task, the Panel has to look at the nature, and not at the results, of the unlawful conduct.**

19. Where the issue of consent is relevant, the position was conveniently summarised in *August* by Sir Anthony Evans (paragraph 78) who explained that:

> **For these reasons I would hold that the correct approach to determining whether or not a "crime of violence" was committed for purposes of the Scheme is, 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 account of the following factors in particular: (1) "crime of violence" includes personal injury caused by arson and by poisoning (I do not read these references as extending the scope of the statutory definition); (2) the statutory definition implies a non-consenting victim (cf *Ex p Piercey* which I would hold was rightly decided on the basis of consent, rather than the minimal use of force); (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.**

20. Following **August**, it is clear that the claimant's status as a "defective" who was unable to consent in law, whilst conclusive of a crime having been committed contrary to s. 15 of the 1956 Act, cannot be conclusive of the issue of whether the matter complained of constituted a "crime of violence". As I will explain, the Panel rightly treated the issue of consent in fact as the central issue in that regard and their treatment of it has been the focus of the claimant's submissions and complaints.

The claimant's submissions

21. The claimant seeks to quash the decision of the panel and to obtain an order obliging the panel to reconsider its decision on the grounds that it did not consider properly the question of the capability of the claimant to consent to the sexual offences complained of.

22. In order to define the parameters of the present dispute, it is appropriate now to consider first some of the claimant's contentions of law which were not contested. They were that:-

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

(ii) It is conceded that *if* the Panel lawfully concluded that JE had consented in fact then this claim fails.

(iii) In determining whether such an offence is a crime of violence, the panel should focus on the presence or absence of consent, rather than upon the precise amount of physical force that may have been threatened or used' (**August**, ibid, per Sir Anthony Evans at paragraph 81). Indeed, the offence may constitute a 'crime of violence' notwithstanding there has been no use or threat of force (**August**, ibid, per Sir Anthony Evans paragraph 78; Buxton LJ at paragraph 22, paragraph 65).

(iv) A victim of buggery (or indecent assault) will rarely fail to establish that the offence was a 'crime of violence' unless his 'real' consent was given (**August,** ibid, Sir Anthony Evans at paragraph 79, 82).

(v) In assessing whether an individual such as the claimant, has given 'real' consent, the following questions are relevant:

a. What is the nature of the decision to which the individual purported to give his consent?

b. Did he have capacity to consent commensurate with the gravity of *that* decision? That is to say, was he able to understand or retain the information relevant to that decision, including information about the reasonably foreseeable consequences of deciding one way or another and was he able to make a decision based on that information (the test in **Re MB (Caesarean Section)** [1996] 2 FLR 426)?

c. Did he in fact consent?

23. In support of the submission in (v) (a) and (b), Mr. Bowen for the claimant relies on the statement of Lord Donaldson MR in **Re T (An adult: Consent to Medical Treatment)** [1992] 2 F.L.R. 458 at 479 in which he said (page 470) that:-

> "*Capacity to decide.* **The right to decide one's own fate presupposes a capacity to do so. Every adult is presumed to have that capacity, but it is a presumption which can be rebutted. This is not a question of the degree of intelligence or education of the adult concerned. However, a small minority of the population lack the necessary mental capacity due to mental illness or retarded development .... This is a permanent or at least a long-term state. Others who would normally have that capacity may be deprived of it or have it reduced by reason of temporary factors .... Doctors faced with a refusal of consent have to give very careful and detailed consideration to the patient's capacity to decide at the time when the decision was made...what matters is that the doctors should consider whether at that time he had a capacity which was commensurate with the gravity of the decision which he purported to make. The more serious the decision, the greater the capacity required".**

24. Mr. Bowen for the claimant says that support for proposition (v)(b) is to be derived from the comments of Butler-Sloss LJ giving the judgment of the Court of Appeal in **Re MB (Caesarean Section)** [1996] 2 F.L.R 426 at 437.

> **"(i) the patient is unable to understand or retain the information which is material to the decision.**
>
> **(ii) the patient is unable to use the information and weight it in the balance as part of the process of arriving at the decision".**

25. None of these submissions by the claimant are disputed by Mr. Coppel for the Panel, which I will assume for the purpose of this application are correct. Mr. Coppel did contest the next contention and the basic complaint of Mr. Bowen which was that the Panel had failed to address and consider the issues set out in (v) (a) – (b) above and that in the light of the evidence before them it had therefore failed to take into account factual considerations relevant to those considerations of the capacity of the claimant to consent. In consequence, Mr. Bowen contends that the finding of the Panel that the claimant had in fact consented to indecent assault was therefore flawed and that it should therefore be quashed.

26. In support of these contentions, Mr. Bowen relied on a number of facts, which were in the evidence before the Panel, which he says, were of substantial relevance to the issue of whether the claimant had capacity to consent. In particular, he points out that the claimant had said that he had no previous sexual experience while Mr. Fleet was on remand for sex offences. Another factor that Mr. Bowen relies on is that Ms. Joanna Brook-Tanker, a Clinical Psychologist said in her report of the claimant that his "deficits, intellectual and memory skills together with a poor understanding of time would suggest that he did not understand the [police] caution and would not have comprehended his rights to obtain legal advice" and that he is "highly suggestible to leading questions in an interrogative situation". Mr. Bowen also points out that the claimant was in prison for the first time while Fleet was much older than the claimant and looked even older and in addition, that he had made strenuous efforts to befriend and share a cell with the claimant.

27. Mr. Bowen stresses that in **August**, Pill LJ said (at paragraph 95) that "in considering whether there is real consent, it was necessary to consider all the circumstances including [the claimant's] defence, age, background, history and personality". He contends that the Panel failed to do this.

28. Mr. Coppel for the Panel says that the reasoning of the Panel cannot be criticised, as it has to be considered in the light of the limited issues that were raised in front of it. He points out that in **R v. Criminal Injuries Compensation Board ex parte Cook** [1996] 1 WLR 1037, Hobhouse LJ (with whom Beldam LJ agreed) said with my emphasis added (at page 1053) that "in every case, the reasons must depend on the nature of the proceedings, the character of the decision-making body and *the issues which have been raised before it,* particularly if they

include issues of fact". Similarly, De Smith, Woolf and Jowell in **Judicial Review of Administrative Action** ((1995) 5th edition) state with emphasis added at paragraph 9-049 concerning the reasons that have to be given by for example a panel that they must "*meet the substance of the principal arguments that the tribunal was required to consider.* In short the reasons must show the decision-maker successfully came to grips with the *main contentions advanced by the parties*".

29. Relying on this principle, Mr. Coppel points out that the only evidence that we have relating to the submissions made on behalf of the claimant to the Panel are set out in the note provided by his counsel at that hearing. The relevant part of it states that:-

> **"Submissions were made on behalf of [JE] in relation to his ability to consent. It was argued that as a matter of fact he did not consent to the acts being done against him. It was submitted that there was evidence from which the Panel could find that. Alternatively, legal submissions were also made along the lines of the argument relied upon by the applicants in R. v. Criminal Injuries Compensation Board, ex pa. August (QBD Crown Office List, Owen J. 4 November 1999, reported on 6 December 1999 on casetrack.com). This was to the effect that as JE could not consent in law to the acts (as he below the threshold for mental handicap under the Mental Health Act 1983 and therefore unable to consent under the Sexual Offences Act 1956, section 15(3)), there must have been a crime of violence; alternatively that the factors present in his case (his youth, vulnerability and the nature of his relationship with Mr. Fleet) made it impossible to say that even if the acts were "voluntary", they were in fact consensual".**

30. It is noteworthy that the points advanced by Mr. Bowen on this judicial review application are very different from those which were put forward in front of the Panel. In particular, the argument in respect of capacity which I have referred to in paragraph 19 (v) (a) – (c) above and which forms the basis of the claimant's submissions in front of me was not put forward in that way.

31. In its reasons, the Panel responded to counsel's main point about the mental incapacity of the claimant and his ability to consent by stating that:-

> **"The applicant's IQ is sufficiently low to indicate to us that he could not have consented at law to the acts of buggery upon him. We then had to consider whether he consented in fact despite his low IQ".**

32. The Panel noted that in the fortnight that he had been together with Fleet, the claimant had not apparently complained to the prison officers although he was separated from Fleet for part of the day. The Panel explained it "took account of the [claimant's] failure to alert the prison authorities and we considered the question of the [claimant's] buggery of Fleet" and that the claimant "did not say that Fleet had done or threatened to do anything to him if he did not do those acts or suffer the acts upon him by Fleet". The Panel then concluded with emphasis added that:-

> **"in all the circumstances the evidence we heard and considered, we form the opinion that whilst the applicant *could not give consent at law, he did consent in fact*".**

33. In answer, Mr. Bowen refers to the recent decision of the **Queen (on the application of B) v. The Criminal Injuries Compensation Appeals Panel** (19 December 2001 [2001] EWHC Admin 1147) in which Wilson J quashed a decision of the Panel but that was a case in which the Panel had failed "to address the significant and discreet part of the claimant's claim based on alleged physical abuse" (paragraph 36). That was not the position here as the Panel dealt with the entirety of the claimant's case as presented to it. So **B's case** appears to be a completely different case from that with which I am concerned and it does not answer Mr. Coppel's argument.

34. My conclusion is that Mr. Coppel is right and that the Panel was only obliged to deal with the issues raised in front of it and in respect of those issues it did precisely that. It took as its starting point the mental handicap of the claimant and then scrutinised the evidence and, as I shall explain in paragraphs 36 and 37 below, the Panel was not obliged to deal specifically in its reasons with every material consideration raised. Thus, I am unable to criticise the Panel for failing to deal with each of those points now raised by Mr. Bowen but which were not pursued before the Panel. The Panel had no obligation to research for and then consider points that counsel for the claimant had not raised in front of it. In any event, an application for judicial review is an attack on the decision-making process and not the actual decision on the facts at which the Panel had arrived. In the light of their findings which I have set out in paragraph 32 above and in particular, that acts of buggery were committed by the applicant on Fleet, the Panel might well have reached and been entitled to reach a similar conclusion to the one that it

did if the submissions now made by Mr. Bowen had been made to it. That is, however, not an issue that I have to resolve on this application.

35. Mr. Bowen is also critical of the brief way in which the Panel dealt with the issue of capability to consent and he submits that it did not give proper reasons so that I should conclude that the Panel did not have rational reasons for its decision. He relies on the statement of Lord Keith in **R v. Secretary of State for Trade ex parte Lonrho Plc** [1989] 1 WLR 525, 539-540 that:-

> "the absence of reasons for a decision where there is no duty to give them cannot of itself provide any support for the suggested irrationality of the decision. The only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker, who has given no reasons, cannot complain if the court draws the inference that he had no rational reason for his decision".

36. Mr. Coppel contends in response that the reasons given by the Panel were sufficiently detailed as they explained why the claimant had not been successful and he relies on the approach of Aldous LJ in **ex parte Cook** (supra) with whom Beldam LJ agreed, when he said at page 1043 that:-

> **"I believe it is clear that the Board's reasons should contain sufficient detail to enable the reader to know what conclusions have been reached on the principal important issue or issues, but it is not a requirement that they should deal with every material consideration to which it has had regard".**

37. In this case as I have explained, the Panel indicated that in spite of the low intelligence of the applicant and in the light of his failure to complain to the prison authorities and his positive acts of buggery, the claimant "did consent in fact". To my mind, this contained sufficient detail to enable the reader to know what conclusions the Panel had reached on the principal issues raised on whether the claimant had in fact consented. In any event, the Panel cannot be criticised for failing to "deal with every material consideration to which it has had regard".

38. Thus my conclusion is that this appeal must be dismissed as the Panel was entitled to reach the decision that it did on the case put before it and its reasons for that decision cannot be criticised.