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

CO/456/99

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Royal Courts of Justice
Strand
London WC2

Thursday, 4th November 1999

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B e f o r e:

MR JUSTICE OWEN

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REGINA

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-v-

THE CRIMINAL INJURIES COMPENSATION APPEAL PANEL
EX PARTE AUGUST

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MR ALAN LEVEY and MS C HAMILTON (instructed by Glanvilles, Newport, Isle of Wight PO301SA) appeared on behalf of the Applicant.

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MS D ROSE (instructed by the Criminal Injuries Compensation Authority Appeal Panel, London EC1A 2JQ) appeared on behalf of the Respondent.

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Thursday, 4th November 1999

JUDGMENT

MR JUSTICE OWEN: This is an application for judicial review of a decision of the Criminal Injuries Compensation Appeal Panel. Permission was granted on 14th April. The decision which is challenged is dated 18th January 1999. The facts of the offences upon which the applicant claimed may be set out quite shortly. There were sexual assaults upon him. A man named Mr Crow was convicted of buggery and gross indecency.

The applicant, who was then aged 13 and already damaged by sexual abuse for which Mr Crow was not in any way responsible, met Mr Crow in a public lavatory in the early summer of 1990. After these offences, this applicant had a troubled history and finished up by committing a number of offences. In all, there were three offences against the person, one sexual offence, one offence against property, five of theft and kindred offences, and one failing to surrender to his bail. The extent of his criminality is, of course, not shown by those convictions. The explanation for them, which no doubt the applicant would give, is that as a result of his upbringing, as a result of not being shown care, affection and love as a child, he was very much an outsider and in those circumstances committed those

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crimes.

However, at this particular time he was just 13 years of age. There was some doubt about how old he was, caused by the original application not being too clear. Certainly, there was no question of any lack of care indicated by that and the actual application indicates that the incidents were between 1st December 1990 and 10th November 1991. In his statement, written by his solicitor, he said he was aged about 12 to 13 and it seems somebody has corrected that to 14 in two places on that form, no doubt relying upon the dates which were given. It is also true to say that he indicated that he did not exactly know the dates -- no doubt, if it had been thought to be necessary, they could have been obtained by the compensation authority. In the end, it does not seem to me that it matters. It matters in the sense that it is necessary to be correct, but the difference between 13 and 14 for this young boy was not of the greatest importance. It is now certain that he was 13, and it is on that basis that I look at these matters. It is also true that he had indicated that he had been abused from the age of 10, which no doubt in part explains what happened.

It seems that the applicant had gone to this public lavatory in the hope of meeting someone to take part in homosexual acts for money, that seemed to be

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what he was saying at the time. There was oral sex between them and there was payment, £10 or £20 or whatever it was, at the time. It did not happen on just one occasion, it happened on a number of occasions and there was at least one offence of buggery, which at the time was said to be one offence of buggery by the applicant on Mr Crow. Subsequently, the applicant said that there were further acts and that he himself was buggered. Certainly, photographs were taken.

It is a part of Mr Levey's case that here there was an element of grooming of the applicant by Mr Crow. In other words, he was persuading him to take part in the acts, which were voluntary in the sense that no objection was taken to them by the applicant. Indeed, it would seem that he had gone to the public lavatory with the intention of obtaining money for such acts. So far as grooming is concerned, it is very difficult to know what attitude to take. It is certain that from the very beginning of the claim which the applicant made to the Compensation Authority, he said:

> "He eventually asked me to take part in pornographic films which I realised would be very violent and I then managed to run away from him."

So that there was something being said at that time, and again one should not be too critical of the phrase

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"I then managed to run away from him.". What, in fact, was happening was that there would be meetings from

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time to time, as I understand it. Of course, in theory, it would be possible to say that all the applicant had to do was not turn up for meetings, but that would no doubt be a somewhat harsh approach and certainly I would not accept that it is the sort of

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approach which would be correct. Nor do I see any reason to think that it was the approach of the Appeals Panel.

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It is certain that payments were made. It is also certain that, eventually, the applicant went to the social services, who at first do not seem to have helped. Again, one should not criticise because it is very difficult to know what information they had; all

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one can say is that young boys, and no doubt young girls, in this situation are in situations which would have made Dickens cringe, let alone modern writers.

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In due course, after charges had been made, there was a prosecution. It seems that at one time the applicant himself was charged with these offences and, indeed, indicated that he would plead -- or perhaps he did, in fact, plead guilty, it is not wholly

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clear -- but very properly those charges were withdrawn and they were not matters for the Appeals Panel to consider.

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There were convictions on 9th June 1993: one count of buggery and two counts of gross indecency. In addition, Mr Crow pleaded guilty to taking indecent photographs. He used to take the camera with him, and that is relied upon by Mr Levey, who says that indicates that here was a paedophile who, of course, was exercising an influence on this boy.

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Originally, Mr Crow was sentenced to seven years imprisonment, and that was reduced to five years by the Court of Appeal. The Court of Appeal's judgment is not only before me, it was before the Appeals Panel. The court was the Lord Chief Justice of the time and two other judges. The appeals were against the sentence. The judge, at first instance, had invoked Section 2(2)(b) of the Criminal Justice Act 1991, and the argument was that that should not have been done. My attention has been drawn to the terms of that subsection, since it is important to note that such a finding was upheld against the man, Mr Crow.

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Section 2(2)(b) indicates that:

> "Where the offence is a violent or sexual offence [and it does not have to specify which], for such longer term (not exceeding that maximum) as in the opinion of the court is necessary to protect the public from serious harm from the offender."

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So the court was saying that that was necessary so far as Mr Crow was concerned.

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The facts were set out, namely, that he was 56 years of age at the time of the appeal, and 53 at the time of the offences. He had not previously been convicted of any sexual offence, indeed, he had only one minor conviction which it was not necessary to mention. The court went on:

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> "The appellant met the complainant, a boy of 13 named ... in public lavatories on the Isle of Wight in early summer 1990. The boy ... had gone to the lavatory in the hope of meeting someone to take part in homosexual acts for money. He had done this before. The appellant and he were in adjoining cubicles. They passed notes through a hole in the wall [and they performed oral sex at that time] ... When they parted [the man] gave the boy £10, and they arranged another meeting."

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There was a later occasion when, at the instance of the boy, the parties met and it is said photographs were taken. Later again, the boy telephoned the appellant, they drove out into the forest and there, according to the complainant, he posed for photographs in return for money. They included photographs of him performing sexual acts. The history went on, in so far as it might be said to be relevant, to a description of what happened in respect of a buggery. The court said:

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> "Then, by agreement, the boy buggered the appellant ... that act was photographed as it took place... The boy claimed that he was annoyed because he had not been given any money. Accordingly, he complained as to what had occurred to staff at the Family Resource

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Unit at Newport."

It is pointed out that, at that time, there was no reference to the snuff movies, but it is right to say there certainly was mention of movies and there was mention of photographs. The important part is that, at that time, it seems his explanation was not that which he gave later. In bearing in mind what must have been the situation, one should not be too critical about that.

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The court went on:

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> "Some time later, he ran away from [the Family Resource Unit] and arranged to meet the appellant after he had finished work. They went to the appellant's home where they watched a pornographic video ...
> On arrest, the appellant explained the photographs by saying, 'Carl is buggering me. It was only the once.'."

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Mr Crow said that he believed the boy was 20 years old, and there is evidence to show that one of the probation officers, who saw Mr Crow, was impressed as to that at first. However, it is quite clear that the opinion was changed when the boy was seen -- presumably on the basis that he did not look 20 years of age to any person with a normal approach to consideration of age. In the event, the appellant admitted the offences and he said what he claimed had happened, namely, it was the boy who had initiated the buggery. As to this, it is right to say that Mr Crow was one of the

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witnesses heard by the Appeals Panel, as indeed was the boy himself.

The court went on to consider a pre-sentence report in which the officer reporting stated that the appellant believed that he had been conned by the victim and blamed the victim. Mr Levey points out that this must have been far from the truth. Certainly, the appellant was saying, at that time, that he had been blackmailed into responding. He said it was "one-off behaviour when he was depressed". There were some reasons to think that this was not, at the very least, wholly accurate, and the pre-sentence probation officer said:

> "He does not seem to take responsibility ... he is ... feeling angry about the way he has been threatened. It is my experience in working with sex offenders that such justification of the behaviour is likely where responsibility for the offending is not accepted [note, it is the responsibility for the offending, not the offending] ... It is unlikely that he will adapt to alternative ways, thereby presenting an ongoing risk to the community."

The court explained this saying:

> "Unless he broke the cycle of his offending behaviour, there would remain a high risk of re-offending."

Before the sentencing judge there was a report from another probation officer, who was a psychosexual therapist holding a post-graduate research fellowship at the University of Southampton. She also had

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expressed the view that the appellant seemed to be unwilling to accept his responsibility. She said at one stage he did seem to accept some blame but:

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> "... I was unable to enable the defendant to maintain this appearance of responsibility and within a sentence he had returned to placing full responsibility once more on the boy."

Towards the end of her report, she said:

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> "It is my opinion that the anger and resentment which this defendant continues to feel towards the victim in this case will prove to exacerbate the risk of further offending, given that suppressed and unacknowledged anger is considered to be an underlying factor in such offending, and seen as justified by Mr Crow, merely perpetuates the feeling of being impotent and hard-done-by which may lead again to being expressed in sexual offending, as such offending has its basis in the exertion power over another who is younger or in some other way less powerful."

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She concluded that he would continue to pose a risk of further sexual offending against young people.

The court naturally quoted from the sentencing judge's remarks in respect of section 2(2)(b). They said:

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> "It was only yesterday that you were telling the jury in great detail why it was that you should not be convicted and seeking to put all the blame on a youngster forty years younger than you who, whatever else one may say about him, at the age of 13 could not possibly have been giving you any serious thought of blackmail or threat or anything else, and the Act requires me to bear that in mind and it seems to me I have got to bear it in mind."

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Then the sentencing judge imposed the sentence of seven years.

As great store is set on this judgment, it seems to me that I should read further passages. The court said:

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> "The appellant had reached the age of 53 without having any previous convictions for this kind of conduct, or indeed anything said against him in respect of this kind of conduct. It is also right that the only victim (if victim he was) of the conduct which brought the appellant before the court was a 13-year-old boy who was already corrupt, and who had gone to the public lavatory for the purpose of seeking out someone to obtain money from them for homosexual activity, and who was the active partner in the only act of buggery which took place."

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The submission was that he was not a continuing danger to young boys. The court said:

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> "In our judgment, [the sentencing judge] had no alternative on the evidence before him but to come to the conclusion that the appellant was likely to commit sexual offences which might cause serious harm in the future. In those circumstances, we consider that the learned judge was entitled to apply section 2(2)(b)."

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However, they went on to say:

> "It may well be that the starting point that the learned judge took was somewhat high. Furthermore, we take the view that in the special circumstances of this case, although the evidence showed that the appellant was likely to be a danger in the future, his conduct to date with this one boy, and particularly the part played by the boy, was such that in our judgment seven years was out of proportion to the offending in question."

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What is said, on the one hand, is that that indicates the danger which was posed by Mr Crow. It indicates that Mr Crow was a dangerous man, a man who did prey on the applicant. It is also right to say, on the other hand, that the court was indicating that the boy was certainly not objecting and, indeed, the appellation "victim" was queried, in the sense that the court said, "if victim he was".

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Next, it is right to say that the considerations which were before that court were not the considerations which were before the Appeals Panel. What was being decided in the Court was the appropriate sentence for the man, Crow, and fairness demands that when doing such an exercise one should not take against an offender more than may be properly said to have been proved. However, that was before the Appeals Court and it is right to say that they would have paid some attention to it, despite the comments which I have already made. More to the point, as I have already said, is the fact that the applicant was before the Appeals Committee, Mr Crow was before the Appeals Committee, and Inspector Wise, who dealt with the prosecution, was before the Appeals Committee.

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In due course, on 3rd April 1997, this applicant came to make his application. He was seeking compensation for the sexual offences committed against

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him in the summer of 1990. Because of his age, the normal time limits did not apply and what is said, on behalf of the respondent -- and it is in respect of only one part of the eventual determination by the Panel, and that in a determination which was not relevant and only added towards the end -- is that if, in fact, you are able to take advantage of the fact that the normal time limits do not apply, then you must also suffer the downside of that, which is that if you make your application late, then the panel will be entitled to consider what has happened to you. Far, far from this case, but take the point that after some crime had been committed, later the applicant had committed a murder, it could not be said that that could not be considered -- making it quite clear that that is something which cannot possibly be said against this applicant, indeed as I have already said, his subsequent offending seems to me to have been at the very low end of offending for young lads who find themselves in the situation in which he was after these matters.

The formal history of what happened thereafter was that, on 13th June 1997, the applicant's claim for compensation was rejected on the grounds -- this is the first rejection -- that the offences committed by Mr Crow were not crimes of violence for the purposes

of paragraph 8A of the scheme and that his own conduct had contributed to the incident so it was inappropriate that he should receive an award of compensation from public funds pursuant to paragraph 13D of the scheme, and that his criminal convictions made it inappropriate that he should receive an award pursuant to paragraph 13E of the scheme.

The applicant sought a review. On 10th November 1997, the authority upheld its original decision on the same grounds. At this, the applicant, as he was entitled, appealed to the Appeals Panel. His grounds of appeal state that, in view of his age and the fact that he had been in the care of the local authority Social Services Department since the age of 8, that he was in need of special education, that his early family background was emotionally bereft, and that he was vulnerable, meant that he was entirely incapable of consenting to the sexual abuse suffered by him.

The factors are all true: what is in dispute is the result which is attributed to those factors. The grounds drew attention, as has been drawn to my attention in this application, to the fact that a child under the age of 16 cannot consent to an indecent assault, and a young person under the age of 21 cannot consent to an act of buggery, and indicated the age of Mr Crow at that time. There are further grounds

relating to the 13E finding, and also it is said that the applicant's offending arises as a consequence of the abuse suffered by him, which has been compounded because his needs, as a result of that abuse, had not been met or dealt with in a healthy developmentally appropriate way by those in whose care he had been placed. So far as paragraph 8A is concerned -- that is the finding that there was no crime of violence -- it was said, at this time, that non-consensual indecent assault and acts of buggery cannot be anything other than crimes of violence.

At the hearing, the applicant gave an account of events which was, it is said, inconsistent with his previous accounts to some extent. What was accepted, and indeed had to be accepted, was that he had participated voluntarily in the sense that he was not forced, but the submission was -- again, as Mr Levey has submitted before me -- that it would be impossible to say that the voluntary nature amounted to consent because of his early history, and because of his experiences of sexual abuse, the age of Mr Crow and all the other matters.

As I have indicated, substantial evidence was available, not only from the applicant but from the other two whom I mentioned. There was also a good deal of evidence as to the applicant's childhood, his

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background, the earlier sexual abuse and his mental condition. It was all before the Appeals Panel and it was there for them to consider and take into account.

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I have been provided with the witness statement of Michael Lewer QC, who was the chairman of the Appeals Panel and has been since its inception 1996. I do not think it is necessary to refer to this in any detail,

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but he dealt with what went on, with the witnesses they heard. He said that the applicant was inconsistent in the way in which his evidence contrasted with earlier statements from him.

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In this paragraph, attention is drawn to the fact that, before the Panel, the applicant said:

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> "... on the first occasion when they met they went to a forest where he was the passive victim of buggery. He said that he did not like it, but because he wanted money he had telephoned Mr Crow and met him again. He said that he was subsequently taken by Mr Crow to a caravan and a chalet and buggered again, and that there were 5 or 6 occasions on which he rang Mr Crow, they met, and he was given money. The applicant said he was given £80 or £100, and that on each occasion buggery was involved. He stated that he stopped seeing Mr Crow when a 'snuff' movie was mentioned, and that he went to the police because his school did nothing to help him. The applicant made allegations of sexual abuse against other people, including a monk and a headmaster, and others in 'the system'."

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There was some question as to whether signs of buggery were found. The applicant saying he thought that they had been. He was cross-examined, and that

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also is commented upon in the statement. He said he was only a child but that he supposed he did start it. He said he was the victim; he agreed he told Mr Crow that he was 17; he said that he had been buggered by Mr Crow on seven occasions. He said he lied to the police in his statement as he was being unco-operative. He dealt with the convictions before the Panel, although not before me, but that does not matter. There were the details of those convictions.

Mr Lewer says there were significant inconsistences, which quite clearly indicates that he was making a decision as to these matters and not merely saying there is an inconsistency, and that is enough. He found as to the circumstances in which they met, what he told him about his age and whether he had ever been the passive actor in an act of buggery by Mr Crow.

Inspector Wise gave evidence. He stated that Mr Crow had been charged with "joint buggery" and had initially pleaded guilty -- it was Mr Crow, not the applicant, who had been allowed to change his plea to not guilty on four accounts. He said had not buggered anyone and that he was the passive partner. He, Mr Crow, was sure there had been no medical examination although, of course, he could not know. Inspector Wise, however, did know, or would have known, and he

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was sure that there had been no medical examination. Mr Crow had been convicted as the passive partner and Inspector Wise, for what it was worth, stated he considered that the applicant had consented and there was no doubt that he had been concerned in homosexual activities in the toilets before he had met Mr Crow.

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Mr Crow gave evidence, saying he did not commit buggery on the applicant but the applicant had buggered him. He said, as was correct, that the judge at trial said it did not matter who did it, it was still an act of buggery which, of course, is correct. Mr Levey says that that has to be taken into account, and it is correct. He, Crow, described the circumstances similar to those which I have already indicated.

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Submissions were made to the Panel. The presenting officer was suggesting that the issue was whether the applicant had in fact consented. Counsel for the applicant submitted there was no dispute that the applicant had participated voluntarily in that he was not forced, however his consent had been vitiated by his earlier history and abusive experiences, and by the age of his assailant, who was 55. The applicant had been sexualised by accumulative abuse by others and was not responsible for his own actions.

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Then the Appeal Panel considered the claim. They

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rejected it. The reasons are set out in the bundle at page 654 and it is right that I should mention what those were. The reasons were supplied at a later

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stage, on 18th January 1999:

> "The applicant's history, his upbringing and his experiences before he met Crow explain why, as a 14 year old, [I have already commented that that should, in fact, have been 13] he was seeking sexual experiences with other men and doing so for money. But to explain and understand does not mean an applicant is entitled to an award within this Scheme.
>
> On all the evidence, it is probable Crow was one, though certainly not the first, in a series of men whom the applicant met and had sexual activity with. At 14, he clearly needed help -- but that does not mean he was not a consenting and willing partner to what he sought. Whether he can blame others is not a matter for us. We do not accept the submission that the cumulative sexual experiences he had were such as to nullify consent. We consider he did consent.
>
> On the issue of credibility, we are not satisfied that he was penetrated by Mr Crow, and we take note of the basis of the conviction as explained to us by the police officer, whose evidence we accepted. However, this does not affect our decision on consent.
>
> No award from this Scheme. If there were a decision on convictions they would lead to a reduction but not the withholding of an award."

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Various criticisms of a minor nature are made of this by Mr Levey. There is also, of course, the major criticism which is the fundamental basis of this application. The minor matters are that there is no mention, for instance, of the applicant's mental health problems but there is clear reference to upbringing and

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experiences and so on. In my judgment, the approach which is expressed there is sympathetic and is an approach which -- subject to the possibility of the arguments on consent -- cannot be criticised.

It has to be borne in mind that it is for the Panel to make the decision. I am only entitled to interfere -- and then only by quashing the decision -- if I find that there has been an error of law or, sufficient to say, in these circumstances, there has been some irrationality in the well-known **Wednesbury** sense. I see nothing to suggest that there was **Wednesbury** unreasonableness and I am bound to say so at this stage. But I have to go on to consider the situation which evolves when I come to consider the real argument here.

First, it is clear that the Panel did not rely on paragraphs 13D or E of the scheme in reaching their decision. It did indicate that if its decision had been taken on the basis of the appellant's criminal convictions, his award would have been reduced but not withheld. It is now necessary to look at the compensation scheme which is copied relevantly at page 628 of the second bundle. Paragraph 6 says:

> "Compensation may be paid in accordance with this Scheme:
> (a) to an applicant who has sustained a criminal injury on or after 1st August 1964."

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Paragraph 8 deals with criminal injury and states:

"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 (including arson, fire-raising or an act of poisoning) ..." [It is not necessary to state the other subparagraphs].

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Paragraph 9 says:

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"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 ...

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(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)."

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Then paragraph 13 was drawn to my attention:

"Eligibility to receive compensation.
A claims officer may withhold or reduce an award where he considers that ...
(d) the conduct of the applicant before, during or after the incident giving rise to the application makes it inappropriate that a full award or any award at all be made; or

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(e) the applicant's character as shown by his criminal convictions (excluding convictions spent under the Rehabilitation of Offenders Act 1974) or by evidence available to the claims officer makes it inappropriate that a full award or any award at all be made."

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That is the framework upon which the various decisions were made. Undoubtedly, the main question is the meaning of the words "crime of violence". Mr Levey

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claims that here there was a crime of violence. As can be seen, the Panel did not agree. They held that there was not a crime of violence. This has been considered in a number of cases to which my attention has been drawn. The arguments have been careful and, in those circumstances, I should consider those various cases, at least shortly.

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The first historically was **Ex parte Clowes** [1977] 1 WLR. There, a divisional court of three, by a majority -- the Lord Chief Justice of the day not agreeing -- dealt with the definition. It was accepted to be a difficult task for many reasons. The word "violent" for instance, has a very wide scope, and an answer was given which was broad. It was not wholly accepted by anybody. There were conflicting -- or, at the very least, slightly conflicting -- approaches between the two other judges. Eveleigh J, as he then was, saying:

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> "'Crimes of violence'... was not limited to offences involving actual physical force but included deliberate criminal activity in which, viewed objectively, there was an obvious probability of personal injury."

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Wien J said that a crime of violence:

> "... was an offence which by definition, as applied to the particular facts of a case, involved the possibility of violence to another."

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As I have indicated, there was conflict and there

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was eventually higher authority.

The next case to which my attention was drawn was **Ex parte Webb** [1984] 1 QB 184. The court again consisted of three judges. The court saying:

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> "[it] finds it highly unsatisfactory that there is no definition of what constitutes a crime of violence for the purposes of the scheme."

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They suggested a definition:

> "Any crime in respect of which the prosecution must prove as one of its ingredients that the defendant unlawfully and intentionally, or recklessly, inflicted or threatened to inflict personal injury upon another."

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It was in this case that Watkins LJ said:

> "The term 'a crime of violence' is not, as we understand it, a term of art."

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That no doubt led the request which, **per curiam**, they sought.

That decision was appealed and went to the Court of Appeal, again in 1986, and it is reported in 1987, 1 QB 74. The facts of all these cases, of course, are

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different but when there is an attempt by the court to make a definition clearly -- unless the very fact that the facts are different makes the definition of no

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avail -- it is to the definition that one turns. It is to be noted that here is the Court of Appeal considering the matter on appeal from the divisional

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court. Again, my attention has been drawn to various passages. At page 79, in his judgment, Lawton LJ said:

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> "Mr Wright submitted that the correct approach to this problem is to start by construing the words in their grammatical context. The word 'crime' by itself covers all unlawful acts or omissions for which the law imposes a penalty. The draftsman of the scheme as amended clearly intended to limit the meaning of the word 'crime'. He did so by the use of the qualifying words 'of violence'. These words are adjectival and indicate the nature of the crime to which the scheme applies. The nature of a crime is different from its consequences."

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Later, Lawton LJ says:

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> "In my judgment, Mr Wright's submission that what matters is the nature of the crime, not its likely consequences, is well founded. It is for the board to decide whether unlawful conduct, because of its nature, not its consequence, amounts to a crime of violence. As Lord Widgery CJ pointed out in **Clowes's** case [when he was in the minority] following what Lord Reid had said in **Cozens v Brutus** [1973] AC 854, the meaning of 'crime of violence' is 'very much a jury point'. Most crimes of violence will involve the infliction or threat of force but some may not. I do not think it prudent to attempt a definition of words of ordinary usage in English which the board, as a fact finding body, have to apply to the case before them. They 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, as in the case of the Road Traffic Act 1972 offence ... [To which there had been reference]."

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The next case to which I should refer is **Gillick v West Norfolk and Wisbech Area Health Authority and the Department of Health and Social Security** [1986] 1 AC

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112. It will have been noted that the Panel was considering consent, and this case was drawn to my attention in that connection. At page 189 of that report, copied at page 746 of the various bundles which I have, this was said by Lord Scarman:

> "When applying these conclusions to contraceptive advice [that was the problem there and not the problem with which we are dealing] and treatment it has to be borne in mind that there is much that has to be understood by a girl under the age of 16 if she is to have legal capacity to consent to such treatment. It is not enough that she should understand the nature of the advice which is being given: she must also have a sufficient maturity to understand what is involved. There are moral and family questions, especially her relationship with her parents; long-term problems associated with the emotional impact of pregnancy and its termination; and there are the risks to health of sexual intercourse at her age, risks which contraception may diminish but cannot eliminate. It follows that a doctor will have to satisfy himself that she is able to appraise these factors before he can safely proceed upon the basis that she has at law capacity to consent to contraceptive treatment. And it further follows that ordinarily the proper course will be for him, as the guidance lays down, first to seek to persuade the girl to bring her parents into consultation, and if she refuses, not to prescribe contraceptive treatment unless he is satisfied that her circumstances are such that he ought to proceed without parental knowledge and consent.
> Like Woolf J, I find illuminating and helpful the judgment of Addy J of the Ontario High Court in **Johnson v Wellesley Hospital** [1970] 17 DLR (3d) 139, a passage from which he quotes in his judgment. The key passage, at page 143, bears repetition [he quoted it, as shall I]:
> 'But, regardless of modern trend, I can find nothing in any of the old reported cases, except where infants of tender age or young

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> children were involved, where the courts have found that a person under 21 years of age was legally incapable of consenting to medical treatment. If a person under 21 years were unable to consent to medical treatment, he would also be incapable of consenting to other types of bodily interference. A proposition purporting to establish that any bodily interference acquiesced in by a youth of 20 years would nevertheless constitute an assault would be absurd. If such were the case, sexual intercourse with a girl under 21 years would constitute rape. Until the minimum age of consent to sexual acts was fixed at 14 years by a statute, the courts often held that infants were capable of consenting at a considerably earlier age than 14 years.'"

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So if the court has to consider whether there is evidence upon which rape may properly be found, it has to consider what the girl has done, and those remarks are as valid today as they were when first stated. That is because what is being considered when rape is being considered, is whether the necessary component parts of that offence may be said to have been shown at the very least, in a **prima facie** case, at first instance.

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Here the question is: was there a crime of violence? That has to be the question which must be answered. The next case to which I feel I should make a reference is the case of **Thompstone**. I do it only because, if it were appropriate, it would be necessary for somebody at some stage to consider the subsequent conduct of this applicant. In **Thompstone** it was held

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by the Court of Appeal that:

> "Compensation may be withheld or reduced in appropriate circumstances where the applicant's conduct, character or way of life had no ascertainable bearing on the occurrence of the injury or its aftermath."

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No doubt there are arguments which could still be raised, but I hope I have already indicated, if not expressly then inferentially, that I take the view that what was said in the final part of the determination was useful but it formed no part of the decision because the decision was that there was no crime of violence.

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Next I have been asked to consider an unreported case decided before McCullough J. Here, the Criminal Injuries Compensation Board was the respondent to the suit of Samantha Daisy Piercy. The case was decided on Monday, 14th April 1997. Since it is said, and rightly, that the facts are very different, I should perhaps say what they were: a man pleaded guilty to the offences of having unlawful sexual intercourse with the applicant in that case, and also to having committed an indecent assault upon her. She was then aged 12 years and ten months and he was aged 19. In those days, there was a rather different scheme but, nevertheless, it was necessary that the Board, on the balance of probabilities, should find entitlement under the scheme.

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The actual facts were that on her waking, having been asleep and having consumed alcohol, she discovered that the cord on her tracksuit trousers was not as she would have left it. She had, in fact, been assaulted by the man who was charged. She had no memory of anything sexual having happened to her after she fell asleep. He was originally charged with rape but his plea of not guilty to that was accepted. The Board said they were not satisfied that she told all of what had happened but, again, that does not in the circumstances seem to have had any great effect. On behalf of the applicant, it was submitted that the decision (that they were not satisfied that a crime of violence had been committed) was flawed.

McCullough J said:

> "She submits that force must have been used; otherwise the bruise and the injury to the private parts could not have been caused. She says that anyone hearing that these offences had been committed against a 12 year old girl would say that she had been the victim of a crime of violence.
> I do not accept this. Consent given by a girl under the age of 16 to unlawful sexual intercourse or indecent touching is not recognised by the law. It does not, however, follow that to commit either offence against a girl of that age involves the use of violence. Each case must be decided on its own facts. Not every application of force is violent. Just as consensual sexual intercourse between a man and a woman would not normally be regarded as a violent act, so it is with a girl under the age of 16. Loveridge's admission that he had intercourse with the applicant did not amount to an admission that he had been violent towards

> her. The medical evidence did not negative her consent, and the Board clearly believed that she had not established that she did not consent. Not every indecent touching of a girl under the age of 16 involves violence."

That decision is not difficult to understand and it is a decision, as it seems to me, which may well have some relevance here. It is right that I should say that, as a part of the background to the scheme, there are the various documents, guides and so on which have been drawn to my attention. For instance, paragraph 7.9 which says:

> "There is no legal definition of the term but crimes of violence usually involve a physical attack on the person, for example assaults, wounding and sexual offences. This is not always so, however, and we judge every case on the basis of its circumstances. For example the threat of violence may, in some circumstances, be considered a crime of violence."

It was drawn to my attention that incest, in some cases, may be a crime of violence, although it might not always be considered to be a crime of violence. Certainly, that must be so. It cannot be said that the definition as it has evolved can rule out those offences saying it is impossible for them to be crimes of violence because quite clearly they may be.

In its simplest form, the applicant's argument is that this applicant could not have consented and in those circumstances there must have been a crime of violence. Second, it is said that if he could have

consented in law, as a result of his personal history and state of mind, he was incapable of consenting in fact. There are various matters upon which they rely, for instance, as a matter of public policy. That argument is in this form. The crimes occurred in the early summer of 1990 when he was 13, incapable in law of consenting to the relevant sexual acts. It follows there could not be consent. That is dealt with by McCullough J, and is quite clearly implicit in the other cases. It does not follow that because there cannot be a consent valid in law there was a crime of violence.

It is said that even the guidance to which I have already referred, given by the authority, indicates what Parliament expects and what society expects in respect of crimes of violence, in other words, saying that since a child cannot consent, then it is necessary for the courts and for bodies such as the Criminal Injuries Compensation Authority to uphold that approach. The Applicant next points out all the matters to which I have drawn attention as we have gone through. The fact that the offender was likely to be a hazard to young children; he says that here was a man who was a paedophile, who was preying on the applicant, and that is something which has to be taken into account; he points out that it is impossible for a boy

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of 13 to be an aider or abetter to the offence of buggery.

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So he says that principle and public policy, all demand that the answer to the question of what is a crime of violence must include within it a subsidiary point, namely that if the victim cannot legally consent to what otherwise would be a crime of violence then there must have been a crime of violence.

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It is in this connection that it is said that here was a grossly psychologically disturbed and damaged 13 year-old boy living in the care system, and he was incapable of consent. If, therefore, the law does not prevent consent then, in fact, there could not -- looked at reasonably -- have been any proper finding of consent.

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As it seems to me, the situation is that all the cases indicate that it is, in the final analysis, for the Appeals Panel to consider all the evidence. As I have indicated already, I am not able to say -- indeed nothing would persuade me to say -- how I would have found in the circumstances had I been the chairman. That would be quite impossible since I did not see the witnesses and the panel did, all of them. It was for them to assess those witnesses; it was for them to assess the facts; and it was for them to make the decision. I can only intervene if they were in

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error in law or if they otherwise came under the **Wednesbury** rules. I see no reason to say that they were in error in law, and I see no reason to say that they were in any way **Wednesbury** unreasonable.

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In those circumstances, there is no way in which I can order the quashing of this decision, which it seems to me they were entitled to make and which I am not entitled to quash. I do not intend to say anything more about the hypothetical basis on paragraph 13E because that was something which was added but does not have any relevance in my view, in view of the fact that they found there was no crime of violence. Thank you both for your help.

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MS ROSE: My Lord, in those circumstances, we would ask for our costs, but I understand the applicant is legally aided, so it would be the normal order.

MR JUSTICE OWEN: The normal form now is to say:

> "Determination of the applicant's liability for payment of costs be postponed pending further application."

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If Mr Levey wants to address me on that, of course he is entitled to do so. But it seems to me that that must follow and I imagine it must also follow that there will not be any further applications.

MR LEVEY: Yes. Clearly what your Lordship says is implicit that there could not be any order without the court being involved, so on that basis I am content with that.

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MR JUSTICE OWEN: Absolutely.

MS HAMILTON: May I ask for a detailed legal aid assessment

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on the applicant's costs?

MR JUSTICE OWEN: Yes, of course you may have that.

MS HAMILTON: And, my Lord, for this to be certified suitable for two counsel?

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MR JUSTICE OWEN: Yes. I have never quite known on what basis that should be done but I have certainly been helped by you both. So if that is enough, then I shall say yes.

MS HAMILTON: Thank you, my Lord

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MR LEVEY: My Lord, I do seek permission from your Lordship to appeal. Of course, I have to consider carefully further your Lordship's judgment but -- as I think was said yesterday in an earlier case -- I do have to make an application, I think, now.

May I put in it in this context: the meaning of "crime of violence" has given rise to some difficulty. It is now over ten years since the Court of Appeal considered it. There have, since then, been changes in the scheme. There is now the statutory umbrella, and there may be other policy arguments which, indeed, I hope I have put before this court. So in the circumstances, I would submit that this does raise important issues and matters that are appropriate for the Court of Appeal to consider.

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MR JUSTICE OWEN: Yes. I am not going to give you leave and I should indicate why. I do believe that the situation is clear. I think if you heard what I said yesterday, you have heard me say I am not one who says that I must be right but, nevertheless, I do have to exercise not only judgment in what I say, but a judgment in whether I give leave. For the reason I have indicated that is what I am going to say. It does not stop you, of course, applying elsewhere if you think that is right.

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MR LEVEY: My Lord, yes.

MR JUSTICE OWEN: Thank you very much.

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