IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

UA-2019-001594-CIC & UA-2020 000600-CIC

Between:

First case

Applicant: **Criminal Injuries Compensation Authority**

v

Respondent: **First-tier Tribunal**

(Social Entitlement Chamber)

And

Interested Party: **CC by his appointee RC**

Second case

Applicant: **RN**

v

Respondent: **First-tier Tribunal**

(Social Entitlement Chamber)

And

Interested Party: **Criminal Injuries Compensation Authority**

Before: Upper Tribunal Judge Gray

Decision: 7 April 2022

Representation:
Criminal Injuries Compensation Authority Mr Ben Collins QC, Counsel
RC Miss Gilmartin, Counsel
RN Mr Robottom and Mr Yetman, Counsel

DECISION

RC

I allow the application for judicial review by the Criminal Injuries Compensation Authority. I quash the decision of the First-tier Tribunal sitting in Manchester and made on 27 February 2019 under number C/1019/17/00064. I remake the decision as follows: The application for a Criminal Injuries compensation award is refused.

DECISION

RN

I refuse the application for Judicial Review by RN. The decision of the First-Tier Tribunal (Social Entitlement Chamber) sitting at East London and made on 5 February 2020 under number C/1021/19/00305 is correct as a matter of law, and it stands.

THE UPPER TRIBUNAL ORDERS that:

(1) No one shall publish or reveal the name or address of either RC or RN or publish or reveal any information which would be likely to lead to the identification of them or any member of their families in connection with these proceedings. This decision itself may be made public.
(2) The provisions of the Sexual Offences (Amendment) Act 1992 apply to these decisions. No matter relating to either complainant shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of a sexual offence. This prohibition applies unless waived or lifted in accordance with s.3 of the Act.

REASONS FOR DECISIONS

1. There are two applications before me. They are for judicial review of two separate decisions of the of the Social Entitlement Chamber of the First-tier Tribunal (the FTT). RC was heard in Manchester on 27 February 2019 under number C/1019/17/00064; RN at the East London Tribunal on 5 February 2020 under number C/1021/19/00305. The FTT is the formal respondent to each appeal, but by convention it does not take part.

2. The two cases raise the same important point of law. Timing and listing difficulties meant that I did not hear them together, but with the consent of the parties each hearing proceeded separately over the CVP, the submissions in each case having been made available to the parties in the other case. RC was heard first, and, again by agreement,

the recording was made available to the parties in RN. Following the hearing of RN, the parties in RC were able to hear that recording and had the opportunity to make any further representations.

3. Counsel for the Criminal Injuries Compensation Authority in both cases was Mr Collins QC; counsel for RC was Ms Gilmartin; RN was represented by Mr Robottom and Mr Yetman of counsel. I am appreciative of their considerable assistance in written and oral argument, both with the central legal issues and with the procedural aspects concerning the way in which the hearings were conducted. I am grateful to both RC and RN for their patience whilst awaiting my decision.

4. The cases have been anonymised because they concern young men who were children when the events occurred. Each boy was the victim of what might be described as online or cyber "grooming". Members of their families, who have supported them throughout the claims process, were present at the hearings. To them I repeat what I said at each hearing, that the outcome is based upon a legal analysis of the way that the Criminal Injuries Compensation Scheme operates. I know that in each case a child suffered psychological damage because of the actions of another person. The legal conclusions that I have reached do not seek to minimise that damage, nor the criminal conduct that led to it.

The issue

5. I believe these to be the first cases of criminal injuries compensation claims for psychological injury from online conduct. The criminal injuries compensation legislation provides redress only where a crime of violence has been committed. Whether the conduct amounted to crimes of violence was the central issue in both cases.

My decision in a nutshell

6. I have decided that the conduct found to have occurred in each case could not as a matter of law amount to a crime of violence under the 2012 Criminal Injuries Compensation Scheme. Accordingly, the claims must fail. My decisions are framed to achieve those outcomes.

Map through my decision

The relevant legal provisions

Section 1 of the Criminal Injuries Compensation Act 1995 provides:

1(1) The Secretary of State shall make arrangements for the payment of compensation to, or in respect of, persons who have sustain one or more criminal injuries.

(2) any such arrangements shall include the making of scheme providing, in particular for –

(a) the circumstances in which awards may be made; and

(b) the categories of persons to whom awards may be made.

(3) the scheme shall be known as the Criminal Injuries Compensation Scheme.

(4) in this Act

…

"Criminal injury", "loss of earnings" and "special expenses" has such meaning as may be specified;

…

"Specified" means specified by the Scheme.

It is agreed that both these cases are governed by the Criminal Injuries Compensation Scheme 2012 Scheme, as amended. The starting point is paragraph 4:

Eligibility: injuries for which an award may be made

4. A person may be eligible for an award under this Scheme if they sustain a criminal injury which is directly attributable to their being a direct victim of a crime of violence committed in a relevant place. The meaning of "crime of violence" is explained in Annex B.

Annex B: Crime of Violence

1. This Annex applies in deciding whether a crime of violence has been committed for the purposes of this Scheme. Where a claims officer is satisfied that a crime has been committed it is still necessary for that crime to constitute a crime of violence in accordance with this Annex.
2. (1) Subject to paragraph 3, a "crime of violence" is a crime which involves:

(a) a physical attack;

(b) any other act or omission of a violent nature which causes physical injury to a person;

(c) a threat against a person, causing fear of immediate violence in circumstances which would cause a person of reasonable firmness to be put in such fear;

(d) a sexual assault to which a person did not in fact consent; or

(e) arson or fire-raising.

(2) An act or omission under sub-paragraph (1) will not constitute a crime of violence unless it is done either intentionally or recklessly.

3. In exceptional cases, an act may be treated as a crime of violence where the assailant:

(a) is not capable of forming the necessary mental element due to insanity; or

(b) is a child below the age of criminal responsibility who in fact understood the consequences of their actions.

4. (1) A crime of violence will not be considered to have been committed for the purposes of this Scheme if, in particular, an injury:

(a) resulted from suicide or attempted suicide, unless the suicidal person acted with intent to cause injury to another person;

(b) resulted from the use of a vehicle, unless the vehicle was used with intent to cause injury to a person;

(c) resulted from an animal attack, unless the animal was used with intent to cause injury to a person;

(d) was sustained in the usual course of sporting or other activity to which a person consented by taking part in the activity; or

(e) was sustained *in utero* as a result of harmful substances willingly ingested by the mother during pregnancy, with intent to cause, or being reckless as to, injury to the foetus.

(2) In this paragraph, “vehicle” means any device which can be used to transport persons, animals or goods, whether by land, water or air.

Sexual Offences Act 2003

Sexual assault

3. (1) A person (A) commits an offence if—

(a) he intentionally touches another person (B),

(b) the touching is sexual,

(c) B does not consent to the touching, and

(d) A does not reasonably believe that B consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

(3) Sections 75 and 76 apply to an offence under this section.

(4) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 10 years.

10 Causing or inciting a child to engage in sexual activity

(1)A person aged 18 or over (A) commits an offence if—

(a)he intentionally causes or incites another person (B) to engage in an activity,

(b)the activity is sexual, and

(c)either—

(i)B is under 16 and A does not reasonably believe that B is 16 or over, or

(ii)B is under 13.

(2)A person guilty of an offence under this section, if the activity caused or incited involved—

(a)penetration of B's anus or vagina,

(b)penetration of B's mouth with a person's penis,

(c)penetration of a person's anus or vagina with a part of B's body or by B with anything else, or

(d)penetration of a person's mouth with B's penis,

is liable, on conviction on indictment, to imprisonment for a term not exceeding 14 years.

(3)Unless subsection (2) applies, a person guilty of an offence under this section is liable—

(a)on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or both;

(b)on conviction on indictment, to imprisonment for a term not exceeding 14 years.

15 Meeting a child following sexual grooming etc.

(1)A person aged 18 or over (A) commits an offence if—

(a)A has met or communicated with another person (B) on one or more occasions and subsequently—

(i)A intentionally meets B,

(ii)A travels with the intention of meeting B in any part of the world or arranges to meet B in any part of the world, or

(iii)B travels with the intention of meeting A in any part of the world,

(b)A intends to do anything to or in respect of B, during or after the meeting mentioned in paragraph (a)(i) to (iii) and in any part of the world, which if done will involve the commission by A of a relevant offence,

(c)B is under 16, and

(d)A does not reasonably believe that B is 16 or over.

(2)In subsection (1)—

(a)the reference to A having met or communicated with B is a reference to A having met B in any part of the world or having communicated with B by any means from, to or in any part of the world;

(b)“relevant offence” means—

(i)an offence under this Part,

(ii) . . . . . .

(iii)anything done outside England and Wales. . . which is not an offence within sub-paragraph (i) . . but would be an offence within sub-paragraph (i) if done in England and Wales.

(3). . . . . .

(4)A person guilty of an offence under this section is liable—

(a)on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b)on conviction on indictment, to imprisonment for a term not exceeding 10 years.

7. The Tariff at Annex E of the Criminal Injuries Compensation Scheme 2012 (the schemeor the 2012 scheme) sets out injuries, both physical and mental, for which the scheme provides compensation. In this case the issue was not as to the injuries caused: CICA accepted that mental injury had been caused to both the claimants. In those circumstances I do not set out the Tariff.

Background to the applications for Judicial Review

RC

8. The victim in RC was CC, who was twelve when he was 'befriended' in an internet chat room. The relevant conduct took place entirely online following the virtual 'meeting'.

9. The perpetrator facilitated CC's access to adult sexual content, thus persuading him to perform sexual acts to camera. This man is now serving a sentence of twelve years imprisonment in the USA for similar crimes against some 200 children. Although there was no prosecution here, in the UK there are offences under the Sexual Offences Act 2003 to protect young people such as CC by criminalising conduct of this nature.

10. In due course a claim was made (by RC on his behalf) to the Criminal Injuries Compensation Authority (hereafter CICA or the Authority). The Authority accepted that CC had been the victim of crime that had caused psychological injury; the issue was whether he had been the victim of a crime of violence. The decision maker at CICA decided that he had not.

11. There was an appeal to the First-tier Tribunal (FTT). CICA argued that only sexual offences involving physical touching came within the scheme. The FTT did not accept that. It allowed the appeal.

RC: FTT findings and reasoning

12. The FTT described the conduct as "online grooming" by a prolific paedophile. It was not in issue that criminal offences under the Sexual Offences Act 2003 had been committed.

13. The tribunal decided that there was a crime of violence in accordance with Paragraph 4 and Annex B. Paragraph 2 (1) (b) "any other act or omission of a violent nature which causes physical injury to a person" applied: the definition of violence in the English dictionary was not restricted to physical contact. It drew from *R (Jones) v First Tier Tribunal (Social Entitlement Chamber) and Criminal Injuries Compensation Authority* [2013] UKSC 19 (now referred to as *Jones*) that the focus must be on the nature of the act rather than the results, although the known consequences may inform the nature of that act. It described the coercive conduct of the perpetrator as a hostile act, subjugating the will of the victim.

14. Paragraph 2 (1)(d) "a sexual assault to which the victim did not in fact consent" also applied, the interpretation of "sexual assault" in the scheme not being restricted to the meaning in section 3 of the Sexual Offences Act (which specifies touching). This was on the basis that the words should be given their ordinary English meaning, and

the victim, given his age, could offer no meaningful consent to sexual acts which came within the Sexual Offences Act 2003.

15. The FTT said: "coercion and control can be achieved through threat or inducement, and this can be in the physical presence of the victim or via electronic communication."

RN

16. From the age of ten RN had been a regular attender at a club dedicated to playing a particular card game. When aged twelve he met a young man there, JP, who began texting him, originally about playing the card game at the club and in tournaments. The text messages, on Facebook and via PlayStation were not available at the time of the FTT hearing but it was common ground that they became sexual in nature. RN's mother found them on his phone and reported the matter to the police.

17. JP pleaded guilty at the Magistrates Court to two 'sets' of offences occurring on different dates. All were inchoate attempts. They were offences under the Sexual Offences Act 2003 sections 10 and 15, respectively causing or inciting a boy under thirteen to engage in sexual activity and meeting a boy under sixteen years of age following grooming for the purpose of sexual activity. He was committed to the Crown Court for sentence.

18. There he was given a suspended sentence, but, on an Attorney General's reference, the Court of Appeal accepted that the sentence was too lenient. It ordered an immediate sentence of two years and four months imprisonment, together with a 10 year Sexual Harm Prevention Order.

19. On an application to the Authority for compensation CICA accepted that RN had been the subject of damaging sexual offending, but not of a crime of violence. The FTT in this case upheld the CICA decision.

20. The material findings of the tribunal were that:

(i) no physical assault took place;

(ii) there was evidence of threats causing RN some fear;

(iii) the threats did not cause RN to fear immediate violence.

21. The FTT reasoned, having analysed the conduct, that it did not constitute a sexual assault as defined by the Sexual Offences Act 2003, which involved intentional touching without consent, and that the Scheme does not extend to cyber-based sexual offences if there is not a threat causing fear of immediate violence.

22. Accordingly, it found there was no crime of violence and RN had no entitlement to compensation under the Scheme.

The route to the Upper Tribunal

23. In RC CICA challenged the FTT decision. Upper Tribunal Judge Levenson granted the authority permission to apply for judicial review as an interested party and transferred the case to me.

24. RN applied for permission to commence judicial review proceedings, which Judge Levenson also granted, and I took over the case due to the similarity of the legal issues.

The legal issues

25. Despite the differing facts, there were common themes:

(i) The legal effect of Annex B: is it guidance, or does it define a crime of violence?

(ii) Do the tests in the Authorities still apply?

(iii) Could the facts of either case constitute an act 'of a violent nature' under 2(1) (b)?

(iv) Did psychological injury fall within the ambit of "physical injury" in 2(1) (b)?

(v) Did the 2012 scheme incorporate the Sexual Offences Act 2003, or at least section 3?

(vi) Via incorporation or otherwise, was touching an essential ingredient of a sexual assault under paragraph 2 (1) (d)?

(vii) Could a crime of violence be committed online?

26. In both cases it had been accepted by CICA that the criminal acts were carried out either intentionally or recklessly within paragraph 2 (2) of Annex B, which reads "An act or omission under sub-paragraph (1) will not constitute a crime of violence unless it is done either intentionally or recklessly." I have not addressed that issue save where it impacts other aspects of the discussion. Similarly, under paragraph 2 (1) I was required only to consider subparagraphs (b) (c) and (d). I have looked at (a) and (e) only as context in construing the relevant parts.

27. Mr Collins QC has asked me to give guidance to the FTT as to the meaning of paragraph 2 (1) and, in particular, subparagraph (d). I have done so, conscious of the observations made *per curiam* in *Jones* (at page 49 D) as to the role of the Upper Tribunal in providing structured guidance on the use of expressions that are central to the scheme to reduce the risk of inconsistent results by different panels at First- tier level.

The positions of the parties

28. I do not do justice to the eloquence of the arguments, but I capture their range in the following summary.

The arguments for CICA

29. Mr Collins tells me that in most claims to the Authority the answer to the question of whether the circumstances constitute a crime of violence is obvious. The cases where there is difficulty, however, are of course those most likely to be before the Tribunal.

30. Mr Collins argued that under the 2012 scheme, to constitute a crime of violence the conduct had to fall within one of the five definitions in Annex B: they were not merely guidance.

31. The process under the 2012 scheme, he said, was for the FTT to find the facts, ask itself whether injury was disclosed and if so, whether the relevant criminal offence was a crime of violence within the terms of Annex B. Some of the old authorities are aimed at a different test and are now relevant only to the earlier schemes where a crime of violence was not defined. Whether a crime of violence has been committed is still for the FTT, but how it answers the question has changed: (i) has there been a criminal offence? (ii) is it a crime of violence within the scheme?

32. Although the tests in the old cases such as *R v Criminal Injuries Compensation Board ex parte Webb and others* [1987] 1 QB 74 *(Webb)* and *Jones*, were no longer valid, that was not to say that case law had no contextual application: wider authority may help in construing the words, but only within the task of construing the scheme, and so, in the context of the scheme as a whole and with due regard to its purpose.

33. The FTT in RC was wrong its construction of paragraph 2 (1) (d) in finding that the conduct was a sexual assault. He argued that "sexual assault" is a statutory term derived from section 3 of the sexual offences act in which "intentionally touches" is an essential ingredient: Section 3 (i) (a). The scheme is based on commission of criminal offences: it would be odd if the criminal offence relating to that provision was not applied. Touching is a necessary ingredient for the purposes Paragraph 2 (1) (d).

34. The term "sexual abuse" is used in the Guide to the Scheme, but that is not an aid to the meaning of sexual assault in Annex B: the guide follows; it does not lead.

35. Where there are sexual offences (although not prosecuted) that would fall within section 3, which would include rape, these are crimes of violence, but that does not mean that sexual offences in general are included.

The arguments in RC

36. For RC Ms Gilmartin relied upon the tribunal's findings of fact which she said reflected the complexity of the situation: grooming by an experienced adult who manipulated using inducements and rewards. The claimant was no less at risk of harm online than he was in person.

37. She argued that it is for the tribunal to assess the acts committed, and that enquiry is not obviated by Annex B. Once the tribunal embarks on a fact-finding exercise it can make an holistic assessment of the facts: it is not confined to a literal interpretation of the sub paragraphs of paragraph 2. The use of the word "involves" in paragraph 2 immediately prior to sub-paragraphs (a)-(e) suggests that the FTT correctly concluded

that was explanatory and not prescriptive. The old cases are still relevant, and "a hostile act" is sufficient.

38. She pointed out that there is nothing within the scheme to suggest that the Sexual Offences Act 2003 is incorporated: there is no reference to it when it could have been stated. She relied on the judgment of Judge Levenson in *CICA v FTT(SEC) and BW* [2017] *(BW),* in which he made *obiter* comments (at paragraph 25) that the use of the term 'sexual assault' in paragraph 2 (1) (d) was not confined to an offence under section 3 of the Sexual Offences Act 2003, and might involve a threat or an attempt where there is no actual touching.

The arguments in RN

39. Mr Robottom argued that to limit recovery under paragraph 2 (1) (b) to criminal acts that were restricted to those causing physical injury was both incompatible with the EU obligations of the UK under the Violent Crimes Directive 2004/18/EC and the EC CVC 1983 (the Compensation Convention), and did not reflect the intention of Parliament in the 2012 scheme, the purpose of which was to compensate victims of crime who suffered physical or psychological injury resulting from an intentional offence of a violent nature.

40. The CICA approach effectively means that injury which is purely psychological cannot be covered unless it falls within 2 (i) (c). That approach restricted the scheme compared to previous iterations. He did not accept that it did, or that it could do so.

41. He argued that, in any event, the facts of this case fell within Annex B, relying upon the use of the word "explained" in paragraph 4 of the Scheme, saying that it was the key to how Annex B must be read: "The meaning of "crime of violence" is explained in Annex B" meant that it was explanatory rather than directive.

42. The failure of the FTT to refer to the case of R v *Ireland and R v Burstow* [1997] AC 147 (*Ireland* or *Burstow*) in its judgment was a material omission, and its conclusion that to come within 2 (i) (d) touching was required was wrong.

43. He accepted that an assault under section 10 of the Sexual Offences Act 2003 must involve touching, but a common law assault need not: *Ireland*. The offences that the perpetrator in the case of RN had committed were not "just grooming" offences: there had been psychological consequences and the FTT was entitled to take them into consideration because they shed light on whether the offences were crimes of violence.

44. He relied on the case of *Jones*. Although that was under the earlier scheme it should still be followed: in *Criminal Injuries Compensation Authority v First-tier Tribunal and AS* [2017] UKUT 0043 (AAC) Upper Tribunal Judge Knowles (as she then was) approved the tests. This, he said, approved the concept that a hostile act was sufficient.

45. Referring to the case of *BW,* this case was factually a long way from voyeurism, involving as it did intentional acts of a sexual nature towards a child. A sexual assault within paragraph 2 (1)(d) meant an assault of a sexual nature. That need not involve touching. A purposive interpretation of the scheme must recognise that the core purpose is to compensate those who suffer serious physical or mental injury as a result

of an offence of a violent nature, and restricting that paragraph to cases where physical contact took place would not be consistent with that intention.

46. Reliance was placed on *Webb,* in which Lord Justice Lawton said, "most crimes of violence will involve the infliction or threat of force but some may not." Also *R v Criminal Injuries Compensation Board ex parte Clowes* [1977] 1 WLR 1353, Mr Justice Eveleigh at 1359A suggested that " 'personal injury directly attributable to a crime of violence' means in my opinion "personal injury directly attributable to that kind of deliberate criminal activity in which anyone would say that the probability of injury was obvious."

47. The term "physical injury" in paragraph 2 (1) (b) can include psychological as well as bodily injury; alternatively, a purposive construction should include that.

48. Referring to the "looseness of language" in both the scheme and the Consultation Response, he argued that this interpretation was the only way to make sense of that Response, and indeed of that subparagraph within the context and purpose of the scheme.

49. Subparagraph (b) must be a broad catch-all provision for offences which do not necessarily include attacks, sexual assaults or threats: it would be otiose otherwise. An approach to construction which would render it superfluous is impermissible: *No 20 Cannon Street Ltd v Singer and Friedlander Ltd* [1974] Ch 229 per Megarry J at 23

My reasoning

Discussion

50. Both the First-tier Tribunals were composed of a judge and panel members experienced in the relevant field, and I respect their factual findings: *Jones; Criminal Injuries Compensation Authority v Hutton and Others* [2016] EWCA Civ 1305 at [54]. I must decide whether the two tribunals applied the law correctly in relation to the facts that each found. The answer to that question starts with the place of Annex B.

The legal effect of Annex B: is it guidance, or does it define a crime of violence?

51. In considering the status and the meaning of Annex B I examine both the wording, its place within the 2012 scheme as a whole, and the evident purpose of that scheme, in accordance with the observations of Lord Justice Briggs in *R (Colefax) v FTT (SEC) and CICA* [2015] 1 WLR 35 at page 40 [18].

52. Paragraph 4 of the 2012 scheme states:

"A person may be eligible for an award under this Scheme if they sustain a criminal injury which is directly attributable to their being a direct victim of a crime of violence committed in a relevant place. The meaning of "crime of violence" is explained in Annex B."

53. Both applicants argue that this language of itself indicates guidance rather than prescription.

54. Mr Robottom goes further, urging me to take a wide view of the term "crime of violence". He relies upon the Supreme Court in *Yemshaw v Hounslow LBC (Secretary of State for Communities and Local Government and Another intervening)* [2011] UKSC 3, in which a wide approach was used to interpret a statutory term in the Housing Act 1996. The circumstances were as to whether someone had become intentionally homeless: that person would have been rehoused by the local authority had they been subject to "domestic violence" in their own home. In those circumstances the Supreme Court defined that term as encompassing emotional abuse. I have not been assisted by that definition in relation to interpreting the Criminal Injuries Compensation Scheme, the purpose of which is wholly different.

55. I must consider paragraph 4 together with the wording of Annex B and the purpose of the scheme.

56. Paragraph 1 of the Annex states that it "applies in deciding whether a crime of violence has been committed for the purposes of this Scheme. Where a claims officer is satisfied that a crime has been committed it is still necessary for that crime to constitute a crime of violence in accordance with this Annex".

57. That language strongly suggests prescription; but I consider it in context.

58. Paragraph 2 (1) states that "… a "crime of violence" is a crime which involves"… and sub paragraphs (a) to (e) are there set out.

59. Ms Gilmartin drew from the use of the term "involves" that the matters set out in the Annex were merely examples and the provision was advisory only; however, on my reading 'involves' (as opposed to, perhaps, 'includes') suggests that paragraph 2 (1) (a)-(e) does not contain mere examples, but a definitive list designed to limit the ambit of the scheme to those matters set out in it.

60. Paragraph 4 (1) (a)-(e) of Annex B sets out specific matters that are said <u>not</u> to be crimes of violence for the purposes of the scheme, and these include circumstances which have, over the years, been the subject of judicial decision making on the point. I note also that a provision in the body of previous schemes, that the use of a vehicle will not be a crime of violence unless it is used with intent to cause injury, is now part of this list at (b). This suggests that the Annex is designed as a codification insofar as it is possible in respect of crimes that are, or are not, crimes of violence.

61. Following *Colefax* and considering the above phrases as part of the scheme as a whole, I find it difficult to read Annex B otherwise than as a provision inserted to achieve clarity. As far as possible it is intended to be determinative of the meaning of the term "a crime of violence".

Do the tests in the authorities still apply?

62. The criteria for deciding what constituted a crime of violence have been developed over a period of years in case law. I agree with Mr Collins that the expression as it is used in the previous schemes remains governed by that.

63. In relation to the definition of a crime of violence in the 2012 scheme the cases must now be read in the light of Annex B.

64. I do note, however, the comments of Carnwath LJ SPT (as he then was) in *Rust-Andrews v FTT (SEC) and CICA* [2011] EWCA Civ 1548 at [34] (regarding the 2008 scheme):

"The Act….expressly requires compensation to be determined in accordance with the Scheme. However, as the judge I think acknowledged, that does not require the exercise to be conducted in a straitjacket, or mean that no help can be gained where appropriate from the wisdom reflected in authorities at the highest level dealing with similar issues."

65. Mr Collins accepted that the old authorities may yet have contextual application, albeit in the light of the scheme itself.

Could the facts of either case constitute an act 'of a violent nature' under 2(1) (b) and how is that term to be interpreted?

66. It is for the tribunal to find the facts, and from them determine whether a crime has been committed; if it has, is it a crime of violence within Annex B? If 2 (1) (b) is under consideration the approach in the older cases may be of assistance in determining whether an act (or omission in relevant circumstances) is "of a violent nature".

67. I will consider the line authority in view of the arguments before me, particularly those in relation to place of the "hostile act".

68. The tribunal in RC found that the conduct amounted to a hostile act which, it said, was sufficient to constitute a crime of violence. Ms Gilmartin relies on that finding and that concept. As to what constitutes criminal conduct "of a violent nature" Mr Robottom also argues that "a hostile act" is sufficient. He draws this from *Jones,* arguing (grounds of appeal at paragraph 31) that at [13] Lord Hope cited with approval remarks made by counsel in in *Webb*, which were endorsed by the Court of Appeal in that case.

69. The reference at [13] of *Jones,* however, is used only in setting out the context to the term "a crime of violence", and the "hostile act test" is not approved.

70. The background begins with the case of *Clowes*, in which found, by a majority, that whether or not an offence was a crime of violence depended upon the probability of injury being obvious; that is, an approach looking at the consequences of the act. I note here the dicta of Eveleigh J on this point, which is relied upon by Mr Robottom in his written submission. However, in a minority judgment Widgery CJ disagreed with that approach, preferring counsel's submission: that it was a crime of which violence is "an essential ingredient".

71. That view was preferred by the Divisional Court in *Webb,* which rejected four claims from train drivers who had suffered psychologically after colliding with people bent on suicide. It endorsed a submission of counsel for the board (said to be similar to that put forward in *Clowes*), to the effect that a crime of violence involves either direct infliction of force, or "at least a hostile act directed towards the victim or class of victims." The Court of Appeal did not disturb the decision; however, it was this case in which Lord Justice Lawton formulated what the court in *Jones* has now found to be the proper approach. This differed from the submission in *Clowes* that had been endorsed by the Divisional Court. (*Jones* at [14] B).

72. Lawton LJ's approach (at page 79 of *Webb* and set out in *Jones* at [14]) was that "it is for the board to decide whether unlawful conduct, because of its nature, not its consequences, amounts to a crime of violence."

73. He had earlier given examples of absurdity were the consequences of a crime to be definitive: the actions of a person failing to fence a potentially dangerous machine (an offence under the Factories Act 1961) or a motorist parking illegally in a dangerous location might amount to crimes of violence. He added guidance which has been often cited since, and which was endorsed in *Jones* at [15] G:

"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."

74. Reliance is placed in both these cases on the consequences that the online conduct had on these young boys. As the CICA decisions turned upon there not being a crime of violence the extent of their psychological harm was not fully investigated either by CICA or the FTT, nonetheless, it has been accepted that they have suffered harm, and some of the documents before me suggest that it has been serious.

75. In relation to some types of crime the consequences still have a place in shedding light on whether a crime was "of a violent nature" within subparagraph (b) of Annex B; however, it must be remembered that the consequences of a crime are not determinative of the violence issue. The case of *Jones* itself was one in which the consequences were devastating for Mr Jones; however, the tribunal decision that, for lack of *mens rea,* the offence of causing grievous bodily harm was not made out, was reinstated by the Supreme Court.

76. In *C Petitioner* 1999 SC 551 Lord Macfayden refused judicial review of a negative decision relating to a claim for personal injury attributable to incidents of indecent exposure. The case did not, contrary to the Authority's argument before me, establish that indecent exposure was not a crime of violence; rather, it said that the circumstances were key to the conclusion on that issue, the critical matter being whether or not the victim was put in fear of immediate harm.

77. The case is relevant to both RC and RN, in that it concerned psychological injury relating to a crime that did not involve physical contact. The passage above from *Webb* was cited with approval; the learned judge adding "it may be that there are cases in which examination of the actual or probable consequences of the criminal act will cast light on its nature. But it is for the light that they cast on the nature of the criminal act rather than for their own sake that the consequences may be relevant."

78. My reading of *C Petitioner* leads me to the view that for the consequences to be of relevance in shedding light on the nature of the act, and therefore potentially of relevance to a tribunal deciding whether or not a crime was "of a violent nature" under paragraph 2 (1) (b), it is the immediate consequences that may be of assistance and not the more remote consequences. The child victim of indecent exposure in C claimed compensation for psychological damage, but it was the circumstances

surrounding the event that were important in deciding the issue of a crime of violence, not any psychological repercussions.

79. Also important in that case was the approach to the argument of counsel for C that the issue was not infliction or indeed threat of force, but whether the victim might reasonably have been fearful of her own safety by the actions of the perpetrator; that is, the focus being on the consequences. Lord Macfayden disagreed, describing the argument as

"an attempt to return, by way of *Ireland*, to the approach adopted by the majority of the court in *Clowes* and rejected in *Webb*. … What the Board required to do, therefore, was first ascertain what happened in the incidents which gave rise to the applications, and then ask itself whether, in respect of each incident, what happened was, according to the ordinary use of language, a crime of violence… There is in my view nothing in *Ireland* which indicates that the *Webb* approach must be abandoned or modified."

80. In *Jones* Lord Hope, having endorsed Lawton LJ's approach in *Webb,* went on to formulate the test which has since been found to apply to the 2012 scheme.

81. *AS*, a decision of Upper Tribunal Judge Knowles (as she then was), concerned the 2012 scheme. She cites the following passage from *Jones*, deciding that the test held good for the 2012 scheme. I do not disagree with her. At [16] Lord Hope said:

"It is for the tribunal which decides the case to consider whether the words "a crime of violence" do or do not apply to the facts which have been proved. Built into that phrase, there are two questions that the tribunal must consider. The first is whether, having regard to the facts which should be proved, a criminal offence has been committed. The second is whether, having regard to the nature of the criminal act, the offence that was committed was a crime of violence."

82. Annex B does not displace this; however, within its consideration of the second part the tribunal must use Annex B to decide whether, on the facts it has found, the offence committed was a crime of violence. The use of the term "of a violent nature" in subparagraph (b) reflects that approach.

83. It will be for the Authority or the Tribunal to consider and decide whether, if the constituents of the offence include a mental element, it was done either intentionally or recklessly, (per paragraph 2(2) of Annex B) under the test in *Jones*

"in the sense that he had actually foreseen that his act would cause some harm even if not the degree of harm which had actually occurred, and it was not sufficient that the offender merely should have foreseen that some such harm might result." (headnote (1) page 49 at B).

84. More troubling, perhaps, in the context of the 2012 scheme, is the dicta set out in the words of Lord Hope at paragraph 18 and prayed in aid by Mr Robottom:

"the crime that section 20 [of the Offences against the Person Act 1861] defines will always amount to a crime of violence for the purposes of the scheme for compensation for criminal injuries."

I pause to observe that Lord Hope was talking about the 2008 scheme, not the 2012 scheme.

85. Section 20 reads:

"Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon another person, either with or without any weapon or instrument, shall be guilty of an offence and liable, on conviction on indictment, to imprisonment for a term not exceeding 7 years."

86. The applicants' submissions regarding *Ireland and Burstow* are to the effect that where serious harm is caused by the actions of an online perpetrator, the offence can be committed.

87. The conclusions that I have drawn as to the place of Annex B mean that the constituent parts of an offence are not necessarily definitive of it being a crime of violence under the 2012 scheme. That is not a conclusion that I have arrived at without hesitation; it is, however, inevitable if Annex B is prescriptive.

Is physical injury required?

88. Under paragraph 2 (1) (b) the requirement is that the act or omission of a violent nature "causes physical injury to a person". Mr Robottom has argued that the paragraph must be read to encompass psychological injury. He relies not only on *Ireland and Burstow,* but to the obligation of the UK under international law.

89. The decisions in *Ireland and Burstow* were to the effect that "bodily harm" under the offences against the Person Act 1861 included psychological harm. They do not require me to construe the term "physical injury" as used in this wholly different context as including purely psychological harm.

90. Mr Collins relies upon the distinction in the scheme between physical and mental injuries, arguing that this is both in relation to such injuries of themselves, and in relation to the table of compensation, which is couched to reflect that distinction.

91. Mr Robottom makes reference to the Consultation Paper "Getting it right for victims and witnesses" CP3/2012 Ministry of Justice January 2012. I note Mr Collins' caution as to its relevance as an aid to construction in these circumstances.

92. Mr Robottom sets out parts of that Paper which relate to sexual and physical abuse, a separate part of the Tariff; indeed, the language used differentiates between sexual violence and physical violence. It is a feature of this document (and the scheme itself) that the terms used are an attempt to simplify the language for the lay reader rather than use legal terms in a strictly legal sense. The sections of the Paper quoted refer to both physical and/or mental injury, and do not, contrary to the argument, make it apparent that physical injury will include mental consequences: it does not assist me.

93. The distinction between physical and mental injury is made on a number of occasions in the scheme itself. Paragraph 2 (1) (c) contemplates mental injury only, because it relates to a threat. This would appear to render the reference to physical injury in sub-paragraph (b) more pertinent.

94. I agree that the structure of the tariff set out in Annex E is important for context. That differentiates physical and mental injury, a distinction that is maintained in other parts of scheme.

95. On the wording itself I conclude in favour of Mr Collins' argument. It is likely that the intention was to exclude eligibility in respect of psychological injury under subparagraph (b) unless it is an exacerbating factor following physical injury.

The international law argument

96. I turn to the international law argument, and whether the scheme offends against the UK's commitment in international conventions if it limits compensation in this way.

97. I start with the principle that I must interpret the 2012 scheme in the light of the relevant EU law, *per* Baroness Hale in *Smith v Smith and another* [2006] 1 WLR 2024, (a case which concerned interpretation of the UK child support legislation) to align with the principles in the United Nations Convention on the Rights of the Child.

98. Mr Robottom relies on the Violent Crimes Directive 2004/18/EC, and the EC CVC 1983 (the Compensation Convention). He argues that the narrow approach put forward by CICA, and which essentially I adopt, means that the scheme falls foul of the intent, indeed the terms, of these, which have been incorporated into English law and remain so under the current provisions following the UK leaving the EU.

99. He refers to the duty to compensate for "impairment of health", rather than merely physical injury. Specifically, he argues that Annex B should be interpreted in the light of paragraph 18 of the explanatory note relating to Article 2 of the Compensation Convention, which states:

"The violence inflicted by the offender may not be physical. Compensation may also be payable in cases of psychological violence (for example serious threats) causing serious injury or death."

100. It is stretching the meaning of an explanatory note to argue that because the words "for example" are used it means that the factual circumstances in RN either constitute psychological violence or fall into a category for which the Convention mandates that compensation is payable.

101. The terms of Article 12 of the Violent Crimes Directive 2004 are also relied upon. They require that:

"All Member States shall ensure that their national rules provide for the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories, which guarantees fair and appropriate compensation to victims."

102. The relationship between the 2012 scheme and the Violent Crimes Directive and The Council of Europe Convention on Violent Crimes was analysed in the case of *JT v First-tier Tribunal and another (Equality and Human Rights Commission intervening)* [2019] 1 WLR 1313*, (JT)* which involved the issue of those prohibited from making a claim by the legislation disallowing recovery in cases affected by the former "same roof rule", a small number of cases where the crimes occurred before 1979. Recovery in such cases was permitted on a different point; however, the discussion is instructive.

103. Having pointed out that the Conventions I have already cited take the existence and scope of the Criminal Injuries Compensation Scheme outside the absolute choice on the part of the state, Leggatt LJ deals with the place of the scheme in the context of the discrimination argument before the Court of Appeal, categorising it as "part of the general framework of social security legislation", so falling within the ambit of Article 1 Protocol 1.

104. Whilst there is not a specific discrimination argument in this case, I take notice of the fact that, as part of the social security framework, the scope of the Criminal Injuries Compensation scheme is one of the areas in which the government has a wide margin of appreciation. In *Stec v United Kingdom* (2006) 43 EHRR 47, *(Stec)* at paragraph 52:

"a wide margin is usually allowed the state under the Convention when it comes to general measures of economic and social strategy. Because of their direct knowledge of their Social Security and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation".

105. *Humphreys v Revenue and Customs Commissioners* [2012] 1 WLR 1449 clarified that the principle applied in relation to considerations by the domestic courts.

106. Prior to the passing of the 2012 scheme into law there was significant consultation on its elements, and insofar as it limits recovery beyond entitlement under previous schemes, I can find neither prohibition nor irrationality (a broadly similar concept to the test in *Stec)* in its so doing. It is an area in which the courts should be slow to interfere. I cannot find that the way in which the scheme has been drafted is inconsistent of with the international obligations of the UK.

The place of the Sexual Offences Act 2003

107. The requirement under the scheme for there to have been injury caused by a crime of violence requires reference to many statutory crimes, but historically the question of whether a crime was a crime of violence has also included consideration of common law offences.

108. As to whether Annex B incorporates the Sexual Offences Act 2003, I am not persuaded by Mr Collins that it does. Had that been the intention of the drafter it would have been straightforward to include a provision to that effect. Further, The Criminal Injuries Compensation Scheme and the primary legislation from which it derives includes Scotland, whereas the Sexual Offences Act 2003 applies only to England and Wales; this makes it yet more unlikely that, without mention, this Act and no other would be included.

109. Mr Collins submits that, even if that Act is not incorporated in its entirety, section 3, dealing with sexual assault should be used as the test under paragraph 2 (1) (d), "a sexual assault to which person did not in fact consent", and that such an assault must involve touching.

110. Even on this more limited base I am not persuaded. Once again, the Scottish position is a salient feature: Lord Hope in *Jones* explained at [17] that, in determining whether or not a criminal offence had been committed would in the circumstances be a factual issue for the tribunal, what the law required for proof of the offence must be considered. As to the answer to the question he said:

"this will depend on what the law requires for proof of the offence. For example, some of the common law crimes known to the law of Scotland are quite loosely defined. The range of acts that fall within the broad definition may vary quite widely, the question

whether there was a crime of violence will have to be determined by looking at the nature of what was done."

111. Given that, I am again swayed by the lack of reference to either incorporation or change in respect of aspects of the criminal law in Scotland.

A sexual assault

112. The cases before me involve crimes of a sexual nature which did not involve touching.

113. Part B of the Tariff of injuries at Annex E deals with injuries sustained in a sexual context. It refers variously to "sexual abuse" "sexual offences" "sexual physical acts". and "sexual assaults". Where "sexual assaults" appear in the tariff, they seem to relate to contact offences.

114. Under paragraph 32 of the scheme:

"Where a person has sustained a mental injury as a result of a sexual assault, they will be entitled to an injury payment for whichever of the sexual assault or the mental injury would give rise to the highest payment under the tariff."

This suggests that "a sexual assault" is a physical act.

115. Paragraph 2 (1) (d) refers not to sexual offences but to "a sexual assault". That choice of words suggests that there are sexual offences which do not amount to a sexual assault; although it does not follow that sexual assaults are only those offences which involve touching, I have considered the use of the various expressions within the 2012 scheme and conclude that under paragraph 2 (1) (d) touching is a necessary ingredient.

116. Upper Tribunal Judge Levenson in *obiter* ('by the way') comments in *BW* opined that the use of the phrase "sexual assault" in paragraph 2 (1) (d) was not limited to the offence of sexual assault in section 3 (1) of the 2003 Act, in which touching is a necessary element. He said, "A sexual assault might involve a threat or an attempt where there is no actual touching."

117. I agree with him that if touching is required it leaves the victim of an attempt outside the ambit of the paragraph; yet, the wording of subparagraph (d) "a sexual assault to which a person did not in fact consent" does not envisage an attempt: the paragraph suggests that there has already been an act, and any consideration must be as to whether or not there was in fact consent.

118. If there is a crime of an attempted sexual assault it would involve apprehension of unwanted sexual activity, and what can the victim of that be fearful of but of being touched without consent, perhaps forcibly. Where the full crime did not take place, maybe a third party intervened to prevent it, the crime would be one of assault, the sexual element being reflected in the consequences (including in sentencing) rather than within the definition of the crime itself. Consideration under subparagraph (c) would then be appropriate.

119. I am conscious that under subparagraph (c) the fear of immediate violence must be both subjectively held and in circumstances that would cause a person of reasonable firmness such fear. If an attempted sexual assault could fall within subparagraph (d) it may be easier to establish. I know that there is much within the

2012 scheme which treats sexual crime as in a particular category, and I have considered whether allowing for an attempt within subparagraph (d) may be reflective of that approach.

120. I conclude, however, that for this scheme which appears to be trying to codify, the complexity of this approach is not likely, and an offence involving touching was intended by sub-paragraph (d).

2 (1) (d) a sexual assault to which a person did not in fact consent.

121. Mr Collins asks me to provide guidance as to the meaning of this part of the provision. It is best understood by some examples of circumstances in which it would apply; although they may not be exhaustive, I believe that they illustrate the provision.

(i) Sexual activity between underage teenagers where consent cannot be legally given is an assault under the Sexual Offences Act 2003: the notion of *de facto* consent prevents a compensation payment where there is no true victim. Decision-makers will need to pay close attention to a disparity of age or other factors that might affect the question of consent in such cases.

(ii) Where in a criminal case of sexual assault (including rape) the defence of reasonable belief in consent was raised and there was an acquittal, the question for CICA is of actual and not presumed consent. The jury verdict is not an endorsement of there being actual consent; it says rather that it has not been established that the defendant did not have a reasonable belief in consent. In a CICA application the question would be whether, using the civil standard of proof, the person did in fact consent.

Can online conduct be a crime of violence within Annex B?

122. Ms Gilmartin argued forcefully that the applicant had been just as much at risk of harm online as he would have been in person. The test under the scheme, however, is not predicated upon the likelihood of harm occurring.

123. In my judgment, unless there is a fear of unlawful and immediate violence in the circumstances set out at subparagraph (c), the answer to that question is no.

124. Further, the fear of violence must be violence from the perpetrator. A more remote fear, perhaps that the perpetrator will expose them to a person from whom they fear violence (perhaps because of what they have done online) will not fall within the test: *BW.*

125. My interpretation of the 2012 Scheme is that, whilst not rendering it impossible for a claim to relate to online grooming activities, it makes that contingent upon the victim fearing unlawful and immediate violence. Such a limitation makes it perhaps unlikely that such cases will succeed. It would become a judicial attempt to legislate, were I to construe the scheme otherwise.

The application of the law to the findings of each tribunal

126. The position differs in the two cases, the main difference being that in RC there was no threat or fear element.

RC

127. Subparagraph (b) is not engaged: the conduct of persuading the child to indulge in sexual behaviour (which the tribunal described as a "hostile act") is insufficient to constitute an act of a violent nature, and there has been no physical injury under the terms of the scheme.

128. There has been no suggestion that the child feared unlawful and immediate violence from the person who so persuaded him. Subparagraph (c) cannot be satisfied.

129. The conduct of the perpetrator was criminal, but whilst it encompassed sexual offences, it was not a sexual assault within 2 (1)(d) of Annex B.

Disposal

130. In the circumstances, the conclusion of the FTT that the conduct it described as "grooming" was a crime of violence was not open to it as a matter of law, and I must quash its decision. I substitute the only decision that the law allows, which is that there is no entitlement to compensation under the scheme because the applicant was not the direct victim of a crime of violence.

RN

131. Subparagraph (b) is not engaged: the "hostile act" contended for is insufficient to constitute an act of a violent nature, and there has been no physical injury under the terms of the scheme.

132. The text messaging which became sexual in nature, and threatening, is capable of satisfying paragraph 2 (1)(c); however, the finding of the FTT was that although there was some underlying fear, RN did not fear immediate violence. That finding was not irrational: it was available to the FTT on the evidence before it. It is the task of that tribunal to establish the facts on analysis of the evidence, and an appellate court or tribunal should be appropriately circumspect in interfering with such findings. I do not do so.

133. There was no sexual assault as a matter of law as there was no touching; neither, (if I am wrong about the need for touching) was there an apprehension of unlawful and immediate violence.

Disposal

134. There could be no entitlement as RN was not the direct victim of a crime of violence within sub-paragraphs (a) to (e) of Paragraph 1 of Annex B. The decision stands.

Concluding remarks

135. Criminal conduct online or via text messaging may have a devastating impact on the lives of those affected, both during and after the events themselves. All must condemn this conduct; however, its inclusion within the Criminal Injuries Compensation Scheme is a matter for Parliament and not the Courts.

Paula Gray

Judge of the Upper Tribunal

Authorised for issue on 7 April 2022