JR/1440/2015

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Rule 14 Direction

1. In accordance with the provisions of rule 14 (1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the applicant or her children or their father.

Decision and Hearing

2. **This application succeeds.** Pursuant to the judicial review jurisdiction of the Upper Tribunal and in accordance with the provisions of sections 15 to 18 of the Tribunals, Courts and Enforcement Act 2007 I make **a quashing order** in respect of:

> (a) the decision of the First-tier Tribunal (Social Entitlement Chamber) (on an appeal against the decision of Criminal Injuries Compensation Authority ("the Authority" or "CICA")) to deduct 40% of any compensation award under paragraph 13(1)(b) of the Criminal Injuries Compensation Scheme 2008 ("the 2008 scheme"), and
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> (b) the directions of the First-tier Tribunal, made at the same time, to adjourn and to obtain up to date psychiatric evidence.

3. That leaves in place the decision of the First-tier Tribunal to deduct 30% of the compensation award under paragraph 13(1)(e) of the Criminal Injuries Compensation Scheme 2008 ("the 2008 scheme").

4. In respect of paragraph 1(b) above I substitute my own decision as being the only decision that the First-tier Tribunal could properly have made. This is to refer the matter to the Authority for further consideration of outstanding matters in the claim on the above basis and on the basis that (as agreed between the parties) the applicant sustained a criminal injury or injuries and was a victim of a crime or crimes of violence.

5. The decision of the First-tier Tribunal was made on 25th June 2014 and the First-tier Tribunal reference is 12/314965.

6. I held an oral hearing of this application for judicial review at Field House in London on 31st May 2016. The applicant, who is the claimant for compensation under the 2008 scheme, did not attend in person but was represented by Adrian Waterman QC and David Malone of counsel, instructed by Woodfines, solicitors. The Authority, which is the interested party in this application, was represented by Robert Moretto of counsel, instructed by the Treasury Solicitor. The organisation Women Against Rape

(WAR), which was not a party, had made written submissions pursuant to my directions of 19th April 2016 and was represented at the hearing by Lisa Longstaff. Ms Longstaff did not wish to add anything to the written submissions. I am grateful to them all for their assistance. The First-tier Tribunal is the respondent but had, quite properly, taken no part in the proceedings. I observe that with so many documents in the files telling parts of the story, an agreed statement of facts (very few of which were disputed at this stage) would have been helpful.

The 2008 Scheme

7. This case is about the application of certain provisions of the 2008 scheme, under which the claim for compensation was made. So far as is relevant paragraphs 13 and 14 of the scheme provide as follows:

> 13(1) A claims officer may withhold or reduce an award where he or she considers that:
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> (a) …; or
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> (b) the applicant failed to co-operate with the police or other authority in attempting to bring the assailant to justice; or
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> (c) …; or
>
> (d) …; or
>
> (e) the applicant's character as shown by his or her criminal convictions (excluding convictions spent under the Rehabilitation of Offenders Act 1974 at the date of application or death) or by evidence available to the claims officer makes it inappropriate that a full award or any award at all be made.
>
> 14(1) …
>
> 14(2) …
>
> 14(3) In considering the issue of character under paragraph 13(1)(e), a claimas officer must withhold or reduce an award to reflect unspent criminal convictions unless he or she considers that there are exceptional reasons not to do so.

For the purposes of the present proceedings these references to a claims officer are to be taken as references to the First-tier Tribunal.

Background

8. It is necessary to go into the quite complex factual background of this unusual case in order to put the decisions in context. The following account (up to the point when the First-tier Tribunal made its decision) derives from the facts found by the First-tier Tribunal except where otherwise indicated. Where the label "E" appears at the beginning of a statement or paragraph, it is based on information in the Statement of Facts and Questions made by the European Court of Human Rights on 27th October 2014 in the applicant's application to that Court (reference 73521/12). This is a much more comprehensive account of the factual background than that to be found in the First-tier Tribunal decision.

9. The applicant is a woman who was born in 1982. In 2000 she moved in with a man (H) who worked on her father's farm and is 12 years older than her. They subsequently married and had four children between 2001 and 2008. From 2004 the applicant was subjected to physical and mental abuse by H. The First-tier Tribunal recorded that "We have no doubt that [she] was subjected to a long and despicable catalogue of violence at the hands of [H] that culminated in 3 incidents of rape". The rapes occurred towards the end of 2009. The third of these was on 28th November 2009, and the applicant made an emergency call to the police on that date. (E: "At the time she was clearly in an extremely distressed state. Police officer attended and she was quickly relocated to a women's refuge with her four children. Her husband was immediately arrested. He denied the offence"). The applicant and the children returned home.

10. H was arrested and, in due course, he was charged in respect of the rapes and remanded in custody. (E: H was charged with six counts of rape). On 10th December 2009 H was released by the Crown Court on conditional bail, (E: the conditions including that he not directly or indirectly contact any prosecution witness, including the applicant).

11. While H was in custody the applicant wrote to him, saying "I have done the one thing you said <u>not</u> to do. I told you I would make it all go away and I will by doing what you said not to do. I want you home babe. We all miss you so much. I cry every night and every morning coz your not here." The First-tier Tribunal did not state what action it thought this referred to but took the statement as showing that the applicant "was capable of making decisions independent of" H.

12. Over the Christmas period it seems that H was at the house with the applicant and the children and that H and the applicant had consensual sexual intercourse. The Court of Appeal later (13th March 2012) described this as "something of a reconciliation". The First-tier Tribunal said that the applicant "colluded in breach of [H]'s bail conditions, partly for family reasons and partly for her convenience (for example getting help from [H] with a heavy load of shopping").

13. E: On 7th January 2010 the applicant sought to withdraw her complaint, although it was true:

> "She made clear that she wished to withdraw her complaint of rape and that she did not want to attend court. She indicated hat she wanted to put everything behind her and move forward for her own sake and the sake of the children. She did, however, confirm that her relationship with her husband had ended, and she confirmed that all of her allegations were true".

14. E: On 18th January 2010 H appeared in court and pleaded not guilty and the trial was fixed for the week of 4th May. Meanwhile the applicant met with prosecutors and explained what had happened over the Christmas period and asked that H not be arrested for breach of his bail conditions as this would make the situation worse. H's solicitors were told that he would receive a warning in this regard. A few days later the applicant told the police that H had sent her a series of abusive text messages. Later the same day she told the police that this had not actually happened but that she had been prompted by the fact that she had heard that H had been seen with another woman.

15. E: On 1st February 2010 H was involved in a road traffic collision in the car he was driving in an area from which his bail conditions excluded him. It was believed that the applicant was the front passenger (another breach of the conditions). On 5th February 2010 H was arrested and remanded in custody (where he remained until 12th February 2010). On 7th February 2010 the applicant had a telephone conversation with a police officer (who says she was quite aggressive) and queried what would happen if she said that she had lied about the rapes because H had not let her work where she wanted to (apparently in a massage parlour – although there is other evidence to the effect that he wanted her to work there but that she could not stand to do so). The applicant was advised to think very carefully about what she was saying, said that she did not care what happened to her, and was told that the CPS would have to be consulted.

16. On 11th February 2010 the applicant made a formal retraction statement saying that all of the allegations of rape were untrue. The First-tier Tribunal recorded that in April 2010 the proceedings against H were discontinued – although (E) it seems that H appeared at the Crown Court, the prosecution offered no evidence and the judge entered not guilty verdicts. H was released from custody.

17. E: On 16th April 2010 the applicant was arrested in respect of having made a false allegation of rape against H. When interviewed she insisted that her allegations had been untrue. On 23rd June 2010 she was charged with perverting the course of justice by making false allegations, and was released on bail. When the claimant met her defence counsel she told him that although she intended to plead guilty her allegations had in fact been true. On 5th August 2010 "the appellant contacted the police. She said that she had come to her senses and had in fact been raped". On 16th August the applicant made a sworn statement for the purposes of family proceedings in which she stated that she had been subjected to domestic abuse and had been raped on three occasions. H had persuaded her to retract her original allegations on the basis that any punishment she might suffer if she did so would be considerably less than what he would suffer if she did not do so. "She added that her husband was able to control

her". (The court issued a non-molestation injunction). On 31st August 2010 the applicant was again arrested and interviewed. She said that her husband's sister had made a rare visit "out of the blue" and it was probably the sister who said that if the applicant told the police that she had lied about the rapes she would not, as a single parent, be sent to prison. Her counsel had advised her otherwise. She had also discussed with H the point that it would be worse for the children if their father disappeared for several years than if their mother disappeared for a few months. On 16th September 2010 the applicant was charged with an additional offence of perverting the course of justice by falsely retracting a true allegation of rape.

18. E: On 20th September 2010 H forced entry into the applicant's home at about 5.30 a.m. She called the police and he was arrested and bailed with a condition not to contact the applicant directly or indirectly.

19. E: On 15th October 2010 at the Crown Court the applicant pleaded not guilty to the charge in relation to making a false allegation of rape. The prosecution offered no evidence and a not guilty verdict was entered. The applicant pleaded guilty to the later charge in relation to falsely retracting a true allegation of rape and the matter was adjourned for reports. The appellant gave the following account to the compiler of the pre-sentence report (page 7 of the Statement):

> "The [appellant]'s explanation for the retraction of the allegation of rape was that after her husband had been arrested and remanded in custody she had felt immense guilt. She had decided that taking divorce proceedings would be punishment enough for him and so she had withdrawn the complaint. She had been in an emotional state and very confused at the time. Although she had suffered years of abuse by her husband and was frightened of him, she reported that because of her feelings of guilt, low self-esteem, and wanting her children to have a family Christmas, she had continued communicating with him. She had felt under immense pressure from her husband to retract her original statement and she had agreed to do so because of fear of repercussions from him."

20. According to the Court of Appeal in [2012] EWCA Crim 434 at paragraph 46:

> 46. On 28th October [2010] the husband came to the [applicant]'s home. During his visit he attacked her. According to her report he dragged her outside by her hair and began to tear her clothes off …

21. On 5th November 2010 the Crown Court sentenced the appellant to eight months' immediate imprisonment and she was taken straight into custody. The Court of Appeal expedited a hearing of her appeal against sentence and on 23rd November 2010 (in [2010] EWCA Crim 2913) it ordered her immediate release and substituted a supervision order for two years. The Lord Chief Justice (Lord Judge) pointed out the public interest in apprehending and convicting offenders and continued:

> 20. All that said, the difference between the culpability of the individual who instigates a false complaint against an innocent man and the complainant who retracts a truthful allegation against a guilty man will often be very marked. Experience shows that the withdrawal of a truthful complaint of crime committed in a domestic environment usually stems from pressures, sometimes direct, sometimes indirect, sometimes immensely subtle, which are consequent on the nature of the individual relationship and the characters of the people who are involved in it.
>
> 21. Where a woman has been raped, and raped more than once, by her husband or partner, the father of her children, the man in whom she is entitled to repose her trust, those very actions reflect, and are often meant to reflect, manifestations of dominance, power and control over her. When these features of a relationship between a man and a woman are established, it is an inevitable consequence that the woman who has been so ill-treated becomes extremely vulnerable.
>
> 22. Of course it is better for a truthful complaint to be pursued, but if the proposal that it should be withdrawn is not accepted, leading to a positive retraction and admission that the original truthful complaint was untrue, and the complainant is then prosecuted to conviction, the sentencing court, when assessing culpability, should recognise and allow for the pressures to which the truthful complainant in such a relationship has been exposed, and should be guided by a broad measure of compassion for a woman who has already been victimised.
>
> 23. This is an exceptional case. We hope that it will be very exceptional for cases of this kind to be prosecuted to conviction in the Crown Court …

22. On 13th March 2012 the Court of Appeal dismissed the applicant's appeal against conviction in [2012] EWCA Crim 434. After reciting much of the background the Lord Chief Justice said:

> 88. The reality of this case is the [applicant] was undoubtedly guilty of a serious crime, from which police officers did all they reasonably could to dissuade her. Compassion for her position, and indeed for any woman in the same or a similar position, should have produced a non-custodial sentence. That is why this court acted speedily to quash the custodial sentence and replace it with a community order which would offer practical assistance to the appellant in the immediate aftermath of her release from prison. The court also expressed itself in clear and direct language, which was immediately considered by the Director of Public Prosecutions, who has now issued fresh guidance about how cases involving false retractions of true allegations by vulnerable defendants will be addressed in the future. All that acknowledged, we cannot dispense with or suspend the statute, or grant ourselves an extra statutory jurisdiction. Accordingly, we are not entitled to interfere with this conviction. The appeal must be dismissed.

23. Meanwhile, on 15th January 2011 (about six weeks after her release from custody) the applicant had committed offences of failing to stop after or report an accident, driving without a licence or insurance, and driving without due care. On 15th February 2011 she committed further offences of driving with excess alcohol and without a licence or insurance. (Pages S14 and 15 of the First-tier Tribunal file:) on 17th February 2011 she pleaded guilty at the magistrates' court to all of these offences and was fined (it seems) a total of £450 with appropriate endorsements and was disqualified from driving for 12 months.

The Claim and Procedure

24. On 22nd November 2012 the applicant claimed criminal injuries compensation under the 2008 scheme in respect of the treatment of her by H. On 16th April 2013 the Authority refused to make an award on the basis of what it referred to as "paragraph 13(b)" of the scheme. This was clearly intended to be a reference to paragraph 13(1)(b). It also referred to her convictions and to "paragraph 13(e) of the scheme – clearly intended to be a reference to paragraph 13(1)(e). On 21st June 2013 the applicant applied for a review of that decision and on 4th November 2013 the Authority reviewed but maintained its decision, still using incorrect references. On 30th January 2014 the applicant appealed to the First-tier Tribunal against the review decision that had been made by the Authority.

25. The decision of the First-tier Tribunal appears at several p;aces in the papers in a somewhat informal manner (and I discuss its decision further below) but it is clear that the First-tier Tribunal allowed the appeal to the extent of finding that the applicant was eligible for an award, but reduced any award by 40% of the total in respect of paragraph 13(1)(b) of the scheme, and by a further 30% of the total in respect of paragraph 13(1)(e) of the scheme, making a total deduction of 70%. None of these amounts was or has since been quantified. The First-tier Tribunal also decided that the appeal could not be finally disposed of at that stage and adjourned for up to date psychiatric evidence. The decision and adjournment notice appears to be undated and unsigned. What must be taken as the written reasons was signed by the presiding judge on 25th June 2014. These run to four typed pages and are set out in paragraphs but there are no headings or paragraph numbers.

26. On 9th January 2015 the applicant applied to the Administrative Court of the High Court for judicial review of the First-tier Tribunal decision. This was an error because in this type of application the Upper Tribunal has exclusive jurisdiction, and on 26th March 2015 Deputy Master Knapman transferred the application to the Upper Tribunal. On 1st July 2015 I gave the applicant permission to proceed with the application and on 10th December 2015 I directed that there be an oral hearing of the substantive application. On 19th April 2016 I declined to add WAR as a party but directed that the organisation be permitted to attend the hearing and to make representations. The hearing took place on 31st May 2016. The Authority supported the decision of the First-tier Tribunal except in relation to the adjournment for psychiatric evidence.

Forensic Psychology Report

27. The First-tier Tribunal had before it a report dated 12th January 2012 from Roger Hutchinson, a consultant forensic clinical psychologist, who holds appropriate (but not medical) qualifications. The report was based on seven hours of interview with the applicant, psychometric testing, personal history and clinical interviews, as well as on the relevant documentation. It runs to 29 pages but his Mr Hutchinson's own summary (in paragraph 2) was as follows:

> 2.1 [The applicant] is a woman of average ability who presents with post-traumatic stress disorder arising out of abuse perpetrated against her by [H].
>
> 2.2 [The applicant] is a compliant individual who will respond to threatening or coercive behaviour by publicly engaging in behaviours with which she does not privately agree in an effort to reduce her sense of threat.
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> 2.3 [The applicant] retracted her non malicious allegation of rape against [H] as a consequence of his continued abusive behaviour towards her after the allegations were made.
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> 2.4 This abusive behaviour coupled with heightened sensitivity to threat as a result of Post Traumatic Stress Disorder, caused [the applicant] to become increasingly fearful of [H] and the potential harm he could pose to her and her children. The retraction lessened the extent of [her] fear about [H].

28. In paragraph 6.9 Mr Hutchinson stated:

> 6.9 I conclude that [the applicant] is suffering from PTSD as a result of the rape and domestic violence inflicted upon her by [H]. I have no doubt that she was suffering from PTSD at the time of the retractions of her claim of rape. As a result of this PTSD, combined with her individual personal characteristics, her will to do the right thing (i.e. maintain her truthful complaint) was overborne by the course of physical, sexual and mental abuse inflicted on her by her husband. In the same way and by the same mechanism her will not to do the wrong thing (i.e. incorrectly withdraw her complaint) was overborne.

Psychiatric Report

29. The First-tier Tribunal also had before it a report of 29th September 2014 from Dr Alfred White, a consultant psychiatrist with appropriate medical qualifications. His opinion included the following (at page 10 of the report):

> "… [the applicant] suffered from mixed anxiety and depressive disorder (F41.2) probably commencing about 2003/2004 and initially taking the form of quite marked anxiety and fear relating to her husband. She became fearful of what he might do to her each time he became drunk which occurred at least

> weekly. She felt intimidated to the degree that she was not able to go out and about on her own. The symptoms appeared to have been relatively mild but she became increasingly frightened about his behaviour and things came to a head after she was raped on three occasions. I did not gain the impression that it was the sexual aspects of the rape that particularly bothered her but rather the violence and her inability to prevent her husband's attacks.
>
> She does seem to have ambivalent feelings about her husband in that at times he could be extremely kind and pleasant towards her and she then enjoyed the relationship with him. I gain the impression that because of such behaviour by him towards her while he was in prison (by letter towards the children) and subsequently she felt sorry for him and persuaded by him and his family to retract her allegations. …"

The Report from Professor Edwards

30. Professor Susan Edwards is a barrister, a former Dean of the School of Law at the University of Buckingham and a member of the Expert Witness Institute. Her particular expertise is in relation to domestic violence and she has been researching and writing on the subject for many years and has advised police, government and the Council of Europe. She has no medical qualifications but her work is well known to many who are professionally engaged in dealing with such matters. She was asked by the applicant's solicitors to report on the typical reactions of a woman who has suffered rape and other forms of domestic violence, and also on whether the applicant's actions could properly be described as voluntary or involuntary. As well as studying the documentation she interviewed the applicant for about 80 minutes. Her report of 2nd June 2014 ran to about 24 pages and was before the First-tier Tribunal. I note the following extracts from her summary of conclusions:

> 2.2 Women in the situation of [the applicant], in the overwhelming majority of cases, report domestic assaults made against them to police then later withdraw the allegation. This results in a high attrition, as in 2006-2011 when domestic violence conviction rates in the five years to 2011 stood at just 6.5% of incidents reported to police.
>
> 2.3 Research show that a battered woman's personal, psychological, and need to survive (cope) physically and mentally, together with other family circumstances weigh heavily on her ability and decision to continue with a prosecution.

31. Professor Edwards concluded (paragraph 2.7) that the applicant's actions to withdraw the rape and to say that the rape and violence did not happen "could be described as involuntary and the product of the pressures listed above" and that taking all the evidence together shows that "her will was sapped and "crushed" so that she was unable to act independently (paragraph 2.4):

> 2.5 She exhibited the typical behaviour of a battered woman, experiencing fear, psychological distress and coercion. The fear of subsequent violence had the effect of grinding down her mental will and fortitude to prevent her from pursuing the prosecution of her husband.
>
> 6.9 … She took reasonable steps to co-operate with police and was prevented from taking the matter through to prosecution not because of her failure to act but because of the threat of violence in her life and the effects of violence and the effects of fear [of] further violence otherwise called PTSD which robbed her of free will and capacity to act. She cooperated as far as was reasonably practicable in her circumstances. It is important that … her circumstances be understood and seriously considered as another manifestation of her victimisation as a victim of domestic violence. A humane society and a consideration of the broad humanitarian and victim cenredness of the scheme require nothing less.

The WAR Submissions

32. WAR made a 20 page written submission to the Upper Tribunal. It was mostly a survey of the responses to rape of various parts of the criminal justice system. It also argued that the decisions in this case by CICA and the First-tier Tribunal are "representative of a general approach in cases involving rape and domestic violence which is both dangerously outdated and legally flawed" (paragraph 3).

33. In relation to the present case, WAR referred to the First-tier Tribunal's identification of the central issue as whether "she was capable of making an autonomous decision not to proceed with her complaint". It argued as follows (by paragraph number):

> 66. … It seems they considered she was not acting under the influence of her violent ex-partner, largely because of the letter she wrote to him while he was in prison, where she expressed longing for his return for a family Christmas.
>
> 67. This argument is ill-informed and lacks compassion. It also invokes the legal and psychoanalytical history of dividing victims into either a robot with no free will, or else someone who is acting with free will and freely consents to being in a abusive violent marriage – it is reminiscent of the rightly defunct and discriminatory concept of the "hysterical woman". We believe the concept of "autonomy" and these kind of value judgments would not have been applied to a man, unless he was mentally ill or had mental disability. They should not be applied to an adult woman.
>
> 68. The modern approach of courts and other tribunals should have been applied focussing on [the applicant's] vulnerability. She, having lived with years of controlling and coercive influence by her husband, felt sorry for her children, for him, and for the loss of her marriage and family unit. When he was on remand [in custody] he exerted influence over her of a different kind

and begging her to help him get out of prison, saying he was missing the children and surrounded by drug addicts, to elicit her pity, and make her feel guilty for the predicament.

69. Instead, the CICA's decision making employed old fashioned judgments and values, asking questions such as why did she go back to him? They claim that she initiated the reinstating of their relationship of her own free will. They seem to assume that victims of years of bullying and rape ought to behave in a rational and consistent way, perhaps in a way they think they would have behaved.

General Matters and the 13(1)(b) Deduction

34. The First-tier Tribunal noted that the applicant's solicitor relied in particular on the opinion of Mr Hutchinson (the consultant forensic clinical psychologist) and Professor Edwards.

35. The basis of the First-tier Tribunal's analysis was really the following paragraph in the statement signed by the presiding judge:

> "We have no doubt that
>
> > (i) [the applicant] was subjected to a long and despicable catalogue of violence at the hands of [H] that culminated in 3 incidents or rape and
> >
> > (ii) that was relevant to her ability to maintain her complaint to the police.
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> The issue is, in effect, whether in the light of this she was capable of making an autonomous decision not to proceed with her complaint".

36. The First-tier Tribunal concluded that it was plain that the applicant had failed to co-operate in attempting to bring the assailant to justice and as a result "a man said to be guilty of a relentless catalogue of abuse and 3 rapes has gone unpunished". This was not quite an accurate statement of the facts as otherwise accepted by the tribunal. The applicant did in fact call the police and report the rapes on 28th November 2009. H was released on bail and, in breach of his conditions, was able to exert influence on the applicant for some time, being at large for all but a week of the period from about 7th January 2010 to about 5th August 2010 during which the applicant was failing to pursue the allegations.

37. For the applicant, Mr Waterman argued that paragraph 13(1)(b) does not specify a failure to "fully" co-operate and in the present case it was necessary to consider failure to continue to co-operate. The First-tier Tribunal was wrong to consider this in terms of the applicant's ability to make an autonomous decision. Allowance had to be made for her vulnerability. The true question was whether, in all of the circumstances,

her failure to co-operate was reasonable. The opinion of Mr Hutchinson was not challenged by CICA and was supported by the other expert evidence. In view of this, the findings of fact, and the comments of the Lord Chief Justice, the 40% deduction was "incorrect, erroneous and wholly unreasonable" in circumstances where the First-tier Tribunal had already found that H's behaviour had provided substantial reason for the retraction of a truthful statement.

38. For CICA, Mr Moretto argued that the First-tier Tribunal simply and properly applied the straightforward meaning of the words used in the 2008 Scheme, had reached decisions that it was entitled to reach in the exercise of its discretion and gave sufficient reasons. There was no basis on which the Upper Tribunal could interfere by way of judicial review. The First-tier Tribunal had not misdirected itself in law, had not taken into account irrelevant matters or failed to take into account relevant matters, or reached a perverse decision.

39. In general terms I agree with Mr Waterman in relation to the application of paragraph 13(1)(b). The tribunal considered the issue of autonomy rather than focussing on the specific wording of paragraph 13(1)(b) of the 2008 scheme. It noted that the applicant's solicitor had submitted that the applicant was not acting as a robot and was aware of her actions and of the difference between right and wrong but that she had no practical choice and her will was overborne. The tribunal also noted that "when pressed" the solicitor "was forced to accept" that for paragraph 13(1)(b) not to adversely affect the potential award the tribunal had to be satisfied that the applicant bore "no responsibility for the retraction", which was a finding that the tribunal felt it could not make on the evidence. However, that is not what paragraph 13(1)(b) provides and the First-tier Tribunal was wrong on this point (as was the solicitor to the extent that he agreed with the tribunal's analysis on this point). For these purposes the First-tier Tribunal stands in the shoes of a claims officer and paragraph 13(1) commences with the words (my underlining); "a claims officer may withhold or reduce an award …". There is no basis in the wording of the scheme for the gloss put on this by the First-tier Tribunal.

40. In finding that it could not be satisfied that the applicant bore no responsibility for the retraction the First-tier Tribunal seems to have taken into account not only the applicant's interactions with the criminal justice agencies but also the partial reconciliation over the Christmas period and the fact that on one or more occasions the appellant appears to have wanted (or at least agreed) to have sex with her husband. These latter matters are (a) not relevant to the wording of 13(1)(b), and (b) in any event are not untypical of the behaviour of victims of domestic abuse, as identified by the expert witnesses and as anybody who has practised in these areas should know. The tribunal itself stated that it was plain that the applicant:

> "… was a victim of chronic abuse with whom no fair-minded person could fail to sympathise and that the history of abuse provides, in part, a cogent reason for her actions. In that context Professor Edwards describes a well-known pattern of behaviour which appears to us to account for a substantial part of [the applicant's] actions".

41. I have quoted above (in my paragraph 21) a lengthy extract from the judgment of the Court of Appeal when considering the applicant's appeal against sentence and it is not necessary to repeat that here, but the First-tier Tribunal appears to have paid no heed to the comments made by the Court of Appeal. Taking account of those remarks, the evidence accepted by the First-tier Tribunal and the matters to which I have referred above I simply do not see how, in this particular case, any reasonable tribunal could have gone on to make any deduction under paragraph 13(1)(b) in respect of an applicant in the circumstances in which the present applicant found herself and whose temporary withdrawal of co-operation with the police and prosecution arose in such circumstances.

42. In accordance with the provisions of section 17(1)(b) and 17(2) of the Tribunal, Courts and Enforcement Act 2007 I substitute on this point the only decision that the First-tier Tribunal could properly have reached in the absence of error of law, which is that no deduction should be made under the provisions of paragraph 13(1)(b) of the 2008 Scheme.

The 13(1)(e) Deduction

43. For the purposes of paragraph 13(1)(e) the First-tier Tribunal, quite properly, disregarded the conviction for perverting the course of justice. Its reasons included the consideration that if the facts had been repeated after the change of prosecution guidelines the applicant would almost certainly not have been prosecuted for this offence.

44. The tribunal rejected arguments on behalf of the applicant that her motoring offences were attributable to the abuse by H and were indicators of the poor judgment that was part of her wider problems: "These are serious offences that we do not consider can be wholly attributed to the historic abuse". The First-tier Tribunal then made the curious remarks that:

> "These findings do not amount to criticisms of [the applicant]: as we say above we have the greatest sympathy for the suffering she endured at the hands of [H]. We must, however, implement the conditions of this *ex gratia* scheme as Parliament enacted them".

45. I leave to another day consideration of what exactly is meant by an "*ex gratia"* scheme if it has been enacted by Parliament. I do not see how the tribunal had the greatest sympathy for the applicant when it made the decisions that it did make, and although it is and was bound to apply the Scheme as enacted, paragraph 14(3) of the 2008 Scheme confers an element of discretion, not an obligation. However, the issue in the current case is whether the Upper Tribunal can interfere with the First-tier Tribunal's decision on this issue.

46. Mr Waterman argued that the First-tier Tribunal erred in using a test of "wholly attributable" rather than the test of what was "appropriate" as paragraph 13(1)(e)

requires, had not really addressed the applicant's arguments on this point, and had not considered whether the overall deduction of 70% was disproportionate. The circumstances were clearly exceptional within the meaning of rule 14(3). Mr Moretto challenged in particular this latter argument.

47. The combination of paragraphs 13(1)(e) and 14(3) mean that an award must be withheld or reduced to reflect unspent criminal convictions unless there are exceptional reasons not to do so. It is certainly reasonably arguable that in the present case there were exceptional reasons not to do so. However, the First-tier Tribunal was also entitled to decide otherwise and I see no basis in a judicial review application to interfere with that decision. It is always better to use the statutory language to avoid risk of error involved in not doing so but in the present case the Upper Tribunal is not justified in interfering with the 30% deduction, which was in accordance with the published guidelines for such deductions. My decision in respect of the paragraph 13(1)(b) deduction means that the arguments in relation to totality and proportionality fall away.

The Adjournment for Psychiatric Evidence

48. On 4th November 2014 the case of SB and Others v First-tier Tribunal and CICA [2014] UKUT 0497 (AAC) was decided by a three judge panel of the Upper Tribunal. It held that on an appeal to the First-tier Tribunal from a decision of the Criminal Injuries Compensation Authority (CICA) the jurisdiction of the First-tier Tribunal is limited to deciding whether the decision made by CICA was correct on the issue or issues that had been addressed in its review decision.

49. That decision came out after the First-tier Tribunal decision in the present case but it is now agreed that the First-tier Tribunal had no jurisdiction to consider the amount of compensation to which the applicant might be entitled, or to collect evidence in relation to the assessment of that amount, because these matters had not been addressed in the CICA review decision.

H. Levenson
Judge of the Upper Tribunal
29th June 2016