

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

Decision and Hearing

1. **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 the decision of the First-tier Tribunal (Social Entitlement Chamber) made on 14th April 2016 (after a hearing at East London on 8th March 2016) under First-tier Tribunal reference CI 021/15/00012 (CICA reference X/08/219127). By that decision the First-tier Tribunal allowed an appeal against the decision of the Criminal Injuries Compensation Authority (“CICA” or “the Authority”) that there had not been a crime of violence in respect of this claim.

2. I substitute my own decision as being the only decision that the First-tier Tribunal could properly have made. This is to confirm the review decision made by CICA to the effect that there had not been a crime of violence and that the claim for compensation must fail.

3. I held an oral hearing of this application for judicial review on 26th January 2017. The applicant, the Criminal Injuries Compensation Authority), was represented by James Purnell of counsel. The First-tier Tribunal is the respondent but had, quite properly, taken no part in the proceedings. The interested party BW is the claimant for compensation (“the claimant”) and was represented by James Littlehales of counsel, instructed by Switalskis Solicitors Ltd. I am grateful to them all for their assistance.

The Legal Context

4. By virtue of section 3(2) of the Criminal Injuries Compensation Act 1995, where, in accordance with any provision of the Scheme, it falls to one person to satisfy another as to any matter, the standard of proof required shall be that applicable in civil proceedings. That is usually expressed as “the balance of probabilities”.

5. Paragraph 4 of the 2012 Criminal Injuries Compensation Scheme (the 2012 Scheme”) provides as follows:

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.

6. Annex A defines “criminal injury” by reference to the list of injuries in Annex E and relates to the consequences rather than the circumstances. Annex B defines “crime of violence” and relates to the circumstances. So far as is relevant Annex B provides:

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

The Crime of Sexual Assault

7. Section 3(1) of the Sexual Offences Act 2003 provides as follows:

- (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.

The Crime of Voyeurism

8. Section 67 of the Sexual Offences Act 2003 provides as follows:

- (1) A person commits an offence if –
 - (a) for the purpose of obtaining sexual gratification, he observes another person doing a private act, and
 - (b) he knows that the other [person does not consent to being observed for his sexual gratification.
- (2) A person commits an offence if –
 - (a) he operates equipment with the intention of enabling another person to observe, for the purpose of obtaining sexual gratification, a third person (B)

doing a private act, and

- (b) he knows that B does not consent to his operating equipment with that intention.
- (3) A person commits an offence if –
- (a) he records another person (B) doing a private act,
 - (b) he does so with the intention that he or third person will, for the purpose of obtaining sexual gratification, look at an image of B doing the act, and
 - (c) he knows that B does not consent to his recording the act with that intention.
- (4) A person commits an offence if he installs equipment, or constructs or adapts a structure or part of a structure, with the intention of enabling himself or another person to commit an offence under subsection (1).
- (5) 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 2 years.

Background

9. The background facts are not really disputed. The dispute is over whether those facts show that the claimant has been the victim of a crime of violence for the purposes of this claim. The claimant is a woman who was born on 25th July 1995. When she was six months old her stepfather came into her life and the claimant always considered her stepfather to be her father (and lived with him until her discovery of the relevant offences). When she was eight years old her mother and stepfather had a child – the claimant’s half brother. It was not until the claimant was 12 years old that she was told that her stepfather was not her biological father. Her mother and stepfather married at about the same time. In mid 2009 the claimant’s mother had an accident while horse riding and was in a coma for twelve months and then died in July 2010. Following the death of the claimant’s mother her stepfather changed and became aggressive and angry with everyone all the time. He would shout at the claimant and grab her and throw things at her. She found him very intimidating.

10. The claimant gave evidence of one episode of sexually explicit behaviour. While her mother was in the coma, her stepfather brought his computer into her room and asked her to use it to communicate with his friend. He left the room but the friend said that her stepfather wanted him to teach her “how to make him come”. She was appalled, returned the computer to her stepfather, said that she did not want to talk to his friend, and locked herself in her room. The incident was not referred to until she went to the police to report the matters relevant to this application.

11. On 2nd February 2014 the claimant was at home on her own while her stepfather was out with her brother. While looking for the pin sentry to give access to her stepfather's laptop computer the claimant found a memory stick that she did not recognise. She decided to see what was on it and discovered video recordings that showed their bathroom at home and eventually herself, naked, stepping out of the shower. It seemed to have been recorded from under the sink. She stopped the recording and removed the memory stick. She told the police (page B5):

“I started to panic and my body was shaking as I didn't know what to do. I believed it was my step dad who had done it as the memory stick was in all his stuff in the envelope in the drawer. I tried ringing and texting my boyfriend [T] several times as I wanted to talk to him for advice, eventually I managed to get hold of him and after a while I blurted out what had just happened. He told me he was coming to meet me so I packed some things in my bag as well as the memory stick and left to meet him on foot”.

12. T arrived by taxi and she went back into the house to show him what it was all about and he persuaded her to go to the police and walked there with her. On the way she telephoned her grandfather and told him what had happened.

13. From details on the recordings of her the claimant said that they were taken no longer ago than three years previously but at least two years previously. Police evidence to the First-tier Tribunal was that there was a large number and wide range of recordings, including indecent images of children and extreme and prohibited images. Many had been taken from hidden cameras in the house. Eventually the stepfather pleaded guilty to five offences of taking indecent photographs of a child between 2010 and 2014 and two offences of voyeurism in respect of the claimant between 1st July 2010 and 1st January 2013. I understand that in April 2015 he was sentenced to seven months imprisonment. On 26th February 2015 the claimant claimed criminal injuries compensation under the 2012 Scheme.

The Claim and Procedure

14. On 27th February 2015 the Authority refused to make an award on the basis that there had been no crime of violence. On or about 14th June 2015 the claimant requested a review of that decision on the basis, as put by her solicitors:

“It is submitted that the offences committed against the [claimant] constitute a gross breach of trust and a breach of privacy of a sexual nature and as such may be seen as a sexual assault to which [she] did not in fact consent”.

15. It was pointed out that the 2012 Scheme contained no definition of what was meant by “sexual assault”.

16. On 24th June 2015 the Authority maintained its refusal, on the same grounds, making a peculiar reference to how the “Crown Prosecution Service defines sexual assault” but in fact quoting the words of section 3(1) of the 2003 Act. On 7th September 2015 the claimant appealed to the First-tier Tribunal against the decision of the Authority. The First-tier Tribunal heard the applicant's appeal on 8th March 2016 and allowed the appeal, giving full written reasons on 14th April 2016. On 8th

June 2016, the Authority applicant applied to the Upper Tribunal for judicial review of the First-tier Tribunal decision and on 4th August 2016 I gave permission to apply on the basis of consideration of the papers. On 10th October 2016 I directed that there be an oral hearing of the application and this took place on 26th January 2016.

The First-tier Tribunal Decision

17. The First-tier Tribunal heard evidence from a police officer who offered his understanding of provisions of the criminal law. The Upper Tribunal has said often enough that it is for the First-tier Tribunal itself to establish what the law is and how to apply it, and that police officers are not expert witnesses in relation to legal provisions, although they are often expert witnesses as to procedure, and clearly can be witnesses as to fact.

18. The claimant told the First-tier Tribunal that “she was frightened of what her stepfather would be capable of when he discovered her discovery. She panicked: ... she believed that they could come back at any minute ...” (paragraph 16 of the written reasons). The tribunal found the evidence of the claimant to be credible and reliable and recorded the following findings (paragraph 22(d) and (e)):

“The [claimant] was in fear of immediate violence from her stepfather at the time she discovered those indecent images.

That fear was well-founded (a) in the light of the accepted nature of the relationship between the [claimant] and her stepfather, in particular his violent and sexually explicit behaviour towards her ... and (b) as it is accepted that there was a realistic likelihood that the [claimant’s stepfather] would return home at any time”.

19. The First-tier Tribunal’s decision was that although voyeurism was not a crime of violence *per se* (which, on the statutory definition of voyeurism, must be correct) in the particular circumstances of this case the claimant was a direct victim of a crime of violence by virtue of paragraph 2(c) of Annex B: she had a well-founded fear of immediate violence from her stepfather at the time she discovered the indecent images of her taken by him. His violent behaviour and the realistic likelihood that he would return at any time and react in a violent manner meant that a person of reasonable firmness would be put in fear of immediate violence.

Arguments and Conclusions

20. The Authority’s case has been put in a number of documents and in oral argument but the essence (with which I broadly agree) is to be found in paragraph 18 of its written grounds of 8th June 2016:

“The only “threat” that the First-tier Tribunal could identify was the hypothetical violent reaction of the offender on realising that his voyeurism had been discovered. However, while it is accepted that the [claimant] may subjectively have feared this scenario it cannot be said to constitute a threat. An actual threat resulting in a fear of violence (immediate or otherwise) would only materialise when the discovery of the voyeurism was itself discovered:

even then this would depend on how the offender reacted. Absent the discovery and reaction, there is no threat”.

21. The Authority also argued that there was no threat emanating from another person (although there might well have been a risk), and the First-tier Tribunal had not at all dealt with paragraph 2(2) of Annex B: the requirement that an act or omission be done either intentionally or recklessly. Here, there was neither act nor omission.

22. On behalf of the claimant Mr Littlehales supported the decision of the First-tier Tribunal. He argued that the offence of voyeurism is a specified sexual offence under the Criminal Justice Act 2003 (Schedule 15 paragraph 150) for the purposes of special provisions dealing with dangerous offences, and therefore must be a crime of violence. I do not see how the provisions of the 2003 Act in a totally different context, using different language and enacted for a totally different purpose, can turn the offence of voyeurism into a crime of violence within the meaning and for the purposes of the criminal injuries compensation scheme.

23. Mr Littlehales argued that at the time the “actual voyeurism was taking place” there must have been “a clear risk of immediate unlawful violence”. I do not see why. Voyeurism can take place from a great distance away with the use of relevant equipment and it does not at all follow that it is accompanied by a risk of violence. Indeed the voyeur might not want the victim to have the remotest knowledge of the voyeurism.

24. Mr Littlehales further argued that the First-tier Tribunal was entitled to find that the threat was not merely hypothetical and the required intention for the purposes of paragraph 2(2) of Annex B was to be found in the intentional voyeurism. However, that is a confused reading of the Scheme. It is the threat that has to be made intentionally or recklessly. Voyeurism is not in and of itself threatening of immediate violence (although the discovery of it caused the claimant to feel threatened) and here there was no threat made by the stepfather.

25. Mr Littlehales also suggested that the claimant was a victim of sexual assault within 2(1)(d) of Annex B because an assault need not involve touching. I accept that the use of the phrase “sexual assault” in 2(1)(d) is not limited to the offence of sexual assault under section 3(1) of the Sexual Offences Act 2003 (which certainly requires touching). A sexual assault might involve a threat or an attempt where there is no actual touching. Nevertheless, in the present case, any intention in relation to the act of voyeurism (sexual or otherwise) was not communicated to the claimant at any stage. Her fear arose from her discovery.

26. For the above reasons this application made by the Authority succeeds and I make the order set out in paragraphs 1 and 2 above.

H. Levenson
Judge of the Upper Tribunal
2nd March 2017