OUTER HOUSE, COURT OF SESSION

[2018] CSOH 63

P848/17

OPINION OF LORD GLENNIE

in the petition of

MM

Petitioner

against

CRIMINAL INJURIES COMPENSATION AUTHORITY

Respondent

for judicial review of the decision of the First-tier Tribunal (Criminal Injuries Compensation) dated 29 March 2017 to refuse the petitioner's application in terms of paragraphs 87 and 89 of the Criminal Injuries Compensation Scheme 2012

Petitioner: Di Rollo QC; Digby Brown, Solicitors
Respondent: Pirie; Office of the Advocate General

13 June 2018

Introduction

[1] There was a time when a person claiming to have been raped or sexually abused many years earlier could expect to have their credibility undermined by the perception that, if their story were true, they would surely have told someone about it at the time of the incident or soon afterwards and would certainly not have delayed for years (or even decades) before reporting it to the police. However, it is now recognised that a victim of

rape or other sexual abuse may well be unwilling, or indeed unable, to come forward and make a complaint to the police or other authorities. They may be reluctant even to tell a close friend. The reasons are myriad, sometimes complex. They may differ according to the victim's age or sex, their relationship to the abuser and/or the environment in which they live. It may be the trauma of the event or events which prevents them speaking. It may be a fear of not being believed; or a fear of reprisal or victimisation. The victim may be under the coercive control of the abuser. The abuse may have occurred within the family, and there may be pressure to keep it within the family. There may be a feeling of shame, or a misplaced sense of guilt, a sense that they were in some way responsible for what happened to them. Or they may simply, but understandably, not want to risk the further trauma of having their private lives exposed to the detailed scrutiny that follows from a police investigation and criminal trial.

[2] In *LPB* (1990) 91 Cr. App. R. 359, a case concerned with an application to set aside an indictment alleging sexual offences committed by the accused against his stepdaughter many years earlier, Judge J, as he then was, explained the matter in this way (at page 361):

> "The delay here [i.e. the delay in bringing proceedings] is the result of reticence by the alleged victim reporting the allegation. Such delay is not uncommon and is wholly understandable. It takes considerable courage for a young victim of sexual indecency at the hands of a parent or step-parent to report it. Delay is directly connected with and may well be a consequence of the offences themselves and the relationship between the victim and the alleged offender and indeed other relationships within the family … It needs no unusual sensitivity to comprehend why it can be agonisingly difficult for a victim of sexual abuse in her home to make a complaint against the man responsible."

Those remarks were made in a particular context. Every case is different. But as Sedley J pointed out in *R* v *Criminal Injuries Compensation Board ex parte S* (1995) 7 Admin LR 693 at 702, referring generally to cases of rape and sexual abuse of victims of whatever age:

> "… in every such case, as everyone concerned in this area of work now knows, one of the fruits of crimes of sexual violence and abuse is the silence of the victim."

Observations to a similar effect were made by Lord Boyd of Duncansby in *M* v *Advocate General for Scotland* 2014 SLT 475 at paras [20] and [21]:

> "[20] … those who have presided over trials of historic sex abuse of children are only too aware of the deep psychological and emotional trauma that surrounds such criminal activity. In order to carry off such abuse the victim has to be cowed or otherwise subdued into remaining silent. That is a continuing effect of the crime. Disclosure may be made years or even decades after the abuse has ended. As Sedley J remarked in *R* v *Criminal Injuries Compensation Board* at p.702, one of the fruits of crimes of sexual violence is the silence of the victim. That is a direct consequence of the crime and is widely recognised as such in the criminal justice system. To suggest that this effect disappears once the child has reached adulthood is to misunderstand the pervasive nature of the trauma which victims of childhood sexual abuse invariably suffer.
>
> [21] [Referring to the possible distinction to be drawn between disclosure to police or other authorities and what might be said over the years to close confidants, he said this:] Disclosure to authority inevitably puts the complainer into a formal process of investigation and possibly prosecution of the defender. That may involve renewed trauma for the victim reliving the abuse and possibly having to confront her abuser in an adversarial process. While the justice system has made great efforts to try and allay victims' fears of the judicial process it remains a psychological barrier which someone complaining of sexual abuse has to overcome before making a complaint to police. On the other hand a victim who shares a confidence with a close friend or family member faces none of these challenges. Such 'disclosures' to friends or family may be made to ease the burden or even to test whether, if they do make a complaint to police, they would be believed. In considering whether or not it would have been reasonable to expect a victim of historic sex abuse to make an earlier disclosure it is important to consider the context in which disclosures are made."

The point made in the last sentence of para [20] is important. The trauma, and its effect on the victim, does not simply disappear over time or with growing maturity. Lord Boyd's remarks in para [20] were cited with approval by Charles J, giving the judgment of the Upper Tribunal in *MJ* v *First-tier Tribunal and Criminal Injuries Compensation Authority (No.3)* [2014] UKUT 279 (AAC), at paragraph 35:

> "… it seems to us that where, as here, a claim for criminal injuries compensation has been made in respect of historic sexual abuse of a child, it is not enough simply to rule the application as being irredeemably out of time because it was made 20 years

> after the last of the incidents in question. To take such a stance would ignore the very real reasons such an individual will have for not disclosing the abuse itself or the full extent of such abuse in the first place and the time that it takes to begin to come to terms with such traumatic experiences. […] In this context we draw to the tribunal's attention the observations of Lord Boyd of Duncansby in *JM* v *Advocate General for Scotland* …"

As is made clear in the passage quoted, that case concerned sexual abuse of a child, but the approach of the UT therein set out is consistent with the other passages in other cases dealing with comparable situations.

[3] It is now within the everyday experience of practitioners and judges in our criminal courts that complainers (as they are called) come forward after many years (or even decades) of silence to say what happened to them and to hold their abuser to account. Why they decide (or feel able) to do so at that particular time will vary from person to person, from case to case. Sometimes the fact that others have come forward to make similar allegations against the same abuser gives them courage to think that they may now be believed. Sometimes publicity given to high profile cases may encourage them to believe that societal perceptions have changed so that they feel able to speak out now without the fear of being "judged" and without the fear of social isolation that may previously have existed. In criminal cases in Scotland expert evidence has often been led to explain why people in that position are slow to come forward. And the Scottish Parliament has recently legislated to require a judge in such cases to direct the jury that "there can be good reasons why a person against whom a sexual offence is committed may not tell others about it or report it to an investigating agency, or may delay in doing either of those things" and that failure to tell anyone earlier "does not necessarily indicate that [the] allegation is false": see section 288DA(2) of the Criminal Procedure (Scotland) Act 1995 as amended.

[4] It is against this background that this petition for judicial review calls into question the decision of the First-tier Tribunal (Criminal Injuries Compensation) dated 29 March 2017 to refuse the petitioner's application for criminal injuries compensation on the grounds that it was made too late and that there were no exceptional circumstances preventing the petitioner from applying within 2 years after the date of the incident giving rise to her claim.

[5] The petitioner in this case is referred to as MM. On 14 September 2017 the court made an order under section 11 of the Contempt of Court Act 1981 prohibiting the publication or broadcasting of her name or other identifying details or of any particulars or details calculated to lead to her identification, and directed that no picture of her should be published or broadcast. That order remains in force. In setting out the relevant facts, I have deliberately sought to avoid precision about dates and other details.

The Criminal Injuries Compensation Scheme 2012

[6] Section 1 of the Criminal Injuries Compensation Act 1995 ("the 1995 Act") requires the Secretary of State to make arrangements for the payment of compensation to, or in respect of, persons who have sustained one or more criminal injuries. Such arrangements include the making of a scheme providing, in particular, for the circumstances in which awards may be made and the categories of persons to whom awards may be made. Such schemes require to be laid before Parliament under section 11(1) of the 1995 Act. The 1995 Act is the current statutory basis for a jurisdiction to award compensation to victims of crime which first came into being in 1964.

[7] There have been a number of different versions of the scheme in force since the 1995 Act came into force (and indeed since 1964). The current scheme ("the scheme") is the Criminal Injuries Compensation Scheme 2012, made on 13 November 2012. As is to be

expected, it contains detailed provision covering, among other things, the sort of injuries for which compensation may be made, the types and amounts of awards potentially available and the circumstances in which an award may be withheld or reduced. A section of the scheme, beginning at paragraph 86, deals with "Applications" and, in particular, the time within which an application for an award under the scheme must be made. The relevant paragraphs are as follows:

> "86. An application for an award will be determined by a claims officer in the Authority [viz the Criminal Injuries Compensation Authority] in accordance with this Scheme.
>
> 87. Subject to paragraph 88, an application must be sent by the applicant so that it is received by the Authority as soon as reasonably practicable after the incident giving rise to the criminal injury to which it relates, and in any event within two years after the date of that incident.
>
> 89. A claims officer may extend the period referred to in paragraph 87 or 88 where the claims officer is satisfied that:
>
> (a) due to exceptional circumstances the applicant could not have applied earlier; and
>
> (b) the evidence presented in support of the application means that it can be determined without further extensive enquiries by a claims officer."

Paragraph 88 concerns an applicant who was a child at the date of the incident and is not relevant here. Decisions on any application are taken on the basis of the civil standard of proof, balance of probabilities: section 3(2) of the 1995 Act.

[8] A determination by a claims officer of an application for an award is subject to review, at the request of the applicant, by a different claims officer (paragraphs 117 and 121). There is a right of appeal to a Tribunal against the decision taken on that review (paragraph 125). That Tribunal is a First-tier Tribunal ("FTT") established under the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"). Its decision on an appeal from such a review is final and unappealable: there is no right of appeal to the Upper

Tribunal (see section 11(1) and (5)(a) of the 2007 Act). That means, somewhat paradoxically, that its decision is subject to judicial review. As explained by Lord Carnwath JSC in *R (Jones)* v *First-tier Tribunal and Criminal Injuries Compensation Authority* [2013] 2 AC 48, in England and Wales this judicial review function has since 29 October 2008 been transferred to the Upper Tribunal ("UT") in terms of Practice Direction (Upper Tribunal: Judicial Review Jurisdiction) [2009] 1 WLR 327, made under and in terms of section 18(6) of the 2007 Act. No equivalent direction has been made in Scotland and, accordingly, any challenge to the decision of the FTT has to be made by petition for judicial review to the Court of Session. It follows that the UT hearing an application for judicial review of a decision by the FTT in a case in England and Wales concerning criminal injuries compensation acts as a court of co-ordinate jurisdiction with the Court of Session hearing a petition for judicial review; and its decisions are entitled to equal respect.

The present petition for judicial review

[9] The circumstances in which this matter comes before the court can be stated briefly. The petitioner was sexually assaulted and raped in 1965 when she was 20 years old. As a result of the rape she became pregnant and gave birth to a son. This is all admitted by the respondent in its answers to the petition. However, she did not report the incident to the police until late in 2013, nearly 50 years later. A year after that, in late 2014, she made an application to the Criminal Injuries Compensation Authority ("CICA") for compensation under the scheme. In April 2015 a claims officer rejected the application on the basis that it had not been made within 2 years after the date of the incident and that there were no exceptional circumstances preventing the petitioner from applying within that period. The petitioner sought a review of that determination but in May 2016 her application was again

rejected. She appealed to the FTT (Criminal Injuries Compensation). At a hearing on 29 March 2017 her appeal was dismissed. Written reasons for dismissing her appeal were given on 4 July 2017.

[10] The petitioner seeks judicial review of that decision by the FTT. She contends that it has not exercised its discretion in accordance with the terms of the scheme, that it has not exercised its discretion reasonably and that such reasons as it has given do not justify the conclusions reached. In order to consider these submissions it is necessary to look more closely at the material presented by the petitioner in support of her application, the reasons given by the claims officers for rejecting the application and the reasons given by the FTT in refusing the appeal. In doing so it is sometimes convenient to refer to the petitioner as "the applicant" or "the appellant", those terms reflecting her position in the various stages of the process before CICA and the FTT.

Material presented by the petitioner in support of her application

The initial application

[11] The petitioner's application form in support of her application for criminal injuries compensation contained a brief account of her reasons for her delay in applying for compensation. This was in the following terms:

> "Applicant had a child as a result of the rape. She was stigmatised and distressed. In [late] 2013, she spoke with rape crisis and reported the incident to the police. [The perpetrator] was arrested and released on restricted bail. His paternity of the applicant's son has been confirmed. The applicant was not previously aware that she could apply for compensation."

Further down the form, under the heading "Reporting details", the petitioner has written: "distress, social stigma and fear of not being believed".

Although this is written against a request for details of what report was made immediately after the incident, it is clear that it was intended as an explanation of the petitioner's delay in making a report – and it would have been understood as such by CICA.

The Application for Review

[12] In rejecting her application in April 2015, the claims officer noted the reasons put forward to explain the delay (ie that she was distressed, unaware of the Scheme's existence and was fearful of not being believed) but, although expressing sympathy, stated that he did not consider that these were exceptional reasons justifying an extension of time.

[13] In her Application for Review, the petitioner sought to address this by setting out four grounds for saying that there were indeed exceptional circumstances and reasons why she could not have applied earlier. The first three grounds are relevant here.

(1) First, she pointed to the social standards prevailing at the time when the crime was committed, in particular the lack of support and society's unsympathetic reaction to victims of rape then. She lived in a small religious community in an environment where victims of rape tended to be blamed and stigmatised. Becoming pregnant as a result made matters worse, causing her to be further stigmatised in her community and made to feel ashamed and an outcast. The fact that the perpetrator was known in the community made speaking out and going to the police very difficult. She was afraid of not being believed. Her mother and father offered little support.

(2) It was only after reporting the rape after speaking to Rape Crisis that she was made aware that she could be eligible for criminal injuries compensation. She had no prior knowledge of the criminal injuries compensation scheme and

therefore it is not reasonable to expect her to have made the application earlier.

(3) The psychological impact on her was another factor. It was now recognised that deep psychological and emotional trauma is involved in such sexual crimes and she continued to suffer psychological trauma as a result of the incident.

The fourth point was that the perpetrator had been charged and the paternity of her son had been confirmed by DNA testing. The application was therefore capable of being determined without further extensive enquiries. That point is directed towards the second part of the test in paragraph 89 of the scheme and does not call for any further discussion at this stage.

Appeal to the FTT – further evidence and argument

[14] In May 2016 the petitioner's claim was again rejected. The reasons given by the claims officer on the review of the earlier decision were commendably brief. After noting the lengthy period between the incident in 1965 and it being reported to the police in 2013, the claims officer said that the evidence did not support any exceptional reasoning for the delay in making a claim. There was no evidence which confirmed any psychological impact which would have prevented a claim being made sooner; and being unaware of the scheme was not an exceptional circumstance. Since no evidence of any exceptional circumstances had been provided he was unable to extend the time limit.

[15] The formal Grounds of Appeal lodged by the petitioner in support of her appeal to the FTT repeated the matters raised in her earlier application for review (see para [13] above). The appeal was heard on 29 March 2017. The petitioner gave oral evidence supplementing a written statement made by her in August 2016.

[16] The petitioner's written statement runs to eight pages. I do not propose to quote it in full. It begins by describing her childhood and teenage years in a religious family in a small community. She left school at the age of 15 and took a number of jobs leading up to one in which she often spent days away from her family. It was while she was employed in this way that she was raped. She had had no previous sexual experience. After the incident she did not know what to say or do. She tidied herself up as best she could. She could not sleep that night. She was physically sick. She had to start work very early the next morning and she tried to "act normal". She stayed quiet because she was "deeply ashamed and upset." Thereafter, she tried to continue as normal. Her attacker tried to make contact with her. When she realised she was pregnant she told her mother and her sister. They knew that what had happened was not consensual. She was not sure how much her father knew but he was not happy about the pregnancy:

> "Falling pregnant outside of marriage was frowned upon at that time. It was seen as scandalous. Going to the police was never mentioned as an option. I was very scared and frightened at what the reaction would be if I went to the police or if I did anything to confront [her attacker]. [He] intimidated me and I was scared of him. The time he followed me really put the fear into me again and I didn't know what else he was capable of. I didn't have any support from my family to go to the police. It was always in the back of my mind that I would not be believed. I knew that often the woman was blamed. I wasn't aware of any support available to rape victims. It was something that was not spoken about."

She went back to live with her mother and father, and then with her brother. Neither her mother nor her father wanted the situation to be well-known in the community. After her son ("XY") was born, her father relented and allowed her to bring him back home. She lived with her mother and father after that and took a job locally. She felt cut off socially for 2 to 3 years. She lost her independence, her confidence and her self-esteem. She did not go out to socialise. She was very depressed and could be very tearful. The stigma of being a single

mother was difficult to bear. She had to put up with spiteful comments from people in the town. On a few occasions she contemplated suicide.

[17] The statement went on to describe her marriage. She had two further children, a girl and a boy. Her son, XY, was not aware that he had a different father from them. That was another reason why she did not consider making a report about what had happened. XY only discovered the truth when he had to complete a passport application at the age of about 14. The petitioner started to do night classes and obtained qualifications. She went on to college and later worked as a care assistant. She went to university and graduated with an honours degree. She also completed a postgraduate course in behavioural science and took on a temporary full-time post as lecturer at a college. The job included guidance support. She retired in 2005.

[18] In her statement the petitioner said this about the period leading up to her decision to contact Rape Crisis in November 2013:

> "My son had started displaying odd behaviour in his teenage years. He stopped going to school and had to go to a special school. […] I began to wonder if my son's mental illness had something to do with how he was conceived. I wondered if there was a connection to his father and if [his father] had other children with similar problems. There was also a lot appearing in the news about historical sexual assault cases and it appears that these were being taken seriously. I was also overwhelmed with the injustice of everything that had happened to me. That one incident changed the course of my whole life. That feeling never went away. I still get tearful and upset talking about it."

The petitioner then made the decision to contact Rape Crisis. She described that decision and what followed from it in this way:

> "… I contacted the Rape Crisis helpline and I was put through to [a particular Rape Crisis centre]. I spoke with a woman […] who came to visit me […]. She was lovely and provided me with an information book for rape victims. She encouraged me to make a report to the police and reassured me that there had been many changes in the way rape cases and rape victims are treated. The police take such reports very seriously these days. The victims are not so readily blamed as they were in the past. Also, there is now a lot of support for rape victims available. I decided to call one of

> the numbers in the information book to report the rape to the police. I was surprised how quickly a police officer came to the house to take a statement. An investigation was underway. [The perpetrator] was arrested and the police spoke to a number of witnesses. DNA testing also confirmed [the perpetrator] is the father of my son. My son is now aware that I was a victim of rape as a result.
>
> In the information book from Rape Crisis, there was also information and a phone number for the Criminal Injuries Compensation Authority. I did not realise you could claim compensation if you had been a victim of crime prior to this. There was so little support and information available for rape victims in the 1960s that I had never even considered that compensation would be available. Criminal injuries compensation was not something that I had come across in my working life. I wasn't sure if I could claim …"

She called the number for CICA. She was told that her application might be considered out of time unless there were exceptional circumstances. She was given some advice. She sought assistance from Victim Support before eventually instructing a solicitor.

[19] The petitioner's statement was supported in part by a letter from the woman who had been her point of contact at Rape Crisis. She confirmed the details of when the petitioner made contact with Rape Crisis and what the petitioner said had happened to her. She explained that the petitioner was from a generation and a culture where people "got on with it". She did not have the language to express what had happened to her, how she felt about it or what she might have wanted to do about it. Everyone assumed she had had sex and got pregnant and that she had brought shame on herself and her family. She was treated as a second-class citizen even in her family home. She had no chance whatsoever to tell anyone she had been raped. It was hard enough for her to have people think she had had consensual sex. As the decades passed the petitioner felt more able to come forward and seek a bit of support, particularly after the media coverage of historical sex abuse cases such as the Jimmy Savile case. One of the reasons the petitioner wanted to speak about her experience was to explore whether, because her son was conceived in rape and therefore the biological child of a rapist, there was any likelihood of him exhibiting abusive tendencies.

[20] A Skeleton Argument submitted to the FTT in support of the appeal developed the arguments made in the Grounds of Appeal. Section 2 of the Skeleton Argument set out the "Background Circumstances". Paragraphs 2.1-2.7 summarised the position of the appellant (the petitioner) up to the time of making the application for criminal injuries compensation in November 2014. This followed the lines of her written statement and it is unnecessary to repeat it here.

[21] Section 4 of the Skeleton Argument is headed "Exceptional Circumstances". The circumstances relied upon were put forward under three sub-headings: (a) knowledge of the scheme; (b) reporting of rape; and (c) psychological trauma. The points made were as follows:

> "(1) So far as concerns 'knowledge of the scheme', the appellant had no prior knowledge of the scheme and it was therefore not reasonable to expect her to have made an application at an earlier stage. Under reference to two decisions of the UT, viz *TG* v *First-tier Tribunal and Criminal Injuries Compensation Authority* [2013] UKUT 0366 (AAC), UT Judge Levenson at para 26 and *YA* v *First-tier Tribunal and Criminal Injuries Compensation Authority* [2015] UKUT 0399 (AAC), UT Judge Levenson at para 48, it was submitted that ignorance of the scheme <u>can</u> be a factor justifying an extension of the time for making a claim for compensation: at the time of the incident the scheme was not well known and because the reaction of her family and community resulted in her not making a report to the police she had no reason to believe that compensation was available to victims of rape. Reference was also made to the 'Report by the Comptroller and Auditor General: Compensating Victims of Violent Crime', National Audit Office, HC 398 1999 – 2000, SE/2000/45, which showed that only 21% of those who applied for criminal injury compensation and responded to the survey were aware of the scheme prior to the incident giving rise to their application; and the majority were only made aware of the scheme after reporting the crime to the police. Awareness of the scheme in 1965 was likely to have been significantly lower than in 2000. It was only after seeking support from Rape Crisis and reporting the rape to the police that the appellant became aware that she could be eligible for compensation under the scheme.
>
> (2) Under the heading 'reporting of rape', it was submitted that the support available to victims of rape in 1965 and society's reaction to victims of rape in 1965 could not be considered by reference to current standards. The fact that the perpetrator was known in the community made speaking out and going to the police very difficult. She was frightened and intimidated. She was fearful of not being believed and of the potential repercussions if she made a report. Her father and

mother offered no support or encouragement for her to take the matter further. The Scottish Crime and Justice Survey 2014/2015: Sexual Victimisation and Stalking, showed that of those who had experienced forced sexual intercourse since the age of 16 only 16.8% said that the police had been informed about the most recent incident. The survey also confirmed that the most common reasons for rape not being reported to the police included fear that reporting the rape might make matters worse. It was much more common than not for rape victims not to report the crime or to delay in reporting the crime to the police. 'Silence of the victim is often an inherent feature of rape.'

(3) Finally, under the heading 'psychological trauma', it was said to be 'well recognised that deep psychological and emotional trauma is involved in sexual crimes, particularly when this results in pregnancy. The psychological impact on the appellant was further exacerbated by her sexual innocence at the time of the rape and her family and community's reaction to her pregnancy. Reference was made to *MJ* v *First-tier Tribunal and Criminal Injuries Compensation Authority (No.3)* [2014] UKUT 279 (AAC) at para 35 where it was explained that to rule an application as irredeemably out of time because it was made 20 years after the last of the incidents giving rise to the application 'would ignore the very real reasons such an individual will have for not disclosing either the abuse itself or the full extent of such abuse in the first place and the time that it takes to begin to come to terms with such traumatic experiences'."

[22] The Skeleton Argument concluded, in section 6, with this submission:

"The overriding principle of the tribunal is to achieve a fair and just outcome. The Appellant is the victim of a historic injustice which has significantly affected her life. It is submitted that the criteria in para 89 are met and discretion is merited. In the interests of fairness and justice, her application should be allowed to proceed. Account has to be taken of the Appellant's circumstances which were exceptional even by the standards of the time. She was brought up in a family and community in which religion, or perhaps religiosity, was the dominant influence. Even if she had known of the existence of the Scheme, it would have been unthinkable for someone raised in that environment to bring further shame upon the family by reporting to the police and making an application to the Authority."

Decision of the FTT

[23] At the hearing on 29 March 2017 the FTT gave an oral decision refusing the appeal. That is the decision under review in these proceedings. Brief reasons were given orally. At the request of the petitioner, the FTT gave written reasons in July 2017. The written reasons explain the decision more fully and provide the material on the basis of which its lawfulness

(in judicial review terms) can be gauged. It is therefore necessary to set out parts of those written reasons in some detail.

[24] In paragraph 6 of the written reasons, the FTT identified the issue as being "whether the Appellant's application should be admitted despite having been made many years after the index incident." That was challenged by the petitioner as inaccurate, since it suggested that the matter was simply one of discretion whereas in fact paragraph 89(a) of the scheme set out certain preconditions which had to be satisfied before any question of discretion arose. That is undoubtedly correct, but I do not think anything turns on it – the FTT was, in my view, simply expressing the question before it as briefly as possible, and it is clear from the remainder of its decision that it purported to apply the correct test set out in that paragraph.

[25] The FTT summarised the evidence in paragraph 7 of its written reasons. It explained that the appellant gave oral evidence, supplementing the evidence contained in the hearing bundle (which included her original written statement). It pointed out that the factual circumstances were not disputed by the respondent. It then summarised the appellant's evidence in this way:

> "(a) She was born in [date] and was brought up in a close-knit churchgoing family. She had a secure and disciplined upbringing in [place]. The community in which she was brought up was very traditional and moralistic in its outlook. As a consequence of her upbringing the Appellant was immature and naive. She socialised only with her parents' permission and within a fairly large group of like-minded friends.
>
> [(b) and (c) described the incident, the pregnancy that resulted in the birth of her son XY.]
>
> (d) After the index incident, the Appellant's assailant persisted in trying to make contact with her. The Appellant was frightened of him and avoided his advances.
>
> (e) When the Appellant realised she was pregnant she told her mother about the index incident. She was not encouraged to report the incident to the police and she

did not do so of her own volition as she feared she would not be believed. A pregnancy out of wedlock was scandalous in her community and her situation caused a family rift. Following the birth [of XY], the Appellant felt a loss of independence, confidence and self-esteem. She felt the stigma of being a single mother and was ashamed, embarrassed and depressed.

(f) The appellant married in [date] and her husband adopted [XY]. The Appellant had a daughter in [date] and another son in [date]. XY discovered that the Appellant's husband was not his father [sometime later]. The Appellant's marriage was not always a happy one and she periodically suffered from depression. She did not discuss her feelings with her GP and had no formal treatment preferring to deal with her condition on her own. She was not prescribed anti-depressants.

(g) The Appellant returned to studies at night classes obtaining Highers. She attended college … [An account is given of the appellant's study at university, her graduation with Honours, a postgraduate course and her work thereafter as a counsellor. Later she obtained a post as lecturer where she worked until she retired in about 2005. The FTT noted that 'guidance support' was an element of her job.]

(h) XY had a difficult teen age and as a young man he moved away from home to live in England. The Appellant lost touch with him for a number of years before discovering that as a consequence of serious mental health issues he was living in a community mental health centre. She ruminated from time to time over XY's mental health and wondered if he was affected by the circumstances of his conception. She wondered if her assailant had other children and if they were similarly affected. She did not act on these thoughts.

(i) Prompted by the media coverage of the Jimmy Savile investigations and the associated publicity around historic sexual abuse, the Appellant contacted [the] Rape Crisis helpline around November 2013. The appellant was encouraged to make a report to the police which she did. An investigation was put in hand and her assailant was questioned by police. Around this time [the] Appellant became aware of the Criminal Injuries Compensation Scheme from a leaflet on sexual abuse that she picked up at the Woman's Aid centre in [place].

(j) The Appellant had not discussed the index incident with anyone out with her immediate family other than a work colleague in the 1990s."

It should be noted that this was only a summary of the petitioner's evidence before the FTT. In paragraph 11, in the Reasons section of its decision, the FTT said that the appellant gave her evidence "in a straightforward manner" and that "[her] oral evidence is considered credible and reliable." In her oral evidence she adopted her written statement, and the reference to her oral evidence being credible and reliable must therefore include the

evidence contained within her written statement. Lest there be any doubt about the matter, Mr Pirie, who appeared for the respondent before me, was at pains to emphasise, correctly in my view, that the FTT had accepted all of the petitioner's evidence, including the evidence set out in her written statement.

[26] In paragraph 8 the FTT summarised briefly the submissions made by the parties. It is not necessary to set these out in detail but it is instructive to note the two main submissions on behalf of the respondent. First, the respondent conceded that for the 1960s, 1970s and most of the 1980s the social and cultural climate in the area where the appellant lived could be a determining factor in preventing her disclosing the index incident and making a complaint to the police; but from approximately 1985 onwards, given her age, life experience, educational attainment and type of employment, it would have been reasonable to expect the appellant to have made a claim under the scheme prior to 2014. Secondly, although the appellant had depression, she did not have "mental health problems leading to treatment", and there were therefore no exceptional circumstances preventing her making a claim before November 2014. I come back to consider these arguments in the context of the FTT's reasoning as set out in its written reasons. However, it is appropriate to observe at this point that the concession that for the 1960s, 1970s and the first half of the 1980s the social and cultural climate in which the appellant lived could be a determining factor in "preventing" her disclosing the incident and making a complaint appears to involve a recognition on the part of CICA that the language of paragraph 89(a) of the scheme ("due to exceptional circumstances the applicant could not have applied earlier") is apt to cover a case where the applicant is deterred from making disclosure and is not limited to a situation where the applicant is physically or mentally disabled from so doing.

[27] The Findings in Fact made by the FTT are set out in paragraph 9 of its written reasons and are as follows:

> "(a) The Appellant suffered a crime of violence [in] 1965. She was then aged 20 years. She told her immediate family what had happened but did not report to the police nor did she claim compensation.
>
> (b) The Applicant reported the index incident to the police [in] November 2013 and made a claim under the scheme in November 2014.
>
> (c) The Appellant does not suffer from an intellectual or cognitive impairment. She has had depression from time to time, treated conservatively.
>
> (d) In the period 1991 – 2005, the Appellant was employed as a graduate qualified college lecturer. Her role included student guidance support."

[28] In paragraph 10 the FTT gave its decision dismissing the petitioner's appeal. It set out its Reasons in paragraphs 11-17. I have already referred to paragraph 11 where the FTT found the petitioner's evidence to be credible and reliable. The reasoning of the FTT appears from the following passages in those paragraphs:

> "12. The Appellant was aged almost 21 when she was raped. She was living at home with her parents but had a job which took her away from home several days per week. She may have had a sheltered upbringing and been naive and inexperienced but none the less, she knew that what had happened to her was a criminal offence. She tried to deal with the experience on her own and initially did not tell anyone what had happened to her. She eventually told her family what had happened but made no report to the police because she thought that she would not be believed and her claim would not be taken seriously. She did not make a claim for compensation as she did not know that she could do so. The appellant then went on to marry, to have two more children and to complete her formal education at night class before graduating from University with an Honours Degree and taking up employment as a college lecturer […] until her retiral in 2005.
>
> 13. The Appellant contends that she did not make an application for compensation until November 2014 as she had no prior knowledge of the Scheme. As the Appellant did not make an application within the two-year time limit set out in Paragraph 87, she must demonstrate that her failure to do so was due to exceptional circumstances preventing earlier application. In considering whether to exercise its discretion in terms of Paragraph 89, the Tribunal has had regard to the Appellant's own personal circumstances in identifying whether any exceptional circumstances exist.

> 14. The Appellant is undoubtedly an intelligent, educated and articulate woman. Accepting that her marriage was not always happy, her home and family life was unexceptional. She suffered from occasional bouts of depression but not to an extent that her condition materially interfered with her employment or social life.
>
> 15. In the judgment of the Tribunal, the Appellant's ignorance of the Scheme, of itself, could not reasonably be described as an exceptional circumstance insofar as it relates to a claimant who was not a child at the date of the index incident, who does not suffer from an intellectual or cognitive deficit and who is intelligent, educated and socially aware.
>
> 16. The Tribunal holds on the facts found that the Appellant could reasonably have been expected to apply for compensation at any time after at least 1991 by which time the Appellant could demonstrate independence of mind by reference to her considerable educational achievement. Further the restrictive social circumstances of 1965 which could arguably be given as a reason for not making an earlier application for compensation had changed with the passage of time."

In paragraph 17 the FTT states that it has had regard to the case law referred to in the appellant's skeleton argument and oral submissions, in particular the comments of Judge Levenson in *BC* v *First-tier Tribunal and Criminal Injuries Compensation Authority* [2016] UKUT 0155 (AAC) at paragraph 15 where he identified two "subsidiary questions" that needed to be asked when applying paragraph 89(a) of the scheme, namely: (i) whether there were exceptional circumstances; and (ii) whether any of them meant that the applicant could not have applied earlier than she did apply. In seeking to answer these two questions, the FTT said this:

> "The only exceptional circumstance identified by the Appellant is the influence on her of the moral and cultural stance of her community at the date of the index incident. The Appellant's social circumstances changed over time and the Tribunal considers on the balance of probabilities that by the time the Appellant completed her University studies and started work as a lecturer, she would not have been subject to or constrained by the circumstances said to be exceptional. On the available evidence the Tribunal did not identify any other circumstances which could reasonably be described as exceptional and in the absence of any such circumstances the appeal must fail."

Submissions

[29] For the petitioner, Mr Di Rollo QC moved the court to reduce the decision of the FTT and remit the matter to a differently constituted tribunal to reconsider whether, under paragraph 89 of the scheme, there were exceptional circumstances due to which the appellant could not have applied for criminal injuries compensation earlier and, if so, whether an extension should be granted. He criticised the way in which the FTT had described the issue before it ("whether the Appellant's application should be admitted despite having been made many years after the index incident"). The question whether it would have been "reasonable" (see eg paragraph 16 of the FTT's reasons) to expect the petitioner to have made a claim prior to 2014 did not address the test in paragraph 89(a) of the scheme. There was no justification for asserting, far less for holding, that in the circumstances applying to the petitioner there was a point in time before November 2013 when she could have reported the matter to the police. The tribunal was not entitled to hold on the facts found that the petitioner could reasonably have been expected to apply for compensation at any time after 1991. There was no evidence on which the FTT could have made a finding that by the time she had completed her university studies and started work as a lecturer, or at any other time before or after that moment, the petitioner would no longer be subject to or constrained by the moral or cultural stance of the community in which she had been brought up. Further, the tribunal had erred in law in holding that ignorance of the scheme was not enough of itself to amount to an exceptional reason; but, in any event, that ignorance existed because of the factors which prevented her reporting the incident to the police or other authorities. The tribunal was wrong to have placed reliance on the petitioner not suffering from an intellectual or cognitive deficit, being intelligent, educated and socially aware, and demonstrating independence of mind, to draw the

conclusion that she could reasonably have been expected to apply for compensation by 1991 at the latest. The reasoning of the FTT demonstrated a wholesale failure to understand the reasons for non-reporting by victims of rape and other sexual abuse.

[30] For the respondent, Mr Pirie first reminded me that the court must exercise restraint when invited to review the findings of a specialist tribunal. He cited the following well-known authorities to illustrate different facets of the point: *Tesco Stores Ltd* v *Secretary of State for the Environment* [1995] 1 WLR 759 at 764G-H and 781F-G; *South Bucks District Council* v *Porter (No.2)* [2004] 1 WLR 1953 at paragraph 36; *R (Iran)* v *Secretary of State for the Home Department* [2005] EWCA Civ 982, [2005] Imm AR 535 at paragraph 15; *MA (Somalia)* v *Secretary of State for the Home Department* [2010] UKSC 49 at paragraphs 43-46; *R (Jones)* v *First-tier Tribunal and Criminal Injuries Compensation Authority* [2013] 2 AC 48 at paragraphs 16 and 25; *Henderson* v *Foxworth* 2014 SC (UKSC) 203 at paragraphs 48 and 57. He submitted that the jurisdiction to grant decree of reduction was inherently discretionary (*King* v *East Ayrshire Council* 1998 SC 182 at 194); and the court will not reduce a legally erroneous decision if the error is immaterial (*Ashiq* v *Secretary of State for the Home Department* 2015 SC 602 at paragraphs 23 and 24).

[31] Mr Pirie accepted that a sexual crime might cause deep emotional and psychological trauma to its victim and that that trauma might be a reason for the victim's silence. He accepted that the petitioner had given credible and reliable evidence. But he submitted that while some of the petitioner's circumstances since around 1980 had been difficult, the thing to which she attributed her delay in making an application to CICA since that time was her lack of knowledge that a claim was possible. There was no evidence before the tribunal from anyone qualified in the diagnosis or treatment of mental health problems to support her claim that this delay was due to some psychological reaction to the trauma. Against this

background, the terms of paragraph 89 of the scheme identified two matters which had to be established on balance of probabilities before the decision had to be made as to whether, as a matter of discretion, to extend the period for making an application under the scheme. The first was that there must be shown to be "exceptional circumstances". Under reference to *Murnin* v *Scottish Legal Complaints Commission* 2013 SC 97 at paras [30] and [31], he submitted that this expression excluded circumstances which were routinely or regularly encountered. While the nature of the family life and the societal constraints in which the petitioner was brought up, and their effect on her preparedness to speak about what had happened, might well be categorised as exceptional, those circumstances no longer had any relevance once the petitioner had left home and become an independent well-educated individual able to stand on her own feet. And the statistics quoted by the petitioner showed that the petitioner's ignorance of her entitlement to claim compensation under the scheme until after reporting the matter to Rape Crisis and to the police was far from exceptional. Secondly, he submitted that the petitioner must show that due to the exceptional circumstances the petitioner "could not" have applied earlier. It was not a question of what was reasonable; it turned on whether she could show that she was unable to apply earlier. The petitioner could not show that she had been unable to apply earlier than she did. The decision of the FTT was correct and should be upheld.

Discussion

[32] As noted above, Mr Pirie was at pains to emphasise the self-imposed constraints upon the court when considering the decision and reasoning of a tribunal. I accept unreservedly the tenor of those submissions. To the authorities cited by Mr Pirie, I would add a reference to the remarks of Lord Hope and Baroness Hale in *AH (Sudan)* v *Secretary of*

State for the Home Department [2008] 1 AC 678 at paras [19] and [30] respectively. Rather than pluck out individual sentences from the reported cases to highlight particular expressions thought to be pertinent to the issues arising in the particular case, I prefer to treat the decided cases as illustrations of the basic point that Parliament has placed the tribunal in the position of being the decision maker and the courts, in the exercise of their supervisory jurisdiction (which is what I am concerned with in this case) should be cautious about interfering with the tribunal's decision. The point is well expressed by Gross LJ (with whom the other members of the court agreed) in *Criminal Injuries Compensation Authority* v *Hutton & Ors* [2016] EWCA Civ 1305, a case to which I refer because it is concerned, as is this case, with the proper role of the court in reviewing a decision of the FTT on appeal from a decision of CICA in the criminal injuries compensation field. Under reference to the remarks in *AH (Sudan)* (supra) and *R (Jones)* v *First-tier Tribunal and Criminal Injuries Compensation Authority* (supra), to which I have referred, Gross LJ gave the following summary of the relevant principles (at paragraphs 57 and 58):

> "57. Pulling the threads together:
>
> (i) First, this Court should exercise restraint and proceed with caution before interfering with decisions of specialist tribunals. Not only do such tribunals have the expertise which the 'ordinary' courts may not have but when a specialised statutory scheme has been entrusted by Parliament to tribunals, the Court should not venture too readily into their field.
>
> (ii) Secondly, if a tribunal decision is clearly based on an error of law, then it must be corrected. This Court should not, however, subject such decisions to inappropriate textual analysis so as to discern an error of law when, on a fair reading of the decision as a whole, none existed. It is probable, as Baroness Hale said [in *AH (Sudan)*], that in understanding and applying the law within their area of expertise, specialist tribunals will have got it right. Moreover, the mere fact that an appellate tribunal or a court would have reached a different conclusion, does not constitute a ground for review or for allowing an appeal.

(iii) Thirdly, it is of the first importance to identify the tribunal of fact, to keep in mind that it and only it will have heard the evidence and to respect its decisions. When determining whether a question was one of 'fact' or 'law', this Court should have regard to context, as I would respectfully express it ('pragmatism', 'expediency' or 'policy', per *Jones*), so as to ensure both that decisions of tribunals of fact are given proper weight and to provide scope for specialist appellate tribunals to shape the development of law and practice in their field.

(iv) Fourthly, it is important to note that these authorities not only address the relationship between the courts and specialist appellate tribunals but also between specialist first-tier tribunals and appellate tribunals.

58. For my part, in applying this authoritative general guidance to this particular appeal, a number of considerations seem pertinent:

(i) First, it is the FTT – not the UT – which is the tribunal of fact and which heard the evidence.

(ii) Secondly, the UT's jurisdiction is limited to one of judicially reviewing the FTT Decision. The UT had no jurisdiction to interfere with the FTT Decision, absent a public law error.

(iii) Thirdly, even with the observations in *Jones* well in mind, I cannot see that this case was one calling for guidance from the UT to shape the development of law and practice in respect of claims under the Scheme. It follows that in classifying issues before the FTT as those of 'fact' or 'law', questions of context (designed to facilitate the giving of general guidance by the UT) can have, at most, only very limited bearing."

In the context of criminal injuries compensation, where there is no right of appeal from the FTT, the reference in paragraph 58(ii) to the UT should, in its application to Scotland, be understood as applying to the Outer House of the Court of Session hearing a petition for judicial review of the FTT's decision. The language of "public law error" (in paragraph 58(ii) of the quoted passage) may jar with Scots law purists if used in connection with judicial review in Scotland, which is not limited to matters of public law, but its meaning in this context is readily understood. The reference to "*Jones*" in sub-paragraph (iii) of each main paragraph is a reference to the judgment of Lord Carnwath in *R (Jones)* v

First-tier Tribunal and Criminal Injuries Compensation Authority (supra) at paragraphs 41 and 46. The point being made there was that the distinction between law and fact is not purely objective but must take account of factors of policy or expediency – the court (or appellate tribunal) will be more ready to treat a question as a question of law rather than as a pure question of fact, or more ready to venture into the "grey" area between the two, when the case calls for more general guidance to help shape the development of the law or practice in a particular area. In this context it is relevant to note also the remarks of Lord Wilson JSC (with whom the other members of the court agreed) in *Steel* v *NRAM* [2018] UKSC 13 at paragraph 37, to the effect that what he called "evaluative conclusions" (eg as to the reasonableness of a particular action or assumption) did not fit easily within the pigeon holes of fact or law, or even mixed fact and law, though the court still required to be satisfied that an evaluative conclusion was wrong before it could set it aside.

[33] In the present case it is the FTT which is the tribunal of fact and its findings of fact are binding on the court hearing a petition for judicial review. But findings of fact are not made in a vacuum. They are made and are to be understood in the context of the legal test to be applied by the tribunal of fact and the questions which it requires to answer. In this case, the questions which the FTT was required to answer in terms of paragraph 89(a) of the scheme (as a jurisdictional threshold before any question arose of exercising a discretion to extend time for making an application for compensation) were twofold: first, were there exceptional circumstances? and, second, did any of them mean that the applicant could not have applied earlier than he did? This is the "two part process" referred to by the UT in *BC* v *First-tier Tribunal and Criminal Injuries Compensation Authority* [2016] UKUT 0155 (AAC) at paragraph 15. I am content to adopt that formulation, though for myself I consider that it might often be more helpful to reverse the order in which the questions are answered,

enquiring first why the applicant was unable to make his application earlier than he did and then going on to ask whether the circumstances preventing an earlier application could be characterised as exceptional. No point of principle arises, and the result should always be the same, but taking them in this order enables the court or tribunal to focus more intensely on whether the actual thing that prevented the applicant making his application earlier is properly to be characterised as exceptional.

[34] An issue was raised in argument as to the meaning of the words "could not" have applied earlier in paragraph 89(a) of the scheme. As I understood Mr Pirie's argument, he contended that this required it to be established that the applicant had been literally unable to make the application earlier – it was not enough that she could not reasonably have been expected to have made it earlier. I note that this is not the interpretation which CICA or the FTT appear to have given that expression up till now. In argument before the FTT it was conceded by CICA that for the whole of the period until towards the end of the 1980s the social and cultural climate in the area where the appellant lived "could be a determining factor in preventing her disclosing the index incident and making a complaint to the police". In paragraphs 16 and 17 of its decision, the FTT appears to have accepted that at least until the late 1980s the applicant could not have applied, on the basis that during the period up till that time she could not reasonably have been expected to have made such an application. In other words, neither CICA nor the FTT approached the matter on the basis that the applicant had to show that she had been (literally) unable to make a claim earlier than she did make it – it was sufficient if in all the circumstances she could not reasonably have been expected to make the application earlier. This is consistent with the approach of both the FTT and the UT in *BC* v *First-tier Tribunal and Criminal Injuries Compensation Authority* (supra), where the argument proceeded in part on the hypothesis that a period during which

the applicant did not make a claim because he was suffering from the effects of bereavement after the death of his father was, for the purposes of paragraphs 89(a) of the scheme, a period during which he could not have applied. Of course the fact that an argument has not previously been advanced does not mean that it is without merit. But in this case I am persuaded that the argument is simply wrong. The words "could not have applied earlier" are apt to cover a wide range of possible meanings, from absolute impossibility (due eg to physical or mental incapacity) at one end of the spectrum to a situation, at the other, where due to any number of factors (such as distress, societal objections, etc) the person concerned could not reasonably have been expected to have made an application earlier than she did. To my mind the proper meaning to be given to the words "could not …" in paragraph 89(a) falls at the latter end of the spectrum. Were that not the case, the power of the CICA claims officer to extend time for making an application would be limited to the case where the victim of crime was physically or mentally incapacitated and unable to get advice or assistance in making a claim. This would be a rare case indeed; and such circumstances would, one might think, always be an "exceptional circumstance", so the qualifying words in paragraph 89(a) ("due to exceptional circumstances") would be unnecessary. On any sensible reading of paragraph 89(a) it seems clear that the power to grant an extension of the period for making an application cannot have been intended to be so restricted. I am aware that earlier versions of the scheme imported a "reasonableness" test as the threshold to be crossed before any question arose of the exercise of discretion to extend time, and it could, I suppose, be suggested that the present wording was designed to be more restrictive; but the point was not argued and, absent some compelling material pointing to such a conclusion, it seems to me unlikely in the extreme that the framers of the 2012 scheme could have intended to introduce into paragraph 89(a) a strict "inability" test which, as indicated above,

would have the effect of emasculating the provisions for extension of time almost in their entirety.

[35] The FTT's reasons for finding that the applicant did not cross the jurisdictional threshold set out in paragraph 89(a) of the scheme are not easy to fathom. They are, I think, to be found in paragraphs 15, 16 and 17 of its decision, set out at para [28] above. The only express findings relate (i) to the petitioner's ignorance of the scheme and (ii) to the restrictive social circumstances in which she was living at the time of the incident and for a number of years thereafter.

[36] The petitioner's ignorance of the scheme, ie of the possibility of claiming compensation, is dealt with in paragraph 15: that ignorance could not be described as an exceptional circumstance because the petitioner (a) was not a child at the date of the incident, (b) does not suffer from any intellectual or cognitive defect and (c) is intelligent, educated and socially aware. There is no finding in terms that the petitioner's ignorance of the scheme was one of the circumstances preventing her applying earlier, but it seems to be implicit in the reasoning that it was rejected as a qualifying circumstance because it could not be described as "exceptional", given the petitioner's age, capacity, intelligence, education and social awareness. I shall come back to this point later in this Opinion.

[37] The FTT deal in paragraphs 16 and 17 with the restrictive social circumstances in which the petitioner lived at the time of the incident and for some years afterwards. It describes them (in paragraph 16) as circumstances which "could arguably be given as a reason for not making an earlier application for compensation" (emphasis added), but goes on to say that those circumstances had changed with the passage of time. It makes a similar point in paragraph 17: by the time she had completed her studies and started work as a lecturer "she would not have been subject to or constrained by the circumstances said to be

exceptional" (emphasis added). Doing my best not to subject the FTT's reasoning to inappropriate textual analysis, I consider that this can fairly be understood as a finding that for a period after the incident the petitioner was prevented from making an application by family and societal circumstances deterring her from reporting the incident to the authorities, and that these circumstances would qualify as "exceptional" for the purposes of paragraph 89(a) – but that those circumstances changed over time and ceased to be a relevant cause of her failure to make a claim as the petitioner grew up, finished her studies and became more independent.

[38] Mr Di Rollo submitted that there was no evidential basis upon which the FTT could have concluded that the effect on the petitioner of the family and societal pressures deterring her from reporting the incident diminished over time or as a result of her educational achievements, employment and independence. There is, to my mind, considerable force in this criticism. The tribunal has to decide the case on the basis of the evidence before it. It is clear from the passages quoted in the authorities that the inhibiting effect of the crime which prevents a child reporting rape or sexual assault to the authorities does not simply disappear when the child becomes an adult: see eg per Lord Boyd of Duncansby in *R* v *Criminal Injuries Compensation Board* (supra) at p.702. By the same token, the effect on a young adult does not automatically disappear with the passage of time, growing maturity, education, employment and independence. In similar vein the UT in *BC* v *First-tier Tribunal and Criminal Injuries Compensation Authority* (supra) described a reference to an individual overcoming the effects of bereavement after the death of his father as "glib and speculative". Everything will depend on the individual case. There was no evidence before the tribunal to support its "glib and speculative" conclusion (to use the phrase in *BT*) that the effect on the petitioner of the family and societal constraints within

which the incident occurred and in which she lived for many years afterwards would have disappeared as she grew older and more independent.

[39] However, the problem with the FTT's reasoning goes much wider than that. Before considering this in detail, I should first conclude my summary of the FTT's reasoning in paragraph 17. In that paragraph the FTT identify those social circumstances – the influence on the petitioner of the moral and cultural stance of the community at the date of the incident – as "the only exceptional circumstances identified by the Appellant" as having prevented her from making an application earlier. Having said, in effect, that these circumstances had ceased to be a cause over time, the FTT concludes (in the same paragraph) by saying that on the available evidence it "did not identify any other circumstances which could reasonably be described as exceptional", presumably meaning that it did not identify any other circumstances which could reasonably be described as exceptional which prevented the petitioner making an application for compensation earlier than she did.

[40] I find this passage difficult to understand. It is not clear to me whether the FTT is saying (a) that, apart from relying on the family and societal circumstances in which she found herself at and for a period after the time of the incident, the petitioner did not seek to explain why she had not made an application earlier than she did; (b) that, apart from its time-limited acceptance that such social circumstances may have played a part, the tribunal did not accept the reasons put forward by the petitioner for not making an application earlier; (c) that the tribunal accepted that there were other reasons which prevented the petitioner applying earlier, but did not find the circumstances to be "exceptional"; or (d) some combination of the above. If the meaning is that identified at (a) above, then the FTT is simply wrong. As is clear from the passages in the evidence noted earlier in this

Opinion, the petitioner did not confine herself to reliance on the constricting family and societal situation in which she found herself at the time of the incident and for some years afterwards. She relied on the overall psychological and emotional trauma which she suffered as a result of the rape, of which the family and societal concerns of the early years were but one of many concerns. If the meaning is that identified at (b) or (c), then this is puzzling, since the FTT was at pains to say that it accepted the petitioner's evidence; and the tribunal can hardly have intended to suggest that such circumstances – the psychological and emotional trauma suffered by a rape victim such as the petitioner – would not qualify as "exceptional".

[41] As I have said, the petitioner's case was not simply that it was the family and societal circumstances in the community in which she lived at the time of the incident and for some years thereafter which prevented her speaking out. Her evidence sought, naturally, to identify particular incidents and circumstances which prevented her speaking out at particular times; but it also included evidence of the more general kind that one might expect in a case such as this. "Distress, social stigma and fear of not being believed" was part of her explanation given in her initial application form for not having reported the matter earlier. Similar points – referring to the psychological impact on her consistent with the psychological and emotional trauma now recognised in connection with sexual crimes – were made in her Application for Review before another claims officer of CICA ("she continued to suffer psychological trauma as a result of the incident"). In her evidence to the FTT it is clear that she described the distress caused by the rape and her perceived inability to speak out in a way which was not confined to the societal constraints of her early years. Her ability to come forward was in part a consequence of news and publicity being given of late to historic sexual assault cases and the fact that it appeared that these were now being

taken seriously. The tribunal must have understood this: hence its recital in para (i) of its recording of her evidence to the media coverage of the Jimmy Savile investigations and associated publicity around historic sexual abuse, a matter which is linked directly to the issue of the reluctance of victims of rape and sexual abuse to speak about the incident or to report it to the authorities in the absence of some trigger event causing them to feel more confident about speaking out. In the Skeleton Argument lodged on her behalf in connection with the appeal to the FTT there was a specific reference, under the heading "psychological trauma" to the fact that it was "well recognised that deep psychological and emotional trauma is involved in sexual crimes …" which was exacerbated by – but not limited to – the reaction of her family and the community to her resulting pregnancy. Yet there is not a word about any of this in the reasons given by the FTT at paragraphs 10-17 of its decision. One can only speculate as to the reason for this omission. It may be that the FTT was distracted by the particular reference to the problems of the petitioner living in a confined family and community environment and simply overlooked the fact that she was making this wider point that she, like many other victims of rape and sexual assault, had been held back from making any report about what had happened by the emotional and psychological trauma inflicted on her by the incident and kept silent because of "distress, social stigma and fear of not being believed" (to quote from her initial application to CICA). By focusing, for whatever reason, solely on the constraints imposed on the petitioner by her family and the community in which she was brought up, the FTT failed altogether to address the broader thrust of the petitioner's evidence and the case made to it on her behalf.

[42] Mr Pirie submitted that there was no need for the tribunal to address this in its reasons, since it had made it clear that it accepted in its entirety the petitioner's evidence. I do not understand this submission. If the tribunal accepted the petitioner's evidence in its

entirety, then it must have accepted her evidence that she was held back from applying earlier by the psychological and emotional trauma resulting from the rape (using "psychological and emotional trauma" as a composite shorthand for the many and varied reasons why a victim of rape or sexual assault might not tell anyone about the crime or report it to the authorities). It should have made a finding to that effect. It should have gone on to consider whether such circumstances were exceptional; it is difficult to conceive that any tribunal could regard them as other than exceptional. If, consistently with the above, it had found that due to such exceptional circumstances the petitioner could not have applied earlier than she did, the FTT ought to have gone on to consider how it would exercise the discretion conferred by paragraph 89(a) of the scheme.

[43] In the result, the FTT made no finding of fact on a crucial part of the petitioner's case, namely that as a victim of rape and sexual assault she had suffered psychological and emotional trauma which had, in effect, prevented her from reporting the matter to the authorities and, in consequence, discovering about and making a claim under the criminal injuries compensation scheme. An alternative way of making the same point is that the FTT did make a finding of fact – to the effect that the petitioner was not prevented from making a claim by any psychological or emotional trauma resulting from the rape – and that that finding is perverse or at least unsupported by any cogent reasoning, given the FTT's acceptance of the petitioner's evidence in its entirety For this reason alone the decision of the FTT cannot stand.

[44] In light of this conclusion it is unnecessary to go into too much detail about the question whether, if it was shown that the petitioner had been, in effect, prevented from applying earlier by reason of the psychological and emotional trauma which often deters victims of rape or other sexual assault from coming forward and reporting matters to the

authorities, such circumstances could be said to be "exceptional". That is a matter ultimately for the tribunal though it is difficult to see how any tribunal could fail to find them so. I did not understand either party to dispute that the exceptionality or otherwise of the circumstances must be assessed subjectively. In other words, the question is to be answered by looking at the circumstances as they affected the individual concerned, subject always, of course, to the point made in *Murnin* at para [30], that an exceptional circumstance cannot be one that is regularly or routinely or normally encountered. I did not understand either party to suggest that rape or sexual assault, and the reticence of the victim in the aftermath of such an attack, would be otherwise than exceptional.

[45] The other matter mentioned by the FTT is the reliance placed by the appellant on her ignorance of the criminal injuries compensation scheme until after she had been to see Rape Crisis and subsequently reported the matter to the authorities. In paragraph 15 of its decision, the FTT conclude that such ignorance of the scheme could not reasonably be described as an exceptional circumstance insofar as the petitioner was not a child at the date of the incident, did not suffer from any intellectual or cognitive deficit and who was intelligent, educated and socially aware. I have touched upon this already, though only briefly. Taken by itself this reasoning is unexceptional. As Mr Pirie pointed out, the petitioner could have made enquiries and found out about the scheme. But this is to take too narrow a view. The petitioner's ignorance of the scheme has to be taken as part of the bigger picture, which is that of a victim of rape manifesting the reticence commonly seen amongst such victims as described in the authorities to which I have referred. The question is whether such a person, who is *ex hypothesi* reluctant to speak to anyone about the incident let alone report matters to the authorities, could reasonably be expected to make enquiries about a compensation scheme which depended upon her telling others about what had

happened. There is no doubt that ignorance of the scheme can be a relevant factor: see *TG* v *First-tier Tribunal and Criminal Injuries Compensation Authority* [2013] UKUT 0366 (AAC) at paragraph 26 and *YA* v *First-tier Tribunal and Criminal Injuries Compensation Authority* [2015] UKUT 0399 (AAC) at paragraph 48. But much will depend upon the underlying circumstances and the reason for that ignorance. It is wrong, therefore, to consider ignorance of the scheme as a self-contained point – rather it is part and parcel of the package of circumstances which resulted in the petitioner not applying for compensation earlier. I should add, however, that I do not accept the argument advanced by Mr Pirie to the effect that because a majority of victims of rape or other sexual assault do not know about the possibility of making a claim for criminal injuries compensation under the scheme until they have reported the matter to the authorities, then it follows that ignorance of the scheme cannot be an exceptional circumstance justifying an extension of the time limit for making an application. For the reasons outlined above, the question of exceptionality must be considered in relation to the whole package of circumstances relied on.

Disposal

[46] I shall reduce the decision of the FTT dated 29 March 2017 and remit the matter to a differently constituted tribunal. I shall reserve all questions of expenses.