Neutral Citation Number: [2016] EWHC 2745 (Admin)

Case No: CO/3111/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Manchester Civil Justice Centre

Date: 01/11/2016

Before :

MR JUSTICE KERR

- -

Between :

THE QUEEN on the application of CRIMINAL INJURIES COMPENSATION AUTHORITY	**Claimant**
- and -	
FIRST-TIER TRIBUNAL (CRIMINAL INJURIES COMPENSATION)	**Defendant**
and	**Interested**
MB	**Party**

- -
- -

Ben Collins QC (instructed by **Wendy Wilson, Criminal Injuries Compensation Authority**) for the **Claimant**
Elizabeth-Anne Gumbel QC (instructed by **Jonathan Bridge, Farleys Solicitors LLP**) for the **Interested Party**

Hearing date: 1st November 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Kerr:

1. An anonymity order has been made in this case. The interested party must not be referred to except by his initials, MB. The documents on the court file must not be made available to any person unless the name of the interested party and of his father, whose initials are also MB, have been reduced to initials.

2. This case is about the reopening of a criminal injuries compensation claim that was closed as long ago as 1997. The injury inflicted by criminal conduct was that the interested party, born in January 1978, was sexually abused between the ages of about 10 and 14 years. I shall refer to the interested party as MB, to distinguish him from his father, to whom I shall refer as MB Senior.

3. In April 2015, First-tier Tribunal Judge Storey refused an application by MB to reopen his case on the basis of fresh medical evidence, but allowed his application to be permitted to "appeal" out of time against the refusal in 1997 of the then Criminal Injuries Compensation Board (CICB) to make him an award of compensation, broadly on the ground that MB had not taken reasonable steps to help the police bring the offender to justice.

4. The decision now challenged was a significant landmark in a five year campaign by MB's solicitor, Mr Jonathan Bridge, to secure compensation for his client. The claimant (the CICA), challenged Judge Storey's decision by judicial review. HHJ Raynor QC granted permission in August 2015, observing that the judge may have failed to take account of the importance to a public body of certainty and finality in decision making, and the prejudice to the CICA of allowing an appeal to proceed so long after the decision appealed against.

5. The procedural history is complex and only partly relevant. I shall omit as much of the detail as I can. MB was aged about 10 to 14 when he was sexually abused by a man called Andrew Fairley. The period was from about 1988 to about 1992 or 1993. Then in September 1995, when MB was aged 17, the abuse was "reported to the police or other appropriate authority". I quote from the CICA's subsequent written submissions. There is a witness statement from MB saying he reported the matter to the police when he was aged 17. That statement was before Judge Storey.

6. On 17 January 1996, MB turned 18 and became an adult. Soon afterwards, on 11 February 1996, an application to the CICB was made in the name of MB. There is undisputed evidence that it was made by MB Senior, with, as the judge found, the knowledge and consent of MB but without the latter having any understanding of the process or ability to conduct his claim.

7. As the judge also later found, she accepted MB's evidence that he had been unaware of the application at the time it was made. She accepted that MB would not have been able to deal with the claim himself at the time and was not satisfied on the evidence before her that MB Senior was able and willing to continue acting

on his son's behalf. Those findings of fact were supported by written evidence that was before the judge, and are not challenged.

8. The evidence of the original decision making process by the CICB is sparse. Such records as survive indicate that the claim was placed before a Mr Michael Churchouse for determination. According to the CICA (in a letter dated 16 August 2010): "[f]rom the printouts you can see that the application was refused under paragraph 6a". One of the printed record sheets does indeed bear the script "6a" against the heading stating the reason for the decision to make a nil award.

9. It is common ground that the then applicable non-statutory scheme, the Criminal Injuries Compensation Scheme 1990 (the 1990 Scheme), provided at paragraph 6a that the CICB may withhold or reduce compensation if they consider that:

> the applicant has not taken, without delay, all reasonable steps to inform the police, or any other authority considered by the Board to be appropriate for the purpose, of the circumstances of the injury and to co-operate with the police or other authority in bringing the offender to justice; … .

10. It was accepted by the CICA in its written submissions to Judge Storey, that "the offender" (which clearly refers to Mr Fairley rather than a different perpetrator in a different case involving the same victim) was convicted at Edinburgh Sheriff's Court on 31 May 1996 of an offence. According to written evidence from MB Senior, the conviction was for "assault" and resulted from a "plea bargain". A letter from Police Scotland dated 31 March 2014 indicates that the offence was one of indecent assault and that Mr Fairley was placed on probation for one year.

11. The CICA noted in its written submissions to the judge that MB had provided a witness statement to the police on 23 November 1996. This was relied on by the CICA in its submissions to the judge for the purpose of arguing that if MB was capable of giving such a statement to the police, he should be considered capable of dealing with his claim for criminal injuries compensation. It is not known whether that written statement survives. If it does, it was not placed before the judge. It appears from the CICA's narrative that the witness statement related to a different case involving a separate sexual assault on MB by a different perpetrator, when MB was aged 18.

12. Mr Churchouse decided, according to the surviving record sheet, on 25 June 1997 that an award of compensation should be refused. The record sheet records as the reason for the refusal the reference "6a". It is common ground that this refers to the then paragraph in the 1990 Scheme I have mentioned and that, accordingly, it may be inferred that Mr Churchouse must have found that MB had not taken, without delay, all reasonable steps to inform the police, or any other authority considered to be appropriate, of the circumstances of his injury and to co-operate with the police or other authority in bringing the offender to justice.

13. There was then a considerable delay. There is a vast amount of medical evidence (much of which was not before Judge Storey) detailing MB's mental and psychiatric problems, which he attributes to the sexual abuse he suffered as a child.

His difficulties have included drug and alcohol abuse, depression and thoughts of suicide. He married in 2000 and has worked as a driver of private hire vehicles. He has received various treatments including hospital treatments for his medical problems. He has been diagnosed with paranoid schizophrenia and has harmed himself. The judge later had some of that evidence before her, and was thus aware of the essentials of the medical evidence about MB.

14. In 2010, MB instructed Mr Bridge, a solicitor who specialises in historic sexual abuse cases. Mr Bridge took statements and attempted to reconstruct the history as best he could. He attempted to make a further application and made various attempts to get MB's case reopened. He succeeded in securing compensation in the other case I have mentioned involving a different crime by a different perpetrator. In the present case, one of his applications was rebuffed on the basis that it was a duplicate of the application that had been turned down in 1997.

15. It is common ground that there was complexity and a degree of confusion evident in the procedural history. The history is described in Mr Bridge's witness statement. I have considered it the five year period from April 2010 to April 2015, when the decision now challenged was made. I do not think I need to go through it in the same amount of detail as the parties have done in their respective skeletons. I am assisted by the chronological history helpfully set out in the skeleton argument of Ms Gumbel QC for MB, and Mr Collins QC for the CICA. I accept that there were a total of three applications bearing different case reference numbers, of which two related to the abuse from Mr Fairley.

16. I am satisfied from that account that the delays that occurred after Mr Bridge was instructed cannot be laid wholly or even mainly at his or his client's door, even though it was not until 2014 that he made the application leading to the decision now challenged. There were considerable delays on the part of the CICA, which are in part understandable because of the need to make enquiries and try to make sense of the complex legacy of the procedural history. The lack of clarity was probably not helped by father and son having the same name, and the two abusers (or in one case, I should say alleged abuser) having the same intials, AF.

17. Until January 2014, Mr Bridge entertained hopes of achieving compensation for his client by persuading the CICA to consider the matter under a rule permitting a case to be reopened by reason of fresh medical evidence, relying on a worsening of MB's medical condition and symptoms. It was not until 31 January 2014 that Mr Bridge felt he was placed in the position of having to attempt an appeal against the 1997 decision to disallow the claim.

18. On that date, it became clear that his strategy hitherto would not work because Mr Bridge received a decision (though it was dated 8 October 2013) of First-tier Tribunal Judge Summers. The judge refused to reopen the 1997 claim under paragraph 13 of the 1990 scheme, the rule dealing with fresh medical evidence. He reasoned that because the original claim had been rejected under paragraph 6a of the then scheme, no award had ever been made and there was therefore nothing to reopen.

19. Although that point may seem fairly obvious, the CICA has not suggested that it would have been in a materially better evidential position to make investigations into the history in 2010 than it was in 2014, when the application leading to the challenged decision was made. The evidence shows that the brief record sheets evidencing the bare decision of Mr Churchouse and the sub-paragraph under which it was taken, were all that was left by the time Mr Bridge was instructed in 2010. It is reasonable to infer that the CICA would have preserved any better evidence it then had once it became aware of Mr Bridge's involvement.

20. Mr Bridge applied for permission to "appeal", i.e. obtain a reversal of, Mr Churchouse's 1997 decision. He did so on a basis set out in two letters dated 25 March 2014. He submitted in support of his "appeal" that MB had been unaware of the application for compensation apparently submitted on his behalf "whilst still an infant … possibly by his father". He developed his argument that MB had lacked knowledge of and the ability to deal with the claim, due to severe psychiatric difficulties. He contended that Mr Churchouse's decision was plainly wrong, in view of the offender's conviction.

21. The CICA pointed out that the application had been made when MB was (just) an adult. It submitted Mr Bridge's application to a judge of the First-tier Tribunal. MB Senior stated that he had submitted the application in 1996 "without the knowledge and consent of my son" MB. For his part, MB signed a witness statement detailing the abuse and that he had reported it to the police when aged 17. He said he had been unaware of the application made in his name by his father.

22. The CICA made detailed written submissions to the judge, setting out the history and pointing out that investigation would be difficult as evidence of the reasons for the original decision was lost. It pointed out that the conviction of Mr Fairley may have resulted from a confession rather than from the testimony and reports of MB, but acknowledged that MB was a minor at the time (in September 1995) when the allegations against Mr Fairley were reported to the police. The CICA enclosed the documentary evidence I have mentioned and the matter was placed before the judge for a decision on the papers. Neither party asked for an oral hearing.

23. It is agreed that certain transitional provisions (to which I need not refer in detail) conferred on the First-tier Tribunal judge the function of deciding the point at issue (so far as relevant here) by reference to paragraph 22 of the 1990 Scheme. Judge Storey looked at the matter on the papers and gave her decision on 28 April 2015. The decision was that she refused to reopen the case on the basis of fresh evidence, for the same reason as Judge Summers: there was no award to reopen. However, she allowed the application to "appeal" out of time the 1997 decision to refuse an award.

24. After setting out the brief facts under the heading "[b]ackground", she recorded the CICA's argument that the 1996 application had been made by MB, as he was already aged 18 when it was made. She quoted paragraph 22 of the 1990 Scheme which, so far as material, provided:

> If the applicant is not satisfied with the decision he may apply for an oral hearing …. . The application for a hearing must be made within three months of notification of the

> initial decision; however the Board may waive this time limit where an extension is requested with good reason within the three month period, or where it is otherwise in the interests of justice to do so…. .

25. She referred to guidance in case law emanating from the Upper Tribunal (Administrative Appeals Chamber) (UTAAC), in cases decided with reference to paragraph 18 of the Criminal Injuries Compensation Scheme 2008. The judge was aware that paragraph 18 is differently worded. It provides that claims for compensation under that 2008 scheme must be brought within two years of the date of the incident, subject to a power to extend time applying a differently worded test of reasonable practicability.

26. At least two of those cases were cases involving historic sexual abuse: *R (MJ) v. FTT and CICA (No. 3) (CIC)* [2014] UKUT 279, AAC, in which Charles J, President of the Chamber, sat with Judge Levenson and Judge Wikeley. Judge Storey paraphrased the guidance derived from that case in six lettered propositions including (at e)) that the longer the delay, the stronger the reasons that would have to be shown to justify waiving the time limit; (at f)) that the fact of a lengthy delay did not of itself mean that a case for waiver cannot be made out, especially in cases of historic sexual abuse; and (at g)) that all the relevant circumstances had to be taken into account and the reasoning appropriately explained.

27. The rationale for treating historic sexual abuse cases as subject to specific considerations, the Upper Tribunal explained in the *MJ* case, was (in the words of Sedley J, as he then was, in a case quoted at paragraph 35 of the judgment) that "one of the fruits of crimes of sexual violence is the silence of the victim"; a phenomenon "widely recognised … in the criminal justice system".

28. The judge made findings of fact on the evidence before her, which were in line with the account of the history I have set out above. Neither party before me sought to criticise or upset those findings of fact. She noted that MB had been, in 1997, a vulnerable individual and, if he had known about the decision of the single CICB member, Mr Churchouse, he would probably have been incapable of understanding it or acting upon it. She went on to say this:

> I have also had regard to the overriding objective to deal with cases fairly and justly. Notwithstanding the very lengthy delay in making this application, I am satisfied that the interests of justice demand that the Applicant be given the opportunity to challenge the decision of the Board dated 25 June 1997 at an oral hearing and to prove to the requisite standard that he did cooperate with the police in bringing the assailant to justice.

29. Such was the decision challenged in this judicial review. At first, I thought there might be a viable alternative remedy, but the parties were rightly in agreement that there is not: the decision cannot be appealed, because it was made by applying the provisions of the old non-statutory 1990 Scheme. Nor can the judge be asked to review her decision; under the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (the 2008 Rules), only an appealable decision can be the subject of a request for a review.

30. It is common ground that the Administrative Court is the correct forum for this claim. It is also common ground that an oral hearing as directed by the judge would be at large, in the sense that all issues relevant to entitlement, or non-entitlement, to an award of compensation, would be open. However, as the judge made clear and the parties before me did not dispute, the only real issue dividing the parties is whether the case falls within paragraph 6a. That is because there is no dispute that if it does not, all the elements of a claim for compensation would be met: an offence was committed, MB was the victim and he suffered injury from the crime.

31. The reference in the judge's decision to the overriding objective must be taken to be a reference to that concept as found in the 2008 Rules, which is similar to the formulation in the Civil Procedure Rules and includes, within the notion of deciding cases fairly and justly, "avoiding delay, so far as compatible with proper consideration of the issues" (rule 2(2)(e)) and "ensuring, so far as practicable, that the parties are able to participate fully in the proceedings" (rule 2(2)(c)).

32. Mr Collins QC, for the CICA, made the following main submissions in support of his claim for judicial review:

(1) the CICA accepted that the judge had properly taken into account the vulnerability and state of knowledge of MB in the 1990s when he was abused and thereafter reported the matter;

(2) however, the judge had failed to weigh in the balance, on the other side, whether the effect of the delay would be such that it would be inappropriate for the judge to exercise her discretion in favour of waiving the time limit.

(3) Specifically, the judge had failed to have regard to material considerations: the difficulties the CICA would encounter in attempting to investigate what had happened in 1997 and earlier, evidence of which had been lost; and what Mr Collins called the "administrative prejudice" to the CICA of having to deal with reopened cases from long ago.

(4) The injustice in the judge's approach was that she had failed to have regard to the need for certainty and finality of decision making by a public body such as the CICA, recognised in various authorities including most recently the illustration of Collins J's decision in *R (CICA) v. Harris* [2016] EWHC 2463 (Admin).

(5) The judge's reasoning included all the factors weighing in favour of MB's side of the balancing exercise, but none of the countervailing factors weighing against him. It was relevant to the exercise of the discretion that the CICA would have to make extensive enquiries and this amounted to prejudice which the judge had left out of account.

(6) The judge had failed to address at all the period of delay after April 2010, when Mr Bridge was instructed. Although there was delay on both sides between 2010 and 2014, the judge ought to weighed in the CICA's favour the additional lapse of time that occurred after Mr Bridge became involved.

(7) There was, at the very least, inadequacy of reasoning here, if not a failure to have regard to material considerations. The reasons, such as they were, were so brief that the CICA does not know why it lost the argument.

(8) Finally, the resurrection of the case would lead, if an award of compensation ensued, to a complex exercise required to assess quantum, involving much consideration of medical evidence; a point the judge did not refer to in her judgment.

33. Ms Gumbel submitted that the judge's decision was lawful: she decided that the real issue in the case should be looked at despite the long delay that had occurred. She had, submitted Ms Gumbel, concentrated on the real issue which was whether it was fair to enable MB to address whether he had indeed failed to co-operate adequately with the police at the time. That, Ms Gumbel said, was a relatively simple issue in view of the conviction of Mr Fairley. If it caused difficulty, the probable prejudice would be to MB who would have to prove his case, not the CICA, which had nothing to prove.

34. Ms Gumbel submitted that there was nothing wrong with the judge addressing the facts bearing on MB's vulnerability; they were relevant and the guidance from case law required them to be considered. She noted that cases of sexual abuse are treated with unusual care because of the problem of the silence of the victim, already referred to. The case was in some ways similar to the cases in which claims are not brought at all until long after the expiry of the initial two year deadline.

35. I come to my reasoning and conclusions. On a fair reading of the judge's decision, I do not accept the proposition that she failed to have regard to material considerations. It is not incumbent on a decision maker to mention expressly, and elaborately, each and every material consideration she takes into account. The context was that the judge may be taken to have read and absorbed the written materials that were presented to her. These included the CICA's arguments on delay.

36. Avoidance of delay is also expressly part of the overriding objective, to which the judge expressly referred. She was plainly acutely aware of the delay and how long it was. It is not realistic to suppose that she was not aware of the issue. She was entitled to reason, as she did, that certain basic facts were not contested: the commission of the crime, the identity of MB as the victim; and his age and vulnerability at the relevant times. Hence, she noted at the end of her decision that the real issue would be that of co-operation with the law enforcement authorities.

37. She referred, albeit briefly, to the lengthy delay. She did not say as much as she might have done about its potential impact on the CICA's ability to marshal its evidence of non-cooperation with law enforcement; nor did she explicitly mention the desirability of finality and certainty; but she was clearly aware that the CICA was arguing against reviving the case on the basis that the facts had occurred long ago and the records that had survived were sparse.

38. The judge correctly directed herself both on the guidance to be derived from the paragraph 18 cases which, she was aware, proceeded from a differently worded test.

Her directions as to the law are not criticised. She also made reasoned findings of fact based on the evidence before her. The CICA rightly does not seek to upset those findings of fact; they were properly made, as is accepted. She was plainly aware that this was a case of historic sexual abuse, and Charles J and his colleagues in the *MG* case had made specific reference to such cases and noted that mere lapse of time without more was not a reason to refuse an extension of time. Again, no criticism is or can be levelled at that part of the judge's decision.

39. I am satisfied, on a fair reading of the decision, that the judge properly balanced the factors weighing for and against allowing the case to be revived. The jurisprudence has moved on since the time when Mr Churchouse made his decision. The judge was right to consider the possible issue of non-cooperation in the context of the up to date jurisprudence on the subject, which she cited. It was open to her to decide, applying that guidance, that it would be more just to allow the claim to be revived than not to.

40. For those brief reasons, which largely endorse Ms Gumbel's submissions in preference to those of Mr Collins, I find myself unable to fault the judge's decision or the reasoning underpinning it. She reached a properly reasoned conclusion and that conclusion was open to her and was not *Wednesbury* unreasonable; it was not marred by a failure to take account of relevant considerations. Her judgment falls on the other side of the line to that which was overset by Collins J on very different facts in the *Harris* case earlier this year. The claim must therefore fail and is dismissed.