



Neutral Citation Number: [2023] EWCA Civ 882

Case No: CA-2022-001545

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS
CHAMBER)
UPPER TRIBUNAL JUDGE GRAY
UA-2019-001594 & UA-2020-000600-CIC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 July 2023

Before :

LADY JUSTICE NICOLA DAVIES
LORD JUSTICE PHILLIPS
and
LADY JUSTICE CARR

Between :

The King on the application of RN **Appellant**
- and -
First tier Tribunal (Social Entitlement Chamber) & Anr **Respondent**
- and -
Criminal Injuries Compensation Authority **Interested**
Party

Chris Buttler KC, James Robottom and Joshua Yetman (instructed by **Irwin Mitchell**) for
the **Appellant**
Ben Collins KC (instructed by **Criminal Injuries Compensation Authority**) for the
Interested Party
Maya Sikand KC, Shu Shin Luh and Camila Zapata Besso (instructed by **Freshfields**
Bruckhaus Deringer LLP) for the **Intervener (ATLEU)** (*written submissions only*)

Hearing dates: 13 and 14 June 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 28 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Nicola Davies:

1. The issue in this appeal is whether the appellant, the victim of sexual offences committed in 2014 when he was aged 12, is the victim of a “crime of violence” as defined by paragraph 2(1) of Annex B to the 2012 Criminal Injuries Compensation Scheme (“the Scheme”) and therefore entitled to compensation.
2. The appeal is in respect of a decision of the Upper Tribunal (“UT”) dismissing the appellant’s claim for judicial review of a decision of the First Tier Tribunal (Social Entitlement Chamber) (“FTT”) dated 5 February 2020 with written reasons given on 23 March 2020. The FTT found that the appellant was not the victim of a crime of violence for the purposes of the Scheme. Permission to appeal the decision of the UT was granted by UT Judge Jacobs upon the basis that the issue is “sufficiently important to merit the attention of the Court of Appeal”.

Factual and procedural background

3. The appellant made a witness statement dated 30 January 2020 in connection with his appeal to the FTT arising from the dismissal of his claim for compensation by the Criminal Injuries Compensation Authority (“CICA”). The statement details the criminal offending which led to the claim. When the appellant was 10 or 11 he began attending a club in order to play Yu-Gi-Oh!. The appellant met his abuser at the club, he described him as a “large imposing person in his early 20s”. As a judge at the club, the abuser had access to records such that he knew where the appellant lived. The appellant added the abuser as a friend on Facebook and messaging took place. The appellant became aware that the abuser knew where he lived and knew of his school. The statement continued:

“10. I should say at this point that Jake [the abuser] was not posing as himself on Facebook but as a girl called Daphne who he explained was his 14 year old cousin. This was a sophisticated way of ‘grooming’ me. He said she was 14. Using Daphne, he was getting me to agree with things that I would not normally do.

11. As a way of meeting up, Jake suggested that Daphne could be hiding in a bush near my house. I suddenly realised that Daphne was actually Jake. I was extremely scared at this point. I did not want to say anything to my parents as I felt threatened. I was only 12 at the time and was being directly contacted by an adult male who had been ‘grooming’ me for a considerable period of time. I tried to get rid of him by telling him I did not want to talk anymore and that I was not gay as I thought he was approaching me in a sexual way for a relationship.

12. There were occasions when he told me not to tell anyone about the messaging. There was an underlying threat about what would happen if he did. Nothing was ever directly mentioned but as a 12 year old boy being told not to say anything about messaging and knowing that he knew where I lived, I did feel threatened. I thought that if I did tell someone he would get to

me in some way, harm me or my family. There had been suggestions that we meet either outside the club or afterwards. Once he had suggested taking me out, so I was aware that he could get to me if he wanted to.

13. There was one occasion when he said that if I was wearing grey socks it meant that I wanted oral sex. He put that across as a joke and, as a 12 year old boy not wanting to admit what was happening, I accepted it as a joke. People were there at the time. I do not think I was thinking about what implications that kind of approach actually had on me but it was all contributing to the underlying threat.

14. The build up of ‘grooming’ was prolonged and sophisticated with gradual introductions of suggestions to meet, knowing where I lived, mentions of sexual acts which I might be exposed to and all this built up to a threat to me that if I told someone some harm would come to me. There was also a point where he was suggesting that I could win games with sexual favours. As I was desperate to win games and I was so young and vulnerable, I probably did not realise this was a direct threat.

15. I realise now that I was afraid when I was getting the messages. As a 12 year old, I had been ‘groomed’ to the extent that I knew there was a threat but I was not sure what it was but I knew that something bad was going to happen if I said something.

16. My mum then found the messages.

17. I was terrified and I did not go back to the tournament. On occasion, Jake broke his bail conditions and had tried to contact me. This terrified me and brought back some bad memories. He got arrested after that.

18. These events have had a massive impact on my childhood.”

4. The abuser was convicted of the following criminal offences in respect of the appellant:
- (i) Attempting to cause or incite a child to engage in sexual activity (section 10 of the Sexual Offences Act 2003 (“the 2003 Act”));
 - (ii) Attempting to meet a boy under 16 following sexual grooming (section 15 of the 2003 Act).

He was sentenced to 2 years and 4 months imprisonment, a 10-year Sexual Harm Prevention Order was imposed.

5. Following the criminal convictions, the appellant sought compensation under the Scheme, paragraph 4 of which states:

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

6. Annex B to the Scheme states:

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

2(1) ...a ‘crime of violence’ is a crime which involves:

- (a) a physical attack;
- (b) any other act or omission of a violent nature which causes physical injury to a person;
- (c) a threat against a person, causing fear of immediate violence in circumstances which would cause a person of reasonable firmness to be put in such fear;
- (d) a sexual assault to which a person did not in fact consent; or
- (e) arson or fire-raising.”

7. In his application to the CICA the appellant stated that he had received over 6,000 messages from the assailant who was pretending to be a 12-year-old girl. It was stated that the assailant groomed and attempted to incite the appellant into illicit sexual acts. The offending was reported to the police on 14 July 2014. The injuries sustained were stated to be “mental injuries, panic attacks”. At the time of the application the current symptoms were identified as anxiety, depression, stress, withdrawn, panic attacks. The appellant was stated to be receiving treatment in the form of therapy and had been enrolled on a number of mental health programmes through his school. It was stated that he also “suffers from panic attacks worsening his asthma”.

8. On 28 November 2017 the CICA refused the appellant’s claim for compensation acknowledging that:

“In this case, although [the appellant] was undoubtedly the victim of a crime, the information provided by the Police does not indicate that the offender physically injured him or that he was in fear of immediate harm.

In these circumstances, the incidents were not violent crimes in terms of this Scheme. I am therefore regrettably unable to make an award of compensation, and I am sorry to send what I know will be disappointing news. ...”

9. On 8 January 2018 the appellant requested a review of that decision contending that his case fell within limbs paragraph 2(1)(b) and (c) of Annex B to the Scheme. By a review decision dated 3 July 2019 the CICA maintained its refusal of compensation. It acknowledged that the appellant was “a victim of crime within the terms of the law” but stated that the information provided by the police showed that:

“...the sexual content [the appellant] was subject to was via social media. Unfortunately, this is not considered a crime of violence within the terms of the Scheme.

I note the review application mentions [the appellant] was subject to grooming and threats made to him which put him in immediate fear. For the purposes of the Scheme, the threat must be made directly without any intervening physical space or lapse of time. The police have reported that they have no record of any direct threats made by the offender towards or at [the appellant].”

It was stated that the evidence “provided by the police does not show that [the appellant] was a victim of a crime of violence within the terms of the Scheme”. Accordingly, the CICA was unable to make an award of compensation.

10. The appellant appealed to the FTT, his grounds being that he was a victim of a crime of violence, the crime falling within either paragraph 2(1)(c) or 2(1)(d) of Annex B to the Scheme. On 5 February 2020 the appellant attended an oral hearing. In addition to his witness statement and his police interview, the appellant also gave oral evidence. It was agreed between the parties that the appellant was a victim of a sexual offence.
11. The oral evidence of the appellant before the FTT provided further details which were recorded by the FTT as follows (paragraph 15):

“ ... • [The appellant] stated that he was told not to tell anyone about the messaging. He felt threatened after a day or two of finding out it was not a young girl and was scared. Sexual comments were made towards him. The offender knew where he lived. The male was large, intimidating, confident and [the appellant] thought he would take him away.

• [The appellant] explained that there was no physical contact at any time. His immediate fear of violence was that the offender would take him behind a building and have his way with him. The offender asked him out for lunch previously. There was no explicit threat to punch or hurt him. He didn't really think it was all real when it was happening:

• [The appellant] explained that he decided in his mind to stop going to the club and the same day or shortly after, his mum found his phone. He originally told her he didn't fancy going anymore and she later saw the messages on the phone. He had been going to the club once every week or every 2 weeks since he was aged 10 or 11:

- The messages were sent between May – July 2014.”

12. The FTT made findings of fact (paragraph 18). On the balance of probabilities, it was satisfied that:

- (i) the appellant was the victim of sexual offences;
- (ii) no physical assault took place;
- (iii) there was evidence of threats causing the appellant some fear.

The FTT was not satisfied that:

- (iv) the threats caused the appellant to fear immediate violence;
- (v) “grooming” constitutes a sexual assault as defined by the 2003 Act (intentional touching without consent).

The findings of fact concluded:

- (vi) the 2012 Scheme is a freestanding scheme;
- (vii) there is no UT case law that details how sexual assault should be defined;
- (viii) the Tribunal was satisfied that the Scheme does not extend to cyber based sexual offences at this time, if there is not a threat causing a fear of immediate violence.

13. By reason of the findings of fact, the FTT found that the appellant was ineligible for an award of compensation as a direct victim of a crime of violence committed in a relevant place, because the circumstances of the incident did not meet the criteria of a physical attack, a sexual assault or a threat against a person causing an immediate fear of violence. It found that the appellant was not entitled to any award of compensation as the FTT was unable to find that the circumstances of the appellant’s appeal fell within Annex B to the 2012 Scheme and what can be defined as a crime of violence (paragraphs 19–20).

14. The FTT stated that it accepted all of the appellant’s evidence and the fact that he is a victim of a sexual offence. It found that the facts of his case are not compensated for within the 2012 Scheme (paragraph 21).

15. The reasons for the FTT’s decision were contained in paragraph 22, namely:

“(i) The Tribunal could not find any evidence that a physical attack or any other act or omission of a violent nature, causing physical injury, took place. The Tribunal applied the ordinary meaning to the words physical attack and physical injury. [The appellant] was consistent in his Police Interview and his oral evidence, confirming that he had no physical contact with the offender:

(ii) The Tribunal could not find any evidence that there was a threat against [the appellant] that caused him or a person of reasonable firmness to be put in fear of immediate violence.

- In his Police Interview, dated 19/07/2014, [the appellant] stated that he thought the sexual messages were a game and weird. He did not believe that the girl sending the messages, Daphne, was real (S3–6). In his oral evidence, [the appellant] confirmed that he felt threatened, scared and frightened. He confirmed that he didn't think anything in particular would happen but felt the offender could take him away, could come to his house, take him behind a building and have his way with him (because there had been a previous request for him to go to lunch). [The appellant] explained that there was no explicit threat to punch or hurt him and that he didn't want to think that what was happening was real:

- In accordance with [the appellant's] own oral evidence and his Witness Statement at TG1-3, the Tribunal concluded that there was evidence of an *'underlying threat'*, but that [the appellant] *'wasn't sure what that threat was. There was no direct threat of violence.'* In his Witness Statement, [the appellant] confirms that he didn't realise that there had been a threat or what that threat was until some while later due to his age at the time. The Tribunal could not establish from the evidence provided, that there was a fear of immediate violence.

- The Tribunal considered [the appellant's] perspective when aged 12 and what grooming is intended to do. The Tribunal accepts Counsel's submissions that both of these factors are relevant but on the evidence provided, the Tribunal could not conclude that [the appellant] feared immediate violence at the time any underlying threat was made. The Tribunal accepted that [the appellant] feared something bad but could not be sure what and also experienced worried thought/s and fears about something happening outside of a sexual nature. However, the Tribunal concluded that this was not a fear which was immediate to any threat that was made. Although the Tribunal heard oral evidence of what [the appellant] thought might possibly happen, as [the appellant] *'wasn't sure what the threat was'*, it was too great a leap for the Tribunal to conclude that he was put in fear of immediate violence relating to what had been said:

(iii) The Tribunal requested submissions at length about the application of the Scheme, the construction and the interpretation of the wording within Annex B and whether the Scheme had any discretion. The Tribunal concluded that the Scheme, a freestanding Scheme, was prescriptive in nature and only qualified by Upper Tribunal decisions. Upper Tribunal decisions are able to define the Scheme narrowly or broaden any application. The Tribunal could not refer to any Upper Tribunal

case law about whether a sexual assault should extend to non-physical/ or non-contact sexual assaults, to include grooming and computer based offences. The Tribunal had regard to the Sexual Offences act (sic) definition 2003. The Tribunal concluded that in the absence of any case law guidance, it was too great a discretion to infer that the facts of the offences against [the appellant], could be defined in the construction of the wording ‘sexual assault.’

(iv) The Tribunal made it clear to [the appellant] that they sympathised with his position as a victim of a sexual offence, arguing eligibility under the Scheme. The Tribunal explained that their role was to apply the Scheme in this case and not change or extend it. In the Tribunal’s view, this is what they would have needed to do to reach a different outcome when considering eligibility under Annex B (2) (1) (d).”

16. The appellant applied to the UT for permission to bring proceedings for judicial review of the FTT’s decision. On 7 April 2022 UTJ Gray (“the UTJ”) refused the application for permission and upheld the decision of the FTT. In reaching her decision, the UTJ considered paragraph 4 of the Scheme together with Annex B. She appears to have held (paragraph 59) that “...paragraph 2(1)(a)–(e) does not contain mere examples, but a definitive list designed to limit the ambit of the Scheme to those matters set out in it”. The UTJ stated that she found it “...difficult to read Annex B otherwise than as a provision inserted to achieve clarity. As far as possible it is intended to be determinative of the meaning of the term ‘a crime of violence’” (paragraph 61).
17. In considering the issue of an act “of a violent nature” under paragraph 2(1)(b), the UTJ considered the relevant authorities which included *R (Jones) v First Tier Tribunal* [2013] UKSC 19; [2013] 2 AC 48 (“*Jones*”) and *C, Petitioner* [1999] SC 551 and accepted that the consequences of a crime are not determinative of the issue of violence. The UTJ appears to have accepted that the circumstances are key to the issue of what constitutes a crime of violence, the critical matter being whether or not the victim was put in fear of immediate harm, and the consequences may be relevant for the light they cast on the nature of the criminal act (paragraphs 75–77).
18. In considering the authority of *Jones* the UTJ relied upon the ‘test’ enunciated by Lord Hope at paragraph 16, namely:

“... that it is for the tribunal which decides the case to consider whether the words ‘a crime of violence’ do or do not apply to the facts which have been proved. Built into that phrase, there are two questions that the tribunal must consider. The first is whether, having regard to the facts which should be proved, a criminal offence has been committed. The second is whether, having regard to the nature of the criminal act, the offence that was committed was a crime of violence.”
19. Applying Lord Hope’s formulation, the UTJ held at paragraph 82:

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

20. At paragraph 84 the UTJ stated that: “More troubling, perhaps, in the context of the 2012 scheme, is the dicta set out in the words of Lord Hope at paragraph 18” and relied on by the appellant namely that “the crime that section 20 [of the Offences Against the Person Act 1861] defines will always amount to a crime of violence for the purposes of the scheme for compensation for criminal injuries”. The UTJ observed that Lord Hope was talking about the 2008 rather than the 2012 Scheme. The UTJ concluded as to the place of Annex B: “...that the constituent parts of an offence are not necessarily definitive of it being a crime of violence under the 2012 scheme. That is not a conclusion that I have arrived at without hesitation; it is, however, inevitable if Annex B is prescriptive” (paragraph 87).
21. The UTJ addressed the issue of whether for the purposes of paragraph 2(1)(b), physical injury included psychological injury. She considered the authority of *R v Ireland* [1998] AC 147 (“*Ireland*”) to the effect that “bodily harm” under the Offences Against the Person Act 1861 included psychological harm and held that *Ireland* did not require her to construe the term “physical injury” as used in this wholly different context as including purely psychological harm (paragraph 89). The UTJ also noted that within the Scheme a distinction is drawn between physical and mental injuries in particular within the structure of the tariff set out in Annex E. The UTJ concluded that the intention of paragraph 2(1)(b) was to exclude eligibility in respect of psychological injury unless it was an exacerbating factor subsequent to physical injury (paragraph 95).
22. The UTJ acknowledged the relevance of international law and found that there was no inconsistency between the drafting of the Scheme with the UK’s international obligations (paragraphs 96–106).
23. The UTJ considered whether Annex B incorporated the 2003 Act in particular section 3, the offence of sexual assault, and determined that it did not, given the lack of reference in Annex B to incorporation of the 2003 Act or by reference to the criminal law of Scotland (paragraph 111).
24. The crimes of which the appellant was a victim did not involve touching. The UTJ considered Part B of the Tariff of Injuries at Annex E to the Scheme which encompasses injuries sustained in a sexual context. She concluded that “sexual assaults” appearing in the tariff appear to relate to contact offences (paragraph 113). The UTJ noted that paragraph 2(1)(d) refers not to sexual offences but to a sexual assault. The choice of words suggested that there are sexual offences which do not amount to a sexual assault but stated that: “... it does not follow that sexual assaults are only those offences which involve touching, I have considered the use of the various expressions within the 2012 scheme and conclude that under paragraph 2(1)(d) touching is a necessary ingredient” (paragraph 115).
25. As to whether online conduct could be a crime of violence within Annex B. The UTJ held that her interpretation of the 2012 Scheme is that it does not render impossible a

claim relating to online grooming activities but such a claim would be contingent upon the victim fearing unlawful and immediate violence (paragraph 125).

26. Applying her interpretation of Annex B, the UTJ held:

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

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

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

Grounds of appeal

27. Permission to appeal was granted on four grounds, Ground 4 is not pursued. Grounds 1 – 3 state that the Upper Tribunal erred in law:

1. in determining that the appellant is not a victim of a crime of violence in the form of a sexual assault under paragraph 2(1)(d) of Annex B to the 2012 Scheme;
2. in determining that the appellant was not the victim of a crime of violence in the form of any other act or omission of a violent nature causing physical injury to a person under paragraph 2(1)(b) of Annex B to the 2012 Scheme;
3. in determining that the appellant was not the victim of the crime of violence in the form of a threat under paragraph 2(1)(c) of Annex B to the 2012 Scheme.

28. The grounds of appeal have been formulated as three issues.

Issue 1: the proper interpretation of gateway 2(1)(c). Should the words “a threat against a person, causing fear of immediate violence” be given a narrower interpretation under the Scheme than under the common law of assault of England and Wales?

Issue 2: the proper interpretation of gateway 2(1)(d). Can serious sexual offences against children, which do not involve the perpetrator touching the child cause serious mental harm, constitute a “sexual assault” within the meaning of the Scheme?

Issue 3: the proper interpretation of gateway 2(1)(b). Can a psychiatric injury constitute a “physical injury” within the meaning of Annex B to the Scheme?

It is accepted by the parties that the appellant is required to succeed on only one of the issues in order to overturn the decisions of the FTT and the UT. It is also accepted by the CICA that if the appellant succeeds on issue 1, that is sufficient to quash the decision of the FTT and it follows, the decision of the UT. The court should then remit this matter to the CICA.

Legal framework

Sexual offences

29. The relevant sections of the Sexual Offences Act 2003 state:

“3 Sexual assault

(1) A person (A) commits an offence if–

- (a) he intentionally touches another person (B),
- (b) the touching is sexual,
- (c) B does not consent to the touching, and
- (d) A does not reasonably believe that B consents.

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

.....”

10 Causing or inciting a child to engage in sexual activity

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

- (a) he intentionally causes or incites another person (B) to engage in an activity,
- (b) the activity is sexual, and
- (c) either–
 - (i) B is under 16 and A does not reasonably believe that B is 16 or over, or
 - (ii) B is under 13.

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

- (a) penetration of B's anus or vagina,
- (b) penetration of B's mouth with a person's penis,

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

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

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

.....

15 Meeting a child following sexual grooming etc.

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

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

(i) A intentionally meets B,

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

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

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

...

(c) B is under 16, and

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

(2) In subsection (1)—

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

(b) 'relevant offence' means—

(i) an offence under this Part, or

...

(iii) anything done outside England and Wales which is not an offence within sub-paragraph (i) or (ii) but would

be an offence within sub-paragraph (i) if done in England and Wales...”

Criminal Injuries Compensation

30. Section 1 of the Criminal Injuries Compensation Act 1995 provides:

“1.— The Criminal Injuries Compensation Scheme.

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

(2) Any such arrangements shall include the making of a scheme providing, in particular, for—

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

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

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

(4) In this Act—

...

‘criminal injury’, ‘loss of earnings’ and ‘special expenses’ have such meaning as may be specified;

...

‘specified’ means specified by the Scheme.”

The Criminal Injuries Compensation Scheme 2012

31. The Criminal Compensation Scheme 2012 provides:

“1. This Scheme (The Criminal Injuries Compensation Scheme 2012) is made by the Secretary of State under the Criminal Injuries Compensation Act 1995 having been approved by each House of Parliament.

...

3. Annex A relates to the interpretation of this Scheme.

Eligibility: injuries for which an award may be made

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

...

Annex A: Interpretation

....

‘criminal injury’ means an injury which appears in Part A or B of the tariff in Annex E;

...

Annex B: Crime of Violence

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

2. (1) Subject to paragraph 3, a ‘crime of violence’ is a crime which involves:

(a) a physical attack;

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

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

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

(e) arson or fire-raising.

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

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

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

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

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

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

...

Annex E: Tariff of Injuries”

32. Annex E sets out the tariff of injuries. Part A identifies physical and mental injuries, Part B sets out the tariff for “sexual and physical abuse and other payments”.

Issue 1

Paragraph 2(1)(c) of Annex B to the 2012 Scheme.

33. Should the words “a threat against a person, causing fear of immediate violence” be given a narrower interpretation under the Scheme than under the common law of assault of England and Wales?

The appellant’s submissions

34. The appellant accepts: (i) pursuant to paragraph 1 of Annex B it is necessary for the crime in respect of which compensation is sought to constitute a crime of violence in accordance with Annex B; (ii) a person must come within paragraph 2(1)(a) – (e) of Annex B; this is an exhaustive list of ‘crimes of violence’ and not merely a subset of crimes of violence.
35. It is accepted by the appellant and the CICA that the words “a threat against a person causing fear of immediate violence” (paragraph 2(1)(c)) are a reference to the criminal offence of common assault in the law of England and Wales.
36. The appellant contends that the FTT erred in law and misdirected itself as to the meaning of the words in paragraph 2(1)(c). In its review decision, the CICA determined that “[f]or the purposes of the Scheme, the threat must be made directly without any intervening physical space or lapse of time”. The FTT accepted that approach and asked itself whether RN “feared immediate violence at the time any underlying threat was made” and whether RN’s fear of violence was “a fear which was immediate to any threat that was made” (paragraph 22(ii)). In the judicial review proceedings, the UT did not question the FTT’s approach (paragraph 132).
37. The appellant submits that there is no requirement under the common law that there be no intervening physical space or lapse of time between the threat and the fear of immediate violence. In *R v Constanza* [1997] 2 CR App R 492 (“*Constanza*”) the Court of Appeal held that delivering a letter to the home of the victim which caused the recipient to fear immediate violence when they later read the letter was capable of constituting an assault. The Court accepted that “the time to start measuring is the time when the victim has the fear. In the present case no earlier than the time when she actually read the letter” (494D). The physical and temporal gap between the making of the threat and the experiencing of the fear by the recipient did not prevent the commission of the offence.
38. The appellant contends that the FTT also erred in concluding that the law requires the victim to know the form of the violence threatened, i.e. what the assailant is threatening to do. There is no requirement that the threat is particularised nor that the victim knows the form of what is threatened. In *R v Ireland* [1998] AC 147 a silent phone call was held to constitute an assault if it placed the recipient in fear of immediate and unlawful violence. Lord Steyn considered that such calls may cause a fear of immediate violence

because the victim is assailed by uncertainty about the caller's intentions and "fear[s] the possibility of immediate personal violence" (emphasis original) (162C). In *Constanza* it was held to be sufficient that a victim felt that the assailant "was going to do something to her" and "felt it could happen at 'any time'" and that she had "a fear of violence at some time not excluding the immediate future" (494A, 494G).

39. It follows from these authorities that the requirement of fear of immediate violence is a fear of violence at some time not excluding the immediate future; there is no requirement that the fear is felt immediately after the threat is made, nor that the victim knows the particular form of violence threatened.
40. As an issue of the common law, a conditional threat of unlawful violence may amount to an assault when the victim fears violence only in the event that he does not comply with the condition.
41. The victim's fear must be assessed in a practical and common sense way (*Ireland*, 162D). It is the appellant's case that his witness statement and his oral evidence provided a factual basis on which to find that: there were threats which included that the appellant would be harmed if he told anyone about the abuser's messages; there was fear of a possibility that violence would occur and; the appellant did not identify when the violence would take place because he thought it would happen at some indeterminate time not excluding the immediate future. There was evidence from the appellant which satisfied the common law test, namely a threat which puts the appellant in fear of immediate violence.

The CICA's submissions

42. The CICA contends that the FTT did not apply a narrower test than that set out in *Ireland*. On the facts as found by the FTT, this case did not meet those requirements. The FTT did not err in finding that the requirement of immediacy was not met. It is accepted that the relevant period is that between the time when the fear arises and the time when the violence feared is to occur.

Discussion

43. The words "a threat against a person causing fear of immediate violence" as set out in paragraph 2(1)(c) of Annex B to the Scheme are a reference to the criminal offence of common assault in the law of England and Wales. In my view, there is no cogent reason to find that Parliament intended the Scheme to take a narrower approach to the requirement of "fear of immediate violence" than that contained in the common law. In *Rust-Andrews v FTT (SEC) and CICA* [2011] EWCA Civ 1548, Carnwath LJ (as he then was) stated at paragraph 34 that although compensation is to be determined in accordance with the wording of the (2008) Scheme "that does not require the exercise to be conducted in a straitjacket, or mean that no help can be gained where appropriate from the wisdom reflected in authorities at the highest level dealing with similar issues".
44. The FTT accepted all of the appellant's evidence. It was satisfied that he was the victim of sexual offences and that there was evidence of threats causing the appellant some fear. The critical finding was that the Tribunal was not satisfied that the threats caused the appellant to fear immediate violence.

45. In setting out its reasons at paragraph 22, the FTT found on the evidence that it could not conclude that the appellant feared immediate violence at the time any underlying threat was made. This was to apply the wrong test in law. It is accepted by the appellant and by the CICA that the point at which to judge the immediacy of the violence is when the victim apprehends the threat e.g. when the letter is read not written (*Constanza*). Further, following *Constanza*, it is accepted that the fear must be of immediate violence, but that is a fear of violence at some time not excluding the immediate future.
46. There is no requirement that the appellant had to know the exact form of the threatened violence. It is my understanding of the reasoning of the FTT that it was of the view that such a requirement exists (paragraph 22(ii)). This was an error of law. The victim need only fear that violence may be used against him; an assault may occur where the victim is uncertain what the perpetrator may do e.g. due to uncertainties about the intention of a person making a silent phone call (*Ireland*).
47. In its consideration of the facts, based upon its assessment of the appellant's evidence, the FTT appears to rely upon one sentence in the appellant's witness statement, namely that he was not sure of what one threat was and whether it was a direct threat due to his age at the time. I do not believe this one sentence fairly reflects the totality of the appellant's evidence who clearly identified the fact that at an early stage he was scared and felt threatened when he realised that his accuser was the male and not Daphne. He later confirmed his specific fear of violence, namely that the abuser would take him behind a building and have his way with him. In my view, there was a consistent thread throughout the appellant's evidence, namely that of feeling threatened, a threat which he then particularised. As to the immediacy of that threat, the evidence of the appellant did not exclude such violence materialising in the immediate future.
48. Had it identified the correct test, the FTT would (or should) have concluded on the evidence that the appellant was the subject of threats etc i.e. that the requirements of paragraph 2(1)(c) were met. The UT also erred in law in its approach to the immediacy of the violence and in its assessment of the facts in accepting that the finding of the FTT that the appellant did not fear immediate violence was not irrational (paragraph 132). In my judgment the evidence of the appellant provided a sound basis on which to find that the appellant was the subject of threats from his abuser which caused him to fear immediate violence. Further, I am satisfied that the violence contained within these threats would cause a person of reasonable firmness to be put in such fear. It follows that I am satisfied that the requirements of paragraph 2(1)(c) of Annex B to the Scheme are met and I find the appellant is a victim of a crime of violence within the provisions of the Scheme.
49. Upon this basis, the findings of the FTT and the UT in respect of paragraph 2(1)(c) of Annex B are quashed. Ground of appeal 3 is allowed. It is agreed between the parties that if the court were to uphold one ground of appeal, that is sufficient and the appellant's claim is to be remitted to the CICA for reconsideration.
50. In the event that the appellant succeeded upon issue 1 the court was asked by the CICA to consider issues 2 and 3.

Issue 2

Paragraph 2(1)(d) of Annex B to the 2012 Scheme.

51. Can serious sexual offences against children, which do not involve the perpetrator touching the child and cause serious harm, constitute a “sexual assault” within the meaning of the Scheme?

The appellant’s submissions

52. In essence, the appellant seeks a purposive interpretation of the term “sexual assault” and submits: (a) the ordinary meaning of the phrase is much broader than the definition contained in section 3 of the 2003 Act and includes non-touching offences; (b) the consultation paper shows that the 2012 Scheme was intended to maintain the scope of the previous Schemes; (c) the scope includes non-touching offences.
53. “Sexual assault” is not defined within the Scheme. The ordinary meaning of the phrase is broader than touching. Such an interpretation accords with the intention of the Government and Parliament to be found in the consultation paper prior to the introduction of the 2012 Scheme, namely to maintain the status quo in respect of compensation for sexual offences. The 1996, 2001 and 2008 versions of the Scheme provided compensation for physical and mental injury resulting from sexual offences (paragraph 9 of each Scheme). They did not limit compensable sexual offences to sexual assault involving sexual touching. In this respect, the appellant contends that the UT correctly found that the term “sexual assault” in the Scheme is not linked to section 3 of the 2003 Act.
54. It is the appellant’s case that the term should be interpreted by reference to the ordinary meaning of the words used and not by seeking to fit the Scheme and the term within the confines of an “analogous legal context” (*R (Colefax) v First-Tier Tribunal* [2015] EWCA Civ 945). The ordinary meaning of “sexual assault” encompasses non-touching offences. The appellant gives as an example section 10 of the 2003 Act, the offence of causing a child to penetrate themselves. As a matter of ordinary language, this constitutes a crime of violence and “sexual assault” but it does not require touching by the offender.
55. The consultation paper includes the following:

“Eligibility

The Scope of the Scheme

176. Most payments under the Scheme are made to victims of ‘crimes of violence’. This term has featured in successive Schemes and, though not having a definitive legal meaning, is generally well-understood. In most cases it is clear whether or not an applicant has been the victim of a crime of violence, but there are difficult cases where the position may be less clear.

...

178. The main purpose of the Scheme is to provide payments to those who suffer serious physical or mental injury as the direct result of deliberate violent crime, including sexual offences, of

which they are the innocent victim. This purpose underpins all our proposals, and it reflects the current Scheme.

179. The terms of the Scheme and all the relevant circumstances must be considered in each case. Our policy in relation to the scope of the Scheme also includes these principles:

- A crime of violence will generally involve a direct, hostile, physical attack, against a person rather than property, which immediately causes mental or physical injury.
- The fact that a person's actions are technically capable of being a crime – even a crime giving rise in some way to injury – does not mean the crime will definitely be a crime of violence. All the relevant circumstances must be considered.

...

183. There are some other crimes which, for the removal of any doubt, we consider should always be considered to be a crime of violence. This is because they might not otherwise be considered to be violent (in the sense of involving the direct application of physical force), but in almost all cases are nonetheless very likely to cause, or create a very serious risk of, serious bodily injury. They are – as under the current Scheme – arson and acts of poisoning.”

56. The appellant relied upon paragraph 221 which states:

“Evidence suggests that victims of sexual offences may suffer a wide range of effects that go beyond the physical and psychological, including reduction in the quality of life, relationship problems and long lasting emotional distress. We think that the public views these crimes as particularly serious and this is backed up by research which indicates that people are more concerned to avoid sexual violence than physical violence. We think that this wider impact upon victims and the level of public concern make these offences particularly significant. For these reasons we think awards specifically in respect of sexual offences merit being safeguarded, wherever in the tariff they currently appear.”

57. The appellant relies upon the authority of *Jones*, one of the issues before the court being whether the offence of inflicting grievous bodily harm contrary to section 20 of the Offences Against the Person Act 1861 constituted a crime of violence. *Jones* concerned the 2001 Scheme but paragraphs 8 and 9 in the 2001 and 2008 Schemes were identical. Lord Hope at paragraph 14 of *Jones* cites Lawton LJ in *R v Criminal Injuries Compensation Board, ex parte Webb* [1986] QB 184 (“*Webb*”) in which he stated that what mattered was the nature of the crime, not its likely consequences. Lawton LJ recognised at 79–80 that “[m]ost crimes of violence will involve the infliction or threat of force, but some may not”. Lord Hope stated:

“17. ... The question whether the nature of the criminal act amounted to a crime of violence may or may not raise an issue of fact for the tribunal to determine. This will depend on what the law requires for proof of the offence. ... The range of acts that fall within the broad definition may vary quite widely, so the question whether there was a crime of violence will have to be determined by looking at the nature of what was done. ...

18. To wound or inflict any grievous bodily harm on another person unlawfully or recklessly, foreseeing that physical harm to some other person will be the consequence of his act, is a crime in terms of section 20 of the 1861 Act. It is also a violent act. So too is the unlawful or reckless application of physical force of any kind to the person, directly or indirectly, so that they suffer injury – frightening or threatening someone so that they run into the road and are hit by a car, for example: see also *R v Martin* (1881) 8 QBD 54, where the accused by unlawful conduct caused panic in the course of which a number of people were injured ... The crime that section 20 defines will always amount to a crime of violence for the purpose of the scheme for compensation for criminal injury.”

58. The appellant relies on the acceptance by Lord Hope that a section 20 offence will always constitute a crime of violence within the Scheme because such an offence can be committed even when touching does not occur.
59. In *C, Petitioner* it was held that indecent exposure could amount to a crime of violence. The appellant contends that this also demonstrates that in certain circumstances, a non-touching sexual offence can constitute a crime of violence. The appellant accepts that *C, Petitioner* concerned the (non-statutory) 1990 Scheme but maintains that there is no difference in wording as between the 1990 and 2008 Scheme.
60. It is the appellant’s case that the CICA’s construction would mean that relatively minor sexual offences, for example sexually touching a person’s leg through clothing without their consent, could constitute a crime of violence without more, but serious sexual offences, namely that under section 10 of the 2003 Act, would not come within the Scheme. This would be contrary to the purpose of the 2012 Scheme.
61. Further, if paragraph 2(1)(d) related only to sexual offences involving touching, it would be otiose, as those offences would be covered by paragraph 2(1)(a) as “a physical attack”.

The submissions of the CICA

62. The CICA contends that “sexual assault” is a statutory term; it is the offence described by section 3 of the 2003 Act and so requires intentional touching. Had the Government and Parliament intended these words to mean something different in the Scheme, which is based on the commission of criminal offences, it can be inferred that they would have said so. The stated aim of the Scheme is to make it simpler and easier for victims to understand. The use of the definition set out in section 3 of the 2003 Act meets that aim.

As set out in the Respondent's Notice, the CICA contends that the UT was wrong to depart from the meaning contained within section 3 of the 2003 Act.

63. The context of the 2012 Scheme is that it relates to criminal offences. The CICA's primary position is that "sexual assault" is limited to facts which would satisfy the requirements of section 3 of the 2003 Act even if charged differently e.g. rape. It is for the CICA to determine whether an offence has been committed even in the absence of a conviction.
64. Alternatively, the CICA submits that 2(1)(d) requires that there must be an assault which is sexual and that would cover online offences only if there is a fear of immediate violence such that the defendant's conduct would amount to an assault.
65. The 2012 Scheme is the first version of the scheme to include a definition of "crime of violence". Under the 1996, 2001 and 2008 Schemes, compensation was payable to a person who sustained a "criminal injury" (paragraph 6), which means one or more "personal injuries" sustained in and directly attributable to a crime of violence (or railway offences or prevention of crime) (paragraph 8). Paragraph 9 of the 1996, 2001 and 2008 Schemes defines "personal injury". The reference to a "sexual offence" at paragraph 9(c) of each Scheme forms part of the provision limiting the circumstances in which compensation will be payable for mental injury without physical injury. Critically, that provision applies only where it has already been determined that the applicant was a victim of a crime of violence, pursuant to paragraph 8. Sexual offences have always been covered by the Scheme but only where the offence amounts to a crime of violence. Eligibility for compensation is not determined according to any measure of the seriousness of the offence but whether the applicant has suffered injury directly attributable to a crime of violence.
66. The decisions in *Jones and C, Petitioner*, in particular the observations of Lord Hope, related to earlier versions of the Scheme which did not define a "crime of violence" and contained no provision equivalent to Annex B.
67. The task of the FTT was one of statutory construction, namely to construe the words "sexual assault" having regard to the context and purpose of the 2012 Scheme. The relevant context is that eligibility for an award is dependent on the commission of a criminal offence, and is assessed by reference to the nature of the specific offence. "Sexual assault" should not be interpreted in different ways as between the 2003 Act and the Scheme.

Discussion

68. In 1964 a non-statutory system for compensation for criminal injuries was introduced. In 1969 the Scheme was amended to provide compensation in circumstances where the applicant had sustained "personal injury directly attributable to a crime of violence (including arson and poisoning)". In 1996 the first statutory scheme was introduced pursuant to section 1 of the Criminal Injuries Compensation Act 1995. Subsequent versions of the statutory scheme were introduced in 2001, 2008 and 2012.
69. Prior to 2012, no Scheme included a definition of the phrase "crime of violence". The issue of what was meant by a "crime of violence" had been considered by the courts. The approach taken by Lawton LJ in *Webb*, endorsed by Lord Hope in *Jones*, reflects

the approach of the courts; rather than attempting to define the words “crime of violence”, the court should determine whether a criminal act constitutes a crime of violence primarily by looking at what was done, rather than at the consequences of what was done. The consequences of the criminal act may cast light on the nature of the criminal act.

70. For the first time, perhaps acknowledging the difficulties which the phrase could cause, the legislator sought to define the words “crime of violence” in the 2012 Scheme. In the Government consultation paper which preceded the introduction of the 2012 Scheme, the section headed “Eligibility. The Scope of the Scheme” (paragraphs 176 – 186) ends with two “Questions for consultation” they are: “How should we define what a ‘crime of violence’ means for the purposes of the Scheme?” ... and “What other circumstances should, or should not, be a ‘crime of violence’ for the purposes of the Scheme?”
71. Following the consultation, the 2012 Scheme introduced a definition of “crime of violence”. Paragraph 3 of the Scheme identifies Annex A as the interpretation section. Within Annex A it is stated that “‘criminal injury’ means an injury which appears in Part A or B of the tariff in Annex E”. Annex E sets out the tariff of injuries, Part A being physical and mental injuries, Part B being sexual and physical abuse and other payments. The effect of paragraph 4 (paragraph 31 above) is that the assessment of injury cannot arise until there has been a determination, pursuant to Annex B, as to whether a crime of violence has been committed for the purposes of the Scheme. The fact that a crime has been committed is not in itself sufficient to bring an applicant within the Scheme; the criminal injury must be directly attributable to a crime of violence as defined by paragraph 2 of Annex B.
72. It is clear that the posing of the two questions (paragraph 70 above) illustrates the intention of the Government namely to introduce a definition of the phrase a “crime of violence” within the Scheme. The five limbs of the definition are set out in paragraph 2(1)(a) – (e) of Annex B. Paragraph 2(1)(d) refers to “a sexual assault to which a person did not in fact consent”. I accept the CICA’s contention that if the phrase “sexual assault” were to refer to any sexual offence, that is much wider and could encompass any offence within the 2003 Act.
73. It is of note that such an interpretation could cover an offence, for example s. 10 (causing or inciting a child to engage in sexual activity), where absence of consent is not an ingredient of the offence. However, the words in paragraph 2(1)(d) “to which a person did not in fact consent” are plainly directed to the requirement of an absence of consent for an offence under s.3 (and other more serious forms of sexual assault such as s.1 rape). They make it plain that, for there to be an offence of violence, there must be not only an absence of consent in law but also as a matter of fact. Thus, whereas sexual assault within the meaning of section 3 of the 2003 Act can be committed despite the victim giving factual consent (i.e. because the victim is under the age of consent so cannot give legal consent), the Scheme excludes compensation for sexual assaults where factual consent is given. The words “to which a person did not in fact consent” in paragraph 2(1)(d) would not readily make sense in the context of offences other than s.3 and other offences involving sexual assault which would fall within that section.
74. That this is the intended effect of the Scheme is made clear in the Consultation at paragraphs 185 – 186:

“Express exclusions.

185. There are a number of circumstances which, though technically involving the commission of a criminal offence, should in the Government’s view, never be capable of being a crime of violence for the purposes of the Scheme. Under the current and former Schemes it is not always clear whether these situations are ‘crimes of violence’. We intend to make it clear these cases are outside the scope of the revised Scheme, because as a matter of public policy we do not consider that it is consistent with the main purpose of the Scheme set out at paragraph 178 to use taxpayers’ money to compensate under the CICS in these cases.

186. The kinds of circumstances we intend to exclude are:

...

Certain criminal offences, or any sexual activity, to which the claimant has consented in fact but is deemed not to have consented as a matter of criminal law. The current practice in respect of sexual offences is explained below. We intend to continue this practice in relation to consensual activity and extend the principle to where the victim has consented in fact to a violent offence.”

75. In my view, the inclusion of the words “to which a person did not in fact consent” demonstrates that the legislators had in mind the law specifically relating to sexual assault in section 3 of the 2003 Act when including the words “sexual assault” in paragraph 2(1)(d). It follows that the words “sexual assault” in paragraph 2(1)(d) were intended to include the requirements of section 3(1) of the 2003 Act, which includes touching.
76. In a decision of the Upper Tribunal, *CICA v FTT (SEC)* [2017] UKUT 0097; 4 WLR 60, it was held that the offence of voyeurism (section 67 of the 2003 Act) was not a crime of violence within the meaning of the Scheme. In remarks that were obiter and were not the subject of reasoned analysis, the UT accepted that the use of the phrase “sexual assault” in paragraph 2(1)(d) was not limited to the offence of sexual assault under section 3(1) of the 2003 Act and that it might involve a threat or an attempt where there is no actual touching. Given the obiter nature of the remarks and the absence of any reasoning, this court does not consider them persuasive.
77. In reaching the conclusions set out in paragraphs 73 and 75 above, I do not seek to detract from the approach taken by the courts in *Webb*, *Jones* and *C, Petitioner*, but in each case the court was considering an earlier version of the Scheme and one which did not include a definition of a “crime of violence”.
78. The context of the 2012 Scheme, and its previous versions, is that it relates to criminal offences. I accept the CICA’s contention that the appellant’s reliance upon the phrase “sexual offence” in paragraph 9 of three earlier versions of the Scheme as providing compensation for physical and mental injury resulting from sexual offences is of limited

effect because the provision applies only when it has already been determined that the offence amounts to a crime of violence. Sexual offences are covered but only where the offence amounts to a crime of violence. I also regard the appellant's reliance on paragraph 221 of the consultation paper as misplaced because this paragraph falls within the section of the paper addressing the tariff of injuries; assessment of the appropriate tariff does not arise until CICA is satisfied that a crime of violence has been committed.

79. I accept that an aim of the 2012 Scheme was to make it easier for victims to understand. The Scheme is a statutory one, and the phrase "sexual assault" has a specific meaning as defined by section 3 of the 2003 Act. The legal context of the Scheme is the commission of a criminal offence. Given the specific term used and the direct legal context of the 2003 Act, I accept that had the intention been to depart from the definition of the "sexual assault" within the 2003 Act, it can properly be inferred that Parliament would have so stated. It did not.
80. It follows from my conclusions at paragraphs 73 and 75 above that the 2012 Scheme may have a narrower scope than previous versions of the Scheme in relation to sexual offences. It means that a victim of a relatively less serious sexual offence (e.g. leg touching) may be compensated whereas a victim of a more serious sexual offence (e.g. non-touching grooming) is not compensated. This may be counterintuitive as a matter of interpersonal justice, but it appears to be the way in which the Scheme currently operates with its focus on "violent" crimes rather than on the consequences upon victims.
81. As to the appellant's contention that the gateway under paragraph 2(1)(d) will be otiose if sexual assaults necessarily constitute a "physical attack", the Scheme is intended to be read and understood by non-lawyers. There is nothing intrinsically wrong in the Scheme making it clear that sexual assaults are covered, not least because a sexual assault which involves touching might not be read naturally as constituting an "attack". The inclusion of "sexual assault" in paragraph 2(1)(d) is a "belt and braces" approach.
82. Article 2 of the European Convention on the Compensation of Victims of Violent Crimes (1983) states that when compensation is not fully available from other sources the State shall contribute to compensate "those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence". The Convention provides no definition of that term. In the explanatory report to the Convention, it is stated that "[i]t is for the Contracting States to establish the legal basis, the administrative framework and the methods of operation of the compensation schemes having due regard to these principles". The report identifies at paragraph 18 that the violence need not be physical, compensation may also be payable in cases of psychological violence causing serious injury or death. It is the CICA's contention, which I accept, that the Convention sets the minimum standards, and there is no prescription as to which circumstances must be treated as crimes of violence; the interpretation of words such as "intentional" and "violent" are for individual states. It follows that there is no inconsistency between the Scheme and the Convention, still less an intention not to observe its spirit.
83. For the reasons given, I conclude that the UT erred in law in finding that section 3 of the 2003 Act is not the test to be used in interpreting "sexual assault" within paragraph 2(1)(d). In my judgment the definition of sexual assault as set out in section 3 of the

2003 Act represents the minimum requirement for a “sexual assault” in paragraph 2(1)(d) of the 2012 Scheme.

Issue 3

Paragraph 2(1)(b) of Annex B to the 2012 Scheme.

84. Can a psychiatric injury constitute a “physical injury” within the meaning of Annex B?
85. The FTT found (paragraph 22(i)) that there was no evidence that a physical attack or any other act or omission of a violent nature causing physical injury took place. It applied what it described as the “ordinary meaning to the words physical attack and physical injury”. The UT stated that the reference to “mental injury” in paragraph 2(1)(c) “render[s] the reference to physical injury in sub-paragraph (b) more pertinent” (paragraph 93). In construing the wording of paragraph 2(1)(b) the UT concluded that the intention was to exclude eligibility in respect of psychological injury unless it is an exacerbating factor following physical injury (paragraph 95).

The appellant’s submissions

86. It is the appellant’s case that the term “physical injury” is capable of including psychiatric injury. As a matter of ordinary language “physical” can mean bodily as distinct from mental or it can simply mean “relating to the body” depending on the context.
87. In the context of violent crimes, the courts have held that “bodily harm” includes psychiatric injury. In *R v Chan-Fook* (“*Chan-Fook*”) [1994] 1 WLR 689, Hobhouse LJ at 695G stated:
- “The body of the victim includes all parts of his body, including his organs, his nervous system and his brain. Bodily injury therefore may include injury to any of those parts of his body responsible for his mental and other faculties.”
88. In *Ireland* the House of Lords approved *Chan-Fook* and held that bodily harm under the Offences Against the Person Act 1861 may include psychiatric injury. Lord Steyn held that “... it is essential to bear in mind that neurotic illnesses affect the central nervous system of the body, because emotions such as fear and anxiety are brain functions” (156G).
89. The appellant relies upon the unchallenged assertion that the civil law has accepted there is no rigid distinction between the body and the mind. In *Bourhill v Young* [1943] AC 92, Lord Macmillan at 103 stated:
- “The crude view that the law should take cognizance only of physical injury resulting from actual impact has been discarded, and it is now well recognised that an action will lie for injury by shock sustained through the medium of the eye or the ear without direct contact. The distinction between mental shock and bodily injury was never a scientific one...”

90. Given the approach of the courts, the appellant submits that “physical injury” in paragraph 2(1)(b) should be taken to include harm to the mind. This construction is said to promote the purpose of the Scheme and Parliament must be assumed to have been aware of the breadth of the courts’ interpretation of “bodily harm” in the specific context of violent crimes when approving the Scheme for such crimes.
91. The appellant submits that a reading of “physical injury” to exclude psychiatric injuries would produce absurd results. A person subjected to sexual abuse like the appellant would be eligible under the Scheme if he suffered a relatively minor physical injury such as a sprained wrist when recoiling physically from the threatening message which would have taken the appellant through the physical injury gateway and allow him to recover for his serious psychiatric injury. Without the minor physical injury, the serious psychiatric injury would be excluded from the Scheme.
92. On the first morning of this hearing, and without any prior notice, Mr Buttler KC on behalf of the appellant, sought to introduce a new aspect of his claim, namely that the offending had caused panic attacks which worsened the appellant’s asthma which is a physical injury. The only piece of evidence upon which the appellant can rely is one line in his application form where he states he suffered an exacerbation of asthma. Mr Buttler stated that he had thought of the point only that morning. The point has never previously been made, it forms no part of the written appeal. It is too late.

The CICA’s submissions

93. The CICA contends that the interpretation sought by the appellant would run counter to the consistent use of the terms “physical injury” and “mental injury” as distinct from one another throughout the Scheme (paragraphs 33 and 34 of the tariff of injuries). If the term “physical injury” at 2(1)(b) were intended to include mental or psychiatric injury there would be no need to use the word “physical”. The Scheme would use the term “injury” or “criminal injury” as is done in the paragraphs dealing with eligibility for compensation.
94. Even if the appellant could show that the term “physical injury” was intended to encompass mental injury, it would still be necessary to show that the act or omission was “of a violent nature”. The FTT was entitled to hold that there was not such act or omission (paragraph 22(1)).
95. It is the CICA’s submission that the Scheme is not intended to provide compensation for all those who sustain injury, even serious injury, as result of criminal offences. Its application is limited to those offences which are determined by the legislator to be violent offences and the offences in this case do not fall within that definition.

Discussion

96. It is undisputed that “bodily harm” in the context of criminal offences against the person encompasses both physical and psychological injury. The civil law has long taken account of the fact that there is no rigid distinction as between an individual’s body and their mind. A civil action will lie for psychiatric injury by shock sustained through the medium of the eye or the ear without direct contact. There is force in the appellant’s submission that given the approach of the courts “physical injury” in paragraph 2(1)(b) should be taken to include harm to the mind.

97. There is also force in the submission of the CICA that the tariff of injuries within the Scheme distinguishes between physical and mental injuries and allows for compensation of the same but the application of the tariff is not triggered until there has been a finding of a crime of violence under Annex B. It is of note that the legislator used the specific term “physical injury” in paragraph 2(1)(b) of Annex B. It stands in distinction to the broader phrase “criminal injury” used in paragraphs 4 to 20 of the Eligibility section of the Scheme.
98. I accept that the CICA’s interpretation of “physical injury” has the consequence of preventing an individual who has been the subject of an act or omission of a violent nature which has resulted in solely mental injury being unable to recover compensation under paragraph 2(1)(b) whereas an individual who has sustained even minor physical injury would not be so barred.
99. I have found resolution of this issue problematic. There is force in the competing submissions of the appellant and the respondent. As I would allow this appeal on ground 3 for the reasons set out above, and as it is accordingly unnecessary to determine this issue, I consider that it is preferable to express no view on its resolution. Resolution of this difficult issue should await a case where it is determinative of a claim.

Conclusion

100. For the reasons given, ground of appeal 3 is allowed and the appellant’s application for compensation is remitted to the CICA for reconsideration.

Lord Justice Phillips:

101. I agree.

Lady Justice Carr:

102. I also agree.