

**THE HIGH COURT  
JUDICIAL REVIEW**

[2022] IEHC 679

**Record No: 2021 697 JR**

**BETWEEN:**

**NICOLA EARLS**

**APPLICANT**

**AND**

**CRIMINAL INJURIES COMPENSATION TRIBUNAL**

**RESPONDENT**

**JUDGMENT of Mr Justice Cian Ferriter delivered this 1<sup>st</sup> day of December 2022**

**Introduction**

1. In these judicial review proceedings, the applicant seeks an order of *certiorari* quashing the respondent's decision of 17 May 2021 ("the decision") in which the respondent ("the Tribunal") determined that the injuries for which the applicant had sought compensation were not attributable to a "*crime of violence*" within the terms of the General Scheme of Compensation for Personal Injuries Criminally Inflicted (the "Scheme"). The applicant also seeks other relief related to alleged breaches of her rights to fair procedures in the process which led to the decision.
2. The applicant's claim related to very serious injuries which were suffered by her as a result of a "*screamer*" firework exploding in her face on Halloween night, 31 October 1995. The applicant was 13 at the time of the incident. The firework which struck her was lit and set off down a public road in Salthill, County Galway by a then-eleven-year-old boy, E.M. (in deference to the privacy interests of the various children involved in the events of the evening, I will not use their full names). The incident left the applicant 90% blind in her right eye. She also lost 10% of the vision of her left eye. She suffered facial

injuries. She says that she has suffered severe adverse consequences in her life since the incident, including migraines and reduced vision.

3. As we shall see, the principal issue which arose in the proceedings before the Tribunal was whether the applicant's injuries were directly attributable to "*a crime of violence*" within the terms of the Scheme.

## **Background**

4. Before detailing the applicant's application to the Tribunal for compensation under the Scheme and how that application was considered and determined, it is necessary to briefly describe at this juncture the nature of the Scheme and of the Tribunal established by it.
5. The Tribunal is a non-statutory, administrative decision-making body. It is common case that the Scheme attracts the protections of constitutional justice in its administration (see e.g. *State (Hayes) v Criminal Injuries Compensation Tribunal* [1982] 1 ILRM 210; *State (Creedon) v Criminal Injuries Compensation Tribunal* [1988] 1 IR 51).
6. Pursuant to paragraph 1 of the Scheme the Tribunal may pay compensation:-

*"in respect of personal injury where the injury is directly attributable to a crime of violence ...."*

7. Later in paragraph 1 it states that "*in determining whether any act is a crime for the purposes of the Scheme, the Tribunal will not take account of any legal immunity which the person who inflicted the injury may have by reason of his mental health, his youth or otherwise.*"
8. The Scheme compensates for pecuniary loss or expense occurred as a result of the victim's injury. It does not compensate for pain and suffering.

9. Paragraph 26 of the Scheme provides that: -

*"The proceedings at the hearing of the Tribunal will be by way of a presentation of his case by the applicant who will be entitled to recall, examine and cross-examine witnesses. It will be for the claimant to establish his case. A member of the Tribunal staff may make submission to the Tribunal on the case and will also be entitled to call, examine and cross-examine witnesses. All information before the Tribunal will be available to the applicant."*

10. In practice, I was informed that the applicant calls their witnesses at the hearing and it is not the practice of the Tribunal to separately call witnesses. It is clear from the note of the hearing that was before Court in this case that the Tribunal actively engaged with both the witnesses and counsel for the applicant and raised questions on the evidence and submissions.
11. The Scheme was established significantly prior to the enactment (on 29 April 2004) of Council Directive 2004/80/EC relating to compensation to crime victims ("the Directive"). It appears that it was previously thought that the Directive only applied to compensation claims made in "cross-border" cases: see e.g. comments of White J. in *Byrne v Criminal Injuries Compensation Tribunal* [2017] IEHC 28 at paragraph 28. The Court of Appeal in *Kelly and Doyle v Criminal Injuries Tribunal* [2020] IECA 342 ("*Kelly and Doyle*") recently confirmed that the Scheme is "*the means by which the State gives effect to its obligations under the Directive both as regards cross-border and purely domestic scenarios*" (paragraph 81 of judgment of Ní Raifeartaigh J.).
12. While the applicant's counsel observed in his submissions that the definition of "*a crime of violence*" in paragraph 1 of the Scheme must be read as to include "*a violent intentional crime*" within the meaning of Article 1 of the Directive, the issues in this case were not the subject of argument by reference to any wider definition of crime of violence in paragraph 1 of the Scheme than was contended for before the Tribunal and, accordingly, that issue does not arise for determination in this case.
13. The terms of the Scheme (at paragraph 27) make clear that the Tribunal will not pay the costs of legal representation. This was held not to breach EU law in *Kelly v Doyle* (paragraph 118 of judgment of Ní Raifeartaigh J.).

14. The only potential Directive-related issue that arose in this case arises from the finding of the Court of Appeal in *Kelly v Doyle* that the Tribunal may have an obligation in certain circumstances to provide an applicant with access to prior decisions of the Tribunal.

### **Meaning of "crime of violence"?**

15. While there does not appear to be Irish authority that addresses the question of the proper approach to the determination of what constitutes a "crime of violence" under the Scheme, there is some helpful authority from the UK courts on that question. It should be noted that in England, for example, compensation for criminal injuries has been on a statutory footing since 1996. The schemes which were in place up to 2012 in England contained language very close to that in paragraph 1 of our Scheme e.g. paragraph 4 of the English 1990 scheme provided "the board will entertain applications for *ex gratia* payments of compensation in any case where the applicant sustained ... personal injury ...directly attributable... to a crime of violence" and materially identical language appeared in the English 2001 Scheme. Since 2012 it appears that a definition of "crime of violence" appears in the English scheme itself; no such definition appeared prior to then.

16. In *R (Jones) v First Tier Tribunal (Social Entitlement Chamber)* [2013] 2 AC 48 ("Jones"), Lord Hope in the English Supreme Court held at p.56 in relation to the English 2001 scheme (which had wording identical to that of paragraph 1 of the Irish Scheme i.e. compensation being payable for personal injuries directly attributable to a crime of violence) 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 have been 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."*

17. As we shall see, that approach was expressly adopted by the Tribunal in its decision in this case.
18. In *R v Criminal Injuries Compensation Board ex parte Webb* [1987] QB 74 ("Webb"), Lawton L.J. held that what mattered in considering the question of whether a crime was a crime of violence was the nature of the crime, not its likely consequences: he said, at

p.79, "It is for the board to decide whether unlawful conduct, because of its nature, not its consequence, amounts to a crime of violence".

19. This approach was endorsed by Lord Hope in *Jones* at (para 15). Lord Hope also cited with approval a passage from the judgment of Lord Macfadyen in *C, Petitioner* [1999] SC 551 ('C') where Lord Macfadyen said that there was a valid distinction between a criminal act and its consequences:

*"The question whether a criminal act constitutes a crime of violence is to be answered primarily by looking at what was done, rather than at the consequences of what was done. As Lawton LJ pointed out in Webb, 'Most crimes of violence will involve the infliction or threat of force but some may not.' It may be that there are cases in which examination of the actual or probable consequences of the criminal act will cast light on its nature. But it is for the light that they cast on the nature of the criminal act rather than for their own sake that the consequences may be relevant."*

20. The above *dicta* have been cited and applied in various UK compensation tribunal decisions such as the Upper Tribunal in *CICA v First-tier Tribunal* [2017] UKUT 0043.

### **Application for compensation and course of decision-making process**

21. On 12 February 1996, solicitors on behalf of the applicant lodged an application to the Tribunal for compensation under the Scheme. The applicant's solicitors enclosed a covering letter setting out the background to the matter and stating that "*we presume that a preliminary question to be decided by the Tribunal is whether the injuries 'were directly attributable to a crime of violence'*". The determination of this preliminary issue was sought in order to avoid the necessity for a substantial number of reports (including medical reports, vocational assessment reports and actuarial reports) in the event that the issue was determined against the applicant. The Tribunal replied by turning down the applicant's request for a preliminary ruling on the basis that there was no provision in the Scheme for such a procedure.
22. Following rejection of the request for a preliminary ruling, as the applicant was only thirteen at the time of the accident, a decision appears to have been taken in conjunction with her legal advisors to hold off the prosecution of her claim for compensation to the Tribunal pending, initially, the outcome of a repeat of her Leaving Certificate in 2000 and, thereafter, to see how the injuries impacted on her early adult life and, in particular, her

career development. Accordingly, the applicant's solicitors did not ultimately lodge detailed papers in support of her claim for compensation to the Tribunal until September 2012, some sixteen-and-a-half years after her initial claim was lodged. The applicant's solicitor, thereafter, pushed for a determination of the application including taking the step of writing to the Minister for Justice and Equality in September 2014, calling for the establishment of a Tribunal to deal with the claim.

#### *First instance decision*

23. On 5 March 2015 a single member Tribunal issued a decision in respect of the applicant's claim. The decision was a single page and noted only that the Tribunal was not of the view that the claim fell within paragraph 1 of the Scheme. The application was refused. The single member Tribunal did not provide reasons for its refusal, but it appears that it had determined that the crime was not a "crime of violence" within the meaning of the Scheme. While that decision was not challenged in these proceedings, I should observe that decisions of such a curt nature do little to assist an applicant in understanding the basis for the decision.

#### *The applicant's appeal*

24. The applicant, through her solicitors, lodged an appeal with the Tribunal on 1 April 2015. The applicant's solicitor followed up on a number of occasions subsequent to then seeking to progress the appeal. The Tribunal wrote to the applicant's solicitors on 16 August 2017, specifying an appeal hearing date of 21 November 2017. The appeal hearing was postponed at short notice on 15 November 2017 by an email which said the necessity for the postponement was "*due to circumstances outside the control of the Tribunal*". The appeal was not ultimately listed for hearing until 10 May 2021 when the appeal hearing proceeded remotely.

#### *Material submitted in support of appeal*

25. The material submitted on the applicant's behalf in support of her claim (and thereafter her appeal) to the Tribunal included a Garda report in relation to the incident. This report contained a statement of the Garda who had investigated the incident, in addition to statements given to the Gardaí in the weeks following the incident from the applicant; her

mother; a friend of the applicant (G.OG.) who was with her on the night of the incident and beside her when the screamer firework went off in her face; a statement from E.M., the boy who had set off the firework; a statement from D.D. who was beside E.M. when he lit the firework; and a statement from another boy, L.C., who was slightly ahead of E.M. when E.M. set off the firework and who gave an account of events as he had seen them.

26. The applicant also filed a detailed 20-page written submission prepared by the Senior Counsel who ultimately presented her case to the Tribunal. The submission made reference to the statements made to the Gardaí, including D.D.'s statement. The submission also addressed in detail why the nature of the crimes committed and the circumstances of the case were such that the requirement of "*crime of violence*" in paragraph 1 of the Scheme was satisfied. English case law was extensively cited, including the *Jones*, *Webb* and *C* cases referred to earlier in this judgment. The submissions also addressed the question of E.M.'s age and relied on paragraph 1 of the Scheme to submit that the Tribunal should proceed as if he were a fourteen-year-old (i.e. the minimum age for criminal legal responsibility then applicable in Irish law).
27. The applicant's submissions identified three possible statutory criminal offences committed by E.M., being s.20 of the Offences Against the Person Act 1861 (as it was in force at the time of the accident) and sections 79 and 80 of the Explosives Act 1875 (as they were at the time of the accident).
28. Section 20 of the Offences Against the Person Act 1861 ("s.20") provided as follows:

*"Inflicting bodily injury, with or without weapon.*

*20. Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour, and being convicted thereof shall be liable . . . to be kept in penal servitude . . ."*

29. Sections 79 and 80 of the Explosives Act 1875 ("s.79" and "s.80") provided (at the relevant time):

*"Imprisonment for wilful act or neglect endangering life or limb.*

*79. Where any person is guilty of any offence which under this Act is punishable by a pecuniary penalty only, and which, in the opinion of the court that tries the case, was reasonably calculated to endanger the safety of or to cause serious personal injury to any of the public or the persons employed in or about any factory, magazine, store, or registered premises, or any harbour, railway, canal, wharf, ship, boat, carriage, or place where such offence is committed, or to cause a dangerous accident, and was committed wilfully by the personal act, personal default, or personal negligence of the person accused, such person shall be liable, if the court is of opinion that a pecuniary penalty will not meet the circumstances of the case, to imprisonment, with or without hard labour, for a period not exceeding six months.*

*Penalty for throwing fireworks in thoroughfare.*

*80. If any person throw, cast, or fire any fireworks in or into any highway, street, thoroughfare, or public place, he shall be liable to a penalty not exceeding five pounds."*

30. The applicant also submitted an opinion from a Senior Counsel with extensive experience and expertise in criminal practice. No objection appears to have been taken to the tendering of this opinion which, in substance, contained a submission as to the approach which the Tribunal should in law take to the facts before it. This opinion contended that an objective test was envisaged by the first limb of s.79, i.e. that the act was "*reasonably calculated*" to endanger the safety of the public or cause serious personal injury or a dangerous accident. The opinion expressly referenced the witness statements to the Gardaí, including that of D.D. who was recorded as saying that E.M. had lit the screamer "*and aimed it down the road in the direction of the promenade*" which is where D.D. said he could see the applicant and her friend, G.OG., on the road. The opinion noted that E.M.'s version of events "*is probably much less reliable as it may be self-serving and seek to diminish his culpability*", although it offered the view that even on his own version of events there was "*a very high degree of recklessness*". The opinion contended on the application of the test in *Webb* (which held that the role of the Board was to look at the nature of the act involved in the criminal conduct and determine whether it amounted to a "*crime of violence*", even though the consequences of the crime are to be disregarded) that the Tribunal would be compelled to conclude that the applicant's injuries were directly attributable to a crime of violence.



## Course of Hearing

31. The hearing of the appeal proceeded (remotely) before a three-member Tribunal panel on 10 May 2021. While no transcript of the hearing was available from the Tribunal, the applicant's solicitor took a detailed note of the hearing, and this note was in evidence before the Court in this judicial review.
32. It was not in dispute at the hearing that the incident occurred and that the applicant had been seriously injured as a result of it. The central issue for the Tribunal to determine was whether the applicant's injury was directly attributable to a "*crime of violence*" within the meaning of paragraph 1 of the Scheme.
33. The applicant and the investigating Garda gave oral evidence to the Tribunal. E.M. was not called by the Tribunal. The applicant's counsel then made submissions.
34. The applicant's counsel submitted at the hearing that the Tribunal should apply a two-tier test (i.e. in essence, the test set out by Lord Hope in *Jones*): first, the Tribunal should be satisfied that a crime was committed and second, the Tribunal should determine if the crime was a "*crime of violence*". This two-step analysis was accepted as correct by the Tribunal in its decision. It was submitted that the Tribunal should approach the issue before it as if E.M. was of legal age.
35. In relation to the s.20 offence, in light of the very serious injuries suffered by the applicant, it was submitted that it was clear that the *actus reus* of the s.20 offence was satisfied; the issue for determination was whether the *mens rea* of the s.20 offence was satisfied. It was accepted from the authorities that a subjective test is applied in determining whether the requisite *mens rea* is made out in respect of the s. 20 offence: *DPP v. Cagney* [2008] 2 IR 111 but it was contended that this test was met on the facts.
36. In relation to the s.79 and s.80 offences, it was submitted that an objective test applied to the first limb of s.79 (the "reasonable calculation" requirement); that s.79 was satisfied on the evidence before the Tribunal; that s.80 constituted a crime of violence given the particular conduct here (setting off a dangerous firework down a public road on a Halloween night when young people were out and about on that road) and therefore the

nature of the conduct involved in the commission of the s.80 offence rendered it a crime of violence also.

### ***Appeal decision***

37. On 27 May 2021, the decision of the Tribunal dated 17 May 2021 (the "decision") was communicated to the solicitor for the applicant. In its decision, the Tribunal determined that no "*crime of violence*" had taken place within the meaning of paragraph 1 of the Scheme.
38. While I will address the terms of the decision in more detail below, the Tribunal's conclusion at para 4.5 was as follows:

*"The Tribunal finds that while the consequences of E.M.'s actions were catastrophic he did not engage in a crime of violence in that he lit a screamer on a street that he thought to be empty and therefore had no contemplation that any other person may be endangered and/or hurt and/or involved in a dangerous accident as a result of his actions. The Tribunal specifically finds that the distance between the two parties and the fact that the road was otherwise empty between the two parties coupled with the fact that one side of the road would have been darker, as not illuminated by houses or businesses, indicates that on the balance of probabilities E.M. did not see any other person on the street and therefore no crime of violence took place. In the circumstances the Applicant's appeal does not fall within the parameters of the Criminal Injuries Compensation Scheme as no crime of violence occurred on the 31st of October 1995."*

### **Summary of parties' positions in this JR**

39. In short, the applicant contended that the decision is vitiated by errors of law, being a failure to apply an objective test to the "*reasonable calculation*" limb of the s. 79 offence and a failure to consider whether the s. 80 offence constituted a crime of violence on the facts of the case; that the decision failed to take into account relevant considerations, being the submissions made to the Tribunal and the relevant witness statements; and that the decision was vitiated by irrationality in respect of material factual findings. The applicant also contended that she was entitled to a declaration that the delay in progressing and determining her claim, in particular, in the period from the lodging of an appeal against the first instance decision on 23 March 2015 and the hearing of that

appeal on 12 May 2021 (a period of just over six years) constituted a failure by the respondent to vindicate her right to constitutional justice and/or her rights under the European Convention on Human Rights (including Article 6 and 13). She also contended that the failure of the Tribunal to provide information on previous decisions relating to the age of the perpetrator and the scope of the concept of crime of violence constituted a breach of fair procedures including a breach of her rights under the Directive. The applicant also pleaded a claim in damages for the wasted costs of the appeal hearing but did not pursue that claim in the hearing before me.

40. The respondent's case, in short, was that the applicant's case (apart from the issues relating to delay and provision of prior decisions) was primarily one in irrationality and the high bar set out in *O'Keefe v An Bord Pleanála* [1993] 1 IR 39 ("*O'Keefe*"), namely that there was no relevant material before the Tribunal to support the findings made, could not be satisfied. The respondent submitted that there were not any errors of law or, if there were, they were not material to the decision reached; that there was no substantive breach of fair procedures in not providing the previous decisions sought and that the delay was not of an order to warrant declaratory relief, particularly in light of the applicant's own very considerable delay in pursuing her case before the Tribunal.

### **Discussion and decision**

41. I will firstly consider the applicant's case as to errors of law before proceeding to deal with her other grounds of challenge.
42. The applicant contends that the Tribunal fell into error of law in how it dealt with her case that crimes of violence had been committed under both s.79 and s.80 and that these errors were decisive as they went to a core question of its jurisdiction i.e. whether or not the applicant's injuries were attributable to a crime of violence.
43. The applicant accepts that the Tribunal set out the correct test (in paragraph 4.4 of its decision) for determining whether an offence under s.20 was committed, albeit that she contends that the Tribunal's legal findings were vitiated by irrational findings as to fact and/or a failure to have regard to relevant evidence, being the contents of statements to the Gardaí made by the other witnesses to the incident. I will address that contention separately. The error of law case accordingly focused on the Tribunal's assessment of whether the offences under s.79 and s.80 constituted crimes of violence in the circumstances of the case.

## **Error of law in considering whether s.79 offence constituted a crime of violence?**

44. At paragraph 4.1 of its decision, the Tribunal found that the s.79 offence "if proven would amount to a crime of violence" for the purposes of the Scheme. It then (correctly) identified a two-tier test which it applied to Section 79 by stating:

*"The Tribunal finds that in order to conclude that E.M. was in breach of section 79, it must find that E.M.'s actions were:*

*Reasonably calculated to either:*

- (a) Endanger the safety of any of the public, or*
- (b) To cause a serious personal injury to any of the public, or*
- (c) To cause a dangerous accident, and*

*Was committed wilfully by*

- (1) The personal act, or*
- (2) Personal default, or*
- (3) Personal negligence of the person accused."*

45. The Tribunal then stated that it found "*that this is a two-tier test that firstly E.M. must have reasonably calculated to cause a dangerous accident and must have committed the act wilfully by act of default or negligence.*"
46. The applicant contends that the Tribunal erred fundamentally in law by then applying an entirely subjective test to the "*reasonable calculation*" limb when in law this was an objective test. The respondent submitted that it is not clear that the Tribunal only applied a subjective test, but that if it did apply a subjective test, and the test was more correctly an objective test, that its conclusion based on its assessment of the evidence would have been no different such that no basis for relief in judicial review is made out.
47. It is clear from the applicant's solicitor's note of the proceedings before the Tribunal (and not in dispute) that Senior Counsel for the applicant at the appeal hearing contended for an objective test in respect of the "*reasonable calculation*" limb of s. 79. The Senior

Counsel's opinion which had been submitted by the applicant also referred to this limb of s.79 as involving an objective test.

48. The decision makes no reference, one way or another, to the submissions made both orally and in writing to the effect that the "*reasonable calculation*" requirement of s. 79 was to be assessed by reference to an objective test. Somewhat surprisingly, it appears that there is no guidance in the case law (or textbooks) on the question as to whether the reasonable calculation test in s.79 is to be assessed objectively.
49. In my view, as a matter of first principles, the phrase "*reasonably calculated*" in s.79 connotes an objective test. The fact that there must be reasonable calculation clearly suggests that a standard of objective reasonableness is involved (as opposed to a question of whether the accused thought that he or she had not made such a reasonable calculation). This may be contrasted with the second limb of s.79 which requires that an act is "*committed wilfully*". Accordingly, whether an act was reasonably calculated to endanger the safety of others, caused personal injury or caused a dangerous accident must be assessed by reference to an objective standard. In those circumstances, the age or maturity of the perpetrator would be irrelevant.
50. While the decision in its terms does not express a view as to the test applied by it as regards the requirement of reasonable calculation, in my view, it is clear that the Tribunal proceeded on the basis that the test was a subjective one. In my view, the Tribunal fell into error of law in this regard.
51. I say that it is clear that the Tribunal took the view that the test was a subjective one for the following reasons.
52. Firstly, the Tribunal (at paragraph 4.2 of the decision) said it was entitled to take into account the perpetrator's immaturity when considering whether he reasonably calculated or caused a dangerous accident. That clearly suggests that the Tribunal were adopting a test of subjective recklessness. The perpetrator's immaturity would have no place in an objective test. While counsel for the Tribunal correctly pointed out that the Tribunal went on to specify in paragraph 4.2 that, even assuming the perpetrator was eighteen years of age on the date of incident, it was of the view that he did not reasonably calculate to cause the dangerous accident by his actions, that does not seem to me to detract from the fact that the Tribunal was erroneously applying a subjective test; otherwise there would have been no need to reference the perpetrator's age at all.

53. Secondly, in its finding at the first paragraph 4.3 of the decision (there were two paragraphs in the decision numbered paragraph 4.3) that "*on the balance of probabilities E.M. did not reasonably calculate that he would endanger the safety and cause personal injury to any of the public or cause a dangerous accident as on the balance of probabilities he did not see the applicant and lit the screamer down a long street on which he saw no other person*", the Tribunal only focused on the subjective account of the circumstances of the accident as given by the perpetrator, E.M. This is re-enforced by the reference in the Tribunal's conclusions as set out at para. 4.5 of the decision, that E.M. "*lit a screamer on a street that he thought to be empty*" and "*had no contemplation that any other person may be endangered and/or hurt and/or involved in a dangerous accident as a result of his actions.*" On an objective assessment, it would have been necessary for the Tribunal to consider all of the relevant evidence relating to the circumstances of the incident which would go to the question of whether, objectively, the acts in context were reasonably calculated to endanger safety or cause serious personal injury or a dangerous accident.
54. Counsel for the Tribunal contended that it could be assumed that the Tribunal had regard to all of the witness statements on the submissions before it; the fact that it did not expressly say so in the decision could not be taken to mean that they did not so consider that material. I do not think I can make any such assumption. Indeed, if such an assumption could be made it could have the effect of neutering legitimate challenges to decisions based on a failure to have regard to relevant material or considerations. It must be clear expressly or by necessary implication from the decision that regard was had to the relevant material. The contrary implication arises here.
55. The Tribunal here did not on the face of the decision or in its reasoning process have any regard to the evidence in the witness statement of D.D., who was beside E.M. at the time the screamer was set off, in which he stated that E.M. aimed the screamer down the road in the direction of the promenade and that he had seen the applicant and her friend G.OG. behind them in that direction. The Tribunal did not have any regard to the evidence of L.C. who said that he was a couple of metres ahead of E.M., that he saw him place a screamer on the ground and light it and that he could see the applicant and her friend, G.OG., on the road in the direction where the screamer went. These were matters relevant to an objective assessment of the first limb of s.79. The absence of such consideration supports the view that the Tribunal erroneously applied a subjective test.
56. In pointing out the failure to have regard to evidence which was on the face of it relevant to an objective assessment of whether the acts of E.M. could be said to have been reasonably calculated to cause danger, I am not to be taken as expressing any view on the weight that should have been attached to that evidence; I am merely pointing out

that the failure to have regard to evidence which was the subject of submissions in the context of a contended for objective test and was relevant to the application of an objective test indicates that the Tribunal did not believe it needed to have regard to that evidence because it was applying a subjective test.

57. Counsel for the Tribunal submitted that, even if the Tribunal had applied a subjective test, as opposed to an objective one, it would have arrived at the same view on the application of an objective test in any event, in light of its assessment of the evidence. However, I do not believe such an assumption can be safely made. On an objective assessment, the evidence of other witnesses to the incident, including their evidence as to the visibility of the applicant and her friend down the street into which the screamer was fired and, indeed, the evidence contained in the various witness statements to the effect that there were a lot of young people around the "Old Folks' Park" which was also down that street, could well have led to a very different conclusion. In the circumstances, in my view, the Tribunal fell into legal error and the error was a material one and the decision ought be quashed on this ground.

#### **Error of law in considering whether s.80 offence constituted a crime of violence?**

58. As regards the offence under s.80, the Tribunal was satisfied that E.M. had committed the offence. The Tribunal held however that:

*"... the Tribunal finds that this is an administrative offence, one of strict liability, where there is no threat of imprisonment. The Tribunal finds that breach of that provision on its own is not a crime of violence."* (paragraph 4)

59. In relation to the s. 80 offence, the Tribunal correctly set out in its second paragraph 4.3 of the decision that, notwithstanding that the s. 80 offence is a strict liability offence and therefore is unlikely to be considered a crime of violence, it is subject to the important qualification that, as noted by the Tribunal, *"as set out in the case law a crime of violence depends on the facts of each case"*.

60. In my view, the applicant is correct in her submission that the Tribunal did not go on to consider whether the s.80 offence, in light of the particular conduct complained of (being the actions of the perpetrator in setting off a "screamer" firework down a public road on a busy Halloween night) constituted a *"crime of violence"*. The Tribunal fell into error in not assessing whether the conduct involving commission of the s.80 offence constituted a

crime of violence in light of the nature of that conduct in the particular circumstances of this case: see Lord Hope in *Jones* at paragraph 17. As pointed out by counsel for the applicant, depending on the facts underpinning the commission of a s.80 offence, very different conclusions could be arrived at on the question of whether the commission of the offence in a given instance constituted a crime of violence. Dropping a “*banger*” on empty park ground with nobody nearby, while constituting a s.80 offence, would not constitute a crime of violence; however setting off a screamer firework down a public road on which people were visible within the range of the screamer could well be taken to constitute a crime of violence while also constituting an offence under s.80. Whether the conduct here involved in the commission of the s.80 offence constituted a crime of violence is ultimately a question of fact for the Tribunal but legally it is required to engage in that assessment and it fell into error in not doing so here.

61. Again, in my view, this was a material error of law, which fortifies me in the view that the decision ought to be quashed.

#### **Irrationality/Failure to take into account relevant considerations**

62. The applicant sought to separately contend that a number of material factual findings were irrational in the *O’Keeffe* sense in that there was simply no evidence to support them and, indeed, the evidence was to the contrary. In an allied argument, it was contended that material findings of fact justified to ground the Tribunal’s ultimate conclusion that no crime of violence had been committed, were made in improper disregard of material evidence contained in the witness statements (which had also been the subject of submissions by the applicant to the Tribunal).
63. The applicant focused, in particular, on the finding, set out at para. 4.5 of the decision, that E.M. “*lit a screamer on a street that he thought to be empty*” and also the finding that “*the distance between the two parties and the fact that the road was otherwise empty between the two parties coupled with the fact that one side of the road would have been darker, as not illuminated by houses or businesses*” as not rationally justifying the conclusion that no crime of violence took place.
64. In relation to the finding that E.M. thought the street to be empty, it was said that this was arrived at in disregard of the evidence in the statements of D.D. and L.C. in particular which stated that there were a large number of young people in the area at the time of the incident and which specifically placed the applicant and her friend within sight of E.M.



65. As regards the question of illumination of the road (and therefore visibility), it was contended that there was simply no evidence that one side of the road was darker and, indeed, the oral evidence to the Tribunal of both the investigating Garda and the applicant was that the whole street was well lit. It was further contended that the distance between E.M. and the applicant and the fact that the road was empty between them at the time of the incident were irrelevant considerations to have regard to in circumstances where it was clear that the screamer had the range to reach and strike the applicant.
66. Counsel for the Tribunal submitted that this was not an *O’Keeffe*-type scenario where there was no relevant evidence to support the impugned findings. He submitted that it was open to the Tribunal to infer from the evidence in E.M.’s witness statement that he thought the street to be empty (because he said he had not seen anybody on the road when he let off the screamer) and that, in light of the evidence of the street being bound by a park on one side, it was open to the Tribunal to deduce that it was less well-lit on that side of the street.
67. In light of the conclusions I have reached as to the errors of law made by the Tribunal, and the consequent need for the decision to be quashed and the appeal re-heard, I do not think it is necessary for me to reach conclusions on these submissions, particularly in light of the findings I have made as to what the Tribunal needed to have regard to if it was applying an objective test. In my view, in light of the proper legal test to be applied when considering whether the s. 79 and s. 80 offences were both proven and constituted crimes of violence on the facts of this case, it will be necessary for the Tribunal, when the matter is remitted to it, to engage with all of the evidence as to what occurred on the night, and not confine itself to the evidence of the applicant and E.M.. Such evidence will include the evidence of other witnesses as to the presence of other people in the vicinity and the evidence as to where the applicant and her friend were visible on the road.

### **Alleged Lack of Transparency in application of the Scheme**

68. The applicant’s solicitor wrote to the Tribunal in July 2015 requesting information from the Tribunal as to cases in which the age of the perpetrator may have been a factor in circumstances where the age of the person who perpetrated the acts in this case was likely to be relevant. The applicant’s solicitor required “*copies of the application made*” in each such case, along with the decision of Tribunal in such cases “*and all relevant documents associated with the relevant issue i.e. the age of the perpetrator*”. He also required similar documents and information in respect of “*previous decisions by the Tribunal in which the age of the perpetrator is irrelevant but where the Tribunal has concluded for other reasons that the act does not involve a crime of violence*”.

69. The Tribunal responded by letter to state that:

*"The Tribunal does not keep records in a fashion that would allow for the easy extraction of the information requested should it exist. Attempting to find any applications matching the criteria outlined would involve the reading of all files held by the Tribunal. I regret that the Tribunal does not have the resources to carry out such an extensive task."*

70. The applicant relies on the recent decisions of the Court of Appeal in the case of *Kelly and Doyle* in support of her argument that the failure of the Tribunal to provide its earlier decisions as requested involved a breach of her constitutional right to fair procedures and also breached her EU law rights.

71. In *Kelly and Doyle*, the Court of Appeal held that the lack of information on how discretionary eligibility criteria under paragraph 14 of the Scheme were applied by the Tribunal was in breach of the applicants' constitutional right to fair procedures and failed to meet the requirements of effective protection of their EU law rights established by the Directive, as set out by the European Court of Justice in *Presidenza del Consiglio dei Ministri v BV* Case C-129/19; ECLI:EU:C 220:566 ("the *BV* case").

72. It is important to note that in *Kelly and Doyle*, the applicants sought orders of *mandamus* directing the Tribunal to provide them with copies of previous decisions of the Tribunal relating to the application or non-application of paragraph 14 of the Scheme in order to allow them properly make their claims for compensation. Here, the applicant frames her argument in terms of a breach of fair procedures in the failure to provide the previous decisions sought such as to invalidate the decision-making process.

73. Paragraph 14 of the Scheme provides that "*compensation will not be payable where the Tribunal is satisfied that the conduct of the victim, his character or his way of life make it inappropriate that he should be granted an award and the Tribunal may reduce the amount of an award where, in its opinion, it is appropriate to do so having regard to the conduct, character or way of life of the victim.*" The Court of Appeal held that as a matter of fairness of procedure, the claimant should have some idea of how the Tribunal applies paragraph 14 in practice. Ní Raifeartaigh J. stated (at paragraph 162) that:

*"The problem of a lack of access to previous decisions demonstrating how paragraph 14 is applied in practice by the Tribunal is compounded by the absence of any other source of information about the issue e.g. from annual reports, or from something in the nature of guidelines. Given this complete dearth of information as to how "conduct, character and way of life" may reduce an award of compensation, or even result in its rejection in entirety, I see merit in the appellants' submission that it would be unfair to expect them to put together a claim, perhaps one involving considerable medical evidence, only to learn at the conclusion of the entire process that paragraph 14 has been applied to their cases, perhaps even leading to the refusal of any award, particularly in circumstances where there has been no legal aid throughout the process. As a matter of fairness of procedure, the claimant should have some idea of how the Tribunal applies paragraph 14 in practice. This is not to say that the claimant is entitled to any particular outcome, but rather that the manner in which the Tribunal reaches its decisions on this issue should be more transparent. The complete absence of any information which might assist both decision-maker and claimant in ensuring that the claimant gets the benefit of a consistent approach, and has notice as to what that approach is, seems to me to be fundamentally unfair. I consider it to be both a breach of constitutional fair procedures and a failure to protect, effectively, the exercise of an EU right."*

74. Ní Raifeartaigh J. further held (at paragraph 163) that issues of cost and practicality must be taken into account in determining the number of decisions that will have to be provided in any given case. In a follow up decision (at [2021] IECA 131), Ní Raifeartaigh J. made clear that an applicant is not entitled to a large range of material and that the level of material to be provided must be proportionate.
75. The applicant accepts that *Kelly & Doyle* did not involve the precise question of how the youth of a perpetrator should be treated under the Scheme or how a Tribunal will approach the "crime of violence" question, but to the extent that such treatment has an effect on eligibility for compensation, she submitted that the reasoning in *Kelly and Doyle* is applicable and her constitutional rights and rights under EU law were breached by the failure of the Tribunal to provide any information on the interpretation of the provisions of the Scheme as sought by her prior to the appeal hearing.
76. I should note that there is perhaps a question-mark over the extent to which this applicant can pray in aid EU law rights based on the Directive given that the accident the subject of her claim occurred in October 1995 and the Directive only came into force in April 2004. Article 18(2) of the Directive provides that "*Member States may provide that the measures necessary to comply with this directive shall apply only to applicants whose injuries result from crimes committed after 30 June 2005*". Counsel for the applicant

pointed out that this provision was in permissive terms, and that Ireland had not introduced such a cut-off date such that the Directive could be taken to apply to her claim. I would prefer to hold over the resolution of that issue to a case in which it is more significantly engaged. It is also fair to note that the analysis of Ní Raifeartaigh J. in *Kelly and Doyle* is as much rooted in the constitutional right to fair procedures as it is in protection of EU rights, so that the point is open to be taken by the applicant by reference to constitutional rights principles even if the Directive does not apply to her claim.

77. It might also be contended that, it can be more readily seen why fairness required provision of at least some prior decisions of the Tribunal in cases said to come within paragraph 14 of the Scheme, given the nature of the factors set out in that paragraph. In contrast, the question of what constituted a "*crime of violence*" is likely to be fact sensitive to the facts of any given case; the applicant did not confine her request, for example, to previous cases in which fireworks-related injuries were said to constitute or not constitute injuries attributable to a crime of violence. The question of the age of the perpetrator (in light of the terms of paragraph 1 of the Scheme) was also likely to be fact sensitive. However, I accept for present purposes that the rationale for the holding in *Kelly and Doyle* (namely, that fairness in assessing the consistency of the Tribunal's prior approach to applying material provisions of the Scheme requires some level of access to prior decisions addressing the provisions of the Scheme in issue in a given case) also applied at least in principle to the question of whether the circumstances of this case (involving a very young perpetrator and an issue as to whether the particular offences involved crimes of violence) justified the provision of some prior relevant decisions.
78. However, assuming the *Kelly and Doyle* principles did apply at the time of the request here (July 2015), I do not believe that on the facts of this case the non-provision of any prior relevant decisions led to a level of breach of the applicant's rights to fair procedures such as to vitiate the lawfulness of the overall process or the decision ultimately arrived at.
79. The applicant was not impeded by the absence of prior decisions in putting in detailed written and oral submissions on the issue of the relevance (or otherwise) of her age and on the issue of whether or not the circumstances constituted a crime of violence. The applicant's legal team were able to rely on persuasive English authority on the equivalent test found in the criminal injuries compensation schemes in that jurisdiction. The Tribunal did not seek to rely on any of its previous decisions whether on the crime of violence issue or the age issue in arriving at its decision.

80. I was told that the Tribunal has now made available prior decisions on its website in light of the Court of Appeal's decision in *Kelly v Doyle*. The applicant did not point to any of the precedent decisions now made available to contend that if, for example, she had had a particular prior decision of the Tribunal available to her from what has now been disclosed, she would have been able to more effectively present her case.
81. Accordingly, on the particular facts of this case, I would not have vitiated the decision on this ground alone; any breach was in truth *de minimis*. In arriving at this finding on the facts of this case, I am not to be taken as detracting from the proposition that, in general, vindication of the constitutional and EU law rights of an applicant for compensation under the Scheme may require provision of relevant prior decisions of the Tribunal.

### **Delay**

82. The applicant seeks a declaration "*that the delay in progressing and determining the applicant's claim for compensation under the Scheme constitutes a failure by the respondent to vindicate the applicant's rights to constitutional justice and/or her rights under the European Convention on Human Rights (including article 6 and 13).*"
83. The applicant, in seeking this declaration, relies not on the significant lapse of time between the original lodgement of her claim under the Scheme in February 1996 and the date of the appeal decision in May 2021 but rather on the period of time between her lodgement of an appeal against the first instance decision, in April 2015 and the date of the appeal hearing and decision in May 2021.
84. In *Byrne v Criminal Injuries Compensation Tribunal* [2017] IEHC 28, White J. accepted "*that it is a well established principle of administrative law that the entitlement to a reasonably prompt decision is an aspect of constitutional justice*" and approved the following statement of Edwards J. in *KM & DG v. Minister for Justice, Equality and Law Reform* [2007] IEHC 234: "*...the entitlement to a prompt decision is an aspect of constitutional justice. Moreover, quite aside from constitutional justice it is clear from the authorities that the idea of substantive fairness includes a duty not to delay in the making of a decision to the prejudice of fundamental rights.*"
85. In that case, White J. granted a declaration that the delay in progressing the assessment of the applicant's claim for compensation was in breach of the applicant's right to constitutional justice in the manner in which the Scheme is operated. On the facts of that

case, there had been some 7 years between the making of a claim under the Scheme and the grant of an interim award and a further 6 years before a final award was made.

86. The applicant also relies on the statement of Ní Raifeartaigh J. at paragraph 112 of *Kelly and Doyle* that "*the safer view for the court to take is that a claim to the Irish scheme would fall within the ambit of article 6 (1) of the convention,*" such that ECHR jurisprudence on delay also applies.
87. It will be recalled here that an appeal hearing was originally scheduled for November 2017 but that hearing was pulled at short notice due to unexplained "unforeseen circumstances" and was not ultimately rescheduled until May 2021. While the Court might have been sympathetic to some Covid-related explanation for the delay in the period from March 2020 to May 2021, no such explanation was offered on affidavit. Even apart from that period, there was still a period of some 5 years delay. Ultimately no explanation or justification on affidavit at all was provided by the respondent for any of the period of the delay of over 6 years between the lodging of the appeal and the holding of the appeal hearing.
88. Such levels of delay are unacceptable and fly in the face of the Tribunal's obligation to determine applications for compensation under the Scheme with reasonable expedition. Such concerns are fortified by the fact that the Tribunal is now giving effect to obligations under the Directive in EU law. In my view, a six-year delay in dealing with an appeal under the Scheme involves a clear breach of the Tribunal's obligation to achieve reasonable expedition in its decision making.
89. The question arises as to whether the Court should grant the declaration sought by the applicant in the circumstances. In my view, it suffices to record my views on the unacceptability of the delay in this judgment. There is no doubt that the applicant herself delayed very considerably in the period from lodging her complaints in February 1996 to substantively reactivating the prosecution of her claim in 2012, over 16 years later. In circumstances where the applicant has, quite responsibly, dropped her claim for damages in the proceedings and where I am quashing the decision in any event, I do not see that there is anything to be gained by granting the declaration sought in this case. I should, however, make clear my view that if similar delays on the part of the Tribunal were to arise in the future there are very likely to be good grounds for applicants to pursue remedies against the Tribunal arising from such delay.

## **Conclusion**

90. For the reasons outlined in this judgment, I will grant an order of *certiorari* quashing the decision and remit the matter back to a differently-constituted Tribunal for a fresh determination.
  
91. I should add that given the very lengthy period which has elapsed since the events giving rise to the claim, it behoves the Tribunal to arrange the re-hearing as a matter of priority.