Neutral Citation Number: [2021] EWHC 2248 (Admin)

Case No: CO/3749/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 August 2021

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE QUEEN **Claimant**

on the application of

KIM MITCHELL
- and -
SECRETARY OF STATE FOR JUSTICE **Defendant**

- -
- -

Hannah Slarks (instructed by the **Centre for Women's Justice**) for the **Claimant**
David Manknell (instructed by the **Government Legal Department**) for the **Defendant**

Hearing date: 22 July 2021

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Approved Judgment

Mrs Justice Lang:

1. The Claimant applies for judicial review of the Defendant's decision not to consult on whether victims of child sexual abuse with unspent convictions of a specified type should continue to be subject to a blanket exclusion from awards of compensation by application of the exclusionary rule in paragraph 3 of Annex D of the Criminal Injuries Compensation Scheme ("the Scheme"). The Claimant has decided to waive her right to anonymity to raise awareness of this issue.

2. Permission was initially refused on the papers by Chamberlain J. on Ground 1 (consultation) and Ground 2 (public sector equality duty). The Claimant renewed her application on Ground 1 only. Permission was granted on Ground 1 by Swift J. at an oral hearing.

Ground of challenge

3. The Claimant submitted that she, and other victims of child abuse, had a legitimate expectation, based on clear and unambiguous representations made by HM Government in its Victims Strategy, published in September 2018, that the Defendant would carry out a lawful consultation on potential changes to the Scheme, including the revision of the exclusionary rule as recommended by the Independent Inquiry into Child Sexual Abuse ("the Inquiry") in its Interim Report in April 2018.

4. The Defendant failed to honour the Claimant's legitimate expectation as he did not consult on the exclusionary rule. Prior to the launch of the public consultation, he undertook an internal review, in the course of which he decided that the exclusionary rule should remain in its current form. He gave his reasons for his decision in the Criminal Injuries Compensation Scheme Review 2020 ("the consultation paper"), published in July 2020. In the consultation paper, he consulted on aspects of the Scheme on which he was considering a change, but not on the exclusionary rule as he had decided not to change it.

5. At the end of the consultation paper, consultees were asked if they had any further comments on the Scheme, following standard practice in consultations. Some consultees commented on the unfair operation of the exclusionary rule. But this exercise did not meet the criteria for a lawful consultation as it did not take place at a formative stage - the Defendant had already decided not to revise the exclusionary rule before the consultation began.

6. Therefore the Claimant submitted that the Defendant breached his duty to conduct a lawful consultation.

7. The Defendant made the following submissions in response:

    i) The Claimant's interpretation of the Victims Strategy was incorrect - it did not contain any promise that there would be a consultation on whether the exclusionary rule should be changed.

ii) Alternatively, even if the Victims Strategy could be interpreted as stating that the exclusionary rule would be consulted upon, the wording was unclear and/or ambiguous, and so could not found a legitimate expectation.

iii) In any event, in substance a consultation was offered to the Claimant and her legal representatives as the consultation which did take place gave consultees the opportunity to express their views on any aspect of the Scheme, not just those on which the Defendant was consulting.

iv) If the Court found that the Claimant did have a legitimate expectation which had not been honoured by a lawful consultation, the Defendant did not seek to argue that there was any overriding reason why he was entitled to resile from it.

Facts

8. The Claimant, whose date of birth is 16 September 1981, was sent to boarding school in September 1989, aged 7 years old, as her parents were living abroad. In 1990, when she was aged 8 years, she was sexually abused by a sport teacher at the school ("the assailant"). She was deeply upset and frightened. The following day, the assailant told her not to tell anyone what had happened, and that if she did, she would not be believed.

9. A few days later, the Claimant told a friend's mother, who notified her parents. The matter was then reported to the police, and social services were involved. No further action was taken against her assailant. The Claimant's parents were told by the social worker that she was not believed by the police or social services. This led to her parents also doubting her.

10. The Claimant became angry and resentful towards her parents and the authorities for failing to protect her and then failing to believe her. She was offered no therapeutic assistance to help her deal with the childhood sexual assault. She has since been diagnosed with complex post-traumatic stress disorder. Previously a good student, the Claimant describes herself as "going off the rails" at school and at home, and taking illegal drugs to help block out her distress. She believes that this conduct was linked to the childhood sexual assault and the handling of it by various public bodies. During this time, she had several convictions for which she could have been excluded from compensation, but none would have resulted in an automatic refusal of compensation as they were prior to the change in the Scheme rules in 2012.

11. In 2012, following the Jimmy Saville scandal, the Claimant read in the press that the police were re-opening old child sex abuse cases. She therefore decided to report the matter again to the police. An officer told her that he had looked into it, but that he could find no record of the original report, and there was no one of the assailant's name in the police data base. He said that the police could not do anything now because too much time had passed.

12. In November 2015, the Claimant tried again to report the incident to the police. This time it was thoroughly investigated. The police discovered that the assailant had been convicted of three very similar offences against a 14 year old girl in about 1999 or 2000, and sentenced to a term of imprisonment.

13. The assailant was prosecuted and convicted of an offence of indecent assault against the Claimant, contrary to section 14 of the Sexual Offences Act 1956, on 20 July 2017. He was sentenced to a term of 15 months' imprisonment. The Solicitor General referred the sentence to the Court of Appeal as unduly lenient, and on 24 November 2017, a sentence of 3 years' imprisonment was substituted for the original sentence.

14. On 21 March 2017, the Claimant was convicted by the South Northumbria Magistrates of an offence of using threatening, abusive, insulting words/behaviour to cause harassment, alarm or distress, contrary to section 4A(1) of the Public Order Act 1986. The circumstances of the offence were that her former employer was improperly withholding her wages. She made repeated requests for payment and raised the matter with ACAS and HMRC. On one of the occasions when she went to the shop where she had worked to ask for her pay, she took her dog with her, and her former employer called the police, accusing her of threatening him. The Claimant acknowledged that her dog looked a bit frightening, as he is a Rottweiler cross Mastiff, though he does not have an aggressive temperament. So she decided to plead guilty. She was sentenced to a community order for 12 months, with an unpaid work requirement, and a fine.

15. On 3 October 2017, the Claimant applied for compensation from the Criminal Injuries Compensation Authority ("CICA").

16. On 29 November 2017, the CICA wrote to the Claimant informing her that no award could be made to her under the Scheme because she had an unspent conviction. Annex D paragraph 3(e) states that an award will not be made to an applicant who, on the date of application, has a conviction for an offence which resulted in a community order. The conviction would not be spent until 19 March 2019.

17. The refusal of an award was upheld by the CICA on review.

18. The Claimant has since filed an appeal to the decision on her application, submitting that the exclusionary rule is in breach of Article 1 Protocol 1 to the European Convention on Human Rights ("ECHR"), combined with Article 14. That appeal is pending.

The Scheme

19. Awards of compensation for criminal injuries were put on a statutory basis by the Criminal Injuries Compensation Act 1995 ("the 1995 Act"). Section 1 of the 1995 Act provides that 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 and that 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.

20. Section 11 of the 1995 Act provides for parliamentary control of the scheme by requiring a draft of the scheme to be approved by a resolution of each House of Parliament.

21. The Scheme is operated by the CICA, which is an Executive Agency of the Ministry of Justice. The CICA administers the Scheme independently of government and decides

all claims. Appeals from the CICA lie to the First-tier Tribunal (Social Entitlement Chamber).

22. Until 2012, the CICA had a discretion in respect of victims of crime with unspent convictions. The applicable rule under the 2008 Scheme was as follows:

> "14.3 (3) In considering the issue of character under paragraph 13(1)(e), a claims officer must withhold or reduce an award to reflect unspent criminal convictions unless he or she considers that there are exceptional reasons not to do so."

23. In 2012, this rule was replaced with the exclusionary rule, the effect of which is to create an absolute bar on victims accessing compensation if they have almost any type of unspent conviction. Paragraph 26 provides:

> "26. Annex D sets out the circumstances in which an award under this Scheme will be withheld or reduced because the applicant to whom an award would otherwise be made has unspent convictions."

24. Annex D provides in relevant part:

> "1. This Annex sets out the circumstances in which an award under this Scheme will be withheld or reduced because the applicant to whom an award would otherwise be made has unspent convictions.
>
> 2. Paragraphs 3 to 6 do not apply to a spent conviction. "Conviction", "service disciplinary proceedings", and "sentence" have the same meaning as under the Rehabilitation of Offenders Act 1974, and whether a conviction is spent, or a sentence is excluded from rehabilitation, will be determined in accordance with that Act.
>
> 3. An award will not be made to an applicant who on the date of their application has a conviction for an offence which resulted in:
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> (a) a sentence excluded from rehabilitation;
>
> (b) a custodial sentence;
>
> (c) a sentence of service detention;
>
> (d) removal from Her Majesty's service;
>
> (e) a community order;
>
> (f) a youth rehabilitation order; or
>
> (g) a sentence equivalent to a sentence under sub-paragraphs (a) to (f) imposed under the law of Northern Ireland or a member

> state of the European Union, or such a sentence properly imposed in a country outside the European Union."

25. The context of the 2012 rule changes was summarised by Leggatt LJ in *JT v First Tier Tribunal* [2019] 1 WLR 1313, in which the Court of Appeal held that the "same roof" rule in the Scheme which applied so as to prevent a victim of child sexual abuse by her stepfather from claiming an award, violated Article 14 and Article 1 of Protocol 1 to the ECHR and was a breach of section 6(1) of the Human Rights Act 1998 ("HRA 1998").

26. Leggatt LJ explained how the Government of the day justified the tightening of eligibility on the basis that it would "restrict awards to blameless victims of crime"[1]. He said:

> "19. Substantial reforms were made to the arrangements for the payment of compensation for criminal injuries made under the 1995 Act when the current scheme was introduced in 2012. The reforms were preceded by a consultation. The consultation paper published by the Ministry of Justice ("Getting it right for victims and witnesses" (Cm 8288) (January 2012)) described a review of the scheme as "long overdue" and noted that "it takes place in a difficult financial climate" (para 23). The consultation paper explained that the aim of the Government's proposals for reform was to reduce the cost of the scheme whilst protecting awards to those most seriously injured by violent and sexual crime (ibid).
>
> …….
>
> 21. A high-level summary of the proposals, at para 174, stated on the subject of "eligibility":
>
> > "We propose that eligibility to claim from the scheme should be tightly drawn so as to restrict awards to blameless victims of crime who fully co-operate with the criminal justice process, and close bereaved relatives of victims who die as a result of their injuries …"
>
> 22. In a section which addressed the scope of the scheme in more detail, the paper stated, at para 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 victims. This purpose underpins all of our proposals, and it reflects the current scheme.""

[1] At [21] of Leggatt LJ's judgment

27. On 9 July 2021 the Supreme Court gave judgment in the case of *A and B v Criminal Injuries Compensation Authority* [2021] UKSC 27, dismissing the appellants' appeal and confirming the legality of the exclusionary rule insofar as it applies to victims of trafficking. It rejected the appellants' submission that victims of trafficking with relevant unspent convictions should be treated different from victims of other crimes because of the particular status and vulnerability of victims of trafficking. It also found that the difference in treatment between victims of trafficking with and without relevant unspent convictions was not a violation of Article 14 and Article 1 of Protocol 1 to the ECHR as it had "the legitimate objective of limiting eligibility to compensation to those deserving of it" and "satisfies the requirement of proportionality" (per Lord Lloyd-Jones at [92]).

28. It was common ground before me that whilst the judgment in *A and B* was an important part of the legal context, it did not assist in determining the issues in this case. The Defendant submitted that the reasoning in *A and B*, in particular the rejection of the notion that victims' vulnerability which leads to offending requires any kind of exemption from the exclusionary rule, as it is taken into account within the criminal justice system when prosecuting and sentencing decisions are made, applies equally to victims of child sexual abuse. The Claimant disagreed, and is pursuing an appeal on the lawfulness of the exclusionary rule. It is not for me to decide upon the lawfulness of the exclusionary rule. However, even assuming that the exclusionary rule is not unlawful for victims of child sexual abuse, that would not obviate the need for the Defendant to consider whether the rule should be revised, as a matter of policy, as recommended by the Inquiry.

The exclusionary rule: concerns and consideration

Concerns about the exclusionary rule

29. The Claimant submitted that the exclusionary rule has a disproportionate impact on victims of child sexual abuse. While victims are abused as "blameless" children, the perpetrators are often not convicted until many years after their crimes. After this extended passage of time, the victims are more likely than most applicants to the Scheme to have accrued unspent convictions, because of the impact of the abuse on the victims. According to the Claimant, there is a body of academic research which demonstrates that many victims of sexual abuse commit crimes because they have been abused, partly because victims of sexual abuse are at particular risk of substance misuse as a mechanism to cope with or escape the trauma of their abuse. See, for example, a briefing by the Prison Reform Trust in 2017, and a paper by Olivia Smith and Jessica Galey 'Supporting rape survivors through the criminal injuries compensation scheme: an exploration of English and Welsh Independent Sexual Violence Advisors experiences', 25 October 2017.

30. Concerns have been raised about the effect of the exclusionary rule on victims of sexual abuse. In 2015, Women Against Rape said that they routinely heard from women who had awards refused on the basis of very minor convictions, including one woman who was the victim of a brutal gang rape and started using drugs to cope with the trauma. Victim Support's commitments to victims in 2017 included campaigning to reform the rule which they considered to be disproportionate. They found from responses to

requests under the Freedom of Information Act 2000 that 159 victims of sexual abuse aged 16 and under had awards refused due to unspent criminal convictions.

31. In January 2019, the Victims Commissioner (Baroness Newlove) published 'Compensation without re-traumatisation: the Victim's Commissioner's Review into Criminal Injuries Compensation'. The report concluded:

> "Victims with unspent convictions are not eligible for compensation and their applications are declined. Given what we now know about crimes such as childhood sexual abuse and exploitation, childhood criminal exploitation, coercion and control within the context of modern day slavery or domestic abuse, we would question whether it is always appropriate to deny victims compensation on the basis that there is a direct link between their criminality and crimes committed against them….
>
> We have not had the opportunity to look at this in detail and believe that the policy of declining such applications should be reviewed in light of our better understanding of the complex relationship between abuse and exploitation and the committing of offences."

32. In October 2019, the all-party Parliamentary group on adult survivors of childhood sexual abuse ("APPG") published its report which, *inter alia*, recommended abolition of the exclusionary rule.

The Inquiry

33. The operation of the Scheme, including the exclusionary rule, became a subject of concern for the Inquiry. Its interim report was published in April 2018. The report made a series of recommendations, including the following:

> "*Revising the Criminal Injuries Compensation Scheme to remove barriers faced by victims and survivors of child sexual abuse*
>
> 5. The Chair and Panel recommend that the Ministry of Justice revises Criminal Injuries Compensation Authority (CICA) Rules, so that awards are not automatically rejected in circumstances where an applicant's criminal convictions are likely to be linked to their child sexual abuse. Each case should be considered on its merits.
>
> 6. The Chair and Panel recommend that CICA ensures that claims relating to child sexual abuse are only considered by caseworkers who have specific and detailed training in the nature and impact of child sexual abuse.
>
> 7. The Chair and Panel recommend that the Ministry of Justice revises CICA rules so that all applicants who previously applied

> for compensation in relation to child sexual abuse – but were refused solely due to the 'same-roof' rule – should be entitled to reapply for compensation and have their claim approved by CICA."

34. On 12 December 2018, Ms Melissa Case, Director of Criminal and Family Justice Policy at the Ministry of Justice, gave evidence to the Inquiry, and was asked about the exclusionary rule (page 136):

> "**Mr Skelton**: The second issue is criminal convictions. Again, the inquiry has given a recommendation in respect of reconsidering the position in respect of those. To give you … a stark example that came up, one witness …. said that when he finally escaped, …. from the institution where he was being sexually abused, he ended up, in order to survive, effectively, stealing things, including ….. a necklace …. and was caught for that …. ultimately, many years later, ….. his conviction effectively changed his award for compensation for the abuse he was trying to escape from. That is a pretty stark example, isn't it, of where the offending is related to the abuse and that ought to be taken into account and disregarded?
>
> **Ms Case**: I think that is a stark example and there have been others that witnesses have raised and I think it's been very powerful evidence put before the inquiry. It is now one of the key tenets that we are going to look at under the review the Secretary of State announced and obviously the evidence from this inquiry will be part of that….."

Ms Case then went on to outline some of the factors to be considered.

35. In September 2019, the Inquiry published its 'Accountability and reparations investigation report' and confirmed:

> "• the Inquiry's finding in its Interim Report that the current CICA rules fail to recognise the impact of child sexual abuse and, specifically, that abuse may have directly contributed to instances of offending and
>
> • the Inquiry's recommendation that the Ministry of Justice revise the rules so that applications are not automatically rejected in circumstances where an applicant's criminal convictions are likely to be linked to their sexual abuse as a child."

The Ministry of Justice's response to the Claimant's case in the Independent newspaper

36. On 30 July 2018, the Independent newspaper published an article about the sexual abuse suffered by the Claimant, and her application to the CICA. A response from the Ministry of Justice was included in the article which stated:

> "This was an awful crime and we have every sympathy for Ms Mitchell. The Criminal Injuries Compensation Scheme clearly sets out that payments may be reduced or refused if an applicant has an unspent conviction. We are looking at concerns about the compensation scheme as part of our work on a victims strategy which will be published this summer."

The press release

37. On 9 September 2018, the Defendant issued a press release announcing that there would be a review of the Scheme to ensure it reflects the changing nature of crime and can better support victims, especially of historic and current child abuse. It stated that the review would consider the exclusionary rule, among other matters. It did not refer to a public consultation.

The Victims Strategy

38. On 10 September 2018, the cross-Government Victims Strategy was published and presented to Parliament by the Defendant.

39. The key paragraph containing the claimed representation stated:

> "**Improve access to compensation**
>
> **Abolish the rule which denied compensation for some victims who lived with their attacker prior to 1979 and consult on further changes to the Criminal Injuries Compensation Scheme**. This will include considering how the scheme can better serve victims of child sexual abuse, exploring the recommendations made by the Independent Inquiry into Child Sexual Abuse (IICSA), and victims of terrorism."

Terms of Reference

40. In December 2018, the Terms of Reference for the review were published in Parliament. They stated as follows:

> "The review will examine whether the Scheme remains fit for purpose, reflects the changing nature of violent crime and effectively supports victims in their recovery. It will consider:

- The scope of the Scheme, including the definition of violent crime for the purposes of compensation for injury, and the type of injuries that are covered by the Scheme.

- The eligibility rules including, inter alia, concerns about time limits for making applications, unspent convictions, and consent in sexual offences cases.

- The requirements of the Scheme in relation to decision-making, including issues such as the level of evidence required for compensation claims, and the timeframes for accepting or rejecting awards.

- The value and composition of awards available through the Scheme, including the balance struck between serious and less serious physical and mental injuries.

- The impact of the Scheme on particular groups, including victims of child sexual abuse and victims of terrorism.

- Opportunities to simplify the Scheme.

- The affordability and financial sustainability of the Scheme.

The review will explore existing research on criminal injuries compensation and international examples of compensation and redress. It will take full account of the findings of the Independent Inquiry into Child Sexual Abuse.

……

The review will engage with key stakeholders, including victims, victims' representatives and groups, Police and Crime Commissioners, the judiciary, relevant criminal justice agencies, and others with expertise or an interest in criminal injuries compensation.

The Government will consult publicly on proposals in 2019."

The review and data analysis

41. Ms Joanne Savage, who is head of a policy team in the Family and Criminal Justice Policy Directorate at the Ministry of Justice, made a witness statement summarising the Defendant's review of the Scheme. Ms Savage explained that, at the time of publication of the Victims Strategy, the Government was committed to abolition of the 'same roof' rule, in response to the Court of Appeal judgment in *JT*. This change was taken forward separately from the main review. The Scheme was amended to give effect to the abolition of the rule, with the approval of Parliament, with effect from June 2019.

42. Ms Savage summarised the research undertaken by the policy team on the exclusionary rule at paragraphs 8 to 10 of her witness statement. As well as undertaking a literature

review, the team conducted stakeholder engagement to seek anecdotal and other evidence and to understand priority concerns.

43. Ms Savage explained, in paragraph 13, that the team examined the operation of the Scheme and analysed three years of decided claims between 2016 and 2019 across all violent crime types. Analysis showed that 8% of claims were refused under the exclusionary rule (as the primary reason for refusal). It was the fifth most common reason for refusal. The data also showed that the rate of rejections under the exclusionary rule was considerably lower in sexual assault claims than in other types of claims, at 2.5%, compared with 13.3% in cases involving assault with a weapon, 5.4% in physical assault cases, and 3.7% for "other crime types". The Defendant relied on this data in order to contest the Claimant's submission that the exclusionary rule had a disproportionate adverse effect on victims of child sexual abuse.

44. Whether the exclusionary rule has a disproportionate effect on victims of child sexual abuse is not a matter for me to decide, particularly since Ground 2 is not pursued. However, in fairness, I should also record the Claimant's response. She did not accept the quality of the Defendant's statistical analysis; the Defendant's data was undisclosed, and the results were contradicted by other experts. In any event, she submitted that the relevant comparison was between the operation of a blanket exclusion and a discretionary exclusion, as under the pre-2012 Scheme. Victims of child sexual abuse were likely to benefit from an exercise of discretion not to apply the exclusionary rule, because they were blameless children when they were abused, often many years ago, and the trauma of the abuse sometimes led to subsequent offending. Victims of other types of assaults were statistically less likely to benefit from a discretion not to apply the exclusionary rule, as the factors specific to child abuse cases did not apply and they were more likely to have convictions for other reasons, such as a high level of crime in their community. Therefore, the statistical comparison made by the Defendant did not address the disproportionate impact of a blanket exclusion, as opposed to a discretionary exclusion.

The consultation

45. In July 2020, the Defendant published the consultation paper, which summarised the work of the review, and its findings to date, and the matters on which the review was consulting the public. The questionnaire included sixteen specific questions relating to scope, eligibility, injury awards, and equality. Question 17 asked for "any further comments on the Scheme". There was no consultation question about the exclusionary rule. The public consultation opened on 16 July 2020 and closed on 9 October 2020. The Defendant has not yet published his final conclusions.

46. Section 3, titled 'Eligibility Rules', included a section on 'Unspent convictions'. It explained the background to the exclusionary rule and how the rule operated. It set out an analysis of the caseload data which I have referred to above. It summarised the concerns raised by stakeholders and others, and referred to the Inquiry's recommendation for change in its interim report, as well as the calls for change from the APPG and the Victims' Commissioner.

47. However, it then went on to say that any change would introduce additional complexity to the Scheme, and increase the time it takes for the CICA to make a decision on

eligibility. It also referred to the fact that all individuals with unspent convictions will have been found guilty of a crime, and are likely to have had any particular circumstances of their vulnerability presented in mitigation, and taken into account in sentencing. The conclusion was that offenders must fairly bear the impact of their offending, which includes exclusion from compensation of this kind, until their conviction becomes spent. It stated that the Defendant believes that the starting point for the unspent convictions rule – where individuals with unspent convictions that have resulted in community and custodial sentences will not be eligible for awards – is the right one and that it is important to continue to reflect the costs to society and to the State from offending.

48. Finally, the Defendant concluded:

> "106. After careful consideration, we do not believe it is possible to commit to making any change to this rule, without undermining the core principles of the Scheme and introducing significant potential discrimination and operational challenge."

49. At the hearing, the Defendant also drew attention to the fact that he did not consult on another issue about which concerns had been raised by the APPG and others, namely, the definition of 'crime of violence'. He decided, after consideration of evidence and the views of stakeholders, that the current definition was sufficiently broad to allow for a wide range of circumstances and so no change was required.

50. The consultation paper did not explain why the Defendant decided not to consult about the exclusionary rule. The explanation given by Ms Savage in her witness statement (paragraph 16) was that, following the internal review, the Defendant decided that reform of the exclusionary rule would not be appropriate and "[t]herefore there was no proposal on which to consult, and no question was asked on the rule". This reasoning was confirmed in the Detailed Grounds of Defence at paragraph 16.

51. In January 2020, civil servants submitted a proposals paper to ministers, which divided the proposals into Annex B (where change was proposed) and Annex C (where no change is proposed and/or views or evidence is being sought). The exclusionary rule was listed in Annex C. Ministers were asked "Do you agree to consult on the package of proposals as set out in Annexes B and C?" indicating that consultation on the "no change" proposals in Annex C was an option for consideration. Later in the paper, the reasons for recommending no change to the exclusionary rule were set out, together with a paragraph on consultation which stated:

> "**Consultation:** We propose to set out why no change is proposed and set right misconceptions as to how the rule is working. There are risks in asking a question that may lead respondents to demand a change that would be challenging to deliver. It is difficult to avoid any discussion of this area given the strength of feeling amongst stakeholders and IICSA and other stakeholders' recommendations."

52. At paragraphs 29 to 31 of her witness statement, Ms Savage said she was satisfied that the decision not to consult on the exclusionary rule complied with the Cabinet Office principles on consultation, in particular, to consult when plans are at a formative stage,

not when a final view has already been reached. I observed at the hearing that this appeared to be Ms Savage's *ex post facto* opinion in response to the claim for judicial review, not evidence of her reasoning at the time of the decision not to consult. Mr Manknell did not disagree with me.

Response to the consultation

53. In her witness statement, Ms Savage summarised the responses to the consultation at paragraphs 18 to 26, and in exhibit JS1 to her statement. Of the 96 responses received to the consultation, 26 raised the exclusionary rule, either within the course of their general submissions or responses to other questions, or under question 17. Among those responses, many called for abolition of the rule or a return to a discretionary rule. The Claimant's solicitors – the Centre for Women's Justice – made representations on the operation of the exclusionary rule, and referred to the Claimant's case. According to Ms Savage, these representations have been considered.

54. Several of the consultees, including the Centre for Women's Justice, expressed their surprise and disappointment at the absence of any consultation on the exclusionary rule.

55. Ms Dawn Thomas, Co-Chair of Rape Crisis England and Wales, made a witness statement in support of the Claimant's claim, explaining that Rape Crisis has had concerns about the exclusionary rule, and sought to persuade the government to look at this issue since 2015. She said, at paragraphs 7 to 9:

> "7. When the public consultation regarding the Criminal Injuries Compensation Scheme was published on 16 July 2020, we were very surprised that it did not include a consultation with respect the unspent conviction rule. We had always understood that this was going to be consulted on.
>
> 8. The reason we expected this matter would be consulted on is that we submitted a paper for the IICSA hearing on criminal injuries compensation, after which followed a recommendation of IICSA, stating that it expects the MoJ's consultation to give consideration to the possibility that abuse may have directly contributed to instances of offending. Furthermore, it states that applications should not be automatically rejected on the basis of unspent convictions that are likely to be linked to their sexual abuse as a child. The government's Victims' Strategy, which was published in 2018, stated that it would consult on IICSA's recommendations.
>
> 9. In addition to our general advocacy work on this matter, we have made our position on this issue known verbally through our communications with colleagues across Government departments. However, we hoped and expected to be able to provide a comprehensive response in writing to this issue, when responding to the consultation, including on behalf of our service users who have had experience of this rule."

56. The Claimant set out in her witness statement the reasons why she expected there to be a public consultation on the exclusionary rule and why she wanted to express her views to the Defendant. Following the article about her case in the Independent on 30 July 2018, when the Ministry of Justice stated that concerns about the operation of the Scheme would be considered in the forthcoming Victims Strategy, the Claimant waited for its publication. She said as follows:

> "10. …. The Victims' Strategy committed that there would be a consultation about various parts of the scheme, and talked about changing the unspent conviction rule. As such, I expected that there would be a consultation, and I wanted to respond. I wanted to make my point directly to the people making the policies, and thought that others in a similar position to me should be able to do the same."
>
> "12. …. My solicitor and I discussed that in the Victims Strategy, the Government had said that it would consult on IICSA's recommendations. In my mind, there was therefore a clear commitment to consult on changing the exclusionary rule."
>
> "13. ….. The terms of reference mentioned reviewing the unspent conviction rule, and at the end of the document, said there would be a public consultation on the proposals in 2019. In light of everything that had been said before, I took this as confirmation that there would be a consultation on this rule."
>
> "14. There was no consultation announced in 2019, but I assume that this as because the government was dealing with other matters and that it would take place at some point."
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> "15. …… I spoke with my solicitor who ……. explained that the Secretary of State for Justice had decided that they would be keeping the exclusionary rule, and there was not going to be a consultation on that issue. I was really shocked by this, as I had been expecting a consultation for nearly 2 years by this stage. I think it is appalling that they misled me, and likely lots of others who thought the same, into believing that they would consult on this issue, and let us have our say, and then take it away….. "

Legal framework

57. A legal obligation to consult may arise from a legitimate expectation of consultation, even in the absence of any statutory or other legal requirement to consult.

58. A legitimate expectation may arise from an express promise or representation made by a public body. We are not concerned here with the class of legitimate expectation that may arise from custom and practice.

59. In order to found a claim of legitimate expectation, the promise or representation relied upon must be "clear, unambiguous and devoid of relevant qualification": *R v Inland*

Revenue Comrs, Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545, per Bingham LJ at 1569G.

60. Bingham LJ's classic test has been widely approved and applied. In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2009] AC 453, Lord Hoffmann said, at [60]:

> "It is clear that in a case such as the present, a claim to a legitimate expectation can be based only upon a promise which is 'clear, unambiguous and devoid of relevant qualification': see Bingham LJ in *R v Inland Revenue Comrs Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569. It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest, particularly in the area of what Laws LJ called 'the macro-political field': see *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, 1131."

61. I was not persuaded by Mr Manknell's attempts to apply a more stringent test to the claimed representation in this case.

62. First, I do not agree that Simon Brown LJ applied a different or more stringent test in *R v Falmouth and Truro Port Health Authority, ex parte South West Water* [2001] QB 445, at 459B. Simon Brown LJ said:

> "*2. Legitimate expectation*
>
> Did the letter of 29 April 1998 give rise to a legitimate expectation of consultation? This category of case I identified as follows in *R v Devon County Council, Ex p Baker* [1995] 1 All ER 73, 89:
>
> > "(4) The final category of legitimate expectation encompasses those cases in which it is held that a particular procedure, not otherwise required by law in the protection of an interest, must be followed consequent upon some specific promise or practice. Fairness requires that the public authority be held to it. The authority is bound by its assurance, whether expressly given by way of a promise or implied by way of established practice. *R v Liverpool Corpn Ex p Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299 and *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 are illustrations of the court giving effect to legitimate expectations based upon express promises; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 an illustration of a legitimate expectation founded upon

> practice albeit one denied on the facts by virtue of the national security implications."

Mr Havers for the water undertaker put this case on the basis of an express promise, submitting that the letter at one and the same time both promised and initiated a consultation process. To my mind it did no such thing. It seems to me a very far cry from, for example, the assurance given in *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 that each illegal entrant would be interviewed and his case treated on its merits, of which Lord Fraser of Tullybelton giving the judgment of the Privy Council said, at p 638:

> "The justification for [the principle that a public authority is bound by its undertakings] is primarily that, when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty."

Once one accepts (as the judge did, and as I do too) that consultation was "not otherwise required by law", then only the clearest of assurances can give rise to its legitimate expectation: see *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569-1570, and that is not to be found in this letter."

63. As in this case, *Falmouth* concerned an alleged promise to consult. On my reading, it is clear from Simon Brown LJ's citation of *MFK*, at 459C, that he was applying Bingham LJ's test in *MFK* - "clear, unambiguous and devoid of relevant qualification"- and paraphrasing it in his own words - "only the clearest of assurances". He was not suggesting a different or additional test to Bingham LJ's test. If he had intended to do so, he would have said so explicitly.

64. Second, there is no authority for the proposition that a more stringent test should be applied to cases which do not involve the removal of an existing right. The cases referred to by Mr Manknell did not provide any basis for this submission. Although Lord Diplock in *CCSU v Minister for the Civil Service* [1985] AC 374, at 408G-H, only referred to existing rights (which Laws LJ described as the "paradigm case" in *R (Bhatt Murphy) v The Independent Assessor* [2008] EWCA Civ 755, at [29]), the doctrine of legitimate expectation has evolved since *CCSU*. As *De Smith's Judicial Review* (8th ed.) observes, "the reference by Lord Diplock to *past* advantage or benefit is unduly restrictive. The expectation may surely extend to a benefit in the future which has not yet been enjoyed but which has been promised."[2]

[2] 12.007

65. The principles to be derived from the current case law are helpfully distilled in a passage in *De Smith*:[3]

> "The promise may relate to an existing situation which will continue, or to a future benefit. In the case of an expectation inducing a right to procedural fairness rather than the substance of the expectation, the promise, as we have seen, may be either to the benefit itself or to a fair hearing…"

66. Ms Slarks referred me to some examples of cases in which claimants have claimed a legitimate expectation to processes that had nothing to do with their existing rights: *R (Save Britain's Heritage) v Secretary of State for Communities and Local Government* [2019] 1 WLR 929 and *Re Finucane's Application for Judicial Review* [2019] UKSC 7, [2019] 3 All ER 191. Neither case afforded any support for Mr Manknell's submission that a more stringent test than Bingham LJ's test in *MFK* ought to be applied.

67. In *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, Laws LJ explained the principled reasons why the courts will require a public authority to honour its promises, unless there is a good reason not to do so. He did not distinguish between existing and future rights. He said, at [68] – [70]:

> "68. The search for principle surely starts with the theme that is current through the legitimate expectation cases. It may be expressed thus. Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public. In my judgment this is a legal standard which, although not found in terms in the European Convention on Human Rights, takes its place alongside such rights as fair trial, and no punishment without law ……
>
> 69. This approach makes no distinction between procedural and substantive expectations. Nor should it. The dichotomy between procedure and substance has nothing to say about the reach of the duty of good administration…..
>
> 70. There is nothing original in my description of the operative principle as a requirement of good administration. The expression was used in this context at least as long ago as the *Ng Yuen Shiu* case, in which Lord Fraser of Tullybelton, delivering the judgment of the Privy Council, said this (638F):

[3] 12.018

> "It is in the interest of good administration that [a public authority] should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty."
>
> ……"

68. The onus of establishing a clear, unambiguous and unqualified representation rests on the Claimant.

69. The Courts have given guidance on how Bingham LJ's test in *MFK* is to be applied. In *Paponette and Ors v Attorney General of Trinidad and Tobago* [2010] UKPC 32, Lord Dyson JSC, giving the judgment of the majority of the Board, said, at [30]:

> "As regards whether the representations were "clear, unambiguous and devoid of relevant qualification", the Board refers to what Dyson LJ said when giving the judgment of the Court of Appeal in *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397, para 56: the question is how on a fair reading of the promise it would have been reasonably understood by those to whom it was made."

70. In *R (Patel) v General Medical Council* [2013] EWCA Civ 327, the court considered whether a statement made by the General Medical Council to the appellant was sufficiently clear, unambiguous and unqualified to give rise to a legitimate expectation.

71. Lloyd-Jones LJ (with whose judgment the Master of the Rolls and Lloyd LJ agreed), confirmed that the test was one of "objective intention" (at [43]).

72. Lloyd-Jones LJ then went on to say:

> "44. The question for consideration is how, on a fair reading of the statement, it would have been reasonably understood by those to whom it was made. (See *The Association of British Civilian Internees – Far Eastern Region v. Secretary of State for Defence* [2003] QB 1397 per Dyson L.J. para. 56.) In the present context the question is whether it would reasonably be understood as an assurance that the qualification would be recognised in the case of this appellant if he obtained it in a reasonable time.
>
> 45. The statement has to be considered in the context in which it was made ……."

73. As well as considering the context in which the statement is made, the Court will also have regard to other parts of the same document or related documents or those to which the main document cross-refers (e.g. *R (Davies) v Commissioners for Her Majesty's Revenue and Customs* [2011] UKSC 47, per Lord Wilson at [39]).

Conclusions

The representation

74. The Claimant submitted that the Defendant made a representation to consult on *inter alia* the exclusionary rule, and that representation was clear, unambiguous and devoid of relevant qualification.

75. The representation was contained in the Victims Strategy which was published on 10 September 2018 and presented to Parliament by the Defendant. In my view, the key paragraph ought to be interpreted in its context, within the document as a whole. I set out the relevant references below, with the key paragraph underlined for emphasis.

76. In the Victims Strategy, the Executive summary states:

> "In **Chapter 1**, we set out our key, overarching commitments. These include:
>
> ……
>
> • Abolish the rule which denied compensation for some victims who lived with their attacker prior to 1979 and consulting on further changes to the Criminal Injuries Compensation Scheme."

77. Chapter 1 is headed 'Overarching improvements to victims' experience'. At internal pages 18 and 19, it states:

> "**What are the challenges?**
>
> …..
>
> **Ensuring that compensation keeps pace with our changing understanding of crime**
>
> The CICS, which is administered by the ….CICA, sets out the circumstances in which a victim of a violent crime may be awarded government funded compensation. The Independent Inquiry into Child Sexual Abuse (IICSA) has made a number of recommendations about changes to the CICS and to CICA's operations for victims and survivors of sexual abuse.
>
> …."
>
> "**To address these challenges, we will:**
>
> ….
>
> **Improve access to compensation**

> **Abolish the rule which denied compensation for some victims who lived with their attacker prior to 1979 and consult on further changes to the Criminal Injuries Compensation Scheme**. This will include considering how the scheme can better serve victims of child sexual abuse, exploring the recommendations made by the Independent Inquiry into Child Sexual Abuse (IICSA), and victims of terrorism. (*emphasis added*)
>
> ……."

At the end of the chapter, at internal page 21, there is a "Summary of key issues" and the "Action" to be taken. Under the heading "**Improving access to compensation"**, the key issue is summarised as "Access to compensation does not reflect our understanding of the nature of crime". The action to be taken is listed as:

> "• Abolish the rule which denied compensation for some victims who lived with their attacker prior to 1979.
>
> • Consult on further changes to the Criminal Injuries Compensation Scheme.
>
> • ….."

78. As the Claimant submits, chapter 1 has been formatted and colour-coded to explain how it should be read. First, it identifies the challenges (in purple). Then it identifies how those challenges will be addressed (in purple), with a list of high-level commitments (in blue). The relevant high-level commitment here is "Improve access to compensation". Under each high-level commitment, it lists, in bold, the practical steps that will be taken in order to meet that commitment. The practical step relevant here is "Abolish the rule which denied compensation for some victims who lived with their attacker prior to 1979 and consult on further changes to the Criminal Injuries Compensation Scheme". After each emboldened practical step, unemboldened text provides a narrative explaining the detail of the practical step. The relevant narrative here is "This will include considering how the scheme can better serve victims of child sexual abuse, exploring the recommendations made by the Independent Inquiry into Child Sexual Abuse (IICSA), and victims of terrorism". This is the key paragraph.

79. In my view, when read objectively and applying the natural and ordinary meaning of the words, and following the sentence structure, the clear and unambiguous meaning of the key paragraph is as follows:

i) There are two practical steps identified. First, to abolish the same-roof rule, and second, to consult on further changes to the Scheme.

ii) The words "This will include" refer back to the consultation identified in the preceding sentence. Thus, the narrative which explains the detail of the practical steps is setting out a non-exhaustive list of the matters to be included in the consultation.

iii) The "recommendations made by the Independent Inquiry into Child Sexual Abuse (IICSA)" are a cross-reference to the two recommendations to the Ministry of Justice in the Inquiry's interim report. The relevant recommendation stated:

> "5. The Chair and Panel recommend that the Ministry of Justice revises Criminal Injuries Compensation Authority (CICA) Rules, so that awards are not automatically rejected in circumstances where an applicant's criminal convictions are likely to be linked to their child sexual abuse. Each case should be considered on its merits."

80. On a fair reading, the Claimant and others who read the Victims Summary would have reasonably understood the key paragraph to mean that the Defendant was promising that there would be a public consultation on further changes to the Scheme, including the Inquiry's recommendation to revise the exclusionary rule. In my view, they would not have reasonably understood the key paragraph to mean that the consultation on the Inquiry's recommendation to revise the exclusionary rule would only take place if the Defendant was in favour of a revision because there are no words which qualify the promise in that way, either expressly or impliedly. They would reasonably have understood the word "consultation" to mean that they would be given an opportunity to express their views on the Inquiry's recommendation, and that the Defendant would take their views into account before making his final decision as to whether the rule should be revised.

81. In my judgment, this representation was clear, unambiguous and devoid of relevant qualification. It was therefore sufficient to found a legitimate expectation.

82. In reaching this conclusion, I have given careful consideration to the alternative interpretations offered by the Defendant.

83. I consider that when the key paragraph is correctly read in the context of chapter 1, it is unarguable that the words "This will include" refer back to the blue high-level commitment to "improve access to compensation", rather than to the consultation, as the Defendant submitted, in paragraph 29 of the Detailed Grounds of Defence.

84. At the initial permission stage, Chamberlain J. accepted the Defendant's submission that the correct interpretation of the key paragraph was that there was a promise to consult, and a separate "promise to consider" under a "process" which would include consideration of the matters in the narrative text, including the Inquiry's recommendation to change the exclusionary rule. The promise to consider was kept by carrying out an internal review. The promise to consult was kept by holding the public consultation on other changes to the Scheme. On that basis, the Judge refused permission.

85. At the oral renewal hearing, Swift J. overturned Chamberlain J.'s refusal of permission based on this interpretation. In my view, he was right to do so. He accepted that the Claimant's interpretation was arguable, and did not even call upon Ms Slarks to make oral submissions in support of her written submission.

86. In my judgment, the Defendant's interpretation of the key paragraph, which was accepted by Chamberlain J. was clearly wrong. It implied into the paragraph a separate "process" (the review), in addition to the consultation. However, the word "process" or "review" does not appear in the paragraph, and cannot be implied. The natural and ordinary meaning of the words "This will include" is that they relate back to the consultation. It is notable that the Executive summary and the Summary of key issues both refer to the consultation, but make no reference to a separate review process.

87. Three months after the publication of the Victims Strategy, the Defendant published the Terms of Reference for a review of the Scheme. The document set out a comprehensive list of aspects of the Scheme which would be examined in the review, including the exclusionary rule and the findings of the Inquiry. In a separate sentence at the end of the document it said:

> "The Government will consult publicly on proposals in 2019".

88. On my reading, the Terms of Reference were consistent with the representation I have identified in the key paragraph in the Victims Strategy. They did not support the Defendant's interpretation that he was only committing to a review, and not a consultation.

89. The representation was made to the public at large. Furthermore, as a victim of sexual abuse who had been recently refused an award under Annex D, the Claimant was within the class of persons who would have a particular interest in the consultation. As the Claimant said in her witness statement:

> "10. …. The Victims' Strategy committed that there would be a consultation about various parts of the scheme, and talked about changing the unspent conviction rule. As such, I expected that there would be a consultation, and I wanted to respond. I wanted to make my point directly to the people making the policies, and thought that others in a similar position to me should be able to do the same."

90. It is apparent from the evidence that others also expected a public consultation on revision of the exclusionary rule (see the statement by Rape Crisis England and Wales, and responses to the consultation).

91. I conclude that the Claimant had a legitimate expectation of consultation on revision of the exclusionary rule, in the terms of the representation in the Victims Strategy.

Was there a lawful consultation?

92. The Defendant submitted, in the alternative, that the claim must fail because a consultation on the exclusionary rule was offered, in substance in the same manner as sought by the Claimant. The consultation paper addressed the exclusionary rule in some detail, referred to the Inquiry's recommendation, and explained why the Defendant had decided to reject it. The consultation gave consultees the opportunity to express their views on any aspect of the scheme in question 17. As set out in the statement of Ms

Savage, of the 96 responses to the consultation, 26 referred to the exclusionary rule, including the Centre for Women's Justice who are the Claimant's legal representatives.

93. In my judgment, this submission is misconceived. In order to be lawful, a consultation must take place at a formative stage. In *R (Moseley) v Haringey LBC* [2014] 1 WLR 3947, Lord Wilson approved this well-established principle in the following terms:

> "25. In *R v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168 Hodgson J quashed Brent's decision to close two schools on the ground that the manner of its prior consultation, particularly with the parents, had been unlawful. He said, at p 189:
>
> > "Mr Sedley submits that these basic requirements are essential if the consultation process is to have a sensible content. First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third … that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals."
>
> Clearly Hodgson J accepted Mr Stephen Sedley QC's submission. It is hard to see how any of his four suggested requirements could be rejected or indeed improved. The Court of Appeal expressly endorsed them, first in *Ex p Baker* [1995] 1 All ER 73, cited above (see pp 91 and 87), and then in *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, para 108. In Ex p Coughlan, which concerned the closure of a home for the disabled, the Court of Appeal, in a judgment delivered by Lord Woolf MR, elaborated, at para 112:
>
> > "It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this."
>
> The time has come for this court also to endorse the Sedley criteria. They are, as the Court of Appeal said in *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* (2012) 126 BMLR 134, para 9, "a prescription for fairness"."

94. It is clear from the civil servants' proposals paper to ministers, the consultation paper, and the evidence of Ms Savage that the Defendant had already made a final decision not to revise the exclusionary rule before the consultation paper was even published. The fact that some consultees made representations on the exclusionary rule cannot assist the Defendant since they could not have made any difference to the outcome – his decision had already been made.

95. In my view, if the Defendant had intended to conduct a genuine consultation on the exclusionary rule, he would have included a specific question about it in the consultation paper, not left it to be addressed under question 17.

Was the Defendant entitled to resile from his representation?

96. The Defendant does not seek to argue that he was entitled to resile from the representation.

Final conclusion

97. The claim is allowed. The Defendant acted in breach of the Claimant's legitimate expectation by failing to conduct a lawful consultation on the Inquiry's recommendation of a revision of the exclusionary rule.

Remedy

98. The Claimant applies for declarations that she had a legitimate expectation of consultation and that the Defendant failed to comply with his obligation to consult. I consider that it is appropriate to make a declaration, and I am grateful to the counsel for agreeing the following wording:

> "It is declared that the terms of the Victims Strategy created a legitimate expectation of consultation on revising the unspent convictions rule in paragraph 3 of Annex D of the Criminal Injuries Compensation Scheme so that applications are not automatically rejected in circumstances where an applicant's criminal convictions are likely to be linked to their sexual abuse as a child, and that in breach of that expectation, the Defendant did not consult on this issue."

99. The Claimant also seeks a mandatory order requiring the Defendant to comply with the obligation to consult. The Defendant opposes this, on the basis that the Defendant has already clearly set out his reasons for deciding not to revise the exclusionary rule, having taken into account the views of those who advocated a revision. It is therefore unclear what purpose would be served at this stage some 9 months after the conclusion of the main consultation.

100. The courts recognise that a public authority may have good reasons for subsequently resiling from a legitimate expectation made at an earlier date. In *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213, Lord Woolf considered the possible outcomes of a legitimate expectation claim and said at [57]:

> "…the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here is it uncontentious that the court itself will require *the opportunity for consultation* to be given unless there is an overriding reason to resile from it (see *Attorney General of Hong Kong v. Ng Yuen Shiu* [1983] 2 AC 629) in which case the court will itself judge the adequacy of the reason for the change of policy, taking into account what fairness requires…"

101. However, in this case, the Defendant has not felt able to make any submissions as to why he was entitled to resile from the legitimate expectation. By inviting the Court to refuse to remedy his breach by carrying out a lawful consultation, he is seeking to achieve the same result by another route.

102. It is important to bear in mind the reason why the courts require public authorities to honour their promises. The principles were set out by Laws LJ in *Nadarajah*, at [68]:

> "Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public."

103. I do not consider that there are any practical reasons why a further consultation cannot take place. Although the main consultation concluded in October 2020, the Defendant has not yet made or published his final conclusion on changes to the Scheme. Ms Savage said in her witness statement that this is in the course of preparation. Much of the background work on the operation of the exclusionary rule has already been done, as indicated by Ms Savage in her evidence and the text of the consultation paper.

104. As to the content of the further consultation, much of the relevant text in the previous consultation paper can be re-used, provided it is made clear that no final decision will be made until after the results of the consultation have been considered. I agree with the Claimant that, as the Defendant does not wish to formulate or advocate a proposal for change, the consultation could lawfully state that the Inquiry had proposed that the Scheme rules "should be revised so that awards are not automatically rejected in circumstances where an applicant's criminal convictions are likely to be linked to their child sexual abuse. Each case should be considered on its merits".

105. I recognise that the Defendant has already decided that the exclusionary rule should not be revised, and so it will be challenging for anyone within the Ministry of Justice who was involved in advising that there should be no change to the exclusionary rule to consider the issue afresh. However, I have no doubt that the Defendant will undertake the exercise with an open mind, in accordance with the law.

106. In my view, a further consultation can serve a useful purpose. Although a number of people commented on the exclusionary rule in the main consultation, it is possible that there are others, like the Claimant, who did not respond to the consultation because the Defendant had already decided not to make any change to the exclusionary rule, and was not consulting upon it. It is possible that the publicity generated by this case will prompt further responses. As the Claimant submitted, the Court does not know what future consultees may say, nor whether the Defendant may be persuaded to change course, away from its current preferred outcome. I have considered section 31(2A) of the Senior Courts Act 1981, though it was not relied upon by the Defendant. As the content and outcome of a further consultation is unknown, I cannot be satisfied that it is highly likely that the outcome for the Claimant would not have been substantially different if the conduct complained of had not occurred.

107. Finally, I consider that a further consultation would accord with the spirit of the Defendant's own words in the Introduction to the consultation paper:

> "28. …. The review seeks to deliver better access to compensation for victims of violent crime while ensuring the Scheme remains affordable and financially sustainable….. We are especially interested in hearing from victims and survivors, victims' groups, academics and clinical experts. We also welcome views from professionals across criminal justice, health, welfare, local authorities and the charity sector.
>
> 29. For each of the areas covered by the review, we will outline the current position and identify the case for change…..
>
> 30. As the review is under way, proposals in this consultation are at different stages of development and the accompanying questions reflect this – for example, in some we will ask for views on specific proposals, whereas in others we may ask for further evidence to better understand the issue…."

108. The open and inclusive approach described in the Introduction is, in my view, appropriate, particularly since the Inquiry and many other well-informed persons have recommended revision of the exclusionary rule.

109. For all these reasons, I consider that it is just and appropriate to uphold the general principle that the law will provide a remedy for a breach of a person's legal rights. Although I gave the Defendant the option of giving an undertaking, the parties have agreed the terms of a mandatory order. The order provides that the Defendant is required to carry out a public consultation on whether the unspent convictions rule in paragraph 3 of Annex D of the Criminal Injuries Compensation Scheme should be revised so that applications are not automatically rejected in circumstances where an applicant's criminal convictions are likely to be linked to their sexual abuse as a child. Following completion of this consultation, the Defendant should re-consider whether the unspent convictions rule should be revised, and announce his decision.