Y v (1) First-tier Tribunal and (2) Criminal Injuries Compensation Authority (CIC)
[2016] UKUT 202 (AAC)

JR/2930/2014

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Decision and Hearing

1. **This application succeeds.** Pursuant to the judicial review jurisdiction of the Upper Tribunal and in accordance with the provisions of sections 15 to 18 of the Tribunals, Courts and Enforcement Act 2007 I make **a quashing order** in respect of the decision of the First-tier Tribunal (Social Entitlement Chamber) to refuse an appeal against the decision of Criminal Injuries Compensation Authority ("the Authority" or "CICA") not to make an award under the Criminal Injuries Compensation Scheme 2008 ("the 2008 scheme"). The decision of the First-tier Tribunal was made on 20th March 2014 and the CICA reference is X/12/207179.

2. I substitute my own decision as being the only decision that the First-tier Tribunal could properly have made. This is that (a) Y is eligible for an award of compensation on the basis and for the reasons given below and (b) the matter is referred to the Authority for further consideration of the claim on this basis and on the basis that (as agreed between the parties) Y sustained a criminal injury and was a victim of a crime of violence and that his condition resulted from the incestuous relationship between his mother and her own father.

3. I held an oral hearing of this application for judicial review at Field House in London on 21st January 2016. The applicant, who is the claimant for compensation, did not attend in person but was represented by Malcolm Johnson, solicitor of BL Claims Solicitors. The Authority, which is the interested party in this application, was represented by Ben Collins of counsel, instructed by the Treasury Solicitor. I am grateful to them for their assistance. The First-tier Tribunal is the respondent but had, quite properly, taken no part in the proceedings. I refer below to actions having been taken by "the applicant" but in practice reference is to actions taken on his behalf.

The 2008 Scheme

4. This case is about the application of certain provisions of the 2008 scheme, under which the claim for compensation was made. So far as is relevant paragraphs 6 and 8 of the scheme provide as follows:

> 6. Compensation may be paid in accordance with this Scheme:
>
> (a) to an applicant who has sustained a criminal injury on or after 1 August 1964;
>
> (b) …

> For the purposes of this Scheme "applicant means any person for whose benefit an application for compensation is made, even where it is made on his or behalf by another person.
>
> 8. For the purpose of this Scheme "criminal injury" means one or more personal injuries as described in paragraph 9, being an injury sustained in and directly attributable to an act occurring in Great Britain which is:
>
> (a) a crime of violence …

5. It is not necessary to set out paragraph 9. It is not disputed in this case that there was a crime of violence that occurred in Great Britain. The First-tier Tribunal stated that "the issue is whether the applicant sustained personal injury directly attributable to a crime of violence".

Background and Procedure

6. The applicant Y is a man who was born on 14th October 1987. His mother was born on 14th October 1966. From about 1975 her father began to abuse her, including having sexual intercourse with her from when she was aged about 11. In about 1991 her father pleaded guilty at the Crown Court to 4 counts of incest occurring between 1982 and 1990 and was sentenced to three years imprisonment. DNA tests have shown that Y's grandfather is in fact also his father, and is also the father of Y's sibling born on 20th January 1990. This is not disputed and Y's mother has been awarded compensation in her own right in respect of the assaults on her by her own father. Y was born with a genetic disorder or disorders described as "a recessive syndrome with learning and joint problems". He has severe learning difficulties, developmental delay, a heart murmur, hearing and sight problems, lax joints, epilepsy and no sense of danger. His sibling does not have this condition or these problems. As I understand it there is a 50% chance of such problems appearing in those who were born of an incestuous relationship, compared with a 2% or 3% chance in the general population. Based on expert evidence the First-tier Tribunal found that Y's problems resulted from him being born of an incestuous relationship and this is now agreed between the parties. Y's mother receives carer's allowance in respect of looking after him.

7. In about February 2012 a claim was made for compensation for Y. On 25th June 2012 the Authority refused to make an award on the basis that Y had not been injured in a crime of violence and that his congenital condition was a result of the relationship between his parents and not of the assault itself. This decision was maintained on review by the Authority on 7th December 2012 and on 6th March 2013 the applicant appealed to the First-tier Tribunal against the decision of the Authority. The tribunal heard the appeal on 19th March 2014 and in a full decision dated 20th March 2014 confirmed the decision of the Authority.

8. On 3rd June 2014 the applicant applied to the Upper Tribunal for judicial review of the decision of the First-tier Tribunal and on 4th July 2015 I gave him permission to proceed with the application on the basis of consideration of the papers. However, I

stayed further proceedings pending the decision of the Court of Appeal in the foetal alcohol case (see further below). The Court of Appeal decision in that case was issued on 4th December 2014 and the parties in the present case were given the opportunity to make further written submissions. There was then a further delay while the Supreme Court considered whether to grant permission to appeal in the foetal alcohol case, which it refused to do at the end of March 2015. On 5th August 2015 I directed that there be an oral hearing of the substantive application in the present case. Unfortunately it was not possible for the hearing to take place until 21st January 2016. The Authority opposes the application for judicial review and supports the decision of the First-tier Tribunal.

The First-tier Tribunal Decision

9. The First-tier Tribunal regarded as "the most valuable authority" a decision of the Outer House in Scotland in Millar (Curator Bonis to AP) v CICB 197 SLT 1180 dated 13th November 1996 ("the Millar case") in relation to the 1969 criminal injuries compensation scheme. It adopted the reasoning in the Millar case "in its entirety". I return to that case below but here I indicate that the First-tier Tribunal took from it the proposition that a genetic disorder arising as a result of the consanguinity of the parents could not be a personal injury within the scheme. There was no uninjured state in which Y could exist without the genetic disorder from which he suffers. There was no "pre-assault" Y.

10. The First-tier Tribunal declined to treat the conception and birth as being an injury because that would involve accepting a claim for "wrongful life" and that being born at all would be the actionable injury, the common law did not recognise a claim for this, it would be impossible to quantify the claim or define the injury, and it was implausible that the 2008 scheme would have provided far greater recovery out of public funds than that available under the common law. As Y did not have and could never have had an uninjured state it is impossible to talk of him being injured.

11. Some of this reasoning seems to me to be fallacious. If Y had been attacked as a very small baby, perhaps with blows to the head, it may well be that such an attack could have caused injuries with similar effects to some of the manifestations of his genetic disorder. Then there would have been no choice but to try to quantify the amount of compensation within the provisions of the scheme. The tribunal had already acknowledged (paragraph 15) that "It is perfectly clear that the 2008 Scheme is not to be interpreted according to common law principles as it is expressly required that that compensation is determined in accordance with the Scheme" and added (paragraph 42) that the fact that Y's claim would not be recognised at common law "does not of itself exclude his claim from the terms of the Scheme but it is relevant to the Tribunal's approach to the "injury" issue".

The Millar Case and Cases Cited Therein

12. The Outer House of the Scottish Court of Session was considering an application for judicial review of a decision of the Criminal Injuries Compensation Board ("CICB", a predecessor of CICA) made under the Criminal Injuries Compensation

Scheme 1964, revised 1969 ("the 1969 Scheme"). The decision was made by Lord Osborne, a senior and distinguished Scottish judge. Nevertheless decisions of the Outer House are not binding on the Upper Tribunal.

13. The facts were very similar to those of the present case. The applicant was a child who had been conceived and born as the result of an incestuous rape of her mother by her maternal grandfather. She was born with a set of congenital characteristics not present in the general population which arose directly from the consanguinity of her parents. These included profound mental handicap, deafness and microcephaly.

14. In general terms the 1969 Scheme provided for an ex gratia payment of compensation, assessed on the basis of common law damages, "where the applicant … sustained … personal injury directly attributable to a crime of violence" (paragraph 5). There was no authority directly on the point but Lord Osborne was referred to a number of authorities (including some from the United States) relating to injury in other contexts. On this basis he concluded that "the weight of American authority" is to the effect that in the law of negligence in America wrongful life claims were not admissible because of the "conceptual problem of regarding a genetic defect as an injury and the impossibility of assessment of the damages on any rational basis". In concluding this, he relied on two cases in particular. In Williams the New York Court of Appeals considered an action for negligence by a child who had been conceived after a sexual assault on his mother, a patient in a state mental hospital, against New York State for negligently failing to prevent the assault. The New York court explained that damages in tort are awarded on the basis of a comparison between the present position and the one that that the plaintiff would have been in had the negligent act not occurred and that comparison could not really be done in that case. Turpin v Sortini concerned a deaf child who sought damages for the defendants' failure to advise its parents of the possibility of hereditary deafness "thus depriving them of the opportunity to choose not to conceive the child". In rejecting the claim the Supreme Court of California observed that the child never had a chance to be born "as a whole, functional human being without total deafness" and that had the defendants done their job properly the child would not have been born at all.

15. Lord Osborne also referred in particular to one United Kingdom decision, McKay v Essex Area Health Authority [1982] 1QB 1166. The claim there was that while the child was in the womb the mother was infected with rubella which caused the child to be born with deformities. One aspect of the action was in effect a claim that the doctors had been negligent in allowing the child top be born alive rather than advising and assisting the mother to have a lawful termination. The Court of Appeal held that that aspect of the claim was contrary to public policy as being a violation of the sanctity of human life, and that the court could not evaluate non-existence for the purpose of awarding damages for the denial of it.

16. Lord Osborne's conclusion was as follows (page 34 of the version of the decision with which I have been supplied):

> "I have reached the conclusion that [CICB] did not err in law when they concluded in their written decision that that "Congenital deficiencies cannot

> properly be held to be injuries within the meaning of the Scheme". … It appears to me that the concept of injury, in the context of a situation in which compensation for it must be assessed, presupposes a pre-injury state which is capable of assessment and comparison with the post-injury state. It is obvious from the circumstances of this case that the child concerned never had, nor could have, any existence save in a defective state. Accordingly, in my opinion, it is inevitable that her plight, grievous though it may be, cannot be seen as "personal injury", within the meaning of para 5 of the revised 1969 Scheme".

17. Lord Osborne was "confirmed" in his view by the fact that the particular Scheme that he was considering provided that compensation was to be assessed on the basis of common law damages. It was "quite evident" that such an assessment would be impossible and that "The common law, in my opinion with logical justification, has set its face against the possibility of making an assessment of damages in a case such as this". He said that this state of affairs was one that he could properly take into account in interpreting the expression "personal injury" in the 1969 Scheme.

The Applicant's Arguments

18. For Y it was pointed out that even in the Millar case Lord Osborne considered that the birth of the child and its disabilities were both directly attributable to the rape. His decision was not based on the issue of attribution but on the meaning of "personal injury". The key point is that that receiving a double dose of a defective gene was a personal injury for the purposes of the 2008 Scheme.

19. It was argued that the common law should not be imported into the interpretation of the 2008 Scheme (Rust – Andrews v First-tier Tribunal [2011] EWCA Civ 1548) and that the plain meaning of the scheme means that the claimant was a victim of a crime of violence. If the common law is to be so imported, the law in relation to "wrongful birth" and "wrongful conception" has moved on considerably since Lord Osborne's decision (1996). In McFarlane v Tayside Health Board [2000] 2 AC 59 the House of Lords upheld the right of a mother to claim for negligence arising from the failure of her husband's vasectomy which led to pregnancy and associated costs. In Parkinson v St James and Seacroft University Hospital NHS Trust [2001] EWCA Civ 530, [2002] QB 266 the Court of Appeal considered the right of a mother to claim for negligence when her own sterilisation operation had failed. The Court held that although there was no right to claim in respect of the costs of upbringing and caring for a normally healthy child, there might be entitlement in respect of the extra costs of bringing up a child with significant disability.

20. It was argued that Lord Osborne (specifically followed by the First-tier Tribunal in the present case) was wrong to say that "the child concerned never had, nor could have, any existence save in a defective state". There is an element of chance in how a child born to consanguineous parents will turn out. It is not obvious that Y could only have existed in "a defective state" – he could have been born in the same condition as his sibling. There had been many scientific, medical and legal developments in this are (dealt with at some length in the claimant's written skeleton argument to the First-

tier Tribunal) and "There is nothing in the 2008 … Scheme that indicates that a victim of a crime of violence has to be a fully formed embryo, foetus or new born child, nor that the crime of violence has to produce the damage at a particular stage in the formation of a human being".

21. Incest is a crime precisely because it is sought to avoid the very harm that happened to Y in the present case. In Attorney-General's Reference Non 3 of 1994 [1998] AC 245 the House of Lords had established that an assailant could be convicted of manslaughter against an unborn child. Thus the criminal law will penalise those who commit crimes against a foetus "and by extension" a person in Y's situation. Alternatively, there is nothing in the terms of the 2008 Scheme which precludes an unborn child or person with technically no existence from making a claim when they come into existence.

22. The claimant also addressed arguments on human rights law to the First-tier Tribunal but it is not necessary for the purposes of my decision to go through those arguments or to make any specific comment on them.

CICA's Arguments

23. CICA accepted that there was a crime of violence and that Y's genetic disorder was probably caused by the incestuous intercourse between Y's mother and her own father. However, in essence it adopted the reasoning in Millar and of the First-tier Tribunal in the present case. It was "necessarily correct" to say that Y's uninjured state could only be never to have been conceived. Had the crime of violence not been committed Y would never have been born.

24. In any event the consequences of the crime of violence all took effect before Y was born and therefore at a time when he had no legal personality. Harm caused before birth which has consequences after birth cannot be treated as an injury sustained by a living person (relying on the Court of Appeal decision in the foetal alcohol case – see further below).

25. CICA accepted that the 2008 Scheme falls to be interpreted by its own terms rather than by reference to the common law. The First-tier Tribunal had interpreted the words "personal injury" according to their own meaning, not by reference to any common law definition. However, the First-tier Tribunal was entitled to note that the common law does not recognise a claim for wrongful life.

The Foetal Alcohol Case

26. CP v First-tier Tribunal and Criminal Injuries Compensation Authority [2014] EWCA Civ 1554 ("the foetal alcohol case") was an unsuccessful appeal to the Court of Appeal from my decision in [2013] UKUT 638 (AAC).

27. During pregnancy CP's mother "consumed grossly excessive quantities of alcohol" as a direct result of which CP was born with foetal alcohol spectrum disorder. The First-tier Tribunal decided that CP was entitled to a criminal injuries

compensation award on the basis that the mother had committed an offence contrary to section 23 of the Offences Against the Person Act 1861, which requires administration of a destructive etc thing "to another person". I decided that as a matter of law the foetus cannot be another person before birth and that the section 23 offence cannot be committed by a pregnant woman drinking alcohol during her pregnancy and thereby causing damage to her unborn child. I rejected an argument, supposedly based on Attorney-General's Reference No 3 of 1994 [1998] AC 245 that the First-tier Tribunal was entitled to link for the purposes of criminal liability the essence of the *actus reus* of the section 23 offence – the administration – to the born child so as mean that the unborn foetus in effect becomes "another person".

28. The Court of Appeal agreed with this analysis (eg in paragraphs 45 and 61). Mr Collins relied in particular on the following parts of Lord Justice Treacy's opinion:

> 42. … The reality is that the harm has been done to the child whilst it is *in utero*. The fact that if the child is born alive it will suffer the consequences of the insult to it whilst in the womb does not mean that after birth it has sustained damage by reason of the administration of the noxious substance … [In the] Thalidomide tragedy … The injury was done to the affected children by the administration of the drug whilst they were still in the womb. Those children who were born affected were born with missing or ill-developed limbs. Whilst they suffered the consequences on a lifetime basis after birth, they did not sustain any additional damage after birth by administration of the drug.
>
> 43. … expert evidence … shows that the harm which is done by ingestion of excessive alcohol in pregnancy is done whilst the child is in the womb. The child would then, when born, show damage demonstrated by growth deficiency, physical anomalies and dysfunction of the central nervous system. Very often, as in this case, the full extent of retardation and damage will not become evident until the child reaches milestones in its development, at which point matters can be assessed. The fact that such deficiencies cannot be identified until that stage does not constitute fresh damage. It merely means that the damage was already done but has only then become apparent.

29. The applicant argued that his case is quite different. There is no dispute that the original sexual assault of his mother was a crime of violence or that his genetic disorder was probably caused by the incestuous relationship. There is no question of construing a criminal statute or considering *actus reus* and *mens rea*, which is what the foetal alcohol case was about.

Conclusions

30. During the course of this case there have been several references to the decision of the Court of Appeal in Rust – Andrews v First-tier Tribunal [2011] EWCA Civ 1548. That case concerned the assessment of compensation for loss of future earnings in a claim for criminal injuries compensation under the 2001 Scheme. Judgment was given

by Lord Justice Carnwath (who was also the Senior President of Tribunals). In paragraph 34 he said:

> 34. In my view … if one looks simply at the Scheme, rather than trying to fit it into a pre-conceived "common law" model, this is a relatively straightforward case. The issue is not whether "common law principles" apply. The [Criminal Injuries Compensation Act 1995] answers that in the negative, since it expressly requires compensation to be determined in accordance with the Scheme. However … that does not require the exercise to be conducted in a straitjacket or mean that no help can be gained where appropriate from the wisdom reflected in authorities at the highest level dealing with similar issues.

31. In this context the arguments over the extent to which the common law (whether in the United States or in this jurisdiction) does or does not recognise claims for "wrongful life", or the extent of liability for negligence, are of very limited assistance. For example, the decision in the New York case of Williams (cited by Lord Osborne in Millar) arises from a totally different jurisprudential basis to the claim in the present case.

32. It is clear that Lord Osborne in Millar was heavily influenced by common law developments in the law of negligence. That might have been appropriate under the 1969 Scheme, which explicitly provided that compensation was to be assessed on the basis of common law damages. In contrast the 2008 Scheme has a self contained set of provisions for assessing the amount of compensation and (to this extent) I agree with the First-tier Tribunal that the fact that Y's claim would not be recognised at common law (assuming that to be the case) does not exclude his claim from the terms of the 2008 Scheme.

33. I have already observed above that it is no answer to Y's claim that quantification of the amount of compensation would not be possible at common law. Under the 2008 Scheme compensation may be paid in accordance with the scheme to a person who has sustained a criminal injury (paragraph 6(a)). The question of whether a claimant has sustained a personal injury is a logically and chronologically prior question and is not to be determined by a premature assessment of whether compensation can be calculated. I make one exception to this – that if it is absolutely clear that even if a person has sustained a personal injury the amount of compensation payable would be less than the minimum award (under paragraph 26 of the scheme), it might be legitimate to refuse compensation on that basis. I note that there is a maximum award payable in respect of a claim, whatever the circumstances (paragraph 24) and this provides a safeguard in respect of any fear of vast awards. The fact that the scheme provides for both minimum and maximum awards contributes to making it very different from the common law approach to damages.

34. Did the applicant sustain personal injury directly attributable to a crime of violence? The First-tier Tribunal indicated that, had it not been for the decision in Millar, it would have been tempted to find that the conception not have happened without the assault although the direct reason why "the disorder eventuated was the consanguinity of his parents" paragraph 45). In my opinion this is an artificial

distinction in the circumstances of this case. The crime of violence was an incestuous rape which led both to the birth of the claimant in his condition. The issue is whether his condition can be regarded as a personal injury. On this issue I find the reliance on Millar unconvincing. I see in the scheme no requirement to establish facts about a "pre-injured" state. The scheme is intended to be a practical self-contained workable pragmatic scheme to compensate victims of crimes of violence. Subject to specific decisions of the Court of Appeal and Supreme Court/House of Lords it is inappropriate to consider its provisions in the context of deep philosophical discussions about the nature of life and existence.

35. Care must be taken in drawing parallels with the decision in the foetal alcohol case. The basis for the ultimate rejection of the claim in that case was that no criminal offence had been committed (and therefore no "crime of violence"). This was because the wording of section 23 of the 1861 Act required that the administration of the relevant substance in that case be to "another person" and the House of Lords had decided in Attorney-General's Reference No 3 of 1994 that a foetus is not a person. That is the context in which the paragraphs of the Court of Appeal decision in the foetal alcohol case on which Mr Collins relied must be understood. In the present case there is no doubt that a crime of violence had been committed.

36. The 2008 Scheme provides that compensation be payable to "an applicant". Clearly, at the time of the claim the applicant is a person. There is no provision in the scheme that the applicant must have been "a person" at the time that the crime of violence was committed. In everyday terms and in common parlance it seems to me that he has suffered injuries. Those injuries have been sustained in and are directly attributable to a crime of violence.

37. For the above reasons this application for judicial review succeeds and I make the order in paragraph 2 above.

H. Levenson
Judge of the Upper Tribunal
25th April 2016