JR/1201/2011

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) sitting in Manchester to allow an appeal against the decision of the Criminal Injuries Compensation Authority ("CICA") not to make an award. The decision of the First-tier Tribunal was made on 7th February 2011 after a hearing on 12th January 2011 and was made under reference 9/256563. I substitute my own decision as being the only proper decision that the First-tier Tribunal could have reached had it not made the error of law that I identify below. This is to the effect that the claimant is not entitled to criminal injuries compensation in respect of her claim made on or about 18th November 2009 in relation to foetal alcohol spectrum disorder.

2. I held an oral hearing of this application for judicial review on 6th November 2013. The applicant, the Criminal Injuries Compensation Authority, was represented by Ben Collins of counsel, instructed by the Treasury Solicitor. The claim for compensation was made by a local authority on behalf of a child to whom I shall refer as CP. They were represented by John Foy QC and Laura Begley of counsel instructed by GLP Solicitors of Greater Manchester. I am grateful to them all for their assistance. The First-tier Tribunal is the respondent but had, quite properly, taken no part in the proceedings.

Background and Procedure

3. The basic facts are agreed in this case. CP is a girl who was born on 10th June 2007. Her mother was quite young but CP is her second child. During the pregnancy CP's mother (in the words of the First-tier Tribunal) "consumed grossly excessive quantities of alcohol" (paragraph 48 of the written reasons). She had been "using drugs" (presumably unlawfully taking non-prescription, recreational drugs) but stopped doing this during her pregnancy and also reduced her consumption of alcohol. She did engage with maternity services and saw her GP, a midwife, a health visitor and a social worker (with whom she discussed the dangers of alcohol consumption on at least two occasions) and was referred to an alcohol counselling project. The First-tier Tribunal found (paragraph 50) that she "had no learning disabilities or mental health or other issues to affect her ability to understand the dangers to her baby of drinking during pregnancy" and that such dangers were commonly known to the population a large (paragraph 51). Accordingly, the tribunal concluded that she was aware of such dangers (paragraph 52).

4. CP was born with foetal alcohol spectrum disorder as a direct result of her mother's consumption of alcohol during pregnancy. This was not diagnosed until birth, when CP displayed signs of intrauterine growth retardation, small stature and particular facial features. There was a failure to thrive and there was a risk of

neurodevelopment, intellectual and behavioural difficulties, organ dysfunction and other problems. CP is now six years old but I do not know her current condition or prognosis.

5. On 20th November 2009 a claim was made on CP's behalf for compensation under the 2008 criminal injuries compensation scheme ("the 2008 scheme"). On 27th November 2009 CICA refused to make an award on the basis that CP had not been the victim of a crime of violence. CICA maintained its decision on review on 19th January 2010 and on 16th April 2010 an appeal against that decision was made to the First-tier Tribunal. The First-tier Tribunal heard the matter on 12th January 2011 and its written decision and reasons were signed on 7th February 2011. It allowed the appeal to the extent of deciding that CP had sustained personal injury directly attributable to a crime of violence and was eligible for compensation, and directed further submissions in relation to further determination of the claim.

6. CICA remained of the view that there had been no crime of violence and on 5th May 2011 applied to the Upper Tribunal for judicial review of the decision of the First-tier Tribunal. On 28th July 2011 I gave CICA permission to apply for judicial review and on 4th October 2011 I directed that there be an oral hearing of the application. This was initially fixed for 30th April 2012 but at the request of the parties the hearing was postponed until after the Supreme Court had made its decision in Jones v First-tier Tribunal and CICA [2013] UKSC 19. That decision was issued on 17th April 2013 and the oral hearing before the Upper Tribunal finally took place on 6th November 2013. It is regrettable that this has all taken so long (it is now four years since the claim was made).

Relevant Criminal Injuries Provisions

7. The 2008 scheme was made under the authority of section 1 of the Criminal Injuries Compensation Act 1995. It is the relevant scheme for the purposes of the present case. The relevant paragraphs of the scheme provide as follows:

> Paragraph 6. Compensation may be made in accordance with this scheme:
>
> > (a) to an applicant who has sustained a criminal injury on or after 1st August 1964 …
> >
> > 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 behalf by another person
>
> Paragraph 8. For the purposes 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 (including arson, fire raising or an act of poisoning.
>
> Paragraph 9. For the purposes of this Scheme "personal injury" includes physical injury … mental injury … and disease …

8. The parties are agreed that foetal alcohol spectrum disorder is a physical injury within the meaning of paragraph 9. They also state that whether or not CP's mother was prosecuted or convicted is not relevant (paragraph 10). I do not quite accept this, because a conviction would show that a crime had been committed (although not necessarily a crime of violence within the meaning of the 2008 scheme). I certainly accept that the absence of a prosecution or conviction does not affect the question of whether compensation is payable. In the absence of a conviction, it is for CICA or (in this case) the First-tier Tribunal to decide whether a relevant crime has actually been committed.

9. The first real area of dispute in this appeal is indeed whether a crime was committed. There is no definition of "crime" in the 2008 scheme and reference must be had to the general criminal law. Neither is the concept of "crime of violence" further defined. This is the subject of recent and (probably) pending decisions by the higher courts but in view of my conclusions on the (logically) prior question of whether there has been a crime at all, it is not necessary to further consider that issue.

Was a Crime Committed? – Section 23

10. The only relevant offence that it has been suggested was committed by the mother and of which CP could have been a victim for the purposes of the present case is that of maliciously administering poison etc so as to endanger life or inflict grievous bodily harm contrary to section 23 of the Offences Against the Person Act 1861, which states as follows:

> Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony, and being convicted thereof shall be liable … to be kept in penal servitude for any term not exceeding ten years.

11. The *mens rea* (mental attitude that must be established before the offence can be proved to have been committed) is specified in the statute as "maliciously". The meaning of this was explained by the Court of Criminal Appeal in a case involving a prosecution for an offence contrary to section 23: R v Cunningham [1957] QBD 396 at 399:

> "In any statutory definition of a crime malice must be taken not in the old vague sense of wickedness in general but as requiring either
>
> (1) An actual intention to do the particular kind of harm that was in fact done; or
> (2) Recklessness as to whether such harm should occur or not (i.e. the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it).
>
> It is neither limited to nor does it indeed require any ill will towards the person injured"

12. That approach is well established. It is also well established that the harm foreseen by the accused need not be of the same degree as that prohibited, but it is enough that the accused foresaw that some physical harm to some person, albeit of a minor character, might result from his or her action (R v Mowatt [1968] 1QB 42; R v Savage; DPP v Parmenter 1 AC 699).

13. The *actus reus* (the blameworthy acts and circumstances that must be established before the offence can be proved to have been committed) consists of the rest of the definition of the offence in section 23.

14. It is agreed that in this case there had been administration of a poison or other destructive or noxious thing, so as thereby to inflict grievous bodily harm. However, the statute requires that administration be to "another person".

Another Person

15. The House of Lords decision Attorney-General's Reference No 3 of 1994 [1998] AC 245 concerned the prosecution of a defendant who stabbed a woman in the stomach, knowing her to be pregnant. She was treated in hospital and lived, but gave birth to a grossly premature child who lived for about four months. The case concerned the liability of the defendant for murder or manslaughter of the child, but during the course of delivering its opinion the House of Lords identified a number of established rules relating to criminal liability. One of these was that in the absence of a specific statutory provision an embryo or foetus *in utero* does not have a human personality and cannot be the victim of a crime of violence. Although the foetus is a unique organism it does not have the attributes which make it a person. As Lord Mustill said (at 262D, my emphasis):

> "The defendant intended to commit and did commit an immediate crime of violence to the mother. He committed no relevant violence to the foetus, which was not a person, …".

16. If CP was not a person while her mother was engaging in the relevant actions, then she was not "another person" for the purposes of section 23 and as a matter of law her mother could not have committed a criminal offence contrary to section 23 in relation to her unborn child.

17. The First-tier Tribunal considered this point but, basing itself on other passages from Attorney-General's Reference No 3 of 1994 decided that there may be a criminal injury in terms of the Scheme "where the injury is to a foetus resulting in harm to a child subsequently born alive" (paragraph 58).

The Coincidence Rule

18. The point here is that the *actus reus* and the *mens rea* must coincide in time (R v Jakeman (1982) 76 Cr App R 223; R v Miller [1982] 1 QB 532). If the *actus reus* is a continuing act this rule is satisfied if the defendant has *mens rea* during its continuance (Fagan v Metropolitan Police Commissioner [1969] 1 QB 439). Applying these basic rules to the present case, even if her mother had the necessary *mens rea* while CP was still a foetus, there was no "another person" and there was no actus reus

at that time. However, Mr Foy supported the approach of the First-tier Tribunal on the basis that the *actus reus* of the section 23 offence includes both action and consequences, the consequences occurred or continued at or after birth (at which point CP became “another person”) and the *mens rea* could be linked with the *actus reus* at that stage.

19. In Attorney-General’s Reference No 3 of 1994 the issue was whether the defendant could be liable for murder or manslaughter or neither. Care must be taken not to apply to the present case propositions intended to apply only to murder and/or manslaughter, unless it is clear that general principles of criminal liability are being established.

20. The First-tier Tribunal cited and relied on the following statements:

> “The unlawful and dangerous act of [the defendant] changed the maternal environment of the foetus in such a way that when born the child died when she would otherwise have lived. The requirements of causation and death were thus satisfied” (Lord Mustill at 264H).
>
> “… injury to a foetus before birth which results in harm to the child when it is born can give rise to criminal responsibility for that injury” (Lord Hope at 268D).

21. However, those statements related to what is crudely known as “unlawful and dangerous act manslaughter”. The *mens rea* of that offence depends on the definition of the particular unlawful act that has allegedly been committed and “dangerousness” depends on the assessment of “all sober and reasonable people” (R v Lamb [1996] 1 QB 59; R v Church [1967] 2 QB 981). This is quite different from the nature of criminal liability under section 23.

22. In the context of murder Lord Mustill also said (261G and 262 B to D):

> “A continuous act or continuous chain of causes leading to death is treated by law as if it happened when first initiated. The development of this into [a] rule which links an act and intent before birth with a death happening after a live delivery causes a little more strain, given the incapacity of the foetus to be the object of homicide. If, however it is possible to interpret the situation as one where the mental element id directed, not to the foetus but to the human being when and if one comes into existence, no fiction is required … The effect fo transferred malice, as I understand it is that the intended victim and the actual victim are treated as if they are one, so that when what was intended to happen to the first person (but did not happen) is added to what actually did happen to the second person (but was not intended to happen), with the result that what was intended and what happened are married are married to make a notionally intended and actually consummated crime. The cases are treated as if the actual victim had been the intended victim from the start. To make any sense of this process there must, as it seems to me, be some compatibility between the original intention and the actual occurrence, and this is, indeed, what one finds in the cases. There is no such compatibility here. The defendant intended to commit and did commit an immediate crime of violence to the mother. He

> committed no relevant violence to the foetus, which was not a person, either at the time or in the future, and intended no harm to the foetus or to the human person which it would become. If fictions are useful, as they can be, they are only damaged by straining them beyond their limits. I would not overstrain the idea of transferred malice by trying to make it fit the present case".

23. I can see nothing in Attorney-General's Reference No 3 of 1994 that entitles the First-tier Tribunal 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" which, as demonstrated above, it could not be.

24. Mr Foy argued that both the *actus reus*, in terms of drinking, and the *mens rea* were ongoing. However, any consumption of alcohol by the mother at or after birth obviously did not cause any damage to CP.

Other Issues and Conclusion

25. Many other issues were discussed during the course of the Upper Tribunal proceedings but in view of my conclusion on the first issue it is not necessary to resolve them. These include the issues of whether there was enough evidence to justify the First-tier Tribunal's conclusion that the *mens rea* had been established and whether, on the assumption that a crime had been committed, it amounted to a "crime of violence" for the purposes of the scheme.

26. For the above reasons I conclude 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 and that, in the present case, no evidence or argument has been offered in respect of the commission of any other offence.

27. Accordingly this application for judicial review by the Criminal Injuries Compensation Authority succeeds.

H. Levenson
Judge of the Upper Tribunal

18th December 2013