

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Upper Tribunal case No's: JR/3160/3161/2015

Before: Mr E Mitchell, Judge of the Upper Tribunal

Decision: These applications for judicial review SUCCEED. Under section 15 of the Tribunals, Courts and Enforcement Act 2007, I make a QUASHING ORDER in respect of the decisions of the First-tier Tribunal taken on 3 August 2015 (file references CI/004/14/00065 & CI004/14/00078). Under section 17 of the 2007 Act, I REMIT these matters to the First-tier Tribunal and DIRECT it to reconsider them in accordance with the Upper Tribunal's findings.

REASONS FOR DECISION

Background

1. Mr M sought permission to bring judicial review proceedings in respect of three decisions of the First-tier Tribunal (the Tribunal takes a neutral stance in these proceedings). The Upper Tribunal granted Mr M permission to bring judicial review proceedings in respect of two of these decision. In both, the Tribunal had struck out Mr M's appeals against decisions of the Criminal Injuries Compensation Authority (CICA) not to extend time for applying for review of a decision to refuse to award him compensation. The Tribunal determined that the appeals did not have a reasonable prospect of success.

2. CICA is an interested party in these proceedings. The chronology of the three CICA decisions is as follows:

(a) some time before 6 April 2010, CICA rejected Mr M's claim for compensation under the 2001 criminal injuries compensation scheme in respect of an incident on 19 March 2001. The CICA reference for this decision is X/02/257042. The papers state this was unsuccessfully appealed to the First-tier Tribunal, which gave its decision on 6 April 2010;

(b) on 7 October 2011, CICA rejected Mr M's claim for compensation in respect of an incident on 23 October 2010. CICA's reference for this claim is X/11/220972-T. The claim was rejected under paragraph 13(b) of the 2008 criminal injuries compensation scheme on the basis that Mr M did not co-operate with the police in attempting to bring his assailant to justice;

(c) on 15 February 2013, CICA rejected Mr M claim for compensation, again under the 2008 scheme. CICA's reference for this claim is X/12/314078-TM5A. The claim was rejected under paragraph 13(e) of the 2008 scheme on account of Mr M's character as shown by his criminal convictions.

The 2001 scheme decision (X/02/257042) (permission to bring judicial review proceedings was refused in this case)

3. CICA's original decision was unsuccessfully appealed to the First-tier Tribunal, which gave its decision on 6th April 2010. On 5 March 2014, CICA, acting under the 2001 scheme, refused to re-open their decision on medical grounds. The First-tier Tribunal struck out Mr M's appeal against this decision.

4. Without holding a hearing, I refused Mr M permission to bring judicial review proceedings in respect of the First-tier Tribunal's decision. Mr M applied for his application to be reconsidered at a hearing and the present applications were stayed pending that hearing. On 1 November 2016, Upper Tribunal Judge Levenson, having held a hearing of Mr M's application, refused Mr M permission to bring judicial review proceedings.

The 2008 scheme decisions (X/11/220972-T and X/12/314078-TM5A).

5. I granted Mr M permission to bring judicial review proceedings in respect of the First-tier Tribunal's dismissal of his appeals against CICA's 2008 scheme decisions. The relevant references are:

(a) CICA file ref. X/11/220972-T; First-tier Tribunal ref. CI 004/14/00065; Upper Tribunal case no. JR/3160/2015.

(b) CICA file ref. X/12/314078-TMA, decision taken on 29 July 2014; First-tier Tribunal ref. CI 004/14/00078; Upper Tribunal case no. JR/3161/2015.

6. In both cases, Mr M had sought out-of-time reviews of CICA's refusals of his earlier compensation claims, under paragraph 58 of the 2008 scheme. The background is explained in my grant of permission to bring judicial review proceedings:

“The 2008 scheme decisions

The review time-limits

8. The 2008 scheme rules concerning reviews and time-limits are not identical to the provisions of the 2001 scheme. While the 90 day primary time-limit is the same, paragraph 59 says this about out-of-time applications for review:

“a claims officer...may grant an extension to this time limit (whether or not it has already expired) if:

(a) the applicant has made a written request for an extension; and

(b) the claims officer considers that there are exceptional circumstances which justify the granting of an extension.”

9. ... So far as the powers of the First-tier Tribunal are concerned: paragraph 63(3) of the scheme provides:

“in a case where the appeal was against a decision not to extend the time limit in paragraph 59, the First-tier Tribunal [if it allows the appeal] will direct the Authority to conduct a review under paragraph 60.”

Mr [M's] circumstances

10. At this point, I will make some observations about Mr [M's] apparent circumstances. Many of his letters to CICA give his address as a mental health hospital and he refers repeatedly to having been detained under the Mental Health Act 1983. There is also a letter within the appeal papers dated 17th July 2014, written to CICA by Mr [M's] consultant psychiatrist, which states “we did agree as a multidisciplinary team that Mr [M] did lack mental capacity with regard to managing his finances” and that the local authority would be asked to make an application to be appointed his deputy (under the Mental Capacity Act 2005). I also note that, while Mr [M] has asserted at various times that he is legally represented by solicitors, none of the papers contain any correspondence from any solicitor acting for him in connection with his compensation claims.

11. The papers also include a First-tier Tribunal adjournment notice which states “Mr Neil Tew (manager of Chesselcare) has confirmed that the appellant wishes to attend an oral hearing of his appeals but it has not been possible to arrange appropriate support in time for this hearing”.

Why I grant permission to bring judicial review proceedings in respect of the 2008 scheme decisions

12. The First-tier Tribunal struck out Mr [M's] appeals on the basis that there was “no reasonable prospect” of his case succeeding (rule 8 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008).

13. X/11/220972-T (JR/3160/2015) began when on 7th October 2011, CICA rejected Mr [M's] claim for compensation in respect of an incident on 23rd October 2010. The claim was rejected under paragraph 13(b) of the 2008 scheme on the basis that Mr [M] did not co-operate with the police in attempting to bring his assailant to justice. On the face of it, that is difficult to understand because the papers include a police report which answered ‘NO’ to the question ‘Is there any evidence held by the police to indicate that the applicant did not fully co-operate with the investigation’. A contemporaneous witness statement given by Mr [M] also states “I support the police with any action they may wish to take”.

14. Mr [M's] application for review of this decision is said to have been received by CICA on 20th December 2013. However, I note CICA's letter of 29th July 2014 – refusing to extend time – refers to him having contacted CICA about the decision on

24th October 2012 and 26th November 2012. I have not been able to locate any evidence of those contacts.

15. In striking out the appeal, the First-tier Tribunal adopted the provisional reasoning of another tribunal judge, given when making a direction warning of strike out, that placed adverse reliance on Mr [M's] failure to supply the witness statements and medical evidence on which he wished to rely...

16. I grant permission to bring judicial review proceedings. Arguably, the Tribunal did not give adequate reasons for deciding that there was no reasonable prospect of the appeal succeeding and/or failed to take into account a relevant consideration.

17. Despite the requirement of the 2008 scheme that "it shall be for the applicant to make out his or her case", the Tribunal was also subject to the overriding objective in rule 2 of its procedure rules one aspect of which was "ensuring, so far as practicable, that the parties are able to participate fully in the proceedings". In the light of Mr [M's] mental condition, and his apparent inability to manage his own finances, should the Tribunal have addressed whether, before striking out the appeal, it should seek his medical records or take steps to enable him to attend a hearing. Despite the note made by the Tribunal in August 2015, it seems that Mr [M] did not in fact attend and give oral evidence. And should the Tribunal also have taken into account the apparently shaky basis for CICA having initially refused Mr [M's] claim?

18. X/12/314078-TM5A (JR/3161/2015) began when on 15th February 2013, CICA rejected Mr [M's] claim for compensation in respect of an incident on 19th March 2011. The claim was rejected under paragraph 13(e) of the 2008 scheme on account of Mr [M's] character as shown by his criminal convictions. [CICA refused Mr M's request for an out-of-time review, made on 14 April 2014, on 29 July 2014].

7. I also granted Mr M permission to bring judicial review proceedings in respect of the Tribunal's striking out of his appeal against CICA's 29 July 2014 decision. Permission was granted on the same 'overriding objective' ground as described above as well as on the ground that arguably the First-tier Tribunal erred in law by overlooking that, on the evidence, it was unclear if Mr M did in fact have any unspent convictions when his claim was originally refused. His most recent conviction resulted in a hospital order and it appeared by no means certain that such a conviction was unspent.

8. I gave the following case management directions:

"1. The interested party [CICA] is directed to provide a response to this grant of permission within one month of the date on which this notice is sent to the interested party.

2. If the interested party supports the application, they must set out the terms of any relief which it is suggested the Upper Tribunal should order.

3. The interested party must also supply with its response any evidence it has about the contacts it had with Mr [M] in October and November 2012
4. Mr [M] may provide a reply to the response within one month of the date on which it is sent to him. I strongly suggest that, if he has a deputy under the Mental Capacity Act 2005, he shows him or her this notice. He should also show it to his care co-ordinator.
5. To prevent unnecessary duplication, I direct that any subsequent papers are only to be added to the bundle for case JR/3160/2015.
6. Either party may request a final hearing of these proceedings but a written request must be made giving reasons.”

The arguments

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9. CICA do not contest the judicial review proceedings in case JR/3160/2015. Their position is:

- (a) there was no evidence to support CICA’s contention that Mr M had failed to co-operate with the police in their investigation into the relevant incident. In fact the evidence pointed to a contrary conclusion. Arguably, the First-tier Tribunal erred in law by failing to take this into account in determining whether there were exceptional circumstances justifying a late application for review;
- (b) given the evidence about Mr M’s mental condition, the First-tier Tribunal, in the light of its obligations under the overriding objective, should have placed “greater emphasis on ensuring that the Applicant was able to participate fully in proceedings...before striking out his case”.

10. CICA’s response also shed light on the 2012 and 2013 contacts between CICA and Mr M. On October 2012 and November 2012 Mr M contacted CICA by telephone to request a copy of their decision letter so that he could discuss the matter with his solicitor. I think it is clear that this information should have been supplied to the First-tier Tribunal.

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11. CICA do not contest the judicial review proceedings in this case either. Their position is that the First-tier Tribunal should, again, have placed greater emphasis on their obligations under the overriding objective in the light of the evidence about Mr M’s mental condition.
12. However, CICA did not concede that Mr M’s hospital order had never resulted in an unspent conviction under the Rehabilitation of Offenders Act 1974.
13. As I understand Mr M’s correspondence, he seeks a hearing of these applications. I do not hold a hearing. There is no need because I allow his applications without a hearing. Mr M’s written case focusses on the merits of his original applications for compensation rather than the issues arising in these proceedings.

Conclusions

14. I allow Mr M's applications for judicial review and make quashing orders in respect of the First-tier Tribunal's decisions.

Tribunal's failure to consider how to apply the overriding objective in the light of Mr M's circumstances

15. In both decisions, the First-tier Tribunal erred in law by failing to consider how to apply the overriding objective of its procedural rules in the light of Mr M's mental health condition.

16. There is no inconsistency between the 2008 scheme's requirement for a claimant to make out his case and the overriding objective. The overriding objective, set out in rule 2 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, is to deal with cases fairly and justly. This includes ensuring "so far as practicable, that the parties are able to participate fully in the proceedings". The 2008 scheme's requirement that an applicant must make out his case does not dilute or modify the overriding objective. The task for the Tribunal is to take such steps as are practicable to enable the applicant to participate fully in proceedings. A party's participation in proceedings involves presenting his case. Accordingly, the overriding objective extends to taking such steps as are practicable to enable a party to present his case.

17. This does not mean the First-tier Tribunal has to construct a case for an applicant. But it does call for a Tribunal to consider whether an applicant's circumstances mean that he faces obstacles in presenting his case that the Tribunal should seek to remove or mitigate to ensure a case is dealt with fairly and justly. The appropriate step or steps to take will be informed by the circumstances of the case but could include: ensuring that an applicant's liability to detention in a mental health institution does not prevent him attending a hearing; inviting an applicant to consent to the Tribunal obtaining medical records rather than insisting that the applicant supplies them; acting more inquisitorially than it would in the case of a represented applicant or one without a mental health condition.

18. The proceedings before the First-tier Tribunal involved Mr M trying to persuade the Tribunal to allow a late review of his unsuccessful claims for compensation. It is not disputed that Mr M had severe mental health problems (he continues to reside in a mental health hospital). The evidence also showed that healthcare professionals had real doubts as to Mr M's mental capacity to take financial decisions.

19. The First-tier Tribunal should have turned its mind to whether a fair and just determination of the appeals called for it to take steps to enable Mr M to participate fully in the proceedings. The Tribunal did not do this. There is no evidence in the appeal papers that attempts were made to overcome the obstacle that Mr M said he faced in attending a hearing (unavailability of staff at his hospital to support him at a hearing on the date proposed in August 2015). There is also no evidence that the Tribunal considered whether it should seek Mr M's medical records, the supply of which would probably have answered the question whether Mr M had any unspent convictions. On the contrary, he was informed that he was responsible for arranging the supply of medical evidence. The First-tier Tribunal did not address whether the overriding objective required it to take these steps and that was an error on a point of law.

Spent convictions

20. This aspect of the proceedings relates to paragraph 13(1)(e) of the 2008 scheme which provides:

“(1) a claims officer may withhold or reduce an award where he or she considers that...(e) the applicant’s character as shown by his or her criminal convictions (excluding convictions spent under the Rehabilitation of Offenders Act 1974 at the date of application or death)...

makes it inappropriate that a full award or any award at all be made”.

21. In their written submissions, CICA argue that when Mr M made his original claim for compensation in case no. *JR/3161/2015*, section 5(7) of the Rehabilitation of Offenders Act 1974 applied to the conviction that resulted in Mr M’s hospital order. Section 5(7) provided that, where a hospital order under Part III of the Mental Health Act 1983 was imposed on conviction, the rehabilitation period for the conviction (at the end of which it was ‘spent’) was the longer of the following dates;

(a) the period of five years from the date of conviction; or

(b) the period beginning with the date of conviction and ending two years after the date on which the order ceases to have effect.

22. The appeal papers contain evidence that Mr M was made subject to a hospital order in 2006 but there is no evidence as to when, if ever, it ceased to have effect. CICA argue this should have been investigated by the First-tier Tribunal. I agree. This matter could have had an effect on the Tribunal’s evaluation of whether Mr M’s appeal had a reasonable prospect of success. The Tribunal erred in law by failing adequately to address an issue raised in the proceedings.

23. I note that section 5 of the 1974 Act was amended, from 10 March 2014, by section 139 of the Legal Aid, Sentencing and Punishment of Offenders Act 2014. As amended, section 5 refers to a range of “relevant orders” which include a hospital order under Part III of the Mental Health Act 1983. The rehabilitation period for the conviction that led to a relevant order is “the day provided for by or under the order as the last day on which the order is to have effect”.

24. I suspect the new version of section 5 of the 1974 Act will apply if the First-tier Tribunal considers it necessary to determine whether Mr M’s conviction, for which he was made subject to a hospital order, was spent when he made his original application for compensation. That is because section 141 of the 1974 Act generally gives retrospective effect to the amendments made to section 5 by the 1974 Act (see *G v First-tier Tribunal* (interested party: CICA) [2016] UKUT 196 (AAC)).

Co-operation with the police

25. On case *JR/3160/2015* CICA concede there was no evidence to show that Mr M failed to co-operate with a police investigation into the incident. They are right. There was no proper basis for finding that he failed to co-operate. The Tribunal erred in law by failing to take this

relevant consideration into account in deciding whether his appeal had a reasonable prospect of success.

Disposal

26. Mr M's applications for judicial review succeed. I make quashing orders in respect of both First-tier Tribunal decisions. Mr M's appeals against CICA's refusals to admit his late review applications will now be re-heard by the First-tier Tribunal.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
25 February 2017