IN THE UPPER TRIBUNAL **Application No. JR/1679/2019 (V) (CVP)**
ADMINISTRATIVE APPEALS CHAMBER

On judicial review of The First-tier Tribunal (Criminal Injuries)

Between:

CM

Applicant

- v –

The First-tier Tribunal (Social Entitlement Chamber) (Criminal Injuries)

Respondent

and

Criminal Injuries Compensation Authority

Interested Party

Before: Upper Tribunal Judge Jones

Hearing date: 26 February 2021
Decision date: 16 March 2021

Representation:
Applicant: Mr Christopher Stephenson, counsel instructed by GLP Solicitors
Respondent: N/A
Interested Party: Mr Graham Maciver, member of the Faculty of Advocates, instructed by the Criminal Injuries Compensation Authority

ON JUDICIAL REVIEW OF:

Tribunal: First-tier Tribunal (Social Entitlement Chamber) (Criminal Injuries)
Tribunal Case No: CI011/14/00486
Hearing Date: 29 April 2019
Decision Date: 2 May 2019
Written Reasons: 21 June 2019

DECISION

The decision of the Upper Tribunal is to dismiss the application.

REASONS FOR DECISION

The application for judicial review

1. This is an application for judicial review of the decision of the First-tier Tribunal which it made after a hearing on 29 April 2019. The First-tier Tribunal ('the Respondent' or 'FTT') produced a written decision in a Decision Notice dated 2 May 2019 and a written statement of reasons dated 21 June 2019.

2. The Applicant applied to the Upper Tribunal for permission to bring judicial review proceedings on 26 July 2019. Upper Tribunal Judge West refused permission to bring the proceedings on the papers on 17 October 2019. I granted permission on 28 April 2020 following an oral hearing of a renewed application for permission on 21 April 2020.

Form of Hearing

3. The form of the hearing was an online video hearing conducted by CVP to which both participating parties agreed. Having taken into account the preferences of the parties, I was satisfied that it was in the interests of justice to conduct a remote hearing. There was public interest in protecting public health and avoiding unnecessary or disproportionate face to face exposure of multiple people during a time of pandemic. I was satisfied that such a video hearing would provide all parties with a fair and reasonable opportunity to present their cases. The arguments in the application were ones of law and there was no live evidence called. The parties presented their cases thoroughly but succinctly in writing in their various skeleton arguments. I had the benefit of the full bundles of evidence and submissions before the FTT and the bundle of relevant documents from the Upper Tribunal proceedings.

4. The Respondent, as is customary, did not participate in the proceedings. The Applicant was represented by Mr Stephenson of Counsel and the Interested Party was represented by Mr McIver of the Faculty of Advocates. I expressed my thanks to

both of them at the hearing for the clear and persuasive way they presented their oral and written cases. I repeat that thanks.

The decision of the First-tier Tribunal subject to review

3. The appeal before the FTT concerned the applicant's award for compensation after suffering abuse at the hands of his parents under the provisions of the Criminal Injuries Compensation Scheme 2008 ("the 2008 Scheme"). Eligibility was not in issue but only the amount of the award (quantum).

4. The appeal was against a review decision made by the Criminal Injuries Compensation Authority (the Interested Party) on 19 October 2012. It was accepted that the Applicant was the victim of a crime of violence. The authority made an award for a sexual assault on a child at level 13 which was an amount of £11,000. In addition, an award was made for physical abuse of a child at level 1. The amount was £1,000. As this was a second award, 30% was payable i.e. £300. The total tariff award was therefore £11,300.

5. On appeal the FTT made an award of £295,183 after an oral hearing on 29 April 2019, whereas the Applicant had argued for an award of £500,000.

The FTT's Decision Notice

6. In the decision notice dated 2 May 2019 the FTT provided a summary of its reasons. It held, so far as material, that

> "A claim was made for future loss of earnings. It was argued that, but for the abuse suffered, [the Applicant] had a realistic and sensible aspiration to earn income in the region of £23,000. This was in accordance with the mean income for a male engaged in a skilled trade. An appropriate multiplier was used to calculate the figure.
>
> The authority argued that it was not appropriate to adopt a multiplier multiplicand approach for future loss of earnings. They preferred to make the assessment under paragraph 33 of the scheme.
>
> The evidence was that [the Applicant] had been in employment since leaving school and was currently working in a warehouse

earning £300 a week net. He had received a final written warning from his current employers in November 2018 but due to the intervention of [his mother], his employers had a better understanding of his disabilities and adjustments had been made to his working pattern. He remained in that employment.

The medical evidence from Dr Ruth Jarman, the psychiatrist appointed to provide expert evidence, was that, due to [his] maladaptive coping strategies, he was at risk of losing his employment. That opinion had been given in August 2018 but six months on the appellant was still in work.

The tribunal decided that the approach of the Authority was correct. Because of his disability [the Applicant] would be at a disability on the open labour market and there was a possibility that he may be unemployed more frequently than would otherwise be the case. However he seemed well motivated to earn money and had adapted well to his work once he had a more regular pattern of shifts.

There was no evidence to show that but for the abuse [the Applicant] would have achieved the earning level suggested by his representatives.

The tribunal adopted the multiplicand used by the Authority of £1000. Allowing this figure over his working life to the age of 67 produced a multiplier of 20. Also taking into account was that, in the event of unemployment, benefits would be payable. An award of £20,000 is appropriate.

A claim was made for past and future care …

Having regard to the expert evidence from Dr Ruth Jarman, and taking into account the future therapy and guidance he would be receiving in the future, by the age of 30 [the Applicant] should be able to live independently without risk of harm to himself and others. The tribunal therefore allowed future care of seven hours per week for a year from the date of the hearing, whilst a suitable regime was being put in place for a buddy and a case manager.

Thereafter the care would be on the basis of scenario 1 set out in the report of Fen Parry (T851) up to the age of 30. Using Table B the appropriate discount factor for this period is 0.65.

…

This award will have to be paid into the Court of Protection and administered by a deputy on behalf of [the Applicant].

…

After year 10 years the likelihood is that the fund will be depleted to a level that does not require a Deputy to administer it and that, having had treatment and being more mature [the Applicant] will be able to manage his own money."

The Statement of Reasons

7. In its statement of reasons dated 21 June 2019, so far as material, the FTT found that:

> **"Loss of Earnings**
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> 66. Past: no claim.
>
> 67. Future: The tribunal rejected the arguments set out by the appellant's representative. He argued for a multiplicand of £23,000 based on the mean net income for a man engaged in a skilled trade. No evidence was provided to establish that but for the criminal injuries suffered [the Applicant] would have been in a skilled trade. The decision of the tribunal was that, given what was known of his natural parents, the best he could have hoped for would be unskilled employment, and very probably unemployment.
>
> 68. Mr Stephenson, for the appellant, argued that all of the evidence points to the likelihood of significant and prolonged periods out of work. The tribunal decided that, on the contrary, all of the evidence indicated that [the Applicant] was able to hold down a job for a prolonged period of time and enjoyed working. The oral evidence of [his mother] was that [the Applicant] enjoyed earning money and was positive about his employment and the friends.
>
> 69. When he had received a written warning, he had made a significant effort to ensure that he kept his job. There have been no episodes of difficulties at work since then.
>
> 70. Had Mr Stephenson believed that there had been significant and prolonged periods out of work, he would have put forward a claim for past loss of earnings.
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> 71. There was a risk that when he moved away from home he may have problems maintaining self-discipline to get to work on time and deal with any conflict. However, given that decision to make an award for supervision as part of the care claim, that possibility would be greatly reduced.

> 72. The tribunal accepted the argument of the respondent and made an award under paragraph 33 of the scheme for the reasons set out in the Decision Notice.
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> …
>
> **Future Care**
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> …
>
> 112. [The Applicant] is still young. The tribunal decided that, with the guidance of his parents, the treatment he would receive and his increasing years he would mature sufficiently to be able to live independently without the need for care by the age of 32. That age was selected by allowing for up to 10 years for [the Applicant] to undergo treatment and to mature and be free of drugs. At the date of decision he is nearly 21 years old. A period of time will have to be allowed for the funding to be set up with the Court of Protection.
>
> 113. The tribunal allowed future care of seven hours per week for one year from the date of the hearing whilst a suitable regime was put in place for a buddy and a case manager. Thereafter the tribunal accepted that care would be on the basis of scenario one set out in the report of Ms Parry at T851 up to the age of 32."

The Grounds of the Application

8. The grounds of the application for judicial review to the Upper Tribunal are contained in Section 5 of the completed form JRC1 (pages 6 to 8).

9. The challenges which were relied upon by the Applicant as errors of law were as follows:

> "(I) LOSS OF EARNINGS
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> 6. The FTT's reasons failed to give proper consideration to the evidence, in particular the expert evidence of Dr Jarman, Consultant Psychiatrist. In particular, the FTT's award for future loss of earnings failed to give sufficient weight to the expert evidence (and evidence from CM's parents) as to his long-term prospects on the open labour market.
>
> 7. The evidence of Dr Jarman and CM's parents was that he had managed to retain employment only with significant amounts of support. Dr Jarman expressed "concern that it is only a matter of time before he loses his job due to maladaptive coping strategies such as missing work due to using illicit substances or alcohol or he gets into some altercation with

> others", and "I do have significant concerns about [CM's] ability to sustain and progress within employment and that his ability to do so is compromised specifically in relation to ongoing educational challenges and unrealistic view of what work means and his difficulties in engaging with others at an interpersonal level".
>
> 8. Given CM's history, the evidence of his parents as to the precarious nature of his life (including employment) and the evidence of Dr Jarman, an award of [sic] was unreasonable and contrary to the weight of the evidence
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> 9. The FTT's written reasons are inconsistent with the reasons given in their Final Decision Notice. In the latter (the short form reasons), it is said that future loss of earnings was calculated on the basis of £1000 a year loss, with a multiplier of 20, amounting to a future loss of earnings of £20,000. In its written reasons, the FTT state (at para 72) that they made an award under paragraph 33 of the 2008 Scheme (a lump sum). This betrays the muddled thinking of the FTT; the FTT accepted CM's argument that this was a multiplier/ multiplicand case, but the award of £1000 a year is completely illogical.
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> (II) FUTURE CARE AND SUPERVISION
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> 10. The decision to award future care to age 32 was arbitrary and unsupported by any evidence. The unchallenged evidence of Dr Jarman was that CM "needs support in terms of daily living, ability to prepare meals, he needs prompting support and encouragement in this regard and his adoptive mother feels that he is [not] in any position to even consider living independently. [CM]'s quite marked mood swings and emotional and behavioural issues require supervision to protect himself from vulnerabilities". There is no evidence to support the suggestion that those vulnerabilities (which require recoverable care under the 2008 Scheme) will no longer exist by the age of 32.
>
> (III) COSTS OF ADMINISTRATION
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> 11. It follows that it was also perverse to restrict CM's claim for the administration of his ward to the age of 32".

The Applicant's submissions

Ground (I) - FUTURE LOSS OF EARNINGS

10. The Applicant's first ground for judicial review was that, *"the First-tier made unreasonable findings of fact (that were perverse, irrational or no reasonable*

tribunal could have come to on the evidence) in relation to the effects of the Applicant's trauma upon his future earnings and his ability to hold down full-time employment".

11. Mr Stephenson submitted that the FTT erred in law because its decision to award the Applicant £20,000 for future loss of earnings is one that no reasonable tribunal would have reached on the evidence.

12. As set out above, in paragraph 68 of its written reasons, the FTT stated:

> *"Mr Stephenson, for the appellant, argued that all of the evidence points to the likelihood of significant and prolonged periods out of work. The tribunal decided that on the contrary, all of the evidence indicated that [the Applicant] was able to hold down a job for a prolonged period of time and enjoyed working. The oral evidence of [his mother] was that [the Applicant] enjoyed earning money and was positive about his employment and friends."*

12. Mr Stephenson submitted that it was unsustainable for the FTT to say 'all of the evidence' indicated the Applicant would be able to hold down a job for a prolonged period of time when Dr Jarman's evidence was to the contrary.

13. Further, in paragraph 70 of its written reasons, the FTT stated:

> *"Had Mr Stephenson believed that there had been significant and prolonged periods out of work, he would have put forward a claim for past loss of earnings."*

14. He submitted that this finding was nonsensical given the issue was the Applicant's future loss of earnings and his lack of past lost earnings was not in dispute.

15. Mr Stephenson submitted that the FTT's findings in these two paragraphs highlights the essential failure of the FTT; the FTT over relied on the Applicant's recent (and nascent) work history at the expense of the expert evidence as to his likely future. The comment of the FTT at paragraph 70 was submitted to go to the heart of that; how could he have asserted that there was a past loss of earnings when there plainly was not? That was not the issue that the FTT were being asked to

consider; the issue is whether the *evidence* supported such a derisory award for future loss of earnings.

16. Mr Stephenson submitted that the *expert evidence* of Dr Jarman was clear and the FTT failed to take into account and give reasons for rejecting it. It is summarised at paragraphs 14.6 – 14.9 of Dr Jarman's second report dated 16 August 2018.

"14.6 On the balance of probabilities therefore, unfortunately I am of the opinion that the prognosis in terms of his attachment disorder / behavioural disorder is likely to be poor, as is the prognosis of his symptoms of Post Traumatic Stress disorder as such underlying psychological trauma has been unprocessed for such a chronic length of time……It is extremely difficult to state what number of sessions [of psychotherapy the Applicant] may require, it is likely he would initially need around 18 sessions with therapy being revisited every 2-3 years at least of the next 10 years.

14.7 ….I am of the opinion that [his] childhood abuse has prevented his ability to work and will do so for the reasons as documented in the main body of the reports. As stated, he is able to undertake full time work at present in a labouring capacity, but I have concern that it is only a matter of time before he loses his job due to maladaptive coping strategies such as missing work due to using illicit substances or alcohol or he gets into some altercation with others. [The Applicant] certainly requires care and assistance in relation to preparations of meals and bodily functions, as well documented in the main body of the report and this requires supervision to avoid substantial danger…..I certainly do not feel that [the Applicant] has the capacity to manage his own affairs under the terms of the Mental Capacity Act 2005.

14.8…..I do have significant concerns about [his] ability to sustain and progress within employment and that his ability to do so is compromised specifically in relation to ongoing educational challenges and unrealistic view of what work means and his difficulties in engaging with others at an interpersonal level. As stated in terms of care [the Applicant] needs support at present in terms of daily living, ability to prepare meals, he needs promoting, support and encouragement in this regard and his adoptive mother feels that he is in any position at present to even consider living independently. [the Applicant]'s quite marked mood swings and emotional and behavioural issues require supervision to protect himself from vulnerabilities. As stated, he is easily led by others and not able to keep control. In terms of [the Applicant's] lifestyle, in light of his vulnerabilities he probably would benefit from one to one support……

14.9 I do not feel that [he] has mental capacity in terms of his ability to manage and make decisions about large amounts of money. I also have concerns about matters in relation to disclosure….He strikes me as a very vulnerable sensitive individual and I would have significant reservations about the impact this would have on his mental wellbeing, further undermining his sense of trust and confidence in others and the world around him."

[Emphasis Added]

17. Mr Stephenson repeated the submission that he made at the permission hearing, that *"there was significant evidence in support of significant disruption to the Applicant's future working life due to his trauma and this was to be found in paragraphs 14.1-14.8 (in particular 14.7 and 14.8) of the second report of Dr Jarman dated 6 August 2018"*.

18. Mr Stephenson submitted that the FTT ignored Dr Jarman's evidence. The only reference in the FTT's written reasons to Dr Jarman's evidence in relation to the Applicant's future earning capacity is at paragraph 50 of the FTT's written reasons when describing the evidence received on the appeal: 'She feared that [he] would lose his job because of his maladaptive coping strategies such as missing work due to use of illicit drugs and alcohol which would cause him to miss work, or that he would get into some altercation with others.' That reference was not a finding of fact and fell well short of reflecting the totality of Dr Jarman's evidence.

19. Further, in the 'Findings of Fact' within the written reasons, the FTT made absolutely no reference to the views of the jointly instructed expert, Dr Jarman. The only reference was in relation to the Applicant's own views at 59 of the written reasons '[The Applicant] had indicated a willingness to engage in therapy in the future and had suggested to Dr Jarman this would be when he was aged 26.'

20. Mr Stephenson submitted a) that the FTT failed to address or take into account or b) failed to give reasons, for rejecting Dr Jarman's evidence or c) that its findings were irrational and perverse. The FTT's error of law could be characterised in any of these three ways. In essence, the FTT appears to have simply rejected or ignored Dr Jarman's evidence without any explanation as to why.

21. He submitted that, in essence, the award of £20,000 was irrational and perverse, when considering the lay evidence of the Applicant's parents and, in particular, the expert evidence as to the long-term implications of the crimes of violence on a severely damaged and still very young man, who had only just started out on his working life and was still living in a very sheltered environment.

22. Mr Stephenson responded to the Interested Party's assertion that the FTT's job in assessing future loss of earnings was forward looking. He accepted this was

plainly obvious. However, in making that assessment he submitted it was perverse to ignore the expert evidence which concluded that it was only a matter of time before the Applicant lost his job and that there were significant concerns about his ability to *"sustain and progress within employment"*.

Conclusion on Ground 1

23. Mr Stephenson submitted that the FTT erred in making its decision as to the award for the Applicant's future loss of earnings. He submitted that the First-tier made unreasonable findings of fact (that were perverse, irrational or no reasonable tribunal could have come to on the evidence) in relation to the effects of the Applicant's trauma upon his future earnings and ability to hold down full-time employment. Another way of putting this ground is that the FTT failed to take into account relevant evidence or gave insufficient reasons when making its findings and coming to its conclusion on future loss of earnings.

24. Mr Stephenson submits, that there was significant evidence in support of significant disruption to the Applicant's future working life due to his trauma and this was to be found in paragraphs 14.1-14.8 (in particular 14.7 and 14.8) of the second report of Dr Jarman dated 6 August 2018.

25. For example, the report states, 'I am of the opinion that [the Applicant]'s childhood abuse has prevented his ability to work and will do so for the reasons as documented in the in body of the report….it is only matter of time before he loses his job due to….' and 'I do have significant concerns about [the Applicant]'s ability to sustain and progress within employment and that his ability to do so is compromised specifically……'.

26. In contrast, at paragraph 68 of its written reasons, the FTT simply stated:

> "Mr Stephenson, for the appellant argued that all of the evidence points to the likelihood of significant and prolonged periods out of work. The tribunal decided that on the contrary, all of the evidence indicated that [he] was able to hold down a job for a prolonged period of time and enjoyed working. The oral evidence of [his mother] was that [he] enjoyed earning money and was positive about his employment and friends.'

27. The FTT summarised Dr Jarman's report at paragraphs 45 to 52 of its written reasons, and stated at paragraph 50, 'She feared that [the Applicant] would lose his job because of his maladaptive coping strategies such as missing work due to use of illicit drugs and alcohol which would cause him to miss work, or that he would get into some altercation with others.'

28. However, the FTT made no reference to the report when making findings of fact or drawing conclusions about his future loss of earnings at paragraphs 67 to 72 of its written reasons.

29. It conclusion Mr Stephenson argued that the FTT came to an unreasonable conclusion on future loss of earnings or failed to take into account relevant evidence in making its findings of fact or failed to give any reasons for rejecting the evidence of Dr Jarman on this topic.

Ground (1b). - The multiplier / multiplicand vs lump sum

30. Further, and in addition, Mr Stephenson submitted that however the FTT arrived at the sum of £20,000 for the future loss of earnings award, its reasoning was flawed.

31. He submitted that the manner in which the FTT arrived at the figure of £20,000 was arbitrary and muddled. If the FTT really thought that this was a case that could properly be disposed of under paragraph 33 of the 2008 Scheme (a lump sum award), there was no need to entertain the question of a 'multiplicand'.

32. In the FTT's Written Reasons, at paragraph 72, it is said that it *'made an award under paragraphs (sic) 33 of the scheme for the reasons set out in the Decision Notice'*. However, the Decision Notice explicitly referred to a 'multiplicand' of £1,000 a year and a 'multiplier' of 20 (see 4th paragraph). It cannot have properly made an award under *both* approaches; that would be perverse.

33. The question at the heart of this ground of the application is whether or not the sum of £20,000 is an award that any reasonable Tribunal could properly have made on the evidence. If the answer to that is 'no', then whether the amount was awarded by way of multiplier/multiplicand or under paragraph 33 of the Scheme is of less relevance.

34. Mr Stephenson submitted that the FTT could not, on any reasonable interpretation, have made this award on the evidence. He made the point that in *Billett v MoD* [2015] EWCA Civ 773, The Applicant was awarded £45,000 by way of lump sum award for a very minor frozen toe injury. That is important, because the ratio of that decision was that the traditional Ogden 7 method of calculating a future loss of earnings should be the starting point for assessing a future loss of earnings and that the old-fashioned *Smith v Manchester* award should be reserved for cases in which such an approach would provide a speculative or obviously excessive result. As Jackson LJ says at paragraph 99:

> *"The Ogden Working Party acknowledge in their Explanatory Notes that in some instances the Smith v Manchester approach remains appropriate. In my view this is a classic example of such a case. The best that the court can do is to make a broad assessment of the present value of the claimant's likely future loss as a result of handicap on the labour market, following the guidance given in Smith v Manchester and Moeliker."* (emphasis added)

35. All *Billett* does is confirm that a multiplier/multiplicand approach should be the norm, save for 'some instances' where a lump sum approach is justified. Mr Stephenson submitted that in this case the *evidence* justified a multiplier/multiplicand approach and was sufficiently robust to support an award well in excess of £20,000.

36. He submitted that for the FTT to rely on a short period of employment of a very young man with the sort of behavioural problems that the Applicant has in preference to the well-reasoned and unchallenged evidence of Dr Jarman resulted in an unreasonable decision.

37. The Applicant relied on his Final Schedule of Loss, which was at page T873 of the FTT hearing bundle. In particular, at paragraph 16 there is a summary of the relevant extracts from Dr Jarman's report dated 2 August 2018, when the Applicant was just 20 years old. Bear in mind that his normal retirement age is 68. Mr Stephenson contended for an approach similar to the Ogden 7 calculation adopted in the civil courts (which is amply ventilated in *Billet*); essentially, he contended that his 'actual' earnings multiplier should be reduced to reflect the impact of the 'disability' caused by his injuries.

38. Mr Stephenson submitted that at the core of the FTT's decision is the absence of any evidence that the Applicant ever had a realistic expectation of earning £23,000

a year. The Applicant has some sympathy with the FTT's conclusion that there was no evidence to substantiate a future earning capacity but for his injuries of £23,000. However, that does not justify a lump sum award of £20,000 on any basis. If the figure of £16,500 is inserted into the calculations as the 'but for' earning capacity instead of £23,000, the proper figure for future loss of earnings would be:

(a) 'But for': £16,500 x 18 = £297,000

(b) 'Actual': £16,500 x 10 = £165,000

(c) (a) – (b) = £132,000

39. Mr Stephenson submitted that this calculation underlines the FTT's failure, because its assessment of future loss of earnings (on the basis of an annual loss of £1000 or a paragraph 33 'lump sum' award) so manifestly fails to take account of the evidence as to the Applicant's disability as to make that award unreasonable.

GROUND 2 – FUTURE CARE AND SUPERVISION

GROUND 3 – COSTS OF ADMINISTRATION

40. Mr Stephenson submitted that these two grounds could be taken together.

(II) CARE

41. He submitted that the FTT failed to take account of the evidence of the Applicant's father, namely that without his parents there to support and protect him, in his opinion, the Applicant would likely be a homeless drug addict, or in prison. All the lay and expert evidence pointed to the conclusion that the Applicant needs significant levels of care and supervision so as to avoid substantial danger to himself, which is plainly recoverable under paragraph 35 of the Scheme.

42. Any exercise of the FTT's 'judgment' should be based on the evidence before it. The FTT's conclusion that the Applicant would only need care for a further 10 years, at the rate of 1 hour a day was arbitrary and not rooted in fact or expert evidence.

43. Judge West suggested, when refusing permission, that in considering the future care claim the FTT was *"exercising a judgment based on the evidence before it"* (paragraph 25).

44. However, Mr Stephenson submitted that the 'evidence' did not support the suggestion that the Applicant would be able to live independently and without care beyond the age of 32. Nowhere in the evidence is it suggested that he would be able to live independently without any care so as to prevent him being a danger to himself or others.

45. To the contrary, Dr Jarman was of the view that the Applicant's prognosis is poor and nowhere does she conclude that he will be able to live without significant levels of care to that end. To that end, see paragraph 14.8 of Dr Jarman's report of 6 August 2018, [T810], in which she concludes: *"In terms of [his] lifestyle, in light of his vulnerabilities, he probably would benefit from one to one support. This is currently given to him by his parents and I have concerns as they get more elderly, the pressure and burden of this responsibility could be a challenge for them"*.

46. The FTT's decision to ignore the expert evidence of Dr Jarman and Fen Parry, which was based on examinations of the Applicant and his parents, was unreasonable. The judgment that was exercised by the FTT was not based on the material before it.

47. The reality is that the FTT plucked the figure of 10 years out of thin air and, in reality, used their own 'judgement' as opposed to deciding issues of fact based on the evidence.

48. That is the only sensible conclusion having read paragraph 112 of the FTT's written reasons at [21]: *"The tribunal decided that with the guidance of his parents, the treatment that he would receive and his increasing years he would mature sufficiently to be able to live independently without the need for care by the age of 32."* That period was not rooted in any of the evidence; nowhere does Dr Jarman suggest that he will at some point not require care and assistance in relation to preparation of meals and bodily functions, or that he will regain capacity.

49. The FTT have read Dr Jarman's reference to the need for therapy within the next 10 years and concluded that equates to a resolution of his care needs and that he will regain capacity. That is perverse and unsupported by the evidence.

50. Mr Stephenson submitted that the Interested Party again made the point that the FTT's job was to look forward; that is obvious. However, the FTT's judicial role is to make that assessment *based on the evidence*. As with all of the heads of loss that are the subject of this application, the FTT failed to pay sufficient heed to the evidence and hence it erred in law.

Remedy

51. He submitted that the matter should be remitted for redetermination, unless the UT considered itself able to substitute its own findings.

Discussion and Decision

52. I am extremely grateful to Mr Stephenson for the persuasive and attractive way in which he presented his submissions at both the permission and substantive hearings. Nonetheless I am not satisfied that the FTT erred in law in a material manner in the ways that have been relied upon. I come to this conclusion with some regret and while recognising the trauma that the Applicant has suffered and the impact it will have on his life. This decision does not seek to minimise it in anyway.

53. Despite having granted permission to bring judicial review proceedings I have come to the conclusion that this application should be dismissed. In doing so, I have accepted and adopted many of the reasons relied upon by Judge West when refusing permission and Mr McIver in opposing this application.

Ground 1 – Future loss of earnings

54. In relation to future loss of earnings, it is worth noting that Dr Jarman's evidence about the Applicant's future ability to hold down a job at paragraphs 14.7 and 14.8 of her report was not categorical nor expressed on the balance of probabilities. She did not say that it was unlikely the Applicant would ever be able or that he would be unable work in the future. Her opinion was not so strong.

55. The height of Dr Jarman's opinion on future loss of earnings was:

> 14.7 I am of the opinion that [his] childhood abuse has prevented his ability to work and will do so for the reasons as documented in the main body of the reports. As stated, he is able to undertake full time work at present in a

> labouring capacity, but I have concern that it is only a matter of time before he loses his job due to maladaptive coping strategies such as missing work due to using illicit substances or alcohol or he gets into some altercation with other……

> 14.8 …..I do have significant concerns about [his] ability to sustain and progress within employment and that his ability to do so is compromised specifically in relation to ongoing educational challenges and unrealistic view of what work means and his difficulties in engaging with others at an interpersonal level.

56. It is expressed in the language 'I have concern' and 'I do have significant concerns'. In effect, the opinion is that there was a (significant) risk of disruption to the Applicant's future working life.

57. It is fair to observe that the FTT made no reference to Dr Jarman's report when making findings of fact or drawing conclusions about the Applicant's future loss of earnings at paragraphs 67 to 72 of its written reasons. It was therefore arguable, on its face, that the FTT came to an unreasonable conclusion or failed to take into account relevant evidence in making its findings of fact and drawing conclusions. It was further arguable that it failed to give any reasons for rejecting the evidence of Dr Jarman on this topic. Further, there was an arguable inconsistency between the FTT's apparent findings at paragraph 68 of its written reasons and the fact that it still made any award for future loss of earnings whatsoever. That is why I granted permission for the judicial review to be brought.

58. However, the FTT's Decision Notice with summary of reasons and Written Statement of Reasons must be read together.

59. I begin with the FTT's Written Statement of Reasons. The FTT summarised Dr Jarman's report at some length at paragraphs 45 to 52 of its written reasons, and in particular, stated at paragraph 50, 'She feared that [the Applicant] would lose his job because of his maladaptive coping strategies such as missing work due to use of illicit drugs and alcohol which would cause him to miss work, or that he would get into some altercation with others.' This is a fair summary of paragraphs 14.7 and 14.8 of Dr Jarman's second report on this issue.

60. Further, at paragraph 72 of its written reasons, the FTT referred to and relied upon its summary of reasons within its decision notice as reasons for making an award under paragraph 33 of the scheme (for future loss of earnings).

61. I then turn to the decision notice and summary of reasons that the FTT had earlier given. Within its summary reasons the FTT accepted (on the second page):

'The medical evidence from Dr Ruth Jarman, the psychiatrist appointed to provide expert evidence, was that, due to [the Applicant]'s maladaptive coping strategies, he was at risk of losing his employment. That opinion had been given in August 2018 but six months on the appellant was still in work.

The tribunal decided that the approach of the Authority was correct. Because of his disability [the Applicant] would be at a disability on the open labour market and there was a possibility that he may be unemployed more frequently than would otherwise be the case. However he seemed well motivated to earn money and had adapted well to his work once he had a more regular pattern of shifts.'

[Emphasis Added]

62. The FTT, within its Decision Notice and written statement of reasons to which it referred, did accept the possibility that the Applicant 'may be unemployed more frequently than would otherwise be the case'. This was largely consistent with Dr Jarman's opinion, although perhaps not accepting the extent of the risk when describing it as a possibility rather than a significant risk. The FTT also made an award for future loss of earnings on the basis of this finding.

63. Therefore, the FTT, when reading its written statement of reasons and Decision Notice as a whole, has demonstrably taken into account Dr Jarman's evidence and not ignored it, nor wholly rejected it.

64. Dr Jarman's evidence was considered by the FTT and relied upon in the decision notice and summary of reasons when making an award for future loss of earnings. It was on this basis the Applicant was made an award of £20,000 for future loss of earnings as a lump sum. However, Dr Jarman's opinion was considered alongside all the other evidence about the Applicant's past and subsequent ability to hold down a job at paragraph 68 of the written statement of reasons and in the decision notice.

65. To the extent the FTT has not wholly relied upon or Dr Jarman's opinion as to future loss of earing, it has given sufficient reasons for its decision for distinguishing

Dr Jarman's opinion, namely subsequent events. It was uncontroversial that, 'six months on the appellant was still in work'

66. Therefore, I am not satisfied that the FTT failed to take into account nor give proper consideration to the expert evidence of Dr Jarman, nor that it failed to give sufficient reasons to the extent it rejected her evidence, nor that it came to a perverse or irrational conclusion. I am therefore not satisfied there was a material error of law in the FTT's decision in respect of this ground.

67. I further adopt some of Judge West's and Mr McIver's reasons for rejecting this ground and when addressing the FTT's consideration of all the evidence on the issue of future loss of earnings.

68. I am satisfied that the FTT fairly summarised Dr Jarman's evidence in relation to the Applicant's employment position in paragraphs 48 to 50 of its written statement of reasons, and his adoptive mother's evidence at paragraphs 18 to 37. It also fairly recorded the evidence from Dr Jarman that, due to his maladaptive coping strategies, he was at risk of losing his employment at paragraph 50. However, it pointed out that that opinion had been given in August 2018, but that 6 months later he was still in work (in the Decision Notice).

69. Further, the FTT also took into account relevant evidence that, due to the intervention of his adoptive mother, the Applicant's employers had a better understanding of his disabilities and adjustments had been made to his working pattern, that he enjoyed earning money and was positive about his employment and his friends and that, when he had received a written warning, he had made a significant effort to ensure that he kept his job, with the result that there had been no episodes of difficulties at work since then (paragraphs 18-19, 26 and 37 of the written reasons). The FTT also recorded the Applicant's mother's evidence at paragraph 26 of the written reasons that she 'hoped that with their support and a good understanding employer there was a good chance of keeping [him] in employment of the rest of his life'.

70. On that basis, I am satisfied that the FTT was entitled to find on the evidence before it that the evidence indicated that the Applicant was able to hold down a job for a prolonged period of time and enjoyed working and was entitled not to accept that any evidence pointed to the likelihood of significant and prolonged periods out of

work. It took into account and did not fundamentally reject Dr Jarman's evidence but to the extent that it did reject Dr Jarman's evidence, it gave sufficient reasons for doing so.

71. To the extent that the FTT stated at paragraph 68 of its written reasons that 'all of the evidence indicated that [he] was able to hold down a job for a prolonged period of time and enjoyed working' I accept Mr Stephenson's submission that it was not accurate for the FTT to say 'all the evidence'. It may be closer to the point if the FTT had said that all the '*non-medical* evidence' or 'all of the evidence *in relation to the past rather than future*'. However, any error of the FTT in this regard was not material for the reasons set out above. All of the FTT's reasoning in both the decision notice and written statement of reasons must be read as a whole. This miswording does not reveal that the FTT failed to take into account Dr Jarman's evidence nor failed to give sufficient reasons to the extent it departed from her opinion.

72. Likewise, in paragraph 70 of its written reasons, there does appear to be a non-sequitur when the FTT addresses the absence of a claim for past loss of earnings when this was plainly not available nor argued by the Applicant. However, this does not demonstrate a material error of law by the FTT for all the reasons stated above.

Conclusion

73. The FTT took account of the evidence of both Dr Jarman and of the Applicant's mother when assessing his future employment prospects and loss of earnings. It also took account of his additional six months' employment history subsequent to the report of Dr Jarman, and of the beneficial effects of care and supervision upon him. The view which it reached – that the Applicant had long-term prospects of achieving lasting employment, with some enhancement to his risk of suffering periods of unemployment – is one which it was entitled to come to. It gave sufficient reasons for so doing.

74. In respect of Dr Jarman's evidence, the Grounds specify two quotes taken from paras 14.7 and 14.8 of her second report [pages T809-810 of the FTT bundle], in the light of which the FTT's findings are said to be unreasonable. Those quotes express Dr Jarman's concerns *'that it is only a matter of time before [the Applicant] loses his*

job' and *'about [the Applicant's] ability to sustain and progress within employment'*. They represent an assessment by her of a prognosis in respect of the Applicant's future employment.

75. I agree with Mr McIver that the assessment required of the FTT was to assess the long-term inhibitions on the Applicant's employment. This was a forward-looking assessment – the Judicial Review Grounds recognise this immediately beforehand, the argument being that the FTT's award *'failed to give sufficient weight to the [evidence] as to his long term prospects on the open labour market'* [para 6].

76. The argument made in the Grounds is that the award (which reflects a view that the Applicant would largely remain in work, with an increased possibility of period of unemployment [Decision notice second page, written reasons at paras 68-71]) diverges to some extent from the evidence of Dr Jarman. However, when it is recognised that the FTT's task here is forward-looking, and when the forward-looking evidence is actually identified, it becomes clear that the parents' and Dr Jarman's evidence also diverges to some extent. In summary, the parents are broadly hopeful, where Dr Jarman is more pessimistic.

77. Contrary to Mr Stephenson's submission, the FTT's finding – that something close to full employment can be hoped for – is broadly in line with the view expressed by the Applicant's mother and recorded by the FTT [para 26 of the written reasons]. Dr Jarman's more, but not entirely, pessimistic view is also recorded [para 50 of the written reasons]. In particular, the FTT expressly recorded Dr Jarman's concerns that the Applicant was at risk of losing his employment, but also observed that six months had passed since she had expressed that view and without those fears being realised [Decision notice second page].

78. It is thus clear that the FTT has not left out-of-account the relevant evidence. Instead, and unlike the Applicant's submissions, the FTT recognised and recorded the mixed nature of the parents' and Dr Jarman's views; additionally, it took account of the undisputed fact of the additional six months' continued employment (which in itself represents at the Applicant's age a significant proportion of his working life) in order to assist it in forming its view on future prospects.

79. The FTT was entitled to reach the view that it did, and took account of the relevant evidence in doing so. Adaptive measures then in place had at the relevant

time eliminated the Applicant's difficulties at work, and that the supervision element of the care award would serve to reduce the risk of future loss of employment as independence came to be achieved [paras 11-14].

80. I agree with Judge West that the FTT expressly bore in mind that there was a risk that, when the Applicant moved away from home, he might have problems maintaining self-discipline to get to work on time and deal with any conflict. However, given that decision to make an award for supervision as part of the care claim, that possibility would be greatly reduced.

Ground 1 b – multiplier / multiplicand vs lump sum

81. Mr Stephenson did not press this ground particularly hard.

82. I am satisfied that Judge West's reasons for refusing permission to bring judicial review on this ground are correct and rely upon them in full.

83. I am satisfied that the FTT was entitled to reject the Applicant's argument that the appropriate multiplicand was £23,000, based on the mean net income for a man engaged in a skilled trade. The FTT decided in its Decision Notice and summary of reasons, 'no evidence was provided to demonstrate that, but for the criminal injuries which he had suffered, the Applicant would have been in a skilled trade……given what was known of his natural parents, the best he could have hoped for would probably have been unskilled employment'. Even if the latter sentence was expressed in a somewhat deterministic manner, the FTT was entitled to make this finding on the evidence (or lack of evidence) available to it.

84. I accept Mr Stephenson's submission that there was an *apparent* discrepancy between the multiplier/multiplicand approach and the lump sum award actually made under paragraph 33 of the Scheme. On the one hand, in the Decision Notice the FTT stated:

> "The authority argued that it was not appropriate to adopt a multiplier multiplicand approach for future loss of earnings. They preferred to make the assessment under paragraph 33 of the scheme"

yet concluded that:

> "The tribunal adopted the multiplicand used by the Authority of £1000. Allowing this figure over his working life to the age of 67 produced a multiplier of 20. Also taking into account was that, in the event of unemployment, benefits would be payable. An award of £20,000 is appropriate."

By apparent contrast, in the statement of reasons the FTT found that

> "72. The tribunal accepted the argument of the respondent and made an award under paragraph 33 of the scheme for the reasons set out in the Decision Notice."

85. Following consideration of Mr Stephenson and Mr McIver's submissions, I do not accept the Applicant's argument that the FTT accepted the argument that this was a multiplier/multiplicand case. Like Judge West, I am satisfied the FTT accepted the Interested Party's submission that this was not such a case and made a lump sum award under paragraph 33 and not an award under paragraph 32.

86. I agree with Judge West that when the respective submissions of the parties are examined in more detail, the apparent inconsistency disappears. I therefore adopt his reasons as my own.

87. What the Applicant was contending was that:

(i) it was appropriate to calculate his future loss on a multiplier/multiplicand basis in accordance with paragraphs 31 and 32 of the Scheme;
(ii) the multiplicand was £23,000 on the basis of engagement in a skilled trade;
(iii) the appropriate Table A multiplier was 20; assuming a 10% deduction for contingencies that resulted in a multiplier of 18;
(iv) the earnings but for the injuries would have been £23,000 x 18 = £414,000;
(v) his actual earnings were £16,500; assuming difficulties in the work market a 50% deduction for the multiplier for contingencies was appropriate i.e. 10;
(vi) the actual earnings would have been £16,500 x 10 = £165,000; and
(vii) the future loss of earnings was therefore £414,000 - £165,000 = £249,000.

88. By contrast, the Interested Party was contending that:

(i) it was appropriate to calculate his future loss on a lump sum basis in accordance with paragraph 33 of the Scheme;

(ii) the purported multiplicand of £23,000 on the basis of engagement in a skilled trade was speculative, particularly when the birth parents had no academic background or record of achieving any work; and

(iii) if any award were to be made, it should be no more than £1,000 per year to reflect that some work would be undertaken and supplemented with in work and out of work benefits as circumstances required.

89. The FTT preferred the arguments of the Interested Party and took the figure of £1,000 as opposed to that of £23,000. Allowing that figure over the Applicant's working life to the age of 67 produced a multiplier of 20. That resulted in an award of £20,000.

90. That was not, however, to confuse the multiplier/multiplicand approach under paragraphs 31 and 32 with the lump sum approach under paragraph 33 (see the commentary in *Criminal Injuries Compensation Claims* (ed. Laura Begley), 2nd ed. (2016), at 9.5.1 where it is pointed out that Applicants may in some cases be advised to model their lump sum claim on an approximate multiplier/multiplicand basis. What the FTT was doing was to make a lump sum award, albeit on a multiplier/multiplicand basis, to take account of the fact that the Applicant might find himself disadvantaged on the labour market. In so doing, although it is not explicitly mentioned, the FT appears to have been working on a *Smith v Manchester Corporation* basis of assessment.

91. That is explained in *Billett v. Ministry of Defence* [2015] EWCA Civ 773 per Jackson LJ as follows:

> "54. In *Smith v Manchester Corporation* (1974) 17 KIR 1 the plaintiff developed a frozen shoulder as a result of an accident caused by her employer's negligence. At the date of trial the plaintiff was undertaking work for the same employer and at the same rate of pay as before (£16.50 per week), so that she had no current loss of earnings. Her employer undertook to continue employing her as long as it could properly do so. The Court of Appeal increased the plaintiff's award of damages so as to include £1,000 for future loss of earning capacity. The court explained that this sum was to compensate the plaintiff for the fact that, if she became unemployed, she would find it more difficult than uninjured persons to obtain employment. Both Edmund Davies LJ and Scarman LJ explained that they could not calculate this award using a multiplier and multiplicand.

Instead they were looking at the matter in the round and making a general assessment. Stamp LJ agreed.

55. In *Moeliker v A. Reyrolle & Co. Ltd* [1977] 1 WLR 132, Browne LJ said that a plaintiff's loss of earning capacity arises where "as a result of his injury his chances in the future of getting in the labour market work (or work as well paid as before the accident) have been diminished by his injury".

56. Browne LJ said that the first question to consider was whether there was a real or substantial risk that the claimant would lose his current job before the end of his working life. If the answer is yes, then Browne LJ gave the following guidance as to how the court should assess that head of damages:

> "Clearly no mathematical calculation is possible. Edmund Davies LJ and Scarman LJ said in *Smith v Manchester Corporation*, 17 K.I.R. 1, 6, 8, that the multiplier/multiplicand approach was impossible or "inappropriate," but I do not think that they meant that the court should have no regard to the amount of earnings which a plaintiff may lose in the future, nor to the period during which he may lose them. What I think they meant was that the multiplier/multiplicand method cannot provide a complete answer to this problem because of the many uncertainties involved. The court must start somewhere, and I think the starting point should be the amount which a plaintiff is earning at the time of the trial and an estimate of the length of the rest of his working life. This stage of the assessment will not have been reached unless the court has already decided that there is a "substantial" or "real" risk that the plaintiff will lose his present job at some time before the end of his working life, but it will now be necessary to go on and consider–(a) how great this risk is; and (b) when it may materialise–remembering that he may lose a job and be thrown on the labour market more than once (for example, if he takes a job then finds he cannot manage it because of his disabilities). The next stage is to consider how far he would be handicapped by his disability if he was thrown on the labour market–that is, what would be his chances of getting a job, and an equally well paid job. Again, all sorts of variable factors will, or may, be relevant in particular cases–for example, a plaintiff's age; his skills; the nature of his disability; whether he is only capable of one type of work, or whether he is, or could become, capable of others; whether he is tied to working in one particular area; the general employment situation in his trade or his area, or both. The court will have to make the usual discounts for the

> immediate receipt of a lump sum and for the general chances of life."
>
> 57. As a matter of convention a claim for damages on this basis is commonly referred to as a *Smith v Manchester* claim. In practice such awards usually range between six months' and two years' earnings: see *Court Awards of Damages for Loss of Future Earnings: an Empirical Study and an Alternative Method of Calculation* by R Lewis and others, [2002] Journal of Law and Society, Vol.29, pages 406-435 at 414.

92. As Jackson LJ said, a *Smith v Manchester* claim in practice usually works out at between six months' and two years' earnings. In this case the award of £20,000 as against an annual wage of £16,500 amounts to somewhere over one year's earnings and is not out of kilter with the usual range of such an award. I am satisfied that, in so deciding, the FTT made no material error of law and I therefore reject this ground.

93. I am satisfied therefore that there is thereby no real inconsistency between the FFT's making a lump sum award, and its (limited) use of a multiplier/multiplicand method – the latter was a check on the former, without in any way undermining that it was the former approach which was used. Indeed, carrying out such a check its approach was consistent with its use of the lump sum approach.

Ground 2 – Future care and Ground 3 – Administration costs

94. The Applicant submitted that the FTT made an unreasonable finding at paragraphs 112 of its written reasons, or failed to take into account relevant evidence or give sufficient reasons, when finding that the Applicant would only need future care for a further 10 years. The same applied in relation to Administration Costs.

95. Mr Stephenson submitted that there was no reasonable evidence upon which the FTT's conclusion was based and the figure of ten years for the Applicant becoming fully rehabilitated and able to cope independently was arbitrary - 'plucked from thin air'. Again, he submitted there was no evidence to support this from the report of Dr Jarman whose opinion was that the Applicant was likely to be affected by his injuries for the rest of his life (for example at paragraph 14.6 of the second report 'the prognosis….is likely to be poor').

96. Again, I agree with Judge West's and Mr McIver's reasons for rejecting these grounds. I am not satisfied that the FTT erred materially in law as claimed.

97. For the ground of judicial review to be made out, it must either be possible to identify a material error in the FTT's process of reasoning – such as a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider or take into account relevant evidence; or, if there is no such identifiable error and the question is simply one of judgment as to the appropriate weight to be given to the relevant evidence, the reviewing court must be satisfied that the Tribunal's conclusion cannot reasonably be explained or justified.

98. It does not matter, whether the reviewing court considers that it would have reached a different conclusion. What matters is whether the decision under review is one that no reasonable tribunal would have reached. Put another way, the reviewing court ought not to interfere unless it is satisfied that the FTT's conclusion lay outside the bounds within which reasonable disagreement is possible.

99. Although the FTT's two formulations of its reasons for its future care aware in a) the decision notice and b) the statement of reasons are not exactly the same, I am satisfied that there is no material difference between them:

> "Having regard to the expert evidence from Dr Ruth Jarman, and taking into account the future therapy and guidance he would be receiving in the future, by the age of 30 [the Applicant] should be able to live independently without risk of harm to himself and others"

and

> "The tribunal decided that, with the guidance of his parents, the treatment he would receive and his increasing years he would mature sufficiently to be able to live independently without the need for care by the age of 32. That age was selected by allowing for up to 10 years for [the Applicant] to undergo treatment and to mature and be free of drugs. At the date of decision he is nearly 21 years old."

100. In considering that the award for future care should last until the Applicant was aged 32, the FTT was entitled to exercise a judgment based on the evidence before it. It took into account the expert evidence of Dr Jarman, the guidance from his parents, the therapy and treatment which he was undergoing and his increase in age

(and the maturity that goes with increasing age). In the exercise of its judgment it considered that it should allow a reasonable 10 years to be able to live independently without the need for care, selecting that age to allow for up to 10 years for the Applicant to undergo treatment and to mature and be free of drugs.

101. I am satisfied that this was an exercise of judgment which the FTT was entitled to make on the evidence before it. It took only relevant factors into account, did not take irrelevant factors into account and reached a judgment on the basis of that material. I can see no error of law in that judgment. It is not 'arbitrary'.

102. Undoubtedly, the Applicant currently, and will for the foreseeably immediate future, need care. As was the evidence before the FTT, the Applicant will "need support in terms of daily living, ability to prepare meals" and will "need prompting support and encouragement in this regard". "His adoptive mother feels that he is [not] in any position to even consider living independently [because his] quite marked mood swings and emotional and behavioural issues require supervision to protect himself from vulnerabilities". However, crucially, Dr Jarman did not say that the Applicant will never be able to live independently without the need for care. At para 14.7 of Dr Jarman's report the 'opinion that the prognosis was likely to be poor' was specifically in relation to attachment disorder / behaviour disorder and symptoms of PTSD but this did not amount to an opinion that the Applicant would always need future care and without the potential benefit of treatment, therapy, support from his parents and years to mature.

103. There is no identifiable error of law made out by the Applicant and the question is really one of judgement as to the appropriate weight to be given to the relevant evidence. I am satisfied, that the FTT's conclusions can reasonably be explained or justified. I do not consider that the FTT's conclusion lay outside the bounds within which reasonable disagreement is possible. As Judge West stated 'That I myself might, or might not, have reached a different conclusion on the evidence does not matter. What matters is whether the decision under review is one that no reasonable tribunal would have reached and I am not so satisfied.'

104. I have also accepted Mr McIver's submissions in coming to this conclusion. The Applicant's grounds for judicial review argue that the decision to make the future care and costs of administration awards to age 32 was unsupported by any evidence. A

passage is quoted from para 14.8 of Dr Jarman's report to the effect that limitations in the Applicant's capabilities mean that *'his adoptive mother feels that he is [not] in any position at present to even consider living independently'*. This passage is however notably focused on his present circumstances.

105. The task for the FTT, in assessing the scope of these heads of award which are by their nature aimed to the future, cannot be limited to any witness's view of present circumstances. Moreover, although Dr Jarman does go on to express concern that the parents may find coping more difficult as they age, this does not assist in fixing a date for the end of care.

106. That was the task of the FTT, and was bound up with its task of assessing all the Applicant's circumstances. It did so, comprehensively, at the conclusion of its Written Reasons:

"The tribunal decided that with the guidance of his parents, the treatment that he would receive and his increasing years he would mature sufficiently to be able to live independently without the need for care by the age of 32. That age was selected by allowing for up to 10 years for [him] to undergo treatment and to mature and be free of drugs. At the date of decision he is nearly 21 years old." [para 112]

107. Each of those elements is founded upon material before the FTT as addressed at paragraphs within the written statement of reasons: parents hoping for future independence [27]; use of drug counselling [23]; openness to therapy [28 and 33]; that any success might not be sooner than 10 years [49]. It is also submitted that, for the same reasons as are noted above, Dr Jarman's relative pessimism as to the Applicant's circumstances was primarily focused on the present, and was thus of limited assistance to the FTT in assessing his future outlook. To the extent that Dr Jarman expressed a poorer long-term prognosis, the FTT gave sufficient reasons for differing from this opinion.

108. The test for assessing the FTT's conclusion of age 32 as an end-point for these heads of award is whether that was reasonable – i.e. whether it was within the range of responses open to it. I am satisfied that it was. Having reached the view that independent living was a realistic goal, which was founded on the availability of treatment, with family support, it was entitled to find that an award for care should be time-limited accordingly.

109. The time period of 10 years was, moreover, not without direct foundation. The FTT expressly linked it to 10 years *'to undergo treatment'* [para 112 of its written statement of reasons]. That time period links directly to the timescale stated by Dr Jarman for the Applicant to mature [at para 14.5 of her Report] and for the timescale for him to need therapy [at para 14.8 of her report]. Her opinion is that 'that he is too immature at this moment….. to undertake any formal therapy….I certainly do not feel that any therapeutic work would be of benefit as [he] agrees, certainly within the next 5 or even 10 years…...It is extremely difficult to state what number of sessions [he] may require, it is likely he would initially need around 18 sessions with therapy being revisited every 2-3 years at least for the next 10 years.'

110. It is noted that despite the FTT's reference to 10 years, age 32 in fact allows 11 years, working strictly from the timeline identified by the FTT at that paragraph. It is submitted that nothing turns upon that – it operates to the Applicant's advantage.

Conclusion on grounds 2 and 3

111. As Judge West observed in his refusal of permission, the FTT's came to reasonable conclusions on future care and costs of administration, which it was entitled to reach as within the range of responses open to it. Grounds 2 and 3 raise the same issue and stand or fall together. Given what I have said above in relation to ground 2, it must follow that ground 3 also fails.

Conclusion

112. For the reasons set out above, this application for judicial review is dismissed. I repeat my thanks to both counsel for their assistance. I am sorry that this result will be disappointing for the Applicant.

Judge Rupert Jones
Judge of the Upper Tribunal
Signed on the original/authorised for issue on 16 March 2021