IN THE UPPER TRIBUNAL **Upper Tribunal case No.** JR/4896/2014
ADMINISTRATIVE APPEALS CHAMBER

Before: Mr E Mitchell, Judge of the Upper Tribunal

Decision: Under section 15 of the Tribunals, Courts and Enforcement Act 2008, the proceedings for judicial review of the decision of the First-tier Tribunal (26th June 2014, file reference *X/98/208101*) are dismissed.

REASONS FOR DECISION

Introduction and summary

1. This case concerns an application for 'medical re-opening' of a final compensation decision made under the Criminal Injuries Compensation Scheme 1996 ("the 1996 scheme"). Such applications must meet certain conditions. And, where the application concerns a decision made more than two years previously, the scheme places an additional hurdle in the path of the application.

2. The principal issue in this case is whether the criminal injuries decision-maker must always consider whether the additional condition for older applications is met. I decide that this is not required. If the overarching condition, applying to all applications for re-opening is not met, there is no need to consider the additional condition for older cases. That means, in this case, any legal misdirection of the Tribunal concerning the additional condition for older cases was not a material error of law.

Background

The original award

3. Mr Y's claim for compensation was made in 1998 and related to stalking and harassment incidents that took place between July and November 1997. That means his case is governed by the 1996 scheme.

4. Being dissatisfied with the award initially offered, Mr Y appealed. On 25th September 2002, a Criminal Injuries Compensation Appeals Panel decided Mr Y was entitled to an award of £5,500. This was a reduction from the 'tariff' award because the Panel decided that only 30% of Mr Y's presenting mental health problems were attributable to the relevant crimes of violence. This was based on the Panel's finding that Mr Y "had been suffering from depression and panic attacks for several years before the incident and was receiving medication for this, the applicant agreeing he was very nervous prior to the incident and could not hold down a job".

The application for medical re-opening

5. Mr Y's application for re-opening of his case for compensation was made by solicitor's letter dated 19th October 2010. It relied on an asserted deterioration in Mr Y's mental condition. The application was not supported by medical evidence although the solicitor did request that the Criminal Injuries Compensation Authority (CICA) commission a psychiatric assessment.

6. Correspondence within the appeal papers shows that in August 2011 CICA undertook to fund a psychiatric assessment. However, CICA's medical contractor was unable to comply with Mr Y's request for assessment by a female psychiatrist because none were available in his local area. Alternatives were suggested: a male psychiatrist with a female chaperone in attendance or a female psychiatrist at her consulting rooms some 50 miles from Mr Y's home.

7. On 26th September 2011, Mr Y's solicitor wrote to the medical contractor stating that Mr Y was content to be assessed at home by a male psychiatrist. It seems that this may not have been communicated to CICA because, by letter of 24th June 2013, CICA asserted that they had not received any communication about the matter after July 2011. That letter also said that on 29th January 2012 CICA had written to Mr Y's solicitor withdrawing their earlier undertaking to commission a psychiatric assessment.

8. On 28th July 2012, CICA gave the decision that was subsequently appealed to the First-tier Tribunal. CICA refused to re-open Mr Y's case because, in their view, there was no evidence of a material change in his condition.

9. On 19th November 2012, the First-tier Tribunal directed a hearing "on the issue of a medical re-opening of this case". On 27th November 2012, the solicitor who was then (but is no longer) representing Mr Y wrote to the Tribunal: "if the Tribunal decide that the case should be re-opened upon medical grounds then our client respectfully requests that the Tribunal make a Direction that the psychiatric assessment previously indicated should now take place".

10. A hearing on 6th June 2013 was adjourned in response to Mr Y having raised as an issue CICA's August 2011 undertaking to fund a psychiatric examination. The adjournment notice states that CICA's representative requested the adjournment to investigate the matter further. Adjournment directions required CICA within 21 days to write to Mr Y's solicitor setting out their up-to-date position regarding funding a psychiatric examination.

11. Mr Y contended that, at the 6th June 2013 hearing, CICA's representative undertook that CICA would fund a fresh psychiatric assessment if it was shown that they had previously promised to do so. However, that is not reflected in the Tribunal's direction notice. Without wishing to cast any doubt on Mr Y's honesty, I think it is unlikely that a CICA presenting officer would have given such a commitment. What is more likely is that Mr Y simply misunderstood what was said at the hearing.

12. On 24th June 2013 CICA wrote to Mr Y's solicitor stating that, having reviewed the case, they remained of the view that a psychiatric report was not required.

13. On 6th August 2013, a different First-tier Tribunal judge (Judge Walker) gave further case management directions. The direction notice observed that under paragraph 57 of the 1996 scheme a case will not be re-opened more than two years after the final decision unless the decision-maker is satisfied "on the basis of evidence presented in support of the application" that the renewed application can be considered without the need for further extensive enquiries. The judge thought this placed the onus on Mr Y to produce "some convincing evidence" in support of re-opening. The direction notice went on:

> "I do not think it matters whether [CICA] did or did not agree to arrange a medical examination. The fact is that it has not taken place and the parties are no further on. Even if the Respondent had agreed to commission a report, in my view they ought not to have done so, for the reasons set out above."

14. Judge Walker also directed Mr Y to obtain and supply to the Tribunal his medical (G.P) records. Mr Y responded that he could not afford to obtain his records and, subsequently, the Tribunal directed that CICA obtain his records for June 2011 to 2014. Mr Y's earlier records were already in CICA's possession and had been supplied to the Tribunal. But Mr Y did supply a G.P. letter dated 7th October 2013 which stated Mr Y "has suffered from anxiety and panic attacks since 2002…This was initially precipitated by episodes of stalking, and since that time he has found it difficult to leave the house".

15. On 19th September 2013, Mr Y's solicitor wrote to CICA requesting that they "now agree to proceed with the psychiatric assessment initially offered and then withdrawn from our client". CICA responded on 24th September 2013 that "as per the directions issued by Tribunal Judge Walker on 06/08/2013 the Authority will not be arranging a psychiatric assessment in this case".

The contents of the medical records

16. The First-tier Tribunal had before it a complete run of Mr Y's G.P. records. This included the G.P's correspondence with external medical practitioners. Since Mr Y's relevant injuries are psychological in nature, I set out what the records say about Mr Y's mental health problems and treatment:

- 4/10/2013: Telephone encounter patient wants letter stating that he suffers from anxiety and panic since 1992 due to stalking. Unclear who he wants to give the letter to – pt v anxious on phone. I think it is something to do with DLA or crown prosecution service following compensation due to stalking. Due to pts anxiety issued v brief factual letter – pt agrees. No fee on this occasion";
- 27/06/2013: On this date, Mr Y consulted his GP about being "unable to tolerate mirtazipine" (an anti-depressant / anxiolytic). No symptoms were described;
- 24/06/2013: On this date, Mr Y was advised to start a newer anti-anxiety drug than Dosuelpin. He agreed to switch to Mirtazipine.

- 15/02/2010: "attended for medical r/v reports being stable. Different meds tried by [Mental Health Team] in the past and does not want to change. Still panic attacks";
- 20/04/2007: "incapacity for work form completed – pt contacted and had chat re depression and anxiety as a result of male stalking years ago. Has panic attacks and on occasions is unable to leave the house".
- 17/03/2006: "medication review with patient. Depressive [symptoms] much the same, mood sleep and appetite variable. No suicidal ideation. Unable to sleep without Zopiclone".
- 26/08/2005: "had long chat re probs-explained stress/anxiety main prob";
- 05/08/2005: "anxiety better";
- 19/07/2005: "recently driving new car. Engine seized up whilst driving on M4. Anxious re driving on fast roads. Advised not to drive if feels panicky";
- 25/11/2004: "unable to work due to depression and panic attacks"
- 13/06/2004: "panic attacks all week, feels tightening in chest"
- 24/03/2004: "remains depressed and "needs" sleeping tabs;
- 12/11/2003: "needs letter stating he has days when unable to leave the house. Also anxious about male assessor due to history of being stalked";
- 17/01/2003: "has good and bad days, panic attacks in public places and sometimes in friend's house";
- 15/03/2001: an entry of this date refers to "depressive symptoms".

17. The computerised GP records do not go back further than 2001. However, the manuscript records show a number of consultations for panic attacks in 1998, 2000 and 2001.

18. The G.P. records also include medical letters from January 1997 which refer to frequent panic attacks and in February 1997 Mr Y was seen by a psychiatrist who noted "severe panic attacks" and diagnosed a "panic disorder". I note that this was before the reported harassment/stalking that led to the CICA claim. In September 1997 (during the reported period of stalking/harassment) the psychiatrist referred to Mr Y experiencing panic attacks as frequently as three times a day but did not refer to stalking or harassment. Stalking was first referred to in a psychiatrist's letter dated 4th November 1997.

The First-tier Tribunal's decision

19. The Tribunal dismissed Mr Y's appeal on the basis that his medical condition had not materially changed since the Appeal Panel's award in 2002. That was explained by reference to the medical evidence which I have set out above. The Tribunal also found that, in the light of the evidence before it, it was able to consider "the case" without extensive enquiries and there was no need to direct a psychiatric examination.

The application for permission to bring judicial review proceedings

20. I granted Mr Y permission to bring judicial review proceedings, following an oral hearing at Cardiff Civil Justice Centre on 22nd June 2015. Permission was given on two grounds:

(a) that the Tribunal may have misdirected itself in law when construing the medical re-opening provisions of the 1996 scheme. In particular, it may have thought that, under paragraph 57 of the 1996 scheme, an applicant needed to show that the application for medical re-opening could be considered without the need for extensive enquiries; and

(b) that the Tribunal, at an earlier stage, may have strayed beyond its legitimate case management role by effectively preventing CICA from commissioning a psychiatric assessment.

21. I did not grant Mr Y permission to bring judicial review proceedings on the ground that "under the Human Rights Act 1998 … I have been unfairly dealt with because I had an existing medical condition and I am homosexual". I could see no basis for finding that the First-tier Tribunal had acted incompatibly with Mr Y's rights under the Human Rights Act 1998.

The arguments

22. CICA contest Mr Y's application. They argue that, while the First-tier Tribunal may have misconstrued the medical re-opening provisions, it made a defensible finding that there had not been a material change in Mr Y's condition for the purposes of paragraph 56 of the 1996 scheme. That rendered immaterial any error of law in construing the medical re-opening rules for older cases in paragraph 57 of the scheme. On the second ground of appeal, CICA argued that Judge Walker's view that CICA had wrongly undertaken to commission a fresh psychiatric assessment had no material effect on the fairness of the Tribunal proceedings. By the time that view was expressed, CICA had already decided to withdraw any earlier offer to fund a psychiatric assessment.

23. In reply, Mr Y mainly repeated his human rights arguments, on which permission to bring judicial review proceedings had been refused. Additionally, he maintained that the Tribunal had unfairly deprived him of the opportunity of trying to persuade CICA to commission a psychiatric assessment.

24. I have decided to determine these proceedings without holding a hearing. I have had written argument on the issues arising in the proceedings and do not think a hearing is necessary. While the First-tier Tribunal is nominally the respondent to these proceedings, and CICA is an interested party, the Tribunal has quite properly adopted a neutral stance.

'Medical re-opening' – the 1996 scheme provisions

25. Paragraph 56 of the scheme contains the general rule that a "decision" under the scheme will normally be regarded as final. But, as an exception to that, paragraph 56 goes on to provide that a "case" may be re-opened where "there has been such a material change in the

victim's medical condition that injustice would occur if the original assessment of compensation were allowed to stand".

26. There is an additional condition, however, where the application concerns a decision made more than two years previously (an "older case"). Mr Y's application was an older case. Paragraph 57 of the scheme provides:

> "A case will not be re-opened more than two years after the date of the final decision unless the claims officer is satisfied, on the basis of evidence presented in support of the application to re-open the case, that the renewed application can be considered without a need for extensive enquiries".

27. Paragraph 66, which is concerned with appeals against refusals to re-open, imposes a similar condition in older cases, although here the age of the case is defined expressly by reference to the date of the application for re-opening.

How do paragraphs 56 and 57 operate?

28. The first point to make is that paragraph 56 contains an over-arching condition for all applications for medical re-opening. It is open to CICA, therefore, to reject an application for re-opening, even in an older case, on the basis that the paragraph 56 condition is not met. CICA does not have to rely on or address paragraph 57 if it decides the paragraph 56 condition is not met. I therefore agree with CICA's submission to that effect.

29. With its dual reference to "the application", paragraph 57 has the potential to confuse. It refers to both the application to re-open and the renewed application itself. If, however, paragraph 57 is construed as a whole in the light of its role under the 1996 scheme, it is clear that the phrase "the renewed application can be considered without a need for extensive enquiries" refers to the applicant's substantive case for compensation under the scheme. This phrase does not refer to enquiries in connection with the application to re-open the case. That is shown by the reference to the "renewed application". The case for re-opening is not being renewed, the case for compensation is.

Did the First-tier Tribunal correctly apply the medical re-opening provisions?

30. There was no material error of law involved in the FtT's application of paragraphs 56 and 57 of the 1996 scheme.

31. The FtT found that Mr Y's mental condition had not changed materially since he was awarded compensation in 2002. If that finding stands, any misunderstanding on the part of the Tribunal about the additional rules for medical re-opening in older cases would be immaterial. That is because, as explained above, the 'material change in medical condition' condition

applies in all medical re-opening cases. If it is not made out, there is no need to go on to consider the additional hurdle placed in the path of an older case by paragraph 57.

32. The Tribunal's determination that there was no change in Mr Y's medical condition such that injustice would occur were the original compensation award to stand was open to it on the evidence. Indeed, the medical evidence shows that, since 2002, there has been no obvious change in Mr Y's mental condition at all. I certainly cannot find that the Tribunal's determination was not open to it on the evidence.

33. To conclude in relation to ground 1, I agree with CICA that the Tribunal did not make a material error of law in deciding that the conditions for medical re-opening were not satisfied. While there are passages in the Tribunal's statement of reasons that suggest it might have thought paragraph 57 required it to consider whether extensive enquiries were called for in relation to the application for medical re-opening, rather than the substantive case for compensation, any legal misdirection concerning paragraph 57 does not amount to a material error of law.

34. I also agree with CICA that the First-tier Tribunal's view (given before the final hearing) that CICA should not in 2011 have undertaken to fund a psychiatric assessment did not lead to unfairness in the Tribunal proceedings. By the time those views were expressed, CICA had already withdrawn their earlier offer to fund such an assessment. In fact, by that point CICA had twice resiled from that commitment (in January 2012 and June 2013). The Tribunal's views could not, therefore, have affected CICA's evaluation at those dates of whether to fund an assessment. Further, it is clear, in the light of the 1996 scheme's provisions, that the Tribunal was not obliged to direct a psychiatric assessment in order lawfully to decide Mr Y's appeal.

35. I accept that CICA's reconsiderations of whether to fund a psychiatric assessment appear to have been made in ignorance of Mr Y's 2011 consent to assessment by a male psychiatrist. However, Mr Y's solicitor could have put that point to CICA before their June 2013 decision maintaining their refusal to fund an assessment. There is no evidence that the solicitor did so. I also accept that in September 2013 CICA relied on Judge Walker's views in refusing to change their minds about a psychiatric assessment. However, in the light of the medical evidence and CICA's earlier refusals, I do not see how Judge Walker's views could have made any difference to CICA's September 2013 reconsideration of whether to fund a psychiatric assessment.

36. I should point out that my decision on the second ground of appeal is not made on the basis that the First-tier Tribunal was right to suggest that CICA should never have undertaken to fund a psychiatric assessment in connection with Mr Y's application for medical re-opening. I do not need to rule on that point although I shall express my views since the First-tier Tribunal may have assumed CICA have no power to commission medical assessments in connection with applications for medical re-opening in older cases.

37. I accept, of course, that paragraph 57 of the 1996 scheme prevents medical re-opening in an older case unless the decision-maker is satisfied "on the basis of evidence presented in support of the application" that "the renewed application can be considered without a need for extensive enquiries". I also note that paragraph 18 of the scheme provides generally that "it will be for the applicant to make out his case" for compensation under the 1996 scheme.

38. Despite those provisions of the 1996 scheme, my view is that CICA probably does have a discretionary power to commission a medical assessment, even in paragraph 57 cases. The Criminal Injuries Compensation Authority is, as I understand it, established under prerogative powers buts it role is to discharge the statutory functions of "scheme manager" under the Criminal Injuries Compensation Act 1995. The long-standing authority of *A-G v Great Eastern Railway Co*. (1880) 5 App. Cas 473 holds that conferral of a statutory function implies necessary ancillary powers:

> "…those things which are incident to, and may reasonably and properly be done under the main purpose [of an enactment], though they may not be literally within it, would not be prohibited."

39. I recognise I have not heard argument on the point but my view is that CICA probably do have power to commission a medical examination in a medical re-opening older case. Whether or not to exercise any such power in a particular case is, of course, a matter for CICA in the first instance.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
17th February 2016