

**JR/0764/2015**

**DECISION OF THE UPPER TRIBUNAL  
(ADMINISTRATIVE APPEALS CHAMBER)**

**Decision and Hearing**

1. **This application succeeds.** Pursuant to the judicial review jurisdiction of the Upper Tribunal and in accordance with the provisions of sections 15 to 18 of the Tribunals, Courts and Enforcement Act 2007 I make a **quashing order** in respect of the decision of the First-tier Tribunal (Social Entitlement Chamber) to refuse an appeal against the decision of Criminal Injuries Compensation Authority (“the Authority”) not to waive the time limit for claiming an award under the Criminal Injuries Compensation Scheme 2012 (“the 2012 scheme”). The decision of the First-tier Tribunal was made after a hearing in Nottingham on 11<sup>th</sup> November 2014 and written reasons were signed in January 2015. The First-tier Tribunal reference is CI014/14/00030 and the CICA reference is X/13/303288 – TM4B.

2. I refer the matter to the Social Entitlement Chamber of the First-tier Tribunal for a fresh hearing and decision by a panel that does not include any judge or member who has considered this matter hitherto. The applicant should consider requesting an oral hearing and the parties should regard themselves as being on notice to send to the clerk to the First-tier Tribunal as soon as is practicable any further relevant written medical or other evidence.

3. I held an oral hearing of this application for judicial review at Field House in London on 13<sup>th</sup> January 2016. The applicant, who was the claimant for compensation, attended in person and was represented by Azeem Suterwalla of counsel instructed by Bhatia Best, Solicitors. The Authority, which is the interested party in this application, was represented by James Purnell, instructed by the Treasury Solicitor. I am grateful to them all for their assistance. The First-tier Tribunal is the respondent but had, quite properly, taken no part in the proceedings.

**The 2012 Scheme**

4. This case is about the application of certain provisions of the 2012 scheme, under which the claim for compensation was made. Paragraphs 87 to 89 of the scheme provide as follows:

87. Subject to paragraph 88, an application must be sent by the applicant so that it is received by the Authority as soon as reasonably practicable after the incident giving rise to the criminal injury to which it relates, and in any event within two years after the date of that incident.

88(1) Where the applicant was a child under the age of 18 on the date of the incident giving rise to the criminal injury, the application must be sent by the applicant so that it is received by the Authority:

- (a) in the case of an incident reported to the police before the applicant's 18th birthday, within the period ending on their 20th birthday; or
- (b) in the case of an incident reported to the police on or after the applicant's 18th birthday, within two years after the date of the first report to the police in respect of the incident.

(2) An application will not be accepted under this paragraph unless a claims officer is satisfied that the evidence presented in support of the application means that it can be determined without further extensive enquiries by a claims officer.

89. A claims officer may extend the period referred to in paragraph 87 or 88 where the claims officer is satisfied that:

- (a) due to exceptional circumstances the applicant could not have applied earlier; and
- (b) the evidence presented in support of the application means that it can be determined without further extensive enquiries by a claims officer.

### **Background and Procedure**

5. The applicant is a man who was born on 11<sup>th</sup> May 1977. On 9<sup>th</sup> April 2013 he made a claim for compensation under the 2012 scheme on the basis that from the ages of 9 and 12 (in the mid and late 1980s) he had been the victim of physical and sexual abuse. He says that as a child he was disbelieved and punished for causing trouble when he tried to tell people about this and that (witness statement of 13<sup>th</sup> February 2015 paragraph 8):

“The very fact that I was disbelieved as a child made me assume that I would be disbelieved as a child made me assume that I would be disbelieved if I had tried to approach the authorities as an adult. I therefore tried to put the abuse to the back of my mind and tried to move on with my life. It became impossible to erase the past from my memory and resulted in me turning to drink and drugs to try to escape.”

6. The applicant became 18 on 11<sup>th</sup> May 1995. The First-tier Tribunal found that from the age of 19 he “has been a habitual drugs user and also consumed alcohol in excess”. In 2009 he was suffering from a serious addiction problem and sought the help of his GP. (See paragraph 14(7) of the First-tier Tribunal Written Reasons).

7. In November 2010 the applicant was approached by the police and informed that because of information discovered during the course of an investigation of allegations by someone else of abuse, the police were making enquiries of those who attended the same cubs/scout group at the same time as this other complainant. It was at this point that the applicant disclosed to the police the abuse that he himself had undergone and made a written statement. On 10<sup>th</sup> August 2011 the perpetrator pleaded guilty to and was convicted of offences against the applicant and 11 other boys and on 9<sup>th</sup> September 2011 he was sentenced to six years imprisonment. In his witness statement

of 13<sup>th</sup> February 2015 the applicant states that the conviction “brought everything flooding back” (paragraph 11) and that he used heroin for about three months and then had to “live like a recluse” for about three months while he went “cold turkey” (paragraph 13). In August 2012 the applicant’s father (to whom he was very close) died suddenly and unexpectedly and “I then suffered a second relapse” (paragraph 14). During this period he was arrested for an offence relating to alcohol and driving and first consulted solicitors, who assisted him on this matter, on which he appeared in the magistrates court on 29<sup>th</sup> January 2013, pleaded guilty and was fined and disqualified. After this he left a telephone message for the solicitors to the effect that he wanted to consult them on another matter – but it seems that the call was not returned. The applicant states that he was “out of action” until approximately April 2013. He did not receive legal advice before making the claim for compensation.

8. On 29<sup>th</sup> April 2013 the Authority refused to waive the time limit for claiming and refused to make an award. This decision was maintained on review by the Authority on 26<sup>th</sup> February 2014 and on 2<sup>nd</sup> April 2014 the applicant appealed to the First-tier Tribunal against the decision of the Authority. The tribunal heard the appeal on 11<sup>th</sup> November 2014 and confirmed the decision of the Authority.

9. On 23<sup>rd</sup> February 2015 the applicant applied to the Upper Tribunal for judicial review of the decision of the First-tier Tribunal and on 9<sup>th</sup> March 2015 I gave him permission to proceed with the application on the basis of consideration of the papers. On 10<sup>th</sup> June 2015 I directed that there be an oral hearing of the substantive application. The hearing was listed for 2<sup>nd</sup> October 2015 but the applicant’s legal representatives applied for the hearing to be adjourned so that they could seek a transcript of the First-tier Tribunal hearing and/or a copy of the presiding judge’s handwritten notes. On 29<sup>th</sup> September 2015 I postponed that hearing but refused to direct the disclosure of any handwritten notes at that stage, although I indicated that the matter could be raised again either at the hearing of the substantive application or at a prior directions hearing if specifically requested by the applicant. The matter was not raised again. The oral hearing finally took place on 13<sup>th</sup> January 2016. The Authority opposes the application and supports the decision of the First-tier Tribunal.

### **The First-tier Tribunal Decision**

10. The First-tier Tribunal accepted that in view of the relatively recent conviction of the assailant, paragraph 89(b) of the 2012 scheme applied in that the claim could be determined without further extensive enquiries by a claims officer. However, in relation to paragraph 89(a) it found as follows (paragraph 15 of its Written Reasons):

15(b) ... there were no exceptional circumstances which prevented the appellant from applying sooner for compensation. The death of the appellant’s father in August 2012, the Appellant’s lack of knowledge of the scheme and the appellant’s drug and alcohol addictions were not exceptional circumstances and consequently the tribunal found no good reason to extend the two-year period for making his claim for compensation.

15(c) The appellant had managed his life with his drug and alcohol addiction, which predated the date on which he made his complaint to the police of the

sexual abuse and these factors continued to be present during the relevant two year period and were not exceptional.

In paragraph 16 the First-tier Tribunal added:

16(2) The appellant had suffered with drugs and alcohol abuse for some years prior to the date on which he first reported the incident to the police and had continued to manage his life throughout this period. He continued to suffer with this drug and alcohol addiction during the two year period and this has continued to date, although he has been receiving treatment

16(3) The death of the appellant's father in August 2012 was clearly a distressing period and whilst it is understandable that for a short period thereafter the Appellant would have suffered with the effects of the bereavement, this is not exceptional, as the appellant would have been able to make his claim for compensation during the period prior to his father's death and following the period, after he overcame the effects of the bereavement.

16(4) Although the appellant had no knowledge of the scheme until 2 April 2013 when he submitted his claim for compensation, it is apparent that the appellant was considering the issue of compensation prior to that date, as he consulted a solicitor in August 2012 when he left a message on the answerphone of the solicitor, but he did not follow up the issue. Additionally he had contact with a different solicitor between August 2012 and January 2013 when he received advice on a charge of driving with excess alcohol.  
16(5) The appellant had both the capacity and the opportunity to obtain knowledge of the scheme and to submit his application at an earlier stage within the relevant two-year period.

11. It seems to me that the above reasoning of the First-tier Tribunal was particularly crass and muddled. For example, the death of one's father is for most people (depending on the family structure) a unique experience. How it can be regarded as unexceptional is totally beyond me, as is the glib and speculative reference by the First-tier Tribunal to the period "after he overcame the effects of the bereavement".

### **The Arguments**

12. The arguments on behalf of the applicant are that the First-tier Tribunal failed to take proper or adequate account of the effect of the applicant's alcohol and drug dependency and that it had relied on a key error of fact in relation to the applicant's dealings with his solicitors. The First-tier Tribunal had referred to the death of the applicant's father but had made no reference to the effects on the claimant of the conviction of the assailant or to the applicant's state after his own conviction. It had also made a key factual error as to when the claimant had consulted solicitors in relation to a claim. In or about August 2012 the applicant consulted a solicitor in relation to the road traffic prosecution. The normal two year period for claiming expired in November 2012 (two years after he was interviewed by the police. He did not leave the message with his solicitor until about the end of January 2013.

13. The Authority argued that the First-tier Tribunal did all that it had to do, took account of all the matters of which it was obliged to take account, had adequately explained its decision, and that the Upper Tribunal should be very slow to interfere with the way in which it had exercised its discretion.

14. Reference was made (by both parties) to a number of legal authorities which either relate to well-established or obvious points of law or do not assist in the decision that must be made in this particular case.

### **The Application of Rule 89(a)**

15. In applying rule 89(a) of the 2012 scheme there are two subsidiary questions that need to be asked: (i) were there exceptional circumstances? (ii) did any of them mean that the applicant could not have applied earlier than he did apply? Whether anything is exceptional is primarily a question of fact for the decision making authority or the First-tier Tribunal but those bodies must be reasonable in reaching a conclusion – and in my view the First-tier Tribunal in the present case was not reasonable, partly for the reasons that I have indicated in paragraph 11 above and partly because the pattern of addiction in the present case could in no way be regarded as unexceptional. In this respect the First-tier Tribunal’s analysis was erroneous in law.

16. It has been suggested that there is an ambiguity in the wording of paragraph 89(a). Does “earlier” refer to a date within the two year period specified in paragraph 88(1)(b) or does it refer to any date prior to the date on which the claim was actually made? I have no hesitation in concluding that it refers to the latter. That is the plain meaning of the wording and if it had been intended to refer to an earlier date within the two year period it would have said so. Thus, if the claim could in practice have been made at any earlier date than it was actually made (whether within the two year period or otherwise) then it should not be admitted under paragraph 89(a). I do not accept the argument that I think was being put on behalf of the applicant that the two year period should be ignored and the question should be whether a claim could have been made at any time between the expiry of the two year period and the date that the claim was actually made.

### **Conclusions**

17. The First-tier Tribunal did not really identify the two part process to which I have referred in paragraph 15 above or separate out the considerations in respect of each question. That was in error.

18. I also accept the arguments of the applicant that I have summarised in paragraph 12 above. The First-tier Tribunal appears to have failed to take account of relevant matters and that is also an error of law. For these and the above reasons I make the decision given in paragraph 1 above.

**H. Levenson**  
**Judge of the Upper Tribunal**  
**22<sup>nd</sup> March 2016**