JR/1555/2015

**IN THE UPPER TRIBUNAL**
**ADMINISTRATIVE APPEALS CHAMBER**

**Before: UPPER TRIBUNAL JUDGE KNOWLES QC**

## DECISIONS

**The decision of the First-tier Tribunal dated 23 January 2015 is quashed.**

**The matter is remitted to a differently constituted First-tier Tribunal to rehear this appeal in accordance with the guidance given herein.**

## REASONS FOR DECISION

Introduction

1. This application for judicial review challenged a decision of the First-tier Tribunal made on 23 January 2015 which found that the Interested Party, Mr S, was a victim of a crime of violence who was entitled to an award of compensation under the Criminal Injuries Compensation Scheme 2012. The circumstances were that, whilst using a pedestrian crossing, Mr S was hit and seriously injured by a cyclist who was cycling in what the tribunal found to be a dangerous and reckless manner.

2. The Criminal Injuries Compensation Authority was the Applicant and is referred to as "CICA". The formal Respondent, the First-tier Tribunal, took no part in these proceedings as is both customary and proper. I refer to it as "the tribunal". Finally I refer to the Interested Party as "Mr S" and to the perpetrator of the alleged crime of violence as "X".

3. I have taken care not to identify by name any of the persons involved in the incident which so seriously injured Mr S. That is not only unnecessary but would also undermine the decision made by Mr S in conjunction with the police that restorative justice was a suitable remedy for what X had done.

4. I gave permission to CICA to bring proceedings for judicial review on 24 August 2015 and this application was originally listed for hearing on 22 January 2016. Unfortunately due to bereavement in one of the parties' legal teams, this hearing had to be postponed until 30 September 2016.

5. Mr Ben Collins of counsel appeared on behalf of CICA and Mr Colm Nugent of counsel appeared on behalf of Mr S. Both advocates had submitted detailed written submissions together with a bundle of relevant case law. I am very grateful to them for the helpful and thoughtful manner in which they made their oral submissions to me.

6. I regret that other judicial business, sickness and leave has prevented me from issuing a decision until now. I have taken time to reflect upon the difficult issues raised in this case and, in particular, I have taken account of the comments made by the Court of Appeal in Criminal Injuries Compensation Authority v Hutton and Others [2016] EWCA Civ 1305 ["Hutton"] about the jurisdiction and role of the Upper Tribunal when hearing an application for judicial review of a First-tier Tribunal's decision in a criminal injuries compensation case. The decision of the Court of Appeal post-dated the hearing but I decided that it was not necessary for me to require the parties to make additional written submissions addressing the implications of that decision for this application.

Summary of My Decision

7. To the best of my knowledge, this is the first Upper Tribunal decision to consider a claim for criminal injuries compensation arising from an incident involving a non-motorised vehicle, in this case, a bicycle.

8. I have concluded that the tribunal's decision on 23 January 2015 was in error of law. First, it erroneously concluded that Mr S was the victim of a crime of violence by reference to the consequences rather than the nature of that act. Further, in coming to its decision on that issue, it failed to have regard to X's actual state of mind during the incident.

9. Second, the tribunal failed to consider what was in X's mind during the incident in order to come to a reasoned view about what was his intention. It was required to consider that issue by paragraph 4(1)(b) of Annex B to the 2012 Scheme. That omission and the failure to address explicitly the relevant parts of X's police interview meant that the tribunal came to a view about whether X used his bicycle with intent to cause injury to Mr S to which no reasonable tribunal could have come.

10. Third and finally, the tribunal accepted the opinion evidence of a police officer, PC B, on issues which it was required to determine for itself such as the accuracy of the accounts of the witnesses and what happened during the course of the incident. Most importantly the tribunal abrogated its fact finding responsibility in relation to issues which touched on X's state of mind. That constituted a fundamental error rendering the tribunal's decision as a whole unlawful.

11. I quash the decision in its entirety.

12. I endorse the submission made by Mr Collins on behalf of CICA that, given the very serious impact of this incident on Mr S, none of the parties had any enthusiasm for another First-tier hearing but, regretfully, the need for that arises from my quashing decision. I thus remit Mr S's appeal against CICA's decision to a differently constituted First-tier Tribunal for rehearing and hope that the same can be arranged as soon as practicable. That tribunal should have regard to the contents of this decision when rehearing Mr S's appeal.

13. Neither the tribunal judge nor the members of the panel which first heard Mr S's appeal should sit on the new tribunal. I leave it to a Tribunal Judge of the First-tier Tribunal to make whatever procedural directions are thought necessary for the purpose of rehearing. I emphasise that the evaluation of all of the evidence will be a matter for the good judgment of the members of the new tribunal.

14. Mr S should therefore understand that the fact that CICA has been successful in this application for judicial review before the Upper Tribunal does not imply that it will necessarily be successful in the re-heard appeal before the new tribunal.

The Scheme

15. Section 1 of the Criminal Injuries Compensation Act 1995 provides as follows:
*"1(1) The Secretary of State shall make arrangements for the payment of compensation to, or in respect of, persons who have sustained one or more criminal injuries.*
*(2) Any such arrangements shall include the making of a scheme providing, in particular for –*
*(a) the circumstances in which awards may be made; and*
*(b) the categories of persons to whom awards may be made.*
*(3) The scheme shall be known as the Criminal Injuries Compensation Scheme.*
*(4) In this Act*
*…*
*"criminal injury", "loss of earnings" and "special expenses" have such meaning as may be specified;*
*…*
*"specified" means specified by the Scheme."*

16. The Secretary of State made a Scheme pursuant to the 1995 Act with effect from 30 September 2012 ["the 2012 Scheme"]. It applies to any application for compensation received on or after that date.

17. Paragraph 4 of the 2012 Scheme sets out eligibility in respect of injuries for which an award may be made. It reads as follows:
*"A person may be eligible for an award under this Scheme if they sustain a criminal injury which is directly attributable to their being a direct victim*

*of a crime of violence committed in a relevant place. The meaning of "crime of violence" is explained in Annex B."*

18. Paragraph 1 of Annex B provides as follows:
*"This Annex applies in deciding whether a crime of violence has been committed for the purposes of this Scheme. Where a claims officer is satisfied that a crime has been committed it is still necessary for that crime to constitute a crime of violence in accordance with this Annex."*

19. Paragraph 2 provides:
*"(1) Subject to paragraph 3, a "crime of violence" is a crime which involves:*
*(a) a physical attack;*
*(b) any other act or omission of a violent nature which causes physical injury to a person…*
*(2) An act or omission under sub-paragraph 1 will not constitute a crime of violence unless it is done either intentionally or recklessly.*
I note that paragraph 3 is not relevant to the facts of this claim.

20. Paragraph 4 provides:
*"(1) A crime of violence will not be considered to have been committed for the purposes of this Scheme if, in particular, an injury:*
*…*
*(b) resulted from the use of a vehicle, unless the vehicle was used with intent to cause injury to a person;*
*…*
*(2) In this paragraph, "vehicle" means any device which can be used to transport persons, animals or goods, whether by land, water or air."*

21. In R (Jones) v First-tier Tribunal (Social Entitlement Chamber) [2013] UKSC 19 ["Jones"], the Supreme Court highlighted the proper approach to consideration of eligibility under the Criminal Injuries Compensation Scheme 2008, the precursor to the 2012 Scheme. Lord Hope identified the task facing the First-tier Tribunal as follows (paragraph 16):
*"It is for the tribunal which decides the case to consider whether the words "a crime of violence" do or do not apply to the facts which have been proved. Built into that phrase, there are two questions that the tribunal must consider. The first is whether, having regard to the facts which have been proved, a criminal offence has been committed. The second is whether, having regard to the nature of the criminal act, the offence that was committed was a crime of violence."*
That approach remains correct for eligibility under the 2012 Scheme.

Background to this Appeal

22. On 24 October 2013 CICA received an application from Mr S for criminal injuries compensation arising from an incident in which he had sustained serious head injuries. On 10 July 2013 Mr S had been struck by a cyclist, X, as he was walking across a zebra crossing. The nature

of Mr S's injuries meant that he had no real recollection of what had actually occurred on that date. At the time of the incident the cyclist, X, was aged 15 years.

23. By letter dated 28 October 2013 CICA refused an award of compensation under the Scheme on the basis that there had been no crime of violence because the injuries resulted from the use of a vehicle with no intent to injure. Mr S asked for a review of that decision but, following the review, the original decision was maintained. Mr S appealed to the tribunal on 7 July 2014.

24. The tribunal held a hearing on 23 January 2015 when both CICA and Mr S were represented. It had before it contemporaneous police statements from two witnesses, Mrs B and Mr A, the transcript of the police interview under caution with X carried out some two hours after the incident, and the police accident report. It heard oral evidence from PC B who was the investigating officer.

25. By a fully reasoned decision dated 24 March 2015, the tribunal allowed the appeal as it was satisfied on the balance of probabilities that Mr S was the victim of a crime of violence. It found that the bicycle ridden by X was used with intent to cause injury to Mr S. Mr S was eligible for an award of compensation under the Scheme and the tribunal remitted his case back to a CICA claims officer for implementation and further decision.

The Tribunal's Decision

26. I deal here with the tribunal's decision insofar as it concerns the subject matter of this application. References are to paragraph numbers in the tribunal's decision. I have omitted material which might serve to identify either the location or the identity of those involved.

27. The decision outlined the background to Mr S's appeal [2-5]; identified and set out the relevant provisions of the Scheme [6] and the provisions of section 28 of the Road Traffic Act 1988 which concern dangerous cycling [7]. It then correctly identified the issues it had to determine, namely whether Mr S was the victim of a crime of violence and whether the exception in paragraph 4(1)(b) of Annex B applied [8]. Further it noted that, unlike its predecessor schemes, the 2012 Scheme defined a crime of violence for the first time [10]. The tribunal went on to summarise the written and oral evidence before it [11-22] and the submissions made by each party [23-24].

28. The tribunal then set out its findings of fact [26-42]. It found that PC B was a credible, reliable and straightforward witness with over five years specialist experience in road traffic matters. He knew X and his family well and his evidence was consistent with that of the other independent witnesses. It found that a bicycle was a vehicle for the purposes of the

Scheme. The cyclist, X, was aware that, by riding his bicycle in a reckless and dangerous manner, it was a virtual certainty that he would cause injury to pedestrians using the crossing and to Mr S in particular [28]. It found that X had ridden his bicycle and struck Mr S with intent to injure him [29]. X was a local boy aged fifteen years who knew the junction where the incident occurred was a busy one [30].

29. The tribunal went on to make findings about the junction and the behaviour of X on his approach to the junction. The incident had occurred when Mr S was half way across a zebra crossing at the junction of two roads, both junction and crossing being controlled by traffic lights [31]. At the material time visibility was good and there was nothing wrong with the traffic lights [32]. On his approach to the junction, X was cycling at speed and weaving in and out of the traffic, on occasion riding on the opposite carriageway. A motorist had to swerve to avoid colliding with him [33]. Before X reached the zebra crossing, the lights had turned to red [34] but he did not slow down and instead deliberately pedalled faster [35]. He had a clear view of the crossing but deliberately cycled through a red light and took no evasive action. He failed to brake until immediately before he struck Mr S [35]. His bicycle made a skid mark on the road which was straight, short in length, and started immediately before the zebra crossing [36].

30. The tribunal found that Mr S's injuries were caused by an act of a violent nature [38]. It acknowledged that X had not given evidence to the hearing but set out portions of his interview under caution [40]. These read as follows:
(a) *"basically right, I was coming down --- Hill, quite fast, … I was about, not far from the traffic lights … … I literally kept going and then as I kept going this man walked out straight in front of me so I tried to brake… … anyway I was still going quite quick so I was like wow, so I started panicking cos I thought obviously go hit him, so I hit him"*
and
(b) *"… I couldn't have stopped cos I was going too quickly for the light so obviously I kept on going and just lay, basically laid straight into the man"*.

31. The tribunal found that, but for his age and but for Mr S and his partner agreeing with the police that restorative justice was an appropriate disposal, X would have been charged with an offence under section 28 of the Road Traffic Act 1988 [41]. X had accepted responsibility for his actions [42].

32. Having found the above facts, the tribunal then set out its decision and the reasons supporting it. It stated that it "*accepted and adopted*" the evidence of PC B [45]. The evidence of the two other independent witnesses was accepted, the tribunal noting that PC B found them to be accurate in their observations of X's manner of cycling, the speed and the timings [46]. Their evidence was consistent with the CCTV

footage viewed by PC B and with the scale drawing of the place where the incident occurred.

33. The tribunal stated there was little doubt X was cycling at speed in a dangerous and reckless manner. It accepted PC B's evidence that X knew the junction well as PC B knew X and his family [49].

34. The tribunal then asked itself if the injuries sustained by Mr S were caused by an act of a violent nature and noted that, in considering whether Mr S was the victim of a crime of violence, it had regard to the nature of the act and not its consequences [51]. The tribunal recognised that, for the first time, the 2012 Scheme defined what was and what was not a crime of violence and, in the light of that definition, asked itself whether Mr S had suffered a physical injury from any act or omission of a violent nature [52]. It found that his injuries were caused by an act of a violent nature and relied on the following matters. First, he had been hit by X riding his bicycle down a steep incline at speed and in a reckless and dangerous manner without regard for other road users including pedestrians crossing at the junction. Second, but for his age, X would have been charged with an offence of dangerous cycling under section 28 of the Road Traffic Act 1988. Section 28(3) of that Act defines dangerous as "*danger either of injury to any person or…*". Third, the force of the impact was such that Mr S – a large and stocky man – was thrown 100 yards from where he was crossing and sustained a severe brain injury which had left him with cognitive and other problems [53]. It concluded that the act was of dangerous cycling and the force of the impact was such that it was also a violent act [54].

35. The tribunal then went on to consider whether the bicycle ridden by X had been used with intent to cause injury to Mr S. It made reference to the leading case of R v Woollin [1999] 1 AC 82 and to Nedrick [1986] 1 WLR 1025. It recognised that intention required a high degree of fault on behalf of X and that the test it had to apply was a subjective one. It accepted that, when he started on his journey, X did not intend to cause injury to anyone. It thus had to consider whether his actions were such that it could be implied that he intended to injure Mr S and whether, in consequence of the manner of his cycling, it was a virtual certainty that injury to Mr S would occur [59].

36. It concluded that X's cycling was dangerous and reckless because of the way in which he was cycling, his speed, his failure to take avoiding action as he neared Mr S, his deliberate running of the red light and the increase in his speed as he approached the junction knowing that pedestrians were crossing. The virtual certainty of injury to pedestrians crossing the junction was a probable consequence of such cycling [60]. X had seen pedestrians using the crossing and knew the lights were red but did not stop and indeed sped up. He was aware of Mr S being halfway across the crossing and tried to brake. The short straight skid mark indicated that X started braking immediately before he hit Mr S

and that he continued cycling without trying to avoid him. He cycled straight at Mr S and thus injury to Mr S was a virtual certainty [61]. The tribunal was satisfied that X had the necessary mens rea for implied if not direct intent [62].

37. The tribunal stated that X was fully aware of his actions and knew that because of his dangerous and reckless cycling it was a virtual certainty that he would cause injury to any pedestrian crossing the road and to Mr S in particular [63]. The tribunal was fortified in that view when it considered X's own words – *"so I started panicking cos I thought obviously go hit him so I hit him"* and *"I couldn't have stopped cos I was going too quickly for the light so obviously I kept on going and just lay, basically laid straight into the man"* – which were consistent with the evidence and its findings [64].

Summary of Each Party's Case

38. In its submission, CICA argued that the tribunal's decision was unlawful or irrational on a number of grounds.

39. First, the tribunal accepted and adopted the evidence of PC B on matters upon which it was required to reach its own conclusions such as the accuracy of the witnesses' accounts and what happened in the course of the incident. The police officer's opinion on those matters was not a legitimate matter for the tribunal to take into account. This was contrary to the approach set out in RS v CICA [2012] UKUT 205 (AAC) ["RS"]. In accepting PC B's opinion as to matters of primary fact, the tribunal erred in its approach to its fact-finding role. Most importantly, the tribunal abrogated its responsibility in relation to issues which touched on X's state of mind such as what he knew and what he would have seen. That failure was of fundamental importance and rendered the decision as a whole unlawful.

40. Second, though the tribunal did not in terms make a finding that X committed a criminal offence, CICA accepted that such a finding was implied by references to section 28 of the Road Traffic Act 1988 and that it was open to the tribunal on the evidence to conclude that Mr S sustained injury as a direct consequence of this offence. However the tribunal's conclusion in paragraph 54 that *"the act is of dangerous cycling and the force of the impact was such that it was also a violent act"* was erroneous in law. It concluded that the act was a crime of violence by reference to its consequences rather than its nature. Alternatively, by relying on the force of the impact rather than considering the nature of the actions themselves, the tribunal failed to give adequate reasons for its conclusion that X's actions constituted a crime of violence.

41. Third, the tribunal erred in law by concluding that X used his bicycle with intent to cause injury. What a person ought to have known and what, on the balance of probabilities, a person did know might well be relevant to

that person's aim or purpose at the time he or she did something. In that respect, a tribunal might be assisted by a direction in accordance with R v Woollin ["Woollin"] to the effect that the necessary intention may be found where (a) the outcome was a virtually certain consequence of the defendant's voluntary act and (b) the defendant appreciated that fact. However the circumstances were different in this case where the tribunal was required to consider, whether in cycling towards Mr S at speed, X intended to cause injury. Wrongly the tribunal considered whether there was a high degree of fault and whether X foresaw that the consequences of his dangerous cycling was injury to Mr X. The tribunal failed to grapple with the essential question which was the point at which X realised that injury to Mr X was inevitable. Most significantly the tribunal failed to deal with that part of X's police interview which expressly dealt with his intention. It either misunderstood its task and thus erred in law or, alternatively, it reached an irrational conclusion in that no reasonable tribunal could have concluded.

42. CICA submitted that the tribunal's decision should be quashed and the matter remitted to the First-tier Tribunal for rehearing and a fresh decision.

43. Mr S's submissions sought in general terms to uphold the tribunal's decision. It was a rational and lawful decision by a specialist tribunal reached having read the material before it, having heard oral evidence, and having considered the parties' submissions.

44. PC B was able to give evidence as the investigating officer about the sequence of events from the evidence collated by him and on his behalf. It was for the tribunal to evaluate that evidence and, having heard the case, to form an independent view about what happened. It did so. Its approach to PC B's evidence was in accordance with RS.

45. Mr S criticised CICA's submission as to whether there was a crime of violence as cherry-picking sentences rather than looking at the decision as a whole. The tribunal was entitled to conclude that the act was by its nature – as exemplified by its consequence – one of violence. It gave detailed reasons for its conclusions which were rational and founded on the evidence before it.

46. Mr S rejected criticism of the tribunal's approach to the question of intent. Its reasoning on this issue was detailed and it was entitled to implicitly reject X's denial in his police interview that he was unable to stop and did not mean to injure Mr S. It formed its own view having directed itself as to the relevant law. Respect should be accorded to its conclusions.

Preliminary Observations: The Approach of the Upper Tribunal

47. The Court of Appeal in Hutton gave helpful guidance on the relationship between not only courts and specialist appellate tribunals but also

between specialist first-tier tribunals and appellate tribunals. That authoritative general guidance has shaped my approach to the issues in this application and it is of importance to set it out in full.

48. In Hutton Lord Justice Gross reviewed a decision of the House of Lords – AH (Sudan) v Home Secretary [2007] UKHL 49 - and the decision of the Supreme Court in Jones in order to extract some guidance of general application. In paragraph 57, he itemised the approach an appellate court should take to a decision of either a specialist appellate tribunal or to the decision of a specialist first-tier tribunal. Thus:
*i) "First, this Court should exercise restraint and proceed with caution before interfering with decisions of specialist tribunals. Not only do such tribunals have the expertise which the "ordinary" courts may not have but when a specialised statutory scheme has been entrusted by Parliament to tribunals, the courts should not venture too readily into their field.*
*ii) Secondly, if a tribunal decision is clearly based on an error of law, then it must be corrected. This Court should not, however, subject such decisions to inappropriate textual analysis so as to discern an error of law when, on a fair reading of the decision as a whole, none existed. It is probable, as Baroness Hale said, that in understanding and applying the law within their area of expertise, specialist tribunals will have got it right. Moreover, the mere fact that an appellate tribunal or a court would have reached a different conclusion, does not constitute a ground for review or for allowing the appeal.*
*iii) Thirdly, it is of first importance to identify the tribunal of fact, to keep in mind that it and only it will have heard the evidence and to respect its decisions. When determining whether a question was one of "fact" or "law", this Court should have regard to context, as I would respectfully express it ("pragmatism", "expediency" or "policy", per Jones), so as to ensure both that decisions of tribunals of fact are given proper weight and to provide scope for specialist appellate tribunals to shape the development of law and practice in their field.*
*iv) Fourthly, it is important to note that these authorities not only address the relationship between courts and specialist appellate tribunals but also between specialist first-tier tribunals and appellate tribunals."*

49. As Lord Justice Gross went on to state in paragraph 58, my jurisdiction is limited to one of judicially reviewing the decision of the tribunal. I have no jurisdiction to interfere with the tribunal's decision absent a public law error. I have had that injunction very clearly in mind when considering the submissions made in this application for judicial review.

50. Following on from the above, I note that there was no dispute between the parties as to the following two matters.

51. First, following the passage in Jones [see paragraph 15 above], the tribunal identified section 28 of the Road Traffic Act 1988 ("*dangerous cycling*") as relevant to the circumstances of Mr S's appeal. It was, in my

view, correct to do so and was thus entitled to reach its conclusions on the basis that a crime under section 28 had been committed.

52. Second, both parties were in agreement that the bicycle ridden by X was properly found by the tribunal to be a vehicle within the meaning of paragraph 4(2) of the Scheme.

53. I propose to address the submissions in a different order to that contained in CICA's written argument.

Crime of Violence

54. Jones identified that the second question for the tribunal to answer was whether, having regard to the nature of the criminal act, the offence that was committed was indeed a crime of violence. The Supreme Court's decision in Jones provided binding guidance on how a tribunal should approach the meaning of the phrase "*crime of violence*" in the 2001 Scheme. Given that the 1996 and 2008 Schemes use the same phrase and do not define the meaning of the phrase "crime of violence", it is reasonable to assume that the principles in Jones also apply to those Schemes.

55. The position is however different under the 2012 Scheme which for the first time, as the tribunal noted in paragraph 10, contained a definition of the phrase "*crime of violence*" in paragraph 2(1) of Annex B to that Scheme. Subject to the exception in paragraph 3 which is not relevant for the purpose of this application, a crime of violence must involve:
a) a physical attack;
b) an act or omission of a violent nature which causes physical injury to a person;
c) a threat against a person, causing fear of immediate violence in circumstances which would cause a person of reasonable firmness to be put in such fear;
d) a sexual assault to which the person in fact did not consent; or
e) arson or fire-raising.
Paragraph 2(1)(b) makes it plain that the **nature** of the act must be violent with no mention being made of either the consequences of that act or of omission.

56. Paragraph 2(2) states that an act or omission under paragraph 2(1) will not constitute a crime of violence unless it is done either intentionally or recklessly. That qualification does not absolve the tribunal from considering first whether an act or omission was of a violent nature and, having answered that question in the affirmative, then considering whether that act was done either intentionally or recklessly. I note that paragraph 2(2) has no application in this case because of the defined exception set out in paragraph 4(1)(b) relating to injury arising from the use of a vehicle.

57. I find that a tribunal's approach to the issue of whether a crime of violence has been committed should begin with the plain and natural language of the 2012 Scheme. That will often be all that is necessary for a tribunal to consider. Courts and tribunals are repeatedly warned against the dangers of taking an inherently imprecise word and, by redefining it, thrusting on it a degree of spurious precision. The correct approach is to construe the words by reference to their ordinary meaning, their statutory context and their purpose [JM v Secretary of State for Defence (AFCS) [2015] UKUT 332 (AAC), paragraph 56]. That is what is required of tribunals applying the wording of the 2012 Scheme.

58. Does Jones and the case law which preceded it provide any assistance to a tribunal faced with determining, for the purposes of the 2012 Scheme, whether an act or omission constituted a crime of violence? I find that it does for the following reasons.

59. First, Jones endorsed well-established case law to the effect that it is the nature of the crime and not its consequences which need to be considered. The Court endorsed the guidance given by Lawton LJ in R v Criminal Injuries Compensation Board, ex parte Webb [1987] QB 74 ["ex parte Webb"] at page 79 that it was for the Board to decide whether unlawful conduct because of its nature not its consequence amounted to a crime of violence. In ex parte Webb, Lawton LJ elaborated on the approach to be adopted as follows [pages 79-80]:
*"Most crimes of violence will involve the infliction or threat of force, but some may not. I do not think it prudent to attempt a definition of words of ordinary usage in English which the board, as a fact finding body, have to apply to the case before them. They will recognise a crime of violence when they hear about it, even though as a matter of semantics it may be difficult to produce a definition which is not too narrow or so wide as to produce absurd consequences…"*

60. Paragraph 15 of Jones states as follows:
*"The same point, that the board had to look at the nature of the crime and not at its results, was made by Lord McFayden in C, Petitioner 1999 SC 551 where he dismissed a petition for judicial review of the board's decision to refuse compensation for personal injury attributable to incidents of indecent exposure. At p.557 he said that there was a valid distinction between the criminal act and its consequences:*
*"The question whether a criminal act constitutes a crime of violence is to be answered primarily by looking at what was done, rather than at the consequences of what was done. As Lawton LJ pointed out in Webb, "most crimes of violence will involve the infliction or threat of force but some may not". It may be that there are cases in which examination of the actual or probable consequences of the criminal act will cast light on its nature. But it is for the light that they cast on the nature of the criminal act rather than for their own sake that the consequences may be relevant."…"*

61. Second, the wording of paragraph 2(1)(b) of Annex B refers to "*an act or omission of a violent nature which causes physical injury to a person*". Thus, the requirement from earlier case law and from Jones that it is the nature of the act or omission which is significant is incorporated into the wording of the 2012 Scheme.

62. In paragraph 51 the tribunal stated that, in considering whether Mr S was the victim of a crime of violence, it had regard to the nature of the act and not its consequences. Following on from that statement, the tribunal concluded in paragraph 53 that Mr S was the victim of a crime of violence and that his injuries "*were caused by an act of a violent nature*". Its reasoning was set out as follows:
*"…He had been hit by X riding his bicycle down a steep incline at speed and in a reckless and dangerous manner without any regard for others using the road, including pedestrians whom he knew were crossing at the junction. But for his age X would have been charged with an offence of dangerous cycling under section 28 of the Road Traffic Act 1988. Section 28(3) defines "dangerous" as "danger either of injury to any person or…". The force of the impact was such that the Appellant who is of larger than average build and stocky was thrown 100 yards from where he was crossing. He sustained a severe brain injury as a result and that has left him with cognitive and other problems."*
In conclusion the tribunal held that the act was "*dangerous cycling and the force of the impact was such that it was also a violent act*" [paragraph 54].

63. CICA submitted that the tribunal's conclusion was an error of law because the tribunal had referred to the consequences – the force of the impact – rather than the nature of the act. Even though the tribunal found that X's cycling was dangerous, it could not properly conclude that the cycling itself was an act of a violent nature. It had failed to give adequate reasons for its decision. Mr S submitted that I should read paragraphs 53 and 54 together since it was the combination of nature and consequence which underpinned the tribunal's conclusion.

64. In paragraph 53 the tribunal considered carefully the manner in which X was cycling by reference to the definition of dangerous cycling set out in Section 28 of the Road Traffic Act 1988. Not only did it make direct reference to section 28(3) which defines dangerous as "danger either of injury to any person", but, by referring to X's lack of regard for other road users and pedestrians and to his cycling at speed down a steep incline, the tribunal also had in mind section 28(2)(a) of the Road Traffic Act 1988. This defines dangerous cycling by reference to the way the cyclist rides as (a) falling far below what would be expected of a competent and careful cyclist and (b) it being obvious to a competent and careful cyclist that riding in that way would be dangerous. All of those factual matters were ones which the tribunal was entitled to consider in deciding whether the criminal offence of dangerous cycling had been committed and, indeed, it so concluded in paragraph 54. However they were not matters

which were determinative of whether a crime of violence had also been committed.

65. In paragraph 53 the tribunal made additional reference to the force of the impact and the distance Mr S was thrown together with his cognitive and other problems arising as a result of the severe brain injury he sustained. As my analysis of the Scheme and the applicable case law indicates, consideration of the consequences of an act are not wholly excluded if that sheds light on the nature of the act itself. In this case, the tribunal had regard to the force of impact in order to illuminate the manner of X's cycling and, by extension, the nature of the act which caused physical injury to Mr S. The difficulty with its formulation even on a benevolent reading is that the tribunal appears to have relied on the force of the impact alone in concluding that Mr S was the victim of a crime of violence – paragraph 54 can be read in no other way. I find that apparent reliance on the consequences of X's cycling to the exclusion of other relevant matters rendered the tribunal's reasoning materially inadequate and in error of law.

66. That conclusion is reinforced by the omission from the tribunal's reasoning of any reference to X's state of mind at the relevant time. Though the parties did not address me on this particular aspect of the tribunal's decision making, I have not required them to remedy that deficit given my conclusions in respect of the two other grounds of this application. The offence of dangerous cycling pursuant to section 28 of the Road Traffic Act 1988 does not require proof of the offender's guilty mind or "*mens rea*" but this does not mean that X's **actual** state of mind was irrelevant. It was part of the wider factual picture which needed to be considered in deciding whether what was committed was a crime of violence. X was not a witness but the tribunal had his police interview under caution available to it which might have yielded some clues as to the nature of X's conduct. In its reasons the tribunal divorced what was in X's mind (which it considered, albeit too briefly, on the issue of intent) from its determination of whether a crime of violence had been committed. That rendered its reasoning on that issue materially inadequate – its conclusion in paragraph 54, read with the statement in paragraph 55 that Mr S was the victim of a crime of violence, makes its course of reasoning clear.

67. As will be seen from the following analysis of the way in which the tribunal approached the question of intent in paragraph 4(1)(b) of Annex B, the tribunal also failed to address adequately what was in X's mind before during and after this incident and fell into error of law on that issue as well.

68. I reach my conclusion that the tribunal erred in law in its approach to the issue of whether a crime of violence had been committed, having made every allowance for and having exercised due caution about interfering with the tribunal's decision making.

Intent

69. The exclusion contained in paragraph 4(1)(b) of the 2012 Scheme makes clear that a crime of violence will not have been committed for the purpose of the Scheme if an injury "*resulted from the use of vehicle, unless the vehicle was used with intent to cause injury to a person*". Unfortunately I find that the tribunal materially erred in law in concluding that X used his bicycle with intent to cause injury to Mr S. My conclusion on that issue alone is determinative of this application for judicial review.

70. Since Mr S's injuries resulted from the use of a vehicle, paragraph 4(1)(b) of the 2012 Scheme requires the tribunal to ask itself whether the vehicle was used "*with intent to cause injury to a person*". The starting point for the tribunal was the meaning of the word "*intent*" and, as stated in paragraph 51 above, I find that tribunals should begin with the plain and ordinary meaning of the word in the 2012 Scheme. The meaning of "*intent*" in criminal law authorities may provide assistance but only insofar as these illuminate the natural meaning of the words in the 2012 Scheme. CICA helpfully reminded me that the 2012 Scheme applies throughout the United Kingdom whereas there are clear differences between Scots and English criminal law. Intent was thus not to be defined by reference to criminal law but by reference to its meaning in the Scheme.

71. Mr Collins on behalf of CICA referred me to Volume 25 of Halsbury's Laws [section 1(2)(iii)(8) citing R v Mohan [1976] QB 1 at 8] where the view is expressed that "*a person intends a consequence where it is his aim or purpose to bring it about*". It was noted therein that such aim or purpose is not to be equated with desire [R v Maloney [1985] AC 905 at 926]. He submitted that this concept of "*aim or purpose*" was consistent with the natural meaning of the word "*intent*". On the other hand, Mr Nugent on behalf of Mr S submitted that the definition of "*intent*" contended for by CICA was nebulous and greater reliance should be placed on the guidance offered by criminal case law.

72. I find myself persuaded by the submissions of CICA on this issue. The plain meaning of "*intent*" as contended for by CICA is not nebulous – indeed tribunals may be more likely to err in law by applying criminal case law as an aid to interpret the ordinary language of the 2012 Scheme.

73. My opinion is reinforced by what follows. The 2012 Scheme excludes from eligibility those injured by vehicles used recklessly or negligently. A claim may only be brought if the vehicle is used with the aim or purpose – the intent - of causing injury. That approach is consistent with the position applying in earlier Schemes where motoring offences were exempted except where the motor vehicle had been used as a weapon in a deliberate attempt to run the victim over. The words in the 2012

Scheme are no different in application to the position in each of the earlier Schemes.

74. When contemplating what a person's aim or purpose was, the tribunal may be helped by considering what the person would have known – both what he ought to have known and, on balance of probabilities, what he did know - at the time when the act was done. To that extent the case of Woollin, relied on by the tribunal in paragraphs 57-63, may provide some limited assistance. It held that the jury in a murder trial may be helped by a direction to the effect that the necessary intention may be found where (a) the outcome was a virtually certain consequence of the defendant's voluntary act and (b) the defendant appreciated that fact. I observe that Woollin concerned a direction to a jury in a murder trial whereas the circumstances in this case were wholly different.

75. I conclude that over-reliance on Woollin rather than on the words of the Scheme may have led the tribunal into error. It was required to consider whether, in cycling towards Mr S at speed, X intended to cause injury. That required a focus on what was X's aim or purpose during the incident – put simply, what was in his mind? Scrutiny of what X himself said about what happened as well as his actions was vital since all of those matters might shed light on his aim or purpose.

76. The tribunal accepted that, when he started out on his journey, X did not intend to cause injury to anyone [paragraph 59]. Given that finding, what was required of the tribunal was an analysis of the point in time at which X **did** form the aim or purpose of causing injury to Mr S. Unfortunately it is not to be found at any point in the tribunal's reasoning. The tribunal described the manner in which X cycled throughout the incident in paragraphs 60 and 61 and concluded that, following Woollin, injury to Mr X was a virtual certainty. It also held that X foresaw the consequences of his actions was injury to Mr S. A generous reading of paragraphs 60 and 61 might be that the tribunal found that X had formed the intention to injure a person at the very start of the incident described by all the witnesses. However I cannot be sure that is correct given the unequivocal statement by the tribunal that X had not intended to hurt anybody at the start of his journey. If, for example, it was already too late as the incident unfolded before X realised injury to Mr S was inevitable, it is difficult to see how there could be a proper finding of intention. The tribunal's failure to address the point in the incident when X's intention changed rendered its conclusion of the question of intent materially in error of law.

77. Moreover, when considering what X said about the incident, the tribunal quoted from his police interview but did not address the part of that interview which clearly dealt with X's intention. In paragraph 64 the tribunal expressed itself to be satisfied that X had the necessary intent having considered what he said in his police interview. It relied on two passages – (a) *"so I started panicking cos I thought obviously go hit him,*

*so I hit him"* [FTT Bundle, S24] and (b) *"I couldn't have stopped cos I was going too quickly for the light so obviously I kept on going and just lay, basically laid straight into the man"* [FTT Bundle, S28]. The second of these quotations was taken from the part of the police interview where X was being asked *"Alright now was it because you was going too fast you didn't get..."* [FTT bundle, S27]. He replied as follows [FTT bundle, S28]: *"Right, this is what I thought, I thought it was on a yellow light and I was going quite quick so obviously I couldn't exactly have stopped so I thought I was going through a yellow light so I was about to, kept on going, and I couldn't have stopped cos I was going well too quick for the light so obviously I kept on going and just lay, basically laid straight into the man who obviously I felt proper gutted cos I didn't mean that."* The tribunal failed to address this passage and, in particular, deal with the express denial of intent when coming to its conclusions. I cannot explain either why the tribunal quoted from some parts of the passage at S28 but omitted others arguably of equal relevance to the question of intention or why it failed in its Reasons to quote from this important passage in full as I have done.

78. Mr Nugent submitted that the tribunal had implicitly rejected X's account, having had regard to what he told the police. It was entitled not to rely on an exculpatory account. Mr Collins submitted that, by failing to specifically address what X said about what was in his mind at the time, the tribunal had lost sight of the simple wording of the Scheme. I find that Mr Nugent's submission would have had more force if the tribunal had explained why it did not rely on X's account that he did not mean to hit Mr S. It did not do so. It may have been led into error either by reliance on Woollin or by a failure to consider the entirety of the relevant passage in the interview.

79. When faced with the question of what a person intended, a tribunal should pay careful regard to what is said in any police interview. The interview should be read as a whole and the tribunal should be careful not to quote from the interview in a manner which might give a misleading picture about what was in a person's mind before, during and after an incident. Most importantly, the tribunal should explicitly address and come to a view about statements made by the perpetrator of an incident (a) explaining what was in his/her mind when the incident took place or (b) dealing with his/her responsibility for an incident.

80. Making all the allowances required by the guidance in Hutton, I nevertheless find that the tribunal's conclusions on the matter of X's intent were manifestly inadequate and thus irrational in that no reasonable tribunal could have concluded that X used his bicycle with intent to injure Mr S.

The Evidence of PC B

81. The proper role of police officers giving evidence to the First-tier Tribunal was analysed by a Three Judge Panel of the Upper Tribunal in RS v CICA [2012] UKUT 205 (AAC) ["RS"]. In paragraphs 23 and 24 of that decision the tribunal held as follows:
*"23. As we have said, the tribunal's task was to make findings of fact, including (among other things) as to when Mrs S sustained mental injury or injuries. How should it approach that, and other fact finding questions? It is a matter of grave concern to us that in this and in other cases the tribunal appears to have sought, and accepted, the subjective evidence of a police officer on a matter which it was for it to decide. Opinion evidence may be relevant in special cases where expert knowledge may assist the tribunal – for example, on matters of pathology. Relevant opinion evidence must be very firmly distinguished from an opinion which is no more than the witness's personal view on what the tribunal should decide.*
*24. As with any other witness, a police officer can give evidence on what the officer perceived, both in the sense of what the officer saw, felt (by touching), heard or smelt, and in the sense of the officer's own emotions or reasoning processes in a case where these are relevant (for example if the tribunal has to evaluate what the officer did or failed to do). Often an officer will give evidence that others said they saw or heard a particular thing happen. The tribunal may be minded to accept that what those others said has been accurately described by the officer and was true. If so, then there is no difficulty with making a finding of fact that the thing in question did happen. In making a finding of that kind the tribunal is not relying on the opinion of the police officer. On the contrary it is accepting the officer's evidence of fact as to what was said, and is accepting the account of events which it has concluded was described to the officer. Before doing so it will consider any relevant evidence going to credibility and accuracy as regards both the officer and those who gave the account in question to the officer."*
Though RS was appealed to the Court of Appeal, it was not suggested that the tribunal's approach to the evidence of police officers was wrong.

82. In this case, PC B investigated the accident and was present at the scene. He was not the officer who interviewed X (that was PC C) and could only assist the tribunal about the collation of the evidence from witnesses and from the officer who produced a plan of the scene. The tribunal stated that it had *"accepted and adopted"* the evidence of PC B [paragraph 45]. CICA submitted it did so on matters on which it was required to reach its own conclusions such as the accuracy of the account of the witnesses and what happened in the course of the incident. Mr Nugent argued that the tribunal did no more than properly evaluate PC B's evidence alongside that of other witnesses in order to reach its own conclusions.

83. I find myself unable to agree with Mr Nugent's submissions for I find that, on certain key issues, the tribunal accepted PC B's opinion evidence on

issues which it was required to determine for itself. What follows are but three examples.

84. First, in paragraph 19, the tribunal stated as follows:
*"PC B told the tribunal that the cyclist, X, and his family were well known to him but not for any criminal activity. X was a local lad and, in the opinion of this experienced officer, he like every other person in the locality whether they be a road user or pedestrian, would have known the junction very well. He said that X did not suffer from any learning difficulties but, at the time of the incident, had been excluded from school for behavioural problems."*
PC B's opinion about how well X would have known the junction should not have been relied on by the tribunal to the exclusion of other evidence. There was relevant evidence – from X himself in the police interview [FTT bundle, S30] – which might have supported the tribunal's view that X knew this junction well but the tribunal made no mention of that and improperly relied on what PC B said about X's road knowledge [paragraph 49].

85. Second, PC B was quoted by the tribunal to have said he was in no doubt that, in approaching the junction, even at speed, X would have seen a number of pedestrians crossing the road [paragraph 20]. The tribunal relied on that opinion evidence when analysing the manner of X's cycling [paragraph 60]. It made no distinction between PC B who had not seen anything of the incident and the evidence of the witnesses who had seen what occurred.

86. Third, the tribunal went beyond the acceptance what paragraph 24 of RS stated when it held as follows:
*"46. The evidence of the independent witnesses, ..., both of whom PC B found to be accurate in their observations of the manner of cycling, the speed and timings is also accepted. Their statements are not only consistent with each other but also with other independent evidence such as the CCTV footage viewed by PC B and the scale drawing of the locus prepared by his colleague in the immediate aftermath of the incident."*
I observe that PC B's opinion on the accuracy of those other witness statements was wholly irrelevant – indeed was he in a position to judge the accuracy of the descriptions about the manner in which X was cycling when he had not seen this for himself?

87. I am also troubled by the ambit of the questions put to PC B by the tribunal in which he was asked for his opinion about X's state of mind [UT bundle, page 62] and about the account given by X in interview [UT Bundle, page 62]. Not only were those matters ones upon which the tribunal should not have been seeking opinion evidence from a police officer but they were matters about which PC B had no direct knowledge as he had neither seen what occurred nor had he interviewed X. That

questioning reinforces my view that the tribunal relied inappropriately on PC B's evidence by *"accepting and adopting"* it.

88. Again making due allowance for the guidance set out in Hutton, I conclude that, by accepting PC B's opinion as to matters of primary fact which were for it to decide, the tribunal erred in its approach to fact finding. I agree with Mr Collins on behalf of CICA that, crucially, the tribunal abrogated its fact finding responsibility in relation to issues which touched on the question of X's state of mind such as what he knew and what he would have seen. The tribunal's failure was one of fundamental importance and rendered its decision as a whole unlawful.

Conclusion: What happens next

89. It is not my role on an application for judicial review to rehear the claim for criminal injuries compensation on its merits. That is a matter for the tribunal to determine. However I am satisfied that the tribunal's decision in this case was flawed for all the reasons I have given.

90. I grant the application by CICA and it follows that I must quash the decision dated 23 January 2015. Section 17(1)(a) of the Tribunals, Courts and Enforcement Act 2007 empowers me, on making a quashing decision, to remit the matter to the court, tribunal or authority who made the decision with a direction to reconsider the matter and reach a decision in accordance with the findings of the Upper Tribunal. I thus remit this appeal to a differently constituted First-tier Tribunal and direct that, at an oral hearing, it considers afresh what findings of fact may be made and, in consequence, whether Mr S is entitled to an award of compensation under the 2012 Scheme.

**GWYNNETH KNOWLES QC**

**Judge of the Upper Tribunal**

**30 January 2017.**

[signed on the original as dated]