

JR/2178/2016

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

Decision

1. **This application does not succeed.** 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 decline to interfere with the decision of the First-tier Tribunal (Social Entitlement Chamber) confirming an award of £500 (after offsetting £10,000) under the Criminal Injuries Compensation Scheme 2012 (“the 2012 scheme”). The decision of the First-tier Tribunal was made and written reasons given after a hearing on 21st April 2016 at East London under First-tier Tribunal reference C1011/15/00223 (CICA reference X/13/800062).

2. I held an oral hearing of this application for judicial review at Field House in London on 13th January 2017. The applicant, who was the claimant for compensation, did not attend in person but was represented by Mr Alex Gask of counsel, instructed by Bhatt Murphy, solicitors. The Criminal Injuries Compensation Authority (the “Authority” or “CICA”), which is the interested party in this application, was represented by Mr Robert Moretto of counsel. 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.

Relevant Provisions of the 2012 Scheme

3. In so far as is relevant to this decision the 2012 scheme provides as follows (references are to paragraph numbers):

57. A qualifying relative of a person who has died as a direct result of sustaining an injury in circumstances falling within paragraph 4 or 5 may be eligible for

(a) A bereavement payment (paragraphs 61 and 62); ...

59. A qualifying relative is a person who at the time of the deceased’s death was ...

(e) a parent of the deceased; or ...

62. Where a claims officer is satisfied that more than one person may be eligible for a bereavement payment in respect of the deceased, the amount of the bereavement payment is £5500. Otherwise the amount of the bereavement payment is £11,000.

75. Where a person has died as a direct result of sustaining an injury in circumstances falling within paragraph 4 or 5 a funeral payment may be made in respect of their funeral expenses for the benefit of their estate.

76. Subject to paragraph 77, the amount of a funeral payment is £2,500.

77. A payment above £2,500 may be made in respect of funeral expenses reasonably incurred, up to a further £2,500.

85. (1) An award under this Scheme will be withheld or reduced if in respect of the criminal injury to which the award relates the applicant ...

(c) agrees the settlement of a damages claim ...

(2) An award will be reduced by the amount of any payments listed in subparagraph (1) ...

4. There is no doubt that the claimant is a qualifying relative and that the deceased died as a direct result of circumstances falling within paragraph 4. It is agreed that the appropriate payment under paragraph 62 is £5500 and that the appropriate amount under paragraphs 76 and 77 is £5000. The issue in dispute is how to apply paragraph 85 in this case.

Article 2

5. The European Convention on Human Rights (“the Convention”) was, so far as is relevant, incorporated into domestic law by provisions of the Human Rights Act 1998. Article 2 of the Convention provides as follows:

1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than is absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

6. Rights and protections under the Convention relate to the actions of signatory states and their public bodies and not to those of private individuals or organisations acting in their private or personal capacity. On the face of it, article 2 is about preventing states from carrying out arbitrary executions, but since its original adoption the scope of the article has been greatly developed by the jurisprudence of both the European Court of Human Rights in Strasbourg and the domestic courts in the United Kingdom. I was referred to a number of authorities but it is not necessary to review them all.

7. In LCB v United Kingdom (1999) 27 EHRR 212 the European Court of Human Rights held that the first sentence of article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life but also to take appropriate steps to safeguard the lives of those within its jurisdiction. The Court's task (in that case) was to determine whether the State did all that could have been required of it to prevent the applicant's life from being avoidably put at risk.

8. In Osman v United Kingdom (2000) 29 EHRR 245 the Court endorsed this and said that the State's obligation extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences. Article 2 may also imply in certain well-determined circumstances a positive obligation on the authorities to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual. Bearing in mind policing difficulties and the unpredictability of human behaviour, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.

9. In Makaratzis v Greece (2005) 41 EHRR 49 the applicant had driven at high speed through red traffic lights and road blocks near the embassy of the USA, crashing into several cars and injuring two drivers. Police opened fire and continued to fire after he had stopped at a petrol station and locked his doors. The applicant complained (among other claims) that article 2 had been breached by the use of excessive fire power, putting his life at risk. The European Court of Human Rights held that article 2 had been violated in respect both of the obligation to protect the applicant's right to life and of the obligation to hold an effective investigation into the incident. The applicant had suffered non-pecuniary damages which could not be compensated solely by the finding of a violation and an award of 15,000 Euros (plus interest) was made.

The Crime of Violence

10. There is a tragic history behind this application. The applicant is a woman who was born on 3rd December 1967. Her son K was born on 17th October 1995. On 20th January 2011 K was in the street with some friends after school when an altercation broke out with Mr A, who produced a knife and stabbed four of the group. K died at the scene. Two others were seriously injured and the fourth was less seriously injured.

11. Mr A was resident at the time in a care home being run by an NHS Trust for those with mental health needs. He had a diagnosis of paranoid schizophrenia and had been in the care home since his discharge from hospital at the beginning of 2006. He had been in the hospital for about five years, having been found unfit to plead in relation to an allegation of indecent assault. He had previous convictions for offences which included robbery, burglary, indecent assault and possession of an offensive weapon.

12. As a result of the incident on 20th January 2011 Mr A was prosecuted for and convicted of murder, the jury having rejected a defence of diminished responsibility (which would have reduced the offence to manslaughter). On 16th May 2012 at the Central Criminal Court he was sentenced to life imprisonment for murder, seven years imprisonment for each of two offences of wounding with intent and 12 months

imprisonment for one offence of assault occasioning actual bodily harm, all sentences to run concurrently. The minimum term was set at 20 years.

13. In sentencing remarks the judge said that Mr A's non-compliance with his medication over a number of days and possibly a week "played a very significant part" in the commission of the offences and that systems in place at the care home to ensure that he took his medication "were plainly wholly inadequate, certainly in the manner in which they were implemented in [Mr A's] case". The judge also pointed out that on occasions in 2005 and 2009 knives had been confiscated from Mr A's room. About a week before the murder Mr A had purchased the murder weapon which must have been kept in his room. The judge said; "Although I was told that random searches of rooms are undertaken, none managed to alight on this knife. Had it done so, these offences may well have been avoided".

The High Court Claim

14. On 18th January 2012 the applicant's solicitors issued a claim in the Queen's Bench Division of the High Court against the NHS Trust on behalf of the appellant and on behalf of K's estate, seeking damages for breaches of the Human Rights Act 1998 and for negligence. Declaratory relief, interest and costs were also sought. On 10th September 2013 the solicitors sent a lengthy and detailed letter before claim to the NHS Trust ("the Trust"). The letter explained that what was sought was just satisfaction for the violation of the applicant's and the deceased's rights under article 2 of the Convention, funeral expenses under the Law Reform (Miscellaneous Provisions) Act 1934 on behalf of K's estate and a bereavement award under the Fatal Accidents Act 1976.

15. On 17th January 2014 the Trust's solicitors wrote denying liability in negligence (because no relevant duty of care was owed by the Trust) and denying liability under the Human Rights Act 1998 in respect (a) of any obligation to have in place effective systems, on the basis that that duty was owed only to patients and (b) of any specific operational obligation because there was no evidence that K was at real and immediate risk from Mr A. By virtue of the 1998 Act such obligations would arise under the provisions of article 2 of the European Convention on Human Rights ("the Convention").

16. On 25th February 2014 the applicant's solicitors replied to this. They complained about a lack of disclosure of information but suggested a stay of the claim pending the inquest and exchange of submissions to the coroner. After lengthy legal argument the letter concluded:

"(e) On the information currently available to our client, we are not able to take matters further in relation to any breach of your client's operational duty under Article 2 in relation to this matter, but we reserve her position in this regard pending the emergence of the full evidential picture through the inquest process.

(f) It remains only to confirm that our client does not seek to pursue and claim in negligence for the reasons that you have correctly identified".

However, the High Court Claim Form was never amended.

17. On 15th May 2014 the Trust's solicitors sent to the applicant's solicitors an offer to pay £10,000 (including interest) plus costs "in settlement of the whole of her claim". On 5th June 2014 the applicant's solicitors replied enclosing by way of service "our client's notice of acceptance of the said offer". The enclosed Notice of Acceptance stated that "the Claimant hereby accepts the Defendant's Part 36 offer dated 15th May 2014 in settlement of this claim". On this matter the applicant had also been advised by counsel. In connection with the appeal to the First-tier Tribunal on the criminal injuries claim (see below) that counsel provided a note dated 6th April 2016 which stated:

"I can confirm that, in valuing the claim (and advising in favour of accepting the settlement offer) I considered only damages likely to be awarded for the non-pecuniary damage suffered by [K and the applicant] as a result of a breach of the Article 2 systemic duty. This was because ... a decision had been taken and communicated to the Trust [by the letter dated 25th February 2014] not to pursue the negligence claim (or a claim for breach of the Article 2 operational duty).

Thus, since the settlement offer was not premised on the basis of a claim in negligence, it would not have included an award for funeral costs under the Law Reform (Miscellaneous Provisions) Act 1934 or a bereavement award under the Fatal Accidents Act 1976".

18. I observe at this stage that the settlement offer was not in terms premised on any basis other than "settlement of the whole claim" and that I cannot read paragraph (e) of the letter of 25th February 2014 as stating that a decision had been taken not to pursue a claim for breach of the article 2 operational duty. The reference in that letter to the article 2 operational duty is quite different in nature from the reference to the claim for negligence.

The Criminal Injuries Compensation Claim

19. On 17th January 2013 the applicant claimed compensation under the 2012 scheme. On 23rd May 2013 CICA made a mistaken decision on the wrongful basis that the applicant was K's sister. On 12th June 2013 the applicant asked the Authority to review that decision. The review decision was dated 20th March 2015 and assessed compensation at £10,500 on the basis indicated in paragraph 4 above but offset £10,000 in respect of the civil claim settlement, leaving a balance of £500. On 12th June 2015 the applicant appealed to the First-tier Tribunal against the decision to deduct the £10,000.

20. The First-tier Tribunal rejected the applicant's argument that paragraph 85 of the 2012 Scheme is tightly defined and does not extend to catch monies paid to bring to an end proceedings brought under article 2 which are in respect of an institution's liability for systemic failure resulting in death which does not contain a claim for funeral expenses or bereavement. The tribunal concluded that the cause of the claim

that was settled was a crime of violence and that the “unvarnished reading” of paragraph 85(1)(c) includes article 2 compensation.

21. On 22nd July 2016 the applicant applied to the Upper Tribunal for judicial review of that decision and on 17th August 2016 I gave her permission to proceed with the application. CICA opposes the application and supports the decision of the First-tier Tribunal.

The Arguments

22. In essence the applicant’s argument is that the compensation received from the Trust by way of settlement of the High Court claim was for a breach of the systemic duty under article 2 to put in place an appropriate legal and administrative framework. Liability for damages for breach of article 2 does not require the loss to be the death itself and there is an article 2 duty in relation to risk that stands independently of any criminal liability or responsibility for death (and can, for example, include inadequate investigation). Thus the applicant had not received compensation in respect of a criminal injury. Damages would only be awarded in a human rights claim where “just satisfaction” requires this. In many cases the finding of a violation would itself be just satisfaction. This is because the focus of the Convention is on the protection of human rights and not on compensation. However it was possible to obtain damages even where a breach of a human rights duty may have made no difference to the outcome (R (Greenfield) v Secretary of State for the Home Department [2005] UKHL 14, [2005] 1 WLR 673 per Lord Bingham). The fact that the Trust paid compensation for breach of the systemic duty does not establish that compensation was based on that breach having caused K’s death. The contents of the applicant’s letter of 25th February 2014, conceding the claims in relation to negligence and breach of the protective obligation under article 2 must mean that the Trust’s settlement offer could only have been in respect of the systemic failure (in breach of the general article 2 duty) to have in place effective systems to prevent risk to life. This was not a settlement that came within paragraph 85 of the 2012 scheme because it was not in respect of the criminal injury. K’s death gave rise to the claim but that does not mean that the settlement was in respect of the criminal injury. Therefore there should be no reduction in the amount of criminal injuries compensation.

23. The Authority argued that the scheme is one of last resort and the purpose of paragraph 85 is to prevent double recovery. The damages paid by the Trust were paid in respect of the death of K. It was not a question of looking at the nature of that claim but it was about its outcome. If it was a payment to compensate the applicant for her loss, the loss was the death of her son, not for some abstract breach of Article 2. There would have been no liability without that loss. This continued to be the case even if the details of the claim changed. The authorities cited by the applicant do not establish that damages awarded in an article 2 claim can be awarded even when there is no causal link between a breach of article 2 and the death of a person. The purpose of a payment of damages in a human rights claim is to place a claimant, so far as is possible, in the same position as if the Convention rights had not been infringed (see eg Anufrijeva v Southwark [2003] EWCA Civ 1406, [2004] QB 1124 per Lord Wolf CJ at paragraph 59). In any event the final settlement document contains no details of the basis on which the claim was settled. The Upper Tribunal should give paragraph

85 of the 2012 scheme its plain and proper meaning and find that First-tier Tribunal reached the correct decision.

Conclusions

24. I am prepared to assume in favour of the applicant (without deciding) that article 2 may be breached in either of the two different ways that Mr Gask has suggested. I accept that in an appropriate case (as on the dramatic facts in Makaratzis) damages can be awarded without the breach being linked to a death (or causing a death), notwithstanding the Authority's apparent arguments to the contrary. However, that is not the case here and I do not propose to speculate (in the context of a human rights jurisprudence that is still developing) on what the position might be in cases where there are very different facts. I agree with the Authority that in the present case it cannot be said that the settlement between the Trust and the applicant was independent of K's death. It was occasioned by K's death and there was a causal link between K's death and the claims and allegations made against the Trust.

25. Notwithstanding how the law might be applied to the facts of any other case, in this particular case the High Court claim form of 10th January 2012 was never amended, the Trust's offer of 15th May 2014 referred to "settlement of the whole of her claim", the Notice of Acceptance of 5th June 2014 went into no further detail, counsel's note of 6th April 2016 does not assist the applicant (for the reasons that I have explained) and I am in no doubt that the First-tier Tribunal was correct to decide that the agreed compensation from the Trust had been paid in respect of the criminal injury to which the award under the 2012 Scheme relates.

26. For the above reasons this application does not succeed.

H. Levenson
Judge of the Upper Tribunal
3rd February 2017