JR/1703/2017

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Decision and Hearing

1. **This application, brought with my permission given on 4th December 2017, 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) made on 22nd March 2017 under reference CI 011/16/00024 (CICA reference X/12/213162). By that decision the First-tier Tribunal allowed an appeal against the decision of the Criminal Injuries Compensation Authority ("CICA") not to make an award to the interested party ("the claimant").

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 previously considered any of the matters relating to the interested party. The parties should regard themselves as being on notice to send to the clerk to the tribunal as soon as is practicable any further relevant written medical or other evidence. The new panel shall make its own findings of fact and decision irrespective of the views of any other judge or member who has considered the matter hitherto. It is limited to considering the issues that were addressed in the CICA review decision that is under appeal.

3. I held an oral hearing of this application for judicial review at Field House (London) on 5th July 2018. CICA was represented by Robert Moretto of counsel. The First-tier Tribunal is the respondent but had, quite properly, taken no part in the proceedings. The interested party SN is the claimant for compensation. She did not attend in person but was represented by Joshua Yetman of counsel on behalf of the Free Representation Unit. I am grateful to them for their assistance.

The Legal Framework

5. The Criminal Injuries Compensation Scheme 2008 ("the 2008 scheme" - the relevant scheme for the purposes of this case) was established under the provisions of the Criminal Injuries Compensation Act 1995. It was approved by parliament and is delegated legislation. It provides for compensation of victim of crimes of violence in specified circumstances and subject to specified conditions. So far as is relevant, paragraph 13 of the 2008 scheme provides as follows:

> 13(1) A claims officer may withhold or reduce an award where he or she considers that:
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> …
>
> (e) the applicant's character as shown by his or her criminal convictions (excluding convictions spent under the Rehabilitation of Offenders Act 1974 at the date of application …) or by evidence

available to the claims officer makes it inappropriate that a full award or any award at all be made.

For these purposes a "claims officer" is the CICA official who is dealing with the claim (or, on appeal, the First-tier Tribunal) and the "applicant" is the person making the claim for compensation.

6. So far as is relevant, paragraph 14 of the 2008 scheme provides as follows:

> 14(3) In considering the issue of character under paragraph 13(1)(e), a claims officer must withhold or reduce an award to reflect unspent criminal convictions unless he or she considers that there are exceptional reasons not to do so.

7. The Rehabilitation of Offenders Act 1974 ("the 1974 Act") provides that in specified circumstances certain conviction need not be disclosed in certain circumstances, which depend on the severity of the sentence. In the appropriate circumstances these are referred to as "spent convictions". The provisions relevant to the present case are as follows:

> **4(1)** Subject to sections 7 and 8 below, a person who has become a rehabilitated person for the purposes of this Act in respect of a conviction shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction; and notwithstanding the provisions of any other enactment or rule of law to the contrary, but subject as aforesaid –
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> (a) no evidence shall be admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in Great Britain to prove that any such person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which was the subject of a spent conviction; and
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> (b) a person shall not, in any such proceedings, be asked, and if asked shall not be required to answer, and question relating to his past which cannot be answered without acknowledging or referring to a spent conviction or spent convictions or any circumstances ancillary thereto.
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> …
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> **4(5)** For the purposes of this section and section 7 below "proceedings before a judicial authority" includes, in addition to proceedings before any of the ordinary courts of law, proceedings before any tribunal, body or person having power –
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> (a) by virtue of any enactment, law, custom or practice;
> (b) under the rules governing any association, institution, profession, occupation or employment; or

(c) under any provision of an agreement providing for arbitration with respect to questions arising thereunder;

to determine any question affecting the rights, privileges, obligations or liabilities of any person, or to receive evidence affecting the determination of such questions.

7 [in relation to England and Wales]

(1) Nothing in section 4(1) above shall affect –
…

(d) The operation of any enactment by virtue of which, in consequence of any conviction, a person is subject, otherwise than by way of sentence, to any disqualification, disability, prohibition or other penalty the period of which extends beyond the rehabilitation period applicable … to the conviction.

8. Section 7(3) provides a residual judicial discretion to admit evidence notwithstanding the provisions of the Act if justice cannot be otherwise done in any particular case. Section 8 relates to defamation actions. Generally speaking convictions for which a person has been sentenced to life imprisonment or a sentence of imprisonment exceeding 48 months can never be spent but there is a sliding scale in respect of other sentences. In the present case the claimant had unspent convictions at the time of her claim for compensation. Rehabilitation periods were reduced by amending legislation with effect from 10th March 2014 and these reductions had retrospective effect. For the claimant in the present case CICA has calculated that her convictions did not become spent (under the amended provisions) until 12th December 2016. The retrospective effect of the amending legislation was considered by Upper Tribunal Judge Mitchell in G v First-tier Tribunal and CICA [2016] UKUT 0196 (AAC), JR 0558 2015. I refer below to both the claimant and the decision in that case as "G".

The Guide

9. Reference must also be made to the "Guide to the The Criminal Injuries Compensation Scheme 2008" ("the Guide") published by CICA "for people who have applied or are thinking of applying for compensation". Appendix 5 to the Guide is headed "Taking Account of Your Criminal Record" and explains (in paragraph 4) that

> "Our current system of deciding about reductions is based on "penalty points". The more recent the conviction and the more serious the penalty, the more penalty points the conviction will attract. We will then use the number of penalty points to decide what level of reduction to make".

There are tables to illustrate this and to assign percentage reductions to penalty points (e.g. 25% reduction for 3 penalty points) "unless there are exceptional reasons" (paragraph 5). Paragraph 6 includes the following:

> "We are not bound by the penalty points system, but we must take account of all unspent convictions. The penalty points are our starting point but we consider convictions and penalty points together with all the other circumstances of the application".

G's Case

10. In 2003 G was the victim of a crime of violence in which he suffered serious head injuries. On 1st October 2003 he applied for compensation under the 2001 scheme, which contained similar provisions in relation to character and convictions as did the 2008 scheme, including an identically worded paragraph 13(1)(e). At the date of his application G had unspent criminal convictions. Subsequent to the application, in 2008 and 2009 he acquired further convictions. On 14th October 2014, having heard his appeal against the decision of the claims officer, the First-tier Tribunal, reduced the award by 25% on account of his character as shown by his unspent convictions. This left an award of approximately £275,000. However, the amendments to the 1974 Act had come into force on 10th March 2014. The amending legislation provided that in relation to convictions before 10th March 2014 the amended provisions applied as if the amendments had always had effect – in other words the provisions were given retrospective effect (section 141 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012).

11. The parties in G agreed that had the amendments been in force when G made his application compensation, all of his previous convictions would have been spent and at the date of the First-tier Tribunal decision the post-application convictions (in 2008 and 2009) would also have been spent. Given the retrospective nature of the amendments, there were no convictions that could lawfully be taken into account and therefore there could no reduction in compensation in respect of them.

12. I agree with Judge Mitchell's decision in G's Case, but I do not agree that the First-tier Tribunal applied it properly in the present case (see below).

Background and Procedure

13. I set out the facts as I understand them to be but I am not to be taken as making any finding of fact on any disputed matter. The claimant is a woman who was born on 16th March 1975. Early in the morning of 27th March 2012 she was the victim of a crime of violence in which she was punched in the jaw and hit over the head with a bottle. On 18th April 2012 she claimed criminal injuries compensation under the 2008 scheme. On 6th November 2012 CICA informed her that it was making enquiries but would make an interim payment of £1500. It emerged that she had criminal convictions and on 16th April 2015 CICA informed her that it had assessed her compensation at £4441.25 after deducting 15% in respect of her character and unspent convictions. At that stage CICA was unaware of more recent convictions, including for racial or religious harassment (fined), 3 offences of assaulting police (3 sentences of 6 weeks imprisonment, all concurrent and suspended for 2 years) and assault (6 weeks imprisonment and activation of the suspended sentences consecutively, totalling 12 weeks imprisonment). On 30th November 2015 CICA made a fresh decision to the effect that no award at all would be made. The claimant asked for a review of that decision on the basis that all of her recent convictions were associated

with alcohol and domestic abuse, but on 21st April 2016 CICA confirmed this decision on review. On 13th September 2016 the claimant appealed nearly two months out of time to the First-tier Tribunal against CICA's review decision.

14. The First-tier Tribunal extended the time for appealing and on 22nd March 2017 it allowed the claimant's appeal (see below). On 13th June 2017 CICA applied to the Upper Tribunal for judicial review of the First-tier Tribunal's decision and on 4th December 2017 I gave permission to proceed with the application. It took some time to arrange representation and on 5th March 2018 I directed that there be an oral hearing. This took place on 5th July 2018.

The First-tier Tribunal

15. The First-tier Tribunal dealt with the matter quite briefly. It noted that as at the date of the CICA review decision there were unspent convictions but that they had all become spent by the time of its own hearing and decision. It referred to Judge Mitchell's decision in G. The CICA representative at the hearing told the First-tier Tribunal that the CICA legal team was intending to apply for judicial review of Judge Mitchell's decision. However, I do not see how that could possibly have been correct. Judge Mitchell's decision was itself made on judicial review (as is this decision) and it is not possible to have judicial review of a judicial review decision – and in any event the decision was made with the agreement of CICA. (The appropriate remedy would have been to appeal to the Court of Appeal, but as far as I am aware there was never even an application for permission to appeal to the Court of Appeal.)

16. In relation to G the First-tier Tribunal in the present case noted that it was bound by that decision and referred to:

> "The Upper Tribunal decision … [G] where Judge E Mitchell made it clear that any criminal convictions when spent are spent for ALL purposes and cannot be taken into account".

It stated that such convictions should not even be admitted in evidence and the tribunal had no discretion to take them into account.

17. In my view the First-tier Tribunal in the present case misunderstood what was decided in G. In G, when the amended rehabilitation provisions were applied retrospectively, the pre-application convictions were deemed to have been spent before the application was made. The post-application convictions clearly could not have come within the exception in brackets in paragraph 13(1)(e) of the 2001 scheme, because those words relate to pre-application convictions. The post-application convictions must be covered by the words "or by evidence available to the claims officer". Given the retrospective effect of the rehabilitation period amendments the parties to the Upper Tribunal case agreed that there was no such evidence available. No doubt because of the agreement of the parties in that case, little information is given about the procedural history of the case.

18. In the present case it is clear that there were unspent convictions at every stage of the decision making process until 12th December 2016, three months after the

claimant appealed to the First-tier Tribunal. In my view that took the present case outside what was decided in G.

The Section 7(1) Issue

19. Section 4 of the 1974 Act is subject to the provisions of section 7. Section 7(1)(d), as set out above, provides that nothing in section 4(1) shall affect the operation of any enactment by virtue of which, in consequence of any conviction, a person is subject, otherwise than by way of sentence, to any disqualification, disability, prohibition or other penalty the period of which extends beyond the relevant rehabilitation period.

20. Mr Moretto argued that the 2008 scheme is subordinate legislation within the meaning of section 21 of the Interpretation Act 1978 and is therefore an "enactment" within the meaning of section 23 of that Act. A reduction under paragraph 13(1)(e) of the 2008 scheme in the amount of compensation to which a claimant would otherwise be entitled is "in consequence of any conviction" a "penalty" (I might see it rather as a "disqualification"). Accordingly, subject to the proviso in brackets in paragraph 13(1)(e), which is limited to convictions which are spent at the date of the application for compensation, other convictions must be taken into account unless there are exceptional reasons not to do so, as provided in paragraph 14(3) of the 2008 scheme.

21. My Yetman rightly accepted that the 2008 scheme itself is subordinate legislation and an enactment for these purposes but argued that the claimant is subject to the sanction of a reduction in or removal of compensation because of the provisions of the Guide and the penalty points scheme and the Guide was not put before Parliament. Accordingly section 7(1) does not apply.

22. I agree with Mr Moretto that the reduction in or removal of compensation is imposed under the 2008 scheme itself, not under the Guide which "is merely an aid to transparent and consistent decision making which is not binding on the courts, tribunals nor indeed CICA". The Guide cannot and does not in itself authorise a reduction in or removal of an award, but explains how CICA approaches its statutory task.

23. Both counsel sought to ascertain and illustrate the meaning of "any disqualification, disability, prohibition or other penalty" by reference to authorities in totally different contexts – being a suitable adoptive parent, having an endorsement on a driving licence, credibility of a party in civil proceedings, employment law and so on. I do not find any of these authorities, on either side, to be helpful. It is quite clear as a matter of plain language that a reduction in or removal of entitlement to compensation to which a claimant would otherwise be entitled is a penalty and a disqualification.

24. Accordingly, subject to the proviso in paragraph 13(1)(e), section 7(1) of the 1974 Act permits account to be taken of convictions that were unspent or not yet incurred at the date of the application for compensation, even if they have become spent by the time of the First-tier Tribunal hearing and/or decision. Of course, the age of the conviction is a matter than can properly be taken into account in exercising the discretion provided by paragraphs 13(1)(e) and 14(3) of the 2008 scheme.

25. In light of my conclusions relating to section 7(1) of the 1974 Act, it is not necessary to consider arguments that were raised in relation to the applicability of section 7(3) of that Act.

Public Policy

26. Mr Moretto argued that if the First-tier Tribunal were correct in the present case in finding that convictions could not be taken into account if they were spent by the time of the First-tier Tribunal hearing or decision, this would limit the effect of paragraph 13(1)(e) to those applicants with the most serious convictions and lengthy (or no) rehabilitation periods. Other applicants would be best advised to "delay and prolong" the process until their convictions had become spent. This would not be in the public interest or the interests of justice.

27. Mr Yetman argued that as time initially runs from the incident of the crime of violence the potential for delay is already built into the period before making an application, the timing of which could be manipulated in appropriate cases to ensure that convictions had become spent. In any event "the public interest in ensuring those with spent convictions are treated equally under the Scheme outweighs any harms associated with tactical delays where rights of review and appeal are concerned". There is no reason why those whose convictions happen to be spent at a particular time are more deserving of compensation than those whose convictions are not spent at a particular time.

28. These are interesting policy issues but should be properly be addressed to those whose responsibility it is to draft and amend successive criminal injuries compensation schemes. They do not assist me in deciding what the law actually provides, as compared with what it might be thought it should provide.

The Human Rights Argument

29. Mr Yetman argued that the decision of the First-tier Tribunal in this case was consistent with the claimant's rights under Human Rights Act with particular reference to article 1 of protocol 1 and article 14 of the European Convention on Human Rights. It seems to me that this argument is premature. Although a person can be a victim of a breach of Convention rights even though their rights have not yet been violated, provided that they would be a victim (R (Adath Yisroel Burial Society et al) v HM Senior Coroner for North London [2018] EWCH 969 (Admin) at paragraph 8), in the present case there will be a fresh First-tier Tribunal hearing at which the claimant will have the opportunity to persuade the tribunal to exercise its discretion in her favour.

30. Meanwhile I note that in its very recent decision in A and B v Criminal Injuries Compensation Authority and Secretary of State for Justice [2018] EWCA Civ 1534, which dealt with a claim under the 2012 scheme, the Court of Appeal held that having unspent convictions of the relevant kind is a status for the purposes of article 14, although under the 2012 scheme the difference in treatment was justified for the kind of convictions involved in that case.

Conclusions

31. In the present case the First-tier Tribunal misunderstood what was actually decided by Judge Mitchell in G. The correct approach is to apply paragraphs 13(1)(e) and 14(3) of the 2008 scheme. Convictions that are spent under the (amended) terms of the 1974 Act at the date of application must be disregarded. Any remaining convictions (of which there must be proper evidence as required by paragraph 13(1)(e)) must lead to an award being withheld or reduced in accordance with paragraph 14(3) unless there are exceptional reasons not to do this. In every relevant case the First-tier Tribunal must actively consider (a) whether there are exceptional reasons and, if not, (b) whether an award should be withheld or whether it should be reduced.

32. For the above reasons this application for judicial review made by CICA is granted and I make the orders set out in paragraphs 1 and 2 above.

H. Levenson
Judge of the Upper Tribunal
20th July 2018