[2017] AACR 4

(Criminal Injuries Compensation Authority v First-tier Tribunal and KM (CIC) [2016] UKUT 338 (AAC))

Judge Levenson **JR/2338/2015**
12 July 2016

Criminal injuries compensation – exceptional and justified risk – test

The claimant, a fire-fighter, was ordered to enter a burning building in the belief that it was a flat containing trapped people only to find that it was a storeroom; he proceeded to extinguish the fire and was injured while doing so. Had the true facts been known, he would not have entered the building but other measures would have been taken. The Criminal Injuries Compensation Authority (CICA) rejected his claim under the Criminal Injuries Compensation Scheme 2012. The claimant appealed to the First-tier Tribunal (F-tT) and at the hearing the Authority argued that the risk had not been "exceptional" as required under paragraph 5(2) of the Scheme because the claimant was trained and had only done what would normally be expected of him in the course of his work. The F-tT rejected the Authority's argument, having taken account of its guidance regarding "exceptional" and "justified" risk, holding as a matter of fact that the claimant would not normally be expected to enter an unoccupied storeroom containing flammable materials, and found him 100 per cent eligible for an award. CICA applied to the Upper Tribunal for judicial review of that decision on the basis that the F-tT had erred. CICA argued that the claimant would normally have entered a burning building if life was endangered, that that had been his belief in this instance and therefore the risk had not been exceptional as required under the Scheme.

Held, allowing the application in part, that:

1. the test of whether there was an exceptional and justified risk should be determined by reference to what was believed to be the position at time the risk was taken. The concept of "taking" a risk in its very nature required a subjective view of what the risk was and at the time the claimant entered the building the risk taken was not exceptional within the requirements of paragraph 5, given his belief that life was endangered by the fire (paragraphs 18 to 19);

2. it was however wrong to focus exclusively on the time that the claimant entered the building as after he had done so he discovered that the building was a storeroom (not living accommodation), and the claimant was then taking an exceptional risk which he would not normally have been expected to take (paragraph 20);

3. the F-tT was limited to deciding whether CICA's decision was correct on the issues that CICA had addressed in its review and therefore the tribunal had no jurisdiction to make a percentage eligibility award as that matter had not been addressed in the review decision: *SB and others v First-tier Tribunal and CICA* [2014] UKUT 497 (AAC); [2015] AACR 16 (paragraphs 21 to 22).

The judge quashed the decision of the F-tT and referred the case to CICA for consideration of the percentage eligibility, among other matters.

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Decision and hearing

1. **This application succeeds to a limited extent.** 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:

> (a) I make **a quashing order** in respect of the decision of the First-tier Tribunal (Social Entitlement Chamber) made on 30 April 2015 (written reasons given on 8 June 2015) under tribunal reference CI011/14/00769 and CICA reference X/13/722717 to "make a 100% finding of eligibility". I substitute my own decision as being the only decision that the First-tier Tribunal could properly have made on this very specific issue. This is to

refer the matter to the Authority for consideration of the percentage eligibility together with other outstanding matters in the claim on the basis that I explain below, and

(b) I decline to interfere with the decision of the First-tier Tribunal that the claim satisfies the conditions set out in paragraph 5 of the Criminal Injuries Compensation Scheme 2012 ("the 2012 scheme").

2. I held an oral hearing of this application for judicial review on 14 June 2016. The applicant, the Criminal Injuries Compensation Authority ("the Authority" or CICA), was represented by Robert Moretto of counsel, instructed by the Treasury Solicitor. The First-tier Tribunal is the respondent but had, quite properly, taken no part in the proceedings. The interested party KM is the claimant for compensation ("the claimant"). He was represented by Tom Goodhead of counsel, instructed by Thompsons Solicitors. I am grateful to them for their assistance. I heard the case together with that in JR/3330/2015 which raised overlapping issues but on which I will give a separate decision.

Paragraphs 4 and 5 of the 2012 Scheme

3. So far as is relevant paragraphs 4 and 5 of the 2012 scheme provide as follows:

"4. 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.

5. (1) A person may be eligible for an award if they sustain a criminal injury which is directly attributable to their taking an exceptional and justified risk for the purpose, in a relevant place, of:

(a) apprehending an offender or suspected offender;

(b) preventing a crime;

(c) containing or remedying the consequences of a crime; or

(d) assisting a constable who is acting for one or more of the purposes described in paragraphs (a) to (c).

(2) A risk taken for any purpose described in sub-paragraph (1) in the course of a person's work will not be considered to be exceptional if it would normally be expected of them in the course of that work."

4. Annex A defines "criminal injury" by reference to the list of injuries in Annex E and relates to the consequences rather than the circumstances. Annex B defines "crime of violence" and relates to the circumstances. It is not necessary to reproduce the Annex here. The facts of the present case come within paragraph 5(1)(c) but eligibility for compensation depends on the satisfaction of the opening requirements in 5(1).

CICA guidance to the 2012 Scheme

5. The Authority has issued "A guide to the Criminal Injuries Compensation Scheme 2012" which "aims to assist applicants in understanding the Scheme". It is not a binding legal

document or statement of law and, as it says, "This guide should be read in conjunction with the Scheme, which remains the authoritative document".

6. I refer to the guide because the First-tier Tribunal noted (in its own paragraphs 3 and 9) that paragraphs 14 and 15 of the guide (which are on page 9 of the guide but which the First-tier Tribunal referred to as being on page 8) state as follows:

> "14. When deciding if the risk was **exceptional**, we will consider if what you did was unusual and was not something which you were trained to deal with. We will not compensate people who were injured ding something that would be expected of them in the course of their normal employment.
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> 15. When considering if the risk was **justified** we will consider all the circumstances, including the seriousness of the situation, and whether there was an immediate threat to those involved."

Background and procedure

7. The significant background facts are not in dispute and I draw the following mainly from the First-tier Tribunal's findings. The claimant was born on 13 November 1958. He had been employed as a firefighter for nearly 30 years and was within a few months of retirement when, in the early hours of 23 August 2013, he was called to a life-threatening fire at a three storey block of flats. It is not disputed that this was caused by arson. When he arrived there were a number of residents "hanging out of the upstairs windows". The building was obviously ablaze and there was smoke emerging from the windows. The senior officer present understood that the seat of the fire was in a first floor flat that was occupied by people whose lives were in danger. He ordered the claimant and a colleague to don breathing and other apparatus and enter the building in order to hose the flat to enable the escape of those whose lives were believed to be in danger. When the claimant and his colleague arrived at what they believed to be the flat they discovered that it was in fact a storeroom, which was unusual to find on the first floor of a block of flats. The storeroom contained disused items but also a number of flammable cans of paint and paint thinners. At some stage while moving rubbish on the landing to access the fire the claimant's hose became entangled and he tripped over debris, injuring his left ankle. He received medical treatment and was away from work for just under two months.

8. The claimant's written statement to the First-tier Tribunal (pages A14 to A18 of the First-tier Tribunal bundle) put it as follows (references are to paragraph numbers):

> "19. [We] went into the block at the ground floor level and made our way up the stairwell. After just 4 or 5 steps, we were in the smoke layer and visibility was nil. Using a Thermal Imaging Camera (TIC) we were able to locate the seat of the fire. We opened the door of that room, assuming it to be a flat although it transpired to be a storeroom.
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> 20. …
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> 21. We were able to extinguish the main fire but we then needed to ensure that any remaining hot spots in the storeroom were also put out. We also needed to make absolutely sure there were no casualties.
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> 22. The room was filled with all sorts of debris including mattresses, cupboards and old bike frames. It remained entirely smoke-logged and visibility was at or near zero.

> 23. I was therefore working in smoke-logged, very hot conditions, wearing full fire kit and heavy, cumbersome breathing apparatus in hazardous underfoot conditions in circumstances where we still could not be sure that there were not lives at risk.
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> 24. …
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> 25. The hosereel which we were using then became trapped in the debris. It was as I was seeking to free the hosereel that I tripped and went over on my left ankle, sustaining my injury.
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> 26. I immediately knew that there was a serious problem with my ankle. However, in the circumstances, I could not stop working until we were confident that the room was clear and safe. I therefore continued working for another 5 – 10 minutes before we made our way out of the building. Going down the stairs I told [my fellow firefighter] that I had hurt my ankle and he was able to help me down the stairs."

9. The First-tier Tribunal also accepted the claimant's evidence that he had received training in respect of entering smoke-filled buildings using breathing apparatus and, where necessary, a vision device, but that, in present day firefighting practice, entering a building on fire was a very rare occurrence. Had the senior fire officer present known prior to the order to enter the building that the seat of the fire was in a first floor storeroom in which there were no residents and no immediate danger to life of residents within the flat and which contained flammable liquids, then he would not have directed the claimant and his colleague to enter the building but, in accordance with usual procedure the fire would have been fought externally using appliances and hoses and the residents would have been removed from the windows using the ladders. The claimant would not be expected as part of his duties to go into a smoke-filled building which was on fire unless the purpose was to save life, which was not in fact the situation.

10. On 14 October 2013 the claimant made a claim for compensation under the 2012 Scheme. On 23 April 2014 CICA refused compensation on the basis that the risk was not exceptional within the meaning of paragraph 5(2). On 16 June 2014 the claimant requested a review of that decision. On 6 October 2014 CICA reviewed but maintained that decision and on 12 December 2014 the claimant appealed to the First-tier Tribunal against that decision of CICA. The First-tier Tribunal heard the appeal, which it allowed, on 30 April 2015. Written reasons were signed on 8 June 2015. On 23 July 2015 CICA applied to the Upper Tribunal for judicial review of the First-tier Tribunal decision. On 2 October 2015 I gave CICA permission to proceed and on 4 January 2016 I directed that there be an oral hearing of the substantive application. This took place on 14 June 2016. The claimant opposed the application and supported the decision of the First-tier Tribunal except in relation to the finding of "100% eligibility".

First-tier Tribunal decision

11. At the First-tier Tribunal the Authority accepted that the fire was caused by arson and that the claimant had taken a justified risk in entering the building while it was on fire because of the danger to human life. However, it argued that the risk was not "exceptional" because what the claimant had done in entering the building was a course of conduct which he had been trained to undertake and which would normally be expected of him in the course of his work.

12. The First-tier Tribunal considered the wording of paragraph 14 of the guide, to which I have referred above. It concluded that there is nothing in the 2012 Scheme itself which indicates

that whether or not a person was trained to undertake a particular task was relevant to whether what they were doing was exceptional (paragraph 9 of its Written Reasons:)

> "9. … people … are often trained to deal with exceptional and frightening circumstances because it is perceived they might occur. However, that does not mean that they are normally expected to deal with such circumstances in the course of their duties … ."

13. I agree with the First-tier Tribunal on this matter. That part of the guide is misleading and the Authority should consider revising it.

14. In paragraph 10 of its Written Reasons the First-tier Tribunal observed that "The situation was clearly a dangerous one and on any view there were people hanging out of the building which was on fire and there was smoke coming from the apertures of the building". In the following paragraphs the First-tier Tribunal explained its conclusions:

> "11. However, the real issue here was whether there was an '*exceptional risk*'. … We find on the evidence of [the claimant], which we fully accept, that if the true position had been known before he and his colleague were directed by the Senior Fire Officer to enter the building, he would not have been directed to do so. … because it was not a 'normal part of his duties' to enter a building unless there was a situation as originally perceived, namely one where it was necessary to put out a seat of fire which was directly endangering the life of people within the relevant flat. The normal course of practice which he would have followed in the course of his duties in the actual situation where the fire was in a highly flammable and dangerous storeroom would have been to fight the fire externally and to remove the occupants of the building externally using ladders. That would have precluded the necessity for entering the building. Therefore we find as a matter of fact that to enter the building in the actual true position of fire in a storeroom which was not occupied and contained flammable liquids was not part of what would 'normally be expected of [him] in the course of [his] work'.
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> 12. We find that the risk that he took was clearly exceptional. He entered a building which was on fire which was laden with smoke using infrared and breathing equipment where he could literally only see a hand in front of him and where he was in danger, as it transpired, of the paint and/or thinners igniting."

The arguments

15. The claimant's arguments in essence support the approach taken by the First-tier Tribunal. For all the lengthy written and oral submissions, the Authority's argument resolves into one fundamental point. This is that that First-tier Tribunal erred in law by determining whether the risk taken by the claimant would have been taken if facts which were later discovered had been known at the time. The correct test was to determine the question by reference to what was believed to be the position at time the risk was taken. If, as the First-tier Tribunal found, it was a normal part of the claimant's duties to enter a burning building where it was believed that life was endangered, and that was what the claimant believed in this case, then the risk taken was not exceptional as required by paragraph 5(2) of the 2012 Scheme to bring the claimant within eligibility under paragraph 5(1). The Authority also disagreed with the First-tier Tribunal over the issue of training.

16. There were arguments over which approach was more likely to produce random or arbitrary or inconsistent decisions, but I did not find such arguments helpful as every case depends on its own facts whichever approach is taken, and different panels could legitimately reach different conclusions on the same set of facts whichever approach is taken. There were also arguments over the relevance of the wording of previous criminal injuries compensation schemes but in my opinion the 2012 Scheme should be taken on its own terms.

Conclusions on paragraph 5 of the 2012 Scheme

17. The starting point is that the First-tier Tribunal accepted the evidence given by the claimant, both written and oral, and found the facts accordingly. The Authority has not sought to challenge those findings. Paragraph 5(1) of the 2012 Scheme requires that the claimant was "taking an exceptional and justified risk". It is agreed that on the facts of the present case the claimant was taking a "justified" risk, but was he taking an "exceptional risk"? According to paragraph 5(2) the risk was only exceptional if it would not normally be expected of the claimant in the course of his work.

18. I agree with the Authority's contention that the correct test is to determine the question by reference to what was believed to be the position at time the risk was taken. The concept of "taking" a risk in its very nature requires a subjective view of what the risk is. Were this not so, a person could be said to be taking a risk when it never crossed their mind that there was any risk at all, and I do not understand that to be what the language means.

19. Thus, the Authority is correct when it argues that at the time the claimant entered the building believing that life was endangered, the risk taken was not exceptional within the requirements of paragraph 5.

20. However, the parties have been wrong to focus exclusively on the time that the claimant entered the building. The First-tier Tribunal accepted and found that once the claimant opened the door of the room that had been assumed it to be a flat and discovered it to be a storeroom full of debris and flammable material he continued to extinguish the main fire and ensure that any remaining hot spots in the storeroom were also put out, working in smoke-logged, very hot conditions, wearing full fire kit and heavy, cumbersome breathing apparatus in hazardous underfoot conditions. It had already been established that this room was not living accommodation and it is clear that the First-tier Tribunal regarded these actions as continuing to take an exceptional risk which would not normally be expected of the claimant. The tribunal was wrong about the continuation aspect in that paragraph 5 was not satisfied when the claimant entered the building, but there did come a point when the subjective view of the claimant and the objective reality coincided. That is why I have refused to interfere with the outcome decision of the First-tier Tribunal in relation to paragraph 5 of the 2012 Scheme.

The 100 per cent assessment

21. On 4 November 2014 the case of *SB and others v First-tier Tribunal and CICA* [2014] UKUT 497 (AAC); [2015] AACR 16 was decided by a three-judge panel of the Upper Tribunal. It held that on an appeal to the First-tier Tribunal from a decision of the Criminal Injuries Compensation Authority (CICA) the jurisdiction of the First-tier Tribunal is limited to deciding whether the decision made by CICA was correct on the issue or issues that had been addressed in its review decision.

22. It is now agreed that the First-tier Tribunal had no jurisdiction to consider whether to make a finding of "100% eligibility" because this matter had not been addressed in the CICA review decision.