IN THE UPPER TRIBUNAL **Case No. UA-2024-000238-CIC**
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 311 (AAC)**

On judicial review from the First-tier Tribunal (Social Entitlement Chamber)

Between:	SH	Applicant
	and	
	The First-tier Tribunal (Social Entitlement Chamber)	Respondent
	The Criminal Injuries Compensation Authority	Interested party

Before: Upper Tribunal Judge Perez

Decided on consideration of the papers

Representation:
Applicant: No representative
Respondent: CICA Legal Team

DECISION

1. I allow this judicial review to the extent of remittal.

2. The decision of the First-tier Tribunal dated 6 December 2023 (under reference CI017/23/00067) is quashed. The case is remitted to the Social Entitlement Chamber of the First-tier Tribunal, to be reheard in accordance with the directions at paragraph 77 of this decision.

REASONS FOR DECISION

Introduction

3. This is Ms H's application for judicial review of the First-tier Tribunal's decision which allowed in part her criminal injuries compensation appeal. I gave permission on 10 August 2024 to bring this judicial review, after an oral hearing on 29 July 2024.

Factual and procedural background

Application for compensation

4. Ms H was sexually abused from the age of 5 by her maternal grandmother's male partner. CICA accepted that and so did the First-tier Tribunal. On 13 September 2019, Ms H claimed criminal injuries compensation for that abuse. The applicable scheme is the Criminal Injuries Compensation Scheme 2012.

5. In a decision communicated by letter dated 26 November 2021, CICA refused the claim on the ground of non-cooperation with CICA (page A19).

6. In a review decision communicated by letter dated 17 March 2023, CICA decided to make an award of £1,500 (page A29). This was for sexual assault child, level B2 x 100%.

First-tier Tribunal appeal

7. Ms H appealed to the First-tier Tribunal.

8. In directions dated 25 May 2023, the First-tier Tribunal told Ms H that it would assist that tribunal if, when obtaining a diagnosis of mental injury by a professional psychiatrist or psychologist, Ms H's full GP records could be sent to that psychiatrist or psychologist, along with a copy of the expert questions enclosed by the tribunal with those directions (pages TD1 to TD3). Ms H obtained and supplied to the First-tier Tribunal a report dated 28 May 2023 (from a clinic of 15 May 2023) from Consultant Psychiatrist, Dr Claudia Murton (pages TG08 to TG13). Dr Murton had already seen Ms H by the time the First-tier Tribunal gave the 25 May 2023 directions. In directions dated 28 June 2023, the First-tier Tribunal decided, having seen Dr Murton's report, that it was necessary for Ms H to be assessed by a psychiatrist or clinical psychologist who would review her medical records and answer specific questions posed by the First-tier Tribunal. The directions ordered CICA to obtain such a report (pages TD4 and TD5). The questions the First-tier Tribunal required CICA to put to the expert were enclosed with those directions (page TD6). CICA commissioned the report from a female doctor, Dr Holt. There were other medical, psychiatric and psychological reports in the papers too. They included three reports from a Dr Alachkar.

9. At the First-tier Tribunal hearing, CICA's representative Ms McNally accepted that Dr Holt's report on page C359 is evidence of permanence in accordance with Note 2 to the scheme (written reasons, paragraph 13). Ms McNally also accepted that what Dr Holt's report said on page C360 supported a claim for loss of earnings (written reasons, paragraph 14). Ms McNally further told the First-tier Tribunal that "*she agreed with the Appellant (TG29) that symptoms have impacted upon paid employment up to 1/03/2058 (retirement age)*" (written reasons, paragraph 14).

10. The First-tier Tribunal allowed the appeal in part, increasing the award to disabling mental injury lasting five years or more but not permanent, level A9, £13,500 x 100%. The First-tier Tribunal said (in a decision notice starting on a second page numbered TD1)—

> "We found Miss [H] suffered a disabling mental injury following the Index Abuse which is not permanent within Note 2 to Mental Injury of the Scheme 2012. While there is medical opinion that Miss [H]'s symptoms would improve with appropriate treatment, we found, it is highly improbable that Miss [H] would engage in appropriate treatment whether NHS or private. In any event, appropriate treatment would be available through the NHS. We make no award for Special Expenses under Paragraphs 51 and 52.
>
> We make no award for Loss of Earnings, past or future.".

11. In its written reasons, the First-tier Tribunal said, among other things—

> "49. Given the Appellant was highly selective as to which professional and when she disclosed disabling symptoms consistent with PTSD, we found it difficult to exclude the real possibility that she was motivated by potential financial compensation gain with associated risk of inconsistencies as to the actual level of her day-to-day function.".

Grant of permission to bring judicial review

12. Ms H applied to the Upper Tribunal for permission to bring judicial review proceedings to challenge the First-tier Tribunal's decision.

13. I gave permission, on 10 August 2024, to bring judicial review proceedings. I did so on the grounds that it was arguable that the First-tier Tribunal had erred in law in the ways, and for the reasons, set out at paragraphs 21 to 73 below

14. I proposed that the Upper Tribunal set aside the First-tier Tribunal decision for the reasons given in my grant of permission, and that the Upper Tribunal remit to the First-tier Tribunal for re-determination entirely afresh by the First-tier Tribunal.

Submissions after grant of permission

15. Both parties agreed to the Upper Tribunal setting aside (that is to say, quashing) the First-tier Tribunal decision for the reasons given in my grant of permission. But CICA initially invited the Upper Tribunal to remit direct to CICA.

16. I gave directions dated 19 September 2024 asking CICA to identify the Upper Tribunal's power to remit in the circumstances of this case. The directions set out my analysis as to why the Upper Tribunal did not seem to have that power. I attach those directions at **Annex 2** to this decision.

17. CICA responded—

> "2. The Interested Party has no objection to the decision of the First-tier Tribunal (FTT) being set aside. As outlined in the various reasons provided for granting permission, it appears to the Interested Party arguable that there has been an error of law in the decision of the FTT.
>
> 3. In the particular facts and circumstances of this case, the Interested Party had invited the UT in submissions dated 30 August 2024 to remit the case back to CICA for further consideration, as opposed to referring the case back to the FTT for redetermination. This was invited, the CICA now accepts, in error.
>
> 4. For the reasons outlined in more recent directions from UTJ Perez dated 19 September 2024, the Interested Party agrees that UTJ Perez does not have the power to remit this claim directly to CICA.
>
> 5. CICA considers that paragraph 129 would not have been engaged in the circumstances of this case. The decision for the FTT in this case was one of quantum and there was no basis upon which paragraph 129 could have been engaged.
>
> 6. CICA is in agreement with Judge Perez, that Section 17(1)(b) of the Tribunals, Courts and Enforcement Act 2007 does not assist in this case either such that the UT could substitute its own decision.

> 7. In the circumstances therefore, the Interested Party invites the court to remit the case to the FTT to consider the matter afresh. Once remitted, CICA will consider its position further as to the most appropriate way to ensure that Ms [H] receives the correct award.".

18. Ms H responded—

> "Dear Judge Perez,
> I would like to express my gratitude for the time and consideration you have given to my case. I appreciate the careful attention to detail in ensuring that all legal aspects have been properly addressed, and I acknowledge the importance of this judicial process.
>
> In relation to the submission from the Criminal Injuries Compensation Authority (CICA), I would like to respectfully request that, should CICA propose any new offer or submission as this process continues, they notify me directly via email as well. This would allow me to carefully consider any proposals without being surprised by a submission presented at the court hearing itself.
>
> I believe that early communication would help to avoid any unnecessary prolongation of this matter, especially if a new offer or proposal from CICA is something that I could potentially accept. My concern is to avoid a situation where, after another First-tier Tribunal hearing, I could find myself in the same position a year from now.
>
> That said, I fully understand the process of the court and acknowledge the importance of due process. Once again, I sincerely thank you, Judge Perez, for your time and dedication in overseeing my case.
>
> Yours sincerely".

19. I thank CICA and Ms H for their help, cooperation and courtesy, which have really helped me in my task.

Law

20. The relevant parts of the Tariff to the scheme regarding mental injury and sexual offences are set out at **Annex 1** to this decision. Paragraph 34 of the scheme is also set out in **Annex 1**. That paragraph 34 deals with where an award is potentially merited under both the mental injury and sexual offence parts of the scheme.

Analysis

21. It is not disputed, and I find, that the First-tier Tribunal erred in law by—

(1) misquoting the test in Note 2 of the Tariff to the scheme and appearing to assume that, without a substantial adverse impact on Ms H's day-to-day activities, the disabling mental injury was present but not permanent;

(2) failing to seek a further report from Dr Holt on the issues on which the First-tier Tribunal found Dr Holt's report lacking;

(3) failing to find that Dr Holt did report sufficiently on functioning;

(4) failing to find that Dr Holt's report was evidence of permanence;

(5) failing to take sufficient account of, and to give sufficient weight to, Dr Alachkar's first two reports;

(6) failing to give sufficient weight to evidence from years before Ms H made her criminal injuries compensation claim that showed a lack of day-to-day functioning;

(7) failing adequately to take into account, and failing to give sufficient weight to, evidence that Ms H left school at 13 and then spent the rest of the time in her bedroom;

(8) failing to give sufficient weight to the statement of Ms H's partner, W;

(9) placing too much weight on the contraceptive implant;

(10) failing to ask Ms H why she has the contraceptive implant;

(11) placing too much weight on the lack of GP entries as to sexual dysfunction;

(12) mischaracterising Ms H's evidence as to her sexual relationship with her partner and impliedly inferring that she was lying about that relationship;

(13) making a finding not supported by the evidence as to the reason for Ms H stopping driving immediately after passing the driving test; and

(14) failing to give sufficient weight to Ms H's reminder to the First-tier Tribunal that she had grown up at her Nana's.

22. I take in turn each of those errors of law.

(1) Error by misquoting the test in Note 2 of the Tariff to the scheme and by appearing to assume that, without a substantial adverse impact on Ms H's day-to-day activities, the DMI was present but not permanent

23. The First-tier Tribunal said at paragraph 54 of the written reasons—

> "The Tribunal must assess whether the DMI had a substantial adverse impact on her day-to-day activities in accordance with Note 2 so as to make it a permanent DMI".

24. This erred in law by misquoting the test in Note 2 of the Tariff to the scheme and by appearing to assume that, without a substantial adverse impact[1] on Ms H's day-to-day activities, the disabling mental injury was present but not permanent. In fact, Note 2 requires that, in order to be disabling at all, the mental injury has to have "*a substantial adverse effect on a person's ability to carry out normal day-to-day activities for the time*

[1] The scheme says "effect" not "impact". But the use of "impact" by the First-tier Tribunal is not material here and is not the misquotation I am talking about.

specified (e.g. impaired work or school performance or effects on social relationships or sexual dysfunction)". By accepting that Ms H had a disabling mental injury at all for the purposes of the scheme, the First-tier Tribunal was effectively accepting that the mental injury had "*had a substantial adverse effect on [Ms H's] ability to carry out normal day-to-day activities*". Permanence is informed by Note 2 only in the sense that the "*substantial adverse effect on a person's ability to carry out normal day-to-day activities*" mentioned in Note 2 has to be, says Note 2, "*for the time specified*". It may be that this was what the First-tier Tribunal meant, but that is not clear. It might also be that, if the First-tier Tribunal did not consider that there had ever been a substantial adverse effect on Ms H's ability to carry out normal day-to-day activities, then the First-tier Tribunal should in fact not have accepted that there was a disabling mental injury at all. That would be contrary to what Ms H seeks of course, but I have to point that out.

(2) Error in failing to seek a further report from Dr Holt on the issues on which the First-tier Tribunal found Dr Holt's report lacking

25. The First-tier Tribunal erred in law in not seeking a further report from Dr Holt on the issues on which the First-tier Tribunal found Dr Holt's report lacking. I say that for two broad reasons.

26. First, the First-tier Tribunal said at paragraph 57 of its written reasons—

> "While Dr Holt provides a diagnosis of Complex-PTSD, which, we found, is reasonable to conclude, we must consider the Appellant's day-to-day functioning in accordance with Note 2, which Dr Holt has not. We might add, it appears Dr Holt had not been specifically instructed with reference to Note 2".

27. As to the part of that passage that I have underlined, the First-tier Tribunal had clearly thought (as Note 2 envisages) that a psychiatrist or clinical psychologist would in principle be well placed to opine on the effect on day-to-day functioning. I say that given that it was the First-tier Tribunal which directed CICA to commission the report (directions 28/6/23, page TD4) and that the tribunal directed CICA to ask the psychiatrist or clinical psychologist the following question, which derives from Note 2: "*What effect have the symptoms of the mental illness/injury had on the Appellant's day to day activities? Please consider ability to work, manage social and domestic activities and sexual or other relevant function*" (page TD6). Moreover, it is clear that CICA must have put that question to Dr Holt; she reproduced it verbatim at paragraph 7.5 of her report (page C357). That question reproduced in substance the part of Note 2 that deals with day-to-day functioning. If the First-tier Tribunal considered that a question formulated by that tribunal, and put to a specialist commissioned at the direction of that tribunal, had not been sufficiently answered, then the tribunal should have sought a fuller answer from the specialist. As Ms H pointed out to me, Dr Holt's report was not commissioned by Ms H but by her opponent (and at the First-tier Tribunal's direction). Any inadequacies in it should not, she submitted, have been held against her. I agree that any perceived inadequacies in Dr Holt's report should not have been held against Ms H without further enquiry of the specialist by the First-tier Tribunal.

28. Second, the First-tier Tribunal said—

> "We note that Dr Holt had not been specifically asked to comment with reference to the meaning of DMI per Note 2 to the Scheme 2012" (paragraph 35, written reasons)

> "it appears Dr Holt had not been specifically instructed with reference to Note 2" (paragraph 57, written reasons).

29. A First-tier Tribunal legal officer had on 28 June 2023 directed CICA to "*commission an assessment by a Psychiatrist or Clinical Psychologist*" (page TD4). Those directions contained at page TD6 a list of questions to be put to the expert. The questions included "*5. What effect have the symptoms of the mental illness/injury had on the Appellant's day to day activities? Please consider ability to work, manage social and domestic activities and sexual or other relevant function*". It appears that CICA did put that question to Dr Holt because Dr Holt reproduced it at paragraph 7.5 of her report as I have mentioned (page C357). If the First-tier Tribunal was not satisfied with the question posed to Dr Holt, that was a dissatisfaction with the First-tier Tribunal's own direction to CICA on page TD6. Any lacuna in Dr Holt's report as a result of Note 2 not being specifically put to her was therefore the responsibility of the First-tier Tribunal, and should in my judgment have been corrected by the tribunal going back and putting Note 2 to Dr Holt.

(3) Error in failing to find that Dr Holt did report sufficiently on functioning

30. In any event, the First-tier Tribunal erred in law in failing to find that Dr Holt did report sufficiently on functioning. I say that in view of the following in her report—

(1) Dr Holt reported that—

> "Ms [H] informed me that the index abuse has had a fundamental impact on her role as a parent, for example, her own fears and anxiety have led her to restrict her sons' activities and stop them from doing certain things. She gave the example of them not being allowed sleepovers (whether at home or someone else's home), and she summarised that her sons have '*no freedom to go out and play*' and do '*not have many friends'*. Ms [H] described how her role as a mother can bring a constant source of anxiety and fear, providing a recent example of her making (unfounded) assumptions that one of her sons may have been sexually harmed and a general hypervigilance related to their safety and well-being" (paragraph 6.2.9.3, page C352);
>
> "Ms [H] informed me that she '*hate*[s] *going on days out*' with her sons due to her dislike of being in unfamiliar places and with other people" (paragraph 6.2.9.3, page C352); and
>
> "she also conveyed sadness when recognising that she has '*missed out on things*' due to her low mood, symptoms of agoraphobia, and disrupted sleep pattern (including the need to sleep during the day when her sons are awake)" (paragraph 6.2.9.3, page C352).

(2) Dr Holt also reported that—

> "As already outlined, Ms [H] described limited intimacy and sexual contact within her relationship with [W]; she informed me that sometimes he sleeps on the sofa and sometimes they sleep in the same bed, but this depends on whether or not she feels about to be physically close to him … Ms [H] made a direct link between the index abuse and patterns in her current sexual relationship; she stated that during times of intimacy she has had upsetting thoughts and memories of the index abuse. She described

thinking '*I did this when I was eight*' and the fact '[I] *don't' want to be back in that place*'" (paragraph 6.2.9.4, page C352); and

"Ms [H] did also detail a more general tendency to avoid intimacy, and explained that this is directly related to the index abuse" (paragraph 6.3.4.2, page C355).

This was clearly a report that intimacy is impacted by the abuse and so by the disorder that the abuse had caused.

(3) Dr Holt reported at paragraph 6.3.2.1 that Ms H had reported: little interest or pleasure in doing things, disturbed appetite, sleeping difficulties and difficulties concentrating (page C354). Those, as distinct perhaps from negative self-concept and depressed mood which Dr Holt said Ms H had also reported, are clearly a report of difficulties with activities. Having little interest or pleasure in doing things suggests that hobbies and leisure activities (for Ms H's own leisure and pleasure) are adversely affected. Sleeping difficulties mean there is a difficulty performing the activity of sleep. Difficulties concentrating mean there is a difficulty with any activity requiring concentration. Dr Holt was not in my judgment required to list each such activity. Disturbed appetite suggests a difficulty with eating properly.

(4) Dr Holt reported at paragraph 6.6.3.1 that Ms H had reported not being able to stop or control worrying and that she had reported having persistent difficulties relaxing (page C354). Not being able to stop or control worrying will impact all activities. Difficulties relaxing impair activities aimed at achieving relaxation.

(5) Dr Holt reported that—

"[W] is practically supportive and '*does everything*' in the house and with regards [sic] their children's care" (paragraph 6.2.9.4, page C352)

"Ms [H] described how she is unable to consistently complete most of the domestic / childcare tasks required and she is reliant upon her partner to perform most of these duties on a daily basis" (paragraph 7.5.1, page C357).

(6) Having set out various limitations on day-to-day activities, Dr Holt drew the threads together at paragraphs 7.5.1 and 7.5.2. Those paragraphs came directly under the question about day-to-day functioning. But those paragraphs were not the sole extent of Dr Holt's answer to that question. Indeed, she started paragraph 7.5.1 with "*The index abuse has had a diffuse impact across all areas of Ms [H's] functioning*". Dr Holt went on, in that paragraph and the next, to refer back to other parts of her report.

(7) Dr Holt reported specifically, at paragraph 7.6.1, that—

"As already detailed, Ms [H] has been unable to sustain any form of paid employment throughout her adult life and it is my opinion that this is a direct result of her mental health needs resulting from the index abuse".

(8) Dr Holt also reported specifically, at paragraph 7.7.1, that—

> "As already detailed, the symptoms directly attributable to the index incident are still present and experienced by Ms [H] on a daily basis" (page C357).

(4) Error in failing to find that Dr Holt's report was evidence of permanence

31. The First-tier Tribunal erred in law in not finding that Dr Holt's report was evidence of permanence. Dr Holt opined that—

> "Ms [H] is likely to experience longstanding symptoms" (paragraph 7.11.1, page C359);
>
> "7.12.1 Given the profile of difficulties that has been identified during this assessment, and their pervasive nature, I think that they will continue to have a permanent impact on Ms [H's] ability to sustain paid employment or to enjoy adaptive interpersonal relationships with others. As already stated, it is my opinion that the recommended type and amount of treatment can enable Ms [H] to experience significantly reduced symptoms and to develop adaptive coping strategies to apply on a day to day basis." (page C360).

I accept Ms H's submission that "*"Significantly reduced symptoms" implies that the symptoms will persist, albeit with strategies to manage them*" (page TG28).

(5) Error in failing to take sufficient account of, and to give sufficient weight to, Dr Alachkar's first two reports

32. The First-tier Tribunal erred in law in failing to take sufficient account of, and to give sufficient weight to, Dr Alachkar's first two reports.

33. The First-tier Tribunal found—

> "[Dr Alachkar] found no evidence of severely depressed mood but rather attributed symptoms to Covid lockdown (C249); this letter was in July 2020 which was after the date the Appellant submitted the claim to CICA" (paragraph 46, written reasons).

34. This ignored what Dr Alachkar had said in his two previous reports.

35. In his report dated 29 January 2018[2] (pages C259 to C262), Dr Alachkar had reported that—

> "she has actually been 'an [redacted] wreck' since her teenage years and that she spent a lot of her time in bed and had no social life between the ages of 13 and 16" (page C260, third paragraph);
>
> "I do wonder if [Ms H] struggled with framing her [redacted] as [redacted] to [redacted] and [redacted] health and not only as physical health problems" (page C261 seventh paragraph); and
>
> "She was not comfortable talking about her background" (page C260, final paragraph).

[2] The report may have been misdated and possibly should have been dated 2019, given that it says the doctor saw Ms H three times in January 2019 in that letter.

36. The redactions made to the second of those three passages made that passage perhaps difficult to understand. But it appears at least that Dr Alachkar was talking about Ms H's struggle with accepting that she has any mental health problems, and perhaps that she also has a struggle with accepting that they may be due to the background that she had difficulty talking to him about. Dr Alachkar said in that report that he had seen Ms H three times in January 2019. So he saw her before she made her criminal injuries compensation claim on 13 September 2019. It was he who suggested that she had mental health problems, not her. This first report from Dr Alachkar suggests that Ms H has not fabricated her mental ill-health, or its causes, for the purposes of her criminal injuries compensation claim.

37. In his second report, dated 18 November 2019 (from a clinic of 28 October 2019), Dr Alachkar said (page C252)—

> "she directed a lot of that anger towards me for suggesting that her current [redacted] might be [redacted] to her past".

38. This suggested: (i) that, far from making up that the abuse was the cause of her problems, Ms H had originally been resistant to the idea and did not make up that proposition herself; and (ii) that she did not make it up only after or for the purposes of the criminal injuries compensation claim; someone else – qualified to do so (Dr Alachkar) – had already suspected that it was already there.

39. Moreover, if the First-tier Tribunal had felt hindered by the redactions in Dr Alachkar's first two reports, that tribunal should have asked Ms H whether she could provide unredacted versions. Ms H told me she would have been able to do that – whether before or at the hearing – within five minutes of being asked, had the First-tier Tribunal asked.

(6) Error in failing to give sufficient weight to evidence from years before Ms H made her CIC claim that showed a lack of day-to-day functioning

40. The First-tier Tribunal erred in law in failing to give sufficient weight to evidence from years before Ms H made her criminal injuries compensation claim that showed a lack of day-to-day functioning. More than one medical letter showed this. An example is the letter dated 7 May 2024 (from a clinic of 25 April 2024) on pages C338 and C339. This letter is from a consultant at Stepping Hill Hospital and says—

> "[Ms H] was very tearful during the interview and talked about how "awful" life was. She stated that everything was a struggle; she has no motivation to do anything and, typically, sits on the couch most of the day. [Redacted] her [redacted] looks after the children and does all of the housework…She reports that her mood was "awful" and it had been for as long as she could remember. She doesn't have any specific plans for the future and described "just getting through each day at a time". She is adamant that she doesn't want any medication as she does not believe in this. She was receptive, however, to having [redacted] [redacted] and feels more able to commit to this.
>
> **Impression**
> Both the team and I have had a lot of contact with [Ms H] over the last few years and it is clear that she has prominent Borderline Personality Traits. Although she also has some agoraphobic symptoms, this is not always consistent and does not appear to be the main disorder. It is unlikely that her problems will be solved with medication and it is reassuring that [Ms H] personally acknowledges this".

41. The speciality of the consultant who wrote that letter is redacted. But it is clear from what he says under "*Impression*" that he practises in mental health. This is clear too from Dr Holt's description of his letter (page C346, line 2); she describes it as discharging Ms H from secondary care mental health services.

(7) Error in failing adequately to take into account, and in failing to give sufficient weight to, evidence that Ms H left school at 13 and then spent the rest of the time in her bedroom

42. The First-tier Tribunal erred in law in failing adequately to take into account, and in failing to give sufficient weight to, the written and oral evidence that Ms H had left school at 13 and had then spent the rest of the time in her bedroom. The First-tier Tribunal also erred in law in deflecting her from expanding on that in oral evidence.

43. Ms H had said in her written statement (page A47, third and fifth paragraphs)—

> "I didn't receive any further schooling after the age of 13
>
> […]
>
> Before the trauma, I was outgoing and had friends. However, after it happened, I withdrew from the world and spent most of my time in my room. I had no friends, couldn't complete school, never worked, and constantly felt guilty. I would go for months without talking to anyone, including my nan. I had panic attacks and felt a sense of dread. All of these experiences left me feeling depressed, confused, and angry. I struggled with conflicting emotions because I loved and missed my grandad, who was the perpetrator of the trauma. I would self-harm, have nightmares, and experience flashbacks.".

44. In addition, the First-tier Tribunal oral proceedings included the following exchange (my underlining)—

> "Dr – Did you do, second question, did you do your GCSEs? Did you try?
>
> Ms H – No, I didn't. I've been [out of] schooling since the age of 13. I attempted to go to high school. I didn't do very well. I spent a lot of time in isolation. So then a specialist provision was found for me called the […..] Centre in […]. I attended there for about nine months, but they said they couldn't meet my needs. And then I was just left in limbo. I didn't have anywhere to go.
>
> Dr – Right.
>
> Ms H – I just spent the rest of the time in my bedroom.
>
> <u>Dr – And…Thank you. Yeah, that's fine. I don't want to trouble you with unpleasant things.</u>
>
> Ms H – No, no.
>
> <u>Dr – You know, that's not the purpose of this.</u> So you didn't attempt GCSEs. So what you said later on was, did you go to college at any time?
>
> Ms H – I attempted to try and enrol in college, but I just couldn't. I just couldn't manage. I just didn't want to be around people. I don't want to be around people still.".

45. Not only did the First-tier Tribunal not give weight to the evidence that Ms H had left school at 13 and then spent the rest of the time in her bedroom, but also the tribunal deflected her – see the underlined text – from saying more in oral evidence. Leaving school at 13 and spending the rest of the time in her bedroom was relevant to the effect the abuse had had on Ms H in the years closely following the abuse. Moreover, had the First-tier Tribunal not deflected her from saying more, that tribunal might well have heard more detail about that effect. That effect in turn laid the foundation for the abuse's continuing effect in later years.

46. In any event, more detail was in Ms H's written statement in the fifth paragraph on page A57, to which the tribunal did not give sufficient weight.

(8) Error in failing to give sufficient weight to the statement of Ms H's partner

47. The First-tier Tribunal erred in failing to give sufficient weight to the statement of Ms H's partner, W. He gave a written account of how Ms H's trauma had affected her daily life and relationships. He said (page A54, second paragraph)—

a. it had taken two years before she felt safe to share a bed with him;
b. she would not let him bathe their children;
c. she has nightmares;
d. she sobs while asleep;
e. she talks in her sleep;
f. she lashes out physically while asleep;
g. she wears baggy clothing and avoids male attention;
h. she avoids physical contact;
i. she is constantly on edge;
j. any unexpected noise or touch can trigger a panic attack in her, especially at night in darkness;
k. she has a severe fear of dark and confinement; and
l. "We have gone back to sleeping separately".

48. Those behaviours could not all be attributed to domestic violence from a previous partner, or to other traumas that were not the sexual abuse.

(9) Error in placing too much weight on the contraceptive implant

49. The First-tier Tribunal erred in placing too much weight on the contraceptive implant.

50. The First-tier Tribunal said (paragraphs 91 to 93, written reasons)—

> "91. While the Appellant has provided a statement that she is friends with her partner rather than they are sexual partners, we found this is inconsistent with the GP records which shows [sic] the Appellant has a contraceptive implant every 3 years (C141/142); in May 2018 and May 2021. There is reference to an implant fitted in June 2015 (C97). There is no mention in the GP records of any significant gynaecological condition requiring hormone treatment. We found the objective evidence supports the Appellant uses contraceptive implants and this has been the case for several years.
>
> 92. Neither have we noted any specific entries in the GP records of the Appellant complaining of issues with her sexual function particularly after she submitted her

> claim to the CICA in September 2019. Even if the Appellant experiences difficulties in her sexual function, we were unable to find any objective evidence to support her claim relevant to the DMI following her claim to CICA.
>
> 93. Thus, we found, there are no substantial adverse effects on the Appellant's sexual function resulting from the DMI nor is there any evidence of persisting or permanent sexual dysfunction in accordance with Note 2.".

51. But as to Mr H's sexual relationship with W, Dr Murton and Dr Holt reported that Ms H had told them as follows.

52. She told Dr Murton (page C58, second paragraph) that—

> "They are not very sexual or intimate and she says that she does not really like people in bed with her, so he often sleeps on the sofa to accommodate this".

53. This was not a statement to Dr Murton that Ms H never has sex with W.

54. Dr Holt reported at paragraphs 6.2.5, 6.2.9.4 and 6.3.4.2 that (pages C349, C352 and C355)—

> "When asked about her relationship with [W], Ms [H] explained that they've got a 'friend relationship' which does not include much intimacy or 'passion'… As already outlined, Ms [H] described limited intimacy and sexual contact within her relationship with [W]; she informed me that sometimes he sleeps on the sofa and sometimes they sleep in the same bed, but this depends on whether or not she feels about to be physically close to him … Ms [H] made a direct link between the index abuse and patterns in her current sexual relationship; she stated that during times of intimacy she has had upsetting thoughts and memories of the index abuse. She described thinking '*I did this when I was eight*' and the fact '[I] *don't' want to be back in that place*' … Ms [H] did also detail a more general tendency to avoid intimacy, and explained that this is directly related to the index abuse".

55. None of what Dr Holt reported was that Ms H said she never has sex with W. Not having "*much*" intimacy or passion with him is not the same as never having any intimacy or passion with him. Having "*limited intimacy and sexual contact within her relationship with [W]*" is not the same as never having any intimacy and sexual contact with him either.

56. I could find no statement from Ms H that she never has sex with W. I said in granting permission that, if I had overlooked it, CICA would no doubt bring it to my attention. CICA have not brought any such statement to my attention. I find that there was no such statement by Ms H.

57. So, having a contraceptive implant for the possibility of sex was not inconsistent with Ms H's evidence that the relationship does not include "*much*" intimacy or passion.

58. In any event, when each renewal time came, only once every three years, was Ms H really going to say, "*No don't bother, I will never have sex again*"? She had the choice once every three years. It is not as if she was choosing to take the pill every day and could choose a month off (although even then, she could not be blamed for continuing the pill just in case).

(10) Error in failing to ask Ms H why she has the contraceptive implant

59. The First-tier Tribunal also erred in failing to ask Ms H why she has the contraceptive implant. This failure was material. Ms H told me – and I accept – that, if the First-tier Tribunal had asked her that question, she would have told that tribunal that "*it was for peace of mind, I might possibly have sex with [W] and I might be attacked*". Ms H told me "*I never said we don't have a sexual relationship, I said it was strained and he sleeps on the sofa 'cause I can't have him in the room, gives me flashbacks*". She is right that she never said they don't have a sexual relationship, as I have found above.

(11) Error in placing too much weight on the lack of GP entries as to sexual dysfunction

60. The First-tier Tribunal also erred in placing too much weight on the lack of GP entries as to sexual dysfunction. Ms H's evidence was that she knows that her problems with intimacy, and with sharing a bed, derive from her grandfather's abuse of her. That abuse included sharing a bed with her while he abused her. Since she knew the cause of the problem, and did not consider the cause to be physical or hormonal, there was not necessarily any reason – from her point of view – to ask her GP for help with it.

(12) Error in mischaracterising Ms H's evidence as to her sexual relationship with her partner and impliedly inferring that she was lying about that relationship

61. The First-tier Tribunal erred in law by mischaracterising Ms H's evidence as to her sexual relationship with her partner. The First-tier Tribunal impliedly inferred that Ms H was lying about her relationship with him because she must be having sex with him. But she never said she never has sex with him, as I have found above.

(13) Error in making a finding not supported by the evidence as to the reason for Ms H stopping driving immediately after passing the driving test

62. The First-tier Tribunal erred in making a finding not supported by the evidence.

63. The First-tier Tribunal found—

> "we understood the reason for stopping driving immediately after passing the test was because the Appellant believed she had achieved what she had set out to do 5 years previously" (paragraph 88).

64. This "understanding" was not supported by the evidence.

65. Asked why she had stopped driving after passing her driving test, Ms H's oral evidence in response was—

> "overwhelming? Just don't want to. Don't want to be in that position. Don't want to feel unsafe. Don't want to be on my own. I don't want responsibility. I don't want any of it" (UT bundle, page 133, 11th paragraph).

66. The doctor on the panel summarised that response as—

> "Right. So you don't want the responsibility. Thank you. The next question is…" (page 133, 12th paragraph).

67. That did not in fact summarise what Ms H had just said; she had given a number of other reasons too, as the citation at paragraph 65 above shows.

68. But in any event, Ms H had not said that she had stopped driving "*because [she] believed she had achieved what she had set out to do 5 years previously*".

69. Ms H's evidence cited at paragraph 65 above was evidence of worries that were relevant to mental health issues. It was also evidence that the worries had caused her not to perform the day-to-day function of driving. The First-tier Tribunal's finding that she had stopped driving for a reason other than those worries overlooked Ms H's evidence of her worries, and led the First-tier Tribunal down a route that took no account of them.

(14) Error in failing to give sufficient weight to Ms H's reminder to the tribunal that she had grown up at her Nana's

70. The First-tier Tribunal failed to give sufficient weight to Ms H's reminder to the First-tier Tribunal that she had grown up at her Nana's.

71. The oral evidence in the First-tier Tribunal included the following—

> "Dr - … And is it your mum or someone you've got close family haven't you? You're in touch with?
>
> Miss H – My nana.
>
> Dr – Nana, right. How far away is she?
>
> Miss H – She lives about 15-minute drive away.
>
> Dr – Right, do you go to see her?
>
> Miss H – I used to go to see her, obviously that's where I grew up and that's like the house where the abuse took place and stuff. I used to go to see her all the time, I used to live there so it wasn't… [sic]. I lived there until I was 16 and moved out and I still went and seen her and stuff.
>
> Dr – Yeah.
>
> Miss H – and it was fine and it was all right and then when he opened the CICA case, I stopped going down, I stopped seeing her really.
>
> Dr – Right.
>
> Miss H – Everything was just too much, it was just always there. Recently I've been down, [W] takes my son to football on a Sunday morning near my Nana whilst he's taking him to football, I've been going sitting with my Nana and having a brew.
>
> Dr – Right.
>
> Miss H – It's just one of those.
>
> Dr – Right, so the football…[sic]. He's near your nana's?
>
> Miss H – Yeah.

Dr – Is it weekends or how often?

Miss H – Just a Sunday morning.

Dr – Right. And how do you get to your nana's? How do you travel there?

Miss H – I try, [W] drives in the car, so [W] will drop me off at my nana's and then take [C] football and then pick me up. I didn't have [W], I wouldn't go out.

Dr – Yeah.

Miss H – I don't go anywhere without him, anywhere.".

72. The First-tier Tribunal failed to give sufficient weight to the part of Ms H's evidence in which she reminded the First-tier Tribunal that she had grown up at her Nana's. Of course, the First-tier Tribunal knew that she had used to live at her Nana's. But Ms H seemed to be pointing out that, given that it was her childhood home, she had a positive reason still to go back there occasionally, despite the abuse, rather than avoiding it altogether as she might with another location where the abuse had happened (she told me that in fact it was grooming that happened at her Nana's, although she now recognises that to be abuse too, and that the touching and ejaculation happened at her abuser's sister's house). Ms H's evidence was however that, once she put the criminal injuries compensation claim in, she stopped going to her Nana's: "*Everything was just too much, it was just always there*". So her evidence was not that she was always able to visit her Nana's without any flashbacks or bad memories; the implication was that the criminal injuries compensation claim had made it fresh again.

73. That she had since been able to resume visiting her Nana, bearing in mind she has an additional reason to now – to wait for her son – does not mean that Ms H had not been prevented previously from doing so by bad memories.

74. It is for the reasons at paragraphs 21 to 73 above that I find the First-tier Tribunal materially to have erred in law.

(15) Disposal

75. I agree with CICA's revised position that it is not open to the Upper Tribunal to remit direct to CICA in this case. Ms S did not oppose remittal to the First-tier Tribunal.

Conclusion

76. It is for all of the above reasons that I allow this judicial review to the extent of quashing the First-tier Tribunal's decision and remitting to that tribunal.

CASE MANAGEMENT DIRECTIONS

77. I direct as follows—

(1) The case must be reheard entirely afresh by the First-tier Tribunal.

(2) The First-tier Tribunal panel which rehears this case afresh must contain no-one who was on the panel which decided the case on 6 December 2023.

(3) I remind the First-tier Tribunal however that CICA wish potentially to make a fresh decision. The First-tier Tribunal might consider it appropriate to enquire of the parties whether they would like a stay for CICA to consider whether to make a fresh decision.

(4) I remind CICA of Ms H's request—

> "I would like to respectfully request that, should CICA propose any new offer or submission as this process continues, they notify me directly via email as well. This would allow me to carefully consider any proposals without being surprised by a submission presented at the court hearing itself.
>
> I believe that early communication would help to avoid any unnecessary prolongation of this matter, especially if a new offer or proposal from CICA is something that I could potentially accept. My concern is to avoid a situation where, after another First-tier Tribunal hearing, I could find myself in the same position a year from now".

Rachel Perez
Judge of the Upper Tribunal
2 October 2024

Annex 1
to Upper Tribunal decision

Extracts from the Criminal Injuries Compensation Scheme 2012

Paragraph 34 of the scheme—

> "34. Where a person has sustained a mental injury as a result of a sexual assault, they will be entitled to an injury payment for whichever of the sexual assault or the mental injury would give rise to the highest payment under the tariff."

Relevant paragraphs of the Tariff to the scheme—

"Mental injury

Note [2]: "Mental injury" does not include temporary mental anxiety and similar temporary conditions.

A mental injury is disabling if it has a substantial adverse effect on a person's ability to carry out normal day-to-day activities for the time specified (e.g. impaired work or school performance or effects on social relationships or sexual dysfunction).

Disabling mental injury, confirmed by diagnosis or prognosis of psychiatrist or clinical psychologist:			
	- lasting 6 weeks or more up to 28 weeks	A1	1,000
	- lasting 28 weeks or more up to 2 years	A4	2,400
	- lasting 2 years or more up to 5 years	A7	6,200
	- lasting 5 years or more but not permanent	A9	13,500
Permanent mental injury, confirmed by diagnosis or prognosis of psychiatrist or clinical psychologist:			
	- moderately disabling	A11	19,000
	- seriously disabling	A13	27,000"

"Sexual offence where victim is any age (if not already compensated as a child)

Note [6]: Where a person has been the victim as part of a pattern of abuse of a number of sexual assaults which would otherwise qualify for separate payments, payment will normally be made for the pattern of abuse, based on the most serious incidents in the pattern, rather than for each separate incident. An exception may be made where a single incident which occurred as part of the pattern of abuse would give rise to a higher tariff payment than that for the abuse, in which case the higher payment may be made instead of the award for the pattern of abuse. Whether incidents are a part of a pattern of abuse will be assessed by reference to all the circumstances, including whether there was one or more assailants (and whether they acted together), the nature of the injuries and incidents, and the period in which they occurred.

Sexual assault			
	- minor - non-penetrative sexual physical act(s) over clothing	B1	1,000
	- serious - non-penetrative sexual physical act(s) under clothing	B3	2,000
	- severe - non-penile penetrative or oral-genital act(s)	B4	3,300

	- pattern of repetitive frequent severe abuse (whether by one or more attackers) over a period			
	- up to 3 years		B7	6,600
	- 3 years or more		B8	8,200
	- resulting in serious internal bodily injuries		B12	22,000
	- resulting in permanently disabling mental illness confirmed by psychiatric prognosis			
	- moderate mental illness		B12	22,000
	- severe mental illness		B13	27,000
[…]				
Non-consensual penile penetration of one or more of vagina, anus or mouth				
[…]				
	- resulting in permanently disabling mental illness confirmed by psychiatric prognosis			
	- moderate mental illness		B12	22,000
	- severe mental illness		B13	27,000
[…]				
	- pattern of repetitive incidents (whether by one or more attackers) over a period			
	- up to 3 years		B11	16,500
	- 3 years or more		B12	22,000
Sexual offence where victim is a child (under age of 18 at time of, or commencement of, offence) or an adult who by reason of mental incapacity is incapable of giving consent Note [6] applies where the victim is a child or an adult unable to give consent.				
Sexual assault				
[…]				
Sexual assault				
	- one or more of non-penile penetrative or oral genital act(s)			
[…]				
	- pattern of repetitive, frequent incidents			
[…]				
	- resulting in permanently disabling mental illness confirmed by psychiatric prognosis			
	- moderate mental illness		B12	22,000
	- severe mental illness		B13	27,000
Non-consensual penile penetration of one or more of vagina, anus or mouth				
[…]				
	- repeated incidents over a period			
	- up to 3 years		B11	16,500
	- 3 years or more		B12	22,000
	[…]			
	- resulting in permanently disabling mental illness confirmed by psychiatric prognosis			
	- moderate mental illness		B12	22,000
	- severe mental illness		B13	27,000”

[End of Annex 1]

Annex 2
to Upper Tribunal decision

Directions about power to remit direct to CICA

"**DIRECTIONS**
19 September 2024

1. Directions are at paragraph 18 below.

Introduction

2. The Upper Tribunal granted permission on 10 August 2024 for Ms [H] to bring judicial review proceedings.

3. The Upper Tribunal proposed setting aside the First-tier Tribunal decision and remitting to that tribunal for redetermination entirely afresh. (The reference to "both components" in that proposal was an error which had crept in from a non-criminal injuries case. But by the time the tribunal noticed and came to say this to the parties, the parties had responded and the error seemed to have made no difference.)

4. Ms [H] responded agreeing to the Upper Tribunal's proposal to set aside and remit. I am grateful to her for taking the initiative to contact the tribunal when she did not receive the expected tick-box form and for responding by email to save time.

5. CICA responded to the tribunal's proposal—

> "2. The Interested Party has no objection to the decision of the First-tier Tribunal (FTT) being set aside. As outlined in the various reasons provided for granting permission, it appears to the Interested Party arguable that there has been an error of law in the decision of the FTT.
>
> 3. In the particular facts and circumstances of this case, the Interested Party invites the court to remit the matter back to CICA for further consideration, as opposed to referring the case back to the FTT for redetermination.".

6. It seems this response may be prompted by a desire in CICA to make a better award than the award the First-tier Tribunal gave.

7. I would like to remit to CICA. It would save the First-tier Tribunal having to administer an appeal which may have to go on hold while CICA makes a fresh decision. And it would save Ms [H] (and CICA) the extra steps of having to deal with the First-tier Tribunal while CICA reconsiders and makes a fresh decision.

8. However, I am not sure I have power to remit to CICA.

9. Section 17 of the Tribunals, Courts and Enforcement Act 2007 provides (as amended from 14 July 2022)—

> "**17 Quashing orders under section 15(1): supplementary provision**

(A1) In cases arising under the law of England and Wales, section 29A of the Senior Courts Act 1981 applies in relation to a quashing order under section 15(1)(c) of this Act as it applies in relation to a quashing order under section 29 of that Act.]

(1) If the Upper Tribunal makes a quashing order under section 15(1)(c) in respect of a decision, it may in addition—

(a) remit the matter concerned to the court, tribunal or authority that made the decision, with a direction to reconsider the matter and reach a decision in accordance with the findings of the Upper Tribunal, or

(b) substitute its own decision for the decision in question.

(2) The power conferred by subsection (1)(b) is exercisable only if—

(a) the decision in question was made by a court or tribunal,

(b) the quashing order is made on the ground that there has been an error of law, and

(c) without the error, there would have been only one decision that the court or tribunal could have reached.

(3) Unless the Upper Tribunal otherwise directs, a decision substituted by it under subsection (1)(b) has effect as if it were a decision of the relevant court or tribunal.".

10. So, I can remit to the court, tribunal or authority that made the decision that I am quashing. Since I am quashing not the CICA decision but the First-tier Tribunal decision, subsection (1)(a) does not seem to confer power to remit to CICA (although I would like to).

11. If it is right to say that subsection (1)(a) does not confer power on the tribunal to remit to CICA, then the question is whether subsection (1)(b) allows for that.

12. I have a concern about whether subsection (1)(b) allows for that in the present case. I will assume for a moment that paragraph 129 of the scheme would have empowered the First-tier Tribunal to remit to CICA to redecide the amount of the award (CICA can tell me if paragraph 129 would not have had that effect in the present case). On that assumption, remittal by the Upper Tribunal to CICA would be substituting the Upper Tribunal's own decision for the First-tier Tribunal decision in question, for the purposes of section 17(1)(b) of the 2007 act. (CICA can tell me if that is not the correct analysis, too.)

13. If the assumption and analysis at paragraph 12 above are both correct, then the three conjunctive conditions in section 17(2) will apply for the exercise of the section 17(1)(b) power. The condition in section 17(2)(a) would be met: the decision in question was made by a tribunal. The condition in section 17(2)(b) would also be met: the quashing order will be made on the ground that there has been an error of law.

14. But I cannot see that the condition in section 17(2)(c) would be met. That condition is that, without the error, there would have been only one decision that the First-tier Tribunal could have reached (whether "decision" means as to amount or as to whether to remit). If it could be said (i) that only one award amount could have been given on the evidence, as to which I am not sure, then (ii) arguably the First-tier Tribunal could only have made that

award rather than remitting, because remitting would be pointless in that case[3]. If both points (i) and (ii) were right, meaning that making an award and not remitting (for CICA to determine the amount) was the only decision the First-tier Tribunal could have reached, that would seem to satisfy section 17(1)(c). But that way of satisfying section 17(1)(c) would mean that the Upper Tribunal, in exercising the section 17(1)(b) power, would be substituting its own decision as to the amount, rather than remitting to CICA for CICA to make a fresh determination as to the amount. But CICA don't want the Upper Tribunal to do that; CICA want the Upper Tribunal to remit to CICA for CICA to make a fresh determination as to the amount. So the above analysis would not achieve what CICA request.

15. For the Upper Tribunal to be empowered to make a remittal to CICA for CICA to make a fresh determination as to the amount, as CICA want, such remittal would have to be the only decision that the First-tier Tribunal could have reached in order for the section 17(2)(c) condition to be met. I can see that remittal by the First-tier Tribunal to CICA for CICA to implement an amount determined by the First-tier Tribunal might be within the meaning of "determine" in paragraph 129 (if "determine" in that paragraph means bring to a conclusion and make the payment, see footnote 1 on this page). But I cannot see that remittal by the First-tier Tribunal to CICA for CICA to determine how much the award should be was the only decision the First-tier Tribunal could have reached, given that the First-tier Tribunal could have made its own decision as to the amount.

16. I am aware of the 2 January 2024 decision of Upper Tribunal Judge Jacobs in *R (the Criminal Injuries Compensation Authority) v the First-tier Tribunal (respondent) and GHI (interested party)* UA-2023-000434-CIC, [2023] UKUT 3 (AAC): https://www.gov.uk/administrative-appeals-tribunal-decisions/the-criminal-injuries-compensation-authority-v-first-tier-tribunal-cic-and-stone-2024-ukut-3-aac. In that case, the Upper Tribunal remitted direct to CICA, using section 17(1)(b). That was however by consent. Moreover, even if such remittal was open to the Upper Tribunal in that case, I am not convinced that it would be so in the present case.

17. If the Upper Tribunal does remit to the First-tier Tribunal in the present case, that will not prevent CICA making a replacement decision. In my observations at paragraph 68 of my grant of permission, I mentioned paragraph 109 of the scheme for this purpose. But CICA might take the view that another provision of the scheme can be, or needs to be, used. For example, there is paragraph 126 of the scheme; CICA might take the view that the appeal becoming pending again in the First-tier Tribunal on remittal amounts to CICA being again in "*receipt of a notice of appeal*" for the purposes of the power conferred on CICA by that paragraph 126, and that the phrase "*On receipt of a notice of appeal*" in that paragraph is satisfied.

CASE MANAGEMENT DIRECTIONS

18. I direct as follows—

(1) CICA **must, within three weeks** of the date on which these directions are sent (with a copy at the same time to Ms [H]), make a submission—

(a) saying whether CICA maintain that the Upper Tribunal has power in this case to remit to CICA (rather than to the First-tier Tribunal); and

[3] Unless remitting for "determination" by CICA in that context, in paragraph 129, means remitting for CICA to implement the award by making the payment, rather than for CICA to decide how much to pay: determination seems to be used to mean both decide and bring to a conclusion in the scheme.

(b) if CICA do maintain that proposition, explaining why the Upper Tribunal has power in this case to remit to CICA (rather than to the First-tier Tribunal).

(2) Ms [H] **may, within three weeks** of the date on which CICA copy to her CICA's submission pursuant to direction (1) above, make any submission to the Upper Tribunal that she wishes to make in response to that submission. NB: Ms [H] does not have to make a submission if she does not wish to.

(3) **To the Upper Tribunal office**: please BF for six weeks and a day. Thank you.

Rachel Perez
Judge of the Upper Tribunal
19 September 2024"

[End of Annex 2]