OUTER HOUSE, COURT OF SESSION

[2023] CSOH 55

P128/23

OPINION OF LORD SANDISON

In the Petition

DML

Petitioner

for

Judicial Review of the decision of the First-tier Tribunal (Social Entitlement Chamber) refusing the Petitioner's application for compensation to the Criminal Injuries Compensation Authority

Petitioner: Party
Respondent (Criminal Injuries Compensation Authority): Iridag [advocate]; Office of the Advocate General

22 August 2023

Introduction

[1] DM is a 50 year-old man who made an application to the Criminal Injuries Compensation Authority in August 2020 for criminal injuries compensation in respect of sexual assaults committed against him in 1983 and 1984. The Authority refused his claim and adhered to that decision when asked to review it. DM took the matter to the First-tier Tribunal (Social Entitlement Chamber), which in turn refused his appeal in October 2022. In

this petition for judicial review, he seeks reduction of that decision of the Tribunal, on the basis of what are said to have been serious failures on its part to afford him a fair hearing.

Background

The Criminal Injuries Compensation Scheme 2012 and associated Guidance

[2] The Criminal Injuries Compensation Scheme 2012, laid before Parliament under section 11(1) of the Criminal Injuries Compensation Act 1995 and amended under section 11(3) of that Act, provides *inter alia* as follows:

> "26. Annex D sets out the circumstances in which an award under this Scheme will be withheld or reduced because the applicant to whom an award would otherwise be made has unspent convictions.
>
> …
>
> **Applications**
>
> 86. An application for an award will be determined by a claims officer in the Authority in accordance with this Scheme.
>
> 87. Subject to paragraphs 88 and 88A, an application must be sent by the applicant so that it is received by the Authority as soon as reasonably practicable after the incident giving rise to the criminal injury to which it relates, and in any event within two years after the date of that incident.
>
> 88. (1) Where the applicant was a child under the age of 18 on the date of the incident giving rise to the criminal injury, the application must be sent by the applicant so that it is received by the Authority:
>
> (a) in the case of an incident reported to the police before the applicant's 18th birthday, within the period ending on their 20th birthday; or
>
> (b) in the case of an incident reported to the police on or after the applicant's 18th birthday, within two years after the date of the first report to the police in respect of the incident.
>
> …

(2) An application will not be accepted under this paragraph unless a claims officer is satisfied that the evidence presented in support of the application means that it can be determined without further extensive enquiries by a claims officer.

89. A claims officer may extend the period referred to in paragraph 87, 88 or 88A, where the claims officer is satisfied that:

(a) due to exceptional circumstances the applicant could not have applied earlier; and

(b) the evidence presented in support of the application means that it can be determined without further extensive enquiries by a claims officer.

…

Annex D: Previous Convictions

1. This Annex sets out the circumstances in which an award under this Scheme will be withheld or reduced because the applicant to whom an award would otherwise be made has unspent convictions.

2. Paragraphs 3 to 6 do not apply to a spent conviction. 'Conviction', 'service disciplinary proceedings', and 'sentence' have the same meaning as under the Rehabilitation of Offenders Act 1974, and whether a conviction is spent, or a sentence is excluded from rehabilitation, will be determined in accordance with that Act.

3. An award will not be made to an applicant who on the date of their application has a conviction for an offence which resulted in:

…

(e) a community order;

4. An award will be withheld or reduced where, on the date of their application, the applicant has a conviction for an offence in respect of which a sentence other than a sentence specified in paragraph 3 was imposed unless there are exceptional reasons not to withhold or reduce it.

…

7. Paragraphs 2 to 6 also apply in relation to an applicant who after the date of application but before the date of its final determination is convicted of an offence which is not immediately spent.

8. In this Annex:

'community order' means:

(a) a community payback order under section 227A of the Criminal Procedure (Scotland) Act 1995"

…

[3] The Authority's Guidance on "exceptional circumstances" within the meaning of paragraph 89 of the Scheme, as at 15 August 2022, sets out the following:

"Paragraph 89 – Extending the time limit

12. The time limits in paragraphs 87 and 88 and 88A can be extended but only where:

- there are exceptional circumstances why the applicant could not have applied earlier; **AND**
- (ii) the evidence supplied means that the application can be determined without the need for further extensive enquiries; **AND**
- (iii) you decide to exercise your discretion to extend the time limit.

(i) Exceptional circumstances – Paragraph 89(a)

13. Exceptional circumstances involve something out of the ordinary. They must explain the whole period of the delay, not just the reasons why an application was not made within the two year period. In practice, if an application could have been made at any date earlier than the date on which it was made, it should not be admitted. You must consider all the circumstances of the particular case in deciding whether there are exceptional circumstances which mean the application could not have been made sooner. Some matters you should consider include:

- Whether the applicant was physically or mentally incapable of making an application. You should take into account what the applicant was able, or unable, to do during the period between the incident and the application being received.
- The extent to which any delay is attributable to the actions or failings of a representative relied upon by the applicant. Even where a representative has been engaged, it may be reasonable to expect an applicant, after a period of delay, to take responsibility for their own application.

- Whether the applicant relied upon advice from a criminal justice agency such as the police about the appropriate time to apply. Advice by the police or other agency not to apply until the trial is over would be a relevant, but not necessarily decisive, factor in considering whether to extend time. You should consider, for example, the nature of the advice, the applicant's reasons for relying up on it, any other information available to the applicant and the extent to which any delay is attributable to other factors.

- The length of the delay. In general the longer the period of delay the stronger you should expect the applicant's reasons for the delay to be. However, a case for extension can still be made out even after a very lengthy delay.

Exceptional circumstances are more likely to exist in cases involving sexual abuse, especially where the applicant was a child at the time of the offence. This is because the silence of the victim, and ongoing psychological and emotional trauma, are well known to be direct consequences of such crimes. These effects continue into adulthood.

Further, the process of a criminal investigation and trial in such cases will often increase the psychological impact of the crimes. For these reasons, where you are dealing with a case involving sexual abuse in which the applicant did not apply until criminal proceedings concluded, you should accept that exceptional circumstances exist unless you consider there are compelling reasons not to do so.

…

18. If there is evidence that the claim would fail under another paragraph of the Scheme then you should refuse to extend the time limit even where paragraphs 89(a) and (b) are satisfied. In this case extending the time limit would be meaningless because the application would fail anyway. The reason for not extending the time limit should be clearly explained to the applicant and a formal decision on the other eligibility issues should be made."

Factual Background

[4] On 27 August 2020 the petitioner, through the agency of his then solicitors, made an application to the Authority for criminal injuries compensation in respect of sexual assaults committed against him between approximately August 1983 and August 1984, when he was 11 and 12 years old. The application narrated that he had reported the assaults to the police in or around August 2016. It stated that he had not made an application for

compensation previously as he had not been aware of the existence of a criminal injuries compensation scheme. It further stated that he had suffered physical and psychological injury in consequence of the assaults, for which he was continuing to receive treatment, and that he was suffering from mental health issues and PTSD.

[5] On 20 January 2021, a claims officer acting for the Authority wrote to the petitioner's solicitors, refusing to make any award of compensation to him. The letter stated that he was ineligible for compensation because he had an unspent conviction which disqualified him from receiving an award in terms of paragraph 26 of, and paragraph 3(e) of Annex D to, the 2012 Scheme. In this regard it specified his conviction for threatening and abusive behaviour on 13 June 2019, which was said to have attracted by way of sentence a community payback order with 100 hours unpaid work, and which would only become spent on 12 June 2024. The letter then went on to set out the terms of paragraphs 88 and 89 of the Scheme and noted that paragraph 88(1)(b) required the application in the petitioner's case to have been made within two years of the date of the first reporting of the relevant crime for which compensation was claimed to the police, i.e. by 22 April 2018, whereas in fact it had not been received until 27 August 2020. The letter went on to state, in relation to the possibility of the extension of the time limit in exceptional circumstances, that:

> "As you have an unspent conviction resulting in no award being made, I do not consider that there are any exceptional circumstances that would allow me to extend the time limits in paragraph 88. I am therefore unable to consider any award."

[6] On 25 February 2021, a new firm of solicitors acting for the petitioner wrote to the Authority indicating that they had taken over from the previous firm representing him and were instructed to submit an application for review of the decision to refuse him compensation. The letter noted that the petitioner denied having a conviction which disqualified him from compensation, that an anticipated judgment of the UK Supreme Court

in a case identified as "A & B" was thought to be germane to the issue, and requested that consideration of the application for review should be delayed until after that judgment had become available, while acknowledging that the deadline for formal submission of a review application was 17 March 2021.

[7] On 10 March 2021 the petitioner's solicitors wrote further to the Authority submitting an application for review of its decision of 20 January 2021. The letter, and an accompanying document handwritten by DM, claimed that that decision was unfair, that the petitioner had been the victim of a horrendous crime of violence at a very young age which had affected him throughout the rest of his subsequent life, that he had been traumatised and continued to suffer from a range of psychiatric conditions, and that it was completely disproportionate for his eligibility for compensation to be lost because of a minor offence. It referred to the still-awaited judgment from the UK Supreme Court and indicated that further submissions would be made once that judgment was available.

[8] On 30 March 2021, the petitioner's solicitors again wrote to the Authority pointing out that, in fact, the sentence ultimately imposed on him in respect of the conviction which had caused him to be treated as ineligible for compensation had been a restriction of liberty order rather than a community payback order, and that the former was not a sentence which disqualified him from eligibility for compensation. An email from the relevant court was attached, noting that a community payback order had initially been imposed on 7 November 2019, but had been revoked in favour of a 30-day restriction of liberty order on 5 March 2020.

[9] On 19 May 2021, the solicitors wrote to the Authority reiterating that, as at the date of his application for compensation, the petitioner had not had a conviction resulting in a

community payback order, and claiming that the then-revoked community payback order was not relevant to disposal of the application.

[10] On 17 August 2021 the Authority again wrote declining to make an award of compensation to the petitioner, "because you have an unspent conviction which prevents … an award of compensation". A fuller explanation followed, setting out paragraphs 26 and 88 of the 2012 Scheme, and noting that:

> "Where a person has an unspent conviction at the date of application which resulted in a type of disposal listed at paragraph 3 of Annex D, the Scheme provides CICA with no discretion and the application must be refused. This includes a community order. Under the Criminal Procedure Act 1995, Section 227A confirms the details in which circumstances we should class a conviction as a community order. Section (2)(e) states a 'residence requirement' will be classed as a community order. As such, this conviction will not be spent until the 12th of June 2024. Therefore I cannot make an award under paragraph 26 of the Scheme."

[11] The letter went on to say:

> "In respect of Paragraphs 87 and 88, Paragraph 89 of the Scheme allows a claims officer to extend the aforementioned time limit where there are exceptional circumstances as to why you could not have applied earlier. You have stated on your application form that you have not applied sooner as you were unaware of the Scheme. I cannot consider this as exceptional circumstances and therefore I cannot make an award under paragraph 88 of the Scheme."

[12] On 6 September 2021, the petitioner's solicitors appealed to the First-tier Tribunal (Social Entitlement Chamber) against the Authority's decision of 17 August, on the ground that he:

> "did and never has had an unspent conviction which preventing [*sic*] him from being able to obtain an award of compensation for the serious crimes of violence perpetrated against him."

This was followed on 7 December 2021 by a letter forwarding the opinion of counsel that a restriction of liberty order was not the equivalent of a community payback order, and that a "residence requirement" as referred to in the Scheme was actually a potential aspect of the latter rather than the former, together with a minute from the relevant court confirming the

revocation of the community payback order and the substitution of the restriction of liberty order.

[13] On 22 December 2021, the Authority made a written submission to the First-tier Tribunal accepting that a restriction of liberty order did not fall within the terms of paragraph 3 of Annex D to the Scheme and thus did not disqualify the petitioner from eligibility for compensation. The document went on to say that the Authority

> "submits that the Tribunal are unable to make final determination on this matter however due to pending prosecutions against [the petitioner] … due to be heard … on 28 January 2022"

and requested the Tribunal to stay the case until the outcome of those prosecutions was known.

[14] The Tribunal initially stayed the case to await the outcome of the pending prosecution of the petitioner, but vacated that stay on 16 September 2022 "as it was not proportionate or appropriate to wait until the outcome of a separate matter which may or may not affect proceedings in the appeal." A hearing was fixed, to take place by telephone, on 31 October 2022.

[15] On 29 September 2022, the petitioner's solicitors wrote to the Tribunal asking for the hearing set down for 31 October to be adjourned until 2023 on the grounds that, due to the impending retiral of the solicitor previously conducting the case on behalf of the petitioner, a new solicitor who had joined the firm would require to take the matter over and would have insufficient time properly to prepare the case for the hearing. It was noted that, due to the legal complexity of the case, it would be unfair to the petitioner to compel him to proceed to represent himself at the hearing.

[16] On 3 October 2022 a legal officer acting under powers granted by the senior president of tribunals under rules 4(1) and (2) of the Tribunal Procedure (First-tier Tribunal)

(Social Entitlement Chamber) Rules 2008 issued a directions notice holding that it was not proportionate to postpone the hearing scheduled for 31 October 2022, as there was sufficient evidence already in the file to allow the hearing to proceed. The directions notice also stated that:

> "Parties are reminded that the only issues before the Tribunal in this appeal are those contained in the CICA's review decision, dated 17 August 2021, which concern the refusal of the application under paragraphs 88, 89 and 26 of the Scheme."

[17] In advance of the hearing the Authority compiled a submission sheet, which contained a hearing summary stating *inter alia* that the Tribunal would be limited to deciding whether the Authority's review decision was correct on the issues it had addressed and decided. It obliquely referred to those issues as "Nil, Paragraphs 88 – 89 & 26". The reference to "Nil" was a reference to the amount of compensation awarded, and the reference to the paragraphs indicated the reasons in the Scheme for the refusal to award compensation. The submission sheet noted that it was for the petitioner to make his case and that the Tribunal would look at the application afresh at the hearing and might take into account matters that emerged at the hearing, even if they were not referred to in the hearing summary.

[18] The hearing before the Tribunal duly took place on 31 October 2022. The information before the court as to what happened at the hearing is restricted to the content of the affidavits of the petitioner and of James Kelly, the presenting officer for the Authority. I was not invited to reject the content of either affidavit as inaccurate or untrue in any regard.

[19] The petitioner stated that he took part in the hearing by telephone, separately from his solicitor. In these circumstances he found it difficult to follow. He was floundering and nervous. He had been told by his solicitor that the issue at the hearing was the nature of his

previous conviction, and that in light of the opinion of counsel provided to him, the Authority was not going to oppose his appeal to the Tribunal. He was not aware of any separate issue about the lateness of his application, and did not understand that his solicitor was aware of any such issue either. His solicitor did not address the Tribunal about that issue. Mr Kelly started asking him questions about it. He was taken by surprise by that, as he had been told that he would only have to state his name and date of birth, and then there would be legal argument in which he would not be expected to participate. He was extremely agitated when matters transpired otherwise, and in something of a haze. He remembers briefly saying that he had been suffering from terrible anxiety and other mental health symptoms since the sexual assaults and that the last thing on his mind had been making a compensation claim. He had explained that he had gone to the police only because a friend had effectively forced him to do so. He maintained that, even on the telephone, it would have been obvious that he was finding it difficult to answer the questions being asked, and not much was asked of him about the state of his mental health at the relevant time. In retrospect, he feels that he was not given any real opportunity or time to explain his circumstances, and that no one wanted to understand the gravity of what he had endured or the impact it had had on him. Whenever he has to confront what happened to him, he becomes distressed and confused.

[20] Mr Kelly stated that it was standard in appeal hearings of the kind in question for the issues in the appeal to be stated at the outset, either by the presiding judge or by the Authority. He thinks (from his preparatory notes for the hearing) that he probably made an opening submission stating that the appeal concerned paragraphs 88 and 89 of the Scheme, and that the Authority was conceding that the petitioner's claim ought not to have been rejected in terms of paragraph 26. He did not recall the petitioner's solicitor asking the

petitioner any questions about the lateness of the application. She asked questions about the unspent conviction issue. By contrast, Mr Kelly's questions of the petitioner were all about the delay in making the application. The petitioner had explained that he had suffered mental health difficulties as a result of the sexual assaults and that he had delayed going to the police as his abuser was violent and had threatened him. Mr Kelly did not form the impression that the petitioner was surprised by his questions or that he found it difficult to answer them. He did not recollect the petitioner's solicitor asking for an adjournment once it became clear that delay in making the application for compensation was an issue in the appeal. He recalled the Tribunal asking the petitioner a question about a period of hospitalisation he had experienced in 1997. The petitioner had made it clear that he was still under the care of mental health services for PTSD and a personality disorder, and required medication to manage those conditions. Finally, the petitioner's solicitor had made submissions about the paragraph 26 issue, but not the paragraphs 88 and 89 issues. He did not recall the Tribunal raising at any point the scope of the issues in play at the hearing.

[21] On 31 October 2022 the First-tier Tribunal refused the appeal to it, and confirmed the Authority's decision of 17 August 2021. It issued brief reasons, accepting that the petitioner was not disqualified for compensation by dint of paragraph 26 of the Scheme, but noting that little information was available to the Tribunal in relation to the effects of his mental health upon his ability to make an application for compensation, and concluding that there was insufficient evidence to conclude on the balance of probabilities that his failure to apply timeously for compensation was due to exceptional circumstances in terms of paragraph 89. It was further noted that the petitioner's initial application, provided by his former solicitors, stated that his failure to apply timeously for compensation was the result of a lack of

knowledge about the existence of the Scheme, rather than a consequence of his mental health issues.

[22] On 23 November 2022 the petitioner's solicitors wrote to the First-tier Tribunal requesting it to set aside its decision of 31 October in terms of rule 37 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, in the interests of justice and on the grounds of procedural irregularity. The letter set out the background to the case and complained that the Tribunal had failed to have regard to the well-known and generally accepted continuing effect of childhood sexual abuse on its victims, in particular that such victims are often subdued into not disclosing the abuse for many years.

[23] On 12 January 2023 the presiding Tribunal judge issued a statement of reasons for its decision, in terms of rule 34 of the 2008 Rules, having been requested by the petitioner's solicitors to do so. The Tribunal accepted, as had the Authority, that the petitioner qualified under paragraph 26 of the Scheme. The appeal was refused under paragraphs 88 and 89 of the Scheme. The Tribunal, having considered the senior president's guidance on vulnerable adults and the *Equal Treatment Benchbook*, had been satisfied that the appeal hearing could proceed by telephone. The Tribunal accepted that the petitioner was a victim of very serious sexual abuse over a sustained period, and had had mental health difficulties for many years. It noted that the petitioner's original application for compensation had stated, as the reason for the lateness of the application, that he was unaware of the existence of the Scheme, rather than seeking to explain the delay as being a result of the state of his mental health, and found that that lack of knowledge was indeed the reason for the delayed application. It held that lack of knowledge of the Scheme did not "satisfy the criteria for exceptional circumstances". It rebuffed the petitioner's solicitors' complaint about procedural irregularity, stating that the 2012 Scheme made some allowance for delayed reporting, and

noting that the petitioner had made disclosure to medical professionals and to the police despite his mental health issues.

Petitioner's Submissions

[24] Although the petitioner had had some background *pro bono* assistance from a person with experience of judicial review proceedings in the English courts, he represented himself throughout the course of these proceedings, ultimately accompanied by a lay supporter who provided him with moral support and who, with the court's permission, read out part of his pre-prepared submissions when he became too affected by emotion to do so clearly himself. The petitioner maintained that he suffered considerable ongoing mental trauma as a result of what had happened to him, from which he had never fully recovered, although latterly he had been more successful in managing his issues. He had not reported the crimes committed against him to the police for several years after they occurred because it was too distressing for him to relive what happened, and he could not cope with that. He had made disclosure to the police eventually after encouragement to do so by a close friend. When the police had told him that his case could not go to court because it was felt that the effect on him of participating in the court process would be overwhelming, he was devastated that the perpetrator was going to escape justice and again sought to put what had happened to him to the back of his mind. The lack of closure preoccupied his thoughts, and there had been no room in his mind for any consideration of the possibility of compensation, particularly since there had been no prosecution of his assailant. He had submitted a claim to the Authority as soon as he felt able to address the matters which such a claim would inevitably entail, having seen an advertisement offering legal services for such claims. Those circumstances, once fully understood, might well fall to be regarded as exceptional

within the meaning of paragraph 89 of the Scheme. All of these matters were amplified in detailed affidavits provided to the court by him.

[25] As to the Tribunal hearing itself, he had understood that the issue to be discussed was his previous conviction. His solicitor had obviously thought the same. The Tribunal ought to have appreciated the situation developing in front of it at the hearing and, if it was considering finding against him on paragraph 88 or 89 of the Scheme, should have adjourned the hearing so as to enable him and his solicitor to address that matter fully. The interests of justice required that, if he was to be refused compensation for what he had suffered, that should at least be on the basis of a full and fair opportunity having been given to him to put all the relevant circumstances before the appropriate decision maker.

Respondent's Submissions

[26] On behalf of the Authority, counsel first submitted that the petitioner's case should read as being strictly limited to his claim of having been given inadequate prior notice of what was to be discussed and decided at the hearing before the Tribunal. It is rather disappointing that a public authority should seek to take a technical pleading point against a party litigant, particularly one of such vulnerability. That notwithstanding, I reject the submission. In statement 6 of his petition as originally lodged, and in respect of which he received permission to proceed, the petitioner clearly states that his essential complaint is that he was deprived of a fair hearing, not merely on account of a lack of fair notice that the timebar issue was to form part of the business before the Tribunal, but also because he or those representing him were not given a realistic opportunity to address that matter. The statement of issues lodged on behalf of the petitioner over two months before the substantive hearing of the petition also made it perfectly clear that, though a lack of fair

notice formed a prominent part of his case, it was by no means the sum and substance of the matters he wished the court to consider.

[27] Counsel then invited the court to refuse the prayer of the petition. The Tribunal had not required to provide the petitioner with written notice of its intention to consider the issue of time limits. Further, if it did require to provide notice, such notice was provided. The petitioner had been provided with an opportunity to make representations on the time limit issue. It had been open to him to seek an adjournment at the hearing when submissions were invited on the issue but he had not done so.

[28] Rule 5(1) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 gave the Tribunal the power to regulate its own procedure. Rule 15 gave the Tribunal discretion on evidential issues. It enabled the Tribunal to give directions as to the issues on which it required evidence or submissions, and allowed the admission of evidence whether or not it had been available to a previous decision maker. In terms of rule 29, the Tribunal had to give parties at least 14 days' notice of the hearing. Such notice only needed to contain the time and place of the hearing. There was no positive duty on the Tribunal, in terms of its governing rules, to set out in the notice the issues it intended to consider, though it might do so.

[29] In *Hutton* v *Criminal Injuries Compensation Authority* [2016] EWCA Civ 1305, [2017] ACD 20 the Court of Appeal held that the time limit issue was clear in the Authority's decision and that the claimant could not have been lulled into a false sense of security as to the scope of the Tribunal appeal hearing by the terms in which the Authority had rejected their claims. The same applied in the present case.

[30] In *R (SB and others)* v *First-tier Tribunal and CICA* [2014] UKUT 497 (AAC) the Upper Tribunal held that the role of the First-tier Tribunal was to decide whether the Authority's

review decision was correct on the issue or issues it had addressed and decided. Any issue which had been considered in the Authority's review could be considered by the Tribunal and the Tribunal could decide how best to hear those issues, whether in one hearing or separately. Neither the case law nor the Tribunal Rules pointed to the existence of any further notification duty. They supported the suggestion that the Tribunal would consider all matters determined by the Authority in its own review.

[31] Even if there had been an obligation on the Tribunal to give notice of the issues to be discussed at the hearing, it had done so. The directions notice set out the specific sections of the Scheme that were to be considered. The petitioner was represented throughout the Tribunal process by solicitors, and representations on his behalf were made by them at the hearing. They should have known that the time limit issue was to be considered by the Tribunal, and been ready to address it. The burden of adducing evidence in relation to that matter had lain on the petitioner: *Hutton* at [61]. No motion to adjourn had been made when that issue was raised. The Tribunal had the power to adjourn the hearing under rule 5(3)(h) of the 2008 Rules. In the absence of an application for an adjournment, the Tribunal was entitled to hear evidence and submissions on the issue and rely upon them in reaching their decision.

[32] Finally, the petitioner's position remained that he had applied late for compensation due to a lack of knowledge of the existence of the Scheme. That did not in itself qualify as "exceptional circumstances" within the meaning of paragraph 89 of the Scheme. Therefore, any breach of natural justice at the Tribunal hearing could not have been material as it could not have affected the outcome. *King* v *East Ayrshire Council* 1998 SC 182, 1998 SLT 1287 established that in an application to the supervisory jurisdiction the court could consider what would happen if the matter was remitted back to the decision maker, and whether any

different outcome might have occurred. The petitioner's present reliance on his mental health issues as a reason for his late application was not part of his original application or his position at the Tribunal; rather, he had claimed to have been unaware of the existence of the Scheme. Even after the Tribunal's decision had been initially issued, the criticism advanced of it by his solicitors was that the Tribunal had failed "to make any findings in fact and apply the appropriate test to those facts" in connection with the mental health consequences of childhood sexual abuse.

Decision

[33] The root of the problems which have given rise to this application for judicial review appear to lie in the way in which the Authority first expressed its decision to refuse the petitioner's claim for compensation in January 2021. It had determined (wrongly) that the claim failed in terms of paragraph 26 of the Scheme because of the supposed nature of the petitioner's conviction in June 2019. In accordance with the internal guidance on exceptional circumstances for late claims set out above, the Authority's claims officer declined to consider whether exceptional circumstances for the late application applied because the existence of the putative bar to compensation in the form of paragraph 26 rendered it pointless to make a separate determination on that issue. It would have been correct, let alone merely natural and reasonable, for any reader of that decision letter to conclude that paragraph 26 was the operative cause of the rejection of the petitioner's claim. An informed reader aware that the Authority's internal guidance in respect of exceptional circumstances suggested that such circumstances would be more likely to exist where the claim was in respect of childhood sexual abuse, and that cases closely analogous to those of the petitioner

should be regarded as involving exceptional circumstances unless there were compelling reasons to conclude otherwise, would have been bolstered in that view.

[34] That paragraph 26 of the Scheme was the sole obstacle to a successful claim then appears to have become something of an *idée fixe* in the mind of the petitioner's solicitors. That, and no other issue, appears to have been their sole concern from receipt of the initial decision letter until the hearing before the Tribunal in October 2022. No other issue was raised by them in any correspondence during that period.

[35] The position of the Authority, however, did not remain the same over that period. By its decision letter on the petitioner's application for a review of the refusal of his application, the Authority again wrongly stated that the claim fell foul of paragraph 26, but this time added that it also failed because there were no exceptional circumstances justifying the extension of the time limit provided for by paragraph 88, for the reason that the petitioner had stated in his application that it had been made late because he had previously been unaware of the existence of the Scheme. Although not identified as such in its decision letter, this amounted to a subtle change of position on the part of the Authority, in that it ceased to rely on paragraph 26 as its reason for not finding that exceptional circumstances existed, but instead decided that there were no exceptional circumstances because of the supposedly inadequate explanation for lateness which had been stated by the petitioner on his application form.

[36] That change in position appears to have gone entirely unnoticed by the petitioner's agents. The appeal to the Tribunal which they lodged in September 2021 was concerned solely with the paragraph 26 issue. That the resolution of that issue alone in favour of the petitioner would not result in the appeal succeeding, because the Authority's review decision which was to be considered by the Tribunal now proceeded on a further and

separate ground, does not appear to have resulted in either the Tribunal or the Authority querying the point of the appeal in any correspondence with the petitioner's agents. The paragraph 26 issue was conceded by the Authority in December 2021, although technically the Tribunal might still have rejected that concession and found against the petitioner on that ground. From that point on, with the benefit of hindsight, one can see that the Authority for its part thought that the hearing before the Tribunal was going to be about the paragraph 89 "exceptional circumstances" issue, and perhaps also about the paragraph 26 issue if the Tribunal did not accept its concession, while the petitioner's solicitors continued to think that paragraph 26 was the key to the resolution of the entire claim and that the timebar issue also turned on it.

[37] Against that background, the reference to paragraphs 88 and 89, as well as to paragraph 26, in the directions notice issued by the Tribunal's legal officer in October 2022, effectively as an aside in the primary context of a refusal of the petitioner's solicitors' request for a postponement of the hearing before the Tribunal, appears not to have been understood by those solicitors as an indication that the appeal was going to concern paragraphs 88 and 89 as an issue separate from paragraph 26. The same appears to pertain to the reference to paragraphs 88 and 89, as well as paragraph 26, in the submission sheet compiled by the Authority in advance of the hearing.

[38] There is no exact record of what took place at the telephone hearing before the Tribunal. The affidavits of the petitioner and Mr Kelly give their respective impressions of what happened, and something can also be taken from the terms of the two decisions issued by the Tribunal. It was clear that the Tribunal was dealing with a claim by someone who had been the victim of childhood sexual abuse. It ought to have been clear to the Tribunal that that might well have significant implications for any decision it required to make in

relation to the existence of exceptional circumstances justifying the disapplication of the ordinary timebar. It must have become clear to the Tribunal during the course of the hearing that the petitioner had suffered, and continued to suffer, from serious mental health issues. The petitioner's solicitor did not ask him any questions about the paragraphs 88 and 89 issue, despite that being the only matter upon which the Authority continued to rely. The Tribunal seemingly made no attempt to enquire as to what might lie behind the rather extraordinary state of affairs which was developing in front of it. The petitioner's solicitor may have made brief submissions on the paragraph 88 and 89 matter to the Tribunal at the conclusion of the hearing, once it had become apparent that that was what the Authority considered the appeal to be about, but it will be recalled that, in issuing its immediate decision on 31 October 2022, the Tribunal stated that little information had been made available to it in relation to the effects of the petitioner's mental health upon his ability to make an application for compensation, and concluded that there was insufficient evidence to conclude on the balance of probabilities that his failure to apply timeously for compensation was due to exceptional circumstances in terms of paragraph 89.

[39] The ultimate effect of all that occurred was that the petitioner did not lay before the Tribunal the full explanation for the lateness of his application to the Authority which he was able to describe before this court. Neither the Authority nor the Tribunal has ever considered or ruled on that explanation. The petitioner has been refused compensation without the full circumstances of his case ever having been considered by the relevant bodies. The question raised in this judicial review is whether that is a situation which the law can and should remedy.

[40] I deal firstly with the suggestion that, since the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 contain no requirement for any notice

about the subject-matter of a forthcoming hearing before the Tribunal to be given to participants, the question of what the petitioner (and his agents) thought was going to be discussed and determined at that hearing has no legal significance. In that context I note that rule 2 of the 2008 Rules is in the following terms:

> **"Overriding objective and parties' obligation to co-operate with the Tribunal**
>
> **2.**— (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it—
>
> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction.
>
> (4) Parties must—
>
> (a) help the Tribunal to further the overriding objective; and
>
> (b) co-operate with the Tribunal generally."

[41] It is difficult to see how the petitioner's case before the Tribunal was dealt with justly. It was a case which was important not only for him, but for the public interest in

seeing to it that the victims of serious crime, especially child victims, receive appropriate compensation as a societal mark of condign sympathy for their suffering. Rule 2 required the case to be accorded a treatment proportionate to that importance. Equally, the petitioner was not able to participate fully in the proceedings. It is true that he was on the end of a telephone and could have said whatever he wanted to say when asked questions about the paragraph 88 and 89 issues. However, that was participation in point of form only. It lacked substance, because he had no idea that he was going to be asked about those issues, was (because of his ongoing mental health issues and understandable reticence to speak about times which had been extremely difficult to live through) singularly ill-prepared to be asked about them, and had not had the benefit of lodging any material about them to which he could have been referred and on which he could have made comment in the course of the presentation of his case. Further, and importantly, it must (or at the very least ought to) have been apparent to the Tribunal during the course of the hearing that the petitioner's case on the paragraph 88 and 89 issues was not merely being badly presented, but that it was not being presented at all. His solicitor concluded her examination of the petitioner without having posed a single question, or indeed having said one word, about those issues. That necessarily entailed that the petitioner's participation in the proceedings could not be full. It would have been practicable for the Tribunal to ensure a fuller participation on his part by recognising the situation which was plainly developing before it and by adjourning the hearing to enable him to be prepared to address the issues upon which the case was to turn, thus realising his right fully to participate in his case, in accordance with the overriding objective of the Rules. Far from the content of the Rules representing any bar to the petitioner's case, in fact they add support to the suggestion that the proceedings at the

Tribunal stage failed to reach the standards of procedural fairness to which the Tribunal itself aspired.

[42] In any event, any set of statutory rules which does not proclaim itself to be a comprehensive and entirely self-contained code for the disposal of a particular kind of dispute (and the 2008 Rules do not so seek to classify themselves) is subject to supplement by common law principles of fairness. As was noted by Lord Sumption JSC (Baroness Hale of Richmond, Lord Kerr of Tonaghmore and Lord Clarke of Stone-cum-Ebony JJSC concurring) in *Bank Mellat* v *HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 at [35]:

> "The duty of fairness governing the exercise of a statutory power is a limitation on the discretion of the decision-maker which is implied into the statute. But the fact that the statute makes some provision for the procedure to be followed before or after the exercise of a statutory power does not of itself impliedly exclude either the duty of fairness in general or the duty of prior consultation in particular, where they would otherwise arise. As Byles J observed in *Cooper* v *Wandsworth Board of Works* (1863) 14 CBNS 180, 194, 'the justice of the common law will supply the omission of the legislature.' In *Lloyd* v *McMahon* [1987] AC 625, 702–703, Lord Bridge of Harwich regarded it as well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.'"

[43] What procedural fairness (formerly frequently referred to as "natural justice") requires in any particular situation will depend on a variety of circumstances. As Tucker LJ put it in *Russell* v *Duke of Norfolk* [1949] 1 All ER 109 at 118, expressing a sentiment that has been echoed in countless subsequent cases:

> "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter under consideration and so on."

[44] I have already identified the particular features of the present case which suggest that a high degree of procedural fairness was required in the proceedings before the

Tribunal, and that the degree of the scrutiny by this court to be applied to the procedure adopted in those proceedings should be correspondingly intense.

[45] It cannot be suggested that the right of a party to a judicial process to understand, and thus to be able to answer, at least the gist of what is said against him, is merely a secondary procedural right easily capable of being overridden by considerations of expedience, let alone convenience. As Lord Mustill put it in *In re D (Minors) (Adoption: Confidentiality)* [1996] AC 593 at 603– 04:

> "… it is a first principle of fairness that each party to a judicial process shall have an opportunity to answer by evidence and argument any adverse material which the tribunal may take into account when forming its opinion. This principle is lame if the party does not know the substance of what is said against him (or her), for what he does not know he cannot answer."

Numerous other judicial affirmations of the fundamental nature of that opportunity could be referred to. I reiterate that the existence of such an opportunity in point of form but not substance is highly unlikely to suffice in the context of such a first-order principle of procedural fairness engaged in such a delicate matter as the subject-matter of the hearing before the Tribunal.

[46] I turn to the question of whether the petitioner was given sufficient prior notice of the matters to be discussed at the hearing before the Tribunal as to enable him to participate fully and fairly in the determination of his rights. So far as the Tribunal was concerned, all that emanated from it in relation to the subject-matter of the forthcoming hearing was the directions notice issued by its legal officer on 3 October 2022, which noted by the way to its principal function of refusing the petitioner's agents' request for a postponement of the hearing that the only issues before the Tribunal would be those contained in the Authority's review decision, concerning the refusal of the application for compensation under paragraphs 88, 89 and 26 of the Scheme. In the context of all that had gone before, that

statement left at least room for doubt whether the issues at the hearing were going to be paragraph 26 and separately paragraphs 88 and 89, or else paragraph 26 and consequently paragraphs 88 and 89. I accept that a careful and competent solicitor reading that directions notice and being fully aware of the subtle change in position of the Authority between its initial decision letter of 20 January 2021 and its subsequent review decision of 17 August 2021 would have appreciated that the proper construction of the notice was the former and not the latter. However, it is clear from the various circumstances already noted that in point of fact the petitioner's solicitor did not appreciate that such was the case and proceeded to prepare herself, and him, on the basis that if the paragraph 26 issue was resolved in his favour, the paragraphs 88 and 89 issues would follow on, given the basis of the Authority's initial rejection of the petitioner's claim, the particular circumstances of the lateness of his application and the approach to the evaluation of exceptional circumstances which the Authority itself commended to its claims officers in cases of that kind. In that regard I remind myself of what was said by Michael Supperstone QC (as he then was), sitting as a Deputy Judge of the High Court, in *Powell* v *Secretary of State for the Environment, Food and Rural Affairs* [2009] EWHC 643 (Admin) at [27]:

> "In a case involving questions of administrative procedure, the general rule that a party is bound by the acts of his legal advisers is not necessarily to be applied in the same way. As Mr Moriarty QC, sitting as a Deputy Judge, said in *Majorpier Ltd* v *Secretary of State for the Environment and Others* [1990] 59 P and CR 453 at 466, '… when one is considering questions of natural justice, one ought to have regard to the position of the lay client personally and not simply to that of his legal advisers as his representatives.
>
> In my view I ought to answer the question, 'Was an adjournment necessary for the appellant to present his case?' with the emphasis on the appellant in the personal sense."

[47] Proceeding on that basis, it is clear that the petitioner himself had no idea that the hearing before the Tribunal was going to address matters relevant to the application of

paragraphs 88 and 89 to his case. That was because the sequence of events concerning the treatment of his claim had given rise to room for misunderstanding as to the scope of the hearing, his solicitor had fallen into a misapprehension on that account, and she had shared that misapprehension with him.

[48] I do not consider that the content of the Authority's hearing summary, which itself referred to the issues to be decided as including paragraphs 26, 88 and 89, is of any significance. For the same reasons, it suffered from the same lack of clarity as did the directions notice. In any event, I was helpfully referred by counsel for the Authority to an unreported decision of Upper Tribunal Judge Rowland sitting in the Administrative Appeals Chamber, UT JR/2707/2009, in which it was made clear at [6] that the statement of the issues to be discussed at a hearing before the First-tier Tribunal contained in the Authority's hearing summary cannot be regarded as in any way determinative of those issues. The hearing summary is accordingly inept as a source of definitive notice to the petitioner as to the nature of the hearing.

[49] I did not find the authorities cited by the respondent to be helpful in determining the fair notice issue. *Hutton* represented the culmination of lengthy litigation, in the course of which the claimants for compensation had been able to present a full account of the circumstances said to justify an extension of time in their cases to the First-tier Tribunal. The observations of Gross LJ as to there having been no unfair surprise for them, while no doubt correct in the context of that case, does not read over to the circumstances of the present case. As to *SB*, it simply makes it clear that the Tribunal can only review issues decided by the Authority and cannot decide issues which have not previously been the subject of such decision. Again, while that observation is perfectly correct, it does not assist in the resolution of the issues in this case. The suggestion by the respondent, that the Tribunal will

always deal with all the issues previously determined by the Authority, is neither a correct proposition nor what *SB* actually says. Similarly, the respondent's suggestion that it was obvious what the Tribunal would be dealing with at the hearing does not advance matters in circumstances where it is perfectly clear that the petitioner's solicitor, for reasons which are understandable if not commendable, evidently did not find that matter obvious and the petitioner himself had been given to understand by her that the problem with his claim was his previous conviction rather than anything else.

[50] There is, further, the fact that the Tribunal cannot reasonably have been left unaware that matters were developing before it in a manner which risked serious injustice being done. As already noted, this was far from being merely a case where the petitioner's position on paragraphs 88 and 89 was presented unconvincingly or with less than average skill on the part of his solicitor. The terms of the appeal to the Tribunal itself had not even mentioned those paragraphs. No material relevant to the issues raised by them had been lodged, although material pertaining to the conceded paragraph 26 issue had been. The petitioner's solicitor said not a word about the paragraph 88 and 89 issues in her questioning of him, despite – so far as the Tribunal was concerned – bearing the burden of rebutting the Authority's prior determination of those matters. The Tribunal, whether in furtherance of the overriding objective of its governing rules or in order to ensure that it was discharging its duty at common law to afford substantive and not merely formal procedural fairness to those appearing before it, ought to have stepped in, ascertained the misunderstanding which was so significantly affecting the just conduct of the proceedings, and adjourned those proceedings so that the petitioner could be permitted fully and meaningfully to participate in them. The power to adjourn is a well-recognised mode of giving effect to an emerging requirement for procedural fairness and the circumstances in which it ought to

have been used are not exclusively for the Tribunal, but also on review for this court to determine: *R* v *Cheshire County Council, ex parte C* [1998] ELR 66 per Sedley J at 73; *Lindsay* v *Solicitors Regulation Authority* [2018] EWHC 1275 (Admin).

In summary:

1. The proceedings before the Tribunal were of particular sensitivity and of importance not merely for the petitioner but for the public interest.

2. The petitioner was, to the knowledge of all concerned, a victim of childhood sexual abuse and, as such, particularly vulnerable in connection with proceedings requiring that abuse and its consequences to be canvassed.

3. No clear express notice of the matters to be dealt with by the Tribunal was given by it to the petitioner; in context, such prior indication as was given was capable of being misunderstood and was in fact misunderstood by the petitioner's agent.

4. That misunderstanding resulted in the petitioner being totally unprepared for the questioning he faced by the Authority and the Tribunal at the hearing, to the extent that he was not given a substantively fair opportunity to present his case on the paragraph 88 and 89 issues.

5. The Tribunal ought to have appreciated from the nature of the appeal and the way that matters were transpiring before it in the course of the hearing that something had gone badly wrong in the presentation of the petitioner's case, and should have stepped in to ascertain the reason for that and used the powers of adjournment available to it to provide a remedy for what had occurred, instead of carrying on regardless.

[51] I have no doubt that that particular concatenation of circumstances resulted in procedural unfairness to the petitioner. He was deprived of a fair and full opportunity to set out the circumstances which were pertinent to his position on the apparent lateness of his application. That is a situation which this court ought to address unless it can be shown that its intervention would be pointless because a remit to the Tribunal so that the proceedings before it can be conducted fairly would inevitably result in the same conclusion on the timebar issue. It will only be in rare cases that the court could sensibly conclude that serious procedural unfairness was of no moment in the disposal of the proceedings in which it occurred. In the present case, the petitioner has an explanation for the lateness of his application which has never been heard in the appropriate forum. The circumstances of his case are at least analogous to those in which the Authority instructs its claims officers to permit late applications unless there are compelling reasons to refuse them. In those circumstances a conclusion that a fair hearing before the Tribunal would be bound to end in failure for the petitioner on that issue is quite impossible.

Conclusion

[52] For the reasons stated, I shall repel the respondent's pleas-in-law (there being no formal pleas for the petitioner), reduce the relevant judgment of the First-tier Tribunal of 31 October 2022, and require the Tribunal to rehear the petitioner's appeal to it before a differently-constituted panel within a reasonable time.