[2018] AACR 22

(CICA v Ft-T & Mailer & Haigh
[2018] EWCA Civ 1175)

CA (Coulson and Gross LJJ) **JR/2338/2015**
24 May 2018 **JR/3330/2015**

Judicial review - Criminal Injuries Compensation Authority- emergency workers- error of law -exceptional and justified risk.

These appeals raised the extent to which it was open to the Upper Tribunal ('UT') in judicial review proceedings, to make a finding that the First-tier Tribunal ('Ft-T') had made a material error of law and then to uphold that original decision without quashing it or remitting it back to the Ft-T. The two interested parties, M and H were respectively a fireman and a police officer who had been injured in the course of their work. The appellant Criminal Injuries Compensation Authority ('CICA') rejected their claims for compensation under the Criminal Injuries Compensation Scheme 2012 (the '2012 Scheme') on the basis that they had been injured because of action which "would normally be expected of them in the course of their work" and that they had not taken an "exceptional and justified risk". The Ft-T allowed the appeals of the interested parties against those decisions finding that the risk they each took was exceptional and justified and consequently warranted compensation under the 2012 Scheme. The appellant applied for judicial review of those decisions on grounds that the Ft-T had erred in law by deciding that the nature of the risk could be assessed, not just by reference to what the interested parties knew or believed at the time the risk was taken, but in light of subsequently discovered facts. The UT found that the FtT had made an error of law in both cases by not determining the issue of risk solely by reference to what the interested parties believed to be the position at the time the risk was taken. In each case the UT decided neither to quash the decisions nor remit the cases to the Ft-T and instead upheld the Ft-T's decisions.

Held, allowing M's appeal and dismissing that of H, that:

1. in M's case, the Ft-T had focused entirely on the risk M faced when he entered the building on fire; there was no consideration of, or evidence about, the changing nature of any risk as he remained in the building, and neither party had made any case based on the situation after entry. However, the UT found that everyone had been wrong to focus on the question of entry, and that although M entering the building was not an exceptional risk, his remaining there was so that the Ft-T had rightly awarded him compensation. The UT had carried out a new inquiry into an aspect of the case which no-one had considered before. Fine distinctions between the precise time when a risk was justified and exceptional and when and how that risk might no longer be justified and exceptional were far removed from the reality faced by M and firefighters like him. However, it was important that a proper and fair process was maintained. The UT's answer to the new issue raised was not necessarily the only one open to the Ft-T. The UT therefore ought to have remitted the case back to the Ft-T.

2. in H's case, the Ft-T's error of law had knocked out two of the reasons supporting the Ft-T's decision that the risk had been exceptional leaving the third unscathed. These three factors had each been expressly described by the FTT as distinct reasons and, on that basis, the UT was entitled to decide that even without the first two reasons, the third reason was sufficient to uphold the Ft-T's decision. The UT had correctly decided that no different decision would have been open to the Ft-T if the matter had been remitted. Accordingly, the UT was justified in upholding the original FTT decision.

DECISION OF THE COURT OF APPEAL

Robert Moretto (instructed by CICA Legal Services) for the Appellant

Tom Goodhead (instructed by Thompsons Solicitors) for the Interested Party (Mailer)

The Interested Party (Haigh) did not appear and was not represented

Judgment Approved

LORD JUSTICE COULSON:

Introduction

1. These linked appeals raise the extent to which, in judicial review proceedings, the Upper Tribunal ("UT") can find that the First-tier Tribunal ("F-tT") made a material error of law, but then, rather than quashing the original decision and/or remitting the case back to the F-tT, go on to uphold that decision for other reasons.

2. The two interested parties, Mr Mailer and Mr Haigh, are respectively a fireman and a police officer. Both were injured during the course of their work. The appellant authority originally rejected their claims because they said that the two men had not taken an 'exceptional and justified' risk, and had instead been injured as a result of action which "would normally be expected of them in the course of [their] work".

3. The interested parties appealed those decisions to the F-tT. In each case, the F-tT found in their favour, holding that the risk they took was exceptional and justified, and therefore warranted compensation under the Criminal Injuries Compensation Scheme 2012. The appellant sought a judicial review of those decisions, on the grounds that the F-tT had made an error of law. In each case the error alleged was the same: that the F-tT had decided that the nature of the risk could be assessed, not just by reference to what the interested parties knew or believed at the time that the risk was taken, but in the light of subsequently discovered facts.

4. In each case, UTJ Levenson found that the F-tT had indeed made an error of law, because the correct approach was to determine the issue of risk solely by reference to what the interested parties believed to be the position at the time that the risk was taken. In each case, UTJ Levenson did not quash the decision and/or remit the matter to the F-tT, but instead went on to uphold the original decision, for the particular reasons which he explained. In the case of Mailer, this was by reference to an element of the evidence which had not hitherto been highlighted. In the case of Haigh, this was by reference to one of the three reasons identified and relied on by the F-tT, the other two having fallen away as a result of the error of law.

The Powers of the Upper Tribunal

5. The powers of the UT to hear applications for judicial review of the decisions of the F-TT are set out in Sections 15-17 of the *Tribunals and Courts Enforcement Act 2007* ("the 2007 Act"). These provide as follows:

> "**15. Upper Tribunal's "judicial review" jurisdiction**
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> (1) The Upper Tribunal has power, in cases arising under the law of England and Wales or under the law of Northern Ireland, to grant the following kinds of relief—
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> (a) a mandatory order;
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> (b) a prohibiting order;

(c) a quashing order;

(d) a declaration;

(e) an injunction.

(2) The power under subsection (1) may be exercised by the Upper Tribunal if—

(a) certain conditions are met (see section 18), or

(b) the tribunal is authorised to proceed even though not all of those conditions are met (see section 19(3) and (4)).

(3) Relief under subsection (1) granted by the Upper Tribunal—

(a) has the same effect as the corresponding relief granted by the High Court on an application for judicial review, and

(b) is enforceable as if it were relief granted by the High Court on an application for judicial review.

(4) In deciding whether to grant relief under subsection (1)(a), (b) or (c), the Upper Tribunal must apply the principles that the High Court would apply in deciding whether to grant that relief on an application for judicial review….

17. Quashing orders under section 15(1): supplementary provision

(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 decision is quashed 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."

6. In short, rather than making an application for judicial review in the High Court, an applicant aggrieved by a decision of the F-tT can make an application for judicial review to the UT, pursuant to the 2007 Act. The UT must apply the principles that the High Court

would apply in deciding whether to grant judicial review (s.15(4)). If, pursuant to s.15(1)(c), the UT makes a quashing order it may remit the matter to the F-tT (s.17(1)(a)), or substitute its own decision for the decision in question (s.17(1)(b)). However, pursuant to s.17(2), the UT can only substitute its own decision for the original decision where that decision has been quashed because there has been an error of law (s.17(2)(b)) and where, without the error, there would have been only one decision that the F-tT could have reached (s.17(2)(c)).

7. The basic principles relating to judicial review generally mirror this statutory framework and are well-known. Thus:

i) Once a material error of law has been established in the way a decision-maker has reached a decision, the decision is *ultra vires* and *prima facie* cannot stand: see *R v Hull University Visitor ex parte Page* [1993] AC 682.

ii) In most cases in which a decision has been found to be flawed, it would not be a proper exercise of the court's discretion to refuse to quash that decision: see *R (Edwards) v Environment Agency* [2009] 1 All ER 57 at paragraph 63.

iii) The function of judicial review is not to substitute the reviewing court as the decision-maker over the authority prescribed in law to make the decision: see *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155.

iv) The reviewing court or tribunal may substitute its own view for that of the relevant decision-maker but usually only if, once allowance has been made for the error, only one decision was open to the decision-maker: see CPR regulation 54.19(3) and *Governing Body of the London Oratory School v Schools Adjudicator* [2005] EWHC 1842 (Admin).

8. It is worthy of note that in neither of his decisions did UTJ Levenson refer to the relevant provisions of the 2007 Act (in particular, the requirement that there was "only one decision that the court or tribunal could have reached") or the common law authorities. That is not of itself fatal to the validity of his decisions, but it suggests that he may not have had this stringent test at the forefront of his mind.

Mailer: The Facts

9. On 23 August 2013, Mr Mailer, who was a fire-fighter, tripped and was injured whilst fighting a fire started through arson. On 14 October 2013, he made an application for compensation under the Criminal Injuries Compensation Scheme 2012. His application was rejected on the basis of paragraph 5(2) of the Scheme, which provides that, whilst a person may be compensated when they are injured taking an "exceptional and justified" risk for the purpose of containing or remedying the consequence of a crime, "a risk taken…in a course of a person's work will not be considered to be exceptional if it would normally be expected of them in the course of that work".

10. Mr Mailer appealed to the F-tT. In their Summary Reasons dated 30 April 2015, the F-tT said:

> "We decide that on the evidence if it had been known in advance by the fire officer in charge who ordered the appellant to enter the flat building that the seat of the fire was not in a flat on the first floor with people in it whose lives were in danger, but in fact a

storeroom on the first floor which contained highly flammable materials including paint and thinners, he would not have expected the appellant or any fire-fighter to enter the building and that storeroom.

Therefore entering the storeroom where the appellant's injury occurred was exceptional because within para 5(2) what he was doing was not a duty that "would normally be expected" of fire-fighters in the course of their duties. Had the true position been known then the fire would have been fought externally and he would not normally have been expected to enter the building."

11. Written reasons were sought and were sent to the parties on 8 June 2015. These reasons expanded on the Summary. Important passages included:

"(a) At the conclusion of the hearing, Mr McKenna [representing the appellants] made two important concessions…he accepted that the risk taken by Mr Mailer as Firefighter in entering the building which was on fire was a 'justifiable risk' because of the danger to human life" [2];

(b) Turning then to the crucial issues. First, as we have identified, Mr McKenna accepted that there was a justifiable risk. It is clear that was justifiable since the purpose in entering was, as it was believed at the time the men entered, in order to save life. The situation was clearly a dangerous one and on any view there were people hanging out of the building which was on fire and there was smoke coming from the apertures of the building." [10];

(c) However, the real issue here is whether there was an 'exceptional risk'…we find on the evidence of Mr Mailer, which we fully accept, that if the true position had been known before he and his colleague were directed by the Senior Fire Officer to enter the building, he would not have been directed to do so. He would not have been directed to enter the building because it was not 'a normal part of his duties' to enter a building unless there was a situation as originally perceived, namely one where it was necessary to put out a seat of fire which was directly endangering the life of people within the relevant flat. The normal course of practice which he would have followed in the course of his duties in the actual situation where the fire was in a highly flammable and dangerous storeroom would have been to fight the fire externally and to remove the occupants of the building externally using ladders. That would have precluded the necessity for him to enter the building. Therefore we find as a matter of fact that to enter the building in the actual true position of a fire in a storeroom which was not occupied and contained flammable liquids was not part of what would 'normally be expected of [him] in the course of [his] work'". [11]

(d) We find that the risk he took was clearly exceptional. He entered a building which was on fire which was laden with smoke using infrared and breathing equipment where he could literally only see a hand in front of him and where he was in danger, as it transpired, of the paint and/or thinners igniting." [12]

12. As is apparent from these passages, the entire focus of the F-tT decision was on Mr Mailer's entry into the building. As Mr Moretto, counsel for the appellant, noted at paragraph 29 of his skeleton argument, the word 'enter' is used 18 times in the F-tT's written reasons when addressing the nature of the risk that was being undertaken. There is no reference in the written reasons to the period after entry, and the word 'remain' is not used at all.

13. On 23 July 2015, the appellant applied for judicial review of the F-tT decision, on the basis of the error of law noted in paragraph 3 above. The hearing took place on 14 June 2016 and UTJ Levenson's decision and reasons were sent to the parties on 12 July 2016.

14. At paragraphs 18-19 of his decision, UTJ Levenson accepted the appellant's basic submission that there had been an error of law. He said:

> "18. I agree with the Authority's contention that the correct test is to determine the question by reference to what was believed to be the position at [the] time the risk was taken. The concept of "taking" a risk in its very nature requires a subjective view of what the risk is. Were this not so, a person could be said to be taking a risk when it never crossed their mind that there was any risk at all, and I do not understand that to be what the language means.
>
> 19. Thus, the Authority is correct when it argues that at the time the claimant entered the building believing that life was endangered, the risk taken was not exceptional within the requirements of paragraph 5."

15. However, having found that the F-tT made a material error in law in reaching its decision, UTJ Levenson did not quash that decision. On the contrary, he affirmed it. That was on the express basis set out in paragraph 20:

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

16. Thus, UTJ Levenson found that the F-tT had erred in law because it had assessed the risk by reference to matters which were not known until after the event. He agreed with the appellant that entering the building was not an exceptional risk. But he then found that, by remaining in the building, Mr Mailer took an exceptional risk, so that the F-tT had been right to award him compensation. The question for us is whether he was entitled to reach that conclusion.

Mailer: Did the UT act unlawfully?

17. Having found a material error of law, and having also found that, by reference to the adjusted test, the risk taken on entry was not exceptional, one course open to the UT was to quash the decision of the F-tT and leave it at that. This was because the UTJ had removed the

only basis on which Mr Mailer had won before the F-tT. However, Mr Moretto did not push that argument too hard, and I consider that he was right not to do so. In all the circumstances, this was a case where, at the very least, it should have been remitted to the F-tT. But Mr Moretto maintained that it was quite wrong for the UTJ not to remit the case, and instead to say that only a decision in favour of Mr Mailer would have been open to the F-tT.

18. I have concluded, with some regret, that the course he adopted was not open to UTJ Levenson. In the circumstances of this case, he did not have the power to do anything other than quash the original decision and remit the case to the F-tT. My reasons for that conclusion are as follows:

i) As I have explained at paragraphs 10 and 11 above, the F-tT decision focused entirely on the situation when Mr Mailer entered the building. That was doubtless because that was the aspect of this case on which the parties themselves had concentrated. There was no consideration of or evidence about the changing nature of any risk facing Mr Mailer as he remained in the building. Neither party made any case to the F-tT based on the situation after entry.

ii) Moreover, the fact that neither of the parties, nor the F-tT, had addressed the position at any time other than when Mr Mailer entered the building was expressly noted by UTJ Levenson in the phrases shown in bold at paragraph 15 above. He said that everyone had been "wrong" to focus on the question of entry. Those comments demonstrate that any claim based on the nature of the risk being run by Mr Mailer at a time other than entry of the building was, by definition, new. I consider that paragraph 20 of his decision is eloquent testimony to the fact that this was a new point which nobody had addressed before.

iii) This is supported by an analysis of the detailed matters of fact that underpinned the original F-tT decision. It is plain that the appellant's concession that the risk was justified related only to Mr Mailer's entry into the building. It is not clear whether the same concession would have been made for any subsequent period. As to whether or not any decision to remain could be described as exceptional, Mr Goodhead properly conceded that this was not something which the F-tT had addressed.

19. Speaking for myself, I understand the frustration that a judge feels in a judicial review case when he or she concludes that the decision-maker made an error of law, but considers that the right answer is plain, and wants to save time and resources by correcting the error and providing that answer. Nobody wants claims to be remitted in order that the whole process can start all over again, if that can be avoided. Moreover, UTJ Levenson's approach is particularly understandable in this case, where Mr Mailer was risking his life fighting a serious fire in very difficult conditions. It might be said with some force that fine distinctions (in a hearing long after the event) between the precise time when a risk was justified and exceptional, and when and how that risk might no longer be justified or exceptional, are far removed from the reality faced by Mr Mailer, and firefighters like him.

20. But it is important that a proper and fair process is maintained: only that can provide the necessary certainty, consistency and clarity in the decisions of the Tribunal Services. For the reasons which I have given, I consider that the new answer supplied by UTJ Levenson to the new question which he had posed was not necessarily the only one open to the F-tT, and he

ought therefore to have complied with the general principles noted at paragraphs 7(c) and (d) above, and remitted this case back to them. On that basis, the appeal in the case of Mr Mailer must be allowed.

21. However, it would be remiss of me not to conclude my consideration of the appeal in Mr Mailer's case by noting that, on the basis of the submissions that we heard, I consider it likely that the F-tT will come to the same view at UTJ Levenson. If Mr Mailer's entry into the building was accepted to be a justified risk, it is difficult to see how his remaining in the building was not also justified: in the circumstances, a responsible firefighter is unlikely to stop what he is doing merely because no individuals were found and the seat of the fire might be identifiable as a storeroom. Similarly, I can well see that, on the basis of the evidence in Mr Mailer's statement, which the F-tT accepted in full, the overall circumstances in this case might be regarded as exceptional. In the final analysis, however, these will be matters for the F-tT.

Haigh: The Facts

22. Mr Haigh is a police officer. On 23 December 2013 he was injured whilst arresting a suspected offender. It subsequently transpired that the offender, Thomas Lee, was identified as "extremely violent" on the Police National Computer ("PNC"). The injury was inflicted when, during the struggle, Lee trapped Mr Haigh's right wrist against the hinge of the police van door.

23. Mr Haigh made a claim for compensation to the appellant which was refused on 24 February 2014. The appellant accepted that the risk was justified but argued that it was not exceptional, and that the arrest would normally be expected of Mr Haigh in the course of his work.

24. Mr Haigh appealed to the F-tT. The F-tT allowed his appeal on 20 August 2015. In their written reasons provided on 1 October 2015, the F-tT said at paragraph 40:

> "(iii) The risk taken by the appellant in the course of his work was exceptional namely it was not normally to be expected of him in the course of his work for the following three distinct reasons:
>
> > 1. Thomas Lee had an 'extremely violent' marker against him on the police national computer records. This is significant in its rarity: the appellant had only come across one offender with the marker, namely Thomas Lee; and
> >
> > 2. The size of the cage in the Ford Connect van is so small that it now accepted to be unacceptably dangerous: it has been known to positional asphyxia and its use has been discontinued by the police; and
> >
> > 3. Police protocol and training dictates that at least two, and usually three, police officers are to be deployed in the arrest [of] an offender who is showing signs of violence and resisting arrest. Despite Thomas Lee showing signs of violence and resisting arrest, police protocol was not followed as only the appellant was involved in his arrest whilst his two colleagues stood by;

> (iv) In summary, the cumulative effect of (a) Thomas Lee's extremely violent marker, (b) the use of a police van now discontinued as it is known to be dangerous and (c) the breach of police protocol and training in the appellant acting alone while his colleagues stood by caused the risk taken by the appellant in the course of his work was exceptional and not normally expected of him."

25. The appellant sought a judicial review on a similar basis to that which informed their application in the case of Mr Mailer; namely that, in considering whether the risk was exceptional, the F-tT erred by taking into account the marking on the PNC and the inadequate design of the van, matters which Mr Haigh had not known about at the time.

26. Consistent with his decision in the Mailer case, UTJ Levenson found that the F-tT had erred in law. He said at paragraph 20:

> "As I have also stated in my decision in JR/2338/2015 [the case involving Mr Mailer] I agree with the Authority's contention that the correct test is to determine the question by reference to what was believed to be the position at [the] time the risk was taken. The concept of 'taking' a risk in its very nature requires a subjective view of what the risk is. Were this not so, a person could be said to be taking a risk when it never crossed their mind that there was any risk at all, and I do not understand that to be what the language means. Thus, the Authority is correct when it argues that that the label on the police national computer and the dangerousness or otherwise of the van and/or cage were not relevant factors."

27. Again, UTJ Levenson did not quash the decision of the F-tT. Instead, he went on to say at paragraph 21:

> "However, it is clear the First-tier Tribunal accepted and found that 'police training and protocol dictates that colleagues assist whenever an offender is resisting arrest. His colleagues' failure to help him when [Thomas Lee] began to resist arrest was most unusual and against police training and protocol'. The claimant continued trying to deal with [Thomas Lee] on his own and (regardless of the irrelevant matters) it was this that really amounted to taking an exceptional risk that would not normally be expected of the claimant in the course of his work. That is why I have refused to interfere with the outcome decision of the First-tier Tribunal in relation to paragraph 5 of the 2012 Scheme."

28. Again therefore, the question is whether, having found that the F-tT made a material error of law, UTJ Levenson should have quashed the decision and remitted the matter to the F-tT or whether he was entitled to substitute his own decision for the F-tT's decision, and uphold the award to Mr Haigh, because that was the only decision which the F-tT could have reached if the matter had been remitted to them.

Haigh: Did the Upper Tribunal act unlawfully?

29. In my view, this is a very different case on the facts to the one involving Mr Mailer. There, for the reasons which I have explained, the basis of UTJ Levenson's decision was a new enquiry into an aspect of the case which no-one had considered before. But in the case of Mr Haigh, all the judge did was to leave out of account the marking on the PNC and the inadequacy of the van design (because neither of those things were known to Mr Haigh, so they were irrelevant) and base his decision entirely on the third reason stated by the F-tT,

namely the breach of police protocol/training and the fact that it was only Mr Haigh who was seeking to arrest Thomas Lee, without the assistance of his two colleagues.

30. For this reason, Mr Moretto had a much more difficult task in endeavouring to persuade me that, as in Mr Mailer's case, the judge was wrong to do what he did. In Mr Haigh's case, the appellant's successful application to UTJ Levenson could only ever have taken them so far: the error of law knocked out two of the reasons for the F-tT's decision, but it was always going to leave the third unscathed.

31. In order to submit that the F-tT could have come to a different conclusion as to the exceptional nature of the risk, if they had not considered the PNC marking and the design of the van, Mr Moretto had to rely on the F-tT's use of the expression "the cumulative effect" in paragraph 40(iv) of their Summary of Reasons (paragraph 24 above). His argument was that, since that expression suggested that the F-tT decision was based on a combination of the three reasons, it was unlawful to remove two reasons and then uphold the decision for the third reason only.

32. I do not accept that submission for two reasons. First, I do not think that that is what the F-tT decided. I consider it wrong to focus on the words the "cumulative effect". They appear in sub-paragraph (iv) which was itself expressed to be just a "summary" of the longer and more detailed sub-paragraphs (i) – (iii) above. It cannot therefore add or subtract from anything in sub-paragraphs (i) – (iii).

33. Sub-paragraph (iii) is the main description of the reasons for the F-tT's decision in Mr Haigh's favour. There, the three factors are expressly described as the "three distinct reasons" for the decision. On the normal meaning of those words, any one of those three reasons justified the F-tT's conclusion that this was an exceptional risk. On that basis, therefore, UTJ Levenson was entitled to decide that, even without the first two reasons, the third reason alone was sufficient to uphold the F-tT's decision.

34. Secondly, there is a wider point, which UTJ Levenson attempted to express when he said that "it was this [the absence of help from his two colleagues] that really amounted to taking an exceptional risk". Mr Lee may have been identified as extremely violent on the PNC, and the size of the police van may have been inadequate. But both matters were, in some ways, of purely academic interest. It is clear from sub-paragraph (iii) that what mattered much more was that Thomas Lee was <u>in fact</u> showing signs of violence and resisting arrest and that, notwithstanding those signs, Mr Haigh was <u>in fact</u> left to effect the arrest alone. That was the real and operable cause of his injuries. The F-tT found that to be an exceptional risk and, in all the circumstances, the UTJ concluded that no different decision would have been open to the F-tT if the matter had been sent back to them. I agree with that analysis.

35. At one point during his submissions, Mr Moretto suggested that UTJ Levenson was not entitled to rely on the third reason as stated by the F-tT, because the F-tT had failed adequately to explain why the breach of the protocol, and the failure of his colleagues to assist Mr Haigh, had led to his injuries. In my view, that argument is simply not open to Mr Moretto. The appeal from the F-tT to the UT proceeded by way of a judicial review. No cogent attack on the third reason relied on by the F-tT was or could properly have been the subject of that judicial review application. On the face of it, it was a perfectly rational explanation for why the risk, on these facts, was exceptional and caused the injury. The appellant cannot now go behind that element of the F-tT's decision.

36. For these reasons, in relation to Mr Haigh's claim, I consider that UTJ Levenson was justified in upholding the original F-tT decision. Accordingly, I would dismiss the appeal against the UT's decision in Mr Haigh's case.

LORD JUSTICE GROSS:

37. I entirely agree and, with respect, specifically endorse the observations of Coulson LJ at [19] and [21] of his judgment.