THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: JR/0888/2020
[2021] UKUT 106 (AAC)

R (CR) v the First-tier Tribunal and the Criminal Injuries Compensation Authority

Decided following an oral hearing on 16 April 2021

Representatives

Applicant	William Poole of counsel, instructed by GLP solicitors
First-tier Tribunal	Took no part
CICA	Robert Moretto of counsel, instructed by CICA

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

On application for judicial review of a decision of the First-tier Tribunal (Social Entitlement Chamber)

Reference: CI017/17/00204
Decision date: 20 February 2020

The decision of the First-tier Tribunal is quashed under section 15(1)(c) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS:

The matter is remitted to the tribunal under section 17(1)(a) of the Tribunals, Courts and Enforcement Act 2007 to decide the appeal in accordance with my guidance below.

REASONS FOR DECISION

A. Introduction

1. This application for judicial review is brought with the permission of Upper Tribunal Judge Levenson. The applicant is a man for whom a claim for criminal injuries compensation was made following an assault in 2011 in which he sustained brain damage. The respondent is the First-tier Tribunal, which struck out appeal. The Criminal Injuries Compensation Authority (CICA) is an interested party.

2. This case is governed by the Criminal Injuries Compensation Scheme 2008. CICA assessed the appropriate tariff award at £110,000 for moderately severe brain damage. That was not in dispute before the First-tier Tribunal on appeal. There was an issue relating to Court of Protection. This was resolved when CICA's representative conceded that the applicant's life expectancy should be assessed at 81 years. This resulted in an increase in the award. The remaining issue on the appeal related to care as a special expense under paragraph 35 of the Scheme. The tribunal refused to make an award under that paragraph.

3. I first explain why I have quashed the First-tier Tribunal's decision. Then I provide some guidance on the interpretation and application of paragraph 35, which will be relevant for the rehearing. Nothing I say on that issue is intended to give any indication of how the First-tier Tribunal should apply that paragraph at the rehearing.

B. Why I have quashed the decision

4. The applicant was represented at the First-tier Tribunal by Mr Poole of counsel who presented a detailed argument relating to the scope of paragraph 35 and its application to the applicant's circumstances. He relied on an expert report. In short, he argued that the appellant needed care that went beyond what was being provided or available under the NHS. He went as far as to argue that the appellant's current care package was detrimental to his health. He argued that he was entitled to care to allow him to develop his potential.

5. The tribunal did not accept this argument. Its written reasons record the history of the appeal, summarise the oral evidence, and give short reasons that cover a page. They do not refer to the expert evidence on which Mr Poole relied or explain why they rejected his argument on the scope of paragraph 35.

6. A tribunal's reasons must be adequate. What is adequate depends on the circumstances of the case. Although there is no rule to this effect, it is usually expected that a tribunal will explain why it did not accept expert evidence or, at least, say what it made of that evidence. In this case it did neither and I consider that more was required in view of the argument put by Mr Poole. Mr Moretto set out a detailed analysis of the evidence that would undoubtedly have provided adequate reasons for the tribunal's decision. But, as I put to him, the tribunal did

not provide them. The fact that a tribunal's decision can be justified by reference to detailed reasoning does not mean that those were the tribunal's reasons. It may be possible to fill in obvious gaps in a tribunal's reasons, but Mr Moretto's reasoning went far beyond that. Moreover, the tribunal did not explain why it rejected Mr Poole's detailed argument on the interpretation of paragraph 35. No amount of reconstruction can remedy that omission.

7. Before leaving this issue, I want to say something about how the First-tier Tribunal conducts its business. Some of the argument at the oral hearing before me suggested that the tribunal should conduct itself as a court would. To take an example, courts usually proceed on the basis that evidence is accepted unless it is challenged. It is dangerous to assume that all tribunals take the same approach as courts or, for that matter, that all tribunals have a common approach. It is, I trust, safe to say tribunals that are dealing with parties who do not have legal representatives do not generally require evidence to be challenged in order for it to be in dispute. That would be difficult to reconcile with the overriding objective in their rules of procedure. It would be disproportionate, it would be unduly formal, and it would hamper participation in the proceedings. Even if, as in this case, CICA is represented by an officer trained and experienced in presenting cases at tribunal, it is wrong to expect them to act as a legal representative would act in court. This point is not limited to challenging evidence. challenges to tribunal's decisions and to the way they conduct their proceedings must be founded in the procedures and practice of the tribunal within its rules of procedure and the proper conduct of a judicial decision-maker.

C. The care issue

8. This is governed by paragraph 35:

> **Compensation for special expenses – paragraph 35**
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> (1) Where the applicant has lost earnings or earning capacity for longer than 28 weeks as a direct consequence of the injury (other than injury leading to his or her death), or, if not normally employed, is incapacitated to a similar extent, additional compensation may be payable in respect of any special expenses incurred by the applicant from the date of the injury for:
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> …
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> (d) the reasonable cost, to the extent that it falls to the applicant, of
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> (i) special equipment, and/or
>
> (ii) adaptations to the applicant's accommodation, and/or
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> (iii) care (in connection with the applicant's bodily functions or the preparation of meals) and supervision (to avoid substantial danger to the applicant or others), whether in a residential establishment or at home, which is not provided or available free of charge from the

> National Health Service, local authorities or any other agency, provided that a claims officer considers such expense to be necessary as a direct consequence of the injury;
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> …
>
> (2) In the case of sub-paragraph (1)(d)(iii) above, the expense of unpaid care provided at home by a relative or friend of the victim will be compensated by having regard to the level of care required, the cost of a carer, assessing the carer's loss of earnings or earning capacity and/or additional personal and living expenses, as calculated on such basis as a claims officer considers appropriate in all the circumstances. Where the foregoing method of assessment is considered by the claims officer not to be relevant in all the circumstances, the compensation payable will be such sum as he or she may determine having regard to the level of care provided.

The relevant language of paragraph 35(1)(d)(iii) is now found in paragraph 52(e) of the Criminal Injuries Compensation Scheme 2012. Upper Tribunal Judge Mesher dealt in detail with the earlier provision in the Criminal Injuries Compensation Scheme 2001 in *R (Criminal Injuries Compensation Authority) v IM and the First-tier Tribunal* [2011] UKUT 70 (AAC). His decision resulted in amendments and the language that I have quoted above.

9. The phrase 'in connection with bodily functions' has been used in legislation since at least the inception of attendance allowance in section 4 of the National Insurance (Old persons' and widows' benefits and attendance allowance) Act 1970. It was subsequently used in supplementary benefit and disability living allowance legislation. There are numerous cases that interpret and apply the phrase. A convenient starting point for research is in the commentary to section 72(1) of the Social Security Contributions and Benefits Act 1992 in Volume I of *Social Security Legislation* (Sweet and Maxwell). The current volume is for 2020/21 and the commentary is at paragraphs 1.219-1.225. Judge Mesher referred to some of the social security cases in *IM* at [33]-[35], but only to show that an expense was 'necessary' when it was reasonably necessary.

10. Both counsel referred to the social security cases. They cannot simply be read across to paragraph 35. They deal with the phrase in the expression 'attention in connection with bodily functions'. That is important because statutory provisions have to be interpreted as a whole. As Lord Bridge said of that expression in *Woodling v Secretary of State for Social Services* [1984] 1 WLR 348 at 352:

> The language of the section should, I think, be considered as a whole, and such consideration will, I submit, be more likely to reveal the intention than an attempt to analyse each word of phrase separately.

It may still be helpful to look at the component parts of a provision separately, as Lord Bridge went on to do, but ultimately it has to be interpreted as a whole.

11. Lord Bridge's approach is significant for the interpretation of paragraph 35. I will take just a couple of examples. The word 'attention' was perhaps significant in the decision that attention must generally be provided in the presence of the claimant. And it may have been significant in deciding the types of bodily functions that are relevant, since they must be ones that can be given attention. I am not going to embark on an analysis of even those social security cases that were cited to me. Disentangling the extent to which 'attention' affected the outcome would be a huge task. However, it is something to which the First-tier Tribunal must be alert whenever social security cases are cited. The same caution is appropriate before relying on what Judge Mesher said in *IM* on earlier wording.

12. I will, though, say something about paragraph 35 and the significance of the word 'care'. In doing so, I will pick up some of the themes from the social security cases that seem most relevant given the evidence and arguments that were put to the First-tier Tribunal.

13. First, in the context of paragraph 35 'care' conveys looking after someone. Care so understood may take numerous forms. I do not consider that it would be helpful to say more about it outside the context of the facts of a particular case.

14. Second, the care must be in connection with the claimant's bodily functions. It does not include anything that is not in connection with those functions, such as window cleaning or servicing any equipment they use, such as a hoist.

15. Third, the care may involve doing things for the claimant that they cannot do for themselves or helping them to do things that they find difficult. Dressing, for example, may fall into either category. Someone who is unable to dress themselves will require care in the form of being dressed, while someone who has reduced upper limb function may require care in the form of help with dressing, such as by fastening buttons or manipulating clothing.

16. Fourth, doing something instead of someone who lacks the bodily function to do it for themselves will not be covered by paragraph 35 unless it amounts to care. In *IM*, Judge Mesher commented:

> 25. … In my judgment the proposed additional category of compensation rejected by the Minister fell outside the meaning of 'care' as determined on the plain words of paragraph 35. It covered cases where a third party carried out some domestic or household service, not connected to the injured applicant's personal needs, instead of it being done by the injured applicant. There is a clear distinction between, say, doing an applicant's garden or decorating a room, with the applicant taking no part, and assisting an applicant to do gardening or decorating him or herself. The latter is capable of constituting care; the former in my view is not. I do not have to consider here tasks such as cooking or washing clothes or bedding in relation to

> which it will be for the good sense of tribunals to decide whether they constitute care in any particular case. …

That example differs from the example I gave of dressing. Dressing someone and helping them dress for themselves both amount to care. Decorating a room for someone is not care, although helping them to do it for themselves may be.

17. Fifth, the social security cases have accepted that some activities that would not normally be classified as attention in connection with bodily functions may be so if they form part of a single activity. That is not the language used in the cases, but it seems to me to capture the essence of the reasoning. Washing clothes or bedding is the usual example. This would not normally count as attention, but it has been accepted that it may do so. The leading authority is the House of Lords' decision in *Cockburn v Chief Adjudication Officer and the Secretary of State for Social Security* [1997] 1 WLR 799. Lord Slynn discussed (at 818-819) the washing of soiled underwear and bedding for an incontinent claimant.

> Thus, as I see it, the attention here is not to be seen as the act of taking a bundle of clothes to the laundry or to the launderette or putting them in the washing machine or wash tub at home. The attention relied on is the act of making sure that the severely disabled person who cannot do these things for herself is kept clean and comfortable in decent conditions. If, as I consider is plain, it is part of 'attention' justifying the care component of an attendance allowance to wash and dry the person who has been incontinent, and to change soiled nightclothes or underclothes, it is no less care and attention to remove and change the sheets in which that person was lying and which, when she was in bed, were soiled on the same occasion as the clothes by the same excretion. To prepare and provide fresh clothes means that they have to be washed. The same is true of the sheets. It is, I consider, unrealistic to distinguish between soiled clothes and soiled bedclothes. It seems to me that the district nurse or healthcare worker who had to change and possibly wash, or at any rate hand to another person to wash, underclothing and sheets for an incontinent person would be astonished that lawyers should draw such distinctions on the language of the statute unless that language compelled them to do so. In my view the language does not so compel them.
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> Clearly some laundry and some domestic chores have no connection with the bodily functions or the situation caused by the disability relating to those functions. The ordinary washing of unsoiled clothes and of domestic items such as tablecloths and curtains would normally not fall for consideration but dealing with soiled clothes and sheets as described here is, in my view, capable of constituting attention within the meaning of the Act and is far from being remote.

That approach, with suitable adjustment to the context of care rather than attention, applies equally to paragraph 35.

18. Sixth, life does not present itself neatly packaged in the categories used by legislation. That is true at the borderline of meaning, which most words have. It is also true of function. An activity may amount to care while at the same time it fulfils some other function. So helping a person with a task may perform the function of care but also perform the incidental or ancillary function of training the person in techniques that will allow them to become more independent. But that does mean that education or training of itself is care.

19. That is by no means a complete list. The points I have picked up are those that were touched on by the arguments in this case. Hopefully they will be of some help to the tribunal at the rehearing.

Signed on original
on 28 April 2021

Edward Jacobs
Upper Tribunal Judge