[2012] AACR 47

(Hutton v First-tier Tribunal (CIC) and Criminal Injuries Compensation Authority [2012] EWCA Civ 806)

CA (Arden, Aikens and McFarlane LJJ) **JR/667/668/669/2010**
14 June 2012

Criminal injuries compensation – approach to be taken by claims or reviewing officers in considering whether to accept late applications – whether the First-tier Tribunal judge's decision was correctly directed on the law

In December 1966 the appellant's father was unlawfully killed by an assailant. His mother had a nervous breakdown and has continued to have mental health problems. Both the appellant and his sister were taken into care by the local authority (they were under two years of age). The appellant and his sister were told of their father's death when they were eight years old but were given no details. The appellant did not discover that his father was killed until 2007. On 2 June 2008 he submitted claims for compensation under the Criminal Injuries Compensation Scheme (2001) to the Criminal Injuries Compensation Authority on behalf of himself, his mother and sister (who also has mental health problems). On August 2008 the Authority rejected the claims as they were late having not been made within two years of the incident. The respondent applied for a review but the Authority refused to exercise its discretion to waive the time bar. The respondent's appeal was dismissed by a First-tier Tribunal (F-tT) judge. The appellant's application for permission to bring judicial review proceedings was considered by an Upper Tribunal (UT) judge. The judge accepted the appellant's argument that the F-tT wrongly concluded there were no particular circumstances to waive the time bar. But he did not grant permission to appeal as the judge considered there was no satisfactory explanation for the respondent's delay of over 20 years in making a claim on becoming an adult. The appellant renewed his application and an oral hearing took place before a different judge who accepted the criticisms of the F-tT's reasoning but who concluded that it could not have reached a different conclusion given the delay in making the claims and that the reasons for it were not related to the making of the application (but in finding out details of the father's death). An application for permission to appeal to Court of Appeal was granted following an oral hearing. The issue before the court was whether the F-tT judge erred in law in interpreting paragraph 18 of the terms of the Scheme, and, if he had not, could he have decided to have waived the time limit.

Held, allowing the appeal, that:

1. the F-tT judge erred in law in his construction of paragraph 18. It states that the two year time limit may be waived where, given the particular circumstances of the case, it is reasonable and in the interests of justice to do so. The words "particular circumstances" refer to the actual or distinct circumstances of the case and not to special circumstances (that is unusual or extraordinary circumstances). When considering whether or not to waive the time limit in a case the relevant officer must: (1) establish the actual circumstances; and (2) consider all the relevant factors, including: the delay in making the claim, the reasons for it and the nature of the claim itself. The relative importance of particular factors will depend on the particular circumstances of each individual case. The officer will have to make an overall decision bearing all these circumstances in mind as well as the general rule that claims should be made promptly and, in any event, within two years of the incident giving rise to the claim (paragraphs 41 to 42);

2. if there had been no error by the F-tT judge he might have decided the time limit should have been waived despite the long delay and the consequent difficulty in assessing any compensation. The appellant's mother and sister had a stronger case as they were not to blame for any delays, given their health problems, which may have resulted from the appellant's approach in obtaining more information before submitting the claims (paragraph 43 to 44);

3. the question as to whether or not to grant judicial review of the F-tT's decision was remitted to the UT to decide as there were possible different issues arising in relation to each applicant, on which the court had not heard full argument, and which might need further investigation by the Upper Tribunal which was better equipped to deal with such issues (paragraphs 45 to 46).

DECISION OF THE COURT OF APPEAL

Mr Christopher Buttler of counsel, acting *pro bono*, appeared for the appellants.

Mr Owain Thomas of counsel, instructed by the Treasury Solicitors, appeared for the respondent.

Judgment (reserved)

LORD JUSTICE AIKENS:

1. The substantive question raised in this case is: by what criteria should a claims officer decide whether or not to waive the two year time limit within which claims for compensation in respect of criminal injury should be brought under the Criminal Injuries Compensation Scheme (2001)***:*** (the Scheme). In form this is an appeal against the order of Upper Tribunal Judge Edward Jacobs, sitting in the Upper Tribunal (Administrative Appeals Chamber) (the UT) dated 3 March 2011, whereby he refused to grant permission to apply for judicial review of the dismissal by the First-tier Tribunal (Social Entitlement Chamber) (F-tT) of an appeal from the decision of a claims officer against waiving the two year time limit for bringing claims for compensation under the Scheme. The appeal is brought by Mr Hutton on his own behalf and also on behalf of his sister and his mother. Permission to appeal to this court was granted by Rix LJ on 23 November 2011, following an oral hearing.

2. Mr Buttler appeared *pro bono* on behalf of the three appellants and I received much assistance from his submissions. I am also grateful for the helpful submissions of Mr Thomas on behalf of the Criminal Injuries Compensation Authority, the Interested Party, whom I shall refer to as "The Authority".

3. Mr Buttler requested that if this court decided to allow the appeal, so that we granted permission to bring judicial review proceedings, then we should deal with the judicial review itself. There is power to allow this, pursuant to section 16(8) of the Tribunals, Courts and Enforcement Act 2007.

The relevant terms of the Criminal Injuries Compensation Act 1995 and the Scheme

4. The Scheme was promulgated by the Secretary of State pursuant to powers granted by sections 1 to 6 and 12 of the Criminal Injuries Compensation Act 1995**.** Schemes for compensation for criminal injuries have existed since 1964. The original scheme has been revised on a number of occasions including revisions in 1979 and 1990. Paragraph 1 of the present Scheme provides that applications received on or after 1 April 2001 for the payment of compensation to, or in respect of, persons who have sustained criminal injury would, in principle, be considered under the 2001 Scheme. Claims for compensation pursuant to the Scheme are to be determined by "claims officers". Compensation will be paid in accordance with the Scheme to an applicant who has sustained a criminal injury on or after 1 August 1964: paragraph 6 (a). An applicant can make a claim on his own behalf and on behalf of others, as has been done in this case by Mr Hutton: paragraph 6(b). "Criminal injury" means a "personal injury" sustained in Great Britain, which is attributable to (amongst other things) a crime of violence: paragraph 8(a). "Personal injury" includes both physical injury and mental injury or disease, including those that may occur without any physical injury, but, in that case only if certain conditions are satisfied as laid down in paragraph 9(a) to (d). Paragraph 13 sets out various circumstances in which a claims officer will be entitled to reduce or withhold an award under the Scheme.

5. Paragraphs 37 to 42 set out the detailed provisions concerning compensation in cases where a victim has died as a result of a criminal offence. They are relevant to this appeal and are set out in the Appendix to this judgment. The "standard amount of compensation" at Level 10 and Level 5 referred to in, respectively, paragraphs 39 and 42(a) of the Scheme are amounts of, respectively, £5,500 and £2,000. Those figures are found in the "Levels of Compensation" tables at the end of the Scheme's terms.

6. The key paragraphs of the Scheme for the purposes of this appeal are paragraphs 18 and 19, which I set out here:

> "Consideration of applications
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> 18. An application for compensation under this Scheme in respect of a criminal injury ('injury' hereafter in this Scheme) must be made in writing on a form obtainable from the Authority. It should be made as soon as possible after the incident giving rise to the injury and must be received by the Authority within two years of the date of the incident. A claims officer may waive this time limit where he considers that, by reason of the particular circumstances of the case, it is reasonable and in the interests of justice to do so.
>
> 19. It will be for the applicant to make out his case including, where appropriate:
>
> (a) making out his case for a waiver of the time limit in the preceding paragraph; and
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> (b) satisfying the claims officer dealing with his application (including an officer reviewing a decision under paragraph 60) that an award should not be reconsidered, withheld or reduced under any provision of this Scheme.
>
> … ."

7. Paragraph 20 stipulates that the standard of proof to be applied by a claims officer to all matters before him will be the balance of probabilities.

The factual background to the proceedings.

8. Mr Hutton's parents had come to the UK from the Caribbean in about 1960. His father was Abraham Hutton. His mother is called Yvonne Akers and she was married to Abraham Hutton. Mr Hutton's sister, called Fiona, is about 17 months older than Mr Hutton. Mr Hutton was born on 2 July 1966. By December 1966 Abraham Hutton was aged 26 and he was employed by British Railways.

9. In the afternoon of 4 December 1966 Abraham Hutton was fatally stabbed by Courtland de Courcey Griffiths in broad daylight in a street in Bedford. At the time of Abraham Hutton's death, Yvonne Akers was 21 years old; Fiona was about 22 months old and Mr Hutton was barely five months old. As a result of this tragedy, all three were traumatised. Yvonne Akers had a nervous breakdown and was later cared for by her mother. She has continued to have mental problems. Mr Hutton and her elder sister were taken into care by the local authority. Mr Hutton later went to boarding school. Fiona has suffered from mental problems. Both children knew of their father's death from about the age of eight but were not told any of the details.

10. Since Mr Hutton has reached adulthood he has tried to find out details of the circumstances of his father's death. He had little or no success until, in 2007, he discovered relevant documents in the National Archive, formerly the Public Record Office, which is now located at Kew, Middlesex. It transpires that on 16 February 1967 Mr Abraham Hutton's attacker was found guilty of manslaughter at the Leicestershire Assizes and he was sentenced to 18 months imprisonment. Copies of the depositions of the witnesses (taken at the old-style committal proceedings in front of the Justices) are in our papers. These too had been deposited in the National Archive. It seems clear that Abraham Hutton was stabbed after an argument in a pub; both men may have been drinking.

11. On 2 June 2008, that is just under 42 years after his father was unlawfully killed, Mr Hutton made a claim to the Authority. He made claims also on behalf of his sister and his mother, from whom he had obtained written authority to do so. It is, I think, accepted by the Authority, for the purposes of this appeal at least, that Mr Hutton is the only one of the three

claimants who is capable of making an application on behalf of all three, because of the continuing mental health problems of the other two.

12. There is a standard form which has to be completed by applicants for compensation under the Scheme. Mr Hutton completed separate forms for himself, his sister and his mother. I will refer only to Mr Hutton's own form. He filled out the various details as requested. These included the name of his deceased father and his occupation at the time of his death, his address at the time of the stabbing and the address where the incident occurred. Under paragraph 1(m) Mr Hutton completed questions which, the form explained, needed answers so that the claims officer could decide if the applicant was financially dependent on the person who died at the time when he died, in which case the applicant might be eligible for "further compensation for dependency or loss of parental services or both if you are under 18 (paragraphs 40 and 42 of the Scheme)". The form stated that if the claims officer found that the applicant was eligible, he would be sent a form for "dependency or parental services" and those considering the claims would use the information provided "to make further enquiries to consider your application". Mr Hutton stated that he was financially dependent on his father at the time that the latter had died and that, at that time, Mr Hutton was, himself, under 18.

13. At paragraph 5(a) of the form Mr Hutton set out the date and time of the incident in which his father was killed. Paragraph 5(b) in the form poses the following question: "if the incident happened more than two years ago, why have you not applied before now?" Mr Hutton's response was:

> "Have been trying to gather all the facts regarding my father's murder. I have been and still remain traumatised by his brutal death and the loss of not having my father around".

14. Mr Hutton also filled in details in paragraphs 5(c) to (g) as requested. In paragraph 5(d), in response to the request to give the address of the police station which had the details of the incident, Mr Hutton stated:

> "National archives hold all the papers regarding this case. Bedford station, Division 'B' dealt with initially".

15. Under paragraph 5(e) Mr Hutton gave the names and numbers of the two Detective Constables who dealt with the incident at the time and under paragraph 5(f), (which warned that investigations into the claim could be delayed if the number was not given), he gave the crime reference number. Mr Hutton also gave the name of his father's assailant.

16. On 13 August 2008 the Authority rejected the claims of all three applicants. It refused to exercise its discretion, under paragraph 18 of the Scheme terms, to waive the time limit for bringing claims under the Scheme. The letter of the Authority to Mr Hutton dated 13 August 2008 states that the claims officer had looked carefully at the details that Mr Hutton had sent to the Authority and "the reports that we have obtained from the police". The letter stated that the Authority was unable to make any award under the Scheme. The reason given is as follows:

> "Under paragraph 18 of the Scheme we must receive all applications for compensation with two years of the date of the incident. We can only accept an application outside this time limit if it is reasonable and in the interests of justice to do so. In your case, because of the delay in sending us the application, we have been unable to get police information to confirm the facts surrounding the incident in which the deceased was involved",

The letter said that, in those circumstances, the claims officer was unable to waive the time limit.

17. On the face of it the reason given is puzzling. Mr Hutton had provided the details he had in the form and had told the Authority that all the papers on the case were held in the National Archive, as indeed was the case. However, it seems that the Authority had written to

Bedfordshire Police on 9 June 2008, indicating that it had received an application for compensation under the Scheme and that the Authority was concerned with various matters, in particular: the circumstances in which the death occurred; the date of the inquest and the court where it was held; whether any person had been charged with an offence in connection with the death and the result of any proceedings; if the deceased was to any extent to blame; and a list of convictions of the deceased and the applicant (if any). Bedfordshire Police responded in the form of a Bedfordshire Constabulary Crime Request Response dated 21 July 2008. The Response form states that the crime archives were checked on 17 July 2008. It continues: "No crime papers retained in connection with details supplied. In line with old retention Policy these papers have been destroyed". It is signed A Breiterbach.

18. Mr Hutton applied on 29 September 2008 for a review by the Authority of its decision, as he was entitled to do under paragraph 58(a) of the Scheme terms. On 10 February 2009 the Authority issued its review decision letter. It refused again to exercise its discretion to waive the time bar in Mr Hutton's favour. The letter said that it would have been reasonable for an application to have been made when Mr Hutton reached adulthood, "at the age of 21" (*sic*), rather than 42 years after the incident.

The proceedings before the First-tier Tribunal and the Upper Tribunal

19. Mr Hutton decided to appeal this decision, pursuant to paragraph 61 of the Scheme terms. The route of appeal of a review decision of the Authority is to the F-tT, in accordance with the Tribunal Procedure Rules. The notice of appeal has to be supported by reasons for the appeal and any relevant additional material which the appellant may wish to submit. Mr Hutton set out his reasons for appealing in a statement attached to his notice of appeal. He said that he had given the Authority extensive documentation detailing the circumstances of the attack on his father. He added that it took him a very long time to get together the relevant papers and eventually they were obtained under a Freedom of Information Act request. He stated that he had provided the Authority with copies of the court documents, newspaper articles, his father's death certificate, and the coroner's and doctor's certificates, together with police and witness statements in his application bundle in order to give information about the circumstances of his father's unlawful killing. The statement continued by saying that Mr Hutton had first enquired about his father's death at the age of eight years, when he asked the Social Services about his father, but he was not given details of the circumstances of his father's death. He also said that he had attempted to obtain information from the police, court services and other affiliated organisations upon reaching the age of 18 but with no result. The F-tT received the notice of appeal on 20 February 2009.

20. On 19 March 2009 the Authority responded to the appeal.

21. The decision of the F-tT was given in writing on 25 September 2009 by tribunal judge Thomas Ward. At paragraph 13 of his decision he noted that the application was evidently not made within two years of the incident. He said that the questions he had to decide were: "(a) what are the particular circumstances of this case; and (b) is it reasonable and in interests of justice to waive the two year time limit and allow the appeal".

22. At paragraph 14 of his decision, Judge Ward set out what he said were the "particular circumstances relied on in support of this appeal". He said that those were:

> "(a) that the applicant at the time of the death of his father was aged 5 months. He had to make extensive enquiries with regard to the incident and it was only after these extensive enquiries had been made of the Bedfordshire Police that he was in possession of the information that allowed him to make the application".

23. Judge Ward then gave his conclusions at paragraph 15. He considered that there were not (i) any relevant "particular circumstances" and that (ii) it was not reasonable and in the interests of justice to justify the waiver of the two year time limit in that case. On the question of whether, as the judge put it, there were "relevant particular circumstances" in this case, Judge Ward said that it appeared that Mr Hutton was aware, at the latest, from the time he reached adulthood, that his father had been unlawfully killed. Yet it took him over 20 years to make the application to the Authority. He said that although it may have been difficult to get detailed records of the incident, those were not required to make an application so there was no reason why one had not been made far earlier and within two years of becoming an adult.

24. On the second question he had posed himself, ie whether it was reasonable and in the interests of justice to waive the time limit, Judge Ward stated that delay in making a claim meant that enquiries could not be made and effected speedily and that the outcome of them would be likely to be less reliable and positive compared with the situation when the claim is made promptly and within two years of the injury. He concluded that the explanation for the delay was not satisfactory. He considered that the application could and should have been made no later than 1989 (when Mr Hutton would have been 22/23) ie within two years of his "becoming an adult". (In law, Mr Hutton would actually have become an adult at the age of 18).

25. Judge Ward therefore dismissed the appeal.

26. Not to be defeated, Mr Hutton sought permission to appeal. Such an appeal had to be by way of judicial review of the F-tT's decision. His application for permission to bring judicial review proceedings was made in the first place to the F-tT itself and it was considered by Upper Tribunal Judge Bano. He gave his decision on 2 July 2010. The application had been made out of time but Judge Bano extended time to make the application. However, he did not grant permission to appeal.

27. Judge Bano accepted the arguments of Mr Hutton that the F-tT had been wrong to conclude that there were no relevant "particular circumstances" in this case. He held that the fact that the incident giving rise to the claim had occurred when Mr Hutton was a young baby and that it was necessary for him to investigate the circumstances of his father's death long after it had occurred were both "particular circumstances". Judge Bano also considered that when the F-tT was deciding whether it was reasonable and in the interests of justice to waive the time limit it should have taken into account the fact that the complete police file was available; it should also have recognised the fact that there was never any doubt about the circumstances in which Mr Hutton's father had met his death.

28. Nevertheless Judge Bano refused permission to bring judicial review proceedings against the Authority's decision. He pointed out that paragraph 19 of the Scheme terms placed on the applicant the burden of making out his case for a waiver of the time limit. Judge Bano's reasons continued:

> "Even taking into account all the matters put forward by [Mr Hutton] I do not consider that he has given a satisfactory explanation for not making a claim under the Scheme until approximately 22 years after he attained his majority. I have therefore come to the conclusion that it was not open to the tribunal to waive the time limit so as to admit the claim in this case".

In effect, Judge Bano was holding that even if the F-tT had made an error of law in reaching its conclusion, there was no prospect that a F-tT, properly directing itself on the law, could reach a decision to waive the time limit. So there was no point in giving permission to bring judicial review of the F-tT's decision.

29. Mr Hutton was not prepared to give up the fight. He next applied to the Upper Tribunal (Administrative Appeals Chamber) (UT) for permission to apply for judicial review of the First-tier decision. That application was determined by Upper Tribunal Judge Edward Jacobs. It seems that Judge Jacobs heard oral evidence from Mr Hutton on this application. In Judge Jacob's decision dated 3 March 2011 he said that he accepted all that Mr Hutton had stated in his evidence, in particular that he was the only person whose mental state permitted him to take action on behalf of himself, his sister and his mother and his evidence about the steps that he had taken to find out exactly what happened when his father was stabbed.

30. At paragraph 6 of his decision, Judge Jacobs states:

> "[Mr Hutton] told me that he had spent time each year trying to find out what had happened to his father, meeting with lack of assistance and dead ends until a new coroner was able to locate documents relating to the investigation and prosecution at Kew. I am satisfied that he did all he could reasonably do in attempting to track down the information. His difficulty is that the information was not necessary in order to make a claim. The fact of his father's unlawful killing was sufficient of itself to allow an application to be made."

31. Judge Jacobs concluded that, whilst he agreed with the criticisms of Judge Bano about the reasoning of the F-tT's decision, he also agreed with Judge Bano that, in all the circumstances of the case, the F-tT could not properly have come to a different conclusion in any event. That was because the period of delay was considerable and the reasons given for it "do not relate to the making of the application. [The reasons given for the delay] amply explain the delay in finding out the details of the death, but as I have said that is entirely separate from the making of an application for compensation".

32. There followed an application for permission to appeal to the Court of Appeal. That was dismissed on the papers, but permission was granted by Rix LJ after an oral hearing on 23 November 2011.

The arguments of the parties and the issues on this appeal.

33. As already noted, although in form this appeal is from the refusal of the UT to grant permission to appeal the UT's refusal to permit the appellants to bring judicial review of the F-tT's refusal to reverse the Authority's claims officer's decision not to waive the two year time limit to make an application for compensation, Mr Buttler, on behalf of the appellants, asked this court to deal with the substantive issue of judicial review itself. I will deal with that issue at the end of my consideration of the permission issues.

34. On behalf of the Hutton family, Mr Buttler submitted that Judge Ward had committed two errors of law in rejecting the appeal from the review decision of the Authority. First, he had misconstrued paragraph 18 of the Scheme and, secondly, having misconstrued it, he had misapplied it to the facts of this case. Mr Buttler submitted that the last sentence of paragraph 18 required that the claims officer (or the reviewing officer) should ask a single question: was it reasonable and in the interests of justice to waive the two year time limit by reason of the particular, that is the actual, circumstances of the case in hand. Instead, Judge Ward had asked two questions: first, were there "particular", ie special, circumstances in this case and, secondly, was it then "reasonable and in the interests of justice" to waive the time limit? Having misconstrued paragraph 18, Judge Ward failed to consider the overall question of whether it was in the interests of justice to waive the time limit in this case. In this context, Mr Buttler argued that Judge Ward gave too much prominence to the long delay which he accepted had occurred. Mr Buttler also submitted that Judge Ward had failed to consider separately the position of Mr Hutton's mother and sister. Even if Mr Hutton might have been at fault in his delay in making

his own application, his mother and sister could not be fixed with his blame and they had only given him authority to act on their behalf in 2008.

35. Mr Thomas, for the Authority, accepted that Judge Ward had incorrectly formulated the questions to be considered in paragraph 15 of his judgment. He accepted that the judge should have asked the overall question of whether it was in the interests of justice to waive the time limits in the particular circumstances of this case. But, he submitted, even if the correct question had been posed, Judge Ward would have acted reasonably in reaching the conclusion that he did, *viz* that the time limit should not be waived. In this regard, he emphasised that paragraph 18 of the Scheme terms stipulated that a claim should be made "as soon as possible after the incident giving rise to the injury" and that, in any event, "it must be received within two years of the date of the incident …". He submitted that this wording emphasised the need to get on with the claim as soon as possible and that it would only be in exceptional circumstances that the time limit would be waived. The delay had to be seen in the context of the mandatory terms ("must") in paragraph 18 and a delay of a total of 42 years was just far too long.

36. Mr Thomas also drew our attention to Part 5, on page 31 of the current "Guide to the 2001 Compensation Scheme", which is headed "*Assessing your application*". Paragraph 1 states that, in general, the Authority can only consider an application if received within two years of the incident. Mr Thomas relied on the next sentence of the paragraph which states that the policy behind this time limit:

> "… is to provide a reasonable period for people to make an application and to make sure that our investigation of newer applications is not slowed down too much by checking the facts of older ones. It is usually more difficult to get reliable information about police investigations and medical treatment given at the time for incidents that happened a long time ago – records are harder to get hold of and may actually have been destroyed."

37. In addition Mr Thomas relied on paragraph 5 on page 32 of the Guide, which is under the heading of "*The 'standard of proof' for applications, and procedural issues (paragraphs 19 to 22 of the Scheme)*". Mr Thomas pointed out that the Authority itself did a great deal to help the process of the claim by obtaining reports from the police, doctors and so forth, whilst also pointing out that the Guide added that "… if you have, or want to get, evidence which supports your case and which we are unlikely to get through our normal enquiries, it is up to you to send it to us as soon as you can". Paragraph 7 on the same page also emphasises that the standard of proof needed to obtain an award is that of a balance of probabilities so that it will be easier for the applicant to establish his entitlement to an award.

38. Mr Thomas accepted that there was no prejudice to the Authority by the delay so far as establishing the circumstances of the death of Abraham Hutton was concerned. However, he submitted that there could be prejudice as to a determination of the financial dependency of all three claimants on Abraham Hutton at the time of his death and also the length of time for which Mr Hutton and his sister might be entitled to an annual payment for loss of their father's "parental services" and any other payments pursuant to the terms of paragraph 42 of the Scheme terms.

39. In response to Mr Thomas' points on the Guide, Mr Buttler submitted that the Guide demonstrated that the clear policy of the Authority was the efficient administration of the Scheme. Therefore, when deciding whether or not the two year time limit should be waived, a claims officer or review officer had to consider the question of whether the Authority had suffered prejudice by virtue of the delay in making the claim. That had not even been alluded to by Judge Ward except in general terms and not by reference to the facts of this case.

40. It seems to me that the issues we have to consider are: (1) is it reasonably arguable that Judge Ward erred in law in his construction of paragraph 18 of the terms of the Scheme, and, if so (2) is there a reasonably arguable case that the F-tT, correctly directed on the law, could reasonably reach the conclusion that the time limit in this case should be waived. The second point has to be considered because if, on the correct construction of paragraph 18 there was no possibility that the F-tT could reasonably have reached a different conclusion, there would be no point in granting permission to bring judicial review proceedings as to the F-tT's decision.

Discussion and conclusions

41. In my view Judge Ward undoubtedly erred in law in his construction of paragraph 18 of the Scheme terms. He considered that the first question he had to ask was whether there were any relevant "particular circumstances" in this case and the second question was whether or not it was in the "interests of justice" to waive the time limit. That misreads the last sentence of paragraph 18. That states that a claims officer "may waive" the two year time limit where he considers that "by reason of the particular circumstances of the case, it is reasonable and in the interests of justice to do so". To my mind the words "particular circumstances" mean the actual or distinct circumstances of this individual case. They do not mean "special" circumstances in the sense of being unusual or extraordinary circumstances. So the task of the claims officer or reviewing officer is to establish the actual circumstances of this particular case. Having done so he then has to ask: given the circumstances of this particular case, is it reasonable and in the interests of justice to waive the time limit.

42. In performing that exercise, I think that the wording requires that the claims officer must consider all relevant factors. These may include the length of the delay in making the claim, the reasons for the delay and the nature of the claim itself. The relative importance of particular factors will depend on the particular circumstances of the case being considered. The claims officer has to make an overall decision bearing all those circumstances in mind. In doing so he will have to take account of the fact that the general rule is that claims should be brought as soon as possible and, in any event, within two years of the incident giving rise to the claim.

43. So, I move on to the second question: assuming Judge Ward erred in law, is it arguable that he might reasonably have concluded that the time limit should be waived in this case. In my view it is. I accept that the period of the delay was very long indeed; it is nominally some 20 times greater than the maximum allowed. I also accept that the approach of Mr Hutton was to gather all the information he could find before making the claims and that this may have been a mistaken approach. I also take the point, made by Mr Thomas, that this delay may make the assessment of compensation (even the "standard" amounts under paragraphs 39 and 42) more difficult. But it seems to me to be reasonably arguable that on the particular facts of this case, the F-tT could reasonably come to the conclusion that the time limit should have been waived by the claims officer. For reasons I give in [46] below, I have decided I should not go into this issue in further detail.

44. For these reasons I would grant permission to bring judicial review of Judge Ward's decision in relation to all three applicants. The case for Mr Hutton's mother and sister is even stronger, because they are both suffering from mental problems and they cannot be blamed for any delays which may have resulted from the way Mr Hutton has gone about researching and presenting the claims.

45. I have considered carefully whether it would be right for this court to go on to deal with the substantive issue of whether to grant judicial review of decision. In giving his reasons for granting permission to appeal to this court the question of whether leave to bring judicial review should be granted, Rix LJ expressed the tentative view (at [12] of his judgment [[2011] EWCA

Civ 1560]) that "… if it is appropriate for there to be a 'rolled-up' hearing in the Court of Appeal, I would give directions for that", in other words it might be possible that this court should consider the substantive question of whether or not to grant judicial review of the F-tT's decision.

46. I have decided that the matter should be remitted to the UT to decide that issue. This is because, if my colleagues agree with my conclusion that Judge Ward erred in law, the next stage is to reconsider all the relevant factors to see whether or not it is in the interests of justice in this particular case to waive the two year time limit. I am conscious of the fact that Mr Buttler conducted the hearing before us *pro bono*. Despite doing so very thoroughly, it seems to me that there may well be issues concerning the different types of compensation that could be claimed and there may be different issues which arise in relation to the three different applicants on which we have not heard full argument and may need further investigation by the UT. It will be better equipped than this court to deal with those issues.

Disposal

47. I would allow this appeal, grant permission to bring judicial review proceedings in respect of Judge Ward's decision, but remit the matter to the Upper Tribunal (Administrative Appeals Chamber) to determine the actual judicial review.

LORD JUSTICE MCFARLANE:

48. I agree.

LADY JUSTICE ARDEN:

49. I also agree.

Appendix to judgment of Lord Justice Aikens

The Criminal Injuries Compensation Scheme (2001)

Paragraphs 18 – 19 and 37 – 42.

Consideration of applications

18. An application for compensation under this Scheme in respect of a criminal injury ("injury" hereafter in this Scheme) must be made in writing on a form obtainable from the Authority. It should be made as soon as possible after the incident giving rise to the injury and must be received by the Authority within two years of the date of the incident. A claims officer may waive this time limit where he considers that, by reason of the particular circumstances of the case, it is reasonable and in the interests of justice to do so.

19. It will be for the applicant to make out his case including, where appropriate:

(a) making out his case for a waiver of the time limit in the preceding paragraph; and

(b) satisfying the claims officer dealing with his application (including an officer reviewing a decision under paragraph 60) that an award should not be reconsidered, withheld or reduced under any provision of this Scheme.

Where an applicant is represented, the costs of representation will not be met by the Authority.

Compensation in fatal cases

37. Where the victim has died in consequence of the injury, no compensation other than funeral expenses will be payable for the benefit of his estate. Such expenses will, subject to the application of paragraphs 13 and 14 in relation to the actions, conduct and character of the

deceased, be payable up to an amount considered reasonable by a claims officer, even where the person bearing the cost of the funeral is otherwise ineligible to claim under this Scheme.

38. Where the victim has died since sustaining the injury, compensation may be payable, subject to paragraphs 13-15 (actions, conduct and character), to any claimant (a "qualifying claimant") who at the time of the deceased's death was:

(a) the partner of the deceased, being only, for these purposes:

(i) a person who was living together with the deceased as husband and wife or as a same sex partner in the same household immediately before the date of death and who, unless formally married to him, had been so living throughout the two years before that date, or

(ii) a spouse or former spouse of the deceased who was financially supported by him immediately before the date of death; or

(b) a natural parent of the deceased, or a person who was not the natural parent, provided that he was accepted by the deceased as a parent of his family; or

(c) a natural child of the deceased, or a person who was not the natural child, provided that he was accepted by the deceased as a child of his family or was dependent on him.

Where the victim has died in consequence of the injury, compensation may be payable to a qualifying claimant under paragraphs 39-42 (standard amount of compensation, dependency, and loss of parent). Where the victim has died otherwise than in consequence of the injury, and before title to the award has been vested in the victim (see paragraph 50), no standard amount or other compensation will be payable to the estate or to a qualifying claimant other than under paragraph 44 (supplementary compensation).

39. A person who was criminally responsible for the death of a victim may not be a qualifying claimant. In cases where there is only one qualifying claimant, the standard amount of compensation will be Level 13 of the Tariff, save that where a claims officer is aware of the existence of one or more other persons who would in the event of their making a claim become a qualifying claimant, the standard amount of compensation will be level 10 of the Tariff. Where there is more than one qualifying claimant, the standard amount of compensation for each claimant will be Level 10 of the Tariff. A former spouse of the deceased is not a qualifying claimant for the purposes of this paragraph.

40. Additional compensation calculated in accordance with the following paragraph may be payable to a qualifying claimant where a claims officer is satisfied that the claimant was financially or physically dependent on the deceased. A financial dependency will not be established where the deceased's only normal income was from:

(a) United Kingdom social security benefits; or

(b) social security benefits or similar payments from the funds of other countries.

41. The amount of compensation payable in respect of dependency will be calculated on a basis similar to paragraphs 31-34 (loss of earnings) and paragraph 35 (d) (iii) (cost of care). The period of loss will begin from the date of the deceased's death and continue for such period as a claims officer may determine, with no account being taken, where the qualifying claimant was formally married to the deceased, of remarriage or prospects of remarriage. In assessing the dependency, the claims officer will take account of the qualifying claimant's income and emoluments (being any profit or gain accruing from an office or employment), if any. Where the deceased had been living in the same household as the qualifying claimant before his death, the

claims officer will, in calculating the multiplicand, make such proportional reduction as he considers appropriate to take account of the deceased's own personal and living expenses.

42. Where a qualifying claimant was under 18 years of age at the time of the deceased's death and was dependent on him for parental services, the following additional compensation may also be payable:

(a) a payment for loss of that parent's services at an annual rate of Level 5 of the Tariff; and

(b) such other payments as a claims officer considers reasonable to meet other resultant losses.

Each of these payments will be multiplied by an appropriate multiplier selected by a claims officer in accordance with paragraph 32 (future loss of earnings), taking account of the period remaining before the qualifying claimant reaches age 18 and of any other factors and contingencies which appear to the claims officer to be relevant.