

## [2010] AACR 8

(Sharon Currie (Petition for Judicial Review of decisions of the First-tier Tribunal)  
[2009] CSOH Civ 45)

**CSOH (Lord Hodge)**  
**23 October 2009**

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### **Judicial Review in Scotland – application for judicial review of decisions of the First-tier Tribunal (Social Entitlement Chamber) under the Criminal Injuries Compensation Scheme – whether application to be transferred to the Upper Tribunal**

It was averred by the petitioner that the First-tier Tribunal, when making two decisions in Scotland under the Criminal Injuries Compensation Scheme, had not seen certain submissions made by the petitioner or alternatively had failed to have regard to them and that it had had taken account of irrelevant matters. There was no right of appeal to the Upper Tribunal against the First-tier Tribunal's decisions and so the petitioner sought to challenge them by way of an application to the Court of Session for judicial review. The petition initially sought the mandatory transfer of the application for judicial review to the Upper Tribunal under section 20(1)(a) of the Tribunals, Courts and Enforcement Act 2007 but it was subsequently amended to seek a first order in the normal terms on the basis that the Court did not have any power to transfer the application to the Upper Tribunal under either paragraph (a) or paragraph (b) of s.20(1).

*Held*, making the first order sought in the petition as amended, that:

1. criminal injuries compensation is a devolved matter in Scotland and therefore the Court had no power of discretionary transfer under section 20(1)(b) of the 2007 Act (paragraph 4);
2. the Act of Sederunt (Transfer of Judicial Review Applications from the Court of Session) 2008 (SSI 2008/357), which specifies challenges to procedural decisions or procedural rulings as cases that may be subject to mandatory transfer under s.20(1)(a) of the 2007 Act, extends to procedural omissions or oversights giving rise to unfairness (paragraph 6);
3. a challenge made not only to procedural decisions or rulings but also to errors of law which are not of a procedural nature does not fall within the scope of the Act of Sederunt and therefore such an application is not subject to mandatory transfer to the Upper Tribunal under section 20(1)(a) (paragraph 7);
4. the averment that the First-tier Tribunal had not seen the submissions was capable of being regarded as being of a procedural nature but the averments that it had not had regard to the submissions and had had regard to irrelevant matters were not of a procedural nature and therefore there was no power to transfer the case to the Upper Tribunal (paragraphs 8 and 10).

### **DECISION OF THE COURT OF SESSION (OUTER HOUSE)**

Mr Christopher Dickson, Solicitor Advocate (instructed by Anderson Strathern), appeared for the petitioner

1. This is an application for judicial review of two decisions of the First-tier Tribunal (Social Entitlement Chamber) in relation to the petitioner's appeal against the refusal by the Criminal Injuries Compensation Authority of her application for compensation.
2. In the petition as initially drafted the petitioner sought the mandatory transfer of the application for judicial review to the Upper Tribunal under section 20(1)(a) of the Tribunals, Courts and Enforcement Act 2007 (the 2007 Act), averring that Conditions 1, 2 and 4 set out in that section were met. After further reflection, the petitioner's solicitor advocate, Mr Dickson, amended his application and no longer sought the transfer of the application to the Upper Tribunal. Instead he submitted that the court had no competence to transfer the application to the Upper Tribunal. He therefore sought a first order in the normal terms.

## **Legal background**

3. The petitioner appealed to the First-tier Tribunal in exercise of a right conferred by the Criminal Injuries Compensation Scheme in compliance with section 5 of the Criminal Injuries Compensation Act 1995. Accordingly, the First-tier Tribunal's decision was one against which there was no right to appeal to the Upper Tribunal: 2007 Act section 11(1) and (5). Any remedy against the decisions of the First-tier Tribunal (other than a re-making of a decision by that Tribunal) is therefore available only by judicial review.

4. Criminal injuries compensation is a devolved matter in Scotland under the Scotland Act 1998. As a result, this court has no power of discretionary transfer under section 20(1)(b) of the 2007 Act. See section 20(4) of the 2007 Act, which provides as Condition 3 that "the subject matter of the application is not a devolved Scottish matter".

5. In order to transfer the application to the Upper Tribunal under section 20(1)(a) of the 2007 Act the court would have to be satisfied that Conditions 1, 2 and 4 set out in section 20 were met. It is clear that Conditions 1 and 4 are met and no more need be said about them. The problem is Condition 2. Section 20(3) states: "Condition 2 is that the application falls within a class specified for the purposes of this subsection by act of sederunt made with the consent of the Lord Chancellor." The Act of Sederunt (Transfer of Judicial Review Applications from the Court of Session) 2008 (SSI 2008/357) specifies as the class of application "an application which challenges a procedural decision or a procedural ruling of the First-tier Tribunal ...".

6. It seems to me that the legislation which requires the transfer to the Upper Tribunal of applications challenging procedural decisions or procedural rulings covers also challenges to decisions which are vitiated by procedural errors. Thus, if the First-tier Tribunal omitted to take a necessary procedural step and thereby gave rise to procedural unfairness, the challenge to the failure to take that step would properly fall within the scope of the Act of Sederunt. In other words, I interpret procedural decisions and procedural rulings as extending to procedural omissions or oversights giving rise to unfairness.

7. But an application for judicial review which challenges not only such procedural decisions or rulings but also errors of law which are not of a procedural nature is not one which falls within the terms of the Act of Sederunt and is therefore not subject to mandatory transfer.

## **The nature of the present application**

8. The petitioner in the first challenge in her application inferred from the decision of the Tribunal Judge dated 26 August 2009 either (i) that she had not seen certain submissions which the petitioner's agents had lodged with the Tribunal or (ii) that she had erred in law in failing to have regard to those submissions. The first alternative inference is in my opinion capable of being regarded as a procedural error by the First-tier Tribunal as it suggests that someone failed to give the Tribunal Judge the relevant documents. The second alternative is an alleged error of law which is not of a procedural nature. The second challenge, which was that the Tribunal Judge had taken account of matters which the Criminal Injuries Compensation Authority had not issued, is also an alleged error of law which is not of a procedural nature.

9. The petitioner's other challenge was to the decision of the First-tier Tribunal dated 7 October 2009 in which it refused on the grounds of lack of jurisdiction her application to have her papers placed before another Tribunal Judge for fresh consideration of her appeal. This

decision, she submitted, was a misdirection because Rule 37 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685) empowered the Tribunal to set aside and re-make a decision where there was some procedural irregularity in the proceedings. Mr Dickson submitted that this was a procedural ruling. It seems to me however that it was a decision on jurisdiction. But that is of no consequence because the application unquestionably includes challenges which do not relate to procedural matters and therefore cannot be the subject of a mandatory transfer.

### **Conclusion**

10. I am satisfied that I do not have the power to transfer this application to the Upper Tribunal either as a mandatory transfer under section 20(1)(a) or as a discretionary transfer under section 20(1)(b) of the 2007 Act. I therefore make the first order which Mr Dickson sought in his amended application.

### **Postscript**

11. I note that the Tribunals Service wrote to the petitioner's agents on 16 September 2009 informing them that the petitioner could apply to the Upper Tribunal for judicial review of a final decision of the First-tier tribunal which was "wrong in law". While this is the position in England and Wales in accordance with the Lord Chief Justice's Practice Direction dated 29 October 2008 ([2009] 1 WLR 327), it is important that the Tribunals Service should have regard to the more limited terms of the Act of Sederunt to which I referred in paragraph 5 above.