IN THE UPPER TRIBUNAL **UA-2022-000653-CIC**
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 121 (AAC)**

Before: Upper Tribunal Judge Wright

DECISION

I grant the application for judicial review of the decision of the Social Entitlement Chamber of the First-tier Tribunal of 1 February 2022 under the tribunal case reference CI021/17/00298.

The Upper Tribunal's order is:

(i) to QUASH the decision of the First-tier Tribunal (Social Entitlement Chamber) (Criminal Injuries Compensation) of 25 July 2017; and

(ii) to REMIT the appeal to be redecided afresh by an entirely freshly constituted First-tier Tribunal (Social Entitlement Chamber) (Criminal Injuries Compensation), at an in person, face to face, oral hearing and in accordance with the law as set out below.

REASONS FOR DECISION

Introduction

1. This is a judicial review of a decision of the First-tier Tribunal made on 1 February 2022 ("the FTT"). The FTT's decision and this decision of the Upper Tribunal turn on rule 89 of the Criminal Injuries Compensation Scheme 2012 ("the 2012 Scheme"). Rule 89 provides as follows:

> "89. A claims officer may extend the period referred to in paragraph 87, 88 or 88A, where the claims officer is satisfied that: (a) due to exceptional circumstances the applicant could

> not have applied earlier; and (b) the evidence presented in support of the application means that it can be determined without further extensive enquiries by a claims officer."

2. On appeal, it was for the FTT to reconsider afresh whether the test in rule 89 of the 2012 Scheme was made out on the evidence. An important issue which arises on this judicial review is whether the FTT was correct to conclude that the appellant's **ignorance** of the criminal injuries compensation scheme was no defence and no excuse for her delay in making her application for compensation to the criminal injuries compensation authority ("CICA").

The relevant background in more detail

3. The incident for which the applicant is seeking compensation from CICA occurred on 2 June 2011. Given the narrow nature of the legal issues arising on this judicial review and the basis on which the application was refused by CICA, there is no need to consider the detail of that incident.

4. It is not disputed that the applicant did not apply to CICA for compensation until 29 April 2016. This is outside the two year time limit found in paragraph 87 of the 2012 Scheme, which provides, insofar as material, as follows:

> "87……, an application must be sent by the applicant so that it is received by the Authority as soon as reasonably practicable after the incident giving rise to the criminal injury to which it relates, and in any event within two years after the date of that incident."

5. The over two year delay was not however fatal to the application, if the applicant could satisfy paragraph 89 of the 2012 Scheme.

6. The applicant has succeeded before in a judicial review challenge to a decision of a previous First-tier Tribunal concerning her late application for criminal injuries compensation in respect of the incident on 2 June 2011. In those earlier proceedings (reference JR/1290/2019), Upper

Tribunal Judge Levenson quashed the earlier First-tier Tribunal decision. Judge Levenson did so because that First-tier Tribunal had erred in law in (a) illogically relying on the applicant's ability to engage in other procedures when her argument related to her lack of knowledge of the existence of the 2012 Scheme, and (b) by confusing the concept of needing to make enquiries with that of needing to analyse the considerable medical evidence already available. It was on this basis that the appeal came before the FTT on 1 February 2022.

7. For the reasons given by CICA, I accept that some caution needs to be taken in treating Judge Levenson's decision as laying down any point of legal principle. This is because it was a decision given without sight of the submissions CICA had made in those judicial review proceedings. It was on this basis that Judge Levenson later accepted that there had been a procedural irregularity in those proceedings. However, Judge Levenson declined to set his decision aside because to do so would have lengthened those proceedings and both parties could make their submissions on the merits to the (new) FTT.

8. The FTT in the current judicial review proceedings made detailed findings of fact around the matters relevant to paragraph 89 of the 2012 Scheme. The relevant findings were as follows.

9. The FTT found that the applicant had reported the incident to the police on 2 June 2011 and had further 'reported' it to her GP the next day. She had had to push the police to make a statement, which she did on 12 June 2011. Then, in or about August 2011, she made a complaint to the police after it decided not to charge her alleged assailant. Ultimately, she and her partner spoke to the Commissioner for Thames Valley Police but this did not result in any charge being brought.

10. The applicant had spoken to "ordinary people" about the incident and also the CAB, seemingly in our about 2012, about it, but the CAB could not support her and advised she see a solicitor, which she was too nervous to do.

11. The FTT further found that the applicant had lost confidence but every so often when she had the confidence she asked the police what they were intending to do. It also found, crucially for these proceedings, that the applicant did not know about the existence of the 2012 Scheme until about two weeks before she made the application to CICA on 29 April 2016, after speaking to Zoe at 'a voluntary organisation' . (The FTT refers to the contact with Zoe being in "early Summer 2016", but that cannot be correct.)

12. Further findings were made by the FTT that the applicant had a home computer on which she asked her partner to carry out research if required, that she used her local library for research into human rights matters, and she was not incapacitated between 2011 and 2013 such that she could not have made the application to CICA in time. Moreover, she was capable of making enquiries and her involvement with her complaint to the police and with the Information Communications Ombudsman, as well as her contact with the CAB and the advice to see a solicitor, showed "potentially knowledge was there for her to utilise".

13. Furthermore, the FTT found that during the period concerned the applicant was involved in a campaign against the proposed closure of a local swimming pool, she was active in this activity and in seeking justice, and she wanted justice instead of compensation.

14. On the basis of the above findings, the FTT held that the applicant:

> "17(k) could have researched the question of whether or not compensation was available for an instance such as she had been involved in and could have done that by a majority of means eg ask the Citizens Advice Bureau, ask a solicitor or use a search engine on a computer".

15. It was at this stage in its fact-finding and reasons that the FTT stated:

> "17(m) Of course ignorance is no defence and no excuse for delay."

16. The FTT continued:

> "17(p) There is a delay between the acquirement of actual knowledge and the claim date but as the appellant's partner points out this is minimal compared to the five year delay [beforehand]. In any event that delay is immaterial as it is the period of almost five years which the Tribunal considers to be fatal to the application.
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> 17(q) The Tribunal's conclusion is that in the light of the above the Appellant chose to pursue other matters such as the swimming pool issue or to seek justice ie the prosecution of the "offender" in the index event rather than look into the possibility of compensation.
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> 17(r) The Tribunal also calls in aid page C2005 to show the fact that the appellant knew about the use of solicitors for the purpose of obtaining compensation as that document is issued by Capita on the instructions of Pannone and Partners LLP in connection with a compensation claim.
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> 17(s) Thus as the appellant was pursuing other matters at the time it is difficult to conclude that her health prevented her from looking into the question of being able to seek compensation….
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> 17(u) If, however, the Tribunal were incorrect in that conclusion they would also point out that the Appellant would fall foul of paragraph 89(b) because the evidence before the Tribunal and [CICA] in support of the application is not sufficient in the Tribunal's view.
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> 17(v) The Tribunal agree with the Presenting Officer [for CICA]'s view that despite the volume of documentation it is not clear that the causal injuries would fall within the tariff set out in the Scheme.
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> 17(w) In addition, further medical evidence would be required in the form of reports because the Appellant refers to PTSD, multiple sclerosis and limb pain. It is also likely that psychological reports would be required.
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> 17(x) In the Tribunal's view this meant that paragraph 89(b) could not be satisfied."

The Upper Tribunal proceedings

17. After an oral hearing on 13 July 2023, I gave the applicant permission to judicially review the FTT's decision. I did so on the following three grounds.

> "4. First, it is arguable that the First-tier Tribunal erred in law in failing to ascertain why [the applicant]] was not aware of the Criminal Injuries Compensation Scheme ("the Scheme") as part of its overall assessment of whether, per rule 89(a), due to exceptional circumstances [the applicant] could not have claimed earlier. This may be said to involve the same error Upper Tribunal Judge Levenson held the previous First-tier Tribunal to have made, namely illogically relying on [the applicant's] ability to engage in other procedures when her argument related to her lack of knowledge of the Scheme's existence.
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> 5. [The applicant's] case, as I understand it, in essence was that she had no knowledge that any Scheme existed until she had been told about it by Zoe (from Victim Support) in the early summer of 2016. [The applicant] had looked to the police to tell her of the remedies available to her after the alleged assault. Her case is that the police did not tell her anything about there being a Scheme. It appears that a police officer accepted before the first First-tier Tribunal that he had not told [the applicant] about the Scheme. This evidence was apparently not noted or explored by the First-tier Tribunal on 1 February 2022. It was further [the applicant's] case that when a police inspector told her that the CPS had decided against bringing a prosecution against her alleged assailant, the Inspector had limited the information about what remained for [the applicant] to do to seek redress to her bringing a private prosecution against her alleged assailant.
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> 6. The First-tier Tribunal's approach to this issue appears to have been (i) that [the applicant] did not know about the Scheme, (ii) however ignorance of the law was no excuse, and (iii) given her other activities, she could have found about the Scheme had she researched matter online (i.e. she ought to have known about it). It is arguable the First-tier Tribunal erred in law in this approach in ruling out from its consideration *why* [the applicant] was ignorant of law and consequently focusing decisively on what she ought [to] have known. It is arguable that being ignorant of law was no more than a starting point for consideration of whether the rule 89(a) exceptional circumstances existed. The critical issue is arguably why the person did not know about the Scheme (see paragraph [11]-[12]

> of *GS v FTT (Social Entitlement Chamber)* [2013] UKUT 628 (AAC) and the other authorities cited therein) and not that such ignorance cannot assist the person.
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> 7. Second, it is arguable the First-tier Tribunal erred in law in law in its approach to the further test in rule 89(b) of the Scheme in:
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> a. not applying the correct statutory test by stating in paragraph 17(u) of its reasons that the evidence before the Tribunal and CICA in support of the application was not sufficient;
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> b. in taking account of an immaterial matter in paragraph 17(v), namely whether the causal injuries would fall within the tariff set out in the Scheme; and
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> c. in failing to give adequate reasons for why the evidence presented in support of the application meant that it could not be determined without further extensive enquires by a claims officer. The reasons arguably fail to explain what the evidence was that was presented in support of the application (though reference is made by the First-tier Tribunal to the "volume of documentation), why that evidence meant that the application could not be determined, and why any further enquires would need to be extensive.
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> 8. Third, it is arguable the First-tier Tribunal erred in law in failing to properly ascertain from [the applicant] the nature of her vulnerabilities as a vulnerable adult: see *R (NL) v First-tier Tribunal and Criminal Injuries Compensation Authority* [2021] UKUT 158 (AAC). I appreciate that this ground may not have any determinative effect if the first two grounds cannot succeed (see further on this paragraphs 12 and 25 of Upper Tribunal Judge Perez's refusal of permission of 3 April 2023). This ground covers the points made by [the applicant] in her written grounds under 'procedural irregularities'. I may add, in so far as it may be considered relevant, that it was noticeable in the oral permission hearing before me the difficulties [the applicant] had in answering what I thought were clear and straightforward questions. She was much assisted by what Mr Gibson had told me, but First-tier Tribunal hearings usually (and rightly) wish to concentrate on the appellant's evidence. The First-tier Tribunal's reasons do not address [the applicant's] potential vulnerabilities in giving evidence."

18. In its written submissions on the judicial review, drafted by Robert Moretto of counsel, CICA consents to the judicial review being allowed but on the third ground only. It submits that the appeal should be remitted to a freshly constituted First-tier Tribunal for rehearing entirely

afresh. CICA's support for the judicial review being allowed on the third ground is for the following reasons.

> "4….CICA agrees that the FtT failed to set out as required (either in the decision notice or written reasons when requested) what the FtT decided about the "*Practice Direction: First-Tier and Upper Tribunal - Child, Vulnerable and Sensitive Witnesses*" and how to apply it so as to facilitate the giving of evidence by the Applicant, who is clearly a vulnerable person as described by the Practice Direction. That is contrary to the decision of the Upper Tribunal in *RT v SSWP* (PIP) [2019] UKUT 207 (AAC) (esp. para 91), as applied in the criminal injuries compensation context in the *R(NL) v FtT & CICA* [2021] UKUT 158 (AAC), which require the FtT to do so, and record they have done so.
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> 5. The CICA should underline that it has now received and heard the recording of the hearing, and in no sense whatsoever can it be suggested that the FtT, or the presenting officer, bullied the Applicant in any way. The FtT and the presenting officer were at all times polite, considerate and reassuring to the Applicant, affording her time to answer questions and breaks. Indeed there were several breaks and at one time the Applicant was offered a break which she said she did not need.
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> 6. The concern however of the CICA is that:
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> > 6.1. This was in fact (contrary to the Applicant's application for judicial review), a telephone hearing and not a video hearing. There was therefore already some degree of disconnect as between the Applicant and the proceedings given that neither she, nor her partner, could see the FtT and presenting officer, and indeed they could not see her.
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> > 6.2. Furthermore, key to the determination of whether time could be extended was the Applicant's position as to why she did not follow up the advice she was given by the CAB to go and see a solicitor about recovering compensation. The finding of the FtT was that the Applicant made a choice to pursue other matters rather than look into the possibility of compensation (see Reasons, para 17(q). The FtT recorded the Claimant's evidence at para 17(d) that she was too nervous to see a solicitor. That evidence was different to the evidence recorded in the first FtT decision, at paras 28 and 30 (namely that she did not go due to cost) (see [TD/12]. 6.3. In circumstances in which the Applicant's evidence as to why she did not go to see a solicitor when she was advised to do so was key, and there was some degree of

> apparent inconsistency in the evidence given at various different stages, it appears to the CICA that it was incumbent to ensure that the requirements of the Practice Direction were met, and recorded as being met. That is in order to ensure that there could be no question that the evidence given by the Applicant was the evidence that she wished to give, rather than evidence which may have been impacted by any cognitive difficulty compounded by the stress of the hearing.
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> 6.4. Furthermore, this is not a situation in which it can be said that Ground 3 is academic if the other two Grounds are dismissed because Ground 3 goes to the fairness to the hearing as a whole."

19. CICA's submission did not agree with the judicial review being allowed on either the first or second grounds, and it sets out argument for why it considers the FTT did not err in law on either of those grounds.

20. Perhaps unsurprisingly, having seen CICA's submission the applicant said in her submission in reply that, on the basis that CICA agreed to the application for judicial review being allowed and also agreed to another First-tier Tribunal, she had no additional comments to make.

Discussion and Conclusion

21. Given the stance of both parties, and in any event, I am prepared to accept that the FTT's decision should be quashed under the third ground on which I gave permission for judicial review. The FTT erred in law in failing to show through its reasons that it had fully and properly ascertained the nature of the appellant's vulnerabilities as a vulnerable adult and how they should be addressed. I agree with CICA, and for the reasons it gives, that this was particularly so in the context of the appeal being dealt with at a telephone hearing.

22. I am concerned, however, by the potential argument that the above would not have been a material error of law if, as CICA argues, the FTT did not err in law under either of the other two grounds of appeal. As Upper Tribunal Judge Perez pointed out when she refused to give

permission for these judicial review proceedings, if the FTT directed itself correctly in finding paragraphs 89(a) and 89(b) could not be met on the applicant's evidence, it may be difficult to see on what basis the third ground of appeal led the FTT into any material error of law. However, (a) neither party is arguing for such a result before me, (b) these proceedings are now of some vintage (for which in respect of my contributing delays I apologise) and it would be inappropriate to extend them by seeking further submissions or a further oral hearing, and (c) even on CICA's case, and otherwise, the third ground of appeal has an overarching effect which means that the FTT may not have gathered all relevant evidence from the applicant under both paragraph 89(a) and (b) of the Scheme.

23. The above is therefore sufficient to dispose of these proceedings and allow the judicial review of the FTT's decision of 1 February 2022.

24. I remain troubled, however, by the FTT's view that being ignorant [of the existence of 2012 Scheme] is no defence and no excuse for any delay, and how that may have affected its approach to the overall question of whether due to exceptional circumstances the applicant could not have applied to CICA earlier than she did in April 2016. I am satisfied for the reasons I give below that the judicial review should also succeed on the first ground on which I gave permission.

25. In my judgment, that there can be no *a priori* exclusion of a person being ignorant of law from the exceptional circumstances which *may* show they were not able to apply to CICA any earlier than they did. Nor do I understand CICA to be arguing for such a result. Its argument is that the FTT, having found that the applicant did not in fact know about the Scheme, did enough to explore why the applicant did not and what she could have done to find out about the Scheme, and so *ought* to have known about it before April 2016. But, to borrow from paragraph 17.2 of CICA's written submissions on this judicial review, "there may be exceptional circumstances which mean that an applicant could not reasonably have made enquires earlier", per *MM* v CICA

[2018] CSOH 63; [2018] SLT 843, (see further below), and in such a case it may be that rule 89(a) of the 2012 Scheme might be satisfied. That, however, is part of the overall evaluation of the circumstances under paragraph 89(a).

26. I can see that there may be force in CICA's argument under the first ground of appeal that:

> "given that the Applicant was expressly told by the CAB that she needed to see a solicitor about the matter in 2012, it is clear that the Applicant could have applied earlier than 2016. That is, she clearly could have applied earlier by doing that which she was advised to do in 2012, namely seek the advice from a solicitor. However, she chose not to do."

This will now be an evidential matter for the new First-tier Tribunal to explore and determine.

27. However, CICA's argument helpfully illustrates the inadequacy of the FTT's approach to why the applicant did not in fact know about Scheme until the Spring of 2016. The force of CICA's argument depends on the nature of "the matter" about which the applicant was seeking advice from the CAB, and that is not clear from the FTT's findings and reasons. This was (and remains) of importance as what exactly the applicant was seeking advice from the CAB about is, in my judgement, relevant to her knowledge at the time she sought that advice and the knowledge she then had, and might have been expected to gain, when the CAB referred her to see a solicitor. In other words, what she was seeking advice about was relevant to whether the applicant could reasonably have made enquiries earlier than 2016. For example, was the applicant seeking advice about any redress, including compensation, she could obtain for the index incident in June 2011, or was her search for advice limited to whether she could take any further action to force the police to prosecute the alleged assailant?

28. The deficit in the FTT's reasoning, in my judgement, was its failure to establish the context in which the applicant was seeking advice from the CAB about the "index event", and this then ties in to the reasons why she was not aware that a criminal injuries compensation scheme existed until earlyish in 2016.

29. As I have said, the context might have been whether the applicant could receive any form of redress or compensation for the incident, though it might be thought that if that were the context then the CAB would have been able to tell her about CICA's existence. The FTT's findings at 17(i) and (j) that the applicant was "focussing on justice" and "seeking justice rather than compensation" may have been relevant to what it was the applicant was seeking advice from the CAB about, as too might the FTT's finding in paragraph 17(d) that every so often the applicant got sufficient confidence "to ask the Police what <u>they</u> intended to do about the matter" (the underlining is mine and has been added for emphasis). But if this was the context in which the applicant (a) sought advice from the CAB and (b) could then have obtained further advice from a solicitor, CICA's argument may well have force.

30. If, however, the applicant was instead seeking advice from the CAB about getting justice from the police, which paragraphs 17(d), (i) and (j) pf the FTT's written reasons might support, her failure to consult with the solicitor <u>on that issue</u> may not establish that she ought to have found out about the existence of the criminal injuries compensation scheme in 2012 or before when she did in 2016.

31. The latter context therefore does not necessarily provide an answer for why the applicant did not know about the criminal injuries compensation scheme until on or just before April 2016 or to whether she could (not) reasonably have been expected to make enquiries earlier than 2016. The reasons why the applicant did not know the Scheme existed until 2016 were relevant to whether the paragraph 89(a) 'exceptional circumstances' existed because they frame the

reasonableness of the applicant's actions (or her lack of action) in finding out about the Scheme's existence.

32. Take the hopefully extreme example, which I emphasise is not this case, of an applicant who was given wrong information from someone they were entitled to accept as an authoritative source that no such scheme existed. Why then, subject to any intervening event or contrary information, could the applicant's ignorance of the scheme not potentially amount to an exceptional circumstance under paragraph 89(a) of the 2012 Scheme? It is difficult in this example to see why it would be considered reasonable for that applicant to seek further advice or information about the existence of the criminal injuries compensation scheme. But even on the applicant's case, if she was not seeking advice from the CAB about financial compensation for injuries she considers she suffered due to the index incident, why that was so and why she did not in fact know (and did not take steps from the index incident occurring in 2011 to 2016 to find out about such compensation) were all, in my judgment, relevant to whether she satisfied the test in paragraph 89(a) of the 2012 Scheme.

33. I add here that I accept, as CICA argue, that the case law to which I referred when giving permission should be treated with caution in relation to paragraph 89(a) of the 2012 Scheme because that case law relates to the similar 'late claim' rules in earlier iterations of the Criminal Injuries Compensation Scheme and on any analysis the wording of paragraph 89(a) of the 2012 Scheme is both different and more restrictive than the wording used in those earlier rules.

34. However, the view I have expressed above about the importance of the FTT establishing why the applicant was in fact ignorant of the criminal injuries scheme between 2011 and before April 2016 is supported by one existing authority decided under the 2012 Scheme: *MM v CICA* [2018] CSOH 63; SLT 843. This a decision of the Outer House of the Court of Session. The key relevant passage in *MM* is at paragraph [45],

which reads as follows (I have underlined the parts in it which I consider support my analysis):

> "45. The other matter mentioned by the FTT is the reliance placed by the appellant on her ignorance of the criminal injuries compensation scheme until after she had been to see Rape Crisis and subsequently reported the matter to the authorities. In paragraph 15 of its decision, the FTT conclude that such ignorance of the scheme could not reasonably be described as an exceptional circumstance insofar as the petitioner was not a child at the date of the incident, did not suffer from any intellectual or cognitive deficit and who was intelligent, educated and socially aware. I have touched upon this already, though only briefly. Taken by itself this reasoning is unexceptional. As Mr Pirie pointed out, the petitioner could have made enquiries and found out about the scheme. But this is to take too narrow a view. The petitioner's ignorance of the scheme has to be taken as part of the bigger picture, which is that of a victim of rape manifesting the reticence commonly seen amongst such victims as described in the authorities to which I have referred. The question is whether such a person, who is *ex hypothesi* reluctant to speak to anyone about the incident let alone report matters to the authorities, could reasonably be expected to make enquiries about a compensation scheme which depended upon her telling others about what had happened. <u>There is no doubt that ignorance of the scheme can be a relevant factor…. But much will depend upon the underlying circumstances and the reason for that ignorance. It is wrong, therefore, to consider ignorance of the scheme as a self-contained point – rather it is part and parcel of the package of circumstances which resulted in the petitioner not applying for compensation earlier</u>. I should add, however, that I do not accept the argument advanced by Mr Pirie to the effect that because a majority of victims of rape or other sexual assault do not know about the possibility of making a claim for criminal injuries compensation under the scheme until they have reported the matter to the authorities, then it follows that ignorance of the scheme cannot be an exceptional circumstance justifying an extension of the time limit for making an application. For the reasons outlined above, the question of exceptionality must be considered in relation to the whole package of circumstances relied on."

35. I direct the new First-tier Tribunal to whom this appeal is being remitted to decide the appeal in accordance with *MM* and with what I have said above about why the applicant was 'ignorant of the law' is relevant to the overall assessment of whether she met the 'exceptional circumstances' test in paragraph 89(a) of the 2012 Scheme.

36. I note, lastly, what CICA's submission to the Upper Tribunal says about paragraph 89(b) of the 2012 Scheme. As I read it, it accepts the FTT's reasons were brief but argues that the evidence before the FTT supported, and very arguably only supported, paragraph 89(b) not being met. In other words, that evidence shows that further extensive enquiries would be required by a claims officer in order to determine the (late) application. Those points have not been the subject of any argument before me. I see the potential force in them, but they will now be part of the evidential considerations the new First-tier Tribunal will have to consider afresh.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

Dated 12th April 2024