



**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Case No. UA-2022-000442-CIC**

On judicial review from the First-tier Tribunal (Social Entitlement Chamber)

**Between:** AS Applicant

and

The First-tier Tribunal Respondent  
(Social Entitlement Chamber)

The Criminal Injuries Compensation Authority Interested party

**Before: Upper Tribunal Judge Perez**

Decided on consideration of the papers

**Representation:**

Applicant: No representative

Respondent: No representative named in or with the representations on the substantive judicial review. Mr Robert Moretto of counsel for written submissions at the permission stage. Ms Sophie Beesley of counsel for oral submissions at the permission stage.

**DECISION**

1. I allow this judicial review to the extent of remittal..
2. The decision of the First-tier Tribunal dated 28 July 2021 (heard under reference CI021/21/00028) is quashed. The case is remitted to the Social Entitlement Chamber of the First-tier Tribunal, to be reheard in accordance with the directions at paragraph 36 of this decision.

**REASONS FOR DECISION**

**Introduction**

3. This is Miss S's application for judicial review of the First-tier Tribunal's decision to dismiss her criminal injuries compensation appeal. I gave permission on 23 August 2023 to bring this judicial review, after an oral hearing on 21 August 2023.

## **Factual and procedural background**

### **Application for compensation**

4. By a form completed and submitted on 23 November 2016, Miss S applied to CICA for compensation for “*domestic/family violence*” from 24 December 2006 to 29 September 2016, resulting in a physical injury to her eye and mental injury. She said in the claim form: “*I have been in domestic violence relationship [sic] since 2006 which I been emotionally abused and also was few accidents when I was beaten 26/7/15 he glassed me*”.

5. The police reports at pages B4 to B6 record five incidents of domestic violence in 2007 (page B4); one incident in January 2008 (page B6); one incident in January 2009 (page B5), one incident in August 2013 (page B5); one incident in August 2014 (page B5); three incidents in 2015 (in January, June and July 2015, pages B5 to B6), and then two incidents in 2016 (in July and September 2016, page B6).

6. In her claim form to CICA, Miss S ticked “Yes” to the question “*Have any of your injuries resulted in scarring?*”, enclosed photographs, and said that her current symptoms are depression. She ticked “Yes” also to the question: “*Has the injury resulted in any of the following for more than 28 weeks? As a direct result of your injury, did you have no, or a very limited, capacity for paid work?*”. She ticked “No” to the question “*As a direct result of your injury, did you incur costs for ‘special expenses’ such as treatment, care, special equipment?*”.

### **CICA decisions**

7. In its original decision dated 8 July 2020 (page A11), CICA awarded what it said was “A8” for disabling mental injury lasting from two to five years, with a 20% reduction for exacerbation, and B3 for what CICA said was “*severe abuse - pattern of repetitive violence*”. In fact, B3 is for the lesser injury: “*serious abuse intermittent physical assaults no appreciable disfigurement*”, which attracts £2,000, whereas “*severe abuse – pattern of repetitive violence resulting in minor disfigurement*” attracts B6 £5,500. But anyway, the original decision awarded the B3 amount. Miss S requested a review by a form completed on 3 August 2020 (pages A18 and A19). On review on 14 January 2021, CICA did not change the disabling mental injury award, except to correct the reference to A8 (which does not exist for DMI) to A7, but CICA did increase the physical abuse award to B6 (pages A21 to A25).

8. CICA did not award a special expenses payment (which had not been claimed), or a loss of earnings payment, in either the review decision or the original decision.

### **First-tier Tribunal decision**

9. Miss S appealed to the First-tier Tribunal by a form completed on 26 February 2021 (pages A26 to A29).

10. The First-tier Tribunal on 28 July 2021 upheld CICA’s review decision. The First-tier Tribunal’s findings included the following—

- (1) The applicant's evidence was evasive and unreliable, and she lacked credibility (paragraphs 5 and 6, First-tier Tribunal's written reasons);
- (2) There was nothing of significance in the medical evidence before them (contained at pages C1 to C183) to support her claim of having a prolapsed disc (paragraph 5, written reasons). Rather, any diagnosis of a prolapsed disc came solely from what the applicant had told a psychiatrist (paragraph 5, written reasons. Psychiatrist report referred to is at page C175).
- (3) The police report did not suggest that the applicant had been kicked once or twice in the back, let alone as she was contending three times in the back over three incidents. Nor did the police report suggest she had been kicked in the back in 2009, the year she said she had suffered a prolapsed disc (written reasons, paragraph 5).
- (4) The First-tier Tribunal was not persuaded that the applicant had a prolapsed disc at all or that, if she did, any back problem could be related to the domestic violence (written reasons, paragraph 5).
- (5) The applicant had various underlying mental health problems going back over a period of time, not connected to domestic violence, including gynaecological problems, fertility problems, a miscarriage and caring for her ill mother (written reasons, paragraph 6).
- (6) The claim that she had been unable to work since 2009 was contradicted by the evidence before the First-tier Tribunal, which suggested that she had had transient work at least between 2009 and 2015, and had a contract with London city airport from as recently as 2015 to 2017 (written reasons, paragraph 7).
- (7) The applicant's contention that she had not worked for three years before her contract with the airport was terminated was contradicted by the medical records, (written reasons, paragraph 7).
- (8) The First-tier Tribunal was not persuaded that there was little prospect of the applicant being unable to work, or that she had not worked, as a direct result of the injury from the crime of violence (written reasons, paragraph 7);
- (9) Any disabling mental health condition arising from the domestic violence did not continue to be a significant problem, so no higher award could be made than the award made by CICA in its review decision (£5,500 for a disabling mental injury of between 2 and 5 years) (written reasons, paragraph 7).

11. The First-tier Tribunal upheld the award for disabling mental injury and upheld the amount awarded by CICA for the physical injury. The First-tier Tribunal agreed with CICA that no award was merited for loss of earnings.

12. The table below sets out the CICA decisions and First-tier Tribunal findings—

|           | <b>Original CICA decision</b> | <b>CICA review decision</b>       | <b>Tribunal decision</b> |
|-----------|-------------------------------|-----------------------------------|--------------------------|
| Disabling | A8 (typo for A7) £6,200 -     | <b>Same:</b> A7 £6,200 - "lasting | Tribunal confirmed       |

|                          |  |   |   |
|--------------------------|--|---|---|
| mental injury            | “lasting 2 years or more up to 5 years”<br>With 20% reduction for exacerbation   | 2 years or more up to 5 years”<br>With 20% reduction for exacerbation   | CICA decision.  |
|                          | <b>Original CICA decision (continued)</b>  | <b>CICA review decision (continued)</b>   | <b>Tribunal decision (continued)</b>                    |
| Physical abuse           | B3 £2,000 x 30% “Serious abuse - intermittent physical assaults resulting in an accumulation of healed wounds, burns or scalds, but with no appreciable disfigurement” (which original decision labelled “severe”) | <b>Increase:</b> B6 £5,500 x 30% “Severe abuse - pattern of repetitive violence resulting in minor disfigurement” | Tribunal confirmed amount of award that CICA had given. |
| Loss of earnings payment | No loss of earnings payment  | <b>Same</b>   | Tribunal confirmed CICA decision.                       |
| Special expenses payment | No special expenses payment  | <b>Same</b>   | Tribunal confirmed CICA decision.                       |

### Application to the Upper Tribunal for permission to bring judicial review

13. By an application form completed on 2 March 2022 (pages 2 to 11) and received by the Upper Tribunal on 23 March 2022, Miss S applied for permission to bring judicial review proceedings to challenge the First-tier Tribunal’s decision. The application was received by the Upper Tribunal just over one month late. The Upper Tribunal admitted it in view of Miss S’s illness.

14. In her application form to the Upper Tribunal, Miss S advanced the following grounds to challenge the First-tier Tribunal’s decision—

“I am fully disagree with the judge who made written reasons.

1. CICA made a huge mistakes. One is on the reward. How the people who do not know me and my medical history (they have but ignored) simply fact about disabling mental injury will last between two no more than five years. Now is 2022 and I am still suffering. I will get new evidence from psychiatric. This is no about the money but about the justice. They ignored the documents from my GP main doctor even the previously years.

2. They have so many years, so many evidences, everything on the plate and they still wrong? which was proven ou ni 1 [sic]. Since 2016 ... [sic]

3. Hearing was an oral which was a telephone hearing due to COVID-19 situation at that time and still going as I am a proof, recovering since 19/01/22. Destroyed my heart more”.

4. I stated very clearly and true facts about my working situation. I always worked in this country. I came 2004 just for holiday. I founded a job and left my whole life back home in Poland. This is very easy to check with Customs or Revenue, which I suggested to the judge. Simply ignored. I am suffered of the memory etc. due to

mental health and injuries. They have all information, evidences. How can they asking me what was years/ months/ days ago if I cannot remember what was yesterday for example. There is written so many things which are not true. It is very easy to check my records, obviously I did all possible to work. I was fainting, bleeding, fallen because of pain, depression, panic [sic] attack. They my bosses sended me home. Doctor was signed sick notes, NOT me. I know this is their job to safe money. The key fact is I am not able to work at all. I am sick but open minded, still.

5. I was saying to judge what I know from my doctors about my back and other issues. The doctors diagnosis made. Also the judge stated there is no proof. There is so many. I wish he could touch my tailbone. You can feel.

Also MRI results etc. How can you spend twice a deposit on someone, opinions being a JUDGE without considering the case at all. Ignoring all evidences. Question doctors opinions? Ignoring the victim and my circumstances TOTALLY.

5. [sic] "Course of time." Was 12 years on and off. I am destroyed what their stated is very painfull [sic]. I never lied. The person who destroyed me, he tried to kill me. They have the evidences from police. What they saying is not true and I am ready to fight for justice.

The letters from doctors stated everything which is proof that judge was extremely wrong.

6. I clearly feel abused by the judge stating I was not credible witness. How horrible is that. They have stated that they have some doctor with them. Who they are? They are humans and was their opinion, which doesn't mean they are wright [sic].

I been extremely open and honest. I share with them that many doctors can't find what is the reason of my heavy bleeding. I will include the proof, what we were talking about. I was not complained at all. I am always positive even after I was going throug [sic] and how badly I am suffering now and probably forever. They should be smart enough to understand that I have problems with my concentration, pain and etc. I been very young when I started my life experience, which I thought was LOVE. Was since 2004-2016.

7. I was employed at City Airport until 2017. Their should call for witnesses from my work before "hanging" me with their painful, untruthful, false opinion. I was more on sick leave (months, years) because of my health

8. I belive [sic] only GOD. He is giving me strenght [sic] to live. I am thankful for every breath and I will do everything to get Justice which is huge problem with [sic].

I hope I can get help here.

Thank you for your time and I am very sorry to continue this unpleasant situation.

Nobody should judge others, without or with evidences. That is why we have JUSTICE to get help. It is my journey, my longevity was shorted [sic] because I was making wrong decission [sic] in my past but now I learned."

15. Miss S also sent to the Upper Tribunal emails on 9 August at 21.48, 9 August at 21.54 (enclosing a certificate of entitlement to Personal Independence Payment and letter from the police dated 10 December 2016), 10 August (a duplicate of the second of the 9 August) and 11 August 2023. In her email of 11 August, the applicant repeated her disagreement with the First-tier Tribunal's decision and added that "*On sick leave doctors written one of many problems on not all the issues*" and that "*Ps.I requested the*

letter from the Coty Airport(SSP) the letter with my attendance to work". No letter from City Airport was supplied to the Upper Tribunal after that email.

16. I directed an oral hearing of the application because I wanted CICA's input on certain matters.

17. The matters on which I wanted CICA's input at the permission hearing related to how the back condition was dealt with by CICA and by the First-tier Tribunal. The First-tier Tribunal appeared to have rejected the notion that Miss S's back condition was due to domestic abuse. But that tribunal had nonetheless upheld the CICA review decision (paragraph 5, written reasons). The CICA review decision had however increased the amount for the physical injury by departing from CICA's original decision which had not accepted that the back condition was the result of domestic abuse, and instead CICA accepted in the review decision that the abuse was the "root cause" of the back problems (page A24, fourth paragraph). But having apparently disagreed with the review decision on that causation point, the First-tier Tribunal did not then decrease the physical injury award back down from what CICA had increased it to. If the reason the First-tier Tribunal did not do that was because it did in fact agree with CICA that the back condition was caused by the domestic abuse, that was material because there were in the medical notes more than 28 weeks of sickness absence that were caused by the back condition.

18. At the permission hearing before me, Miss S reiterated her disagreement with the First-tier Tribunal's decision. She said that the First-tier Tribunal should have accepted that the back condition was from domestic abuse and should have accepted that she had had more than 28 weeks off work due to the domestic abuse (for the loss of earnings).

19. Miss S told me that her doctors in Poland all say she cannot work and that she will never be able to work. She had sent what appear to be Polish medical documents, but was unable to produce a letter from any of them to that effect, even in Polish. As to her GP in the UK, Miss S said "*it is not my fault if doctors put back condition rather than mental health*" in the GP notes as to cause of sickness absence. Miss S cited the parts of the GP letter dated 16 July 2020 "To whom it may concern" which said "*This is to confirm that there is extensive documentation throughout [Miss S's] notes regarding her problems due to domestic violence*" and "*She has had prolapsed disc in 2009 and this is reported as being a direct result of assault*" (page C179). Miss S said that these extracts showed that her back condition was caused by the domestic violence. She argued that this case is not about the money but about what she went through and that she should be awarded more money.

20. Miss S pointed, at the permission hearing, to the part of the 10 December 2016 letter from the police which said that her husband "*is currently on remand until a trial at Wood Green Crown Court in February 2017 charged with Threats the [sic] Kill and Threats to Cause Arson*". She submitted that this proved that her husband had tried to kill her.

21. For the DBS, there was for the permission hearing a helpful and thorough written submission from Robert Moretto of counsel, in which he said among other things that Miss S is seeking to do no more than reargue her case. Ms Beesley made oral submissions in accordance with Mr Moretto's written submission. She submitted that the findings were supported by the evidence and that, playing devil's advocate, she could find no evidence to support the applicant's contentions.

22. As to the back injury, Ms Beesley’s submissions for CICA at the permission hearing were to the effect that it was the RTA of 14 August 2014<sup>1</sup> – and not the domestic violence – that had caused any back injury and so no loss of earnings payment was merited because the time off work due to back pain, although exceeding 28 weeks (paragraph 44 of the scheme), was not attributable to the domestic violence (paragraph 43(1) of the scheme) and time off for anything attributable to the domestic violence did not exceed 28 weeks either. This reflected paragraphs 39, 41 and 42 of Mr Moretto’s written submission dated 3 March 2023.

### **Grant of permission to bring judicial review**

23. I gave permission, on 23 August 2023, to bring judicial review proceedings. I did so on the grounds that it was arguable that the First-tier Tribunal had erred in law (i) in failing to take account of the medical records entries that pre-dated the RTA and showed back pain, and (ii) in failing to explain why, despite those entries, the back pain was not from the domestic violence. I gave for that decision the reasons reproduced at paragraphs 30 to 32 below.

### **Submissions on the substantive judicial review**

24. In response to the grant of permission, CICA made this written submission—

“3. The CICA’s position in relation to the substantive judicial review hearing is neutral and the CICA has no further submissions to make in relation to relevant issues. The CICA does not request an oral hearing of the judicial review application.

4. The CICA would not oppose the First-tier Tribunal’s decision, in relation to this issue, being quashed and the case being remitted to the First-tier Tribunal with directions to reassess this element of the Applicant’s appeal.”.

25. Miss S said, after permission had been granted, that she did not need an oral hearing. She made no submission beyond that. But I would not necessarily have expected her to since CICA did not oppose the Upper Tribunal quashing the First-tier Tribunal decision and remitting.

### **Law**

26. Section 16(1) and (3C) to (3G) of the Tribunals, Courts and Enforcement Act 2007 provide—

“(1) This section applies in relation to an application to the Upper Tribunal for relief under section 15(1).

[...]

(3C) In cases arising under the law of England and Wales, when considering whether to grant permission to make the application, the tribunal—

(a) may of its own initiative consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and

(b) must consider that question if the respondent asks it to do so.

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<sup>1</sup> I get the date from the 8 June 2015 entry at the top of page C39. I think the reference to “her RTA - on around 13th May” in the 6 June 2016 entry (page C24) may be just a mistake.

(3D) In subsection (3C) “the conduct complained of” means the conduct (or alleged conduct) of the respondent that the applicant claims justifies the tribunal in granting relief.

(3E) If, on considering the question mentioned in subsection (3C)(a) and (b), it appears to the tribunal to be highly likely that the outcome for the applicant would not have been substantially different, the tribunal must refuse to grant permission.

(3F) The tribunal may disregard the requirement in subsection (3E) if it considers that it is appropriate to do so for reasons of exceptional public interest.

(3G) If the tribunal grants permission in reliance on subsection (3F), the tribunal must certify that the condition in subsection (3F) is satisfied.”.

27. The relevant paragraphs of the Criminal Injuries Compensation Scheme 2012 regarding injury payments provide—

“4. A person may be eligible for an award under this Scheme if they sustain a criminal injury which is directly attributable to their being a direct victim of a crime of violence committed in a relevant place. The meaning of “crime of violence” is explained in Annex B.

#### Types of payment

30. The types of payment which may be made under this Scheme are:

- (a) Injury payments (paragraphs 32 to 41);
- (b) Loss of earnings payments (paragraphs 42 to 49);
- (c) Special expenses payments (paragraphs 50 to 56);
- (d) Bereavement payments (paragraphs 61 and 62);
- (e) Child’s payments (paragraphs 63 to 66);
- (f) Dependency payments (paragraphs 67 to 74);
- (g) Funeral payments (paragraphs 75 to 77);
- (h) Certain other payments in fatal cases (paragraphs 78 to 84).

[...]

#### Injury payments

32. A person is eligible for an injury payment under this Scheme if:

- (a) their criminal injury is described in the tariff at Annex E; or
- (b) in any case falling within paragraph 36 (acceleration or exacerbation of an existing condition), their injury is described in that tariff and the value of the acceleration or exacerbation is at least £1,000.

33. The amount of an injury payment will be determined in accordance with the tariff and paragraphs 34 to 37. The tariff shows:

- (a) in Part A, the amount payable in respect of physical and mental injuries;
- (b) in Part B, the amount payable in respect of fatal injuries, sexual and physical abuse; and
- (c) notes relating to the determination of the amount of an injury payment for certain injuries.

[...]

37. (1) Where an application relates to more than one criminal injury each of which would qualify for an injury payment under paragraph 32, the amount of the injury payment for which the applicant will be eligible is:

- (a) the full tariff amount for the criminal injury which gives rise to the highest payment;



- (b) 30 per cent of the tariff amount for the criminal injury with an equal or second highest payment; and
- (c) where there are three or more criminal injuries, 15 per cent of the tariff amount for the criminal injury with an equal or third highest payment.

(2) When calculating the injury payment for which an applicant may be eligible, subparagraph (1) will be applied after paragraphs 34 to 36.”

28. The tariff to the scheme provides, so far as relevant to physical abuse—

| <b>“TARIFF OF INJURIES – PART B: SEXUAL AND PHYSICAL ABUSE AND OTHER PAYMENTS</b>  |       |                   |
|--|-------|-------------------|
| <u>Description of injury</u>   | Level | Standard Amount £ |
| <u>Fatal criminal injury</u>   |       |                   |
| Single qualifying relative   | B9    | 11,000            |
| Multiple qualifying relatives  | B6    | 5,500             |
| <u>Physical abuse of adults, including domestic abuse</u>  |       |                   |
| <p>Note [5]: Where a person has sustained a number of injuries as part of a pattern of abuse, payment will normally be made to reflect the pattern of abuse, based on the most serious injuries in the pattern, rather than each separate injury. An exception may be made where a single injury sustained as part of the pattern of abuse would give rise to a higher tariff payment than that for the abuse, in which case the higher payment may be made instead of the award for the pattern of abuse. Whether injuries have arisen as part of a pattern of abuse will be assessed by reference to all the circumstances, including whether there was one or more assailants (and whether they acted together), the nature of the injuries and incidents, and the period in which they occurred.</p> |       |                   |
| <b>Serious abuse</b>   |       |                   |
| - intermittent physical assaults resulting in an accumulation of healed wounds, burns or scalds, but with no appreciable disfigurement   | B3    | 2,000             |
| <b>Severe abuse</b>  |       |                   |
| pattern of repetitive violence resulting in minor disfigurement  | B6    | 5,500             |
| Persistent pattern of severe abuse over a period more than 3 years   | B8    | 8,200”            |

29. As to loss of earnings payments, paragraph 43 of the scheme provides—

“43. (1) The first condition is that as a direct result of the injury for which the applicant is eligible for an injury payment they have no or very limited capacity for paid work.

(2) The second condition is that the applicant:

- (a) was in paid work on the date of the incident giving rise to the injury, or, in the case of a series of incidents, at any time during the series;

- (b) had been in regular paid work for a period of at least three years immediately before the date of the incident giving rise to the injury; or
- (c) had a good reason for not having been in regular paid work for the period mentioned in paragraph (b).

(3) For the purpose of this paragraph, a person will be considered to have a good reason for not having been in regular paid work if, for example, they were unable to work because they were in full-time education, or by reason of their age or caring responsibilities.”.

## **Analysis**

30. I find that the First-tier Tribunal erred in law because close examination of the medical records shows repeated consultations and treatment for back pain prior to the RTA—

- 19 June 2012: “**Acute back pain – lumbar** (*First*) not had previously, no neuro sx ... tender over L3-5, rediced [sic] flexion ...” (page C58)
- 22 June 2012: “re back pain / wants walking sticks ... no longer needs she went to the hospital yesterday and got some” (page C58)
- 11 December 2012: “**Acute back pain – lumbar** (*New*) ... acute low back pain recurred-wants referral to physiotherapy and anaesthesia” (page C56)
- 11 December 2012: “**MED3 issued to patient** (*First*) back pain 2 weeks”
- 16 January 2013: “Assault and headinjury [sic]; Duration 14/01/2013 – 28/01/2013” (page C56)
- [between 23 September and 1 October 2013, applicant had hysteroscopy – page C54 (not clear from 23/9/13 entry whether it was the operation the next day, or just the pre-op assessment)]
- 1 October 2013: “still getting some pain in back since operation” (page C54) (comes after hysteroscopy whether or not caused by it)
- 7 October 2013: “**Hysteroscopy NEC** (*Review*) ... still getting some pain in the back ... another 1w given” (page C54)
- 6 December 2013: “back pain for a few months” (page C53)
- 7 December 2013: “**Low back pain** (*First*) ... on and off for a year but getting worse this last 3-4 months esp over the last 2 weeks. there all the time in her lower back” (page C53)
- 5 June 2014: “flare of pain in back, has had this before. cocodamol helps” (page C48, first entry)
- 6 August 2014: “**Low back pain** (*New*) ... wants an MRI scan. flares can last up to 3-4 weeks. this time has lasted 3-4 days very severe when it comes. used to have leg pain but now just low back. no neuro symp. seen here by NP dec/june. examined in dec. same symp as then. no trigger. never saw physio. was referred by nP in dec

naproxen/cocodamol not helping ... Diazepam 2mg tablets 1-2 for acute back pain ... Tramadol 50mg capsules” (page C47)

- 7 August 2014: “diazepam and tramadol not touching pain. walking with a crutch. will come in for rv/exam” (page C47)
- 7 August 2014: “**Low back pain (Review)** ... pain ++ diazepam x2 tramadol x2 today no effects ... painand tenderness across whole of lumbar spine and paralumbar and sacrum. limited flexion. neg staright leg raise. but pain bilaterally on most movement of leg. flexion of hip causes pain in back + b/lateral” (page C46)

#### [14 August 2014 – RTA]

##### **First post-RTA entry:**

- 15 August 2014: “someone went into back of her car. having headache and back and neck pain. told by insurance needs to see GP. tablets help a bit for back but not helping neck/head ... **Whiplash injury (First)**” (page C46)

- 15 August 2014:

|                     |  |
|---------------------|--|
| “Problem<br>History | <b>Low back pain (Review)</b><br>back improving. can walk now independently. still painful but slowly better. diclofenac helped. |
|---------------------|--|

|                        |   |
|------------------------|---|
| Problem<br>Examination | <b>Whiplash injury (Review)</b><br>Tender left trapezius ++, no bony/spinal tenderness. tender on scalp – no sign swelling/skin break/bruise. limited neck rotation to left and abduction esp to left limited shoulder abduction due to muscular [sic] pain |
|------------------------|---|

|         |  |
|---------|--|
| Comment | no bony/serious injury. advice. analgesia etc. should [sic] improve slowly with time |
|---------|--|

|         |                         |
|---------|-------------------------|
| History | Was wearing seat belt”. |
|---------|-------------------------|

#### 31. I make four observations—

- (1) First, I have included the entries for back pain after the hysteroscopy because I am including all the back pain entries I have found. The hysteroscopy itself cannot of course have been the cause of the pre-hysteroscopy back pain. I have not formed even a provisional view on whether a point can be made that all back pain prior to the hysteroscopy was caused by whatever gynaecological condition (if any) or other non-domestic-violence related condition caused the symptoms that merited the hysteroscopy.
- (2) Second, the first two post-RTA medical notes entries after the RTA refer to the post-RTA pain as “*Whiplash injury*”, and give whiplash its own entry separate from the “*Low back pain entries*” which preceded and succeeded the RTA date. While that distinction is not maintained in entries for back pain after those first two entries, the distinction suggests that, immediately after the RTA, injuries from the RTA were considered separate from the back pain that had appeared in the medical notes prior to the RTA. That later entries do not mention whiplash as separate from the back pain does not on the face of it appear to detract from that point.

- (3) Third, I accept that there are entries in the medical notes which show the applicant asking her GP to record that her back pain is from the RTA. For example, on 9 June 2016: “*She is calling further regarding her letter. She would like me to say the back [sic] was attributed to the accident. She however had back pain prior to the accident in 2014*” (page C23). There is also an entry on 6 June 2016 showing her asking her GP not to say in a letter that the applicant had been off work prior to August 2014: “*I called pt as she has been off work prior to August 2014. she is adamant she wants letter to say off work since August 2014*” (page C24). Those post-RTA entries cannot undo the pre-RTA back pain entries, but may mean that the applicant was trying to claim that pre-existing pain did not in fact pre-exist the RTA, for insurance purposes. That does not however detract from the fact that the pre-RTA entries record back pain.
- (4) Fourth, I have included the entry which records an assault and head injury not because it also mentions back pain, which it doesn’t, but for transparency and because it is an entry that might be an instance of the domestic violence and so might give context.

32. It is not disputed, and I find, that the First-tier Tribunal erred in law (i) in failing to take account of the medical records entries that pre-dated the RTA and showed back pain, and (ii) in failing to explain why, despite those entries, the back pain was not from the domestic violence.

33. In view of my above findings, there is no need to make findings as to the other grounds on which Miss S originally sought permission to bring judicial review proceedings. Permission to bring those proceedings was not given in respect of those grounds, but nor was it refused. Miss S will be free to raise those matters, if they are relevant, at the remitted First-tier Tribunal hearing.

34. I accept CICA’s submission that remittal is the right course. Evidence needs to be considered afresh, and perhaps additional evidence taken. Miss S did not oppose remittal.

## **Conclusion**

35. It is for the above reasons that I allow this judicial review to the extent of quashing the First-tier Tribunal’s decision and remitting to that tribunal.

## **CASE MANAGEMENT DIRECTIONS**

36. I direct as follows—

- (1) The case must be reheard entirely afresh by the First-tier Tribunal.
- (2) The First-tier Tribunal panel which rehears this case afresh must contain no-one who was on the panel which decided the case on 28 July 2021.
- (3) The First-tier Tribunal may wish to note the Upper Tribunal’s directions dated 26 August 2022. They highlighted matters which might have benefited from further explanation (but of course, whether those matters are relevant on the remitted appeal will be a matter for the First-tier Tribunal).

**Rachel Perez**  
**Judge of the Upper Tribunal**  
**20 November 2023<sup>2</sup>**

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<sup>2</sup> Corrected 12 January 2024 for website.