



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**Case No. UA-2019-002633
(Previously JR/295/2019)**

Between:

MP

Applicant

- v -

First-tier Tribunal (Social Entitlement Chamber)

Respondent

(1) Criminal Injuries Compensation Authority

(2) Secretary of State for Justice

Interested Parties

Before: Upper Tribunal Judge Ward

Hearing date: 23 March 2021 (with subsequent written submissions)

Representation:

Applicant: Ariane Adam and Geeta Koska, instructed by Scott-Moncrieff & Associates Ltd

Respondent: No appearance or representation

Interested Parties: Robert Moretto, instructed by Government Legal Service

DECISION

The application for judicial review is refused.

REASONS FOR DECISION

1. The applicant is a national of Sri Lanka and has at all material times been ordinarily resident there. He is the father of a man born in 1988, who was murdered in Sheffield on 27 October 2013. The deceased, who was also a national of Sri Lanka, was lawfully residing and working, and ordinarily resident, in the UK when he was killed.

2. The applicant applied to the first interested party for compensation under the Criminal Injuries Compensation Scheme 2012 ("the Scheme"). By a decision dated 14 September 2016 his claim was refused because he could not satisfy the eligibility requirements contained in paragraph 10 of the Scheme (see [28] below). On his appeal to the First-tier Tribunal ("FtT"), the submission on his behalf was that he was discriminated against contrary to art.14 and article 1 of protocol 1 ("A1P1") of the European Convention on Human Rights when para.10 was applied to reject his

MP v FTT and CICA (CIC) [2022] UKUT 91 (AAC)
Case no: UA-2019-002633 (previously JR/295/2019)

claim. The appeal was dismissed by a decision dated 18 October 2018. The FtT's decision stood as its statement of reasons.

3. The FtT held:

- (a) relying on the Court of Appeal's decision in *JT v First-tier Tribunal and CICA* [2018] EWCA Civ 1735, a claim under the criminal injuries compensation scheme was within the ambit of A1P1;
- (b) the applicant's claim had failed because he was neither ordinarily resident in the UK nor a British citizen. "Residence or domicile" had been held to amount to an "other status" for the purposes of art.14: *R (RJM) v SSWP* [2008] UKHL 63, so the applicant had an "other status";
- (c) the provisions were not "without reasonable foundation" (*sic*); and
- (d) even if the FtT had concluded otherwise in relation to (c), it could not properly have disapplied para.10.

4. On 28 May 2019 Upper Tribunal Judge Levenson gave permission to apply for judicial review and on 29 July 2019 he granted an application by the second interested party to be joined under rule 9. A substantial delay followed while the applicant pursued an application for legal aid, ultimately successfully. The parties sought an oral hearing and in December 2020 the case was transferred to me to conduct it.

5. A hybrid hearing was held on 23 March 2021 in Rolls Building, initially by Kinly CVP. Counsel and the applicant's solicitor attended in person. The interested parties' solicitor and representatives of her clients observed remotely, as did the applicant himself (in Sri Lanka). Some problems of feedback were observed and so far as possible addressed but after some 50 minutes a message was received from the interested parties' solicitor that she was finding it impossible to follow every speaker because of the feedback. After an adjournment, the hearing continued using a combination of telephone conferencing and Kinly CVP. There was a further short adjournment towards the end of the day as some participants' phone batteries were out of charge, to allow them to borrow phones or make other suitable arrangements. I am satisfied that counsel, being present in person throughout, were able to participate fully. There was no suggestion (and nor has there been since) that the difficulties in hearing part of the submission experienced by the interested parties' solicitor (and very possibly by her clients also) had rendered the hearing unfair.

6. The interested parties sought to raise additional points challenging those parts of the FtT's decision which had gone in the applicant's favour. This Chamber of the Upper Tribunal has not previously followed a formal system of pleading. I am satisfied that each party had a fair opportunity to consider all the points raised by the other party.

7. By the same token, having considered the submissions made up to and including those made at the oral hearing, I decided to invite post-hearing written submissions addressing (or addressing further – the parties take differing views on whether a new point is involved but, for the reasons below, it ultimately does not make any difference) whether this was in reality a *Thlimmenos* case, by reason of the Scheme's failure to make provision, by way of allowing reliance to be placed on the residence qualification of the deceased person in cases where the deceased had met the residence (etc.) requirements. In due course such submissions were received and, as regards substantive matters, are considered further below.

8. The interested parties however take a preliminary objection to a *Thlimmenos* argument now being considered on the basis that the applicant is changing the basis on which the case is advanced at a late stage. They submit that such a case is based on a different “other status” and a different comparison and claim to have been “seriously prejudiced” responding. I do not accept that. They have had the opportunity, with sight of the applicant’s written submission putting forward a *Thlimmenos* case, to make a written submission of their own and have done so, including as to the matters which they submit arise differently on a *Thlimmenos* claim.

9. The applicant can and does say that a *Thlimmenos* case was included in the original Grounds and skeleton argument. Whilst I accept that they contain references to the position of relatives (who do not themselves meet the residence requirements) of a deceased person (who did), the case is framed in terms of the discrimination involved in excluding persons such as the applicant from entitlement by reason of the application to him of the para.10 rules, rather than in it being constituted by a failure to permit reliance on the residence status of the deceased. It is striking that neither in the Grounds nor the skeleton argument does the word “*Thlimmenos*” appear, when it is widely-used shorthand among lawyers for a failure to make different provision for those whose circumstances are relevantly different. However, even if that be so, the applicant will now have had the chance to articulate a *Thlimmenos* claim, unless I uphold the objection of principle made by the interested parties, which I consider in the following paragraphs.

10. The interested parties submit that in judicial review proceedings such as here, the Upper Tribunal is not remaking the decision as it would on an appeal from a FtT decision, and is not exercising an inquisitorial function as it would on such an appeal. Rather, its jurisdiction is no wider than the High Court’s would be, as set out in s.15(4) of the Tribunals, Courts and Enforcement Act 2007:

“(4) In deciding whether to grant relief under subsection (1)(a), (b) or (c), the Upper Tribunal must apply the principles that the High Court would apply in deciding whether to grant that relief on an application for judicial review.”

11. The reason why the jurisdiction of this Chamber of the Upper Tribunal is, in most if not all of the subject matters with which it deals, an inquisitorial one is derived from established authorities in relation to social security, which apply to the Upper Tribunal, as to the FtT. Thus *Kerr v DSD* [2004] UKHL 23 cited with approval the principles of an earlier case:

“Ever since the decision of the Divisional Court in *R v Medical Appeal Tribunal (North Midland Region), Ex p Hubble* [1958] 2 QB 228, it has been accepted that the process of benefits adjudication is inquisitorial rather than adversarial. Diplock J as he then was said this of an industrial injury benefit claim at p 240:

"A claim by an insured person to benefit under the Act is not truly analogous to a *lis inter partes*. A claim to benefit is a claim to receive money out of the insurance funds... Any such claim requires investigation to determine whether any, and if so, what amount of benefit is payable out of the fund... ."

12. In *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2, Baroness Hale observed at [41]:

MP v FTT and CICA (CIC) [2022] UKUT 91 (AAC)
Case no: UA-2019-002633 (previously JR/295/2019)

“Another relevant fact of tribunal life is that the benefits system exists to pay benefits to those who are entitled to them. As counsel put it to us in *Hinchy v Secretary of State for Work and Pensions* [2005] UKHL 16, [2005] 1 WLR 967, the system is there to ensure, so far as it can, that everyone receives what they are entitled to, neither more nor less.”

I see no reason why the same principle should not apply to the payment out of public funds of sums in recognition that people have been victims of violent crime.

13. In this Chamber of the Upper Tribunal, these principles apply not only when the Upper Tribunal is “remaking the decision” (per the interested parties’ submission) but when it is assessing whether there has been an error of law below (which precedes any jurisdiction to remake the decision). It is not easy to see why, unless statute requires it, the nature of the jurisdiction on a judicial review should be any different from that when assessing whether there has been an error of law on a statutory appeal. Statute, in the form of TCEA s.15(4) relied upon by the interested parties, in my view does not require it. It is about the principles for giving relief and in my view cannot be read so as to apply to every aspect of the Upper Tribunal’s practice on judicial review.

14. I also consider that even in the courts there may be more room than the submission implies for moving between the non-*Thlimmenos* approach and a *Thlimmenos* approach: see for instance the approach of Lord Wilson in *R(DA) and R(DS) v SSWP* [2019] UKSC 21 at [45], in the face of a very reluctant propounding by a party of a *Thlimmenos* argument

15. For the reasons above I do not regard the interested parties’ preliminary objections to the *Thlimmenos* point being considered as well-founded and, as I consider that the procedure adopted has given them a fair chance to address it, proceed to consider it below.

The Human Rights Act 1998

16. The Human Rights Act 1998 makes provision for the application in English law of the main provisions of the European Convention on Human Rights (“the Convention”). The main relevant sections of the Act are as follows (references are to section numbers):

“3(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”

“6(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act [of a public authority] if-

(a) as a result of one or more provisions of primary legislation the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights the authority was acting so as to give effect to or enforce those provisions.

(3) In this section "public authority" includes –

(a) a court or tribunal

...”

“7(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may-

(a) ...

(b) rely on the Convention right or rights concerned in any legal proceedings.”

The Relevant Provisions of the European Convention on Human Rights

17. For the purposes of the present case, the main relevant provisions of the Convention are as follows:

Article 1 Protocol 1 (Protection of property)

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 14 (Prohibition of discrimination)

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The Upper Tribunal’s task on a human rights challenge

18. What is the Upper Tribunal’s task on a judicial review in a criminal injuries case which consists of a human rights challenge? Is it to reach a decision for itself on the human rights claim or is it, as Mr Moretto suggests, necessary to point to a public law error on conventional criteria in how the FtT approached that task. In *Belfast City Council v Miss Behavin’ Limited* [2007] UKHL 19 Baroness Hale said at [31]:

“The first, and most straightforward, question is who decides whether or not a claimant’s Convention rights have been infringed. The answer is that it is the court before which the issue is raised. The role of the court in human rights adjudication is quite different from the role of the court in an ordinary judicial review of administrative action. In human rights adjudication, the court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision-maker properly took them into account.”

19. Mr Moretto relies on *R(TP) v SSWP* [2020] EWCA Civ 37 at [120] – [122] in support of the view that the Upper Tribunal should not second guess the FtT but needs to be able to point to a public law flaw in its reasoning. In context it is clear

that the Master of the Rolls in that case was considering specifically the application of CPR52, but I accept in the light of cases such as *In re B (a child) (Care Proceedings: threshold criteria)* [2013] UKSC 33 that “the court system as a whole must fairly determine for itself whether the requirement of proportionality is met, but that does not mean that each court up the appeal chain does so” (per Lord Neuberger of Abbotsbury PSC at [85]) and thus that the point is a general one. The present case does not come before me as an appeal, but as a judicial review: not of CICA’s decision, nor of the Scheme, but of the FtT’s decision and that does determine the part the Upper Tribunal may properly play within “the court system as a whole” in examining the human rights issue. I am mindful in this regard that there is authority in cases such as *PE (Peru) v Secretary of State for the Home Department* [2011] EWCA Civ 279 that while in some cases there will be only one permissible conclusion whether an action is proportionate or disproportionate, in others there will be two permissible options and in such a case, absent other errors of law, an appeal confined to error of law is not available and neither, it seems to me, would there be grounds for judicial review.

20. The need for there to be a public law flaw in the FtT’s decision is not disputed by Ms Adam. The public law flaws in the decision are said to be (in summary) (a) irrationality (b) misdirection in law (c) failure to take account of relevant matters and/or (d) taking account of irrelevant matters. She accepts that in practice she is dependent in relation to all of these on her submissions on the human rights issue.

International agreements on criminal injuries compensation

21. The European Convention on the Compensation of Victims of Violent Crime was concluded in 1983. It is only necessary to mention the following:

“The member States of the Council of Europe, signatory hereto,
...;

Considering that it is necessary to introduce or develop schemes for the compensation of these victims [of intentional crimes of violence] by the State in whose territory such crimes were committed...

Have agreed as follows:

...

Article 2

1 When compensation is not fully available from other sources the State shall contribute to compensate:

a those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence;

b the dependants of persons who have died as a result of such crime.

...

Article 3

Compensation shall be paid by the State on whose territory the crime was committed:

a to nationals of the States party to this Convention;

b to nationals of all member States of the Council of Europe who are permanent residents in the State on whose territory the crime was committed.”

I note that, even leaving aside the territorial issues, the Convention does not require compensation to be paid to non-dependant relatives.

22. Turning to EU law, Council Directive 2004/80/EC of 29 April 2004, adopted as part of the objective of abolishing obstacles to the free movement of persons, contains provisions to not dissimilar effect, placing (by art.2) responsibility for paying compensation on the competent authority of the Member State on whose territory the crime was committed.

23. There is no relevant treaty between the UK and Sri Lanka.

Criminal injuries – the 1995 Act and the 2012 Scheme

24. Criminal injuries compensation was initially introduced on a non-statutory basis. In its initial versions, the amount of awards followed closely the model of damages in civil claims. When it was placed on a statutory basis by the Criminal Injuries Compensation Act 1995, there were significant changes. By s.1:

- “(1) The Secretary of State shall make arrangements for the payment of compensation to, or in respect of, persons who have sustained one or more criminal injuries.
- (2) Any such arrangements shall include the making of a scheme providing, in particular, for—
 - (a) the circumstances in which awards may be made; and
 - (b) the categories of person to whom awards may be made.”

25. Section 2 states that:

- “(1) The amount of compensation payable under an award shall be determined in accordance with the provisions of the Scheme.
- (2) Provision shall be made for—
 - (a) a standard amount of compensation, determined by reference to the nature of the injury;
 - (b) in such cases as may be specified, an additional amount of compensation calculated with respect to loss of earnings;
 - (c) in such cases as may be specified, an additional amount of compensation calculated with respect to special expenses; and
 - (d) in cases of fatal injury, such additional amounts as may be specified or otherwise determined in accordance with the Scheme.”

and goes on to provide for a Tariff setting out various standard amounts for different injuries (thus moving away from the common law damages model).

26. By s.11, a Scheme, and specified changes to it, must be approved by a resolution of each House of Parliament.

27. Following several intervening schemes, the (2012) Scheme was adopted, following a period of consultation, on which I say more below. The key provisions of the Scheme for present purposes are set out below.

28. The eligibility requirements are as follows:

“10. A person is eligible for an award under this Scheme only if:
(a) that person was ordinarily resident in the United Kingdom on the date of the incident giving rise to the criminal injury;
(b) one of the conditions in paragraph 11 was satisfied in relation to them on the date of the incident giving rise to the criminal injury; or
(c) one of the conditions in paragraph 13 is satisfied in relation to them on the date of their application under this Scheme.

11. The conditions referred to in paragraph 10(b) are that the person was:
(a) a British citizen;
(b) a close relative of a British citizen;
(c) a national of a member state of the European Union or the European Economic Area;
(d) a person who had a right to be in the United Kingdom by virtue of being a family member of a national of a member state of the European Union or the European Economic Area;
(e) a national of a State party to the Council of Europe Convention on the Compensation of Victims of Violent Crimes (CETS No. 116, 1983);
(f) a member of the armed forces; or
(g) an accompanying close relative of a member of the armed forces.”

29. Para. 12 defines who is a “close relative” for the purposes of circumstances which do not arise in the present case. Para.13, which concerns human trafficking, is not relevant to this case.

30. Under the Scheme, the eligibility requirement attach to the applicant for compensation. Thus, in a fatal case, under the Scheme as drafted, it is irrelevant whether or not the deceased met those requirements.

31. It is relevant to note that in previous Schemes, there had been no eligibility criteria based on nationality or residence.

32. Para.4 provides

“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.”

33. The following relevant provisions are within the section on payments in fatal cases:

“57. A qualifying relative of a person who has died as a direct result of sustaining an injury in circumstances falling within paragraph 4 ... may be eligible for:

(a) a bereavement payment (paragraphs 61 and 62);

...

59. A qualifying relative is a person who at the time of the deceased's death was:

...

(e) a parent of the deceased; or

...

61. A bereavement payment may be made to a qualifying relative who is not:

(a) a former spouse or former civil partner of the deceased; or

(b) a person who is estranged from the deceased at the time of their death.

62. Where a claims officer is satisfied that more than one person may be eligible for a bereavement payment in respect of the deceased, the amount of the bereavement payment is £5,500. Otherwise, the amount of the bereavement payment is £11,000."

The Scheme also makes provision for an amount to be paid in respect of funeral expenses relating to the deceased person.

Article 14 – the issues

34. The issues to be considered are:

a. Does the matter fall within the ambit of a Convention right?

b. Are the complainant and another or others in a relevantly similar situation, or, in the case of so-called *Thlimmenos* discrimination, in a situation which is relevantly different so that different provision is needed?

c. What was the reason for the treatment of the complainant? Was this on one of the grounds within art.14?

d. Was the treatment justified i.e. can the body seeking to uphold the treatment show that it was in furtherance of a legitimate aim and a proportionate response.

Ambit

35. The interested parties accept that the Upper Tribunal is bound to hold, in the light of *JT*, that a claim for criminal injuries compensation is within the ambit of A1P1, but reserve the right, should the case go higher, to argue that *JT* was wrongly decided in this respect. The applicant reserves the right to argue that the matter falls within art.2 of the Convention following the decision of the European Court of Human Rights in *Vanyo Todorov v Bulgaria*, Application No.31434/15 (21 October 2020).

Analogous or relevantly similar situation

36. This was not dealt with very expressly by the FtT but in my view it is evident from para 28 of its decision that the FtT considered those in an analogous situation were the parents of a deceased victim of a crime of violence who are ordinarily resident in the UK or a British citizen.

37. This leads to a submission from Mr Moretto that, to the extent that the FtT held that the applicant was in such an analogous position, it was wrong to do so. In support, he relies on *JT* and on the decision of the House of Lords in *R (Carson) v*

SSWP [2005] UKHL 37. From *JT*, he draws particularly on the remarks of Leggatt LJ (as he then was) at [64]–[70]:

“64. The terms "welfare benefit" and "social security" are not terms of art. They are capable of describing almost any form of financial support or help provided to citizens by the state to promote or protect their welfare. The principle in *Stec* has been applied broadly to a wide range of benefits including, for example, in the UK earnings-related allowances for persons with industrial injuries, income support for disabled persons, child tax credits, housing benefit, and disability living allowance.

65. In the sense relevant for present purposes, payments made by the state under the UK's criminal injuries compensation scheme are in my view to be regarded as welfare benefits. Such payments are no different in principle from, for example, benefits payable to persons who have suffered industrial injuries (with which the case of *Stec* was itself concerned) or to people who have disabilities. Awards of compensation under the criminal injuries scheme are not made because the state is responsible for causing the victim's injuries, any more than the state is responsible if an accident occurs at work or if a person is or becomes disabled. (In the limited circumstances in which the state is responsible for failing to prevent crimes, a separate claim for damages will arise: see *D v Commissioner of Police of the Metropolis* [2018] UKSC 11; [2018] 2 WLR 895.) The underlying justification for making payments to victims of violent crimes is that they have suffered a very serious misfortune which the whole community should help to compensate for reasons of "equity and social solidarity": see the second recital to the Convention on the Compensation of Victims of Violent Crimes.

66. It is notable that in the *Italian Interns* case the European Court of Human Rights regarded payments made under the German compensation scheme which was the subject of that case as "non-contributory benefits" (see the second passage quoted at para 60 above). What was held to distinguish that case from the case of *Stec* was that the relevant payments were one-off payments in respect of particular historic events made outside the framework of the state's regular social security legislation. Applying that distinction, I think it clear that the UK criminal injuries compensation scheme is not a special scheme set up to provide one-off payments of reparation for a particular historic event. It forms part of the general framework of social security legislation in this country. The fact that it falls within the budget and remit of the Ministry of Justice rather than the Department for Work and Pensions and is governed by a different Act of Parliament from the Social Security Contributions and Benefits Act 1992 and Social Security Administration Act 1992 cannot be dispositive. What matters is not how the scheme is administered and regulated but the nature of the scheme.

67. The question is then whether, applying the test established by the *Stec* case, the legislation provides for payments to be made as of right. Although payments made under the criminal injuries scheme were originally discretionary and *ex gratia* in nature (being described in *R v Criminal Injuries Compensation Board, ex parte P* [1994] 1 All ER 80 at 84 as "not a right but a

MP v FTT and CICA (CIC) [2022] UKUT 91 (AAC)
Case no: UA-2019-002633 (previously JR/295/2019)

privilege" and as a "manifestation of the bounty of the Crown"), that is no longer the case. Since the scheme was placed on a statutory footing in 1995, a victim of crime who fulfils the eligibility conditions has a right to an award under English domestic law. That was accepted by the Home Secretary and by CICA in *R (C) v The Home Office* [2004] EWCA Civ 234, para 41, in the context of article 6(1). It was also accepted by the court on an application to the European Court of Human Rights in that case: see *CB v United Kingdom* (Application No 35512/04) 25 August 2005, para 2.

68. Nor is the existence and scope of the criminal injuries scheme any longer purely a matter of choice on the part of the state. In accordance with the European Convention on the Compensation of Victims of Violent Crimes, which the UK has ratified, the UK now has an international obligation to provide compensation to victims of intentional crimes of violence who have suffered bodily injury or impairment of health. Such an obligation also arises under the Treaty on the European Union pursuant to Council Directive 2004/80/EC of 29 April 2004 [...].

69. The necessary conclusion, in my view, is that the current criminal injuries compensation legislation in the UK is to be regarded as establishing a proprietary interest falling within the ambit of article 1P1 for persons satisfying its requirements. It follows that article 14 applies to JT's claim that she would be eligible for an award under the 2012 scheme but for discrimination on a ground prohibited by article 14.

70. In reaching this conclusion, I am fortified by the fact that it accords with the recent decision of the Court of Session (Inner House) in *MA v Criminal Injuries Compensation Board* [2017] CSIH 46; 2017 SLT 984, which has been followed by the High Court of Northern Ireland in *In re F* [2018] NIQB 7."

38. From this, Mr Moretto relies on Leggatt LJ's characterisation of criminal injuries compensation as "welfare benefits". From there, he moves to *Carson*. Ms Carson had a full national insurance contributions record in the UK but had moved to South Africa and reached pensionable age. There are provisions (the details do not matter) which require the amount of retirement pension to be adjusted annually, principally to reflect cost of living increases. Those provisions apply to the pension of those who are resident in the UK or in countries with which the UK has a reciprocal agreement. These did not include South Africa. The consequence was that Ms Carson's pension stayed at its original level and the gap between it and the pensions received by the residents of the UK and those of reciprocal agreement countries was liable to widen yearly. Ms Carson claimed a breach of art.14/A1P1 on the basis of residence, submitting that she was in an analogous position to those who, like her, had paid sufficient national insurance contributions, but who were resident in the United Kingdom or in a reciprocal agreement country.

39. Mr Moretto refers me to passages in Lord Hoffman's speech, with which the majority of their Lordships agreed (Lord Carswell dissenting). At [18] Lord Hoffman noted that when Ms Carson moved to South Africa:

MP v FTT and CICA (CIC) [2022] UKUT 91 (AAC)
Case no: UA-2019-002633 (previously JR/295/2019)

“she put herself outside the primary scope and purpose of the UK social security system. Social security benefits are part of an intricate and interlocking system of social welfare which exists to ensure certain minimum standards of living for the people of this country. They are an expression of what has been called social solidarity or *fraternité*; the duty of any community to help those of its members who are in need”

and at [22] that

“The interlocking nature of the system makes it impossible to extract one element for special treatment.”

Thus, he concluded, the position of a non-resident was materially and relevantly different from that of a UK resident.

40. The European Court of Human Rights in *Carson v United Kingdom* (Application No.42184/05), March 16, 2010, broadly endorsed the reasoning of the House of Lords on the point.

41. Turning to residents of reciprocal agreement (“treaty”) countries, Lord Hoffman considered there was likewise no valid comparison, observing at [27]:

“The comparison with residents in treaty countries seems to me to fail for similar reasons. Mr Blake was able to point to government statements to the effect that there was no logical scheme in the arrangements with treaty countries. They represented whatever the UK had from time to time been able to negotiate without placing itself at an undue economic disadvantage. But that seems to me an entirely rational basis for differences in treatment. The situation of a UK expatriate pensioner who lives in a country which has been willing to enter into suitable reciprocal social security arrangements is relevantly different from that of a pensioner who lives in a country which has not. The treaty enables the government to improve the social security benefits of UK nationals in the foreign country on terms which it considers to be favourable, or at least not unduly burdensome. It would be very strange if the government was prohibited from entering into such reciprocal arrangements with any country (for example, as it has with the EEA countries) unless it paid the same benefits to all expatriates in every part of the world.”

42. I am unable to accept this part of Mr Moretto’s submission. In saying at [65] that “payments made by the state under the UK’s criminal injuries compensation scheme are to be regarded as welfare benefits”, Leggatt LJ made clear that he was speaking “in the sense relevant for present purposes”. What those purposes were is evident from [69]: deciding whether

“the current criminal injuries compensation legislation in the United Kingdom is to be regarded as establishing a proprietary interest falling within the ambit of article 1P1 for persons satisfying its requirements... .”

As noted by Leggatt LJ at [64]:

“The terms “welfare benefit” and “social security” are not terms of art.”

43. Mr Moretto’s submission seeks to take a ruling made for the purpose of addressing one specific issue and to apply it in a different context. That does not mean that *Carson* is necessarily inapplicable on this issue but nor does it mean that it necessarily is. For that we must consider the logic of *Carson*.

44. In the House of Lords, counsel for Mrs Carson accepted that the UK could have provided no pension whatever to people who had gone to live abroad. Nor did she claim to be entitled to other contributory benefits. The complaint was that having recognised that she had an entitlement to pension because of her national insurance contributions, the state ought to pay her at the same rate as others who had made the same contributions. So the “one element” Mrs Carson sought to “extract...for special treatment” was receipt of retirement pensions on the basis of her contributions record, even though (as is indeed the case) there is no direct link between the payment of contributions - which are in effect a form of general taxation – and the funding of the state retirement pension.

45. Lord Hoffman viewed the purpose of social security as being “to ensure certain minimum standards of living for the people of this country”, within which the payment of retirement pensions falls, albeit subject to potential clawbacks via the tax and means-tested benefits systems in appropriate cases.

46. Criminal injuries compensation is not paid for such a purpose. Receipt of a tariff award (the primary form of compensation under the Scheme) is not linked to ensuring a minimum (or any particular) standard of living. The amount is payable to all who qualify, regardless of their financial position otherwise.

47. As to what its purpose is, Ms Adam refers to para.178 of the Consultation Document:

“The main purpose of this Scheme is to provide payments to those who suffer serious physical or mental injury as the direct result of deliberate violent crime.”

In my judgment she is right to do so. The nature of criminal injuries compensation is further reflected in the fact that previous schemes did not have nationality or residence requirements, but compensated victims of a crime of violence which had occurred in the UK. It may also be reflected, as Ms Adam submits, in the territorial basis of the Compensation Convention and the Council Directive, at least to a degree, although these may also have reflected a wish to minimise conflict of laws problems. I am satisfied for the totality of the above reasons that the applicant is not precluded by an argument by reference to *Carson* from establishing that he is in an analogous position to someone whose circumstances were the same, save that the latter was a British Citizen and/or ordinarily resident in the UK.

48. I do not, accept, however Ms Adam’s submission that the applicant is also in an analogous position with someone in a country with which the UK has concluded a reciprocal agreement, for the reasons given by Lord Hoffman at [27] of *Carson*, the logic of which can be applied beyond the particular issues in that case.

Status

49. Ms Adam submits that the applicant was treated unfavourably on the ground of his nationality and/or country of ordinary residence; alternatively, that he was treated unfavourably because of his inability to meet the conditions in paras 10-16 of the Scheme. (It appears to me that in a *Thlimmenos* case, the appropriate comparison is between a parent of a deceased person who had been ordinarily resident in the UK where the parent is ordinarily resident (or otherwise meets the eligibility requirements) and such a parent who does not meet those requirements: that, it seems to me, is essentially the same as the former of Ms Adam's formulations.

50. It is convenient to deal with Ms Adam's alternative position first. That in my view is a clear instance of a claimed status defined entirely by the alleged discrimination. As such there is authority binding on the Upper Tribunal that it cannot constitute a "status" for this purpose: see *Mayor and Burgesses of the London Borough of Haringey v Simawi* [2019] EWCA Civ 1770 at [41], considering *R v Docherty* [2016] UKSC 62.

51. Mr Moretto resists a finding that nationality and/or ordinary residence were the basis for the unfavourable treatment. He submits that there are ways in which a national of Sri Lanka might still be eligible. That submission is correct so far as it goes: they might for instance be a close relative of a British citizen or a family member of a national of a member state of the European Union, within subparagraphs (b) or (d) of para.11 of the Scheme respectively. Similarly, ordinary residence in Sri Lanka would not be determinative to excluding entitlement – a British citizen who was so resident would be entitled, for instance.

52. Ms Adam counters that by submitting that it is nonetheless undoubtedly harder for a national of Sri Lanka, or a person who is ordinarily resident in that country, to fulfil the requirements of paras.10-16 than it would be for a British citizen or someone ordinarily resident in the UK and that is sufficient. She relies on *OA v Secretary of State for Education* [2020] EWHC 276 (Admin) where Nicol J cited with approval the decision of the Grand Chamber in *DH v Czech Republic* (2008) 47 EHRR 3 at [184] that:

"[discrimination] may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group ... Such a situation may amount to "indirect discrimination", which does not necessarily require a discriminatory intent."

53. I accept therefore that the measure does treat the applicant unfavourably on the ground of nationality and/or ordinary residence.

Justification

54. I turn, accordingly, to justification. To do so requires careful consideration of the background.

55. The consultation process which led to the 2012 Scheme was commenced by a Consultation Document issued in January 2012 “Getting it right for victims and witnesses”. It covered, as Mr Moretto rightly notes, a range of matters. The criminal injuries compensation scheme was one but the consultation also addressed such matters as funding and commissioning victim services, the extent to which offenders should make reparation for their crimes and the support to be given to victims of terrorism overseas. As regards criminal injuries compensation, the Consultation Document explained that the existing scheme was demand-led and cost over £200m each year. The aim was to save about £50 million each year at what the document described as “a time of acute financial pressure”, whilst safeguarding payments to those in greatest need (paras 22-24).

56. At para. 172 the Government indicated the principles they had taken into account:

“The need to protect payments to those most seriously affected by their injuries, measured by the initial severity of the injury, the presence of continuing or on-going effects, and their duration.

Recognition of public concern for particularly vulnerable groups and for those who have been the victims of particularly distressing crimes, even though the injury may not be evident, or the effects are particularly difficult to quantify, for example sexual assaults and physical abuse of adults and children.

Consideration of alternative provision. Our proposals take into account the availability of other services and resources (e.g. state benefits) a victim may be entitled to receive to meet the needs arising from the injury.

Making the scheme simpler and easier for victims to understand. Our proposals clarify the eligibility criteria and the evidence victims need to provide to make an application to the scheme.

Ensuring proposals comply with our legal obligations, both domestic and European, and that we have shown due regard, through analysis and consultation, to the effects on those protected under equality legislation, for example disabled people, women and those from minority ethnic communities.”

57. At para 174 a “high level summary” of the proposals included:

“Eligibility

We propose that eligibility to claim from the Scheme should be tightly drawn so as to restrict awards to blameless victims of crime who fully co-operate with the criminal justice process, and close bereaved relatives of victims who die as a result of their injuries. Applicants should have a connection to the UK which is more than temporary.

...

Fatal Cases

We propose that the bereavement award, funeral payments and parental service payments will be protected.”

58. At para 188 the proposals for requiring a “connection to the UK” were set out:

“We believe that applicants to the Scheme should have a defined connection to the UK. We propose to award compensation only to those who have been lawfully resident in the UK for at least six months at the time of the incident. We consider that a minimum requirement of 6 months’ residence demonstrates sufficient connection with UK society, such that it remains right that they should be eligible to claim under the Scheme. We propose this period – which is shorter than that for victims of terrorism overseas – to take into account the fact that the injury will have been sustained in Great Britain. The intention is that those in the UK in the short-term (i.e. less than 6 months) for whatever reason, will no longer be eligible.”

59. The responses to the consultation were reviewed in “Getting it right for victims and witnesses: the Government response” (July 2012). The Government concluded that the proposed requirement for residence for a six month period was too stringent and so substituted the requirement that an applicant for compensation should be ordinarily resident, thus demonstrating “an intention to develop and maintain a connection to the UK” (para 169).

60. Equality impact assessments were published in connection with the Consultation Document in January 2021 and in connection with the revised proposals in July 2012. The former recorded that:

“106. In fatal cases, bereaved relatives who apply to the Scheme will need to meet the residency requirements in the same way as other applicants. However, we do not intend to apply the residence condition in respect of the deceased, so long, as now, that the incident giving rise to the claim takes place in Great Britain.

...

109. This proposal [i.e. the requirement for at least six months’ lawful residence] will adversely affect those foreign nationals who have not been lawfully resident in the UK for at least six months at the time of the incident or to whom we do not otherwise have an obligation”

61. The July 2012 Equality Impact Assessment noted at [80] that the revised proposals “will exclude visitors here on short term visas, including tourists, some students and non EU, EEA members who can not otherwise show they are resident at the time of the incident giving rise to the application.” At [96] the document acknowledges that restrictions on eligibility based on residency status could give rise to potential adverse effects in relation to the protected characteristic of race. It recorded that the change from the requirement for 6 months’ residence to that for ordinary residence would “exclude fewer people from the scheme while still maintaining the underlying policy of connection to the UK” and noted that any effects on non-British victims might be mitigated in part through access to NHS treatment and support services for victims of crime whilst in the UK. At [74] it recorded the

MP v FTT and CICA (CIC) [2022] UKUT 91 (AAC)
Case no: UA-2019-002633 (previously JR/295/2019)

position stated at [106] of the first EIA in respect of fatal cases. It does not suggest that fatal cases were among the equality issues raised during consultation and does not comment on them further (albeit the general move from requiring 6 months' residence to requiring ordinary residence might help a small sub-category of bereaved would-be applicants.)

62. The (general) impact assessment set out a summary of estimated reductions in compensation payments. By far the biggest savings (£40-45 million) were attributable to the removal of the tariff bands applicable to the least serious injuries and the reduction of the amounts payable in respect of some other tariff bands. Paying loss of earnings only at the rate of statutory sick pay and changes to the discount rate for future loss were anticipated to save between £0m and £10m. Changes to the eligibility rule in connection with victims of crime with unspent criminal convictions was anticipated to save up to £2m. As the document noted at [59]:

“Costs to victims who do not satisfy the requirement of ordinary residence or are exempt from it...: these individuals will lose entitlement to compensation for crimes of violence committed in Great Britain. As there are currently no requirements relating to residence in the scheme, no information is held that could be used for an estimate, so we are not able to quantify the impact of this reform”.

63. The interested parties provided the applicant's representatives with substantial data in connection with the matters raised by the case, albeit it was in some cases incomplete because of data retention policies. Under the 2008 Scheme, there were 54 applications based on a fatality, of which 28 resulted in awards (1 application still pending), with a total value of £588,698. As previously noted, there was no residence requirement under the 2008 scheme, so that was not the reason for the refusals. Under the 2012 Scheme there had been 4,066 applications based on fatalities of which 512 remained undecided at the time the data was compiled. 2,676 had resulted in awards at a cost of £17,992,988. 878 cases had been refused, of which 17 were refused on the basis of para. 10 (residence requirements) of the Scheme.

64. The residence requirements were introduced in an attempt to save costs. References to “sufficient connection to the UK” and such like mean essentially the degree of connection which the Government considers appropriate to spend resources on. There is nothing intrinsic in being a victim of crime in Great Britain that otherwise makes such a connection necessary and as noted both predecessor schemes and the Convention and the Directive proceed on the basis of the territory where the crime occurred. Nonetheless, saving costs in order to provide a compensation scheme and, given the wider reforms, other services to victims of crime is in my judgment a legitimate aim. The decisive question is whether the difference in treatment of the applicant can be justified: see e.g. Lord Reed's observations in *R(JS) v Secretary of State for Work and Pensions* [2015] UKSC 16 at [63]-[64].

65. The position adopted by the Government and reflected in the Scheme has a number of consequences. The applicant's son was undoubtedly ordinarily resident in the UK, having completed a university course, and lawfully remained afterwards,

MP v FTT and CICA (CIC) [2022] UKUT 91 (AAC)
Case no: UA-2019-002633 (previously JR/295/2019)

working as a pizza delivery man at the time he was murdered. If he had been seriously injured in the attack, rather than killed, he would have been eligible for compensation. The consequences of the attack were sadly more serious but as the Scheme stands his family have no claim. If he had been injured and then died sometime later, he might have received compensation (see Scheme para 60) but his parents would not.

66. Conversely, if a person from overseas falling outside the Scheme's eligibility categories was murdered whilst on a short visit to Great Britain to see their relatives who were ordinarily resident in Great Britain, those relatives would have a claim, but a visiting person who was seriously injured would not.

67. Para 106 of the first EIA sets out the latter intention. No justification is advanced for the position though it may be because it was viewed as something of a concession. As to the former position, I have been taken to no consideration of it on the part of Government. Specifically, there was no consideration of it in the equality impact assessment even though, even without statistics, one may reasonably infer that the numbers of people in minority racial groups who are ordinarily resident in the UK, but whose close relatives are not, is likely to be significant. While there is substantial material relating to the imposing of an eligibility requirement in general terms, as regards why it was appropriate for the requirement for ordinary residence to attach to the applicant for compensation rather than to the victim, had the Government's view been discernible from the evidence, it would be entitled to weight, but it has not, so a court or tribunal has to reach its own conclusions.

68. At the time of the hearing, it was accepted on the basis of the then existing authorities that the relevant question was whether the difference on treatment is "manifestly without reasonable foundation", a question requiring proactive examination. Since then, the Supreme Court has given judgment in *R (SC and others) v SSWP* [2021] UKSC 26. Lord Reid counsels at [161] against an over-reliance on the "manifestly without reasonable foundation" formulation, suggesting that "rather than trying to arrive at a precise definition of the ambit of the "manifestly without reasonable foundation" formulation, it is more fruitful to focus on the question whether a wide margin of judgment is appropriate in the light of the circumstances of the case." A degree of weight, which will normally be substantial, is to be accorded the judgment of the primary decision-maker in fields involving economic and social policy and I consider that the present case is no exception.

69. I note that differential treatment based exclusively on nationality requires very weighty reasons (see *Gaygusuz v Austria* (1996) 23 EHRR 364 at [42]) but nationality was not the exclusive ground in the present case. Residence on the other hand is not one of the "suspect grounds": *R(SC) v SSWP* [2021] UKSC 26 at [125]. Permanent residence was observed to "come close to" a suspect ground by Singh LJ in *R (Drexler) v Leicestershire County Council* [2020] EWCA Civ 502, but only in the context of one of a number of reasons for not placing reliance in the context with which he was concerned on *Ponomaryov v Bulgaria* (2013) 59 EHRR 20. The present case does not turn on permanent residence and in any event, the issue in *Drexler*, namely whether the "manifestly without reasonable foundation" test should be applied has been overtaken by the decision in *SC*.

70. I did consider whether it was appropriate to invite further submissions in the light of SC but decided not to do so on the basis that (a) neither party had asked for that opportunity; (b) the impact of SC, as applied to the present case, appeared likely to be not significantly different from the application of the “manifestly without reasonable foundation” test developed in existing submissions before me; and (c) to do so, given the considerable and regrettable delay to this case already, would be liable to add further to it with very little advantage.

71. The FtT dealt with the matter as follows:

“36. In this case we do not find the policy to be unjustifiable. We think it was a legitimate aim to require a connection to the UK. The Government put this at the heart of the reform to the Scheme and when providing a compensation scheme funded by the taxpayer we consider that to be a reasonable policy. The scheme provided that the test for that connection be either residency or citizenship. We consider that to be a legitimate test.

37. Any other test would be very subjective. The appellant says he has a connection to the UK but this is vicariously through his son who lived in the UK to whom he was very close and he paid his university fees. There will be other relatives who had no link at all with the UK other than the fact that their deceased relative, with whom they may have had little contact, happened to reside in the UK at the time of their death. The basis of the connection has to be through the applicant and the beneficiary of the award and not the deceased.

38. There will be victims of crimes of violence who are not resident and not citizens but feel they have a connection to the UK. A victim who has regularly visited friends for many years, a victim who frequently visits for business meetings with UK companies.

39. The appellant submits that the policy to exclude relatives not habitually resident or non nationals in fatal cases is not a proportionate means of achieving an aim. The appellant submits he is one of a tiny cohort. However, to say that paragraph 10 does not apply to him would undermine the whole of the residency and nationality requirements because there could be other groups or individuals who could argue a close connection to the UK.

40. We do find the policy proportionate and we cannot see a less intrusive measure that could be used without undermining the objective.

I observe that it is unclear whether in the final sentence of its para.37 the FtT is stating the position or is giving its own view.

72. Ms Adam submitted that the difference in treatment is indeed manifestly without reasonable foundation. She relies on *JT* at [111] where Leggatt LJ said:

“I fully accept that what level of resources to allocate to the criminal injuries compensation scheme and how to allocate those resources are pre-eminently choices for the Secretary of State to make with the approval of Parliament.

MP v FTT and CICA (CIC) [2022] UKUT 91 (AAC)
Case no: UA-2019-002633 (previously JR/295/2019)

Nevertheless, that freedom of choice is not completely unconstrained. In particular, it cannot be a sufficient reason for excluding a category of persons who have suffered injuries as a direct result of violent crimes from a scheme designed to compensate people who have suffered such injuries that doing so would save money. Although a wide margin is accorded to the Secretary of State in choosing how to allocate the funds made available for paying compensation to victims of crime, those funds must be allocated according to some rational set of criteria and not in a wholly arbitrary way.”

73. Ms Adam suggests that where the line is drawn is indeed arbitrary. The amount of fatality claims under the 2008 Scheme was very small; the number of fatality claims under the 2012 Scheme rejected because of para.10 was only 17, which in comparison with the claims paid and the overall cost of the Scheme was extremely small. She draws a comparison with OA, where the cost of the adjustment to the student finance rules to accommodate OA’s circumstances was minimal.

74. Compensation for criminal injuries is properly based on the territory where the crime occurred for the reasons already given. Indeed, the later 2020 Consultation on the Scheme states (Executive Summary, para.2, emphasis in the original)

“The Scheme has at its heart this purpose – to recognise, through compensation, the harm experienced by a victim injured as a result of violent crime. The Scheme is a universal one and has to work equally for all victims of violent crime.”

75. As regards excluding from compensation the parents of a victim who had been ordinarily resident in the UK, there is no indication that it had any material financial impact; the government had not considered the impact of excluding the parents of those who died from violent crimes; and it was irrational that a parent from an EU or Convention country could get compensation if their child was murdered while here as a worker but the applicant could not.

76. Mr Moretto relies on what is said in *R(RJM) v SSWP* [2009] AC 311:

“54. However, policy concerned with social welfare payments must inevitably be something of a blunt instrument, and social policy is an area where a wide measure of appreciation is accorded by the ECtHR to the state (see para 52 of the judgment in *Stec* 43 EHRR 1017). As Lord Bingham said about a rather different statute, “[a] general rule means that a line must be drawn, and it is for Parliament to decide where”, and this “inevitably means that hard cases will arise falling on the wrong side of it, but that should not be held to invalidate the rule if, judged in the round, it is beneficial” - *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] 2 WLR 781, para 33.

...

57. The fact that there are grounds for criticising, or disagreeing with, these views does not mean that they must be rejected. Equally, the fact that the line may have been drawn imperfectly does not mean that the policy cannot be justified. Of course, there will come a point where the justification for a policy is so weak, or the line has been drawn in such an arbitrary position, that, even

MP v FTT and CICA (CIC) [2022] UKUT 91 (AAC)
Case no: UA-2019-002633 (previously JR/295/2019)

with the broad margin of appreciation accorded to the state, the court will conclude that the policy is unjustifiable.”

77. He submits that the line cannot be regarded as arbitrary because there is no obligation to pay public funds to non-UK residents and the extension beyond those who are ordinarily resident – to EEA nationals, nationals of Convention countries, British Citizens, members of the armed forces etc.– was on a rational basis.

78. The amounts involved in claims by bereaved parents (£18m under the 2012 Scheme) were substantial and, while the number of claims rejected for an inability to meet paragraph 10 had been small, one does not know how many claims would have been made had that provision not been in place. The fact that it was not possible to monetise the saving does not invalidate it; it is rational to seek to exclude costs of an unknown amount.

79. While accepting that the position of family members of victims who had met the ordinary residence requirement when killed was not addressed in the EIAs, he submitted that it is not legitimate to identify a set of circumstances which came up in a particular case and say that it should have been included in the EIA. The amendments to the Scheme had drawn broad lines.

80. The “manifestly without treasonable foundation” test did not fall to be applied in OA (see [48iii]) and the case was exceptional in that what OA was complaining about had already been put right for the future by a change in the rules (at a small cost) and so the additional cost involved in extending the concession to her retrospectively was particularly small.

81. As to *TD*, it was unsurprising that the measure was held irrational, as the problem arose from a Government mistake.

82. He invites me to hold that “connection to the UK is the reason”, not confined to costs, although there clearly would be a cost to extend dependency to those who do not have a connection to the UK.

83. I do not accept on the evidence that “connection to the UK” was anything other than a way of attempting to save unknown costs, in a way which was presumably considered politically acceptable. However, approaching it on such a basis, it still seems to me that to have some kind of residence test is proportionate and in general terms unobjectionable. It can be found in reaction to many mainstream social security benefits, for example. I further accept Mr Moretto’s submission that the various extensions of who is eligible are rational, whether they be based on the UK’s international obligations or the responsibilities which the State considers it owes to its citizens or to members of the armed forces. It seems wholly impracticable, where a residence requirement can be properly applied, to disapply it in individual cases on the basis of some perceived closeness of connection with the UK.

84. Where in my view the matter is more debatable is in applying the test to the applicant for compensation in a fatality case rather than to the deceased. A person who is ordinarily resident in the UK and who is likely to be contributing to UK society through work and paying taxes or in other ways, has, as it were, “earned” the right to

MP v FTT and CICA (CIC) [2022] UKUT 91 (AAC)
Case no: UA-2019-002633 (previously JR/295/2019)

be eligible for compensation in the event that they sustain an injury through being the victim of crime. The claim of a parent (or others) is derived from the attack on the victim. It seems to me that the person who “earns” the protection of the state for themselves through ordinary residence, citizenship, membership of the armed forces or whatever might be thought to do so equally for the degree of protection afforded to his relevant family members (etc.) by the bereavement provisions.

85. As noted, the impact on family members of victims who met the eligibility conditions but whose family members did not, does not appear to have been considered at all. Nor has any justification been advanced of why it is appropriate to allow ordinarily resident, or otherwise eligible, family members of non-ordinarily resident victims to claim. All there appears to have been is the reiteration in the EIAs that such would be the position.

86. I have no doubt that the scheme could rationally have provided for eligibility to be determined on the basis of the deceased having fulfilled the eligibility requirements, either as well as, or instead of, applicants who themselves fulfil those requirements being able to claim even where a deceased person themselves could not have done so. The impact on family members overseas of victims who were ordinarily resident appears to have received scant consideration, including in relation to race, but I am not considering a judicial review of the lawfulness of the making of the Scheme. The issue involved unknown (though possibly modest) sums of money. It fell to be decided as part of package of measure to assist the victim of crime and to involve perpetrators in making reparation. It required (and received) a decision, involving sensitive matters of political judgment, about how far considerations of equity and social solidarity might stretch. Leaving aside any human rights considerations, there was no other legal obligation for them to stretch further: even where those international agreements to which the United Kingdom is a party do apply, they do not require compensation to be paid to non-dependants. The Scheme received democratic scrutiny, having been approved by both Houses of Parliament. It is well-recognised that the State is allowed to rely on “bright line” rules in relation to the allocation of public funds. Unless the overall cost were to increase, drawing the line to allow a person in the applicant’s position to rely on the residence status of the deceased would mean disentitling another group, such as those parents who meet the residence requirements when the deceased person did not, and it is not in my view for a court or tribunal to say that the line should have been drawn in this place rather than that. Even without the benefit of the State’s rationale in not allowing the eligibility of a deceased victim to be relied upon, I consider that the above considerations are sufficient to justify not only the imposition of the eligibility requirements under the Scheme, but the failure to make different provision to allow reliance on the deceased’s eligibility, and for the above reasons, the terms of the Scheme must in my view be respected.

88. Were I to be wrong in my view that the basis for the differential treatment in this case does not require “weighty reasons”, I would conclude on the basis above that such reasons exist.

89. There are parts of the FtT’s decision in my respectful view (with the benefit of fuller submissions than the FtT will have had) which are open to some criticism. In particular its para 37 appears to assume what has to be decided, while its concern,

MP v FTT and CICA (CIC) [2022] UKUT 91 (AAC)
Case no: UA-2019-002633 (previously JR/295/2019)

entirely understandable, that any alternative which human rights legislation might require should not involve an impractical degree of subjectivity does not consider the possibility of linking the ability to claim in a fatal case to the eligibility of the deceased. However, in the light of the conclusions I have reached, those criticisms did not have a material impact on the outcome, so if the task for me is reviewing the FtT's decision in relation to human rights, I would not intervene to make a quashing order. If the task for me is to conduct my own evaluation of the human rights submissions, I conclude that there is no breach of art.14 in the present case.

90. It remains to express regret to the parties for the very considerable delay affecting this decision. Along with the impact of Covid-19, there have been other staffing and operational issues affecting the Chamber over the last year and I am sorry that the parties have had to be so patient.

C.G.Ward
Judge of the Upper Tribunal
Authorised for issue on 22 March 2022