Neutral Citation Number: [2023] EWCA Civ 1527

Case No. CA-2022-001937

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)
UPPER TRIBUNAL JUDGE WARD
[2022] UKUT 91 (AAC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 December 2023

Before:

LORD JUSTICE PETER JACKSON
LORD JUSTICE LEWIS
and
LADY JUSTICE FALK

- -

Between:

THE KING (on the application of PEIRIS)	**Appellant**
- and -	
(1) FIRST-TIER TRIBUNAL **(2) CRIMINAL INJURIES COMPENSATION AUTHORITY** **(3) SECRETARY OF STATE FOR JUSTICE**	**Respondents**

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- -

Nicola Braganza KC and Geeta Koska (instructed by **Scott-Moncrieff & Associates**) for the **Appellant**
Robert Moretto (instructed by **Government Legal Department**) for the **Second and Third Respondents**
The First Respondent did not appear and was not represented

Hearing dates: **28 and 29 November 2023**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 21 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE LEWIS:

INTRODUCTION

1. This appeal concerns the refusal by the Criminal Injuries Compensation Authority ("the Authority") of a bereavement payment to the appellant, Mr Peiris, following the tragic murder of his son, Thavisha Peiris, in Sheffield in October 2013. The appellant is a Sri Lankan national who is not ordinarily resident in the United Kingdom.

2. The Authority refused to make a payment as the appellant did not satisfy the eligibility criteria for such awards under paragraphs 10 and 11 of the Criminal Injuries Compensation Scheme 2012 ("the Scheme"). Those paragraphs provide that a person is eligible for an award under the Scheme only if he was ordinarily resident in the United Kingdom on the date of the incident giving rise to the criminal injury, or if he was a British national, or a national of a state to which the United Kingdom owed obligations under international or European Union law, or a member of the armed forces. As the appellant was not ordinarily resident in the United Kingdom, and did not meet any of the other conditions, the Authority refused to make a bereavement payment.

3. The appellant appealed to the First-tier Tribunal which dismissed his appeal. He then sought judicial review of that decision, contending that the refusal of the bereavement payment amounted to unlawful discrimination contrary to Article 14, read with Article 1 of the First Protocol, of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The Upper Tribunal dismissed the claim. It accepted that the appellant was in a materially analogous situation with parents of a deceased victim of violence who were ordinarily resident in the United Kingdom or were British nationals, and that he was subjected to differential treatment on the grounds of status, namely nationality and/or residence. The Upper Tribunal held, however, that the differential treatment was objectively justified. In particular, it considered that a residence requirement was proportionate, as was the extension of the Scheme to citizens of the UK and members of the armed forces for whom the United Kingdom was responsible, and to nationals of states to whom the United Kingdom owed obligations under international or European Union law.

4. The appellant appeals against the finding that the differential treatment was objectively justified. The third respondent, the Secretary of State for Justice, also seeks to uphold the decision on additional grounds, namely that the appellant was not in a materially analogous position to other parents of deceased victims and the Upper Tribunal was wrong to find that any differential treatment was based on a status recognised by Article 14 of the Convention.

5. There are two preliminary matters. First, the application made by the appellant included an amount of £3,795.59 in respect of funeral expenses for his son's burial as well as the claim for a bereavement payment. Under the terms of the Scheme, funeral payments may be made for the benefit of the estate of a person who dies as a result of a crime of violence. It would, therefore, be wrong to refuse a funeral payment on the basis that the parent of the deceased was ineligible for a bereavement payment – the two payments are distinct. The point had not been raised in the claim for judicial review nor in the grounds of appeal which focussed solely on Article 14 of the Convention. When the point was raised by this Court, Mr Moretto for the Authority took instructions. The Authority then very properly accepted that they should make a decision on the claim

for funeral expenses. Mr Moretto explained that that would require a new application form and the provision of certain information, but the Authority would not take any point on delay in making the application or the need for the person making the application to be ordinarily resident in the United Kingdom. Following the hearing we were informed that the Authority had now made an award of £3,704 for funeral expenses, that being the full amount claimed, calculated at current rates of exchange. As the decision of 13 December 2023 acknowledged, no amount of money could compensate for the loss of a loved one but the payment was an expression of public sympathy for the loss. We were pleased to be told by the appellant that the prompt action of the Authority following the hearing means a great deal to the family.

6. Secondly, the appellant sought permission to rely on an unagreed bundle. Whilst not all of the material included within that bundle is relevant, some documents are and we granted permission to rely on it. The appellant also sought to rely on a witness statement made by his surviving son, Thavisha's brother. We granted permission for that witness statement to be adduced.

THE LEGAL FRAMEWORK

The Legal Basis of the Scheme

7. Section 1 of Criminal Injuries Compensation Act 1995 ("the 1995 Act") provides that 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." The arrangements are to include the circumstances in which, and the categories of persons to whom, awards may be made. Section 2 of the 1995 Act deals with the basis on which compensation may be paid. Section 2(2) provides, amongst other things, that provision shall be made for the payment of:

> "in cases of fatal injury, such additional amounts as may be specified or otherwise determined in accordance with the Scheme."

8. Section 11 of the 1995 Act deals with Parliamentary control of the making of the Scheme and provides, so far as material, that:

> "(1) Before making the Scheme, the Secretary of State shall lay a draft of it before Parliament."
>
> (2) The Secretary of State shall not make the Scheme unless the draft has been approved by a resolution of each House.

The Review and Making of the Scheme

9. In 2012, the Secretary of State conducted a review of the predecessor scheme. He undertook a consultation following the publication of a consultation document, entitled "Getting it right for victims and witnesses". That document set out the principles underlying the proposed reforms. At paragraphs 22 and 23, the consultation document said this:

> "22. We are also concerned that any compensation scheme must be sustainable. The CICS is a demand-led scheme which costs

> the Government over £200m each year and is one of the most expensive in Europe in terms of direct financial compensation for victims of crime. The Scheme has historically been underfunded, with funding allocated at the beginning of the financial year needing to be topped up later in the year. Under the tariff scheme there are existing applications with an estimated total value of £260m, more than the value of claims expected to be made each year, and more than the available annual budget for future years. In addition, provision was not made for the scheme's historic (pre-tariff) liabilities of nearly £400m, which this administration is now tackling and to which it is already allocating funding, so that awards due to victims will be paid as their cases are decided.
>
> 23. It is clear that a review of the Scheme is long overdue and that it takes place in a difficult financial climate. The Scheme must be sustainable if it is to continue to offer timely compensation to victims in the long-term and provide a set of fair, realistic expectations. Our proposals for reform are focused on protecting awards to those most seriously injured by violent and sexual crime. They open the way to make savings from the Scheme and rebalance the overall resources available to victims to best effect by increasing the financial reparation made by offenders in order to provide additional funding for victims services."

10. The consultation document considered questions of eligibility for the payment of an award. It set out proposals requiring a connection with the United Kingdom and the applicant for an award as explained at paragraph 188 which said:

> "188. 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. "

11. The consultation document also proposed that, in fatal cases, bereaved families would need to meet the residency requirements, saying at paragraph 194:

> "194. In fatal cases, bereaved families 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. ”

12. One of the questions for consultation was therefore the following:

> “Q35 To be eligible for compensation should applicants have to demonstrate a connection to the UK through residence in the UK for a period of at least six months at the time of the incident?”

13. The government published its response to the consultation in July 2012. At paragraphs 163 to 169, it indicated that the majority of the responses to this question had difficulty with the proposal that victims would be denied compensation simply by virtue of not being resident although a third of respondents supported the imposition of a residency test. The government's responses did not indicate that specific comment had been made about the proposal that bereaved family members in fatal cases would only be eligible for payments if they were resident in the United Kingdom. The government response was set out at paragraph 169 in the following terms:

> “We have considered the responses and have concluded that the proposal to require applicants to demonstrate residence for a period of six months at the time of the incident is too stringent a test. However, we remain of the view that applicants should demonstrate at least an intention to develop and maintain a connection to the UK. We have therefore removed the requirement that the applicant be resident for six months at the same time of the incident but retained the requirement that they be ordinarily resident.”

14. Other documents were published in July 2012. One was an economic impact assessment of the proposed changes. That document stated that the policy objectives and intended effects of the proposed changes were, amongst other things, to make the Scheme more sustainable long-term. The assessment sought to provide estimates of the costs which would be saved by implementing different options. Among the options considered was the exclusion of those who could not show they were ordinarily resident in the UK at the time of the incident other than British nationals, European Union and European Economic Area (“EEA”) nationals, and nationals of states party to the European Convention on the Compensation of Victims of Violent Crimes (“the Victims Convention), members of the armed forces and victims of traffickers. In relation to those changes, the assessment said:

> “59) *Costs to victims who do not satisfy the requirement of ordinarily resident or are exempt from it* **(reform b)**: 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.”

15. There was also a footnote which says that in 2009/2010, the Authority received 254 claims from individuals with addresses outside Great Britain. Of those, 160 received compensation totalling £908,000. However, the footnote indicated that those figures

could include British or EU or EEA nationals living abroad, including armed forces personnel, who would continue to be eligible for payments under the proposals (and so the change in eligibility rules would not result in any cost savings in relation to this group). The figures also excluded persons with United Kingdom addresses but who may not be ordinarily resident in the United Kingdom (and who would not be eligible for awards under the proposals and this could result in reduced costs). The footnote stated that these figures are "not a useful guide to the impact of a restriction based on residence".

16. An equalities impact assessment was also published. That stated that the government believed that applicants to the Scheme should have a connection to the United Kingdom. It explained that a residence test was considered to be the best way of determining connection but that the United Kingdom had a number of international obligations and obligations owed to the European Union. Consequently certain people would be exempt from the residence test, namely EU and EEA nationals, nationals of states which were a party to the Victims Convention and also victims of trafficking. In addition, British nationals were to be exempt as the government considered that British nationals should not face an additional eligibility hurdle but should be considered on the same footing as EU and EEA nationals and those from states which were parties to the Victims Convention. The equality impact assessment also set out the view that those serving in the armed forces had a connection with the United Kingdom. The equality impact assessment also noted concerns about the impact on certain groups of victims and considered mitigation and justification. The equality impact assessment considered the eligibility test as a whole, as it applied to victims of crime or, in fatal cases, bereaved families. It did not separately consider the impact of the residence requirement on bereaved families, although it repeated at paragraph 74 that bereaved relatives of the Scheme who applied to the Scheme would need to meet the residency requirement in the same way as other applicants but it noted that it was not proposed to apply the residency requirement to the deceased person so long as the incident giving rise to the claim took place in Great Britain.

The Scheme

17. The Scheme was made by the Secretary of State on 13 November 2012 after being approved by each House of Parliament.

18. Paragraphs 4 to 9 deal with the injuries for which an award may be made. The material provisions are paragraphs 4 and 7 which 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. 5. "
>
> …..
>
> 7. An award may be made in accordance with paragraphs 57 to 84 where a person who has sustained an injury in circumstances falling within paragraph 4 or 5 subsequently dies."

19. Eligibility for an award is dealt with in paragraphs 10 to 16, the material provisions of which provide:

> "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."

20. Payments in fatal cases are dealt with in paragraphs 57 and following of the Scheme. The provisions of paragraph 57 and 59 which are material for this appeal provide:

> "57. A qualifying relative of a person who has died as a direct result of sustaining an injury in circumstances falling within paragraph 4 or 5 may be eligible for:
>
> (a) a bereavement payment (paragraphs 61 and 62);
>
> (b) a child's payment (paragraphs 63 to 66);
>
> (c) a dependency payment (paragraphs 67 to 74).
>
> 59. A qualifying relative is a person who at the time of the deceased's death was:

…..

(e) a parent of the deceased;

…..”

21. A bereavement payment is governed by paragraphs 61 and 62 of the Scheme which provide:

> “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.”

22. Dependency payments are payments that may be made to a qualifying relative who at the time of the deceased’s death was financially or physically dependant on the deceased (see paragraph 67). Child’s payments are payable to a person who is a qualifying relative who was under 18 years old at the time of the death of the deceased and was dependent on him.

THE FACTUAL BACKGROUND

23. The appellant’s son, Thavisha, was born in October 1988. He was a national of Sri Lanka but at the time of his death he was living in the United Kingdom. He came to the United Kingdom in 2011 to study at Sheffield Hallam University. His education in the United Kingdom was funded by his father from his retirement savings. Thavisha completed his studies, obtaining a bachelor’s degree with honours. He was granted post study leave and remained in the United Kingdom. He obtained a part time job as a delivery driver prior to starting a new career as an IT consultant. On 27 October 2013, on his last day of work as a delivery driver, Thavisha was driving and stopped to ask two individuals for directions. The two men followed Thavisha’s car as he drove into a parking bay, intending to rob him. One of the individuals had a knife and stabbed and killed Thavisha. One of the individuals pleaded guilty to murder and the other was convicted of murder following a trial. The two killers were sentenced and, as the sentencing remarks made clear, this was an unprovoked attack on Thavisha. It is clear from the evidence that Thavisha was a loved, and loving, son and brother. He was an exceptionally likeable, intelligent person who worked hard and had a successful future in front of him as a software engineer. The death of Thavisha has had a profound effect on his family.

24. On 6 October 2014, the appellant made a fatal injury application on the form provided by the Authority. He sought a bereavement payment and reimbursement of funeral expenses. As noted above, at no stage prior to the hearing before us was a distinction drawn between these two claims; all attention focussed on the former. On analysis, it is

relatively clear that the appellant was applying for the bereavement payment under paragraphs 61 and 62 of the Scheme on the basis that he was the parent (and so was a qualifying relative under paragraph 59(e)) of a person who had died as a result of a crime of violence. He was not applying for a dependency payment under paragraph 67 of the Scheme (as he was not dependant on his son). No question of a child's payment under paragraph 62 arose as the deceased did not have children. In order to be eligible for a bereavement award, the appellant, as the applicant for the award, would have to satisfy the eligibility requirements of paragraph 10 of the Scheme.

25. On 14 September 2016, the Authority refused the application. Following a review of that decision, the Authority wrote again on 1 March 2017 stating that it had decided not to make an award. The material parts of the letter said this:

> "Under paragraph 10 of the Scheme applicants must have a defined connection to the UK, normally by residence or nationality. "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.
>
> I have looked at the evidence submitted in support of your claim and application for a review of the original decision. I have arrived at the same conclusion as my colleague, that no award is possible under the 2012 [Scheme].
>
> An applicant must satisfy the conditions set out in paragraph 10, before any further consideration can be given to other conditions elsewhere in the Scheme. Mr Peiris, senior, the applicant in this case, has the residency test applied to him. He is not resident in the UK, therefore cannot qualify for an award. The fact that Mr Peiris Junior, was resident in the UK at the time of his death, unfortunately, is not sufficient to satisfy the terms of the Scheme.
>
> I am sorry for your loss and that I'm unable to make an award in these tragic circumstances."

The First-tier Tribunal Decision

26. The appellant appealed to the First-tier Tribunal ("the FTT") pursuant to paragraph 125 of the Scheme. The skeleton argument prepared by counsel on the appellant's behalf contended that the exclusion of bereaved relatives based on nationality and/or residence amounted to discrimination contrary to Article 14 of the Convention read with Article 1 of the First Protocol.

27. Following a hearing on 13 September 2018, the FTT dismissed the appeal by a decision of 18 October 2018. The FTT accepted that awards under the Scheme fell within the ambit of Article 14 of the Convention, and the appellant did not qualify for

compensation as the parent of a deceased victim as he was neither ordinarily resident in the United Kingdom nor a British citizen. That amounted to differential treatment on the basis of status. The FTT found, however, that the second respondent had established that the differential treatment was objectively justified as it had a legitimate aim and there was a reasonable relationship of proportionality between the aim and the means employed to realise it. The material parts of the FTT decision are in the following terms:

> "34. The Tribunal accept that the design of the 2012 Scheme is a matter of government policy in the context of the allocation of scarce resources with which Courts and Tribunals have been reluctant to interfere with. [A] wide margin is usually allowed to the state under the Convention when it comes to general measures of economic and social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds and the court will generally respect the legislature's policy choice unless it is manifestly without reasonable foundation" (*Stec v UK* (2006) 43 EHRR 1017)
>
> 35. In the case of *R (RJM) v Secretary of State for Work and Pensions* [2009] AC 311 at paragraph 57 Lord Neuberger says
>
> "the fact that there are grounds for criticising or disagreeing with these views (of the executive) 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 the policy is so weak, or the line has been drawn in such an arbitrary position, that, even with the broad margin of appreciation accorded to the state, the court will conclude that the policy is unjustifiable."
>
> 36. In this case the Tribunal does 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 to be either residency or citizenship. We consider that to be a legitimate test."
>
> and
>
> "39. The appellant submits that only 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."

The Decision of the Upper Tribunal

28. The appellant applied for judicial review of the decision of the FTT. That claim was determined by the Upper Tribunal. Following a hearing on 23 March 2021, the Upper Tribunal dismissed the claim by a decision dated 22 March 2022.

29. The Upper Tribunal accepted that a claim for compensation for injuries from crimes of violence fell within the scope of a Convention right, namely Article 1 of the First Protocol to the Convention and so Article 14 applied. It held that the appellant was in a materially analogous position to the parents of a deceased child who were ordinarily resident in the United Kingdom or were British citizens. The appellant was treated unfavourably on the ground that he was not ordinarily resident in the United Kingdom and was not a British national and so the measure treated the applicant unfavourably on the grounds of nationality and/or ordinary residence.

30. The Upper Tribunal then considered objective justification. Having considered the consultation document, the government response to the consultation, the economic impact assessment and the equality impact assessment, it said this at paragraph 64:

> "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 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]"

31. The Upper Tribunal then considered the submissions of counsel for the Authority, including the submission that having a connection to the UK was the reason for the differential treatment, not simply costs. The Upper Tribunal dealt with this submission, and its assessment of objective justification at paragraphs 83 to 88 where it said:

> "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 are 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 be eligible for compensation in the event that they sustain an injury through being the victim of crime. The claim of the 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 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 of the differential treatment in this case does not require "weighty reasons", I would conclude on the basis above that such reasons exist."

THE APPEAL

32. As this is an appeal from a refusal to grant judicial review, we are concerned with the decision of the Upper Tribunal. There are three grounds of appeal, namely that the Upper Tribunal erred in its consideration of objective justification as:

(1) it erred in rejecting the requirement for "weighty reasons" and concluding that, in any event, applying such a requirement would not have led to a different outcome;

(2) it was wrong to find that pursuing alleged (unspecified) savings in public expenditure alone amounted to a sufficient or proportionate justification for differential treatment; and

(3) it erred in applying the margin of appreciation afforded to democratic bodies, and conflated the issues of (i) the margin of appreciation and (ii) whether a reasonable relationship of proportionality was established between the purported aim and the treatment complained of.

33. The Secretary of State contended that there were two additional grounds for upholding the decision of the Upper Tribunal to dismiss the claim. First, he contended that the Upper Tribunal was wrong to hold that the appellant, as a Sri Lankan national who had never been resident in the UK, was in an analogous position to a person who was resident in the United Kingdom and could therefore claim compensation under the Scheme. Secondly, he contended that the Upper Tribunal was wrong to hold that any differential treatment was based on the grounds of status, and in particular on the grounds of nationality and/or ordinary residence.

SUBMISSIONS ON THE GROUNDS OF APPEAL

34. It is convenient to consider all three grounds of appeal together as they involve different aspects of the question of whether the Upper Tribunal erred in finding that the Secretary of State had demonstrated that the difference in treatment was objectively justifiable.

35. Ms Braganza KC, with Ms Koska, for the appellant, submitted that the refusal of the bereavement payment to the appellant was based on his nationality and his place of residence. Had he been a British national, he would have been eligible for the bereavement payment. In those circumstances, very weighty reasons were required to justify the differential treatment. Ms Braganza relied upon the decisions of the European Court of Human Rights ("the European Court") in *Gaygusuz v Austria* (1996) 23 EHRR 364, *Koua Poirrez v France* (2005) 40 EHRR 2 and *Ponomaryov v Bulgaria* (2014) 59 EHRR 20. The Upper Tribunal, therefore, erred, it was submitted, in concluding that weighty reasons were not required or in concluding that if they were required, that such reasons existed in the present case.

36. Secondly, Ms Braganza submitted that the Upper Tribunal had held that the eligibility criteria were exclusively intended to save costs. Having reached that conclusion, the Upper Tribunal erred in concluding that saving costs alone was capable of being sufficient justification. Further, Ms Braganza submitted that there was no evidence before the Upper Tribunal as to the costs savings in fatal cases and therefore there was no basis on which the Upper Tribunal could find that the differential treatment was justified on costs grounds.

37. Thirdly, Ms Braganza submitted that the margin of appreciation had no or little relevance in the present case as there was no evidence that Parliament had considered the relevant infringement, namely the rights of non-residents and non-British nationals in fatality claims. No decision of Parliament, to which the Upper Tribunal could properly defer, had been identified.

38. Mr Moretto, for the Authority and the Secretary of State, submitted that the correct approach now to questions of justification was set out in the decision of the Supreme Court in *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 233. That approach had been applied by the Supreme Court in this context in *R (A and another) v Criminal Injuries Compensation Authority and another (Anti Trafficking and Labour Exploitation Unit intervening)* [2021] UKSC 27, [2021] 1 WLR 3746.

39. Mr Moretto submitted that those authorities demonstrated that, in the context of welfare benefits such as payments under the Scheme, the sound management of public finances was a legitimate aim. Within the context of the allocation of scarce resources, it was unobjectionable, as found by the Upper Tribunal, for benefits to be limited to those who are resident in the United Kingdom or are British nationals. Furthermore, the eligibility criteria in the Scheme had been set by the government, and approved by Parliament, which required the applicants for an award to have a connection with the United Kingdom. In those circumstances, the Upper Tribunal was entitled to conclude that the differential treatment was objectively justified.

40. In relation to ground 1, Mr Moretto submitted that the present case was not analogous to *Gaygusuz* and the other cases relied upon by the appellant. Those cases were concerned with differential treatment based exclusively on grounds of nationality which was not the situation here. Weighty reasons for the differential treatment were not required or, if they were, the requirement in this context for a connection with the

United Kingdom in order to be eligible for payments was itself such a weighty reason. In relation to ground 2, the sound management of public finances was a legitimate aim in the cost of the provision of welfare benefits. The Upper Tribunal was referring to that aim when it found that "saving costs in order to provide a compensation scheme, and given the wider reforms, other services to victims of crimes" was a legitimate aim. It was inappropriate to characterise that as simply a question of cost savings. In relation to ground 3 the Upper Tribunal had not misapplied the margin of appreciation.

DISCUSSION AND CONCLUSION ON THE GROUNDS OF APPEAL

Article 14 read with Article 1 of the First Protocol to the Convention

41. The principal issue in this case concerns the question of whether the fact that the appellant is not eligible for a bereavement payment following the murder of his son, whereas a parent who was British national or ordinarily resident in the United Kingdom would be eligible, involves unlawful discrimination contrary to Article 14 of the Convention, read with Article 1 of the First Protocol to the Convention. Article 14 provides:

> "*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".

42. As appears from its terms, Article 14 can only be considered in conjunction with the enjoyment of one or more of the substantive rights or freedoms set out in the Convention. In the present case, the material provision is Article 1 of the First Protocol which provides that:

> "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 intentional 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. "

43. In broad terms, the approach to the question of whether differential treatment is contrary to Article 14 involves consideration of the following issues:

(1) Does the claim fall within the ambit of a Convention right?

(2) Are people who are in analogous, or relevantly similar, situations treated differently?

(3) Is that difference in treatment based on an identifiable characteristic amounting to a status?

(4) Does the difference in treatment have an objective and reasonable justification? That in turn involves consideration of whether the measure giving rise to the differential treatment pursues a legitimate aim and whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

44. In the present case, it is accepted that the payment of awards such as bereavement awards, under the Scheme fall within the ambit of Article 1 of the First Protocol and that, therefore, Article 14 of the Convention applies to the eligibility fixed by the Scheme (see *JT v First-tier Tribunal (Social Entitlement Chamber) and another (Equality and Human Rights Commission Intervening)* [2018] EWCA Civ 1735, [2019] 1 WLR 1313, especially at paragraph 69). The question of whether the appellant is in a materially analogous position to British national and ordinarily resident parents of children who are killed, and if so whether that differential treatment is based on status, forms the subject matter of the respondent's notice and is dealt with below.

45. The critical issue in respect of the grounds of appeal was whether the third respondent can establish that the difference in treatment under the Scheme is objectively justified. The Upper Tribunal held that the differential treatment was objectively justified. The task for this Court is to determine whether the decision of the Upper Tribunal was wrong. This Court does not re-hear the case as if it were a court of first instance but reviews the decision of the tribunal below: see *R (TP) v Secretary of State for Work and Pensions* [2020] EWCA Civ 37, [2020] PTSR 1785, at paragraph 119. In that regard, however, it is appropriate to bear in mind that the correct approach now to questions of proportionality is that identified by the Supreme Court in *SC*. That case was decided after the hearing in the Upper Tribunal in the present case and the Upper Tribunal did not invite further submissions on that decision. Given the importance of the decision in *SC*, however, it is appropriate to summarise the decision before considering the reasoning of the Upper Tribunal against the approach outlined by the Supreme Court.

46. In *SC,* Lord Reed summarised the position as follows. In considering questions of proportionality in relation to measures of economic or social strategy, courts will need to adopt a "nuanced approach which is not fully captured by a 'manifestly without reasonable foundation' standard of review, and which in some circumstances calls for much stricter scrutiny" (paragraph 2). It is doubtful if that nuanced approach can be comprehensively described by any general rule (paragraph 99). Lord Reed identified certain general points, however, at paragraph 115 and 116 in the following terms:

> "115. In summary, therefore, the court's approach to justification generally is a matter of some complexity, as a number of factors affecting the width of the margin of appreciation can arise from "the circumstances, the subject matter and its background". Notwithstanding that complexity, some general points can be identified.
>
> (1) One is that the court distinguishes between differences of treatment on certain grounds, discussed in paras 100–113 above, which for the reasons explained are regarded as especially

serious and therefore call, in principle, for a strict test of justification (or, in the case of differences in treatment on the ground of race or ethnic origin, have been said to be incapable of justification), and differences of treatment on other grounds, which are in principle the subject of less intensive review.

(2) Another, repeated in many of the judgments already cited, sometimes alongside a statement that "very weighty reasons" must be shown, is that a wide margin is usually allowed to the state when it comes to general measures of economic or social strategy. That was said, for example, in *Ponomaryov* , para 52, in relation to state provision of education; in *Schalk*, para 97, in relation to the legal recognition of same-sex relationships; in *Biao v Denmark* , para 93, in relation to the grant of residence permits; in *Guberino* , para 73, in relation to taxation; in *Bah v United Kingdom* para 37, in relation to the provision of social housing; in *Stumner v Austria*, para 89, in relation to the provision of a state retirement pension; and in *Yigit v Turkey*, para 70, in relation to a widow's pension. In some of these cases, the width of the margin of appreciation available in principle was reflected in the statement that the court "will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'": see *Bah*, para 37, and *Stummer*, para 89.

(3) A third is that the width of the margin of appreciation can be affected to a considerable extent by the existence, or absence, of common standards among the contracting states: see *Petrovic* and *Markin* .

(4) A fourth, linked to the third, is that a wide margin of appreciation is in principle available, even where there is differential treatment based on one of the so-called suspect grounds, where the state is taking steps to eliminate a historical inequality over a transitional period. Similarly, in areas of evolving rights, where there is no established consensus, a wide margin has been allowed in the timing of legislative changes: see *Inze v Austria, Schalk* and *Stumer v Austria.*

(5) Finally, there may be a wide variety of other factors which bear on the width of the margin of appreciation in particular circumstances. The point is illustrated by such cases as *MS v Germany, Ponomaryov* and *Eweida v Uinted Kingdom*.

116. As the cases demonstrate, more than one of those points may be relevant in the circumstances of a particular case, and, unless one factor is of overriding significance, it is then necessary for the court to make a balanced overall assessment."

47. The application of those principles to the field of compensation for criminal injuries was considered in *R (A) v Criminal Injuries Compensation Authority.* That, again, was

a decision of the Supreme Court given after the hearing before the Upper Tribunal in the present case but before judgment. The specific issue did not concern the eligibility treatment in paragraph 10 and 11 of the Scheme but a different exclusionary rule contained in paragraph 26 of the Scheme which provided that awards could be withheld or reduced where the applicant has unspent convictions. Lord Lloyd-Jones, with whom the other members of the Court agreed, made the following three general observations at paragraphs 83 to 85 of his judgment:

> "83. First, the [Scheme] operates in the field of social welfare policy where courts should normally be slow to substitute their view for that of the decision maker (*R (RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311, para 56). Furthermore, this is an area where the ECtHR usually accords a wide margin of appreciation to national courts as it explained in *Stec*, paras 51, 52, cited at para 82 above and in *Fábián v Hungary* (2017) 66 EHRR 26, paras 114, 115. The question whether and, if so to what extent, the state should pay compensation to victims of crimes of violence who have themselves committed crimes is essentially a question of moral and political judgement. Furthermore, it requires the exercise of political judgement in relation to the allocation of finite public resources. This is, therefore, a field in which the courts should accord a considerable degree of respect to the decision maker.
>
> 84. Secondly, the reasons for judicial restraint are greater where, as in the present case, the statutory instrument has been reviewed by Parliament. In *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 Lord Sumption JSC expressed the matter in the following terms at p 780, para 44:
>
> > "when a statutory instrument has been reviewed by Parliament, respect for Parliament's constitutional function calls for considerable caution before the courts will hold it to be unlawful on some ground (such as irrationality) which is within the ambit of Parliament's review. This applies with special force to legislative instruments founded on considerations of general policy."
>
> 85. Thirdly, the basis of the discriminatory treatment complained of is also relevant here. The ECtHR has identified a number of suspect grounds of differential treatment which are regarded as particularly serious, such as sex, race or ethnic origin, nationality or birth status, and which will usually require very weighty reasons by way of justification, unless outweighed by other relevant considerations. In general, the rationale is the link between the characteristic on which differential treatment is founded and a history of stigmatisation, stereotyping and social exclusion. However, in the present case the status relied upon, i e being a victim of trafficking with a relevant unspent conviction, is not within the range of suspect reasons where discrimination is usually particularly difficult to justify.

> Accordingly, to ask whether the measure is manifestly without reasonable foundation is an entirely appropriate test.

The Present Case and the Judgment of the Upper Tribunal

The Legitimate Aim

48. The context in the present case is the payment of compensation to victims of crime or their relatives. The payments made under the Scheme are, or are akin to, welfare or social benefits intended to express social solidarity or support for those affected and to address the economic consequences that they suffer as a result of being victims of crime. That is true both of victims of crime generally, and specifically in relation to the family members of deceased victims of violence. The payments for the family members of deceased victims include bereavement payments, as an expression of social solidarity or support, and other payments such as dependency payments or child payments which address the economic consequences for those who were dependent on the victim. The underlying rationale, or justification, for making payments to those affected by violent crime is that they have suffered a serious misfortune for which the whole community should help to compensate.

49. Against that background, it is apparent from reading the material in the present case that the aim underlying the reforms to the Scheme was to ensure the provision of a criminal injuries compensation scheme which was sustainable. Such a scheme was demand-led and, by 2012, cost over £200 million and was one of the most expensive in Europe. As the consultation document noted, the Scheme had to be sustainable if it were to continue to offer compensation to victims of violence. The reforms were intended to protect those most seriously injured by violent and sexual crime. They involved making savings, rebalancing the overall resources made available to victims and increasing financial reparation from offenders.

50. The aim, therefore, was to provide for a scheme for the payment of compensation for the victims of crime in a manner which was sustainable. As Lord Reed recognised at paragraph 202 of his judgment in *SC,* that is a legitimate aim. A system of welfare or social benefits such as child tax credit in that case, or compensation for criminal injuries in the present case, must be guided by the principle of control of expenditure.

51. In that regard, the Upper Tribunal was correct to conclude that controlling expenditure in order to provide a compensation scheme and, given the wider reforms, other services to victims was a legitimate aim (paragraph 64 of its reasons). It may be unhelpful to characterise this aim simply as an "attempt to save costs" or to regard the reforms as nothing "other than a way of attempting to control costs" as it was expressed in paragraph 83 of its reasons. The legitimate aim was to provide a sustainable basis for the allocation of social or welfare type payments for those who were the victims of violence and that necessarily involved controlling the costs of such payments.

The Question of Proportionality

52. The basis of the revised system of making awards was to require a connection to the United Kingdom. That meant that those applying for awards had to establish that they were ordinarily resident in the United Kingdom or fell within one of the exceptions including, in particular, that they were British nationals (I deal below with the other

exceptions). Those eligibility requirements applied to a person who was the victim of violence. They also applied to the family members in fatality cases where their family member had died as a result of a crime of violence. The real question on this aspect of the appeal is whether the Upper Tribunal was entitled to consider that the use of those eligibility criteria as a means of determining who would receive payments bore “a reasonable relationship of proportionality” to the legitimate aim.

53. In that regard, a court now would be required to adopt the nuanced approach described in *SC*. The following general points may be made. First, a wide margin is usually allowed to the decision-maker when it comes to general measures of economic or social policy involving the allocation of resources. That consideration is applicable here, as was expressly recognised in the context of payments under the Scheme in *R (A) v Criminal Injuries Compensation Authority* where the Supreme Court noted that the Scheme operated in the field of social welfare policy where courts should normally be slow to substitute their view for that of the decision-maker (see paragraph 83 cited above at paragraph 47 above). Secondly, the reasons for judicial restraint are greater where the arrangements have been reviewed by Parliament (see paragraph 84 of *R (A) v Criminal Injuries Compensation Authority* cited at paragraph 47 above). Thirdly, consideration has to be given as to whether the particular grounds for the differential treatment are what are regarded as “suspect” grounds calling, generally, for weighty reasons to justify it or whether there are other factors mitigating the intensity of review.

54. In the present case, on the first point, the Upper Tribunal did recognise that weight, which would normally be substantial, was to be accorded to the judgement of the primary decision-maker in fields involving economic and social issues (paragraph 68 of its reasoning). It recognised that the adoption of eligibility criteria involved sensitive decisions on matters of what it described as political judgment about how far considerations of equity and social solidarity required the payment of compensation. It recognised, in essence, that that involved decisions on how to allocate scarce resources between different groups noting that allowing persons such as the appellant to qualify for payments (relying on the residence status of the deceased) might mean having to disentitle other groups. See paragraph 86 of the Upper Tribunal’s reasons. That factor is one of the factors that a court is to take into account as part of the nuanced approach to proportionality in this context. On the second point, the Upper Tribunal also recognised that the Scheme had received democratic scrutiny as it had been approved by both Houses of Parliament. That, too, is part of the complex of factors to be taken into account.

55. In certain respects, however, the Upper Tribunal appeared in fact to attribute less weight to these factors than it might have done. The Upper Tribunal appeared to take the view that, while the government had explained why a residence requirement should be imposed in general terms, it had not explained that it was appropriate for that requirement to be attached to the applicant for compensation rather than the victim. Further, it stated that the impact on family members of victims where the victim but not the family member met the eligibility requirements “does not appear to have been considered at all” (paragraph 85 of its reasons). It said at paragraph 86 that the impact on family members overseas of victims who fulfilled the eligibility requirements “appears to have received scant consideration”.

56. This is true in the limited sense that no express consideration is given to the different situations of injured victims and of bereaved families. However, the consultation

document does expressly set out the view that applicants to the Scheme should have a defined connection to the United Kingdom (paragraph 188 of the consultation document). It expressly set out the view that, in fatal cases, families who apply to the Scheme will need to meet the residence requirements (paragraph 194 of the consultation document). It specifically consulted on the question of whether, to be eligible for compensation, applicants should be able to demonstrate a connection to the United Kingdom through residence. The terms of the Scheme reflect that choice. It is clear, therefore, that those who made and approved the Scheme did consider the question of whom the Scheme should make payments to and, in particular, whether the applicant (and putative recipient) of the payment should be required to show a connection to the United Kingdom whether he was the victim of violence or was a bereaved family member in fatal cases.

57. It is correct that the Scheme *could* have chosen to make payments dependent on where the crime had occurred (rather than the place of residence of the applicant, whether that was the victim or a family member in a fatality case). But it is also the case that compensation is, or can be seen as, a form of welfare or social benefit payable by the community to persons who are part of, or live in the community. The view was taken by government and approved by Parliament, that applicants, i.e. those seeking payments from the Scheme, should have a connection with the United Kingdom either because they were ordinarily resident in the United Kingdom or were British nationals. Adapting the words of Lord Reed at paragraph 202 of *SC*, the payment would be made as "an expression of social solidarity: the duty of any community to help those of its members who are in need".

58. Further, there is evidence that the government considered the costs involved in changing the eligibility requirements to focus on those applicants with a connection to the United Kingdom rather than the location where the crime of violence occurred. The difficulty was that no reliable figures existed as to the amount of compensation paid under the previous scheme to persons not ordinarily resident. There were figures for 2009/2010 showing that 254 claims had been made from addresses outside the United Kingdom (amounting to £908,000) but for the reasons given that might have overstated or underestimated the amount of compensation paid to non-nationals who were not ordinarily resident in the United Kingdom. In terms of the impact on individual family members of a deceased victim, it is apparent from the terms of the Scheme that the loss in the case of non-dependant relatives would be the bereavement payment, that is, a sum of £5,500 or £11,000 if there was only one qualifying relative. The other amounts saved would be the dependency payment (the calculation of which was set out at paragraph 71 of the Scheme) or the child's payment if the dependant relative was a child under 18 which was to be £2,000 for each year plus any additional element in relation to expenses incurred by the child as a direct result of the loss of parental services being provided to the child (see paragraph 65 of the Scheme). The Upper Tribunal, therefore, appears to have overlooked the fact that the Secretary of State when making, and each House of Parliament when approving, would have had an appreciation of the impact on the deceased family.

59. The third particular factor relevant here concerns the ground upon which the differential treatment was based. Ms Braganza submitted that the refusal was based on nationality or residence. If the appellant had been a British national, he would have qualified for a bereavement payment. He was not and so did not qualify. Ms Braganza submitted that

the Upper Tribunal had stated that the measure did treat the appellant unfavourably "on the ground of nationality and/or ordinary residence" when considering whether differential treatment was based on some other status within the meaning of Article 14 (see paragraph 53 of its reasons). Nationality was a "suspect" ground and weighty reasons were needed to establish differential treatment on that ground. Yet, when considering the question of justification, the Upper Tribunal considered that eligibility was not based on nationality but was based on residence and that was not a suspect ground of differential treatment calling for weighty reasons (see paragraph 69 of its reasoning). That, Ms Braganza submitted, was erroneous.

60. The starting point is to consider the relevant basis for exclusion of the appellant from payment of a bereavement award. As appears from paragraph 10 of the Scheme, in order to be eligible the applicant has to be ordinarily resident in the United Kingdom or satisfy one of the conditions in paragraph 11. Those conditions relate to being a British citizen (or a national of certain specified states to whom the United Kingdom owed obligations under international or European Union law or a member of the armed forces, as discussed below). The appellant was not ordinarily resident. He did not meet the other conditions. He was not therefore eligible for a payment. If he had been ordinarily resident, then he would have qualified irrespective of his Sri Lankan (or indeed any other) nationality. In the context of a scheme involving the payment of welfare or social benefits, basing eligibility on ordinary residence in the United Kingdom or British nationality is not a ground of differential treatment which generally calls for weighty reasons justifying that treatment. The Scheme, and the eligibility criteria, are tied to the concept that those who are members of, or living in, the community will be looked after when they suffer injury as a result of crimes of violence. That is not in this context a suspect ground of challenge. There is no element of stereotyping, stigma or social exclusion of the sort which explains the need for intensive scrutiny, and the need to show weighty reasons to justify differential treatment (see *SC* at paragraph 103, and *R (A) v Criminal Injuries Compensation Authority* at paragraph 85).

61. Nor do the cases relied upon by the appellant lead to a different conclusion. In *Gaygusuz,* the applicant was a Turkish national who was refused an advance on his pension in the form of emergency assistance because he did not have Austrian nationality. The relevant national law provided that, for a grant to be made, the person had to have Austrian nationality although there were exceptions if a person had been born in Austria and been continuously resident since 1930 or was born in Austria after that date and had lived there continuously but Mr Gaygusuz did not satisfy those exceptions. He had lived legally in Austria at certain times and had worked there and paid contributions in the same capacity and on the same basis as Austrian nationals. The European Court held that the refusal to grant assistance was based exclusively on the fact that he did not have Austrian nationality as required by Austrian law (paragraph 47 of its judgment). It held that very weighty reasons would have to be put forward before it could regard "a difference of treatment based exclusively on the ground of nationality as compatible with the Convention" (paragraph 43 of its judgment). That is not analogous to the present case. The appellant here was not refused exclusively on the basis of his nationality. Indeed, if he had been ordinarily resident in the United Kingdom he would have qualified for the bereavement payment irrespective of his nationality.

62. Similarly, in *Kouia Poirrez*, Mr Poirrez was refused a disabled adult's allowance. He was a national of the Ivory Coast although he had lived in France since the age of 7 when he had been adopted by a French national. The European Court noted that he was legally resident in France and that the refusal to award him the allowance "was based exclusively on the fact that he did not have the requisite nationality, which was a precondition for obtaining the allowance" (paragraph 47 of its judgment). In those circumstances, very weighty reasons were called for to justify the differential treatment. That again differs from the present case where nationality is not a precondition for eligibility for an award and a person ordinarily resident in the United Kingdom would be eligible.

63. Finally, in this regard, the appellant relied upon *Ponomaryov*. That case concerned a mother and children who were Russian nationals. Their mother married a Bulgarian national and the family moved to Bulgaria where the children were enrolled in secondary school. The mother was granted permanent residence but the children did not have permanent residence although they were lawfully resident in Bulgaria. The children were required to pay school fees in order to pursue secondary education because they were not Bulgarian nationals and did not have permanent residence. The importance of secondary education "militated in favour of stricter scrutiny by the Court of the proportionality of the measure affecting the applicants" (paragraph 57 to 58 of its judgment). The applicants were not unlawfully in the country accessing public services. They were lawfully in Bulgaria and the authorities did not have any intention of deporting them. They were not trying to abuse the Bulgarian educational system but were in Bulgaria as their mother had married a Bulgarian national and the children had come with her to Bulgaria at a young age. They could not realistically choose to attend school in any other country. In those circumstances, the European Court found that "in the specific circumstances of the present case" the requirement for the applicant to pay fees for their secondary schooling on account of their nationality and immigration status was not justified (paragraph 63 of its judgment). That case is, again, not analogous to the present and provides no authority for the proposition that weighty reasons were required before justification could be established in relation to the eligibility requirements under the Scheme.

64. In the circumstances, therefore, the Upper Tribunal did not err in regarding the present case as one where it was not necessary to consider if there were weighty reasons justifying the differential treatment. Even if that were wrong, in a context such as the present, dealing with the allocation of resources for the payment of welfare or social benefits, the fact that eligibility was based on ordinary residence or British nationality would itself be a sufficiently weighty reason, along with the other factors discussed above, to provide objective justification of the eligibility criteria. Making social welfare provision for persons who are part of, or live in, the community would be a weighty reason for differing between those who are members of that community and those who are not.

65. For completeness, it is also right to note that certain other nationalities were also eligible for awards under the Scheme. That differential treatment, however, was based on the fact that the United Kingdom owes obligations to nationals of countries with whom the United Kingdom has reciprocal obligations, such as nationals of states party to the Victims Convention or under European Union law. That is regarded as objectively justified: see *Ponomaryov* at paragraph 54, and *C v Belgium* (2001) 32 EHRR 2 at

paragraph 38. Differential treatment in relation to members of the armed forces and accompanying close relatives (who are eligible under paragraph 11(f) and (g)) is also objectively justifiable as they may not be ordinarily resident in the United Kingdom but have a connection to the United Kingdom by virtue of their association with the armed forces.

66. In the light of the above discussion, I can deal briefly with the three grounds of appeal. In relation to ground 1, for the reasons given above, this was not a case where weighty reasons justifying the differential treatment were called for but, if they were, the Upper Tribunal was correct to consider that they existed. In relation to ground 2, it is not accurate to describe the aim here as being exclusively to save costs and to assert that such a reason was insufficient to justify differential treatment. It is the case that some of the language in the reasoning of the Upper Tribunal does refer to saving costs. The legitimate aim is, however, more properly assessed as the provision of a system of compensation system for victims of crimes of violence in a way which was sustainable. That is a legitimate aim as recognised by the Supreme Court in *SC* at paragraph 202. In relation to ground 3, the Upper Tribunal did not err by misapplying the margin of appreciation. This was an area involving general measures of social policy and the allocation of resources where the decision-maker does have a wide discretion and where, generally, its choices should be respected. Further, the issue of whether the eligibility criteria should be tied to residence and nationality was specifically considered and also appears from the terms of the Scheme itself. The nature of the impact on individual applicants also appeared from the Scheme itself. The Scheme had been made by the executive and approved by the legislature in full knowledge of the choices that were being made to limit eligibility. The Upper Tribunal was entitled to give that factor weight as part of a nuanced approach to proportionality.

THE RESPONDENT'S NOTICE

67. Mr Moretto, for the Secretary of State, submitted that the appeal should be upheld on additional grounds. He submitted that the appellant who is not, and has never been, resident in the United Kingdom was not in a materially analogous position to those who were ordinarily resident or were British nationals. Further, he submitted that there was no differential treatment on grounds of status: rather, the eligibility criteria do no more than reflect the rules under which the differential treatment occurs. They do not amount to a separate status on the basis of which the appellant is treated differently.

68. Mr Moretto submitted that social security benefits are part of an interlocking system of social welfare which existed to ensure certain minimum standards of living for the people of the United Kingdom. They were payable to persons living in the community to whom a degree of social solidarity was owed by other members of the community. As a person who had never lived in the United Kingdom, the appellant was not a member of the community and was not in an analogous position with persons who were members the community because they lived in the United Kingdom (or were British nationals). Mr Moretto relied upon the decision of the European Court in *Carson v United Kingdom* (2010) EHRR 13.

69. These issues can be dealt with relatively shortly. The position is that the Scheme provides for compensation for victims of violence or, in cases of death, the families of the victims. The trigger event for a claim for compensation is the fact that a person has sustained injury as a result of a crime of violence. That appears from paragraphs 4 and

7 of the Scheme. Thereafter, there are eligibility criteria which indicate whether a person can claim an award because he has suffered injury, or, if he has died, whether a family member can claim an award.

70. Viewed in that light, a person who has suffered an injury as a result of a crime is in a materially analogous position to another victim of crime: both are injured and both suffer economic consequences as a result. Whether or not each or both of the victims obtain compensation will depend on the eligibility criteria. Similarly, if two victims of crime die, the parents of each are in a materially similar position: each has suffered as a result of the crime and each seek a bereavement payment. The eligibility criteria are a means of deciding which of the victims receive compensation and which do not. The basis for the differential treatment is whether they are ordinarily resident or British nationals (or the other conditions in paragraph 11 of the Scheme). Residence is some "other status" within the meaning of Article 14 of the Convention.

71. The position in this case is different from that in *Carson*. In that case persons who resided in the United Kingdom had their pension increased in line with inflation. Persons resident outside the United Kingdom did not have their pensions uprated. The claimants' main argument was that they were in a relevantly similar position to pensioners who received uprating as they had all worked in the United Kingdom and paid national insurance contributions. However, the European Court considered that there was no direct link between national contributions and retirement pensions and that the complex and interlocking system of welfare and taxation made it impossible to isolate the payment of national insurance contributions as a "sufficient ground for equating the position of pensioners who receive up-rating and those, like the applicants, who do not". Rather the social security system, including state pensions, existed to ensure certain minimum standards of living for residents in the United Kingdom (paragraph 85 of its judgment). It was difficult, therefore, to draw any comparison between the position of pensioners in the United Kingdom with those living elsewhere because of the range of economic and social variables that applied from country to country.

72. I understand the argument that, at a high level, the payment for compensation to victims of crimes of violence, is part of a system of social and welfare payments. I recognise that, in the present case, from 2012 onwards, the Scheme was drafted in such a way as to tie eligibility to ordinary residence or nationality. I do not consider, however, that the position is similar to the position in relation to pensions. There is this difference. The trigger event for the payment of compensation is that a crime of violence has occurred. The eligibility criteria adopted in 2012 are intended to differentiate between those who are eligible, and those who are not eligible, to receive compensation arising out of that event. A person who is a victim of crime is in a materially similar position to another person who is also a victim of crime. A parent of a victim of crime who has died as a result of the injuries sustained is in a materially analogous position with other parents of deceased victims. In each case the person has suffered as a result of a crime of violence and seeks compensation. The ground on which their eligibility for compensation is determined is ordinary residence or nationality. That does amount to an "other status" within Article 14 of the Convention. The Upper Tribunal was therefore correct to find the appellant was in a materially analogous position to parents of a deceased victim of a crime of violence who were ordinarily resident in the United

Kingdom or were British nationals and that the differential treatment was based on grounds of status (see paragraphs 36 to 53 of its reasoning).

73. That does not mean that the fact that eligibility for compensation is tied to residence in the United Kingdom or nationality is irrelevant. But it is a factor that, along with the other relevant factors, is more appropriately, and better, assessed as part of the assessment of proportionality.

CONCLUSION

74. The differential treatment reflected by the use of the criteria for eligibility for an award of a bereavement payment under the Scheme is objectively justified. The eligibility criteria serve a legitimate aim, namely the provision of a system of compensation for victims of crime of violence which is sustainable. There is a reasonable relationship of proportionality between the aim, and the method sought to achieve that aim, that is requiring that an applicant for compensation demonstrate a connection with the United Kingdom by ordinary residence or British nationality. The Upper Tribunal was right, therefore, to dismiss the claim for judicial review of the refusal of the bereavement payment as the differential treatment was justified. I would dismiss the appeal.

LADY JUSTICE FALK

75. I agree.

LORD JUSTICE PETER JACKSON

76. I also agree.