IN THE UPPER TRIBUNAL **Appeal No: CIS/1728/2019**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Jones

DECISION

The Upper Tribunal allows the appeal of the appellant.

The decision of the First-tier Tribunal sitting at Birmingham on 28 November 2018 under reference SC184/18/00185 involved an error on a material point of law and is set aside.

The Upper Tribunal is not in a position to re-decide the appeal. It therefore remits the appeal to be decided afresh by a differently constituted First-tier Tribunal and in accordance with the Directions set out below.

This decision is made under section 12(1), 12(2)(a) and 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007

DIRECTIONS

Subject to any later Directions by a District Tribunal Judge of the First-tier Tribunal, the Upper Tribunal directs as follows:

(1) The fresh decision will follow an oral re-hearing before the First-tier Tribunal.

(2) If the appellant has any further evidence that she wishes to put before the tribunal that is relevant to the terms and conditions and schedule to the relevant insurance policies so as to inform the decision on the applicability of regulation 10 (1)(b) of The Social Fund Maternity and Funeral Expenses (General) Regulations 2005 as referred to in paragraphs 60, 61 and 70 of this decision, this should be sent to the First-tier Tribunal's office within one month of the date that this decision is issued.

(3) The First-tier Tribunal should have regard to the points made in the documents set out in the paragraph (5) below.

(4) Copies of: the appellant's application for permission to appeal and notice of appeal and grounds of appeal dated 24 October 2018 and 25 July 2019; the appellant's submissions dated 9

December 2019; and the respondent's submissions dated 13 and 15 November 2019, should be provided to the First-tier Tribunal re-hearing the appeals together with this decision.

REASONS FOR DECISION

1. The Secretary of State for the Department of Work and Pensions ("the Appellant" or "DWP") appeals against the decision of the First-tier Tribunal ("the First-tier") dated 14 August 2018. By that decision the First-tier allowed an appeal against the decision of the Appellant dated 17 April 2018 refusing to award the Respondent a Social Fund Funeral payment in the sum of £1,562.

2. The First-tier overturned the Appellant's decision of 17 April 2018 and found that a sum of £8,000 received by the Respondent did not form part of the estate of her late husband and therefore it should not have been deducted from her entitlement to a payment of £1,562.

3. The First-tier provided a statement of reasons for decision ("SOR") dated 24 September 2018. District Tribunal Judge MacMillan granted permission to appeal on 9 July 2019 (the permission decision being issued to the parties on 21 July 2019).

Decision

4. I allow this appeal for the reasons set out below. I am satisfied that the First-tier Tribunal erred in law in a material manner in making its decision of 14 August 2018. I set aside the First-tier's decision and re-remit it to be re-heard by a fresh Tribunal on the terms set out below.

Background

5. The First-tier made its decision on the papers without the attendance of either party on 14 August 2018.

6. It made the following relevant findings of fact which are not in dispute.

7. On 24 October 2017 the Respondent claimed a Social Fund Funeral Payment, via the Appellant's DWP Bereavement Service, in respect of her late husband's funeral which took place on 19 October 2017.

8. On 30 October 2017 the Appellant refused to pay the Respondent any funeral payment on the basis she had received £8,000 from insurance policies following the loss of her husband. On 17 April 2018 it confirmed its decision following a reconsideration.

9. The Respondent appealed on the basis that she met the requirements laid down in the regulations set out in the Social Fund Maternity and Funeral Expenses Regulations 2005. At the time of her husband's death she was receiving Guaranteed Pension Credit.

10. The Respondent stated in her Grounds for Appeal that she took out, at different times, two insurance policies with Liverpool Victoria. She paid the premiums and was the named beneficiary. She made all payments of the premiums by 2009 and 2015 respectively. She did not claim upon the policies until her husband passed away and her income was reduced. She stated that the policies were investments forming part of her personal savings and were not due on the death of her late husband and she could have encashed them prior to his death if she chose.

11. The lump sums from the policies were claimed at the time following the Respondent's late husband's death because she needed extra money to live on – the household was receiving considerably less income and she needed money to pay the household's everyday bills. The Respondent had claimed the £1,562 Funeral Payment towards the costs of her late husband's funeral (which would not cover the full cost).

12. By letter dated 21 July 2018 the Respondent provided to the First-tier two copies of the two policies and letters showing that all premiums had been paid before her husband's death. In addition, the Respondent provided a letter from Liverpool Victoria, the insurance provider, dated

4 May 2018 confirming that the policies were proposed by her and did not form part of the estate her late husband.

13. The First-tier found therefore that the £8,000 insurance payment did not form part of the estate of the Respondent's late husband and therefore it should not have been deducted from her entitlement to a payment of £1,562.

The Law

14. The Social Fund Maternity and Funeral Expenses (General) Regulations 2005 as in force at the relevant time provide for the circumstances in which a payment may be made from the social fund towards a funeral. Regulation 10(1)(a) and (b) provide for the circumstances in which any payment may be reduced or extinguished:

> 10 Deductions from an award of a funeral payment
>
> (1) There shall be deducted from the amount of any award of funeral payment which would otherwise be payable—
>
> (a) [subject to paragraph (1A)] the amount of any assets of the deceased which are available to the responsible person (on application or otherwise) or any other member of his family without probate or letters of administration, or (in Scotland) confirmation, having been granted;
>
> (b) the amount of any lump sum due to the responsible person or any other member of his family on the death of the deceased by virtue of any insurance policy, occupational pension scheme or burial club, or any analogous arrangement;
>
> ………………

15. In *PA v Secretary of State for Work and Pensions* [2010] UKUT 157 (AAC) ('*PA v SSWP*') Judge Levenson stated the following at paragraphs 8-11, 14 and 16:

> <u>The Insurance Policies</u>
>
> 8. The deceased had taken out a number of insurance policies on her own life, although I understand that at some stage the claimant took over payment of the premiums. These were payable on the death of the deceased and formed part

of the estate. The proceeds totalled £350.78. There were two further policies that that the claimant had taken out on the life of the deceased, the proceeds of which totalled £890.57. The claimant was the proposer for, paid the premiums for and was the beneficiary of these policies. Mrs D states that this was her mother's way of saving. There is evidence from the insurance company, in a letter of 7th May 2009 (page 91 of the file) to the effect that the policies could have been cashed before the death of the deceased. This information was not available to the tribunal, which assumed that the policies were only payable on the death of the deceased. That was an error which went to its reasoning in the case and that is why I have set aside its decision. However, that does not assist the claimant.

Legal Provisions

9. Section 138(1) of the Social Security Contributions and Benefits Act 1992, so far as is relevant, provides:

138(1) There may be made out of the social fund, in accordance with this Part of this Act-

(a) payments of prescribed amounts, whether in respect of prescribed items or otherwise, to meet, in prescribed circumstances, … funeral expenses …

10. Section 175 of the Act provides very wide powers to make regulations, including regulations prescribing the circumstances to be covered by the provisions of section 138(1).

11. The main provisions are to be found in the Social Fund Maternity and Funeral Expenses (General) Regulations 2005 as amended. It is not necessary to go through the whole of the regulations. It is sufficient to refer to the following provisions:

10(1) There shall be deducted from the amount of any award of funeral payment which would otherwise be payable –

(a) the amount of any assets of the deceased which are available to the responsible person …
(b) the amount of any lump sum due to the responsible person or any other member of [her] family on the death of the deceased by virtue of any insurance policy, occupational pension scheme or burial club, or any analogous arrangement

It is well established and not disputed that the word "due" in regulation 10(1)(b) means legally due, in the sense that the responsible person or family member concerned must have a right to legally enforce payment.
………………….
14. There is no dispute in the present case (and it is clear from the documentation) that the insurance company accepted premiums from the claimant and regarded itself as legally obliged to pay her on the death of the deceased. In these circumstances I do not see that a court (or, in the absence of

court action, the regulatory mechanisms for the insurance and life assurance industry) would have refused to enforce payment. In the circumstances I regard the payment as "due". Even if this was not, technically speaking, an "insurance policy" within the meaning of regulation 10(1)(b), it was an "analogous arrangement".

……………………………………..

16. The claimant argues that because she could have cashed in at least some of the policies at an earlier stage and spent the money, they should not now be taken into account. However, the fact that she did not cash them in at an earlier stage does mean that they were due on the death of the deceased and, as a matter of law, they have to be taken into account. The claimant also argues that account should be taken of any similar policies held by other members of the family. Regulation 10(1)(b) only covers amount due to the responsible person (the claimant) and member of her family, narrowly defined in regulation 3 to refer to members of a couple and people in the same household. The claimant suggests that she has been a victim of her own honesty and that if she had not declared the policies, she would not be in this position. However, in those circumstances she would probably have been committing a criminal offence. Finally she queries whether it was fair for her to have to pay for the funeral in the first place as there are many members of the (wider) family who are in a better financial position. Neither the Secretary of State not the Tribunal Service forced her to become the responsible person. If she chose to do so, and to make a claim under the social fund scheme, she was bound by its rules.'

Proceeding without a hearing and the parties' submissions

16. Both parties filed submissions in writing regarding the appeal before the Upper Tribunal. Neither party sought an oral hearing but consented to it being determined on the papers. I therefore decided the appeal on the papers without a hearing because I considered it was in the interests of justice to do so for the purposes of Rule 34 of the Upper Tribunal (Tribunal Procedure) Rules 2008. Both parties had a full opportunity to present their cases in writing, I had all the relevant evidence and law before me in the bundles, the issue was a point of law and to hold a hearing would only have caused further delay in a case that was already fairly old (being decided some eighteen months earlier).

The Appellant's submissions

17. The Appellant DWP appeals on the following grounds set out in application for permission and notices of appeal dated 24 October 2018, 25 July 2019 and in submissions dated 9 December 2019.

18. First, the Appellant submitted that the First-tier erred in law by only considering the applicability of regulation 10(1)(a) of the regulations (whether there were assets of the deceased that fall to be deducted) but not considering and applying the provisions of regulations 10(1)(b) (deducting lump sums due on death by virtue of an insurance policy) when making its decision.

19. Second, the Appellant submitted that applying the decision of *PA v SSWP* to the Respondent's circumstances, the fact she could have 'cashed-in' the policies earlier but did not do so, instead, making a claim to the monies on the death of her late husband did not assist the Respondent. The fact remained that the insurance company had a legal liability to pay those monies to the Respondent following her claim and the payment of £8,000 in respect of the two policies were lump sums due on the death of her late husband by virtue of insurance policies such that Regulation 10(1)(b) was satisfied. If the First-tier had correctly applied *PA v SSWP* it would have been bound to dismiss the Respondent's appeal and confirm the decision not to make a funeral payment.

20. Therefore, the Appellant submitted that the First-tier materially erred in law in finding that the lump sums should not be deducted and in finding that the Respondent was entitled to a social fund funeral payment. As a consequence, the Appellant sought that its appeal against the decision of the First-tier of 14 August 2018 be allowed and its original decision of 17 April 2018 be confirmed refusing to make any funeral payment.

The Respondent's submissions

21. On 13 November 2019 the Respondent, acting in person, prepared and filed thirty pages of submissions in writing by email.

22. I pay tribute to her diligence, courtesy and intelligence in responding to the appeal. It is clear that she has put in an enormous amount of effort in presenting her case and researching the legal position. I also recognise that these proceedings result from the death of her late husband to whom she was married for over fifty years and are therefore significant to her emotionally as well as financially. It is apparent that she considers there to be a grave injustice in this case and that neither Regulation 10(1)(a) and (b), interpreted in the way she reads them, applies to her case.

23. I hope I convey no sense of discourtesy if I attempt to summarise her arguments while at the same time assuring her that I have considered the substance of all that she has written.

24. The Respondent submits that the First-tier did not make any error of law and correctly interpreted and applied both Regulations 10(1)(a) and (b) of the Social Fund Maternity and Funeral Expenses (General) Regulations 2005 in making its finding that she was entitled to a funeral payment and no sums should be deducted.

25. She submits that the two 'assurance' polices became "free policies" in 2009 and 2015, reaching the end of their 30-year terms on those dates and she would have been able to encash the guaranteed sums and bonuses without penalty, in contrast to cashing in a term life insurance policy early. She did not consider the policies to be analogous to life insurance policies which are only due on the death of the insured nor a burial club payment.

26. She submits that the Frist-tier were correct to hold that Regulation 10(1)(a) did not apply as the policies and lumps sums were her property and not part of her late husband's estate at any time.

27. The Respondent submits that the First-tier had in fact considered Regulation 10(1)(b), even if it has not been referred to in its statement of reasons, because it had considered the entire contents of the bundles which had included references to the provision by each party.

28. She submits that Regulation 10(1)(b) is not a 'blunt instrument that applies to all insurance polices without exception, if they provide a lump sum on death' because this 'is not a holistic approach to the Regulation'. One must consider the words 'any insurance policy,' by reference to the remaining words in the phrase 'occupational pension scheme or burial club, or any analogous arrangement'.

29. The Respondent's interpretation was that the social purpose behind the legislation meant that Regulation 10(1)(b) only applied to an insurance policy that 'has some features in common with an occupational pension scheme or burial club are to be deducted from the funeral payment'. She submitted that these facilities tend to be taken out by the deceased and only become payable without penalty on the death of the deceased and become part of the estate of the deceased.

30. In contrast, she submitted that the assurance policies were taken out by her and that they were personal investment savings that were due to her before her husband died. They were with-profit whole-of-life assurances showing that they were intended to be her personal investments and were more analogous to an investment than simple term insurance.

31. The Respondent submitted that references to insurance policies within Regulation 10(1)(b) are to be interpreted as only applying to policies that become payable or are 'only due on death'. She did not accept that the decision in *PA v SSWP*, as relied upon by the Appellant, interpreted Regulation 10(1)(b) to apply to 'any insurance that happens to be

legally payable to any family member on the date of the death of the deceased'. She submitted that to suggest so would include the coincidence of a claim being legally payable on a particular date and risks the inclusion of payments that were not connected or consequent upon the death of the deceased.

32. I interpret this to be a submission that some causation is required between the death and the legal entitlement to payment.

33. The Respondent submitted that the Appellant's interpretation of Regulation 10(1)(b) would 'risk the inclusion of 'any insurance of whatever nature without exception, legally payable to any family member of the deceased regardless of a lack of any association between the deceased and the insurance policy'.

34. She submitted that the interpretation of 'any insurance policy' might include only insurance policies that pay out solely to the estate because of the death of the deceased. She submitted: 'If the policy is due on the death simply because the policy is encashed at that time, then I feel that the word "due" must still satisfy the test of legal liability. In other words a policy that the insurance company was not legally liable to pay upon death would fall outside this definition of "due".'

35. The Respondent submitted that: 'The DWP have made a suggestion that I told them be telephone that my life assurance policies were available to pay for the funeral bill. I maintain that I did not state at any time that my policies were available to pay for the funeral bill. I feel it is simple common sense that I cannot have meant that my policies were available to pay for the funeral bill in perpetuity, as I would not have been claiming for a funeral payment if that were the case.'

36. She also submitted that no part of her policies was specifically paid to her for funeral expenses – she chose to cash them at that time out of general financial need as they were part of her savings. The lump sums were received not for the purposes of paying the funeral bill which she

had paid in full on 23 October 2017. She submitted that once her assurance policies became "free policies" in 2009 and in 2015, she was able to use them as she wished. She chose not to encash them, until financial circumstances made that necessary. She was the only person able to withdraw the assurance policies as she was the sole legal owner.

37. The Respondent submitted that section 175(1), (2), (9) and (10) of the Social Security Contributions and Benefits Act 1992 only empowered regulations to be promulgated which do not express a contrary intention to the Act. Therefore, the Regulations were contrary to the Act(s) under which they were made. She made submissions as to the wording of section 32(4) of the Social Security Act 1986 and 78(4) of the Social Security Administration Act 1992 on the recovery of (social fund) payments to meet funeral expenses as if they were funeral expenses out of the estate of the deceased and 'by no other means'. Therefore Regulation 10(1)(b) was ultra vires as it allowed for recovery from sources outside the estate of the deceased.

38. The Respondent also submitted that her case could be distinguished from *PA v SSWP* because her 'case does not involve insurance policies taken out on someone upon whose life I had no insurable interest as defined in Judge Levenson's ruling, nor does my case involve any insurance policies taken out by the deceased upon their own life.'

39. She submitted that: 'the payment of money would only be made upon the death of my husband if he had died prior to the policies becoming "free policies". By the time of his death in 2017, the policies would not have been paid on death" in the same way that they would not have been paid "on death" had they been encashed 2 years and 8 years earlier.' As she used her money to pay for her policies this indicated she was the beneficial owner for tax purposes. As her husband had no estate to pay for his burial, she had little option but to attend to those debts as a pressing need.

40. The Respondent submitted that: 'Had the system worked as it claims to work, I should have been able to attend to the funeral bill and give my husband a modest but decent burial, and the received the funeral payment from the DWP to cover a fairly small amount of that funeral bill, in order to replenish my savings and then avoid debt from the other bills. Instead, the DWP has pushed me into pecuniary difficulty and into debt, as has done so for two years from the death of my husband, during the period of their appeals.'

41. She submitted that had she encashed her policies before her husband died, she would have received policy payments earlier and there would be no claim for deduction by the DWP. She would have had capital of £8,000 which was below the £10,000 savings limit for Pension Credit and so the funeral payment would have been awarded.

42. In further submissions dated 15 November 2019 the Respondent submitted that the Citizens Advice Bureau, having seen a photocopy of her policy documents, were of the view that her husband's life was not insured when he died – this was because the policies matured in 2009 and in 2015 her husband's life was no longer insured by those policies. She submitted that regulation 10(1)(b) refers only to lumps sums due by virtue of any insurance policy but it does not apply because the policy was not insuring her husband's life.

43. She accepted that her policies bear these words:

"Provided every premium is paid to the Society at the due date the Society will on the happening of the event or events specified in the schedule become liable to pay to the proposer.....the appropriate sum payable hereunder....subject to the terms and conditions of the table of assurances...."

The Schedules specify: "Payable at the date of the life insured".

44. The Respondent submitted that unlike in *PA v SSWP*, her policies could also have been cashed before the death of the deceased but it does not necessarily mean that the policies referred to that in decision were "free policies" at the time of the death.

Discussion

45. The issue before the First-tier was whether the Respondent was entitled to a funeral payment in accordance with the provisions of the Social Fund Maternity and Funeral Expenses (General) Regulations ("SFMFEGR") 2005. The First-tier allowed the Respondent's appeal on the basis that the payment of £8,000 the Respondent received from her insurance policies did not form part of the estate of the deceased and hence, did not fall to be deducted from the amount of the funeral payment of £1,562.

46. The Appellant's submission is that had the First-tier considered Regulation 10(1)(b) at all, or at least correctly, it would have been bound to dismiss the Respondent's appeal and uphold the original decision refusing to make any funeral payment.

47. This is because a deduction should be made under Regulation 10(1)(b) as the lump sums were paid by virtue of insurance policies on the death of her late husband. The fact that the Respondent could have cashed-in the policies earlier was irrelevant to the test in law – she did not do so but instead made a claim to the monies on the death of her late husband and the insurance company had a legal lability to pay those monies to her following her claim on her husband's death.

48. Before choosing between the competing submissions, it is worth being reminded of the evidence before the First-tier upon which it made its decision.

49. The Respondent's insurance or 'assurance' policies were evidence by documents at pages 27 to 31 of the bundle. Certificates were issued for

each by Liverpool Victoria Friendly Society stating, 'Industrial Branch Whole-life assurance table'. Each certificate described the life insured as the Respondent's late husband, giving the date of issue in July 1979 and June 1985 respectively, and describing the proposer as the Respondent with her relationship to the insured being wife. The premium to be paid was £2 every four weeks with the sum assured being '£722.00' and '£458', 'payable at the death of the life insured'.

50. The policy certificates include the following at the bottom of the page, 'This policy is issued to witness that, (i) A proposal has been submitted to the Society to insure the life named in the Schedule. The proposal has been accepted by the Society and is the basis of this assurance. (ii) Provided every premium is paid to the Society at the date the Society will on the happening of the event or events specified in the Schedule become liable to pay to the proposer or his /her personal representative the appropriate sum payable hereunder....subject to the terms and conditions of the table of assurance.........'.

51. On 18 July 2018 the First-tier had adjourned an earlier hearing so that the Respondent would provide copies of the insurance policies showing when they were taken out together with confirmation of whether the premiums were still being paid at the time of death. Nonetheless the Schedule to the policies and the precise terms and conditions were not provided by the Respondent and were not before the First-tier which decided the appeal on the papers.

52. As a consequence of the First-tier's direction, there were some letters from Liverpool Victoria provided by the Respondent dated 2 May 2009 and 20 June 2015. Each informed the Respondent that due to the length of time that the policy had been in force, under the Society's rules it now qualified to become a free policy from the 5 May 2009 and 22 June 2015 respectively. They required no further premiums from those dates. The letters stated, 'The full sum assured and bonuses will become payable in the event of a claim. A guaranteed value has already

built up, to which a further terminal bonus may be added at the time of claim.'

53. Finally, a letter dated 4 May 2018 from Liverpool Victoria Friendly Society Limited to the Respondent stated, 'with regards to the insurance policies you owned on your late husband's life, please see below for confirmation of the claim payment'. The letter specified the Respondent as proposer / policy owner of each policy and as the rightful claimant with the life insured being her late husband. The amount payable on each policy was identified (totalling over £8,000) and the letter continued, 'As these policies are proposed by you, they do not form part of the estate of [the Respondent's late husband]. As you were the owner of these policies you were legally entitled solely to all proceeds of these policies at any time whilst they were in force. If these policies had been encashed before [the Respondent's late husband] passed away any monies would have been paid to you.'

Decision

54. Despite, the Respondent's attractive submissions I am satisfied that the First-tier erred in law in allowing her appeal. It manifestly did not have explicit regard to Regulation 10(1)(b) of SFMFEGR in its decision nor consider whether the lump sums of £8,000 paid to the Respondent were due to her on the death of her late husband by virtue of insurance policies. The issue before the First-tier was not simply whether the lump sums were part of the late husband's estate, which manifestly they were not. The First-tier therefore misdirected itself in law and the appeal should be allowed on the Appellant's first ground of appeal.

55. The question is whether the First-tier's error in respect of the first ground was material and therefore whether its decision should be set aside, and if so, whether the Upper Tribunal should re-make the decision or remit it to the First-tier for a further hearing.

56. In answering this question, I have regard to authority on the proper interpretation of Regulation 10(1)(b) of SFMFEGR. The relevant parts of the wording 10(1)(b) are as follows:

> '(b) the amount of any lump sum due to the responsible person or family member ….on the death of the deceased by virtue of any insurance policy…..'

57. As Judge Levenson has already held at paragraph 11 of the decision in *PA v SSWP*, the proper interpretation of the words 'due…on the death' is as follows:

> 'It is well established and not disputed that the word "due" in regulation 10(1)(b) means legally due, in the sense that the responsible person or family member concerned must have a right to legally enforce payment.'

58. As the Appellant submits, the life assurance policies were insurance policies which confirmed that the policies were payable to the Respondent (as proposer) 'at the death of the life insured' (her late husband) but they also refer to the sums being payable 'on the happening of the event or events specified in the schedule'. I assume that one of the events in the schedule is the death is the death of the life insured (ie. the Respondent's late husband) but this is not evidenced, at least as being the only cause, and it may be that there are other events that trigger payment.

59. Applying Judge Levenson's test, if the lump sums were legally due on the death of the Respondent's late husband (which appears to be the case but requires confirmation by the exploration of further evidence) and if the Respondent's claim was made on that basis, or at least if Liverpool Victoria paid the lump sums to her on the basis of this death (rather than some other triggering event) then Regulation 10(1)(b) will be satisfied and the lump sums should be deducted from any funeral payment, thus extinguishing the Respondent's right to any funeral payment.

60. It appears as a reasonable inference from all the documents submitted that lump sums paid by Liverpool Victoria were paid to the Respondent's wife and were due to her on the death of her late husband

by virtue of two insurance policies. Legally due means that the Respondent had a legal right to enforce payment. However, I am not satisfied that all the relevant evidence on this point has been explored. This is because relevant evidence is missing as to the circumstances in which the Respondent had a legally enforceable right to receive payment from Liverpool Victoria under the terms of the policies.

61. This is due to the absence of the schedule to the policy terms and conditions, schedules to the policies and documents confirming the nature of the claim made by the Respondent and the documents confirming the reasons for the lump sums made. The Respondent has also not given any oral evidence to the First-tier on this point to the extent that any written evidence is missing.

62. Whilst the Respondent's lengthy legal arguments are ingenious, unfortunately they do not persuade that the test in law is anything other than set out in *PA v SSWP*. The Respondent's interpretations of Regulation 10 SFMFEGR involve readings other than those provided by the natural language. They appear driven by sense that Regulation 10(1)(b) is unjust in its effect.

63. Nonetheless, I am satisfied that the meaning of the language is clear. If the payment made pursuant to the insurance policy was legally due, payable and enforceable on the death of the insured, her late husband, then Regulation 10(1)(b) applies. To that extent there must be a connection, association between the right to the payment made and received and the death of the person insured – that is what 'due…on the death by virtue of any insurance policies' mean.

64. If there exists a legal right to a payment of a lump sum upon the death of the insured (even if there are other triggering events) and as a matter of fact, the payment was made by the insurer to the relevant person (responsible person or family member) as a result of the death being

the triggering event (rather than some independent entitlement) then Regulation 10(1)(b) will apply.

65. I do accept the Respondent's submission that if there are events other than death of the insured which may trigger payment and if payments are made by virtue of such other triggering events then Regulation 10(1)(b) will not apply (so long as the death is not one of a number possible triggering events or was not the materially triggering event for entitlement to the payment).

66. However, I accept the Appellant's submission that the fact that the premiums of the insurance policies had been fully paid by the Respondent prior to the date of her late husband's death and she could have made an earlier claim is irrelevant. This much is clear both from the terms of Regulation 10(1)(b) and from Judge Levenson's decision at paragraph 16 of *PA v SSWP*.

67. While I have sympathy for the Respondent, the death of her husband and her financial circumstances, the fact is that she only made the claim and received the payment after her late husband's death. The only question upon which further evidence may be useful is the terms on which the money was due and paid under the policies.

68. The fact is that the claim and payments under the policies were made only after death, and subject to the First-tier being provided any evidence that Royal Victoria paid out the lump sums to her because they were due and paid on a triggering event other than her late husband's death, then Regulation 10(1)(b) applies and the Respondent is not entitled to a funeral payment. This is because the lump sums received under the policies would extinguish such a right (they reduce the potential award of £1,562 by the amount of £8,000).

Remittal

69. For the reasons set out above, I have decided that the Appellant's appeal should be allowed, the First-tier's decision should be set aside and the case remitted to a freshly constituted First-tier tribunal.

70. I have made directions that the Respondent should provide any further available documents which evidence the circumstances under which she claimed the lump sum payments from Royal Victoria and the circumstances or entitlement under which she was paid and under which the lump sums were due to be paid. These should also include documents which evidence the terms and conditions of the insurance policies, the schedule thereto and any other documents which cast light on the nature of her legally enforceable right to payment including whether it was due on the death of her late husband.

Conclusion and remittal

71. For the reasons given above the First-tier's decision dated 18 August 2018 must be set aside for material error of law. The Upper Tribunal is not in a position to re-decide the first instance appeal because the First-tier Tribunal will need to make fresh factual findings for the purposes of determining whether Regulation 10(1)(b) of the SFMFE Regulations 2005 applies.

72. The appeal will have to be re-decided afresh by a completely differently constituted First-tier Tribunal (Social Entitlement Chamber).

73. The First-tier should have regards to the points made above.

74. I therefore allow the Appellant's appeal. The Respondent shall have the opportunity for a fresh determination following an oral hearing of her case before a new First-tier Tribunal, which I have provided for in the

directions above. It will also be in her best interests to attend so that the tribunal has the opportunity to hear her oral evidence and all relevant evidence can be presented.

75. The Appellant's success on this appeal to the Upper Tribunal on error of **law** says nothing one way or the other about whether the Respondent's case will succeed on the **facts** before the First-tier Tribunal, as that will be for that tribunal to assess in accordance with the law and once it has properly considered all the relevant evidence.

Signed (on the original) Rupert Jones
Judge of the Upper Tribunal

Dated 26 February 2020