IN THE UPPER TRIBUNAL **Appeal No. UA-2022-001558-CIC**

(ADMINISTRATIVE APPEALS CHAMBER) **[2024] UKUT 84 (AAC)**

On Judicial Review of the First-tier Tribunal (Social Entitlement Chamber) CI003/16/00043

BETWEEN

DOMINIC STEPHENSON

(by his appointee VICTORIA TREACEY)

Applicant

and

FIRST-TIER TRIBUNAL (SOCIAL ENTITLEMENT CHAMBER)

Respondent

and

CRIMINAL INJURIES COMPENSATION AUTHORITY (CICA)

Interested Party

BEFORE UPPER TRIBUNAL JUDGE WEST

Decided after an oral hearing on 27 February 2024: 5 March 2024

DECISION

The judicial review against the decision of the First-tier Tribunal (Social Entitlement Chamber) dated 16 August 2022 (after an oral hearing on that date) under file reference CI003/16/00043 is dismissed.

This determination is made under section 16 of the Tribunals, Courts and Enforcement Act 2007 and rule 30(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Representation: Ms Justine Skander, counsel, for the Applicant (instructed by Irwin Mitchell)

Ms Victoria Webb, counsel, for the Interested Party (instructed by CICA)

REASONS

Introduction

1. This case concerns the correct interpretation of paragraph 42 of the Criminal Injuries Compensation Scheme 2001 ("the 2001 Scheme") and in particular whether (a) compensation under paragraph 42(b) is limited to loss of parental services and (b) whether the costs of the adaptation or extension of the appointee's house, the costs of administering the trust of an award under the Scheme and the costs of the Court of Protection were recoverable under paragraph 42(b) as "such other payments as a claims officer considers reasonable to meet other resultant losses".

2. The Applicant brings judicial review proceedings, with my permission, against a decision of the First-tier Tribunal which it made on 16 August 2022 after an oral hearing on the same date. The Tribunal produced its summary of reasons for its decision on the same day and its statement of reasons on 24 August 2022. The applicant applied to the Upper Tribunal for permission to bring judicial review proceedings in form JRC1 on 17 November 2022.

3. On 10 January 2023 I acceded to the Applicant's application and granted him permission to bring judicial review proceedings.

4. On 23 August 2023 I directed an oral hearing of the judicial review, which I heard in Birmingham on the morning of 27 February 2024. The Applicant

was represented by Jasmine Skander and CICA by Victoria Webb, both of counsel. I reserved my decision.

5. This case arises under the 2001 Scheme, not under the Criminal Injuries Compensation Scheme 2012 ("the 2012 Scheme"). Although the case does not concern the 2012 Scheme, I consider the wording and effect of the relevant provision in the 2012 Scheme at the end of his decision, where I also explain the genesis of the 2012 Scheme.

The Tribunal's Decision

6. In its statement of reasons the Tribunal stated that

> **"Background**
> 1. A claim for Criminal Injuries Compensation was made on behalf of Dominic Stephenson who was born on 10 April 1997. On 3 January 2005, Dominic's father killed Dominic's mother as a result of which he was convicted of manslaughter. At the date of his mother's death, Dominic was 7 years old.
>
> 2. Dominic suffers from Kabuki syndrome, a congenital disability and his mother had provided the majority of his care. Following his mother's death, Dominic and his two siblings lived with their maternal grandparents but in January 2007 they moved to live with Mrs Victoria Treacey and her family. Mrs Treacey is Dominic's maternal aunt. Mrs Treacey built an extension to her house in order to accommodate Dominic and his siblings.
>
> 3. The claim was made on 1 April 2005 and therefore falls under the Criminal Injuries Compensation Scheme 2001. The decision under appeal is the Respondent's review decision of 11 January 2016 which awarded compensation of £44,210. This was calculated as follows:
>
> Fatal injury award as a qualifying claimant (pursuant to paragraphs 38 and 39 of the Scheme) £ 5,500
>
> Loss of parental services (paragraph 42(a)) £22,000
>
> Costs of appointing a deputy in the Court of Protection £16,710

Total award	£44,210

4. Dominic had received an award of £38,710 from the civil courts and interim payments from the Respondent of £11,000 i.e., a total of £49,710. Under the terms of the Scheme, the award payable under the Scheme must be reduced by the amount of the civil award. As Dominic had also received interim payments which exceeded the balance, there was no further award to be paid.

5. The appeal came before the Tribunal on 4 October 2018 when it was dismissed. The Tribunal's decision was subject to judicial review and the Upper Tribunal quashed the First-tier Tribunal's decision on the basis of procedural impropriety and remitted the case for rehearing.

6. The appeal was relisted on 2 February 2021 when it was adjourned with a direction that it should be listed for a hearing on the interpretation of paragraphs 41 and 42 of the Scheme and the heads of loss which are recoverable under those paragraphs.

7. The Appellant was represented by Ms Skander of counsel, instructed by Irwin Mitchell solicitors. A presenting officer, Ms Reid attended for the Respondent. The hearing was held remotely by video link (CVP) and in view of the issues in the appeal the Tribunal reserved its decision in order that we could give full written reasons.

The issues

8. It was not in dispute that Dominic was a qualifying claimant under paragraph 38(c) of the Scheme because he was a child of the deceased.

9. The issues to be decided by this hearing were the interpretation of paragraphs 41 and 42 of the Scheme and the heads of loss recoverable thereunder.

10. In particular,

(i) Whether the costs of administering a trust of any award and Court of Protection costs were compensable and

(ii) Whether the costs of adaptation/ extension to Mrs Treacey's house were recoverable.

11. The Tribunal was only concerned at this hearing with determining whether those heads of loss could be compensated under paragraphs 41 and 42 and not with determining the quantum of any such compensation. Paragraphs 41 and 42 read as follows:

> "41. The amount of compensation payable in respect of dependency will be calculated on a basis similar to paragraphs 31-34 (loss of earnings) and paragraph 35 (d) (iii) (cost of care). The period of loss will begin from the date of the deceased's death and continue for such period as a claims officer may determine, with no account being taken, where the qualifying claimant was formally married to or a civil partner of the deceased, of remarriage or prospects of remarriage or of a new civil partnership or the prospects of a new civil partnership. In assessing the dependency, the claims officer will take account of the qualifying claimant's income and emoluments (being any profit or gain accruing from an office or employment), if any. Where the deceased had been living in the same household as the qualifying claimant before his death, the claims officer will, in calculating the multiplicand, make such proportional reduction as he considers appropriate to take account of the deceased's own personal and living expenses.
>
> 42. Where a qualifying claimant was under 18 years of age at the time of the deceased's death and was dependent on him for parental services, the following additional compensation may also be payable:
>
> (a) A payment for loss of that parent's services at an annual rate of Level 5 of the Tariff; and
>
> (b) such other payments as a claims officer considers reasonable to meet other resultant losses.
>
> Each of these payments will be multiplied by an appropriate multiplier selected by a claims officer in accordance with paragraph 32 (future loss of earnings), taking into account of the period remaining before the qualifying claimant reaches age 18 and of any other factors and contingencies which appear to the claims officer to be relevant."

…

Discussion

25. There is little authority on the meaning of paragraph 42(b) of the Scheme. Two editions of a "Guide to Applicants for Compensation in Fatal Cases" were published by the Respondent, one in 2002 and the other in 2005.

26. Both editions of the Guide state that "Compensation may also be payable to meet other resultant losses for example, any additional costs of childcare or loss of earnings suffered by an adult in looking after the child".

27. The Guide is just a guide and not a statement of the law. The law is set out in the Scheme …

28. The Tribunal also asked for the representatives' views on the views expressed at page 203 of the first edition of Begley "Criminal Injuries Compensation Claims" which is largely viewed as the main reference book for such claims and the book issued to all judges on their appointment to the jurisdiction. Begley's view is that "Where a child of the family is disabled, the dependency claim may reasonably last much longer" [i.e., beyond the age of 18]. The Tribunal allowed a short adjournment to allow counsel opportunity to consider the Guides and Begley.

29. The Tribunal noted that the award under appeal did in fact include the sum of £16,710 for the costs of applying to the Court of Protection to appoint a deputy for Dominic. The Tribunal therefore asked the Respondent to clarify why, having made an award for Court of Protection costs, its view was any further such costs were not payable under the Scheme. The Respondent's presenting officer confirmed that the Court of Protection costs should not have been paid by the Respondent because they were incurred due to Dominic's pre-existing condition but that the costs already paid were not in issue in the appeal.

30. Ms Skander expressed concern that the Respondent's representative had made submissions which were not supported by the Guide i.e. that it had been submitted that other resultant losses had to be losses experienced by the child whereas the Guide referred to losses incurred by an adult caring for them. Further, the costs of childcare and carer's loss of

earnings were given as examples and were not an exhaustive list.

31. Ms Skander submitted that Begley supported her submission that the period of dependency does not automatically end at age 18 but there is an inbuilt discretion to extend it. Further, paragraph 35 of the Scheme does not suggest that the need for an application to the Court of Protection must be attributable to an injury caused by the crime of violence.

32. It was not clear from the evidence before the hearing whether the Appellant was claiming the costs of adapting her home in order to make it suitable for Dominic to live there with his disabilities or whether the costs were for extending her home to house Dominic (and his 2 siblings). The Tribunal therefore took the opportunity to obtain evidence from Mrs Treacey in that respect.

33. Mrs Treacey's evidence was that that they had an extension and built 2 extra bedrooms and a downstairs toilet. They also made a downstairs lounge for Dominic as he had the smallest bedroom which was only suitable for sleeping. Her evidence was that a downstairs toilet was required because Dominic is incontinent and there had been no specific adaptations e.g., a wet room or ramp.

The Decision

34. The Tribunal found that eligibility for an award of a lump sum in respect of loss of parental services (paragraph 42(a)) ends once the qualifying claimant reaches 18. However financial dependency which leads to an award of additional compensation (paragraph 40) may extend beyond that age. The second edition of Begley (page 342) suggests that paragraph 42(b) could be used in respect of a very disabled child who required extensive care from a deceased parent which is now provided by another, to make an award reflecting the extra level of care as compared with an able-bodied child. Begley also refers to an unreported case (*Mathurin v CICA* 2014) where an award was made reimbursing legal costs of an application for parental responsibility as well as the value of care provided by extended family. This case was not available to the Tribunal, being unreported.

35. We accepted the Appellant's argument that paragraph 41 of the Scheme sets out how the amount of

compensation payable in respect of dependency should be calculated (i.e., on a basis similar to loss of earnings and cost of care) and that paragraph 41 was not intended to be read such that loss of earnings and cost of care were the only heads of additional compensation that could be paid.

36. Paragraph 42 provides that additional compensation may be payable pursuant to paragraphs 42(a) and 42(b) where the qualifying claimant was dependent on the deceased for parental services. Paragraph 42(a) provides for a tariff award for loss of parental services and 42(b) provides for "such other payments as a claims officer considers reasonable to meet other resultant losses".

37. The Tribunal found that on a plain reading of the text, "other resultant losses" must mean other resultant losses resulting from the loss of parental services. This would include the examples in the guide of childcare, loss of earnings if someone else had to give up their job to provide childcare previously provided by the deceased and the cost of someone else obtaining parental responsibility.

38. The Tribunal did not accept that the costs of accommodation/adaptation or Court of Protection/trust costs were losses intended to fall within the remit of paragraph 42(b).

39. We found that the cost of an extension (or indeed adaptation) to Mrs Treacey's house was not a resultant loss because it did not arise due to loss of parental services. The recovery of the cost of an extension would be significantly widening the remit of the Scheme. Paragraph 35 lists special expenses which may be compensable where the appellant has a loss of earnings claim. Paragraph 35 is not directly relevant as Dominic's claim falls to be determined under paragraphs 37-44 of the Scheme. However, it is of note that whilst paragraph 35 allows the reasonable cost of adaptations to the applicant's accommodation it does not include the costs of an extension. In any event the cost of the adaptation claimed in this instance was the provision of a downstairs toilet and the Tribunal did not find that cost (or the cost of an extension) to be a loss resulting from the loss of parental services.

40. Trust costs are not stated as a head of recoverable loss anywhere in the scheme. There is no provision

anywhere in the 2001 scheme for trust costs to be recoverable (even in paragraph 35). The Tribunal therefore finds that it was not intended that they would be recoverable under paragraph 42(b).

41. The costs of appointing a deputy have already been paid, albeit in error, by the Respondent and were not in issue in the appeal. In any event we find the costs of Court of Protection applications arise as a direct result of Dominic's pre-existing disability and not as a result of loss of parental services and therefore any future such costs are not a resultant loss within the meaning of paragraph 42(b).

42. For these reasons, the appeal was refused. The issue of care costs remains outstanding and therefore directions are given in that respect."

The 2001 Scheme

7. So far as a material, the 2001 Scheme provides that

"Compensation for special expenses

35. Where the applicant has lost earnings or earning capacity for longer than 28 weeks as a direct consequence of the injury (other than injury leading to his death), or, if not normally employed, is incapacitated to a similar extent, additional compensation may be payable in respect of any special expenses incurred by the applicant from the date of the injury for:

(a) loss of or damage to property or equipment belonging to the applicant on which he relied as a physical aid, where the loss or damage was a direct consequence of the injury;

(b) costs (other than by way of loss of earnings or earning capacity) associated with National Health Service treatment for the injury;

(c) the cost of private health treatment for the injury, but only where a claims officer considers that, in all the circumstances, both the private treatment and its cost are reasonable;

(d) the reasonable cost, to the extent that it falls to the applicant, of

(i) special equipment, and/or

(ii) adaptations to the applicant's accommodation, and/or

(iii) care, whether in a residential establishment or at home, which are not provided or available free of charge from the National Health Service, local authorities or any other agency, provided that a claims officer considers such expense to be necessary as a direct consequence of the injury; and

(iv) the cost of the Court of Protection or of the curator bonis.

In the case of (d)(iii), the expense of unpaid care provided at home by a relative or friend of the victim will be compensated by having regard to the level of care required, the cost of a carer, assessing the carer's loss of earnings or earning capacity and/or additional personal and living expenses, as calculated on such basis as a claims officer considers appropriate in all the circumstances. Where the foregoing method of assessment is considered by the claims officer not to be relevant in all the circumstances, the compensation payable will be such sum as he may determine having regard to the level of care provided.

…

Compensation in fatal cases

…

40. Additional compensation calculated in accordance with the following paragraph may be payable to a qualifying claimant where a claims officer is satisfied that the claimant was financially or physically dependent on the deceased. A financial dependency will not be established where the deceased's only normal income was from:

(a) United Kingdom social security benefits; or

(b) social security benefits or similar payments from the funds of other countries.

41. The amount of compensation payable in respect of dependency will be calculated on a basis similar to paragraphs 31-34 (loss of earnings) and paragraph 35

(d) (iii) (cost of care). The period of loss will begin from the date of the deceased's death and continue for such period as a claims officer may determine, with no account being taken, where the qualifying claimant was formally married to the deceased, of remarriage or prospects of remarriage. In assessing the dependency, the claims officer will take account of the qualifying claimant's income and emoluments (being any profit or gain accruing from an office or employment), if any. Where the deceased had been living in the same household as the qualifying claimant before his death, the claims officer will, in calculating the multiplicand, make such proportional reduction as he considers appropriate to take account of the deceased's own personal and living expenses.

42. Where a qualifying claimant was under 18 years of age at the time of the deceased's death and was dependent on him for parental services, the following additional compensation may also be payable:

(a) a payment for loss of that parent's services at an annual rate of Level 5 of the Tariff; and

(b) such other payments as a claims officer considers reasonable to meet other resultant losses.

Each of these payments will be multiplied by an appropriate multiplier selected by a claims officer in accordance with paragraph 32 (future loss of earnings), taking account of the period remaining before the qualifying claimant reaches age 18 and of any other factors and contingencies which appear to the claims officer to be relevant".

The 2012 Scheme

8. So far as material, and as I explain at the end of this decision, the 2012 Scheme provides that

> "65. The amount of a child's payment is:
>
> (a) £2,000 for each year (pro rata for each part year) of the period to which the payment relates; and
>
> (b) such additional amount in relation to any expenses suffered by the child as a direct result of

> the loss of parental services as a claims officer considers reasonable".

The Applicant's Submissions

9. On behalf of the Applicant, Ms Skander made the preliminary point that his primary submission was that paragraph 41 was a method of calculation, not as the CICA submitted an exhaustive list of claims which a qualifying clamant could bring (by reference to paragraph 35). That was accepted by the Tribunal at [35].

10. It followed that the grounds related solely to the interpretation of paragraph 42, in particular the interpretation of:

(1) the word 'other' – at [36-37].

(2) adaptation to accommodation – at [39].

(3) trust and Court of Protection costs – at [40-41].

11. Ms Skander submitted that the Scheme was prescriptive in nature, that words were to be given their ordinary meaning and that paragraph 42 was to allow for a fact specific analysis; it allowed the decision maker some discretion when considering which particular facts might be taken into account. A non-controversial example of that was the reference to "any other factors and contingencies which appear relevant" when determining the relevant period.

The First Ground – The interpretation of the word 'other'

12. Ms Skander submitted that the Tribunal's interpretation in [37] was wrong, contrary to plain English and contrary to a plain reading of the text.

13. It must follow that "other payments" for "other resultant losses" were *other than* the payment for parental services. The finding that "other resultant losses" meant other losses *resulting from* as opposed to "*other than"* the loss of parental services was not a plain reading.

14. The word “other” in the Concise English Oxford Dictionary (11th edition – 2008) was defined as follows:

> “(1) used to refer to a person or thing that is different from one already mentioned or known; alternative of two; those not already mentioned.
>
> (2) additional”.

15. The Penguin Pocket English Dictionary (2004 edition) reads:

> “Other (adj)
> 1. Distinct from that or those previously mentioned
> 2. Not the same; different
> 3. Additional or further.
> 4. Second; Alternate; every other Tuesday.
> 5. Far or opposite.
> 6. Recently past: the other day.
>
> Other (pron)
> 1. The remaining or opposite one.
> 2. A different or additional one”.

16. The Applicant’s submission was that “other” meant “other than” the word/ meaning which preceded it. In this case, *other than parental services.*

17. The finding that ‘other resultant losses’ meant only losses *resultant from* the loss of parental services took no account of:

(1) the fact that the scheme was prescriptive – had the draftsmen intended the scheme to be interpreted in such a narrow fashion, he would have said so, in plain English;

(2) words in the scheme were intended to have their ordinary everyday meaning, contrary to other words which could have very specific legal meanings. The paragraph did permit discretion as to which facts to consider as relevant, thus indicating that a narrow interpretation was probably not appropriate or intended.

18. The Upper Tribunal should find that “other payments” and “other resultant losses” meant “distinct from parental services as previously mentioned” and so additional to payments for parental services.

19. If such a conclusion were reached, the fact that the Tribunal appeared to be encouraged or reassured as to its definition of “resultant from” by the examples in the Guidance was to be ignored. The footing was unsafe from the outset; some basis later in the reasoning did not make good such a foundational flaw.

20. For the avoidance of doubt when considering how the word “other” operates, the preceding concept was in paragraph 42(a) “parental services”. The scheme used the conjunction “and”, and so that was plainly the operative concept.

21. It could not be said that one should abandon paragraph 42(a) and look directly to the start of paragraph 42 and therefore read “other payments” and “other resultant losses” as following on from that. That was nonsensical. The words “other payment” and “other resultant losses” must therefore be with reference to the payment for parental services as set out at paragraph 42(a).

22. Further, paragraph 42 did not limit the scope of the compensation to losses which were resultant from the loss parental services. The text in paragraph 42 was a direction on eligibility, namely that if the claimant is a qualifying claimant, under the age of 18 years and in fact dependent on the deceased for parental services, then the paragraph was to be considered and applied to him. That was typical of the CICA scheme(s); one must first be eligible under a paragraph before it applied. It did not and could not mean that any one of those eligibility factors was the governing factor to which the remainder of the paragraph must be linked.

23. In summary, it was unclear how or why the Tribunal considered that a plain reading of "other resultant losses" meant "resultant from". Firstly, it was contrary to the definition of 'other' within the ordinary everyday meaning of the word and the sentence structure of the paragraph. Secondly, removing paragraph 42(a) from the equation did not assist in finding the logic. Thirdly, the opening lines of paragraph 42 related to eligibility to claim under the paragraph; there was no evidence that the drafter of the scheme intended questions of eligibility to be the linking factor which must be established in the types of payment.

The Second Ground - Adaptation to accommodation

24. The Tribunal provided three identifiable reasons for finding that the adaptation to accommodation/extension was not permissible under a fatal claim in the 2001 Scheme. At each juncture the panel erred in law.

25. The first line of reasoning was that

> "We found that the costs of an extension (or indeed adaptation) to Mrs Treacy's house was not a resultant loss because it did not arise due to the loss of parental services."

26. That was a continuation of the previous error of law. Had the Tribunal applied the ordinary everyday meaning of the word "other", noting that it was in a prescriptive scheme, to a paragraph where the draftsmen had intended the decision maker to use some discretion, the finding in question could not have been made.

27. The second and third line of reasoning was that

> "the recovery of the cost of an extension would be significantly widening the remit of the scheme. Paragraph 35 lists special expenses which may be compensable where the applicant has a loss of earnings claim. Paragraph 35 is not directly relevant as Dominic's claim falls to be determined under paragraphs 37 to 44

> of the scheme. However, it is of note that whilst paragraph 35 allows the reasonable cost of adaptations it does not include the costs of an extension."

28. Firstly, reliance upon paragraph 35 in a case where it did not apply, was wrong. One need only consider the Tribunal's reliance on the Guidance only two paragraphs above, at [37] to establish the point. The Tribunal listed "the cost of someone else obtaining parental responsibility" as an example of a type of claim which was recoverable. Such a loss was not found in paragraph 35 of the Scheme. The very fact of its existence as an example illustrated that the types of loss in fatal cases under the 2001 Scheme were fact specific and not confined to the list for other special expenses. It was therefore erroneous to place such weight on a non-applicable paragraph of the scheme.

29. Secondly, the fact that adaptations were allowed, but extensions were not referred to was contrary to the plain everyday meaning of the word 'adaptation' which might require an extension so that the accommodation was suitable. Again, reliance was placed upon dictionary definitions:

(1) the Penguin Pocket Dictionary read:

> "Adapt 'to make or become suited to different circumstances'"

(2) the Concise Oxford English Dictionary read:

> "Adapt 'make suitable for a new use or purpose'".

30. The question for the Tribunal was one of pure interpretation. It was wrong to say that, because the Scheme did not use the word "extension", adaptations which included the creation of new rooms was deemed not to qualify. The scheme was prescriptive in terms of categories which were applicable, but the interpretation by the Tribunal was too narrow and ventured into the absurd.

31. That erroneous interpretation also had far-reaching ramifications for both fatal cases and other cases in the Scheme and later Schemes where paragraph 35 (as updated) was applicable. Had the Tribunal intended to limit the interpretation so as to exclude the creation of new rooms, the matter ought to have been adjourned to consider the case law on the point. That was at the very least a procedural irregularity.

32. Finally Ms Skander submitted that, if one worked on the basis that the word "other" was denied its everyday meaning and was taken to mean "resultant from", it remained unclear how the Tribunal found that the provision of a downstairs toilet was "not a resultant loss resulting from the loss of parental services".

33. The Tribunal was only required to assess whether that was permitted in law, not whether it was reasonable. However, it elected to take evidence on that, despite the Applicant's concern that that would be procedurally irregular. The evidence was that the Applicant's appointee (who had parental responsibility) adapted the accommodation so as to create inter alia a downstairs toilet because the claimant was incontinent.

34. The reasons took no account of the fact that the provision of suitable accommodation (in this case by adaptation) was on any analysis a fundamental aspect of the provision of parental services. To say otherwise was to say that parents could house their children in unsuitable accommodation. The provision of parental services and the provision of suitable accommodation were inextricably linked.

Third Ground - Trust and Court of Protection costs

35. The Tribunal provided two reasons for the finding that trust and Court of Protection fees were not permissible.

36. The first line of reasoning at [40] was that

> "Trust costs are not stated as a head of recoverable loss anywhere in the scheme. There is no provision anywhere in the 2001 scheme for trust costs to be recoverable (even in paragraph 35) The tribunal therefore finds that it was not intended that they would be recoverable under paragraph 42(b)."

37. The Applicant repeated the submissions above in respect of reliance on paragraph 35 of the Scheme which was not applicable.

38. Further the fact that a claim was not referred to elsewhere in the Scheme did not mean that it was not applicable to a fatal case. The Tribunal accepted and even relied on other examples which were not contained within the Scheme (childcare and the costs of obtaining parental responsibility).

39. As to the intention of the draftsman, he had utilised the words "other resultant losses". In accordance with everyday language, that was other losses resultant upon the event in question (here the status of the qualifying claimant, as one without a parent who had died as a result of a crime of violence). It followed that, if there had been administrative legal costs which were payable, then they might be (on the facts) a resultant loss.

40. The second line of reasoning at [41] was that

> "we find that the costs of the Court of Protection applications arise as a direct result of Dominic's pre-existing disability and not as a result of loss of parental services."

41. The Applicant repeated his submission that the Tribunal erred in finding that "other resultant losses" meant "*resultant from".*

42. In respect of the finding that the costs were impermissible because they were attributable to the pre-existing disability and not to the loss of parental services, the Tribunal erred again.

43. Firstly, some costs might be required to administer any award from the Scheme. That was a question of fact to be determined at a later hearing.

44. Secondly, the paragraph provided a discretion. The use of the words "other resultant losses" must mean other categories of losses as applicable on the facts of the case and without limit or specificity. The guiding word was 'reasonable', which must mean that there was discretion and one must look into the facts to be found. Indeed, even when considering the period, a decision maker was invited by the draftsman of the Scheme to take into account the facts before him, including any *other factors and contingencies which are relevant*. The disability of a qualifying claimant was a contingency.

45. There was no provision that such a contingency must be caused by the violence or caused by the loss of services, or even caused by the status of the clamant as one without a parent upon whom he depended. It followed that the paragraph was designed to take the qualifying claimant as found. That was with whatever reasonable 'other resultant losses' which had been incurred on account of his status (that is one without a parent who had died because of a crime of violence) and to adjust the period as applicable to his particular contingencies and the factors of his life. As such, one could take the period far beyond 18 years since the qualifying claimant was severely disabled.

CICA's Submissions

46. On behalf of CICA, Ms Webb made the following submissions.

The First Ground: The interpretation of the word 'other'

47. The use of the word "*other*" and the phrases "*other payments*" and "*other resultant losses"* could not usefully be subjected to isolated examination. Paragraph 42(b) needed to be read in the context of paragraph 42 and the 2001 Scheme as a whole.

48. On that approach the Tribunal's finding (at [37]) that the phrase "*other resultant losses*" in paragraph 42(b) "*must mean other resultant losses*

resulting from the loss of parental services" was a natural reading of the Scheme.

49. In particular:

a. the phrase "*other resultant losses*" appeared in a paragraph specifically concerning loss of parental services (both the stem of paragraph 42 and paragraph 42(a)) and it was a natural reading to link "*resultant*" with *"loss of parental services"* rather than the broader issue of the death of the deceased;

b. the payment for loss of parental services at paragraph 42(a) was a tariff award; it made sense therefore that the Scheme should provide discretion to the claims officer under paragraph 42(b) to make "*other payments*" to meet "*other resultant losses"* to the extent that the tariff award might not adequately reflect payment for the loss of the parental services in a particular case;

c. the interpretation of paragraph 42(b) contended for by the Applicant, that it concerned payments "*distinct from parental services as previously mentioned*", was to read words into the scheme which were not there and were not logically to be inferred to be there; and

d. the wider reading contended for ignored the word "*resultant*" – if the Scheme were intended to refer to any heads of loss without restriction, the word "*resultant*" would not have been used.

50. Ground one should therefore be dismissed.

The Second Ground: Adaptation to accommodation

51. The Applicant relied upon his interpretation of paragraph 42(b) of the Scheme in order to assert there had been an error of law in not permitting recovery of the costs of the *"adaptation to accommodation/extension"*. CICA's position was that that interpretation was erroneous and the Tribunal's interpretation was correct.

52. The expense incurred could not be characterised as a cost to replace the care of the Applicant by his mother, rather it was a general item of living expense of a household. Paragraph 42(b) did not apply to the item claimed.

53. Responding to the further arguments in the Grounds:

a. paragraph 35 was not directly relevant to the interpretation of paragraph 42, as noted by the Tribunal and therefore the Tribunal's comments on the scope of paragraph 35 were not central to its decision;

b. the question was whether a loss or expense claimed was to meet "*other resultant losses*", not whether the items were spent as part of the provision of parental services. Otherwise, the 2001 Scheme would potentially cover any expense (such as food, schooling, clothing) incurred by individuals who had taken over parenting of applicants in those circumstances.

54. Therefore, that second ground of judicial review should also fail.

The Third Ground: Trust and Court of Protection costs

55. The Applicant relied upon his interpretation of paragraph 42(b) of the Scheme in order to assert there had been an error of law in not permitting recovery of those further costs. As stated above, CICA's position was that the Applicant's interpretation of paragraph 42(b) was erroneous.

56. Those costs could not be characterised as a cost to replace the care of the Applicant by his mother, rather they might potentially come about because civil and/or CICA claims have been pursued and awarded. Paragraph 42(b) did not apply to the item claimed.

57. Further as to the costs of a trust:

(a) they were described in the Applicant's Grounds as "*administrative legal costs*". Under that logic, any legal costs associated with the fatal injury could be captured by paragraph 42(b); that clearly was not the intention of the Scheme;

(b) if the costs of a trust were intended to be recoverable in fatal claims under the 2001 Scheme, express wording would have provided for it.

58. Further as to the costs of the Court of Protection:

(a) the fact a decision maker would consider "*factors and contingencies*" when considering the appropriate multiplier to be applied to payments which fell under paragraph 42(b) was not relevant to the question of whether payments are applicable to paragraph 42(b) in the first place;

(b) if the costs of Court of Protection were intended to be recoverable in fatal claims under the 2001 Scheme, express wording would have provided for it.

59. Therefore, the third ground of judicial review should also fail.

Analysis

The First Ground: The interpretation of the word 'other'

60. I am satisfied that Ms Webb is correct and that the phrase "other resultant losses" in paragraph 42(b) "must mean other resultant losses resulting from the loss of parental services" and that it does not have the wider meaning contended for by Ms Skander.

61. Paragraph 42 must be read as a whole. Paragraph 42(b) cannot be read in isolation from the rest of the provision. The word "other" and the phrases "other payments" and "other resultant losses" must be construed in the context of the paragraph as a whole.

62. The phrase "other resultant losses" appears in a paragraph which specifically concerns the loss of parental services. That is apparent from both

the stem of paragraph 42 and paragraph 42(a). Moreover, the payment for loss of parental services at paragraph 42(a) is a tariff award. To the extent that the tariff award might not adequately reflect payment for the loss of the parental services in a particular case, it makes sense that the Scheme should provide a discretion to the claims officer under paragraph 42(b) to make "other payments" to meet "other resultant losses".

63. I agree with Ms Webb that the correct reading of paragraph 42(b) links "resultant" with "loss of parental services" rather than linking "resultant" with the broader issue of the death of the deceased.

64. The interpretation of paragraph 42(b) contended for by the Applicant, namely that it concerns payments "distinct from parental services as previously mentioned", ignores the context of the sub-paragraph, which appears in the context of the stem of paragraph 42 and in the light of paragraph 42(a). It is also to read words into the Scheme which are not there.

65. The fact that a decision maker is directed in the coda to paragraph 42 to consider "any other factors and contingencies which appear to the claims officer to be relevant" when considering the appropriate multiplier to be applied to payments which fall under paragraph 42(b) is not relevant to the prior question of whether payments are within the ambit of paragraph 42(b) in the first place.

66. I therefore reject the bedrock of Ms Skander's argument (as set out in paragraph 18 above) that I should find that "other payments" and "other resultant losses" meant "distinct from parental services as previously mentioned" and so additional to payments for parental services.

67. The word "other", whether in the context of "other payments" or "other resultant losses", cannot be construed without reference to the whole of paragraph 42, which includes the references to dependency on parental

services in the body of the paragraph to loss of that parent's services in paragraph 42(a). "Other" payments are payments other than the tariff payment, but they must be to meet other resultant losses arising or resulting from the loss of parental services.

68. In that event the Tribunal's conclusion at [37] that the phrase "other resultant losses" in paragraph 42(b) must mean "other resultant losses resulting from the loss of parental services" is the correct conclusion for it to have reached.

69. I have reached this conclusion without recourse to the Guide to Applicants for Compensation in Fatal Cases TS4 (issue no. 1 4/01), which is just that – guidance and no more, but my conclusion accords with that guidance. What it states is that

> *"Loss of parental services*
> 13. A qualifying claimant under 18 years of age may be eligible, in addition to any sum for dependency, for compensation for loss of parental services at an annual rate of Level 5 of the Tariff – currently £2,000. Compensation may also be payable to meet other resultant losses, e.g. any additional costs of childcare or loss of earnings suffered by an adult in looking after the child. An appropriate multiplier, applied to the period until the child reaches the age of 18, will be used".

(The same formulation is used in the later 2005 version.)

70. Ground one therefore falls to be dismissed.

The Second Ground: Adaptation to accommodation

71. In the light of the conclusion which I have reached about the true construction of paragraph 42(b), I can take the second and third grounds quite shortly.

72. Whether they are to be characterised as an adaptation or an extension to the appointee's property, the costs incurred cannot be characterised as a cost

to replace the care of the Applicant by his mother. They are part of more general living expenses of a household, but the cost of them is not within the ambit of the Scheme.

73. I also agree with Ms Webb that the decisive question is whether a loss or expense claimed is to meet "other resultant losses" arising out of or resulting from the loss of parental services, not whether the items were spent as part of the provision of parental services. Otherwise, the 2001 Scheme would indeed potentially cover any expense (such as food, schooling, clothing) incurred by individuals who had taken over parenting of applicants in such circumstances.

74. Paragraph 35 of the Scheme is not relevant to the construction of paragraph 42 and Ms Webb rightly did not argue that it was, but that does not vitiate the Tribunal's conclusion in paragraph [39] of its decision. The Tribunal itself noted that paragraph 35 of the Scheme was not directly relevant and its conclusion is set out in the first and last sentences of the paragraph which do not refer to, or rely on, paragraph 35.

75. I do not therefore need to consider whether the work done was an adaptation or an extension, since whichever description applied the cost of the work would fall outside the Scheme in any event.

76. Similarly, in the light of the conclusion which I have reached on the construction of paragraph 42(b), I do not need to lay down any guidance as to whether adaptation to accommodation would or would not include an extension as Ms Skander asked me to do. In any event, it is not clear to me that the problem is widespread one given that this is a case arising under the old 2001 Scheme rather than the present 2012 Scheme.

77. Ground two therefore also falls to be dismissed.

The Third Ground: Trust and Court of Protection costs

78. Again, the in the light of my conclusion about the ambit of paragraph 42(b), I can take ground 3 shortly.

79. The costs of administering the trust and the costs of any Court of Protection applications cannot be characterised as a cost (or costs) to replace the care of the Applicant by his mother. Rather they potentially come about because civil claims, or claims under the Scheme, have been pursued and awarded.

80. The costs of administering the trust may be "administrative legal costs", but that does not bring them within the ambit of paragraph 42(b). It is not within the ambit of the Scheme to make any legal costs associated with the fatal injury fall within its purview. The position is the same with any costs incurred in relation to applications made to the Court of Protection.

81. Paragraph 42(b) does not therefore encompass losses caused by the regularisation of the Applicant's legal position by way of fees incurred for obtaining parental responsibility.

82. This ground of review also falls to be dismissed.

Coda: The 2012 Scheme

83. Although the case is governed by the terms of the 2001 Scheme, I did raise with counsel the terms of the 2012 Scheme in which paragraph 42(b) reappears, differently worded, as paragraph 65(b).

84. In the Ministry of Justice Consultation Paper CP3/2021 (January 2012) "Getting it right for victims and witnesses" (Cm 8288), the Paper deals with loss of parenting in the following terms:

> **"Loss of parenting**
>
> 245. We propose to continue to pay compensation for loss of parenting to qualifying applicants who were under the age of 18 and dependent on the victim at the time of

> the victim's death. (Footnote: Paragraph 42 of the Scheme (loss of parental services).) A payment is made at an annual rate of £2,000 for each year of loss up to the age of 18. This currently costs approximately £3m per year.
>
> 246. We also propose to retain the provision in the current Scheme that provides for additional payments that the claims officer considers reasonable to meet other specific losses the child may suffer.
>
> **Question for consultation**
> Q51 What are your views on our proposals on parental services:
>
> • To continue making payments for loss of parental services at the current level (£2,000 per annum up to the age of 18)?
>
> • To continue to consider other reasonable payments to meet other specific losses the child may suffer?"

85. It does not appear from the Consultation Paper that there was any proposal to alter the ambit of paragraph 42(b).

86. In the Government response to the Consultation Paper (July 2012) (Cm 8397) the Ministry of Justice stated that

> **"Fatal cases**
> 200. We proposed that the bereavement award, funeral payments and parental service payments will be protected. We proposed to make dependency payments in fatal cases in line with our loss of earnings proposals.
>
> We asked:
>
> Q50. …
>
> Q51. What are your views on our proposals on parental services:
>
> • To continue making payments for loss of parental services at the current level (£2,000 per annum up to the age of 18)?

- To continue to consider other reasonable payments to meet other specific losses the child may suffer?

Q52. …

Q53. …

201. There were 50 responses to this set of questions. The majority agreed that the bereavement award and parental services awards should be retained at their current levels. A small number of respondents, including local police authorities, thought that the bereavement award should be extended, at the discretion of the claims officer, to cover siblings, and also victims of overseas terrorism. Individual comments included suggestions that a bereavement award should include families bereaved by homicide abroad, the process of claiming should be made easier, and that we should exclude those with unspent criminal convictions from receiving payments.

202. The majority of respondents agreed that dependency awards should be retained and paid in line with loss of earnings. Where additional comments were made respondents thought that dependency awards should be higher.

203. The majority of respondents agreed that funeral payments should continue to be paid. A number of respondents said that this should be a fixed amount and should be paid up-front, more quickly than the rest of the award.

204. We have considered extending eligibility to receive a bereavement award. However, we believe that the current criterion for qualifying claimants covers those most affected by the death of the victim. To extend eligibility to other categories of qualifying applicant would increase the cost of the Scheme at a time when we are seeking to make it sustainable for the future.

205. We have considered whether dependency payments and loss of earnings awards should be higher. However, as with loss of earnings we believe that the alternatives would lead to significantly increased costs, at a time when the Scheme needs to be made sustainable, and that dependency payments should be made in line with loss of earnings awards.

206. We considered responses relating to funeral payments and agree that making an up-front payment would assist bereaved families. In the new scheme claims officers will be able to pay a flat rate of £2,500 up front to the deceased's estate and, where the applicant can demonstrate other additional costs, it will be possible to make further funeral payments up to a maximum value of £5,000.

We will retain:

- the bereavement award at its current level;
- the existing categories of qualifying applicant for the bereavement award and other fatal payments;
- payments for loss of parental services at the current level (£2,000 per annum up to the age of 18);
- consideration to make other reasonable payments to meet other specific losses that qualifying applicants under the age of 18 may suffer;
- dependency payments and pay them in line with loss of earnings proposals.

We will pay £2,500 up front to the deceased's estate for funeral costs. Where the applicant can demonstrate other additional costs we will make further funeral payments up to a maximum of £5,000."

87. Again, it does not appear that it was intended to alter the ambit of paragraph 42(b) of the Scheme.

88. However, when the draft 20212 Scheme was issued, paragraph 42(b) had been recast as paragraph 65(b) and in its new form it provided that

"The amount of a child's payment is:

(a) £2,000 for each year (pro rata for each part year) of the period to which the payment relates; and

(b) such additional amount in relation to any expenses suffered by the child *as a direct result of the loss of*

> *parental services* as a claims officer considers reasonable".

89. There is no material which I have seen which explains why the wording of the 2001 Scheme was not carried over into the 2011 Scheme and why it was thought necessary to alter the wording of what was now paragraph 65(b). It may be that the draftsman was simply clarifying the language of the previous provision rather than seeking substantively to alter it, particularly since the consultation process evinced no intention to alter the ambit of the provision, but it is curious that there is apparently no explanation for the redraft of the provision.

90. However that may be, the position is quite clear under the 2012 Scheme. In the 2012 Scheme, by virtue of paragraph 65(b), the amount of a child's payment is such additional amount in relation to any expenses suffered by the child *as a direct result of the loss of parental services* as a claims officer considers reasonable. Thus, just as the expenses sought in the instant case are not recoverable under the 2001 Scheme, they would not have been recoverable under the 2012 Scheme either.

91. I reached my conclusion about the effect of the 2001 Scheme without recourse to the 2012 Scheme, which did not apply to the award in this case, but the upshot is that the result would be the same, whichever version of the Scheme applied.

Conclusion

92. For the reasons set out above, I am satisfied that the decision of the Tribunal which sat on 16 August 2022 does not contain an error of law. The judicial review of that decision is therefore dismissed.

93. In its further directions notice dated 24 August 2022 the Tribunal stated that

> "4. The Tribunal finds that the only issue now to be determined is an award for care.
>
> 5. It may well be that an award for past and future care is extinguished by benefits received or to be received. The Tribunal makes no finding in that regard as the quantum of the care claim was not before it. However, the point is made to remind the parties that they have a duty under the Tribunal Rules to further the overriding objective to deal with case fairly and justly. This includes dealing with the case in ways which are proportionate and avoiding delay, so far as compatible with proper consideration of the issues.
>
> 6. The Appellant must, if so advised, serve an updated Schedule of Loss within 28 days of service of this not or alternatively notify HMCTS that they wish to withdraw their appeal.
>
> 7. If a Schedule of Loss is served, the Respondent is to serve a Counter Schedule of loss 28 days thereafter.
>
> 8. The parties must liaise after their respective disclosures and prepare a Scott Schedule identifying any matters agreed and those matters which remain in dispute which must be filed within 28 days of service of the Counter Schedule.
>
> 9. The appeal should thereafter be referred to a District Tribunal Judge (DTJ Beale is excluded) to determine whether a decision can be made pursuant to rule 27 without a hearing or for listing directions".

94. Those directions have lain fallow since the Tribunal's decision on paragraph 42(b) pending the outcome of the judicial review. Now that the judicial review has been dismissed, the parties must now take steps to comply with them.

Mark West
Judge of the Upper Tribunal

Signed on the original 5 March 2024