



**THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

**UPPER TRIBUNAL CASE No: UA-2021-001453-CIC (JR/1026/2021)
[2022] UKUT 265 (AAC)**

**R (AXO) v the First-tier Tribunal (respondent) and
the Criminal Injuries Compensation Authority (interested party)**

THE UPPER TRIBUNAL ORDERS that, without the permission of this Tribunal:

No one shall publish or reveal the name or address of AXO, who is the Applicant in these proceedings, or any information that would be likely to lead to the identification of her or any member of her family in connection with these proceedings.

Any breach of this order is liable to be treated as a contempt of court and may be punishable by imprisonment, fine or other sanctions under section 25 of the Tribunals, Courts and Enforcement Act 2007. The maximum punishment that may be imposed is a sentence of two years' imprisonment or an unlimited fine.

Decided following an oral hearing on 31 August 2022

Representatives

Applicant	Jesse Nicholls of counsel, instructed by Bhatt Murphy solicitors
First-tier Tribunal	Took no part
Criminal Injuries Compensation Authority (CICA)	Victoria Webb of counsel, instructed by CICA

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Authority (interested party)**

NCN: [2022] UKUT 00265 (AAC)

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

On application for judicial review of a decision of the First-tier Tribunal (Social Entitlement Chamber)

Reference: CI019/20/00029
Decision date: 4 March 2021
Venue: By telephone

The decision of the First-tier Tribunal is quashed under section 15(1)(c) of the Tribunals, Courts and Enforcement Act 2007. The Upper Tribunal substitutes its own decision under 17(1)(b) of the Act.

The decision is that: the £10,000 paid for breach of Article 2 was paid in respect of the same injury for the purposes of paragraph 49(1) of the Criminal Injuries Compensation Scheme 2008, but the £5,000 paid for breach of Article 3 was not.

REASONS FOR DECISION

1. This application for judicial review is brought with the permission of Upper Tribunal Judge Levenson. It was re-allocated to me on his retirement. It has two registration numbers because it has been transferred to a new database; I have used both numbers to avoid any confusion.

A. What the case is about

2. AXO is the applicant. She was born in 2006, so the application has been made on her behalf by her grandmother. Sadly, AXO's mother was killed by her former partner. The Criminal Injuries Compensation Authority (CICA) made an award of £25,500 under the Criminal Injuries Compensation Scheme 2008. Subsequently, AXO received £15,000 in settlement of her claim under the Human Rights Act 1998 for breaches of Convention rights under Articles 2 and 3. CICA then decided that AXO had to repay that amount under paragraph 49 of the 2008 Scheme. The First-tier Tribunal confirmed that decision.

3. The issue for the Upper Tribunal is: does AXO have to repay CICA any part of her settlement? This depends on whether, in the language of paragraph 49(1), all or part of her settlement was received as a 'payment in respect of the same injury' as the CICA award.

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B. The Criminal Injuries Compensation Scheme 2008

4. This Scheme applies to this case, although there has since been a new Scheme in 2012. It was made under section 1 of the Criminal Injuries Compensation Act 1995:

1. The Criminal Injuries Compensation Scheme.

(1) The Secretary of State shall make arrangements for the payment of compensation to, or in respect of, persons who have sustained one or more criminal injuries.

(2) Any such arrangements shall include the making of a scheme providing, in particular, for—

- (a) the circumstances in which awards may be made; and
- (b) the categories of person to whom awards may be made.

(3) The scheme shall be known as the Criminal Injuries Compensation Scheme.

(4) In this Act—

...

‘award’ means an award of compensation made in accordance with the provisions of the Scheme;

...

‘compensation’ means compensation payable under an award;

‘criminal injury’ ... have such meaning as may be specified;

‘the Scheme’ means the Criminal Injuries Compensation Scheme;

...

‘specified’ means specified by the Scheme.

5. These are the relevant provisions of the 2008 Scheme:

Eligibility to apply for compensation

6. Compensation may be paid in accordance with this Scheme:

...

(b) where the victim of a criminal injury sustained on or after 1 August 1964 has since died, to an applicant who is a qualifying claimant for the purposes of paragraph 38 (compensation in fatal cases).

8. For the purposes of this Scheme, ‘criminal injury’ means one or more personal injuries as described in paragraph 9, being an injury sustained in and directly attributable to an act occurring in Great Britain which is:

- (a) a crime of violence (including arson, fire-raising or an act of poisoning); ...

9. For the purposes of this Scheme, personal injury includes physical injury (including fatal injury) ...

Consideration of applications

18. An application for compensation under this Scheme in respect of a criminal injury ('injury' hereafter in this Scheme) must be made in writing on a form obtainable from the Authority. ...

Compensation in fatal cases

...

38. (1) Where the victim has died:
- (a) if the death was in consequence of the injury, compensation may be payable to a qualifying claimant under paragraphs 39-43 (standard amount of compensation, dependency, and loss of parent); ...
 - (2) A 'qualifying claimant' is a person who at the time of the deceased's death was:

...

- (c) a natural child of the deceased, or a person who was not the natural child but was accepted by the deceased as a child within the deceased's family or was dependent on the deceased.

Where victim died in consequence of injury

39. A qualifying claimant may claim an award under this paragraph (a 'bereavement award') unless he or she was a former spouse or civil partner of the deceased or was otherwise estranged from the deceased immediately before the date of death. In cases where only one person qualifies for a bereavement award, the standard amount of compensation will be Level 13 of the Tariff, save that where a claims officer is aware of the existence of one or more other persons who would in the event of their making a claim qualify for a bereavement award, the standard amount of compensation will be Level 10 of the Tariff. Where more than one person qualifies for a bereavement award, the standard amount of compensation for each claimant will be Level 10 of the Tariff.

42. Where a qualifying claimant was under 18 years of age at the time of the deceased's death and was dependent on the deceased 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 (multipliers, discount factors and life expectancy), taking account of the period remaining before the qualifying

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claimant reaches age 18 and of any other factors and contingencies which appear to the claims officer to be relevant.

Effect on awards of other payments

...

48. (1) An award payable under this Scheme will be reduced by the full value of any payment in respect of the same injury which the applicant has received or to which he or she has any present or future entitlement, as a result of:

...

(e) a settlement of a claim for damages, compensation or both on terms providing for the payment of money.

...

49. (1) Where a person in whose favour an award under this Scheme is made subsequently receives any other payment in respect of the same injury in any of the circumstances mentioned in paragraph 48, but the award made under this Scheme was not reduced accordingly, the person will be required to repay the Authority in full up to the amount of the other payment.

C. History – the award of compensation

6. CICA made its award in November 2012. It consisted of two elements. One was a bereavement award of £5,500 under paragraph 39, being the appropriate award for a fatal injury where there were other qualifying claimants. The other element was £20,000 for loss of parental services under paragraph 42(a).

D. History – the human rights claim

7. In June 2016, a claim was lodged on AXO's behalf against the Chief Constable of Nottinghamshire Police, Nottinghamshire County Council and the Secretary of State for Justice, alleging: (a) breaches of Convention rights under Articles 2, 3, 8 and 14; (b) negligence; and (c) misfeasance in public office.

8. The letter of claim was sent to the defendants in May 2018. A schedule of loss was produced, amounting to £296,967.50. For convenience, this included sums payable to the estate of AXO's mother as dependency damages. Leaving dependency damages aside, the claim for AXO was £15,000.

9. In July 2019, the parties agreed a settlement. This led to an order of the High Court in Tomlin form, which provided for proceedings to be stayed save for the purpose of carrying into effect the agreed terms set out in two schedules. Schedule 1 provides for apologies and for a meeting to discuss lessons learned. Schedule 2 provides for a payment of £15,000 to AXO 'of which £10,000 reflects settlement for breach of Article 2 ECHR and £5,000 reflects settlement for breach of Article 3 ECHR'. The settlement provided that when the defendants had complied with its terms, they would 'be

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discharged from all further liability to the Claimants in respect of the claims in this action.'

10. In view of AXO's age, she was a protected person, as a result of which approval of the settlement was required. This was given by Master McCloud on 17 September 2019. AXO's solicitor provided on AXO's behalf a report for the Master on the settlement. This included her view on the reasonableness of the offer. These paragraphs of the report are relevant to the issue I have to decide:

60. Our advice on settlement is that the £10,000 for a breach of Article 2 is for compensation awarded against the state agencies for non-pecuniary losses is 'just satisfaction' under the Human Rights Act 1998 arising out their failure to protect AXO's fundamental rights. It is accordingly entirely distinct from the CICA award which is intended to compensate AXO for harm suffered as a result of an individual's criminal acts towards her and her deceased mother. Accordingly the CICA award does not amount to double recovery in respect of any aspect of AXO's payment.

61. The Court is therefore respectfully asked to approve the AXO's settlement on the basis that she should not have to return the £10,000 to reflect the Article 2 ECHR award to CICA on the basis that the retention of the CICA award would not amount to double recovery and would not be in breach of paragraph 48 of the 2008 Scheme.

62. As set out above in reference to the Schedule of Loss, the amounts as claimed for AXO were for financial loss including financial dependency pre-trial (**£91,417.50**), financial dependency post trial (**£73,680**) services dependency pre trial (**£81,600**), services dependency post trial (**£30,000**), loss of special attention (**£5,000**). She also claimed an award for non-pecuniary loss in respect of breaches of Article 2 ECHR (right to life) and breach of Article 3 ECHR (right not to be subject to inhuman and degrading treatment) in the sum of **£15,000**.

63. In contrast, AXO's settlement is clearly not for services or financial dependency. The Tomlin order as agreed by the parties makes explicitly clear that the sum of £15,000 represents £10,000 for a breach of Article 2 ECHR i.e. to reflect [AXO's mother's] loss of life and the Defendant's failure to protect that life and £5,000 for a breach of Article 3 ECHR i.e. the inhuman and degrading treatment that she suffered as an individual and the failure by the Defendants in that respect.

64. Accordingly, our submission to CICA is primarily that whilst none of this award should be recovered, that in any event only £10,000 of AXO's compensation is potentially recoverable by CICA.

65. The question remains whether this amount of £10,000, which (subject to the approval of the Court) reflects just satisfaction for breaches of Article 2 ECHR - should be recovered by CICA on the basis that they are compensating AXO for the same loss as per the CICA award.

66. We have submitted to CICA that it should not be recovered for the following reasons:

- a) AXO's claim for non-pecuniary loss for breach of Article 2 ECHR concerns a claim for just satisfaction to reflect the failures of the Defendants to protect her mother.
- b) The £10,000 for a breach of Article 2 ECHR that she was awarded does not concern a services dependency or loss of love and affection as set out in the 'loss of parental services' award. As part of the civil claim against the police, AXO was seeking an award for services dependency and loss of special attention, neither of which were ultimately successful and for which no settlement was agreed. Accordingly her final award does not include a sum for services dependency.

67. The question of double recovery was specifically addressed in *DSD v Commissioner of Police for the Metropolis* ([2014] EWHC 2493 (QB), [2015] 1 WLR 1833) where Green J addressed the question of whether an award of damages pursuant to Article 3 ECHR should be reduced to reflect the fact that a CICA payment had already been made. Green J (at [65]) rejected that argument for the following reasons (emphasis added):

*With regard to payment by the CICA, DSD and NBV received payments amounting to £13,500 for DSD and £2,000 for NBV. Under the terms of the CICA rules if a victim of crime receives compensation for the crime then the CICA award has to be repaid. **In the case of DSD and NBV the CICA payments were specifically for the consequences of the criminal assault. Accordingly, no award was made for harm caused by the entirely different acts and omissions of the MPS.** To the extent to which those payments may reflect harm which overlaps with the harm being compensated in this case then the principles that I have applied in relation to the civil claim against Worboys should apply. **Accordingly (i) I should take the CICA awards into account as I have done in relation to the civil payments and (ii) they would not be** repayable by virtue of the award I make herein.*

68. The situation is analogous here. The damages awarded to DSD and NBV were granted **in addition to and notwithstanding** the fact that CICA payments had already been made in respect of the criminal act itself.

69. CICA is yet to make its decision as to whether it will seek to recover the £10,000 or any of AXO's settlement.

70. In the circumstances, we would ask the Court to make clear that the approval of the Second Claimant's settlement of £10,000 reflecting the Article 2 ECHR award is made on the basis that there should be no recovery of this amount by CICA on the basis that there has been no double recovery.

11. The Master approved the sum of £15,000 with the apportionment between Articles 2 and 3. She did not go as far as requested in paragraph 70 of the report with

regard to CICA, but recorded that the total ‘reflects a sum for non-pecuniary losses as *just satisfaction* under the Human Rights Act 1998 and is distinct from any sum that AXO has received from the Criminal Injuries Compensation Authority.’

E. Tomlin Orders

12. For those not familiar with these orders, their nature and operation are explained in Zuckerman on Civil Procedure – Principles of Practice (4th edition), footnotes omitted:

Tomlin Orders

23.63 The operative order of a judgment delivered by the court after a trial on the merits is normally fairly simple, involving no more than a command that one party pay a sum of money to another, deliver possession of some object, refrain from doing some specified act or take some simple step such as executing a deed. When an agreed settlement has a similar outcome, the resulting consent judgment can be drawn up to include the full terms on which the proceedings are concluded. But sometimes, settlement agreements are much more involved. Indeed, it is one of the advantages of an agreed solution to a dispute that it may incorporate much more subtle and flexible solutions to conflicts than would be open to the court to order. An agreed settlement may specify a variety of mutual obligations to be carried out at different times and in particular eventualities, which may themselves be conditional on earlier performance of settlement obligations, for example. It is hardly desirable that such complex arrangements should be incorporated in their entirety into the court’s operative order. The Tomlin Order provides a more appropriate facility for such situations.

23.64 A Tomlin Order stays the proceedings on agreed terms, which do not appear in the order itself but are instead set out in a schedule attached to the order. Since the schedule terms do not form part of the court’s order, they cannot be enforced as a judgment. Consequently, if the parties wish a particular provision to be directly enforceable, they must include it in the order itself. For instance, it is essential to include in the body of the order any order as to costs, such as a direction for a party’s costs to be assessed. At the same time the parties retain the freedom to pursue the proceedings in order to enforce the agreed terms—for example, by applying for an injunction or an order for specific performance. The order itself thus usually includes the following directions:

- (a) that the proceedings be stayed to enable the agreed terms to be put into effect;
- (b) that, if the agreed terms require it, there be payment out of monies paid into court and provision for accrued interest thereon;
- (c) for costs to be assessed, whether between the parties or out of public funds; and
- (d) liberty to apply for the purpose of carrying such terms into effect.

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23.65 The parties are free to include in the schedule any terms they see fit, even terms that could not have been ordered in a court judgment. But care needs to be taken to ensure that the terms agreed in the schedule are sufficiently clear to enable the court to enforce them. The terms of the schedule represent a contract between the parties, and accordingly will be construed as a commercial instrument. For the same reason, the court has no power to vary the terms of an agreement incorporated into a Tomlin Order, though they are susceptible to rectification in accordance with settled contractual principles. The schedule need not include the entire agreement reached by the parties. But terms left out of the schedule would be enforceable only if it is clear that they formed part of the parties' agreement, part of which was incorporated in the schedule. Given the contractual underpinnings of a Tomlin Order, and having regard to the confidential nature of the schedule to a Tomlin Order, it is inappropriate for a judge to review the terms of the schedule.

F. The error in the First-tier Tribunal's decision

13. Much of the tribunal's reasons are taken up with concerns about the form in which evidence had been presented. They were resolved before the case came before me. It is sufficient to say what error the tribunal made. Although it generally took the correct approach, it went wrong by treating the total amount of the settlement as a global one, which it dealt with as a whole.

G. Paragraph 49(1) in its context

Some analysis

14. Section 1(1) of the Criminal Injuries Compensation Act 1995 provides for Schemes to 'make arrangements for the payment of compensation to, or in respect of, persons who have sustained one or more criminal injuries.' In this case, the criminal injury was sustained by AXO's mother, so the payment to AXO was made in respect of her mother. AXO was a qualifying claimant by virtue of paragraph 6(b) of the Scheme.

15. Paragraph 49(1) uses the expression 'in respect of'. This is a common expression that has to be applied rather than defined. Any attempt at making the meaning clearer inevitably glosses the phrase in which it appears, which is wrong as a matter of principle, and creates new uncertainties, which is distracting and unhelpful.

16. 'In respect of' indicates some form of connection between two things. In paragraph 49(1), that connection is between the payment received and the injury. Applying that to this case, the connection is between the settlement amount and the death of AXO's mother.

17. The nature of that connection is left imprecise by the language of the Scheme – 'in respect of'. This is wider than 'payment for the same injury', which could have been used but was not. Beyond that, I am not going to attempt to define the nature of the connection or the extent of the connection. The words must stand for themselves in the context of the Scheme and in particular of paragraph 49(1). As Lord Bridge

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explained, of a different provision, in *Woodling v Secretary of State for Social Services* [1984] 1 WLR 348 at 352:

The language of the section should, I think, be considered as a whole, and such consideration will, I submit, be more likely to reveal the intention than an attempt to analyse each word or phrase separately.

18. What Lord Bridge said must be read subject to definitions. ‘Injury’ is defined by paragraph 8 as ‘one or more personal injuries ... sustained in and directly attributable to an act ... which is ... a crime of violence’. And paragraph 9 provides that ‘personal injury includes physical injury (including fatal injury)’. Applying those definitions produces the result that the injury in this case is the death of AXO’s mother.

19. Under paragraph 49(1), any part of the payment made to AXO under the settlement scheduled to the Tomlin Order must be repaid to CICA if it was a ‘payment in respect of the same injury’. Putting that together with my previous conclusion produces the result that an amount must be repaid if it is a payment in respect of the death of AXO’s mother.

20. But definitions, even ones in exhaustive form (X means ...), may be displaced by the context: *Meux v Jacobs* (1875) LR 7 HL 481 at 493 and *Robinson v Local Board of Barton-Eccles, Winton and Morton* (1883) 8 App Cas 798 at 801. I have considered whether that is so in the Scheme. Specifically, paragraphs 23 and following deal with types of compensation and draw a distinction between: (a) a standard amount fixed by reference to the nature of the injury; and (b) a loss of earnings or earning capacity as a direct consequence of the injury. Might paragraph 49(1) refer just to the injury itself and not any consequences or related matters? I put the point to Mr Nicholls by way of an example, but he disavowed taking the point and argued that the language of paragraph 49(1) did not allow a distinction between different heads of loss. I accept that that is the proper reading of the language of the Scheme.

21. Finally, a word about double recovery. When the law provides for damages for loss, it does not allow double recovery, which would be contrary to the principle that the purposes of damages is to compensate for the loss. Paragraph 49 includes that. It would apply for example if the victim of an assault received both a CICA award and an award of damages in a civil claim against the assailant. But the paragraph is not limited to double recovery in that sense. If it were, it would provide for payments received *for* the same injury rather than, as it does, *in respect of* the same injury. Paragraph 49 has the wider purpose of protecting the expenditure of public funds by limiting the circumstances when a CICA award can be made and retained. It is not limited to preventing double recovery for the same loss.

Applying my analysis

22. If a civil claim for damages is decided by a judge following a trial, the judgment in the case will explain the basis on which damages were awarded. The judge’s reasoning will be relevant to, and perhaps determinative of, the issue whether the damages awarded were in respect of the same injury as any CICA award. That is not this case, because there was no trial.

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23. If a civil claim is settled, the basis of any damages may be less clear. In the simplest case, the settlement will represent an acceptance of the case presented, both as to liability and quantum. It will be straightforward to identify the basis on which the settlement was agreed. In other cases, the matter will not be so easy. The agreement will represent a judgment of the chances of success by both parties. There may also be tactical considerations, such as costs, again by both sides. And, to make matters more complicated, the parties' judgments and considerations will not be disclosed and can only be deduced. That would have been the position here, were it not for the fact that AXO was a protected person, which meant that the High Court had to approve the settlement. The need for that approval means that more information is available about the basis of the settlement than would otherwise be available.

24. The result is that the basis on which damages were paid has to be determined by reference to the settlement itself and any relevant document or surrounding circumstances that shed light on the issue. The report to Master McCloud is especially important, as it provides the only insight on the basis of the settlement. It was written by AXO's solicitor who had personal knowledge of what had taken place. The defendants did not contribute to the report or to the proceedings before the Master, whose concern was (in the words of her Order) to be 'satisfied that the form of the Order is that which best meets [AXO's] needs and that there has been compliance with CPR 21 and the relevant Practice Direction.'

The settlement

25. The settlement provides part of the answer. Schedule 2 to the consent order provides for the apportionment of the total sum payable. Paragraph 2(b) reads:

2. The sum in paragraph 1 above is to be apportioned as follows:

...

(b) £15,000 to the Second Claimant (AXO) (of which £10,000 reflects settlement for breach of Article 2 ECHR and £5,000 reflects settlement for breach of Article 3 ECHR); ...

That isolates the sums attributable to Article 2 and Article 3. Nothing else in the settlement helps with what I have to decide. I attach no significance to the provision for all other liability to be discharged once the terms of the settlement have been complied with. This is merely standard form.

Master McCloud's Order

26. The Master approved the payment. She repeated the language of paragraph 2(b) of Schedule 2. I have already quoted what she said about the sum being distinct from any payment of criminal injuries compensation. This takes the matter no further. But it is relevant that she understood and approved the arrangement in the light of the report from AXO's solicitor.

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The solicitor's report

27. This brings me to the report on the settlement. It was written by a solicitor who had the closest knowledge of the claim and the negotiations for a settlement, and it was written in her capacity as a solicitor seeking judicial approval of that settlement. She was under a duty to state the circumstances objectively and accurately. The whole tone of the report reflects that, with its frank recognition of the difficulties AXO would have faced if the case had proceeded to a trial. Paragraph 63 of her report is relevant. I have already set it out, but repeat it for convenience:

63. In contrast, AXO's settlement is clearly not for services or financial dependency. The Tomlin order as agreed by the parties makes explicitly clear that the sum of £15,000 represents £10,000 for a breach of Article 2 ECHR i.e. to reflect [AXO's mother's] loss of life and the Defendant's failure to protect that life and £5,000 for a breach of Article 3 ECHR i.e. the inhuman and degrading treatment that she suffered as an individual and the failure by the Defendants in that respect.

28. The paragraph could not be clearer about the damages for Article 2: they are paid for the loss of AXO's mother's life and for the failure to protect that life.

29. The paragraph is less clear about the damages for Article 3. Who is the 'she' who suffered inhuman and degrading treatment as an individual? Is it AXO or her mother? My reading is that it refers to AXO. The sentence as a whole sets up a contrast between AXO's claim as an indirect victim for her mother (Article 2) and her own claim 'as an individual' (Article 3). In short, the contrast is between what happened to her mother and what happened to her. That reading is consistent with paragraph 40 of the report, which I have not quoted so far. It reads in part:

In respect of Article 3 ECHR, the argument is that the Defendants failed to properly investigate the circumstances of the inhuman and degrading treatment that [AXO], as [her mother's] daughter was herself subject to.

There is no ambiguity about that.

The claim

30. I have not found it helpful to refer to the claim. Depending on the circumstances, the terms of the claim and, for that matter, the defence may be relevant. But what matters is not what was claimed, but what was paid. That may be narrower than the claim. It may also be wider and include matters that were not part of the claim. That is one of the advantages of using a Tomlin Order, as Zuckerman explained. The way in which the settlement came about in this case at the suggestion of the claimants themselves shows that the apologies and meeting to discuss lessons learned were a significant objective from the outset.

Conclusion

31. The £10,000 damages for Article 2 were received in respect of the death of AXO's mother and are within paragraph 49(1). The solicitor's report admits the connection

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between the damages agreed and the mother's loss of life. The solicitor was alert to the possibility that CICA would seek repayment of some or all of its award and would have understood the significance of putting the point as she did. I do not treat what the solicitor said as decisive, but it is significant.

32. In addition to the solicitor's view in the report, I consider that there is sufficient factual connection between the award of damages under Article 2 and the CICA award. The connection has to be in respect of the injury for which the CICA award was made, in this case the death of AXO's mother. The injury had to be identified in the context of the 2008 Scheme, but is ultimately a matter of fact. The nature of the loss under Article 2 also had to be identified in the context of that Article, but again it is ultimately a matter of fact. The question is whether there was sufficient connection that the damages were paid in respect of the death. The relevant matters of fact – the death and the failings of the defendants – exist independently of their legal contexts. It is permissible to take account of the factual reality that extends beyond the legal categories of criminal injuries and Article 2. In that perspective, the failing for which damages were paid arose in relation to a course of domestic abuse. The murder was itself an act of abuse and the ultimate culmination of the course of conduct against AXO's mother. The failings may not have caused the murder, but they arose in relation to the conduct that led to the murder. In those circumstances, the damages can, as a matter of language, be described as paid in respect of the death of AXO's mother.

33. The £5,000 damages for Article 3 were not received in respect of the death of AXO's mother and are not within paragraph 49(1). AXO is entitled to the whole amount and does not have to repay CICA any part of it. The best evidence I have of the basis on which they were paid is in the solicitor's report, which says that they relate to AXO's own treatment. My conclusion is that AXO's treatment would have been the same regardless of any human rights failing in respect of her mother or whether her mother was abused or killed. The only connection between the damages under this Article and her mother's death is that the breach was part of a pattern of domestic abuse, of both AXO and her mother, that ultimately led to the murder. That is not a sufficient connection for the damages to be paid in respect of her mother's death. The damages cannot, as a matter of language, be described as paid in respect of the death of AXO's mother.

34. Ms Webb drew my attention to the inconsistencies and lack of clarity in the evidence and argument on the basis of the Article 3 claim and settlement. I accept that point, but it is less significant when I focus on the question I have to decide under paragraph 49(1): on what basis did AXO receive the £5,000? That has to be answered by reference to the terms of the settlement in the context of any relevant document or circumstances.

H. The cases cited

35. I have left the authorities cited to me until last, because it is easier to explain their relevance in the light of my analysis of paragraph 49.

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R (AXO) v the First-tier Tribunal (respondent) and
the Criminal Injuries Compensation Authority (interested party)

D and V v Commissioner of Police for the Metropolis [2015] 1 WLR 1833

36. This is the judgment of Green J. I accept Mr Nicholls' argument that the case probably involved the 2008 Scheme, although the judge did not say so.

37. The case eventually made its way to the Supreme Court, but it is the judgment at first instance that is relevant. It is long and detailed, and I heard detailed argument on what the judge did or did not decide. I can, though, deal with the relevance of the case without explaining any of the detail. The important passage is paragraph 65:

With regard to payment by the CICA, DSD and NBV received payments amounting to £13,500 for DSD and £2,000 for NBV. Under the terms of the CICA rules if a victim of crime receives compensation for the crime then the CICA award has to be repaid. In the case of DSD and NBV the CICA payments were specifically for the consequences of the criminal assault. Accordingly, no award was made for harm caused by the entirely different acts and omissions of the MPS. To the extent to which those payments may reflect harm which overlaps with the harm being compensated in this case then the principles that I have applied in relation to the civil claim against Worboys should apply. Accordingly (i) I should take the CICA awards into account as I have done in relation to the civil payments and (ii) they would not be repayable by virtue of the award I make herein.

38. Mr Nicholls relied on that paragraph and, in particular, the final sentence to support his argument that damages under the Human Rights Act 1998 are distinct from and paid for a different loss than criminal injuries compensation. I accept that, but I do not accept that the final words of that paragraph are an authority on the interpretation and operation of paragraph 49(1). That issue was not before the judge and could not be. Initial decision-making for criminal injuries is allocated to CICA. There is then provision for an appeal to the First-tier Tribunal, followed by a judicial review in the Upper Tribunal. After that, there is an appeal to the Court of Appeal. The High Court is not part of the structure, so the issue can never come before a High Court judge either in the King's Bench Division or in the Administrative Court. That leaves me free to decide the issue in this case free from authority of the High Court. This does not mean that I should ignore what Green J said. His opinion is entitled to respect, but as it is just a conclusion given without any analysis of the relevant provisions in the Scheme, I can only agree or disagree with it. For the reasons I have given, I disagree with it

VG v First-tier Tribunal (respondent) and CICA (interested party) [2017] 49 UKUT (AAC)

39. This was a decision of Upper Tribunal Judge Levenson under the 2012 Scheme. The applicant's son had been killed. This led to a claim for damages: (a) for negligence; (b) under the Fatal Accidents Act 1976; and (c) under Article 2. The claim was settled for £10,000. CICA subsequently assessed criminal injuries compensation at £10,500, but reduced it under paragraph 85 of the Scheme by £10,000. The First-tier Tribunal dismissed the appeal.

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40. I have assumed for the sake of argument that paragraph 85 of the 2012 Scheme and paragraph 49 of the 2008 Scheme are to the same effect. I have not decided that they are, nor have I decided that they are not. Just to avoid any misunderstanding, I have not relied on the language of paragraph 85 to interpret the language of paragraph 49.

41. Judge Levenson confirmed the tribunal's decision. This was his analysis:

24. I am prepared to assume in favour of the applicant (without deciding) that article 2 may be breached in either of the two different ways that Mr Gask has suggested. I accept that in an appropriate case (as on the dramatic facts in *Makaratzis*) damages can be awarded without the breach being linked to a death (or causing a death), notwithstanding the Authority's apparent arguments to the contrary. However, that is not the case here and I do not propose to speculate (in the context of a human rights jurisprudence that is still developing) on what the position might be in cases where there are very different facts. I agree with the Authority that in the present case it cannot be said that the settlement between the Trust and the applicant was independent of K's death. It was occasioned by K's death and there was a causal link between K's death and the claims and allegations made against the Trust.

25. Notwithstanding how the law might be applied to the facts of any other case, in this particular case the High Court claim form of 10th January 2012 was never amended, the Trust's offer of 15th May 2014 referred to "settlement of the whole of her claim", the Notice of Acceptance of 5th June 2014 went into no further detail, counsel's note of 6th April 2016 does not assist the applicant (for the reasons that I have explained) and I am in no doubt that the First-tier Tribunal was correct to decide that the agreed compensation from the Trust had been paid in respect of the criminal injury to which the award under the 2012 Scheme relates.

42. The facts of *VG* are different from AXO's case, so the conclusion cannot be read across to his case. More importantly, the judge did not analyse the language as I have done and did not set out any guidance on how to apply paragraph 85 to different circumstances. What he did in the paragraphs I have cited was to explain how he had applied paragraph 85 to the facts and circumstances of the case. That, as it happens, is the approach to take under the 2008 Scheme – he applied the language of the Scheme and did not define it. It is important to understand that Judge Levenson's application of paragraph 85 does not provide any basis for comparison in future cases. Each of the factors he mentioned was relevant in the context of *VG* and in combination with all of the other factors. Whether their presence or absence is relevant in other cases depends on the context and the other factors present.

Khan v CICA CI012/17/00204

43. This is a decision of the First-tier Tribunal, dated 7 August 2018, under the 2008 Scheme. As a decision of the First-tier Tribunal, it is not binding on that tribunal or on the Upper Tribunal.

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44. The applicant's son was killed in a drive-by shooting and CICA made an award of £5,000. The applicant claimed damages from the police under Article 2. The claim was settled for £15,000 on the basis that this compensated for the failure by the police to protect the son's life. The tribunal distinguished *VG* on the ground that the son would have died regardless of the failures by the police. There was, therefore, no causal connection between the breach of Article 2 and the injury that led to the CICA award. Accordingly, paragraph 49 did not apply. The tribunal said that, in contrast to *VG*:

54. ... the settlement between [the police] and the Appellant was arrived independent of [the son's] death and the sums were not paid by reason of the death. ...

That passage negates the reasons given by Judge Levenson in paragraph 24 of his decision. It was relevant for the tribunal to make those points, but not because *VG* was an authority that those factors were significant outside their context – I have made this point in my discussion of *VG*.

45. The tribunal went on to say that the damages were not paid in respect of the son's death, but solely in respect of the failings by the police. The tribunal was right, but that does not mean that they could not have been paid in respect of the same injury. In particular, it is not necessary to establish a causal connection for damages to be paid in respect of an injury.

46. I do not need to consider whether the tribunal came to the correct conclusion or to one that it was entitled to make. It is sufficient to say that the tribunal's approach to the application of the language was not entirely consistent with my analysis.

**Authorised for issue
on 3 October 2022**

**Edward Jacobs
Upper Tribunal Judge**