Neutral Citation Number: [2024] EWCA Civ 226

Case No: CA-2022-002361

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)
Upper Tribunal Judge Jacobs
[2022] UKUT 265 (AAC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 March 2024

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE MOYLAN
and
LADY JUSTICE WHIPPLE

- -

Between :

R (ON THE APPLICATION OF AXO, A CHILD, BY HER LITIGATION FRIEND JXO)	**Claimant/ Appellant**
- and -	
FIRST-TIER TRIBUNAL (SOCIAL ENTITLEMENT CHAMBER)	**Defendant/ Respondent**
THE CRIMINAL INJURIES COMPENSATION AUTHORITY	**Interested Party**

- -
- -

Richard Hermer KC and Jesse Nicholls (instructed by **Bhatt Murphy Solicitors**) for the **Appellant**
Victoria Webb and Turan Hursit (instructed by **Criminal Injuries Compensation Authority**) for the **Interested Party**
The **Respondent** was not represented.

Hearing dates : 8 and 9 November 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 11 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lady Justice Whipple :

Introduction

1. The appellant's mother was subjected to domestic abuse by her ex-partner over a long period. A number of state agencies were aware of that history and had been involved in efforts to protect the appellant's mother from harm. However, on 15 October 2011 the appellant's mother was murdered by her ex-partner. The appellant was then 5 years old.

2. The appellant applied to the Criminal Injuries Compensation Authority ("CICA") for compensation. On 29 November 2012 CICA awarded her £25,500, comprising £5,500 for bereavement and £20,000 for loss of parental services (the "CICA Compensation").

3. The appellant subsequently brought civil proceedings against three state agencies (the police, social services and probation, the "state defendants") alleging breaches of Articles 2 and 3 of the European Convention on Human Rights ("ECHR" or "Convention") and seeking damages under the Human Rights Act 1998 ("HRA") which implements the ECHR into domestic law. The state defendants offered to settle the appellant's claims for £15,000, agreeing that £10,000 of that amount related to the appellant's claim for breach of Article 2 and the remaining £5,000 related to the appellant's claim for breach of Article 3. The appellant, still a minor and acting by her litigation friend, accepted that offer in principle. Master McCloud approved the settlement on 17 September 2019 (the "HRA Damages").

4. On 20 November 2019, CICA sought repayment of part of the CICA Compensation out of the HRA Damages. CICA asserted that the HRA Damages were paid "in respect of the same injury" as the CICA Compensation earlier received, applying the terms of the CICA statutory scheme. That decision was upheld on internal review and on appeal to the First-tier Tribunal. The appellant then sought a judicial review in the Upper Tribunal which succeeded in part by overturning the First-tier Tribunal's decision that the £5,000 in settlement of the Article 3 claim was payable to CICA; but the Upper Tribunal upheld the First-tier Tribunal's decision in so far as it related to the £10,000 paid in settlement of the Article 2 claim. That latter aspect of the Upper Tribunal's decision is now under appeal.

5. The issue raised by this appeal is whether CICA is entitled to claim all or any part of the £10,000-worth of HRA Damages paid in settlement of the Article 2 claim. That issue turns, centrally, on the scope and meaning of paragraph 49(1) of the 2008 Criminal Injuries Compensation Scheme (the "2008 Scheme") which imposes a requirement on a person who has benefited from a payment under that scheme to repay it if they receive a payment from another person "in respect of the same injury".

6. Permission to bring this appeal was granted by Dingemans LJ on 8 March 2023. He also granted anonymity for the appellant and her litigation friend. The appellant is now 17 and she remains a protected party. She pursues this appeal by her maternal grandmother acting as her litigation friend.

7. The First-tier Tribunal is the named respondent to this appeal but has played no part in it. The *de facto* respondent is CICA, named as interested party.

The 1995 Act and the 2008 Scheme in Outline

8. The United Kingdom ratified the 1983 European Convention on the Compensation of Victims of Violent Crimes (the "Compensation Convention") on 7 February 1990. The Compensation Convention came into force in the UK on 1 June 1990 and was implemented into domestic law by the Criminal Injuries Compensation Act 1995 (the "1995 Act") which put the previously non-statutory compensation scheme on a statutory footing.

9. The first scheme under the 1995 Act came into force on 1 April 1996. By the time of the events in question in this appeal, the 2008 Scheme had succeeded the first (and second) scheme. A further revised scheme was implemented on 13 November 2012 (amended on 13 June 2019) which is not relevant for present purposes (although I note that its implementation date in fact preceded the payment of the CICA Compensation in this case by a short period of a week or two). It is the 2008 Scheme which is in issue in this appeal.

10. Section 1 of the 1995 Act provides:

> **"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;
>
> "claims officer" means a person appointed by the Secretary of State under section 3(4)(b);
>
> "compensation" means compensation payable under an award;
>
> "criminal injury", "loss of earnings" and "special expenses" have such meaning as maybe specified;

> "the Scheme" means the Criminal Injuries Compensation Scheme;
>
> "Scheme manager" means a person appointed by the Secretary of State to have overall responsibility for managing the provisions of the Scheme (other than those to which section 5(2) applies); and
>
> "specified" means specified by the Scheme."

11. The amount of compensation payable is determined according to s 2 of the 1995 Act, including provision for a standard amount of compensation determined by reference to a tariff prepared by the Secretary of State as part of the Scheme (the "Tariff", of which more later), and subject to such maxima as may be specified. In addition, there is provision for loss of earnings or special expenses in certain cases, as well as "in cases of fatal injury, such additional amounts as may be specified or otherwise determined in accordance with the Scheme" (s 2(2)(d)).

12. Section 3(1) of the 1995 Act provides that the Scheme may include provision for certain events, including at s 3(1)(d) "for the whole or any part of any compensation to be repayable in specified circumstances".

13. Section 5(1) of the 1995 Act confers a right of appeal against a review decision of CICA to the First-tier Tribunal.

14. The following are features of the 2008 Scheme (references in square brackets are to paragraphs of that scheme):

    (1) The 2008 Scheme is intended to provide compensation to, or in respect of, "persons who have sustained criminal injury" ([1] and [6(a)], reflecting s 1(1) of the 1995 Act).

    (2) Appeals against decisions taken on review under the 2008 Scheme are to be determined by the First-tier Tribunal ([2]).

    (3) A "criminal injury" is defined as one or more personal injuries ([9]) sustained in and directly attributable to a crime of violence ([8(a)]).

    (4) Personal injury is defined to mean a physical injury, including a fatal injury, as well as a mental injury ([9]).

    (5) Standard compensation is payable by reference to the nature of the injury according to the description in the Tariff ([23], [26]-[[29]). There is provision in addition for loss of earnings ([30]-[34]) and special expenses ([35]-[36]).

    (6) Where the victim of a criminal injury has died, compensation may be paid to a "qualifying claimant" ([6(b)]) which expression includes the natural child of the person who has been killed ([38(2)(c)]). Where the victim has died and if the death was in consequence of the injury, the award may include standard compensation as well as compensation for dependency and for the loss of a parent ([38(1)]).

(7) The maximum award that may be made in respect of the same injury is £500,000 ([24]).

15. The 2008 Scheme is supplemented by a number of notes including Note 3 which sets out multipliers, discount factors for assessing accelerated receipt of compensation and a life expectancy table. There then follows the Tariff which contains levels of compensation and amounts for specified types of injury.

16. The 2008 Scheme contains provision for deduction from compensation, or repayment of compensation already paid, in the event that other payments in respect of the same injury are made at [45]-[49]. Paragraph [48] provides for CICA awards to be reduced by the full value of any payment in respect of the same injury which the applicant has received or to which the applicant has any present or future entitlement, including the payment of damages pursuant to any order of court or in settlement of any claim. Paragraph [49] provides that CICA can demand repayment of amounts received subsequently in respect of the same injury; it is in the following terms:

> "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 [CICA] in full up to the amount of the other payment.
>
> (2) Any monies received by the Authority under sub-paragraph (1) above that relate to criminal injuries sustained otherwise than in Scotland shall be paid to the Secretary of State and any monies that related to criminal injuries sustained in Scotland shall be paid to the Scottish Ministers."

Background Facts

The CICA Compensation

17. The CICA Compensation paid to the appellant was notified by a letter from CICA dated 29 November 2012. A schedule to that letter set out the calculation of the award. The award comprised a "fatal injury" award of £5,500 and a "loss of parental services" award of £20,000. The total was £25,500.

Fatal Injury/Bereavement Award

18. In CICA's letter, the fatal injury award was cross-referenced to level 10 of the Tariff. The Tariff provides that in cases of fatal injury, where there is one qualifying claimant, level 13 compensation is payable (in the amount of £11,000); in cases where there is more than one qualifying claimant, level 10 compensation is payable (in the amount of £5,500 for each). In this case, the appellant and her grandmother were both qualifying claimants so the lower figure was awarded (see [38] of the 2008 Scheme). Under a heading "Where victim died in consequence of the injury", the 2008 Scheme provides at [39] that "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…". The award described in CICA's letter as an award for fatal injury was a bereavement award under [39].

Loss of Parental Services Award

19. In CICA's letter, the award for loss of parental services was cross-referenced to [42(a)] of the 2008 Scheme which provides that:

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

20. Level 5 compensation under the Tariff is £2,000. It is to be inferred that a multiplier of 10 was applied to that figure to reach the overall award of £20,000 under this head.

21. The basis of that award is explained at [40] of the 2008 Scheme which provides that "additional compensation … may be payable to a qualifying claimant where the claims officer is satisfied that the claimant was financially or physically dependent on the deceased", and at [41] which specifies that the amount of compensation payable in respects of dependency will be calculated on a basis similar to that applied to loss of earnings and cost of care claims.

Acceptance

22. On 6 December 2012 the appellant's grandmother, acting on the appellant's behalf, accepted the offer of CICA Compensation in the amount of £25,500 "in full and final settlement of an application for compensation". She signed an acknowledgement at the end of CICA's letter agreeing to repay if compensation was received from any other party, in these terms:

> "I promise to advise and repay the Authority from any damages, settlement or other compensation which may be received in this respect. I understand that if I do not advise and repay in full any such payment the Authority will take court action to recover the same."

23. This was a reference to the repayment obligation at [49] of the 2008 Scheme. The language of the letter was a little loose, referring to damages, settlement or other

compensation "in this respect". It is common ground that the repayment obligation would only apply to the extent that other compensation "in respect of the same injury" was received, those being the words at [49] of the 2008 Scheme; the acknowledgement signed by the appellant's litigation friend went no further than that.

HRA Damages

24. On 18 May 2018, the appellant, still a minor and acting through her litigation friend, but now represented by Bhatt Murphy Solicitors, sent a pre-action protocol letter to the three state defendants outlining her claim. The claim was advanced under the HRA (asserting breaches of Articles 2, 3, 8 and 14 of the ECHR) as well as in negligence and by way of vicarious liability. The remedies sought were damages including aggravated damages, compensation for pecuniary and non-pecuniary loss under the HRA and a declaration of violation of the claimant's rights. Insofar as the claims were for financial losses, the appellant sought compensation for the loss of her mother's services, for financial dependency and for psychiatric harm. The letter noted that an extension of time to bring the claims under the HRA would be sought.

25. By pre-action protocol response letters sent on various dates in October 2018, all three state defendants denied liability but agreed to engage in Alternative Dispute Resolution ("ADR") with a view to resolving the appellant's claim.

26. On 15 November 2018, Bhatt Murphy wrote a letter, without prejudice save as to costs, which enclosed a Schedule of Loss, also without prejudice and prepared for the purposes of ADR only. The Schedule of Loss specified the damages claimed for financial dependency, services dependency, loss of special attention, and non-pecuniary loss in respect of the appellant's claims under Articles 2 and 3 of the ECHR. The total amount claimed by the appellant was £296,697.50. Within that, the damages claimed for the alleged breaches of Articles 2 and 3 was £15,000 (the Schedule of Loss did not specify separate amounts for each article). The letter made an offer to settle on the basis of the claimed HRA damages (for the appellant and her co-claimant, her maternal grandmother) and funeral expenses only.

27. The state defendants accepted this offer to settle. In so far as the settlement related to the appellant, the Court's approval was required. Sophie Naftalin, the appellant's solicitor at Bhatt Murphy, prepared a report for the Court dated 11 September 2019 setting out the background and the proposed settlement. The report noted that the parties had agreed, subject to the Court's approval, that £15,000 should be paid to the appellant of which £10,000 reflected settlement of the appellant's claim for breach of Article 2 and £5,000 reflected settlement of the appellant's claim for breach of Article 3. The Article 2 claim was described as relating to the appellant's case that there was a real and immediate risk to the appellant's mother's life, which risk should have been mitigated by action by the state defendants. The Article 3 claim was described as relating to the appellant's case that the state defendants had failed properly to investigate the circumstances of the inhuman and degrading treatment that the appellant had herself been subject to. In the report, Ms Naftalin explained the possibility that CICA would seek repayment of the HRA Damages to recoup the CICA Compensation and she invited the Court to approve the appellant's settlement on terms that the appellant should not have to repay any part of her HRA Damages "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 [sic] of the 2008 Scheme".

28. The approval hearing was before Master McCloud on 17 September 2019. CICA was not present or represented at that hearing. By order of that date, Master McCloud approved the settlement and ordered, so far as relevant, that:

> "1. The [appellant] be allowed to accept the sum of £15,000 in full and final settlement of her claim (which comprises £10,000 for a breach of Article 2 ECHR and £5,000 for a breach of Article 3 ECHR);
>
> 2. The approval of the sum of £15,000 is made on the basis that it reflects a sum for non-pecuniary losses as "just satisfaction" under the Human Rights Act and is distinct from any sum that [the appellant] has received from [CICA]."

29. Shortly afterwards, all three state defendants issued letters of apology to the appellant's grandmother. Two of them (social services and probation) acknowledged shortcomings.

Procedural History

CICA's Decision and Internal Review

30. On 20 November 2019, CICA wrote to Bhatt Murphy claiming repayment from the appellant of £15,000, on grounds that "the CICA award and the civil award are in respect of the same injury", a reference to paragraph 49(1).

31. On 15 January 2020, Bhatt Murphy requested a review by CICA. On 28 February 2020 CICA concluded its review and confirmed its earlier decision.

The First-tier Tribunal

32. The appellant appealed to the First-tier Tribunal ("FTT"), as she was entitled to do under the 1995 Act and the 2008 Scheme. The appeal was heard on 4 March 2021 (FTT Judge McGarr sitting with Prof CV Clark and Mrs R Spafford), leading to a decision dated 16 March 2021 with full reasons following on 13 April 2021. The FTT found that the only real explanation for the HRA Damages was contained in Ms Naftalin's report filed with the Court for the purposes of the approval hearing, which stated that £10,000 was paid to the appellant for breach of Article 2 and £5,000 was paid for breach of Article 3. In the FTT's view, the total figure of £15,000 was a "global sum" covering the appellant's mother's loss of life and as such it was to be repaid in full to CICA (see [52]). The appeal was dismissed.

Upper Tribunal

33. The appellant sought a judicial review of the FTT's decision in the Upper Tribunal, Administrative Appeals Chamber (there being no right of second appeal in relation to disputed CICA awards). Permission for judicial review was granted by Upper Tribunal Judge ("UTJ") Levenson on 2 November 2021 and the case was heard by UTJ Jacobs on 31 August 2022. Judgment was promulgated on 3 October 2022. UTJ Jacobs concluded that the FTT had been in error in treating the HRA Damages as a global sum ([13]). The £5,000 damages agreed to relate to the claim under Article 3 were not received in respect of the death of the appellant's mother and could not be

the subject of any recoupment, because they related to the appellant's own treatment and there was an insufficient connection between that part of the HRA Damages and the appellant's mother's death ([33]). The remaining £10,000 of the HRA Damages, which settled the appellant's claim for breaches of Article 2, were, however, received "in respect of" the death of the appellant's mother and were therefore subject to recoupment (see [31]). UTJ Jacobs held that paragraph 49(1) of the 2008 Scheme used the expression "in respect of", which was a "common expression to be applied rather than defined" ([15]) and which denoted "some form of connection between two things" ([16]). He held that:

> "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)."

34. He considered the principle of double recovery and held that paragraph 49(1) of the 2008 Scheme precluded double recovery but was not limited by that principle:

> "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."

35. UTJ Jacobs granted the application (so overturning the FTT) to the extent that the challenge related to the £5,000 agreed to represent settlement of the appellant's Article 3 claim. He dismissed the application to the extent that it related to the £10,000 agreed to represent settlement of the appellant's Article 2 claim. It is against that decision that this appeal is now brought. There is no cross-appeal by CICA, so that UTJ Jacob's decision in relation to the £5,000 stands and that amount is not amenable to recoupment by CICA.

Appeal

36. The appellant argues that CICA has no right to demand payment of any part of her HRA Damages. She is represented by Richard Hermer KC (who did not appear below) and Jesse Nichols (who did), whose Notice of Appeal advances six grounds of appeal:

(1) The Upper Tribunal's construction of paragraph 49(1) of the Scheme is ultra vires the 1995 Act.

(2) The Upper Tribunal's construction of paragraph 49(1) is contrary to the statutory purpose of the 1995 Act.

(3) The Upper Tribunal erred in law in misapplying the criteria at paragraph 49(1) of the 2008 Scheme.

(4) The Upper Tribunal's decision is based on errors of law under Article 2.

(5) The Upper Tribunal's decision denies the appellant an effective remedy for the violation of her Article 2 rights, contrary to Article 13 ECHR.

(6) The Upper Tribunal's decision infringes the appellant's right to the protection of her property under Article 1, Protocol 1 ECHR.

37. The first three grounds of appeal converge on a single point about the construction of paragraph 49(1). If Mr Hermer KC and Mr Nicholls are right on those three grounds, then the remaining grounds, (4) to (6), do not need to be determined.

38. Ms Webb (who appeared below) and Ms Turan Hursit (who did not) resist this appeal for CICA. Their case, in short summary, is that the Upper Tribunal was right for the reasons it gave.

39. I shall deal with the parties' detailed submissions when I get to each of the issues. I wish to acknowledge, before I get there, the careful and well-informed arguments that were advanced by both parties. I thank all counsel and their legal teams for the considerable assistance they have provided to the Court.

Issues

40. In my judgment, the following broad issues arise for determination:

(1) Is paragraph 49(1) of the 2008 Scheme (the right to deduct) limited to situations of double recovery? If so:

(2) What are the principles which underpin the payment of (a) compensation by CICA pursuant to the 2008 Scheme; and (b) damages under the Convention?

(3) In this case, is there any double recovery between the CICA Compensation and the HRA Damages (or any part of them)?

(4) In summary, what approach should be taken when determining whether there is double recovery between CICA awards and Convention damages?

Issue (1): Is paragraph 49 of the 2008 Scheme (right to deduct) limited to situations of double recovery?

CICA's right to repayment

41. I have been assisted by the judgment of Leggatt LJ in *JT v First-tier Tribunal and another (Equality and Human Rights Commission intervening)* [2018] EWCA Civ 1735, [2019] 1 WLR 1313 which sets out a detailed review of these provisions and their development at [7]-[36]. The domestic legislation is to be construed in the light of the Compensation Convention which it implements.

42. The recitals to the Compensation Convention record that victims of crime and dependants of those who have died as a result of such crimes should be awarded compensation "for reasons of equity and social solidarity" and that the Compensation Convention establishes "minimum provisions".

43. Part 1 of the Compensation Convention is headed "basic principles". It contains Articles 1 to 11. Article 1 requires State signatories to take the necessary steps to give effect to the principles set out in Part 1. Article 2 provides that when compensation is not "fully available" from other sources, the State shall contribute to compensate victims of crime and the dependants of those who have died as a result of such crime. Article 4 requires the compensation to cover at least the following items: loss of earnings, medical and hospitalisation expenses, funeral expenses, and, as regards dependants, loss of maintenance. Article 10 provides that the State may pursue a subrogated claim for the amount of compensation paid to them. Article 11 imposes an obligation to ensure information is available to potential applicants.

44. The right to recoup from money received from another source is set out in the following terms at Article 9, which I set out in full (with emphasis added):

> "**Article 9**
>
> *With a view to avoiding double compensation*, the State or the competent authority may deduct from the compensation awarded or reclaim from the person compensated any amount of money received, in consequence of the injury or death, from the offender, social security or insurance, or coming from any other source".

45. The Explanatory Report on the Compensation Convention, published on 24 November 1983, was prepared by a committee of experts to facilitate the application of the provision contained in the convention; it is not, as it says, itself an instrument providing an authoritative interpretation. The Explanatory Report notes in its commentary on Article 1 that it is for the Contracting States to establish the legal basis, the administrative framework and the methods of operation of the compensation schemes having due regard to the principles in the Compensation Convention. The Explanatory Report's commentary to Article 9 is as follows (emphasis again added):

> "38. *To avoid double compensation*, compensation already received from the offender or other sources may be deducted from the amount of compensation payable from public funds.

> It is for the Parties to specify which sums are so deductible. In some of the member States, for instance, sums paid to the victim under private insurance schemes are not generally deductible from compensation.
>
> 39. A State may require any compensation the victim receives from the offender or other sources after being compensated from public funds to be repaid in full or in part (depending on the sum received) to the State or the authority paying compensation from public funds.
>
> This eventuality is liable to arise, for example, where:
>
> - a victim suffering hardship receives State compensation pending decision of an action brought against an offender or agency;
>
> - the offender, unknown at the time of compensation from public funds, is subsequently traced and convicted, and has fully or partly made reparation to the victim.
>
> 40. Informing the compensating authority of subsequent compensation awards poses obvious problems. In some States, the courts inform the compensating authority of awards made to the victim, thus facilitating restitution of the sums allowed by the compensating authority."

46. Mr Hermer and Mr Nicholls argued, based on the terms of Article 9 of the Compensation Convention in particular, that the right to seek repayment only arises where there would otherwise be double recovery or double compensation. The Compensation Convention informs the construction of sections 1 and 3 of the 1995 Act and the meaning of the words "in respect of the same injury" as they appear at paragraphs 48 and 49 of the 2008 Scheme. Those words must be given their ordinary meaning, construed "in the context of the Scheme as a whole, and with due regard to its evident purpose", citing *R (Colefax) v FTT (SEC) and CICA* [2015] 1 WLR 35 at [18]. They say that the evident purpose of the provision is the avoidance of double recovery.

47. Ms Webb submitted that the starting point must be the ordinary meaning of the words used at paragraph 49(1), construed in the context of the 2008 Scheme as a whole and with regard to the evident purpose of that scheme, citing the same passage from *Colefax.* She submitted that the Upper Tribunal considered the ordinary meaning of the words and reached a conclusion on that meaning which was permissible and should be respected. Whether the HRA Damages were received "in respect of the same injury" as gave rise to the CICA Compensation was ultimately a question of fact. The Compensation Convention provided a framework of broad principles and granted latitude to signatory States as to the precise manner of implementation. It was permissible for the United Kingdom to maintain a right to demand repayment in terms which extended to payments "in respect of the same injury" even though not strictly overlapping. Paragraph 49 is not, properly construed, limited to instances where there would otherwise be double recovery; it is broader in ambit.

Discussion

48. It is important to clear the decks of one point, not disputed: it makes no difference to the analysis that the HRA Damages were received *after* the CICA Compensation was paid. Similar arguments would have been advanced if the HRA Damages had been paid *before* the CICA Compensation was paid, save that it would have been paragraph 48, not 49 that was in issue. It is common ground, and obviously correct, that Article 9 of the Compensation Convention permits, and the 2008 Scheme contains, provisions to deal with both scenarios.

49. In brief summary, the Convention provides for minimum standards of compensation, leaving it open to the States to provide more than that minimum if they so wish. Its overarching purpose is to ensure, for reasons of equity and social solidarity, that compensation is available to those who have suffered personal injury or the loss of a person on whom they were dependent as a result of crime, acknowledging that in many circumstances the perpetrator of that crime will not have been identified or will lack resources. The State's obligation arises where full compensation is not available from other sources; the State is the payer of last resort.

50. I come then to the central issue which is whether the right of repayment arises only in circumstances where there would otherwise be double recovery or applies more generally whenever money is received which has a connection with (or is "in respect of" the injury or death). I am sure that Mr Hermer and Mr Nicholls are right to say that the principle of double recovery underpins the right of repayment; that right does not apply unless the payment duplicates compensation already received, and it is that circumstance which justifies repayment because retention would amount to double recovery. I reach that conclusion for the following reasons.

51. First, as a matter of language, the reference in Article 9 to avoiding double compensation is meaningful and Article 9 cannot be interpreted as if those words were not there. They introduce the State's right of deduction and frame the circumstances when such a right may exist. The ordinary, unstrained meaning of Article 9 is that double recovery is a condition precedent to the State's right of deduction.

52. Second, Article 1 requires States to give effect to the principles contained in Part 1, and Article 9 is within Part 1. The latitude as to the State's methods of implementing the Compensation Convention does not permit States to disregard or reframe the basic principles on which the Compensation Convention is based. The principle established by Article 9 is that a State can seek repayment of its own outlay from money subsequently received by the victim with a view to avoiding double recovery. The principle does not go any wider than that. There is no permission contained in the Compensation Convention that a State may seek repayment whether or not there would otherwise be double recovery.

53. Third, that analysis is consistent with the scheme and purpose of the Compensation Convention as a whole. The Convention requires compensation to be paid by the State when the victim of crime has not already been fully compensated. This is clear from Article 2 which refers to compensation not being "*fully* available from other sources". If the victim is fully compensated from other sources, the State pays nothing. That is what is meant by the State being the payer of last resort. Articles 2

and 9 work together: if money is subsequently received which duplicates the compensation already paid by the State, then the State can seek repayment of its outlay because otherwise there would be double recovery. But there is no coherence between Articles 2 and 9 if the State seeks repayment of money subsequently received which does not duplicate the compensation already paid (but, let us say, relates to a different type of loss or harm suffered by the victim but relating to the same injury or death). If the State takes money from the victim in the latter circumstances, the victim will be left under-compensated; further, the State will have received a windfall by way of repayment. That is not consistent with the scheme or purpose of the Convention.

54. I reject Ms Webb's argument that the words "in respect of the same injury" are words of wide meaning which are not limited to payments which would amount to double recovery. Her construction conflicts with the clear words of the Compensation Convention and offends its scheme and purpose. While she is correct to point out that the Compensation Convention allows States wide latitude in how they implement and administer their national schemes, that latitude relates to the details and not the basic principles to be respected which are set out in Part 1.

55. I agree with Mr Hermer that it was not open to UTJ Jacobs to adopt an approach which differed from the true legal construction of that paragraph. UTJ Jacobs erred in law when he concluded that paragraph 49(1) is <u>not</u> limited to double recovery (see [21] of the Upper Tribunal's judgment). This was a fundamental error which went to the heart of the case. It follows that the Upper Tribunal's decision must be set aside, so far as it relates to the £10,000 HRA Damages in settlement of the appellant's Article 2 claim. (The Upper Tribunal's determination that CICA had no right to seek repayment of the £5,000 received by the appellant in settlement of her Article 3 claim is not in dispute, so that part of the Upper Tribunal's judgment remains undisturbed.)

56. The appellant therefore succeeds on grounds 1, 2 and 3. On those grounds, the appeal must be allowed and the relevant part of the Upper Tribunal's determination must be set aside. It is not necessary to address the appellant's remaining grounds (although I note that ground 5 is really the mirror image of grounds 1, 2 and 3, in that any attempt by CICA to recover its outlay in the absence of double recovery would not only amount to a windfall for CICA but would also, surely, risk undermining the effectiveness of the appellant's right to an effective remedy).

57. Neither party suggested that this case should be remitted to the Upper Tribunal in the event that its judgment was set aside. The primary facts have been found and the Court has heard full argument on appeal. The Court is therefore in a good position to re-make the decision in relation to the £10,000 HRA Damages in dispute, pursuant to CPR 52.20(1). That is what I propose to do.

Issue (2)(a): what principles underpin the payment of compensation by CICA pursuant to the 2008 Scheme?

58. The issue which lies at the heart of this case is whether any part of the £10,000 paid to the appellant as part of her HRA Damages amounts to double recovery when set alongside the CICA Compensation earlier paid to her. In order to resolve that issue, it is necessary to establish what CICA Compensation was paid for, before performing a similar exercise in relation to the HRA Damages.

59. The CICA Compensation was based on two entries in the Tariff: for fatal injury (the bereavement award) and for loss of parental services.

CICA Fatal Injury (Bereavement) Award

60. The award for fatal injury (bereavement) was a lump sum award of £5,500 pursuant to [39] of the 2008 Scheme. The precise purpose of a CICA bereavement award is not specified in the 2008 Scheme.

61. Ms Webb showed us a Command Paper entitled "Rebuilding Lives supporting Victims of Crime" from December 2005 which discussed the criminal injuries compensation scheme in a section starting at p 14 and included a passage about compensation in fatal cases at p 19. The Command Paper queried how any compensation scheme "can adequately cost a life" and noted that the awards of £11,000 (one qualifying claimant) and £5,500 (more than one qualifying claimant) were "broadly in line with the amounts that the civil courts would pay in claims for damages".

62. Ms Webb also showed us CICA's published Guide to the Criminal Injuries Compensation Scheme 2008 which contains a section on fatal injuries at appendix 3. It outlines the three types of awards available in fatal injury cases, namely: (i) the 'standard amount' of compensation, (ii) dependency and (iii) loss of parental services for children aged under 18. The Guide describes the standard amount in the following way:

> "11. The standard amount of compensation recognises the fact that someone very close to you has died as a result of a crime of violence. No amount of money can make up for the death of a close relative – the standard amount is a gesture of public sympathy for the grief caused by death".

63. Mr Hermer noted that this passage from the Guide was cited in *Hutton v CICA* [2016] EWCA Civ 1305 at [9] (per Gross LJ with whom the other members of the Court agreed).

64. There is an obvious analogy to be drawn between a bereavement award under the 2008 Scheme and damages for bereavement under s 1A of the Fatal Accidents Act 1976 ("FAA"). There are differences (in the amounts payable, currently £15,120 under the FAA, and the class of eligible claimants, limited under the FAA to the partner of a deceased or the parent of a deceased child) but both measures make provision for a lump sum award to compensate for loss of a close family member. Section 1A was introduced by s 3(1) of the Administration of Justice Act 1982 and came into operation on 1 January 1983. It implemented the recommendations by the Law Commission in the 1973 Report on Personal Injury Litigation – Assessment of Damages (Law Com 56). The Law Commission proposed a bereavement award as a head of non-pecuniary loss as an exception to the rule that only pecuniary damage should be compensated. The Law Commission characterised the proposed bereavement award as "the recovery of damages for non-pecuniary loss suffered by others than the victim" (at [163]) and chose the term "bereavement" instead of "grief" to recognise that such an award would comprehend not only grief and mental

suffering but also the loss of that person's help as a member of a household, their counsel and their guidance (see [169], [170] and [172]).

65. Mr Hermer accepted that a bereavement award under the FAA and a CICA bereavement award were similar in seeking to compensate for non-pecuniary loss as a result of the death of a loved one, but he suggested that the CICA bereavement award compensated only for grief, and was narrower in scope than its FAA comparator. Ms Webb argued that the CICA scheme was statutory in nature and should not be equated with awards under a different statute or in common law at all.

66. I would accept Ms Webb's general proposition that the CICA scheme is distinct from civil law damages. Nonetheless, the types of award made by CICA and the means by which they are calculated clearly share much common ground with similar heads of claim available in civil law. That equivalence was recognised in the Command Paper where the two sources of compensation were compared. There is nothing surprising about that given that the CICA scheme and civil damages (including damages under the FAA) share the same broad objective in cases of fatality of providing compensation for the loss of a close family member.

67. I conclude that a CICA bereavement award is similar to a bereavement award paid under the FAA. They both compensate for non-pecuniary loss, in the form of grief and the loss of the deceased's help, counsel and guidance.

CICA award for loss of parental services

68. The award by CICA for loss of parental services was in the amount of £20,000, calculated pursuant to [42] of the 2008 Scheme by reference to the Tariff multiplier and multiplicand. The Guide published by CICA describes this award in this way:

> "Loss of parental services
>
> 16. A qualifying claimant aged under 18 at the date the victim died may be able to get compensation on top of any amount for dependency for what is called 'loss of parental services'. This is an amount of money to provide some small recognition of the tasks parents carry out for their children. The current compensation level for loss of parental services is the equivalent of £2,000 for every year until the child reaches 18. We will apply a multiplier to produce a lump sum …"

69. This type of award, and its method of calculation, is similar to a civil law claim for damages to compensate for the loss of a parent's services, above and beyond what might be recoverable as part of a dependency claim. This is a claim for pecuniary loss, in that the services lost are capable of being valued in money terms, even if they would have been given free of charge and out of familial love if the parent had lived. In civil law, this sort of claim finds its origins in the judgment of Watkins J in *Regan v Williamson* [1976] 1 WLR 305 as explained by Martin Chamberlain QC sitting as a deputy High Court Judge in *Grant v Secretary of State for Transport* [2017] EWHC 166 (QB):

> "107. … the courts have sometimes recognised that a dependant may suffer a pecuniary loss as a result of the death of a relative that is not adequately compensated by an award for services dependency. A pecuniary loss, for these purposes, means a loss that is conceptually capable of being valued in money or money's worth. The award for services dependency is calculated by reference to the cost of replacing those services commercially; and this cost may be an imperfect proxy for the true value of the deceased's services lost. Thus, in *Regan*, the dependency figure was increased to reflect the extra hours the mother spent in the evenings and weekends when no substitute for her services was available. Similarly, in *Fleet* [*Fleet v Fleet* [2009] EWGC 3166 (QB)], the additional award reflected the value of the care the husband would have given to his older wife. Likewise, the award in *Devoy* [*Devoy v William Doxford & Sons Ltd* [2009] EWHC 1589 (QB)] was justifiable insofar as it was intended to compensate for the care that the husband would have provided to his disabled wife. In all these cases, the services could in principle be valued in monetary terms. Awards made on this basis do not offend the principle that, bereavement apart, compensation is available for pecuniary loss only. They are simply an attempt to capture more accurately the pecuniary value of the deceased's services in circumstances where the cost of replacement services does not capture the whole of the loss, because the services in question are, at least in part, not commercially available. …"

70. I conclude that this part of the CICA award reflected a form of pecuniary loss for the lost services of a parent.

Issue (2)(b): what principles underpin the payment of damages under the Convention?

71. I turn then to consider when damages will be ordered as a remedy for breach of Convention rights and what those damages are for. Mr Hermer submits that Convention damages, at least in the context of a breach of Article 2, contain elements that are not reflected in an award by CICA for fatal injury. He points to the discretionary nature of Convention damages which are awarded only where that is necessary to accord "just satisfaction" for the breach, to the importance of holding the state to account for any breach of Convention rights, and to the reflection of "moral damage" in Convention awards, that being a concept unknown in domestic law. He accepts that an award of damages for breach of Article 2 may well contain an element of compensation for the victim's grief at their loss of a loved one, but he suggests that that possibility of overlap is insufficient to meet the requirement of paragraph 49(1). His submissions traversed many cases of the domestic courts and the European Court of Human Rights in Strasbourg ("ECtHR"). I will consider the submission under the following sub-headings: (i) the appellant's status; (ii) the juridical basis of damages awards under the Convention; and (iii) moral damage.

(i) The appellant's status

72. Article 2 of the ECHR provides that "Everyone's right to life shall be protected by law". That article has been interpreted as imposing on the State a positive obligation to protect life in certain circumstances. This duty is known as the *Osman* duty (following *Osman v United Kingdom* (1998) 29 EHRR 245 at [115]-[116] in particular). It was considered in *Rabone v Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 AC 72 at [12] per Lord Dyson JSC who said that Article 2 imposes a positive obligation on the State which in turn includes an operational duty to take positive steps where the authorities know or ought to know of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party; in such cases, the authorities are under an obligation to take such measures as are within the scope of their powers and which, judged objectively, might be expected to avoid that risk.

73. Section 7(1) HRA provides that a claim under that Act can be brought by a person who is (or would be) a victim of the unlawful act. By section 7(7) the term victim is accorded the same meaning as it carries under the Convention (Article 34) if proceedings were brought in the ECtHR in respect of that unlawful act.

74. Case law confirms that family members of a deceased person can bring claims under Article 2, as victims in their own right, in relation to alleged breaches of the operational duty by the State (*Rabone* at [46]-[47]).

75. I accept Mr Hermer's submission, which I did not understand Ms Webb to oppose, that the appellant's claim under Article 2 was brought in her own name and in her own right as an indirect victim for Convention purposes. The focus of that claim was the alleged failures by the authorities to protect her mother from the criminal acts of a third party.

76. That starting point assists in framing the next topic, namely the juridical basis for making awards of damages in cases where Convention breaches are established.

(ii) The legal basis of damages awards for breaches of the Convention

77. The starting point is Article 41 of the Convention which provides that:

> **"Just satisfaction**: If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

78. Article 41 is not scheduled to the HRA. However, s 8 HRA provides as follows:

> "8. Judicial remedies.
>
> (1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

> (2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.
>
> (3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—
>
> > (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and
> >
> > (b) the consequences of any decision (of that or any other court) in respect of that act,
>
> the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made."

Domestic cases

79. In *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 1 WLR 673, Lord Bingham of Cornhill confirmed that Article 41 was reflected in s 8 HRA, and that in deciding whether to award damages and if so how much, the domestic court was required to take the principles established by the ECtHR into account (see [6]) (see also *R (Faulkner) v Secretary of State for Justice* [2013] UKSC 23, [2013] 2 AC 254 at [39]). Lord Bingham also held that "the focus of the [ECHR] is on the protection of human rights and not the award of compensation" ([9]) and drew a distinction between damages as a remedy for Convention breaches and those due in domestic law for breaches of tort ([19]).

80. That distinction was emphasised in *Van Colle v Chief Constable of the Hertfordshire Police* [2008] UKHL 50, [2009] 1 AC 225 per Lord Brown of Eaton-under-Heywood at [138]:

> "…[ECHR] claims have very different objectives from civil actions. Where civil actions are designed essentially to compensate claimants for their losses, Convention claims are intended rather to uphold minimum human rights standards and to vindicate those rights. …"

81. In *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2, [2012] 2 AC 72, the claimants were the parents of a young woman who had taken her own life while a psychiatric in-patient. They brought a claim against the NHS Trust responsible for her care under Article 2 ECHR. The issue arose whether their settlement of a civil law claim brought in negligence under the Law Reform (Miscellaneous Provisions) Act 1934 on behalf of their daughter's estate, against the same NHS Trust, precluded their Convention claim. Lord Dyson JSC, with whom the other justices agreed, concluded that it did not, but part of his reasoning was that the parents had not received a bereavement award under the FAA and he suggested that the outcome might have been different if they had:

> "57. … if (i) the domestic law claim that is settled was made by the same person as seeks to make an article 2 claim and (ii) the head of loss embraced by the settlement broadly covers the same ground as the loss which is the subject of the article 2 claim, then I would expect the ECtHR to say that, by settling the former, the claimant is to be taken to have renounced any claim to the latter.
>
> 58. To return to the facts of the present case, I do not accept that by settling the 1934 Act negligence claim on behalf of [the deceased's] estate, Mr Rabone renounced an article 2 claim on behalf of himself and Mrs Rabone for damages for non-pecuniary loss for their bereavement. No such claim had been made in the negligence proceedings because such a claim was not available in English law. That is because section 1A of the Fatal Accidents Act 1976 (as inserted by section 3(1) of the Administration of Justice Act 1982) provides that a claim by parents for damages for bereavement for the loss of a child (currently fixed by section 1A(3) at £11,800) shall only be for the benefit of the parents of a minor and [the deceased] was more than 18 years of age at the date of her death. In these circumstances, the settlement of the 1934 Act claim did not amount to an implied renunciation of any article 2 claim. In the absence of an express renunciation, the settlement of itself had no legal effect on the status of Mr and Mrs Rabone as victims for the purpose of their article 2 claim. …"

82. Lord Dyson held that there was a significant overlap between the damages received by settlement and the Article 2 claim:

> "72. … In the present case, the trust admitted that they had negligently caused [the deceased's] death and they paid compensation to reflect that admission. There is a considerable degree of overlap between the claim in negligence and the article 2 claim. The essential features of the case against the trust were that: (i) [the deceased] was a vulnerable patient in the care of the trust at the material time; (ii) she was known to be a suicide risk; (iii) the trust acted negligently in failing to take reasonable steps to protect her; and (iv) their negligence caused her death. In substance these features formed the basis of the claim in negligence and the claim for breach of the article 2 operational duty."

83. The parents were awarded £5,000 each as damages for breach of their Article 2 rights ([89]).

84. The Supreme Court returned to the principles established by the ECtHR (referred to in *Greenfield* at [6]) in *R (Sturnham) v Parole Board* [2013] UKSC 47, [2013] 2 AC 254, where Lord Reed JSC said this:

> "32. The search for "principles" in this broad sense is by no means alien to British practitioners, at least to those who had experience of practice in the field of personal injury law before the Judicial Studies Board published its guidelines. The conventions underlying the amounts awarded as general damages (or, in Scotland, solatium) for particular forms of harm could only be inferred from an analysis of the awards in different cases and a comparison of their facts. It is an exercise of a similar kind which may be called for when applying section 8 of the 1998 Act in connection with the quantification of awards for non-pecuniary damage (or "moral damage", as the court sometimes describes it, employing a literal translation of the French expression)."

85. In 2014, the Court of Appeal decided the case of *Sarjantson v Chief Constable of Humberside Police* [2013] EWCA Civ 1252, [2014] QB 411. This was an *Osman* claim, complaining about a failed police response. The Court confirmed that the fact that a police response would have made no difference to the outcome was not relevant to liability although it might be relevant to quantum (per Lord Dyson at [29]).

86. In *DSD v Commissioner of Police of the Metropolis, NBV v Commissioner of Police of the Metropolis* [2014] EWHC 2493 (QB), [2015] 1 WLR 1833 (sometimes referred to as *D* in the case law), two victims, known as DSD and NBV claimed that the Metropolitan Police had breached their Article 3 rights by failing adequately to investigate their reports of sexual assaults by John Worboys, who was subsequently convicted of multiple rapes. Both DSD and NBV had previously received awards from CICA to compensate them for injuries received at the hands of Worboys. Each had also received damages from Worboys in settlement of a civil claim. Green J found in their favour under Article 3 (in the liability judgment at [2014] EWHC 436 (QB)) and awarded them damages to reflect those breaches (in the remedies judgment, cited at the start of this paragraph). At [17] of the remedies judgment, he recognised that damages awarded for breach of Convention rights can incorporate a significant compensatory element, particularly where pecuniary losses have been sustained and are reflected in an award. But so far as non-pecuniary harm was concerned, he said in the same paragraph that:

> "… the court adopts a more broad brush approach to setting an appropriate quantum award. No attempt therefore is made to apply a "but for" or counterfactual analysis, or seek to equate harm with any identifiable measure of financial value. Routinely, quantum figures are justified simply by the broadest of references to "equity"."

87. Green J recognised in the remedies judgment that in some cases a non-financial remedy, such as a declaration, would be sufficient "just satisfaction", but there were at least two components to the question whether a financial award should supplement any declaration: first, whether the breach had caused any harm which should appropriately be reflected in an award of compensation; and secondly, whether the violation was of a type which should be reflected in a pecuniary award ([18]). The rules were not applied in "any absolute or inflexible manner" ([21]). There were cases where the core concern was to bring the violation of human rights to an end, in

which cases compensation would be very much a secondary objective ([22], referring to *Anufrijeva v Southwark Borough Council* [2003] EWCA Civ 1406, [2004] QB 1124 at [52]-[53]).

88. On the facts of the case before him, Green J concluded in the remedies judgment that damages should be awarded for the ECHR breaches, noting that in consequence of those breaches, DSD and NBV had suffered harm that was "quite discrete" from the harm caused by the assaults by Worboys, namely the distress of not having their complaints properly and timeously investigated (see [25]).

89. Green J stated at [36] of the remedies judgment that an overarching principle found in Strasbourg case law is that of flexibility which means looking at all the circumstances and the "overall context" (a phrase found in cases such as *Edwards v UK* (2002) 35 EHRR 19 and *Al-Jedda v UK* (2011) 53 EHRR 23 to which I shall come). At [40] he listed a number of factors relevant to the "overall context", including whether the violation was deliberate or in bad faith, whether the state has drawn the necessary lessons and whether there is a need to include a deterrent element in the award; whether there is a need to encourage others to being claims against the state by increasing the awards; and whether the violation was systemic or operational.

90. The Court of Appeal dismissed the appeal against the liability judgment ([2015] EWCA Civ 646, [2016] QB 161). The distinction between damages under the Convention and for negligence at common law damages was analysed by Laws LJ:

> "65. There are important differences between the Convention's strategic purpose to secure minimum standards of human rights protection, and the English private law purpose (as Lord Brown described it in the *Van Colle* case [2009] AC 225) of compensation for loss. It is elementary that in a negligence claim at common law, the court asks whether the defendant owes a duty of care to the claimant: that is, a duty to take reasonable care; and "reasonable" care is generally what a "reasonable" man - traditionally the passenger on the Clapham omnibus - would take it to be (though where the duty is owed by an expert, such as a doctor, the court considers the standard set by his profession). If the duty is established, the question will be whether any act or omission relied on by the claimant (a) constitutes a breach of the duty and (b) has caused the claimant loss; loss is a defining element of the tort.
>
> 66. The process by which a human rights claim is adjudicated is quite different. The starting point is not the relationship between the claimant and the (state) defendant. It is to ascertain whether the case is within the scope of any of the rights or freedoms which the Convention requires the state to secure; and then, if it is, to decide whether the state has or has not violated the article or articles in question. The possibility of compensation for the individual complainant is secondary: the provision for "just satisfaction" (article 41of the Convention, discussed by Lord Bingham in R (*Greenfield*) v Secretary of State for the Home Department [2005] 1 WLR 673; cf section 8

> of the 1998 Act) is essentially discretionary. The focus is on the state's compliance, not the claimant's loss."

91. The Supreme Court dismissed the further appeal ([2018] UKSC 11, [2019] AC 221). Lord Kerr gave a judgment with which Lady Hale and Lord Neuberger agreed:

> "64. It is well settled, however, that the award of compensation for breach of a Convention right serves a purpose which is distinctly different from that of an order for the payment of damages in a civil action …
>
> 65. Laws LJ said in para 68 of his judgment in the Court of Appeal … that the inquiry into compliance with the article 3 duty is "first and foremost concerned, not with the effect on the claimant, but with the overall nature of the investigative steps to be taken by the state." I agree with that. The award of compensation is geared principally to the upholding of standards concerning the discharge of the state's duty to conduct proper investigations into criminal conduct which falls foul of article 3. In paras 72 - 77 of his judgment, Laws LJ set out the systemic and operational failures of the appellant, quoting extensively from the judgment of Green J as to the first of these. That catalogue of failures was considered to warrant the award of compensation to the respondents, irrespective of the fact that they had received damages from both Worboys and CICA. I cannot find any flaw in the judge's decision to award that compensation nor in the Court of Appeal's decision to uphold that decision."

92. Lord Hughes disagreed with Lord Kerr's reasoning in some respects, but endorsed the sentiment at [65] of Lord Kerr's judgment when he said:

> "136. In substance, the Convention-based duty is not aimed at compensation but at upholding and vindicating minimum human rights standards. It is, substantially, to insist on performance of a public duty."

93. *DSD* was a case about Article 3 damages but the passages outlined above are equally relevant to the characterisation of damages for breaches of Article 2.

94. *Alseran v Ministry of Justice* [2017] EWHC 3289 (QB), [2019] QB 1251 was decided just before *DSD* was heard in the Supreme Court. Leggatt J summarised the domestic approach to remedies for Convention breaches into eight principles ([908]-[916]), the third, fourth and sixth of which are relevant:

> "911. Third, where it is shown that the violation has caused "pecuniary damage" (i.e. financial loss) to the applicant, the court will normally award the full amount of the loss as just satisfaction: see paragraphs 10 - 12 of the Practice Direction.
> …

> 912. Fourth, it is also the practice of the court to award financial compensation for "non-pecuniary damage", such as mental or physical suffering, where the existence of such damage is established: see paragraphs 13 - 14 of the Practice Direction. If the court considers that a monetary award is necessary, the Practice Direction states that it will make an assessment "on an equitable basis, having regard to the standards which emerge from its case law": see paragraph 14. The case law of the European court shows that awards for mental suffering are by no means confined to cases where there is medical evidence that the applicant has suffered psychological harm and that compensation may be awarded for injury to feelings variously described as distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life or powerlessness. The case law also shows that the court will often be ready to infer from the nature of the violation that such injury to feelings has been suffered. Applicants who wish to be compensated for non-pecuniary damage are invited by the court to specify a sum which in their view would be equitable: see paragraph 15 of the Practice Direction.
>
> …
>
> 914. Sixth, in deciding what, if any, award is necessary to afford just satisfaction, the court does not consider only the loss or damage actually sustained by the applicant but takes into account the "overall context" in which the breach of a European Convention right occurred in deciding what is just and equitable in all the circumstances of the case. This may require account to be taken of moral injury. …"

95. Leggatt J referred to the Grand Chamber's decision in *Varnava v Turkey* (application no 16064/90) dated 18 September 2009 and *Al-Jedda v United Kingdom* (2011) 53 EHRR 23 at [114], both examined below.

96. I have already referred to *JT v First-tier Tribunal and another (Equality and Human Rights Commission intervening)*. In that case, the issue was whether a claimant was entitled to receive an award from CICA in circumstances where the relevant crimes had been committed against her by her stepfather, with whom she was living as a child, at a point in time prior to 1979 when the relevant scheme had included a "same roof" rule excluding the right to compensation where the victim was living with the assailant as a member of the same family. The Court of Appeal held that the same roof rule constituted discriminatory interference with the victim's rights under Article 1, Protocol 1 of the ECHR. Leggatt LJ, with whom Sir Terence Etherton MR and Sharp LJ agreed, examined the nature of payments by CICA:

> "65. In the sense relevant for present purposes, payments made by the state under the United Kingdom's criminal injuries compensation scheme are in my view to be regarded as welfare benefits. Such payments are no different in principle from, for

> example, benefits payable to persons who have suffered industrial injuries … or to people who have disabilities. Awards of compensation under the criminal injuries scheme are not made because the state is responsible for causing the victim's injuries, any more than the state is responsible if an accident occurs at work or if a person is or becomes disabled. (In the limited circumstances in which the state is responsible for failing to prevent crimes, a separate claim for damages will arise: see *D v Comr of Police of the Metropolis* [2018] 2 WLR 895.) The underlying justification for making payments to victims of violent crimes is that they have suffered a very serious misfortune which the whole community should help to compensate for reasons of "equity and social solidarity": see the second recital to the Convention on the Compensation of Victims of Violent Crimes."

Strasbourg Cases and Sources

97. The domestic cases make reference to and build on a number of cases before the ECtHR. The first of those is *Edwards v United Kingdom* (2002) 35 EHRR 19. The applicants' son had died after being attacked by a fellow prisoner while detained. The Court held that there had been breaches of substantive as well as procedural obligations imposed by Article 2. The Court turned to consider remedy. There was no pecuniary loss, only non-pecuniary loss. The Court noted that bereavement damages were not available in domestic law under the Fatal Accidents Act 1976 ([39]). The Court said that:

> "97. … Furthermore, in the case of a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of redress."

98. The Court discussed the possibility of redress for Convention breaches within domestic civil law:

> "99. The Court recalls that in general actions in the domestic courts for damages may provide an effective remedy in cases of alleged unlawfulness or negligence by public authorities[…].While in this case a civil action in negligence or under the Fatal Accidents Act before the domestic courts might have furnished a fact-finding forum with the power to attribute responsibility for Christopher Edwards' death, this redress was not pursued by the applicants. It is not apparent (and the Government have not argued) that non-pecuniary damages (for the suffering and injuries of Christopher Edwards before his death or the distress and anguish of the applicants at his death) would have been recoverable or that legal aid would have been available to pursue them. The Court does not find that this avenue of redress was in the circumstances of the case of practical use."

99. The Court noted the applicants' claim in the following terms:

> "104. The applicants claim non-pecuniary loss in respect of the anxiety, fear, pain and injury suffered by their son Christopher immediately before his death, their own anguish, severe distress and grief suffered at the loss of their son and the ongoing stress and associated ill-health suffered by the second applicant as a result of the traumatic loss and ongoing frustration at the inability to pursue an effective avenue of redress. They do not specify a sum."

100. The Court made an assessment on an "equitable basis" and awarded non-pecuniary damages in the amount of £20,000 ([106]).

101. In *Shanaghan v United Kingdom* (application no 37715/97 dated 4 May 2001, Times 18 May 2001, [2001] Inquest LR 1) the Court found the United Kingdom had breached Article 2 by its failure to conduct an adequate investigation into the death of the claimant's son who died during the Troubles in Northern Ireland. The United Kingdom argued that no damages were due to the claimant because she had already received £25,520 from the criminal injuries compensation scheme and because a finding of violation would in itself constitute just satisfaction. The ECtHR disagreed and awarded damages:

> "144. … the Court has found that the authorities failed in their obligation under Article 2 of the Convention to carry out a prompt and effective investigation into the circumstances of the death. The applicant must thereby have suffered feelings of frustration, distress and anxiety. The Court considers that the applicant sustained some non-pecuniary damage which is not sufficiently compensated by the finding of a violation as a result of the Convention. It has not taken into account the ex gratia compensation payment from the Criminal Injuries Compensation Scheme which related to the damage flowing from a criminal act and not to the lack of procedural efficacy in the investigation.
>
> 145. Making an assessment on an equitable basis, the Court awards the applicant the sum of £10,000."

102. In *Varnava v Turkey,* complaints were made about Cypriot nationals who had disappeared during the military operations carried out by Turkish armed forces in Northern Cyprus in 1974. In the first judgment delivered on 10 January 2008 (2010) 50 EHRR 21, the ECtHR found Turkey had breached Articles 2, 3 and 5. The Court emphasised at [156] of its judgment that "the Court serves a purpose beyond the individual interest in the setting and applying of minimum human rights standards for the legal space of the contracting states. The individual interest is subordinate to the latter".

103. The case was transferred to the Grand Chamber who delivered a second judgment on 18 September 2009 (Appl. nos. 16064-73/90). The Court said this in respect of Article 41 (emphasis added):

> "224. The Court would observe that there is no express provision for non-pecuniary or moral damage. Evolving case by case, the Court's approach in awarding just satisfaction has distinguished situations where the applicant *has suffered evident trauma, whether physical or psychological, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life, or real loss of opportunity* (see, for example, *Elsholz v. Germany* [GC], no. 25735/94, § 70, ECHR 2000-VIII; *Selmouni v. France* [GC], no. 25803/94, § 123, ECHR 1999-V; and *Smith and Grady v. the United Kingdom* (just satisfaction), nos. 33985/96 and 33986/96, § 12, ECHR 2000-IX) and those situations where the public vindication of the wrong suffered by the applicant, in a judgment binding on the Contracting State, is a powerful form of redress in itself. In many cases where a law, procedure or practice has been found to fall short of Convention standards this is enough to put matters right (see, for example, *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 120, ECHR 2002-VI; *Saadi v. Italy* [GC], no. 37201/06, § 188, ECHR 2008; and *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 134, ECHR 2008). In some situations, however, *the impact of the violation may be regarded as being of a nature and degree as to have impinged so significantly on the moral well-being of the applicant as to require something further*. Such elements do not lend themselves to a process of calculation or precise quantification. Nor is it the Court's role to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred. *Its non-pecuniary awards serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage; they are not, nor should they be, intended to give financial comfort or sympathetic enrichment at the expense of the Contracting Party concerned*."

104. The Court reiterated that sentiment in *Al-Jedda v United Kingdom* (2011) 53 EHRR 23 at [114]:

> "The Court recalls that it is not its role under art. 41 to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach

> occurred. Its non-pecuniary awards serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human-right and reflect in the broadest of terms the severity of the damage. …"

105. The Practice Direction issued by the President of the ECtHR on 27 March 2007 and amended on 9 June 2022 provides as follows (an earlier version of this document was discussed by Leggatt J in *Alseran*):

> "10. The Court's award in respect of non-pecuniary damage serves to give recognition to the fact that non-material harm, such as mental or physical suffering, occurred as a result of a breach of a fundamental human right and reflects in the broadest of terms the severity of the damage. Hence, the causal link between the alleged violation and the moral harm is often reasonable to assume, the applicants being not required to produce any additional evidence of their suffering.
>
> 11. It is the nature of non-pecuniary damage that it does not lend itself to precise calculation. The claim for non-pecuniary damage suffered needs therefore not be quantified or substantiated, the applicant can leave the amount to the Court's discretion.
>
> 12. If the Court considers that a monetary award is necessary, it will make an assessment on an equitable basis, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant, as well as his or her own possible contribution to the situation complained of, but the overall context in which the breach occurred."

Summary

106. These cases and sources can be drawn together into the following propositions, which are the key ones for the purposes of this appeal, and which are not as I understand it disputed:

i) The Court will grant such relief or remedy for a breach of the Convention as is within its powers and which it considers to be just and appropriate, taking account of the principles developed by the ECtHR to afford just satisfaction to an injured party (HRA s 8(1), *Greenfield* [6]).

ii) The focus of a claim under the ECHR is to uphold standards and vindicate rights, and not to obtain compensation (*Greenfield* [9], *Van Colle* [138], *DSD* in Court of Appeal [65]-[68], *DSD* in the Supreme Court [136], *Varnava* [156]).

iii) In deciding what remedy is necessary, the Court will consider the loss or damage actually sustained as well as the "overall context" in which the breach occurred (*Alseran* [914], Practice Direction [12]).

iv) Damages for non-pecuniary loss will in principle be available for breaches of Articles 2 and 3, which rank as the most fundamental provisions of the Convention (*Edwards* [97]).

v) Where damages are awarded to reflect non-pecuniary loss, the Court will adopt a broad brush approach to assessment of damages to arrive at an award that is "equitable" (*DSD* [17], *Varnava* GC [224]).

vi) Non-pecuniary loss is sometimes referred to as "moral damage" (*Varnava* GC [224], *Sturnham* [32]), which concept includes mental or physical suffering (*Varnava* GC [224], *Alseran* [912], President's Direction [10]).

(iii) Moral Damage

107. Mr Hermer argues that moral damage is a feature of awards of damages under the Convention; that moral damage is associated with the violation of a person's human rights and the affront to society as a result of that violation; that moral damage can be assumed to exist when Convention damages are awarded – at least to the extent that they recognise non-pecuniary loss - but it is not a concept known to domestic law. Thus, he argues, the existence of moral damage as an aspect of Convention damages for non-pecuniary loss is itself a distinction between a Convention award and a domestic award (by CICA or in civil law), sufficient to demonstrate that the two do not overlap or amount to double recovery.

108. I would accept Mr Hermer's submission to this extent: moral damage is a term associated with breach of fundamental human rights; it can be inferred in cases where damages for non-pecuniary loss are awarded; it is recognised by an award of damages because "something further" than a declaration is necessary to mark the significance of the impact of the violation (see *Varnava* GC).

109. I would not, however, accept that moral damage is a feature which necessarily distinguishes Convention damages from domestic law damages. Moral damage is concerned with the harm to a person's well-being. That is the point made by the Grand Chamber in *Varnava* (at [224] of the judgment in that case, cited at paragraph [103] above, noting the passages emphasised): there is a distinction to be drawn between those cases where trauma, pain and suffering – both mental and physical – has been suffered by a person as a result of the violation of their Convention rights and those situations where the public vindication of a wrong is sufficient redress; in the former category of cases, the "impact" of the violation may be regarded as being of a nature and degree as to "impinge so significantly on the moral well-being of that person" that something further, in the form of damages, is required; non-pecuniary awards serve to recognise the fact that "moral damage has occurred" although they are not intended to give financial comfort or sympathetic enrichment at the expense of the Contracting Party. These are all pointers towards moral damage meaning harm to the individual. Paragraph 10 of the Practice Direction supports that analysis in acknowledging the practice of awarding Convention damages to recognise that "harm, such as mental or physical suffering, occurred as a result of a breach" of Convention rights. Thus, moral damage means actual harm or damage; it does not mean simply the marking of a breach of Convention rights.

110. The type of mental or physical harm covered by the concept of moral damage appears to be broad, and at its margins may encompass injuries to feelings (in the form of distress, anxiety or frustration) which would not typically be compensated by way of damages for personal injury in domestic common law: see again *Varnava* GC. But, margins aside, there is much common ground between moral damage as a concept of ECHR law and the sort of non-pecuniary loss and damage which can be compensated in civil law (or by a CICA award).

111. In determining in any given case whether the moral damage reflected in the Convention award overlaps with the damage compensated by a CICA award, it is in my judgment necessary to reach a fairly high level, general view about what each type of award was for, acknowledging that each is the product of a different legal mechanism. In a case involving a fatality, where damages have been awarded to an indirect victim for an Article 2 breach which is closely connected with the death, it is artificial to characterise the mental suffering consequent on the violation of Article 2 as something distinct from the mental suffering consequent on the fact of death. The suffering is indivisible and in the real world occurs in consequence of the death of a loved family member. In that sort of case, mental suffering is the cardinal feature of both claims. That proposition is supported by *Edwards* at [99] where the ECtHR identified an action in civil law for negligence or under the FAA as potentially adequate redress for Convention breaches, and by *Rabone* where the Court stated at [72] that there was a "considerable degree of overlap" between the claim in negligence and the Article 2 claim, but held that Convention damages for non-pecuniary loss were justified in the absence of a domestic award for bereavement; I take from this that if an FAA bereavement award had been paid to the claimants they would not have been awarded HRA damages in addition. By contrast, where the Article 2 breach has led to harm which is discrete (for example, a failure to *investigate* the death had led to delay and additional anxiety and upset), it may be possible to separate the mental suffering consequent on the death from the anxiety and upset consequent on the failure of investigation: this was precisely the exercise that Green J undertook in *DSD*.

112. I reject the submission that the existence of moral damage as a component of Convention damages is sufficient to distinguish a Convention award from a common law award. Moral damage can probably be assumed in all cases where Convention damages for non-pecuniary loss are awarded. But that begs the question whether there is double recovery. The answer to that issue depends on the facts and on the "overall context" in which the Convention award was made.

Issue (3): In this case, is there any double recovery between the CICA Compensation and the HRA Damages (or any part of them)?

113. I take as my starting point the agreed basis for the HRA Damages in this case. Master McCloud recorded that the sum of £15,000 (to which she gave her approval) reflected a sum for "non-pecuniary losses as 'just satisfaction' under the Human Rights Act". Of this amount, £10,000 remains in dispute.

114. I agree with Mr Hermer that the CICA award for loss of parental services, which was in essence an award for pecuniary losses, has no overlap at all with the HRA Damages which were for non-pecuniary loss. It follows that CICA is not entitled to seek repayment of any part of the £20,000 awarded for loss of parental services.

115. The issue therefore narrows to the CICA bereavement award of £5,500: did the HRA Damages duplicate that? The CICA bereavement award was for the appellant's non-pecuniary loss. I have held that it was similar in its nature to a bereavement award under the FAA.

116. As the case law acknowledges, where a Court assesses damages for breach of Convention rights, the Court uses a broad brush (see proposition (v) above, paragraph [106]). In this case, the damages were not assessed by a Court but paid by agreement to settle the appellant's Convention claims and approved by the Court. The settlement itself reflected a wider set of incentives: it brought with it the advantage of finality as well as convenience in avoiding the costs, risks, publicity and disruption of ongoing litigation (for all parties). The brush was very broad indeed.

117. What, then, were the £10,000-worth of HRA Damages for? That depends on the overall context of the case (see proposition (iii) above, paragraph [106]). The particular breaches alleged in this case related to the state defendants' operational duty under Article 2; this was an *Osman* claim. The essence of the claim was that the state defendants' failures created the opportunity for a third party to murder the appellant's mother. There is a close factual nexus, in this case, between the alleged *Osman* failures and the murder of the appellant's mother. There is also a close factual nexus between the alleged *Osman* failures and the CICA Compensation which was paid as a result of the appellant's mother's murder.

118. Standing back, I conclude that the HRA Damages paid in settlement of the Article 2 claim were paid for the appellant's mental suffering in losing her mother. That this was her personal claim for breach of her own rights (see above) serves, if anything, to reinforce that analysis. This case is in some ways similar to *Edwards* and *Rabone* where it was suggested that if CICA compensation or statutory bereavement had been paid then no award of Convention damages would have been necessary. I conclude that the Convention claim and the common law award (represented by the CICA Compensation) in this case were paid for the same thing, namely the grief and mental suffering of the appellant in consequence of her mother's death.

119. It follows that there would be double recovery if the appellant retained the CICA bereavement award as part of her CICA Compensation. Paragraph 49(1) applies because the HRA Damages relating to Article 2 were "in respect of the same injury" so that CICA is permitted to seek repayment of the bereavement award of £5,500.

Issue (4): What approach should be taken when determining whether there is double recovery between CICA awards and Convention damages?

The general approach

120. Whether there is double recovery in any case depends on an analysis of the CICA award (and what it was for) alongside an analysis of the Convention award (and what it was for). The first question is whether either or both awards contained an element for pecuniary loss. If so, then the comparison between them should be relatively straightforward.

121. Awards for non-pecuniary losses are less readily comparable. But still the comparison exercise needs to be undertaken. The following points, reprised from above, will

hopefully assist in that exercise:

(1) Determining what the Convention damages were for, and whether they overlap with the CICA award(s), will depend on analysing the reason why the Convention award was made in the "overall context" of the case.

(2) In considering the "overall context" of the case, a high level, general, and itself broad brush approach should be taken.

(3) The existence of moral damage as a component of the award of damages for Article 2 breaches can usually be assumed and does not, of itself, mean that there is no duplication.

(4) In the context of Article 2, there is a difference between Convention awards for violations of human rights which bear a close factual nexus with the death, and those where the violation(s) led to discrete harm and loss.

122. There may be cases where it is simply not possible for CICA, the tribunal or the Court to reach a conclusion about whether the Convention award overlapped with the CICA award. In such cases, the default must be that CICA cannot seek repayment from the Convention award, because double recovery is not made out.

Limits to the Court's role

123. Finally, I deal with one or two points which emerged during the hearing in relation to the way similar issues had been dealt with by the courts previously. In this case, Master McCloud made an order which stated that the HRA Damages were "distinct from any sum that [the appellant] has received from the Criminal Injuries Compensation Authority". In one sense, the two sets of payments were obviously distinct. But if that statement was intended to rule on the extent of any overlap (or double recovery), then I think it went too far: recoupment by CICA was not an issue that arose before the Master on an approval hearing under CPR 21.10(1).

124. Ms Webb was critical of Green J's approach in *DSD* for similar reasons. Green J took account of the CICA award, as well as the damages settlement, when he quantified damages for the victims' breach of Article 3 rights. He dealt with the relevance of the prior payment by CICA in the following way, with my emphasis added:

> "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.*"

125. Although Mr Hermer sought to support Green J's approach, I think Ms Webb is right to query it. There is a difference between CICA awards which can be reclaimed in the event of subsequent damages awards, and civil payments of damages which cannot be recouped, and the two should not have been equated. Further, it is only the latter which can properly be taken into account if the Court is required to assess damages from a different source which touch on the same losses. With respect to Green J, I think it would have been better if he had simply assessed the Article 3 damages without regard to the CICA awards and left it to CICA to decide if there was double recovery, in the knowledge that CICA's decision could be appealed to the First-tier Tribunal with CICA named as a defendant to that litigation. That is what the statute envisages.

126. Finally, in answer to one point made by Mr Hermer: I accept that the possibility of CICA seeking repayment may be relevant to a judge at an approval hearing where the claimant is a protected party. Such a possibility may affect the judge's assessment of the merits of the proposed settlement.

Conclusion:

127. In summary, it is my conclusion that:

(1) Paragraph 49(1) of the 2008 Scheme permits CICA to reclaim a previously paid award only where there would otherwise be double recovery, and that is the meaning to be given to the words "in respect of the same injury" in that paragraph.

(2) The Upper Tribunal erred in law in holding that paragraph 49(1) permitted CICA to reclaim any money subsequently received that was connected to the same injury, whether or not it amounted to double recovery. The Upper Tribunal's decision is therefore set aside and this Court remakes the decision.

(3) There is no double recovery in relation to the award for lost parental services made by CICA as part of the CICA Compensation.

(4) There would be double recovery to the extent of the bereavement award made by CICA as part of the CICA Compensation.

(5) It is therefore open to CICA to demand repayment of £5,500 (the amount of the bereavement award) from the £10,000 HRA Damages paid to the appellant to settle her claim for damages for breach of her Article 2 rights.

128. To that extent, I would allow this appeal.

Lord Justice Moylan:

129. I agree with both judgments.

Lord Justice Underhill, Vice-President of the Court of Appeal (Civil Division):

130. I agree that this appeal should be allowed to the extent proposed by Whipple LJ and for the reasons that she gives. I would wish to emphasise the point that she makes at paragraphs [109]-[110] of her judgment. UK lawyers can sometimes be led by the unfamiliarity of the term "moral damage" into thinking that the European Court of Human Rights awards compensation for non-pecuniary loss on a fundamentally different basis from that adopted domestically. But the passages which Whipple LJ cites from *Varnava* (paragraph [103] above) and from the Presidential Practice Direction (paragraph [105] above) show that that is not the case. The approach there set out, explicitly based on actual damage to the well-being of the victim, is broadly in line with that adopted in the UK. Whipple LJ refers in particular to personal injury cases, but I would draw attention also to the award of compensation for "injury to feelings" in claims under the Equality Act 2010. That may seem like a rather anodyne term but in fact it refers to a very broad class of injury which is described in the case-law in terms which are very close to those used in *Varnava*: see, for example, Mummery LJ's references in *Vento v Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1871, [2003] ICR 318, to "upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, depression and so on" (see [50]) – further glossed at n. 7 of my own judgment in *Commissioner of Police of the Metropolis v Shaw* [2012] ICR 464. There may, as Whipple LJ says, be some marginal differences in what factors may influence quantification, though even that may be debatable; but the essential point is that the damages are for the same kind of injury.