Neutral Citation Number: [2025] UKUT 271 (AAC)
Appeal No. UA-2024-000216-CIC

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

H.J.

Applicant

- v -

FIRST-TIER TRIBUNAL (SOCIAL ENTITLEMENT CHAMBER)

Respondent

and

CRIMINAL INJURIES COMPENSATION AUTHORITY (CICA)

Interested Party

JUDICIAL REVIEW OF A DECISION OF A TRIBUNAL

Before: Upper Tribunal Judge Wikeley
Hearing date: 25 July 2025
Decision date: 11 August 2025

Representation:
Appellant: Mr Warren Fitt, counsel, *pro bono*, instructed by the Free Representation Unit
Respondent: No attendance or representation
Interested Party: Mr Louis Browne KC and Mr David Illingworth, counsel, instructed by CICA

On appeal from:
Tribunal: First-tier Tribunal (Social Entitlement Chamber)
CICA Case No.: CI005/23/00023
Tribunal Venue: Remote hearing
Hearing Date: 21 August 2023
Decision Date: 24 August 2023
Written Reasons: 19 December 2023

Keywords

70.1 Criminal Injuries Compensation Scheme - claims

SUMMARY OF DECISION

The Applicant claimed a bereavement payment under the 2012 Criminal Injuries Compensation Scheme following the murder of her partner. The case turned on whether the Applicant met the test for being a "qualifying relative". CICA refused her claim on the basis of paragraph 59(b) of the Scheme. The FTT unanimously found on the facts that the Applicant had not been "living with [her partner] in the same household and had done so for a continuous period of at least two years immediately before the date of the death" (paragraph 59(b)). The FTT also ruled, but by a majority, that the Applicant was not "a person who would satisfy sub-paragraph (a) or (b) but who did not live with the deceased because of either person's ill-health or infirmity" within paragraph 59(c). The Upper Tribunal refused the application for judicial review of the FTT's decision.

Please note that the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and the Reasons of the Judge follow.

ORDER

Pursuant to rule 14(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the Applicant, her daughter or her late partner in these proceedings. Any breach of this order is liable to be treated as a contempt of court and may be punishable by imprisonment, fine or other sanctions under section 25 of the Tribunals, Courts and Enforcement Act 2007. The maximum punishment which may be imposed is a sentence of two years' imprisonment or an unlimited fine.

DECISION

The application for judicial review against the decision of the First-tier Tribunal (Social Entitlement Chamber) dated 24 August 2023 under file reference CI005/23/00023 is dismissed. This determination is made under sections 15 and 16 of the Tribunals, Courts and Enforcement Act 2007 and rule 40 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

REASONS FOR DECISION

Introduction

1. This application for judicial review of a decision by the First-tier Tribunal concerns the definition of a "qualifying relative" for the purpose of making a claim for a bereavement payment under the 2012 Criminal Injuries Compensation Scheme. The First-tier Tribunal decided (by a majority) that the Applicant was not a qualifying relative. For the reasons that follow, the Upper Tribunal refuses the application for judicial review of that decision.

Bereavement payments under the 2012 Criminal Injuries Compensation Scheme

2. Paragraph 57(a) of the 2012 Criminal Injuries Compensation Scheme ('the Scheme') states that a "qualifying relative" of a person who has died as a direct result of a criminal injury may be eligible for a bereavement payment. Paragraph 61 then specifies that a bereavement payment may be made to a qualifying relative who is not a former spouse or former civil partner of the deceased (or a person who was estranged from the deceased at the time of their death). Crucially, paragraph 59 then provides the following definition of "qualifying relative":

> 59. A qualifying relative is a person who at the time of the deceased's death was:
>
> > (a) the spouse or civil partner of the deceased, who was living with the deceased in the same household;
> >
> > (b) the partner of the deceased (other than a spouse or civil partner), who was living with them in the same household and had done so for a continuous period of at least two years immediately before the date of the death;
> >
> > (c) a person who would satisfy sub-paragraph (a) or (b) but who did not live with the deceased because of either person's ill-health or infirmity;
> >
> > (d) the spouse or civil partner, or a former spouse or civil partner, of the deceased who was financially dependent on the deceased;
> >
> > (e) a parent of the deceased; or
> >
> > (f) a child of the deceased.

3. The present case turns on the proper interpretation and application of paragraph 59(b) and 59(c), which are underlined above for emphasis. Sub-paragraphs (a), (d), (e) and (f) do not arise on the facts of this case.

A summary of the factual background to this judicial review

4. The Applicant ('H') is a young woman whose male partner ('J' or 'the deceased') tragically sustained fatal injuries in a stabbing incident. J's assailant was convicted of murder and sentenced to life imprisonment. H made a claim for a bereavement payment under the Scheme. In its initial decision, the Criminal Injuries Compensation Authority ('CICA') rejected H's claim under paragraph 59(b) of the Scheme. This was on the basis that she had not been living with J in the same household for a continuous period of at least two years immediately before the date of J's murder. H then applied for a review of that decision, arguing that she would have met the test in paragraph 59(b) were it not for J's "ill-health or infirmity" (paragraph 59(c)), namely his mental health problems including drug addiction. However, CICA's review decision maintained its refusal to make an award. H then appealed to the First-tier Tribunal ('the FTT'), which dismissed her appeal. The FTT found unanimously that H did not satisfy the requirement in paragraph 59(b) and decided by a majority that she did not qualify under the exception in paragraph 59(c).

The Criminal Injuries Compensation Authority's review decision

5. The CICA review letter dated 1 March 2023 explained its decision to refuse the Applicant's claim for compensation in the following terms:

> The Scheme outlines who we can consider to be a qualifying relative, this includes a partner of the deceased (other than a spouse or civil partner), who was living with them in the same household and had done so for a continuous period of at least two years immediately before the date of the death. There is an exception to this where someone who did not live with the deceased because of either person's ill-health or infirmity.
>
> I appreciate the reasons you have provided both in your application and at review stage for the reasons that you were not living with J. However, I understand from the police information on file that during the two years prior to his death there were multiple occasions that you had broken up, including an occasion when J has broken into and vandalised your home, and others when J was in prison. I understand you did not resume your relationship with J until June 2021, five months prior to his death.
>
> Regrettably, in these circumstances, I am unable to consider any award under the Scheme as there are other reasons, other than ill health, that you did not live with J for two years before his death.

The First-tier Tribunal's decision

6. The FTT summarised its decision on its short-form decision notice at paragraph 6 as follows:

> e. Over the two-year period immediately before the index crime of violence on 23 November 2021 the Appellant and J ceased to be partners for about

> 11 months from about July 2020, when they broke up, until June 2021, when their relationship revived. Additionally, they did not live in the same household for about 14 months from about July 2020 until J's death.
>
> f. The Tribunal thus unanimously held that the Appellant was not a "qualifying relative" within the meaning of sub-paragraph (b) of paragraph 59 of the Scheme when considered in isolation from sub-paragraph (c).
>
> g. Considering sub-paragraph (c), the Tribunal held by a majority of 2:1 that the Appellant would not have satisfied sub-paragraph (b) but for J's "ill-health or infirmity" being his mental health problems including drug addiction. There were other reasons apart from his drug addiction which prevented them living together in the same household. These included J's infidelity and dishonesty as well as safeguarding issues for the Appellant's daughter.
>
> h. Accordingly the appeal was dismissed.

The First-tier Tribunal's findings of fact

7. The FTT made the following more detailed findings of fact in its full reasoned decision. I have omitted the first paragraph in this passage (paragraph [13]) which contains too many identifying details about H and her young daughter (who I refer to in this decision as 'X'). Where necessary, and consistent with the Rule 14 Order, I have also redacted other identifying details in the account that follows. I should add that the reference to *Sohrab* in paragraph [22] of the extract below is to the decision of the Upper Tribunal (Immigration and Asylum Chamber) in *Sohrab and Others (continued household membership) Pakistan* [2022] UKUT 157 (IAC), which is discussed later. The FTT found the facts to be as follows:

> 14. The deceased was born [in] 1990. He endured a troubled childhood. For the purposes of this appeal only, and based solely on the appellant's evidence, the Tribunal accepts that he was physically abused as a child by his father, ['E'], which led to mental health problems as an adult.
>
> 15. The deceased got into serious trouble with the police. In 2017 he had been released from prison on licence and was living with his mother ['L'] and younger brother ['T'] in his mother's flat […]. The Tribunal has not been informed for what offence he was convicted. He returned to prison in late August 2017 for about a year to complete his sentence.
>
> 16. Meanwhile, the appellant and the deceased had met in May 2017 when their close relationship began. Their relationship did not survive his return to prison but revived soon after he was released to his mother's address in the autumn of 2018. Although the deceased and the appellant spent a lot of time together thereafter, he remained a member of his mother's household until she died in September 2018.

17. The deceased and T became homeless soon after his mother's death as a result of which he moved in with the appellant as her partner and from October 2018 they lived together as part of the same household with X.

18. The deceased was very upset by discovering his mother's death and changed a lot. He drank heavily and the appellant found out he was misusing Class A drugs including crack cocaine and "spice". The appellant does not know, and the Tribunal makes no finding, when the deceased's drug addiction started, but accepts that he hid and denied it for a while and that she became aware of it in 2019. Following the death of his mother, the good times they used to have were over. They would live on and off together, sometimes he would stay with mates and sleep on their sofas, and she would always have him back. This on/off relationship continued until they broke up in July 2020 due to the 'K' situation and his drug addiction (see §23 below).

19. The appellant told the Tribunal in evidence that she would accompany the deceased to the GP but would wait outside while he had his consultation and was only told snippets of what was said, not a precise diagnosis. Later, he declined to have his mental health assessed on behalf of the police or the probation service. There was no medical evidence of a diagnosis of mental illness available to the Tribunal.

20. In March 2019 the deceased sustained a broken leg jumping from a 2nd floor window to evade the police who were looking for him. He was admitted to hospital. The Tribunal found that this period in hospital did not break the continuity of his living with the appellant as a member of the same household. She visited him in hospital and he returned to her flat when he was discharged. She looked after him during his rehabilitation, pushing his wheelchair and getting him to all his appointments (A9).

21. In October 2019 they moved to her new flat […], where he received his mail including from the benefits agency and the NHS. It was the same household in a new flat.

22. The Tribunal found that, despite the on/off nature of their relationship, the appellant and the deceased were partners who lived together in the same household for a continuous period of $1^{9/12}$ years from October 2018 until July 2020. Having regard to the guidance in *Sohrab*, the Tribunal unanimously agreed that, the short periods of separation during their on/off relationship did not alter the overview that the appellant's home was his home and they were, until July 2020, broadly speaking, living together in the same household.

23. From about July 2020 their relationship was more off than on. Arguments developed as a result of both his drug addiction and his one-night stand with another woman, ['K']. This had happened in the summer of 2019 and came to light the following year because K thought he may have been the father of her baby; it transpired he was not. Moreover, the

deceased's volatile behaviour due to his drug addiction drove him and the appellant apart: he became loud and agitated, stole to support his habit, and often either failed to come home or brought his drug abusing friends home with him.

24. The appellant chose to protect X and asked the deceased to leave. The Tribunal found that from the summer of 2020 she and the deceased broke up and the deceased ceased to live with her as part of the same household. Even so, they continued to celebrate their birthdays together and the Tribunal found the appellant never gave up hope that he would change his ways.

25. On 10 November 2020 the deceased broke into the appellant's flat, kicking through the door. This was terrifying for the appellant and X and marked a low point in their relationship. The Tribunal noted the appellant clarified her police statement (S23) to the effect that he did not smash the house up, just kicked the door in and accepted her evidence that he never hurt her or her daughter. The Tribunal found he was not violent to her or X but was violent within the home on that occasion.

26. The deceased was returned to prison for about 2 months from the end of November 2020 for breach of his licence conditions. Initially the appellant wanted no contact with the deceased and asked for her number to be taken off the prison phone list, although this did not happen (S15). She told us she needed a break. At this point, when their relationship was strained almost to breaking point, the deceased underwent detoxification in prison. The deceased then wrote to the appellant (TG2-TG5) regretting his behaviour and wanting once more to revive their relationship.

27. Throughout his time in prison and his rehabilitation on release, the appellant remained in contact and found him much improved and progressing well with the help of his support worker. However, neither she nor social services wanted the deceased to return to live with her until satisfied he was rehabilitated from his drug addiction. They wanted to shield her daughter from his drug addiction and associated contacts and behaviour.

28. The deceased was released into supported accommodation, first a hotel, then a hostel and then into a supported house. During this period they were actively prevented from living together by the deceased's volatile behaviour, the risk he presented, particularly in terms of safeguarding X, and his licence conditions. Social Services did not want him anywhere near X. Nevertheless, as the appellant told the police (S15), when she learned of his release she tracked him down, even though she was not supposed to, because she just wanted to see him.

29. From about June 2021 the appellant and the deceased resumed their relationship, although they did not again live together in the same household before his tragic death on 23 November 2021.

> 30. In early September 2021 he was evicted from his room in the supported house because he was accused of stealing from one of his housemates. The Tribunal considered it likely he had committed theft, such stealing being consistent with the behaviour of a drug addict, even, when trying to rehabilitate. We found this was one of the reasons the appellant would not have him back in her flat.
>
> 31. During this period he was homeless, but they met frequently and he kept all his post and possessions at the appellant's flat which was his official address. She made sure he had clean dry clothes and a good overcoat, checked where he was sleeping overnight and looked after his benefits. He was trying to prove to her that he had changed his ways. She never gave up hope that he would.
>
> 32. Since his death, the appellant has suffered a severe and painful bereavement. She has become ill with anxiety and depression for which she has been prescribed medication.

The First-tier Tribunal's reasoning

8. Turning to the FTT's reasoning, the panel found unanimously that (putting to one side for the present the issue of "ill-health or infirmity" under paragraph 59(c)) the Applicant did not meet the condition laid down in paragraph 59(b) of the Scheme. In that regard the FTT as a whole reasoned as follows:

> 34. The two-year period specified in paragraph 59(b) of the Scheme ran from November 2019 until the index crime of violence on 23 November 2021. Having regard to the history set out above, the Tribunal found:
>
> > a. At the start of this period until July 2020, some 8 months, the appellant and the deceased were partners who lived together in the same household.
> >
> > b. From about July 2020 until the end of November 2020 they separated because of his drug addiction and associated behaviour, his depression and anxiety, and the strain on their relationship of his infidelity, the one-night stand with K the previous year.
> >
> > c. From the end of November 2020 until January 2021 they remained separated and living apart because of his return to prison.
> >
> > d. From his release in January 2021 until his death in [November] 2021, and notwithstanding his engagement with rehabilitation and the resumption of their relationship from June 2021, they remained separate and living apart because of the deceased's drug addiction and associated behaviour, including stealing from a housemate, and the safeguarding concerns for X shared by Social Services and the appellant.

> 35. Having regard to the guidance in *Sohrab*, the Tribunal unanimously agreed that, although the short period of separation while he was in prison would not, by itself, have prevented them living together in the same household, the appellant and the deceased were largely separated and living apart over this critical 2-year period. Accordingly, we unanimously held that the appellant was not a "qualifying relative" within the meaning of sub-paragraph (b) of paragraph 59 of the Scheme when considered in isolation from sub-paragraph (c).

9. The FTT then went on to consider whether the Applicant fell within the terms of paragraph 59(c).

10. The majority view on paragraph 59(c) was as follows:

> 36. Considering sub-paragraph (c), the Tribunal further held by a majority of 2:1 that the appellant would not have satisfied sub-paragraph (b) but for the deceased's "ill-health or infirmity" being his mental health problems including drug addiction.
>
> 37. The majority held there were other reasons apart from his mental health problems and drug addiction which prevented them living together in the same household. These included safeguarding issues for the appellants daughter, the deceased's infidelity in the summer of 2019, which came to light in the summer of 2020, and his dishonesty which led to him stealing from a housemate in September 2021.The majority view was that his infidelity and dishonesty was not all attributable to his "ill-health or infirmity". He had been able to live elsewhere in the community after his release from prison notwithstanding his mental health and drug issues which, by themselves, had not kept the appellant and the deceased apart.
>
> 38. Moreover, the majority was not satisfied that the deceased's mental health problems amounted to "ill-health or infirmity" within the meaning of sub-paragraph(c). They considered, in the absence of reliable evidence of a diagnosis, that the only evidence in support of him suffering such "ill-health or infirmity" was the short period of drug rehabilitation and they found this was not treatment for mental illness. Accordingly, the majority did not accept that he had mental health diagnoses that were a) present and b) severe enough to cause a drug addiction and c) severe enough to necessitate them living apart.
>
> 39. For these reasons, the majority decided, and the Tribunal held, they were not living together in the same household over the critical 2-year period within the meaning of paragraph 59 and the appeal was dismissed.

11. In contrast, the minority member of the panel reasoned as follows, so far as the application of paragraph 59(c) was concerned:

> 40. The minority view, by contrast, accepted the evidence of the appellant that the deceased struggled greatly with his mental health and suffered

> complex grief over the loss of his mother, that this led to him to dependency on Class A drugs (A9-A10 and S11-12), that as she told us in evidence he was prescribed anti-depressants for a while, and that, as she gleaned from the deceased following his visits to the GP, the possibility of PTSD and anxiety and depression, were both raised as issues. In the minority view, the appellant's evidence of his childhood abuse, complex grief, drug addiction and the prescription of anti-depressant medication were enough to support the proposition that he probably suffered mental "ill-health or infirmity" including, at the least, 'substance use disorder' and 'anxiety and depression'. In the minority view he was likely to have been mentally ill from soon after his mother's death in September 2018 until his own on 23 November 2021.
>
> 41. Furthermore, the minority view was that the appellant was throughout torn between her hope that the deceased would give up or conquer his drug addiction, on the one hand, and her need to protect her daughter by not letting him live with her on the other. But for his mental health problems, especially his drug addiction, he would have been living with the appellant in the same household over the critical 2-year period. In the minority view the other reasons which prevented them living together in the same household themselves resulted from his drug addiction and were themselves directly attributable to his "ill-health or infirmity".

12. There is no right of appeal to the Upper Tribunal against the decision of the FTT in the exercise of its criminal injuries compensation jurisdiction. Anomalously, the sole route of challenge is by way of an application for permission to apply for judicial review.

The grounds for judicial review

13. The Applicant (at that stage the Claimant or the Appellant) was unrepresented at the FTT hearing. She was also acting as a litigant in person when she made her original application to the Upper Tribunal for permission to apply for judicial review. Section 5 of the standard JRC1 Judicial Review claim form asks applicants to provide a "Detailed statement of the grounds and facts relied on". The Applicant duly appended a printed and discursive four-page 'To whom it may concern' letter, explaining in some detail (and indeed very movingly) why she considered the FTT majority's conclusion to be unjust. What it lacked – and no criticism is intended, given the Applicant's circumstances and her lack of access at the time to professional support – was a clear and crisp statement of the proposed grounds for judicial review in the conventional sense.

14. On 8 August 2024 Upper Tribunal Judge Fitzpatrick directed an oral hearing of the application for permission to apply for judicial review. In doing so, the Judge also directed CICA to file a written response to "address the grounds for review raised by the applicant and specifically address the application of paragraph 59(c) of the scheme". Following that submission, on 13 December 2024 Judge Fitzpatrick held the permission hearing by CVP video-link. In her subsequent grant of permission, promulgated on 10 January 2025, Judge Fitzpatrick noted

that the permission hearing had involved "consideration of the interpretation of paragraph 59 of the scheme. Given the complexity of these matters and the possible issues around statutory interpretation, further consideration of these arguments is merited. I am not at this stage limiting the grant of permission to appeal specifically to this issue." The Judge also drew the Applicant's attention to the scheme for *pro bono* advice and assistance operated by the Free Representation Unit (FRU).

15. Following the intervention of FRU, and with their invaluable assistance, the Applicant advanced four grounds for judicial review. As set out more forensically in Mr Fitt's skeleton argument, they read as follows (with some minor and inconsequential textual amendments to ensure anonymity, and with underlined emphasis as in the original):

> First, the FTT did not have regard to relevant authorities on the meaning of the expression "*the partner of the deceased … who was living with them in the same household*" in paragraph 59(b). As a result, it did not ask itself the right question, which was whether either H or J had demonstrated a settled acceptance or recognition that their relationship was in truth at an end.
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> Second, the majority misconstrued the expression "*because of*" in paragraph 59(c). As a result, it asked itself only whether J's ill-health was a 'but for' cause of their living apart. Bearing in mind the well-recognised inadequacies of the 'but for' test, the majority also needed to (but did not) stand back and ask itself whether, as a matter of common sense and bearing in mind the purpose of paragraph 59(c), H and J were not living together because of his ill-health. In any case, the majority did not apply the 'but for' test correctly. Rather, it asked itself whether J's ill-health was the exclusive or sole cause of their living apart, which was the wrong question on any view.
>
> Third, despite accepting elsewhere in its reasons that J's ill-health was a cause of their living apart, the majority reached the irrational conclusion that it was not a cause, including because they wrongly required H to satisfy them (i) that J's drug addiction was caused by a preceding mental illness; and (ii) that his mental ill-health was severe enough to "*necessitate*" their living apart.
>
> Fourth, the majority's conclusion that J did not suffer from "*ill-health*" within the meaning of paragraph 59(c) proceeded on the incorrect premise that H had to satisfy them that J had a mental health diagnosis. As a result, they wrongly ignored all the other evidence which tended to show that J suffered from mental ill-health.

16. It will be evident from that synopsis that Ground 1 was directed to the FTT's unanimous finding on the non-applicability of paragraph 59(b) while Grounds 2, 3 and 4 all addressed the majority's approach to the test under the exception embodied in paragraph 59(c).

Does the Applicant need permission to rely on new grounds?

17. The process of articulating and refining the grounds for judicial review described above prompted the Interested Party to argue that the Applicant needed the permission of the Upper Tribunal to rely on Grounds 1 and 2. In summary, Mr Browne KC, for CICA, submitted that Grounds 1 and 2 did not fall within the scope of the original grant of permission by Judge Fitzpatrick. As such, he averred, the Applicant should have made a formal application for permission to rely on the two additional grounds (being an application under rule 32 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698)). Mr Fitt, for the Applicant, submitted that Grounds 1 and 2 fell squarely within Judge Fitzpatrick's grant of permission to apply for judicial review. However, if he was wrong about that, he contended that it was plainly in keeping with the overriding objective for the Upper Tribunal to grant consent to rely on Grounds 1 and 2.

18. I announced my ruling on this issue at the oral hearing of the substantive application for judicial review. In deciding this preliminary procedural point, I have taken into account the detailed written and oral submissions by counsel. I do not need to rehearse those arguments in full here but simply set out the two principal reasons for my decision that Grounds 1 and 2 fell within the terms of the grant of permission to apply for judicial review.

19. First, Judge Fitzpatrick's grant of permission to apply for judicial review was expressed to be in broad terms. Although at the outset she had directed a written submission from CICA specifically to "address the application of paragraph 59(c) of the scheme" (emphasis added), the actual grant of permission was phrased more expansively, noting that the permission hearing has involved "consideration of the interpretation of paragraph 59 of the scheme. Given the complexity of these matters and the possible issues around statutory interpretation, further consideration of these arguments is merited. I am not at this stage limiting the grant of permission to appeal specifically to this issue."

20. Secondly, I am satisfied that on a fair reading of her 'To whom it may concern' letter the Applicant's own discursive grounds encompassed (at least in part) the same terrain as that covered by Grounds 1 and 2. In her 'homemade' grounds for judicial review the Applicant stressed the ongoing nature of her committed relationship with J (which played into Ground 1) as well as the causative effect of J's drug addiction on their living apart (which gave rise in part at least to Ground 2). Thus, H's letter asserts that the FTT was wrong to conclude both that her relationship with J was at an end and that they were not living apart due to his mental illness. In effect Grounds 1 and 2 both articulate and amplify those grounds by identifying the specific errors of law that are alleged to infect the FTT's decision-making.

21. Lastly, and if I am in error in deciding that Grounds 1 and 2 fall within the existing grant of permission to apply for judicial review, I would in any event give permission for these two grounds to be argued. I entirely take Mr Browne KC's point that we need to avoid a procedural free-for-all. However, Grounds 1 and 2 were set out in detail in the Applicant's skeleton argument, which was served on

CICA a fortnight before its own skeleton argument was due and a month before the final hearing. There can be no serious suggestion that the Interested Party has been ambushed and indeed no actual prejudice has been identified, as CICA has addressed the merits of Grounds 1 and 2 in both its skeleton argument and final oral submissions. Bearing in mind the terms of the overriding objective in rule 2, I would therefore have given permission (if indeed necessary) for Grounds 1 and 2 to be argued in any event. However, it does not follow that a purposive and possibly generous interpretation of the scope of the grant of permission to apply for judicial review will necessarily be reflected in a similarly liberal approach to the substantive grounds for judicial review.

The role of judicial review

22. The case law of the superior courts is replete with reminders as to the limited role for judicial review when considering challenges to the decision of a specialist tribunal. In *CICA v Hutton and First-tier Tribunal (Criminal Injuries Compensation)* [2016] EWCA Civ 1305 (hereon '*CICA v Hutton*') Gross LJ set out the following guidance as to the principled approach to be followed:

> DISCUSSION
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> 52. *(1) The approach to be adopted by this Court:* My starting point is to consider the approach to be adopted when considering this appeal from the UT Decision.
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> 53. In *AH (Sudan) v Home Secretary* [2007] UKHL 49; [2008] 1 AC 678, dealing with appeals which had come to the Courts from the Asylum and Immigration Tribunal, Baroness Hale of Richmond said this (at [30]):
>
> > "…. This is an expert tribunal charged with administering a complex area of law in challenging circumstances. ….. the ordinary courts should approach appeals from … [such expert tribunals] … with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right…. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."
>
> Lord Hope of Craighead (at [19]) expressed his agreement as to the caution:
>
> > "…with which the ordinary courts should approach the decision of an expert tribunal. A decision that is clearly based on a mistake of law must, of course, be corrected. Its [i.e., the tribunal's] reasoning must

> be explained, but it ought not to be subjected to an unduly critical analysis….."

54. *R (Jones) v First-tier Tribunal* [2013] UKSC 19; [2013] 2 AC 48 concerned CICA. The FTT denied a claimant recovery, holding, on the facts, that he had not sustained an injury directly attributable to a "crime of violence". The UT dismissed a claim for Judicial Review, essentially holding that the FTT had properly directed itself. The Court of Appeal allowed the appeal, holding that the FTT had erred in law. The Supreme Court allowed CICA's appeal. The FTT's finding was one to which a rational tribunal could have come and was not open to review by the UT or the Court of Appeal. The FTT's decision that the terms of the Scheme did not permit an award of compensation to the claimant would be restored.

55. In *Jones*, with regard to questions of whether a criminal offence had been committed and, if so, whether it constituted a crime of violence, Lord Hope of Craighead DPSC (at [16]) said that:

> " ….it is primarily for the tribunals, not the appellate courts, to develop a consistent approach to these issues, bearing in mind that they are peculiarly well fitted to determine them. A pragmatic approach should be taken to the dividing line between law and fact, so that the expertise of tribunals at the first tier and that of the Upper Tribunal can be used to best effect. An appeal court should not venture too readily into this area by classifying issues as issues of law which are really best left for determination by the specialist appellate tribunals."

56. Lord Carnwath JSC observed (at [31]) that because of the important principle involved that case was one of three heard together by a three-judge panel presided over by a High Court Judge. In "normal circumstances", he continued (at [32]), "in the absence of some serious error of principle, one would not have expected there to have been a need for a further appeal to the higher courts." It was in this context that Lord Carnwath went on to say the following (at [41]):

> " …Where, as here, the interpretation and application of a specialised statutory scheme has been entrusted by Parliament to the new tribunal system, an important function of the Upper Tribunal is to develop structured guidance on the use of expressions which are central to the scheme, and so as to reduce the risk of inconsistent results by different panels at the First-tier level."

Staying with the same theme, Lord Carnwath (at [46]), applying his own extra-judicial writings, commented favourably on "expediency" or "policy" influencing the division between law and fact, so as to permit a specialist appellate tribunal to range more widely and thus ensure that its "…expertise should be used to best effect, to shape and direct the development of law and practice in the field".

57. Pulling the threads together:

i) First, this Court should exercise restraint and proceed with caution before interfering with decisions of specialist tribunals. Not only do such tribunals have the expertise which the "ordinary" courts may not have but when a specialised statutory scheme has been entrusted by Parliament to tribunals, the Court should not venture too readily into their field.

ii) Secondly, if a tribunal decision is clearly based on an error of law, then it must be corrected. This Court should not, however, subject such decisions to inappropriate textual analysis so as to discern an error of law when, on a fair reading of the decision as a whole, none existed. It is probable, as Baroness Hale said, that in understanding and applying the law within their area of expertise, specialist tribunals will have got it right. Moreover, the mere fact that an appellate tribunal or a court would have reached a different conclusion, does not constitute a ground for review or for allowing an appeal.

iii) Thirdly, it is of the first importance to identify the tribunal of fact, to keep in mind that it and only it will have heard the evidence and to respect its decisions. When determining whether a question was one of "fact" or "law", this Court should have regard to context, as I would respectfully express it ("pragmatism", "expediency" or "policy", *per Jones*), so as to ensure both that decisions of tribunals of fact are given proper weight and to provide scope for specialist appellate tribunals to shape the development of law and practice in their field.

iv) Fourthly, it is important to note that these authorities not only address the relationship between the courts and specialist appellate tribunals *but also* between specialist first-tier tribunals and appellate tribunals.

58. For my part, in applying this authoritative general guidance to this particular appeal, a number of considerations seem pertinent:

i) First, it is the FTT – not the UT – which is the tribunal of fact and which heard the evidence.

ii) Secondly, the UT's jurisdiction is limited to one of *judicially reviewing* the FTT Decision. The UT had no jurisdiction to interfere with the FTT Decision, absent a public law error.

iii) Thirdly, even with the observations in *Jones* well in mind, I cannot see that this case was one calling for guidance from the UT to shape the development of law and practice in respect of claims under the Scheme. It follows that in classifying issues before the FTT as those of "fact" or "law", questions of context (designed to facilitate the giving

> of general guidance by the UT) can have, at most, only very limited bearing.

23. With those observations firmly in mind, I therefore now turn to the Applicant's four grounds for judicial review, taking each in turn. In doing so I outline the parties' key submissions on each ground before setting out my own reasoning.

Ground 1

Introduction

24. Ground 1 is that the FTT did not have regard to relevant authorities – and one authority in particular – on the meaning of the expression "*the partner of the deceased … who was living with them in the same household*" in paragraph 59(b). As a result, it is said, the FTT failed to ask itself the right question, which was whether either H or J had demonstrated a settled acceptance or recognition that their relationship was in truth at an end.

25. This is the sole ground for judicial review directed to the FTT's unanimous decision on the application of paragraph 59(b) (as opposed to the FTT's majority decision on paragraph 59(c)). To satisfy the criterion in paragraph 59(b), H would have to show (and, of course, the burden of proof was on her to establish entitlement under the Scheme) that she and J were living "in the same household and had done so for a continuous period of at least two years immediately before the date of the death".

26. In terms of relevant case law, the FTT cited *Sohrab* (in the FTT decision at paragraph [12]), which concerned continued household membership in the context of deciding whether a person was an "extended family member" ('EFM') of an EEA national. In particular, the FTT referred to paragraphs 3, 4 and 6(a)-(d) of the headnote in *Sohrab*, which set out the following principles:

> 3. There must not be a break in dependence or household membership from the country of origin to the UK, other than a *de minimis* interruption.
>
> 4. To be a member of an EEA national's household requires a sufficient degree of physical and relational proximity to the EEA national through living in the household of which the EEA national is the head, living together as a unit, with a common sense of belonging. There should be a genuine assumption of responsibility by the EEA national for the EFM. Questions of the commencement of the assumption of responsibility and the duration of dependency or household membership are relevant.
>
> …
>
> 6. It will be a question of fact and degree as to whether a person living away from the EEA sponsor's household is to be regarded as having left that household. Relevant factors are likely to include:

> (a) the duration of the separation;
>
> (b) the nature and the quality of the links maintained with the household during the extended family member's time living away;
>
> (c) whether there was an intention to continue life together as a household, with the EEA national as the head, at the time the putative EFM left;
>
> (d) the extent to which the departing members of the household have established their own distinct household elsewhere;

27. Paragraph 6(a)-(d) of the headnote draw on paragraph 40 of the decision in *Sohrab* itself, in which the Upper Tribunal (Immigration and Asylum Chamber) held as follows:

> 40. In our judgment, it will be a question of fact and degree as to whether a person living away from the household is to be regarded as having left the household. Relevant factors are likely to include the following: the duration of the absence; the nature and the quality of the links maintained with the household during the extended family member's absence; whether there was an intention to resume life together as a household, with the EEA national as the head, at the time the putative EFM left; the extent to which the departing members of the household have established their own distinct household elsewhere; and the extent to which there remains a genuine assumption of responsibility by the EEA sponsor for the extended family members during the period of physical separation.

28. The omission of paragraph 6(e) and (f) of the headnote to *Sohrab* from the FTT's reasons was not material given their limited significance in the present context. The FTT's reasons referred to no other case law as being relevant to the issue it had to determine under paragraph 59(b).

<u>The Applicant's submissions on Ground 1</u>

29. Mr Fitt submitted that the FTT had misdirected itself as to the meaning of "living … in the same household" in paragraph 59(b) as it had failed to have regard to the authoritative guidance derived from *In re Dix, dec'd* [2004] EWCA Civ 139; [2004] 1 WLR 1399 ('*Dix*'), a case decided under the Inheritance (Provision for Family and Dependants) Act 1975. The applicant in *Dix* was a Mrs Gully, who had lived with Mr Dix, an alcoholic, but had not been married to him. There had been several temporary short separations and Mrs Gully had also left for her own safety some three months before his death. Neither party regarded their relationship to be at an end. The issue under the then statutory test was whether "during the whole of the period of two years immediately before the date when the deceased died, the person was living (a) in the same household as the deceased, and (b) as the husband or wife of the deceased ...". The trial judge found that Mrs Gully satisfied that statutory test, and so was entitled to financial

provision on Mr Dix's death, notwithstanding her absence in the final three months. The Court of Appeal upheld that decision.

30. In *Dix* Ward LJ observed (at [20]) that the "concept of parties living together in the same household is a familiar one in other areas of statutory law". Ward LJ continued as follows, having referred to an authority from the field of revenue law:

> 22. Perhaps a closer analogy with the present position is that under the Divorce Reform Act 1969, re-enacted in section 1(6) of the Matrimonial Causes Act 1973, as follows:
>
> > " ... a husband and wife shall be treated as living apart unless they are living with each other in the same household, and references in this section to the parties to a marriage living with each other shall be construed as references to their living with each other in the same household."
>
> 23. That received this court's attention in *Santos v Santos* [1972] Fam 247. Giving the judgment of the court, Sachs LJ observed first at page 262 and then at page 263:
>
> > " ... use is again made of words with a well settled matrimonial meaning -- 'living together', a phrase which is simply the antithesis of living apart, and 'household', a word which essentially refers to people held together by a particular kind of tie, even if temporarily separated ... "
> >
> > ... 'living apart' ... is a state of affairs to establish which it is in the vast generality of cases arising under those heads necessary to prove something more than that the husband and wife were physically separated. For the purpose of that vast generality, it is sufficient to say that the relevant state of affairs does not exist while both parties recognise the marriage as subsisting. That involves considering attitudes of mind; and naturally the difficulty of judicially determining that attitude in a particular case may on occasions be great."
>
> Although the court was dealing with the converse situation, namely living apart, nevertheless I find that judgment helpful in the construction of the 1975 Act.
>
> 24. In my judgment, similar considerations must apply to the meaning to be given to the statute with which we are presently concerned. Thus the claimant may still have been living with the deceased in the same household as the deceased at the moment of his death even if they had been living separately at that moment in time. The relevant word is "household" not "house", and "household" bears the meaning given to it by Sachs LJ. Thus they will be in the same household if they are tied by their relationship. The tie of that relationship may be made manifest by various elements, not simply their living under the same roof, but the public and private acknowledgment of their mutual society, and the mutual protection and

> support that binds them together. In former days one would possibly say one should look at the whole *consortium vitae*. For present purposes it is sufficient to ask whether either has demonstrated a settled acceptance or recognition that the relationship is in truth at an end. If the circumstances show an irretrievable breakdown of the relationship, then they no longer live in the same household and the Act is not satisfied. If, however, the interruption is transitory, serving as a pause for reflection about the future of a relationship going through difficult times but still recognised to be subsisting, then they will be living in the same household and the claim will lie. Just as the arrangements for maintenance may fluctuate, using Stephenson LJ's expression cited above, so the steadfastness of a commitment to live together may wax and wane, but so long as it is not extinguished, it survives. These notions are succinctly encapsulated in the judge's test, which was to ask whether the relationship was merely suspended, and I see no error in his approach.

31. By analogy, Mr Fitt submitted that it followed from *Dix* that the FTT in the instant case needed to determine whether the Applicant and the deceased had demonstrated a settled acceptance or recognition that their relationship was in truth over. Thus, the claim to qualify under paragraph 59(b) only failed if their relationship had irretrievably broken down, and not simply subsisting, albeit going through a difficult time. He further submitted that the FTT's reliance on *Sohrab* meant that it had asked itself the wrong question – it had considered only whether they were separated and not physically living together in the relevant period and not whether their relationship had irretrievably broken down.

The Interested Party's submissions on Ground 1

32. So far as Ground 1 was concerned, Mr Browne KC made two principal submissions in response to the argument that the FTT had misdirected itself as to the meaning of "living with them in the same household" in paragraph 59(b) of the Scheme.

33. First, he argued that reliance on *Dix* was inapposite – the issue there was the meaning of a similar but not identical phrase in the Inheritance (Provision for Family and Dependants) Act 1975. However, the Court of Appeal's construction of a test that applied in the field of matrimonial and probate law was of no assistance in construing similar words used in the Scheme. Even if the language was similar, it did not follow, without more, that a phrase should be given the same meaning in a different context: see by analogy *R (N) v Lewisham London Borough Council* [2014] UKSC 62; [2015] 1 AC 1259 at [81]-[88] *per* Lord Carnwath JSC. Furthermore, the Applicant was in effect asking the Upper Tribunal to decide that the Court of Appeal's reading of a provision in the 1975 Act was decisive in the construction of a phrase adopted by the minister in the exercise of prerogative powers to create an *ex gratia* compensation scheme for the victims of criminal injuries.

34. Secondly, and in any event, the guidance in *Sohrab* made it clear that "it will be a question of fact and degree as to whether a person living away from the

household is to be regarded as having left the household". In that context Mr Browne KC further submitted that the FTT's unanimous finding (at paragraph [35]) that the Applicant and J "were largely separated and living apart over this critical 2-year period" was a factual finding that was squarely within the range of reasonable conclusions available to the FTT on the facts as it had found them to be.

Analysis – Ground 1

35. I remind myself that the test the FTT had to apply under paragraph 59(b) was whether the Applicant as the deceased's partner "was living with [J] in the same household and had done so for a continuous period of at least two years immediately before the date of the death". I accept Mr Fitt's submission that the Court of Appeal's decision in *Dix* may shed some light on the construction of this phrase. The relevant statutory test under the 1975 Act – "during the whole of the period of two years immediately before the date when the deceased died, the person was living (a) in the same household as the deceased, and (b) as the husband or wife of the deceased ..." – is in substance very similar to that under the Scheme. The differences are essentially ones confined to drafting styles – both tests involve a focus on living in the same household as the deceased's partner for a period of two years before the index date. I also recognise that the facts in *Dix* were not that far removed from those in the instant judicial review. Indeed, it may be said the factual matrix in *Dix* was self-evidently closer to the present case than the circumstances in the immigration case of *Sohrab*. To that extent I would not be so dismissive as Mr Browne KC as to the potential relevance of *Dix* in the current context.

36. In *Santos v Santos* [1972] Fam 247 at 262 Sachs LJ described a household as "a word which essentially refers to people held together by a particular kind of tie, even if temporarily separated ..." Undoubtedly part of the *ratio decidendi* (if not the *ratio decidendi*) of *Dix* was likewise that "the claimant may still have been living with the deceased in the same household as the deceased at the moment of his death even if they had been living separately at that moment in time" (*per* Ward LJ at [24]). That principle may apply equally to a case under the Scheme. So, for example, if the facts were different, such that H and J had unquestionably been living together continuously for 1 year and 11 months and J had then been sentenced to a short period of imprisonment, it may well be that paragraph 59(b) would have been satisfied (and without need for any recourse to the exception in paragraph 59(c)).

37. However, I do not accept the submission made on behalf of the Applicant that *Dix* is authority for the proposition that "a settled acceptance or recognition that the relationship is in truth at an end" is, in effect, an *essential* prerequisite to a finding under the Scheme that the parties are no longer living in the same household. The requirement laid down in the private law context of *Santos v Santos* [1972] Fam 247 for a mental element to be established in addition to physical separation may well reflect the enduring effects of the concept of *consortium vitae*, a notion which has no obvious place in a state-funded scheme for the compensation of victims of crime.

38. Furthermore, and in any event, the application of the paragraph 59(b) test ultimately involves a multi-factorial evaluation. As the Upper Tribunal held in *Sohrab*, the assessment as to whether a person who is living away from the household is to be regarded as having left that household is a classic question of fact and degree, which may include consideration (amongst other matters) of "whether there was an intention to resume life together as a household" (paragraph 40). To that extent there is a degree of communality of approach in both *Sohrab* and *Dix* to the question of household membership, rather than any conflict. However, that factor cannot be determinative. It is simply one consideration amongst several. Some assistance in this context may be gained from case law in the field of social security law. Commenting on the terms "household" and "member of the same household" in the law relating to supplementary benefits, Mr Commissioner J. Mitchell opined in reported decision *R(SB) 4/83* (at paragraph 19) that:

> Neither of these terms has any technical meaning in general usage nor is either a term of art in the general law of the land. The terms fall, accordingly, to be given their normal, everyday meaning; and their application by the determining authorities is primarily a matter of fact. (See, for example, *Cozens v Brutus* [1973] A.C. 854 per Lord Reid at p.861.) … It is a matter of common sense and common experience.

39. In the present case the FTT – unanimously – applied its "common sense and common experience". It correctly identified the two-year period for the purposes of paragraph 59(b) as running from November 2019 to November 2021. It found that from November 2019 until July 2020, a period of some eight months, the couple were partners who lived together in the same household (paragraphs [22] and [34(a)]). It further found that the couple were separated from July 2020 to November 2020 (paragraphs [23], [24] and [34(b)]) and that J was imprisoned from November 2020 to January 2021 (paragraphs [26] and [34(c)]. The FTT also concluded that the couple "remained separate and living apart" from January 2021 until November 2021, notwithstanding the resumption of their relationship from June 2021 (paragraphs [28]-[31] and [34(d)]. The FTT recognised that the short period of J's imprisonment by itself would not have prevented them from being found to be living together in the same household (paragraph [35] and as hypothesised at paragraph 36 above). In holding so, the FTT effectively acknowledged the *ratio decidendi* of *Dix* – namely that the couple could still be regarded as living in the same household even if temporarily living apart. However, the FTT's further (and unanimous) conclusion that the couple "were largely separated and living apart over this critical 2-year period" is an unimpeachable finding of fact which is firmly based on the evidence.

40. Finally, I recognise that underpinning all of Mr Browne KC's submissions was his argument that on a proper construction the definition of a "qualifying relative" in paragraph 59(b) comprised two distinct core requirements. The first was that a qualifying relative must have been living with the deceased in the same household for a continuous period of at least two years prior to their death. He labelled this the 'Cohabitation Requirement'. The second was that a qualifying relative must have been so living as the deceased's partner for a continuous

period of two years prior to their death. He described this as the 'Relationship Requirement'. Moreover, he contended, paragraph 59(c) was not a standalone provision which established a qualifying relative's eligibility – rather, sub-paragraph (c) only provided an exception to the Cohabitation Requirement in paragraph 59(b) in circumstances where either party's ill-health or infirmity meant they were unable to cohabit. It followed that the Relationship Requirement in paragraph 59(b), mandating the partners to be in a continuous relationship of at least two years' standing before the date of death, was still required to be satisfied.

41. In this context, Mr Browne KC drew attention to the immediate predecessor to paragraphs 59(b) and (c). The 2008 Criminal Injuries Compensation Scheme used the concept of a "qualifying claimant" rather than a "qualifying relative", although nothing turns on that change in terminology. Such a person was defined as follows by paragraph 38(2) of the previous 2008 Scheme (omitting the sub-clauses including parents or children of the deceased within that term):

> (a) the partner of the deceased, being only, for these purposes:
>
> > (i) a person who was living together with the deceased as husband and wife or as a same sex partner in the same household (or a person who would have been so living but for infirmity or ill health preventing physical proximity in the same house) immediately before the date of death and who, unless married to that person or a civil partner of that person, had been so living throughout the two years before that date, or
> >
> > (ii) a spouse or civil partner or former spouse or civil partner of the deceased who was financially supported by the deceased immediately before the date of death;

42. It followed, according to Mr Browne KC, that paragraph 38(2)(a)(i) of the 2008 Scheme made it clear that the Relationship Requirement had to be satisfied throughout the two-year period, distinct from the Cohabitation Requirement. In terms of the drafting, he contended, paragraph 38(2)(a)(i) rolled up both the Relationship Requirement and the Cohabitation Requirement along with the ill-health or infirmity exception to the latter.

43. The public consultation on the future of the 2008 Scheme led to the publication of *Getting it right for victims and witnesses: the Government response* (Cm 8397, July 2012), which in turn established the framework for the 2012 Scheme. The Government's conclusion on eligibility for bereavement payments was as follows:

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

44. It is therefore tolerably clear that the policy intention was that there should be no material change to the test applicable for partners to qualify under the Scheme. It follows that paragraph 59(b) continues to impose both the Relationship Requirement and the Cohabitation Requirement, albeit (probably only for purposes of clarity) that the ill-health or infirmity exception to the latter has been relocated to paragraph 59(c).

45. The (unanimous) FTT did not, at least in so many terms, explicitly frame its reasoning by reference to the Relationship Requirement and the Cohabitation Requirement. However, that matters not as it is clear from its discussion that it addressed the right questions when interrogating the evidence in the light of paragraph 59(b). The FTT's factual findings make it plain that it considered there was no relationship between H and J between approximately July 2020 and June 2021, so for some 11 months out of the relevant 24 months. The FTT also found that the couple were largely separated and living apart, and so not cohabiting, during that two-year period.

46. I recognise that the FTT found the Applicant to be "an honest and straightforward witness" who "did her best to answer the difficult questions necessarily posed by the Tribunal" (paragraph [4]). I also do not doubt the sincerity of the Applicant's hope that J would be able to turn his life around and that they would be able to resume living together as a family unit with X. However, the Scheme requires CICA and the FTT to make some hard-edged findings of fact in the application of paragraph 59(b) which leave no scope for wider considerations of fairness.

47. It also follows from the analysis above that in applying paragraph 59(b) the (unanimous) FTT (a) did not misdirect itself in law by following the guidance in *Sohrab*; and (b) did not misdirect itself in law by failing to refer to *Dix*.

Ground 2

Introduction

48. Ground 2 is that the FTT majority misconstrued the expression "*because of*" in paragraph 59(c). As a result, it is said, the majority asked itself only whether J's ill-health was a 'but for' cause of their living apart. Moreover, bearing in mind the well-recognised inadequacies of the 'but for' test, the majority also needed to (but did not) stand back and ask itself whether, as a matter of common sense and bearing in mind the purpose of paragraph 59(c), H and J were not living together because of his ill-health. In any case, it is contended, the majority did not apply the 'but for' test correctly. Rather, it asked itself whether J's ill-health was the exclusive or sole cause of their living apart, which was, so Mr Fitt submitted, the wrong question on any view.

The Applicant's submissions on Ground 2

49. Mr Fitt developed two main submissions in support of Ground 2. First, and by reference to paragraph [36] of the FTT's decision, he argued that the majority had applied a 'but for' test in asking itself whether "but for the deceased's 'ill-health or

infirmity'" the couple would have been living in the same household. However, such a 'but for' test, he contended, was too blunt an instrument to apply in assessing causation, as recognised by the Supreme Court in *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1; [2021] AC 649 at [181]-[185] *per* Lord Hamblen and Lord Leggatt. Applying the analysis in *Arch Insurance*, the majority should have asked itself whether, even if J's ill-health was not a 'but for' cause of their living apart, it was one of a number of causes which, in combination, had caused them to live apart – even if some lesser combination of those causative factors would also have been sufficient.

50. Secondly, and in any event, Mr Fitt submitted that the FTT majority had misapplied the 'but for' test of causation. By reference to paragraph [37] of the FTT's decision, he contended that a necessary inference of the majority's reasoning was that paragraph 59(c) could only be satisfied if J's ill-health was the sole reason why H and J could not live in the same household. Such an approach was inconsistent with the Court of Appeal's ruling in *R v Criminal Injuries Compensation Board ex p. Ince* [1973] 1 WLR 1334 (at 1341E *per* Lord Denning MR), where it was held that for an injury to be "directly attributable" to a state of affairs it did not need to be "solely attributable" to that state of affairs. Rather, it was sufficient that it was directly attributable in whole or in part. In sum, the majority had asked itself a more stringent question than applying the 'but for' test, namely whether J's ill-health was the exclusive cause of their living apart. The proper question that the majority should have asked itself, Mr Fitt submitted, was simply whether J's ill-health was a substantial cause of the couple living apart.

The Interested Party's submissions on Ground 2

51. Mr Browne KC rejected the central premise of Ground 2. The majority had not, he argued, set itself a 'but for' test at paragraph [36] of the FTT's decision. Instead, the majority had simply used the words 'but for' to explain the conclusions it had reached on whether the Applicant was not living with J "because of" his ill-health. Further, and in any event, paragraph 59(c) of the Scheme could be reformulated as a 'but for' test without changing the meaning of the requirement. Thus, "a person who … but for the deceased's ill-health or infirmity, would have lived with the deceased" is synonymous with "a person who … did not live with the deceased because of [his] ill-health or infirmity." In short, Mr Browne KC submitted, the Applicant was asking the Upper Tribunal to do precisely what the Court of Appeal in *CICA v Hutton* had warned against when reviewing the decision of a first instance fact-finding tribunal. The superior courts and appellate tribunals should not "subject such decisions to inappropriate textual analysis so as to discern an error of law when, on a fair reading of the decision as a whole, none existed."

Analysis – Ground 2

52. This ground for judicial review is not persuasive. I agree with Mr Browne KC's central submission that the majority did not apply a 'but for' test of causation at paragraph [36] of the FTT's decision. Instead, the majority had simply used the words 'but for' to explain the conclusions it had reached on whether the Applicant

was not living with J "because of" his ill-health. The majority took into account all the reasons why the Applicant and her partner were not living together and concluded that the answer to that 'why' question could not be answered "because of the deceased's ill-health or infirmity". It was open to the majority, on the FTT's findings, to decide that the reasons why the couple were not living together could not be said to arise out of J's ill-health. Those reasons included safeguarding issues around X's welfare, J's dishonesty and his infidelity – and again it was open to the majority to find on the facts that those reasons were not attributable to his ill-health, whether in whole or in part. It follows this ground for judicial review does not succeed.

Ground 3

Introduction

53. Ground 3 is said to be that the FTT majority, despite accepting elsewhere in its reasons that J's ill-health was a cause of their living apart, reached the irrational conclusion that it was not a cause, including because they wrongly required H to satisfy them (i) that J's drug addiction was caused by a preceding mental illness; and (ii) that his mental ill-health was severe enough to "*necessitate*" their living apart.

The Applicant's submissions on Ground 3

54. Mr Fitt submitted that – irrespective of the test to be applied with respect to causation – the majority's conclusion on the application of paragraph 59(c) of the Scheme, namely that H and J did not live together "*because of*" J's ill-health, was illogical and indeed irrational. He noted that the FTT had accepted that the Applicant had asked J to leave in the summer of 2020 because she "chose to protect" her daughter from the behaviour associated with his drug addiction (paragraph [24]). He also observed that the majority found that J's theft from a housemate in September 2021 was not attributable to his ill-health while at the same time accepting that such dishonesty was "consistent with the behaviour of a drug addict, even when trying to rehabilitate" (paragraph [30]). Mr Fitt further submitted that the majority's imposition of a requirement that J suffer from a mental health diagnosis that was both "severe enough to cause a drug addiction" and "severe enough to necessitate them living apart" (paragraph [38]) involved an error of law.

The Interested Party's submissions on Ground 3

55. Mr Browne KC's submission in response was straightforward – Ground 3, he contended, was simply a challenge to the FTT majority's factual findings dressed up as an irrationality challenge. Therefore, in order to succeed, the Applicant would have to show that the majority's factual findings were infected by public law irrationality. Mr Browne KC submitted that none of the three examples cited by Mr Fitt came close to meeting that test. First, the Applicant's reliance on paragraph [24] assumed what it sought to prove, whereas the reasons why she had asked J to leave were set out in paragraph [23] – his volatile behaviour, his

stealing and his failure to come home or returning home with drug-abusing friends. Second, the FTT's conclusion at paragraph [30] that stealing correlated with the behaviour of a drug addict was consistent with the reason why J was living apart – and not because of his ill-health. Third, the challenge to paragraph [38] was irrelevant, as this was not a finding of fact but a consideration of whether J's drug addiction and mental health issues constituted "ill-health" for the purposes of paragraph 59(c).

Analysis – Ground 3

56. An irrationality challenge involves a high bar, if not indeed a very high bar. As the Divisional Court explained in *R (on the application of the Law Society) v The Lord Chancellor* [2018] EWHC 2094 (Admin); [2019] 1 WLR 1649, the legal basis for unreasonableness or irrationality in judicial review proceedings involves two aspects:

> 98. … The first is concerned with whether the decision under review is capable of being justified or whether in the classic *Wednesbury* formulation it is "so unreasonable that no reasonable authority could ever have come to it": see *Associated Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 233-4. Another, simpler formulation of the test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision-maker: see e.g. *Boddington v British Transport Police* [1998] UKHL 13; [1999] 2 AC 143, 175 (Lord Steyn). The second aspect of irrationality/unreasonableness is concerned with the process by which the decision was reached. A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it – for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error. Factual error, although it has been recognised as a separate principle, can also be regarded as an example of flawed reasoning – the test being whether a mistake as to a fact which was uncontentious and objectively verifiable played a material part in the decision-maker's reasoning: see *E v Secretary of State for the Home Department* [2004] EWCA Civ 49; [2004] QB 1044.

57. As such, the Applicant must show that the relevant findings of fact could not be made and no tribunal properly directing itself could make the factual findings in question. As Lloyd Jones LJ put it in *Department for Work and Pensions v Information Commissioner* [2016] EWCA Civ 758; [2017] 1 WLR 1 at [34], albeit in the context of another specialist first instance tribunal (there the FTT in the information rights jurisdiction of the General Regulatory Chamber):

> 34. The approach to be followed in perversity challenges to decisions of specialist Tribunals, as described by Irwin J. in the *BBC* case, is simply a reflection of the respect which is naturally paid to the decisions of a specialist Tribunal in an area where it possesses a particular expertise. Given such expertise in a Tribunal, it is entirely understandable that a reviewing court or Tribunal will be slow to interfere with its findings and

> evaluation of facts in areas where that expertise has a bearing. This may be regarded not so much as requiring that a different, enhanced standard must be met as an acknowledgement of the reality that an expert Tribunal can normally be expected to apply its expertise in the course of its analysis of facts. It has been described in various ways in the cases. I agree with Irwin J. that the formulation employed by Mummery LJ in *Yeboah* requiring an overwhelming case, may perhaps be the high water mark of this consideration, although the formulation employed by Sir John Donaldson, MR, in *Murrell* (so wildly wrong as to merit being set aside) would be a close rival. Both were referred to by the Upper Tribunal in the present case at [48]. Nevertheless it is clear from the context – in particular from the careful explanation of Irwin J. – that the approach referred to by the Upper Tribunal is no more than paying appropriate respect to a decision of a specialist Tribunal and in my view does not amount to an error of law.

58. Thus, it is trite law that "assuming that the fact finder's analysis was open to him or her, an appellate court or tribunal can only intervene in that process based upon an error of law which is not the same as pointing to a different analysis of the evidence" (*Secretary of State for Work and Pensions v Roach* [2006] EWCA Civ 1746 at [31] per Leveson LJ). Accordingly, *R (on the application of the Law Society) v The Lord Chancellor* [2018] EWHC 2094 (Admin); [2019] 1 WLR 1649 shows that either the factual conclusions must fall outside the range of reasonable conclusions open to the FTT or there must be a demonstrable flaw in the reasoning that led to those conclusions. I cannot say that type of error is disclosed in the instant case. In that context the factual findings that I might have made on the same evidence is neither here nor there. The FTT is the tribunal of fact and heard the evidence. It split 2-1 but that simply illustrates that it was adjudicating upon a borderline case in which reasonable tribunal judicial office holders might reasonably come to different but still reasonable conclusions. It does not mean that either the majority's or the minority's decision-making was infected by an error of law. It follows that I find that Ground 3 is not made out.

Ground 4

Introduction

59. Ground 4 is that the FTT majority's conclusion that J did not suffer from "*ill-health*" within the meaning of paragraph 59(c) proceeded on the incorrect premise that H had to satisfy them that J had a mental health diagnosis. As a result, it is argued, the majority wrongly ignored other evidence which tended to show that J had suffered from mental ill-health. As such, this final ground for judicial review represents a further challenge to the approach of the majority of the FTT panel to the application of paragraph 59(c) (or rather, as they found, the non-applicability of paragraph 59(c)).

The Applicant's submissions on Ground 4

60. Mr Fitt's submissions focussed here on the reasoning of the majority in paragraph [38] of the FTT's decision. He rejected the notion that "ill-health" was an

expression that was necessarily confined to a recognised mental health condition. The majority's insistence on there being "reliable evidence of a diagnosis" or failing that "treatment for mental illness" misunderstood the term "ill-health" as importing an evidentiary requirement that was not there. In the alternative, the majority's approach, he argued, proceeded on the basis that there was no other evidence that J suffered from mental illness despite e.g. the FTT's findings at paragraphs [14], [18] and [34(b)] (and the matters relied upon by the minority member of the panel in their reasons at paragraphs [40] and [41]).

The Interested Party's submissions on Ground 4

61. Mr Browne KC's core submission was – and no disrespect is intended by this observation – a retread of his main argument in relation to Ground 3. Ground 4, he contended, was likewise a challenge to the FTT's factual findings, again dressed up as an irrationality challenge. The FTT, he submitted, was perfectly entitled to reach the conclusion on the evidence before it that the deceased's issues did not constitute "ill-health" for the purposes of the exception in paragraph 59(c). Moreover, it was quite open to the majority to require reliable evidence either of a formal diagnosis or of treatment for mental health issues to support a conclusion on the facts that J was suffering from ill-health.

Analysis – Ground 4

62. As Mr Browne KC submits, this ground for judicial review faces the same difficulty as Ground 3. In summary, it represents an invitation to trespass on the fact-finding role that is properly the exclusive preserve of the FTT. The majority's conclusion that the deceased did not suffer from ill-health, and more specifically that H "did not live with the deceased because of … [his] ill-health or infirmity", was one that was reasonably open to them on the evidence to make. Just because the minority member of the panel took a different view does not mean that the majority's conclusion was irrational. The ordinary and natural meaning of the term "ill-health" does not include volatile, anti-social and occasionally violent behaviour arising out of drug addiction, even if that addiction had amongst its ultimate causes the mental health difficulties arising out of a troubled childhood and a more recent family bereavement. It follows that I also find that Ground 4 is unsuccessful.

Conclusion

63. I therefore conclude that the decision of the First-tier Tribunal does not involve any material error of law. As such, I refuse the application for judicial review. My decision is also as set out above.

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised by the Judge for issue on 11 August 2025

Corrected on 12 September 2025 under rule 42 to ensure compliance with rule 14 Order (by insertion of ‘X’ for name of Applicant’s daughter in paras 25 and 28 within the extract from FTT decision cited at para 7 above).