



**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Case No: CSIS/256/2020**

On appeal from First-tier Tribunal (Social Entitlement Chamber)

**Between:**

**JEC**

Appellant

- v -

**The Secretary of State for Work and Pensions**

Respondent

**Before: Upper Tribunal Judge Marion Caldwell QC**

Decision date: 23 June 2021

Decided on consideration of the papers

**DECISION**

**The decision of the Upper Tribunal is to dismiss the appeal.**

**REASONS FOR DECISION**

1. This appeal concerns a claim for a Funeral Expenses Payment from the Social Fund under the Social Fund Maternity and Funeral Expenses (General) Regulations 2005 (“the 2005 Regulations”) and the meaning of “funeral”.

**Legislative Background**

2. Section 138 of the Social Security Contributions and Benefits Act 1992 provides that, in prescribed circumstances, payment may be made out of the Social Fund to meet funeral expenses. The entitlement provisions for funeral expenses payments are in the 2005 Regulations.

3. A funeral payment is defined as a social fund payment to meet funeral expenses of a deceased person<sup>1</sup>. Certain conditions must be satisfied to qualify for payment<sup>2</sup>. These include that that the deceased was in receipt of at least one of a list of state benefits, or the claimant is in receipt of such a benefit when the claim is made, and that the deceased was ordinarily resident in the UK at the date of death<sup>3</sup>. The condition with which this appeal is concerned is Regulation 7(9)(b), which provides that the funeral must take place in the UK. (There are certain exceptions for EU workers and their family members or EU citizens with a right to reside in the UK, which are not relevant to the present appeal<sup>4</sup>.)

4. Originally, “funeral” was defined in the 2005 Regulations as “a burial or cremation”. That definition was revoked with effect from 2 April 2018<sup>5</sup>. As at the date of the claim, there was no statutory definition of “funeral” in the regulations.

### **Factual Background and claim history**

5. The claimant and his late wife (“the deceased”) were married in Zimbabwe in December 2003. They lived together in the UK from October 2004 until the deceased died on 26 February 2019 (page 131). On 21 March 2019, a Christian church service was held to allow the attendants to view the deceased’s body and to celebrate her life (pages 93-101). The Order of Service referred to this as a “Celebration of the Life” of the deceased. The Order of Service shows that several pastors were present and took part in the service. The deceased’s body was then transported to Zimbabwe for burial. These facts do not appear to be in dispute.

6. On 21 March 2019, the claimant made a claim for a funeral expenses payment (“FEP”) in respect of the costs incurred in the UK for the funeral director’s invoice and the service held on 21 March 2019. On 17 April 2019, the Secretary of State decided that the claimant was not entitled to a FEP because the funeral took place in Zimbabwe and not in the UK. The decision was reconsidered but not changed.

7. The claimant appealed to the First-tier Tribunal (“the tribunal”). The appeal was heard by telephone on 17 March 2020. The claimant attended the hearing by telephone. The tribunal refused the appeal on the grounds that the funeral had not taken place in the UK or in any of the other accepted countries to qualify for a FEP in terms of the 2005 Regulations. The claimant has now appealed to the Upper Tribunal.

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<sup>1</sup> Reg 7(1)(a).

<sup>2</sup> Reg 7(2).

<sup>3</sup> Reg 7(3), (4) and (5).

<sup>4</sup> Reg 7(9)(a) and (10). Where the claimant is a worker for the purposes of Regulations 1612/68 or 1251/70, a member of the family of a worker for the purposes of Regulation 1612/68, a member of the family of a worker who has died and to whom Regulation 1251/70 applied, or a person who has a right to reside in in the UK under Directions 68/360 or 73/148, in which case the funeral may take place in the EU or one of the other specified EEA states.

<sup>5</sup> Social Fund Funeral Expenses Amendment Regulations 2018/61, reg 4.

### **The appeal to the Upper Tribunal**

8. In granting permission to appeal District Tribunal Judge Newall stated:

*Whilst it may well be that, upon close consideration of the facts and law, there was no material error in the First-tier Tribunal's decision on this appeal, I consider it at least arguable that the tribunal's approach to what constituted a funeral was in error. In particular, arguably the tribunal failed to consider fully the implication of the removal of the definition of funeral from regulation 3(1) of the Social Fund Maternity and Funeral Expenses (General) Regulations 2005 as from 2 April 2018 and, therefore, the removal of the requirement that a funeral be "a burial or a cremation". At least arguably the tribunal was in error in finding as a fact that "Burial is an essential part of the funeral process" (although I recognise that this finding must be seen in the context of the particular case, in which there was in fact a burial).*

*I have not found any case law authority dealing with the removal of the definition of "funeral" from the regulations. Although the respondent in the submission to the First-tier Tribunal asserted that the change was made "primarily so funerals without a body could fall within the scheme", there is no authority quoted for that proposition. It is not reflected in the explanatory memoranda or consultation documents I have seen on the amending regulations (i.e., the Social Fund Funeral Expenses Amendment Regulations 2018). If the purpose was to include "funerals" where there was no body, that could have been achieved by amending the definition rather than removing it. It seems contradictory to say on the one hand that the ordinary, everyday meaning of "funeral" must be applied and the burial or cremation is still the primary component of what would be recognised as a funeral, whilst also acknowledging that a ceremony without a burial or cremation can nevertheless be a funeral for the purposes of the regulations. That is what the respondent asserted in the submission to the First-tier Tribunal in this appeal. It seems to me that the implications of the legislative change merit further consideration, including whether events such as were held in the present appeal can be considered a "funeral" or part thereof for the purposes of the regulations.*

### **The Tribunal's decision**

9. In its decision, the tribunal noted that the definition of "funeral" as a burial or cremation had been revoked<sup>6</sup>. The tribunal found that burial was an essential part of the of the funeral process; that the funeral of the deceased did not take place within

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<sup>6</sup> Page 74, paragraph 6.

the UK or within one of the other defined areas in the regulations; that the funeral took place in Zimbabwe and, accordingly, the appellant was not entitled to a funeral payment<sup>7</sup>. The tribunal considered that the decisions in the cases of *O'Flynn v Adjudication Officer*<sup>8</sup> and *CIS/1335/2004*<sup>9</sup> applied to the appeal and stated:-

*The service which was conducted on 21 March 2019 was to celebrate the life of the appellant's late wife. This is a memorial service to honour the deceased lady. A memorial service is distinct from a funeral service for someone who is buried. The funeral itself took place in Zimbabwe, and, accordingly it is unfortunate that as Zimbabwe is not in one of the countries covered by the regulations, all of the associated costs of the funeral cannot be met. On balance, the tribunal took the view that the expenses which were incurred in the United Kingdom, such as the invoice from (the funeral directors) at page 11, were more properly part of the funeral costs for someone who is buried in Zimbabwe, and as such they are out with the scope of the regulations and entitlement cannot be covered in terms of the regulations.*

### **Appeal to the Upper Tribunal and Response**

10. The appellant's grounds of appeal<sup>10</sup> are, in summary, that he applied for a payment towards funeral costs incurred in the UK (and not the Zimbabwean costs); that as there was no statutory definition of funeral at the material time restricting it to a burial or cremation, he should be entitled to a FEP in respect of the costs associated with the "funeral" held on 21 March 2019. He made reference to the DWP Advice for Decision Making Guide L3125 which states, *There is no definition of a funeral for claims made on or after 2 April 2018. This means that a Social Fund Funeral Payment can be made where there is no body or remains of the deceased.* The appellant submits that a funeral in everyday life is an event, religious or secular, which is held in honour of a deceased preceding interment or other disposal of the deceased's remains. The Christian farewell service held for the deceased must be considered a funeral for the purposes of the regulations. It was a matter of discretion for the family to name this a "Celebration of Life" in accordance with the Pentecostal Christian tradition which they practise. He stated that he had never referred to it as a memorial service either in paperwork or to the tribunal. He submitted that the deceased had made many friends while living in the UK and the service was an opportunity for them to view her body and pay their last respects to her. The costs of the coffin, funeral director's services and preparation of the deceased's remains for burial are basic expenses and incurred, irrespective of where the interment takes place. The more

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<sup>7</sup> Page 74, paragraphs 2-4.

<sup>8</sup> R(IS)4/98

<sup>9</sup> Contained in the bundle at pages 60-64.

<sup>10</sup> Pages 85 – 101 and 126 - 138

detailed points he makes are reflected in the District Tribunal Judge's decision granting permission to appeal.

11. The Secretary of State does not support the appeal and submits that the tribunal was correct in holding that a burial was an essential part of the funeral process and that as that had taken place in an ineligible country a FEP was not payable under the regulations<sup>11</sup>.

*4. The policy intent behind the change, whilst admittedly not put into the explanatory memorandum which accompanied the legislation, was solely in order to allow Funeral Expenses Payments to be made in situations where there was no body, where there could literally be no cremation or burial. When the regulations were presented in the memorandum to the Social Security Advisory Committee (attached) this was explained:*

*"8. Regulation 3 of the 2005 Regulations currently defines a funeral as a cremation or a burial. Regulation 4 of the 2017 regulations removes this definition to ensure that FEP claims are not refused in cases where the deceased's body has not been found or their remains cannot be recovered, for example in cases such as the recent Grenfell tower block tragedy."*

*5. This is also reflected in the regulations for The Social Fund (Children's Funeral Fund for England) Regulations 2019 (the "2019 Regulations"), which were introduced to provide for the funeral costs of any deceased person under the age of 18. These regulations contain the following definition of "funeral": "means erecting a memorial in a case where there is no body, or the burial or cremation of a body (whether or not the burial or cremation is accompanied by the erection of a memorial)". This sets out two situations in which a funeral can be considered to be held for the purposes of a Child Funeral Fund payment, namely (1) where there is no body and (2) where there is a body. In the case where there is a body, a funeral related to its burial or cremation. The 2019 Regulation is consistent with the Policy intent set out in paragraph 4 above with respect to the 2018 Amendment. In the circumstances where there is a body, a funeral is where there is a burial or cremation of that body.*

*6. The policy intent was that Funeral Expenses Payment should only be paid for the costs associated with an actual burial or cremation service, except in the very rare circumstances where there is no body. In the instance where there was no body, the scheme would cover the eligible costs of a service equivalent to a burial or cremation. It was not intended as a widening of entitlement to cover the costs of any services or ceremonies separate from the burial or cremation. It is submitted that the Tribunal were correct when it noted that the service being claimed for in this case was "distinct from a funeral service" (paragraph 7).*

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<sup>11</sup> See Secretary of State's Submission at pages 113 – 124.

*7. It is further submitted that the language of the regulations leads one to the conclusion that the scheme was designed to account for burial and cremation services only. Whilst the definition of “funeral” has been removed from the legislation, the word retains its natural meaning. The ordinary English usage of the term still largely ties the word to a burial or cremation. The Collins English Dictionary (Fifth Edition, 2000) defines funeral as “a ceremony at which a dead person is buried or cremated”. The Oxford English Dictionary (Second Edition, Revised, 2005) defines a funeral as “A ceremony or service held shortly after a person’s death, usually involving the person’s burial or cremation”. The Cambridge Online Dictionary provides the definition as “a (usually religious) ceremony for burying or burning the body of a dead person”. Merriam-Webster Online has “the observances held for a dead person usually before burial or cremation”. The term “funeral” is commonly understood to mean an event involving a burial or cremation, whereas other events or ceremonies associated with the passing of a deceased person, such as memorials, would not normally be described thus.*

12. It is further submitted that under regulation 9(3), only a few of the costs that can be claimed are not directly related to the handling of the body and the burial or cremation of the body. Relevant expenditure under regulation 9(3)(f) is the cost of one return journey for the responsible person, either for the purpose of making arrangements for, or for attendance at the funeral. It is submitted that this envisages the funeral as a single event rather than multiple events.

13. The Secretary of State’s representative advises that the Department for Work and Pensions is seeking to have the legislation further amended to create a different definition of “funeral” explaining that this is not an admission that the removal of the definition was a widening of the scope of the benefit but to ensure that the policy intent of allowing a FEP in those instances where there is no body are included within the scheme.

14. It is submitted, in conclusion, that the event in the UK on 21 March 2019 was not a burial or cremation, therefore it was not a funeral and, as such it was not within the ambit of the scheme and the tribunal had not erred in law.

## **Discussion**

15. There has been provision for the payment of funeral expenses to those in need since at least 1981. The Supplementary Benefit (Single Payment) Regulations 1981 provided a scheme for funeral expenses payments which was similar in many respects to the scheme applicable to the present appeal<sup>12</sup>. In the 1981 Regulations “funeral” was not defined but referred to the cost of a “funeral or cremation”. One of the conditions for entitlement to a single payment for funeral or cremation expenses was

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<sup>12</sup> Regulation 8.

that the funeral or cremation took place in Great Britain<sup>13</sup>, subsequently amended to United Kingdom.

16. In *R(SB) 23/86* a single payment was refused for the expenses of a funeral for the claimant's mother-in-law who had died in the UK. Undertakers carried out some of the functions which would normally be attendant on a funeral then the body was flown to Rawalpindi for burial. The payment was refused because the burial was not in the UK. On appeal, the tribunal found that the funeral took place in the UK and awarded a single payment towards funeral costs. The adjudication officer appealed to the Social Security Commissioner. On appeal by the Adjudication Officer, it was argued for the claimant that "funeral" referred to religious services and included burial; cremation meant the act of burning, the words "or cremation" were used in regulation 8(1) to avoid the doubt as to whether cremation could be involved in a funeral; if a person were cremated in Rawalpindi and there was a service for that person in a temple in this country, the "funeral" condition in 8(1)(c) was satisfied, but the cremation condition was not, and vice versa. It was submitted that there was no reason in principle why the service in the UK should not qualify and fulfil the condition that the funeral take place in the UK.

17. In allowing the appeal the Commissioner (Hallett) said:

*In my judgement, the word "funeral" as used in regulation 8(1)(c) of the single payments regulations must be given its ordinary and natural meaning in the context in which it occurs. That context relates to a claim for a single payment for the expenses of a funeral or cremation. It is clearly not envisaged that the claimant can obtain the expenses of both. For example, a claimant may, if the conditions in paragraph 1 of regulation 8 are satisfied, be entitled to the cemetery fees for a simple funeral or the crematorium fees for a simple cremation: see paragraph 2(e) of regulation 8. It is obvious that he cannot have both. "Cremation" has the settled dictionary meaning of "the reduction of a corpse to ashes in lieu of interment" (Shorter Oxford English Dictionary) and is the noun of the verb "cremate", which means "to burn up (something, particularly a corpse) and reduced to ash" (Collins English dictionary) or "to burn (esp a dead body)" (Chambers 20<sup>th</sup> Century Dictionary). The antithesis of "cremation" is "burial". It is in the sense of "burial" that "funeral" is used. The US meaning of "funeral" according to the Shorter Oxford English Dictionary, is "funeral service" but that is not the sense in which the word is used here. If a burial (or cremation) does take place in the United Kingdom the cost of a service here connected with the burial (or cremation) is allowed for by the provisions of paragraph 2(e) of regulation 8. I do not accept (counsel for the claimant)'s arguments that "Funeral" is used in the sense of the ceremonies or religious services which accompany burial or cremation. If his construction were adopted (and [counsel] did not shrink from this consequence), where there is a religious*

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<sup>13</sup> Regulation 8(1)(c).

*service within the United Kingdom and the cremation takes place outside the United Kingdom, the claimant would qualify for the expenses incurred in the United Kingdom. Such a surprising result cannot have been intended. The provisions for a single payment for funeral or cremation expenses is narrowly drawn and, apart from an exception for temporary absence from the United Kingdom, there are no exceptions to the stringent stipulations indicating that expenses are only to be met by a single payment if all relevant occurrences take place in an United Kingdom context. It is a condition that*

- (1) The accommodation for the deceased normally lived prior to his death is in the United Kingdom*
- (2) The deceased died in the United Kingdom (or during temporary absence from the United Kingdom)*
- (3) The funeral or cremation takes place in the United Kingdom [these 3 conditions are all in regulation 8(1)(c)] and*
- (4) The need does not occur outside the United Kingdom (regulation 6 (1)(d)).*

*The third condition clearly contemplates one single identifiable event, not a series of events; for it uses the definite article “the”. Under the alternative construction put forward by (the claimant’s counsel), not only is the condition that the funeral or cremation takes place in the United Kingdom satisfied where the cremation takes place elsewhere but there is a funeral service here, but the condition is also satisfied where the burial takes place elsewhere and the funeral service (or, in some cases one of the funeral services) takes place here. On this construction, if it is accepted, the funeral can take place both inside the United Kingdom and outside the United Kingdom, which in effect is what is said to have happened in the present case. In my view, this construction does violence to the language used and is contrary to the intention which, in my judgement, is to restrict the payment of expenses to cases where the “funeral or cremation” takes place wholly within the United Kingdom.*

18. The Social Fund was established by the Social Security Act 1986. Regulation 8 of the Single Payment Regulations was revoked by the Social Fund Maternity and Funeral Expenses (General) Regulations 1986. In the 1986 Regulations “funeral” was defined as “burial or cremation”; I would speculate that was inserted as a result of the issues raised in *R(SB) 23/86*. The 1986 Regulations were, in turn, revoked by the Social Fund Maternity and Funeral Expenses (General) Regulations 1987 (the 1987 Regulations). The 2005 Regulations replaced the 1987 Regulations in their entirety; “However, with a few exceptions, the effect was intended to consolidate those



regulations and to produce a (greatly needed) simplification in the structure and wording of the rules for funeral payments.”<sup>14</sup>

19. Payments from the Social Fund are intended to assist people on low incomes; hence the requirement that the deceased was, or the claimant is, in receipt of a qualifying benefit. FEPs are broadly aimed at covering the unavoidable costs of a decent and respectful funeral.

20. As was observed by the Court of Appeal in *Esfandiari v SSWP*<sup>15</sup>:

*7. It should be noted that, ..... the funeral payment may not meet the full costs of the funeral, and in such a case it may need to be “topped up” by payments from other sources. There are detailed rules governing the allowable costs, and most are restricted by reference to what is “necessary” (see regulation 7A(2)(a)(i), (b)(ii), (d), (e)(ii) and (f)). “Other funeral expenses” (for example, for a coffin and flowers) are restricted to £600 (regulation 7A(2)(g)). As was said by another Commissioner:*

*“The word ‘necessary’ is, in my judgment, an important limitation on costs, and it must never be forgotten that the costs in question are being defrayed out of public funds. Parliament has had to balance the wishes of the relatives of the deceased against any increased costs involved, and has decided that, as such costs are being borne out of the public purse, they must be limited to that which cannot be avoided.” [R(IS) 18/98, paragraph 14.]*

21. “Funeral” was originally defined in the 2005 Regulations (as it had been in its predecessor Social Fund regulations) as “a burial or cremation”. That definition was omitted with effect from 2 April 2018. In the absence of a statutory definition, what is a “funeral” for the purposes of the 2005 Regulations from that date?

22. I am unable to accept the submission of the Secretary of State, that without further ado, “funeral” should simply be given the same meaning as that defined in the 2019 Regulations because the policy intent in each case was the same. That reasoning begs the question why the same definition as was used in the 2019 Regulations was not substituted when the 2005 Regulations were amended. I agree with the District Tribunal Judge that it is somewhat contradictory to submit on the one hand that the ordinary, everyday meaning of “funeral” must be applied, that burial or cremation is still the primary component of what would be recognised as a funeral, whilst also acknowledging that a ceremony without a burial or cremation can nevertheless be a funeral for the purposes of the 2005 Regulations. However, I do agree with the remainder of the submissions for the Secretary of State.

23. The dictionary definitions quoted above show that, in ordinary language, “funeral” tends to suggest an event involving the disposal of the deceased’s body but may also be ceremonies related to that.

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<sup>14</sup> Social Security Legislation (Mesher, Poynter and Wikeley) 2019/20, Volume II, paragraph 5.31.

<sup>15</sup> [2006] EWCA Civ 282 (*R(IS) 11/06*). A case concerning claims under the 1987 Regulations.

24. As was stated by Commissioner Hallett “funeral” must be given its ordinary and natural meaning in the context in which it occurs. Some assistance in considering what is meant by “funeral” for the purposes of the 2005 Regulations can be derived by examining the nature of the funeral expenses eligible for a FEP. A funeral payment is an amount sufficient to meet any relevant expenditure (subject to certain deductions)<sup>16</sup>. Regulation 9(3)(a) to (f) sets out what is “relevant expenditure” for the purposes of a FEP<sup>17</sup>, together with “other funeral expenses” up to a certain monetary limit.

25. Regulation 9(3) is largely concerned with costs that will be incurred in the disposal of the deceased’s body either by burial or cremation, and, in some circumstances, the cost of transport of the deceased’s body from the place of death to the funeral director’s premises or to the place of rest; and from there to “the funeral”.

26. In *CIS/1335/2004*, Commissioner Rowland, as he then was, considered similar provisions to regulation 9(3) under the 1987 Regulations. The claimant’s husband died while they were on holiday in Spain. She was unable to afford to have his body returned to the UK and so he was cremated in Spain. His ashes were then interred in England and a service held for that ceremony. She made a claim in respect of the interment costs in the UK. The 1987 regulations defined “funeral” as “a burial or a cremation”, and provided that to be eligible for a funeral payment the funeral must take place in the UK. Commissioner Rowland stated<sup>18</sup>:

*As in force at the time material to the present case, the new legislation makes it even clearer that the cost of purchasing a new burial plot and cemetery fees that may be met under regulation 7A(2)(a) cannot be claimed where there is a cremation having the effect that regulation 7A(2)(b)<sup>19</sup> applies. Moreover, regulation 7A(2)(e) provides that the cost of transport covers “a vehicle for the coffin and bearers and ... one additional vehicle”, making it clear that such costs may be claimed only in respect of the burial of a body or the cremation of a body. Similarly, costs covered by regulation 7A(2)(d) because they are incurred to “transport the deceased” can only refer to costs in respect of transporting the body before interment or cremation and it seems to me that travel costs covered by regulation 7A(2)(f) “either for the purposes of making arrangements for, or attendance at, the funeral” (my emphasis) must be those arising in connection with the interment of the body or, where there is a cremation, to the cremation itself and not to any subsequent interment of ashes.*

27. Regulation 9(5) provides that regulation 9(3)(a) (burial costs) does not apply to costs in connection with the burial of the deceased’s ashes where cremated. The result is that a funeral payment under regulation 9(3) may be made for the cost of either a cremation or a burial but not both.

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<sup>16</sup> Regulation 9(1).

<sup>17</sup> Except those met by a pre-paid funeral plan or similar arrangement (Regulation 9(10)(a)).

<sup>18</sup> Paragraph 7.

<sup>19</sup> Cremation costs.

28. Regulation 9(7) excludes from payment under regulation 9(3)(a), (b), (d), (e) the cost of certain listed items and services which relate to a requirement of the deceased's religious faith.

29. Any "other funeral expenses" allowable under regulation 9(3)(g) is not defined in the regulations. It has been held that provided the expenses are "funeral expenses" and are otherwise eligible, they should be allowed under subparagraph (g)<sup>20</sup>. Costs which have been held to be eligible include funeral director's fees and the costs of a coffin<sup>21</sup> where these costs could not be met under Regulation 9(3)(a) or (b); suitable funeral attire<sup>22</sup>; transportation of ashes; and flowers<sup>23</sup>.

30. As noted in *Esfandiari*, some of the costs are limited to what is "reasonable" and others to what is "necessary". For example, the necessary cost of obtaining a new burial plot is relevant expenditure<sup>24</sup>. In *R(IS) 18/98*, the Commissioner decided that "necessary costs" implied that costs were to be kept to a minimum; any expense more than is properly required is to be excluded<sup>25</sup>.

31. There are references in the regulations to "funeral" or "the funeral" which imply that what the scheme is concerned with is one event. See for example, regulations 7(9), 8(4)(b), 9(3)(e) and (f) and 9(6)(b). I agree with the reasoning and decision of Commissioner Hallett on this point.

32. Considering the purpose and scope of the FEP scheme, the type of costs and expenses that might be recoverable, the limitation on costs and the language used in the regulations, I have concluded that despite the revocation of the definition of "funeral", under the 2005 Regulations a funeral is an event involving the final disposal of the deceased's body and ceremonies closely related to that in nature, time, and place. Given the way in which the scheme is drafted, in my opinion, it does not envisage a ceremony for the deceased taking place as one event separate from the event disposing of the deceased's body. I am therefore unable to accept the claimant's submission that in the 2005 Regulations "funeral" is used in the sense of a ceremony or religious service which does not accompany burial or cremation. The funeral must take place wholly within the UK to qualify for payment under the scheme.

33. In reaching its decision, the tribunal stated that it relied on the decisions in *O'Flynn* and *CIS/1335/2004*.

34. The legislation, as originally enacted, provided that the funeral ("a burial or cremation") must take place in the UK only. Mr O'Flynn was an Irish national who was resident in the United Kingdom as a former worker. His son died in the United Kingdom but was buried in Ireland. When Mr O'Flynn was refused a funeral payment because the burial had taken place in Ireland, he argued that he was being discriminated against

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<sup>20</sup> *CIS/1345/2004*.

<sup>21</sup> *CIS/2651/2003* and *CIS/2607/2003*.

<sup>22</sup> *CIS/1345/2004*.

<sup>23</sup> *CIS/1924/2004*.

<sup>24</sup> Regulation 9(3)(a)(i).

<sup>25</sup> Paragraph 8.

contrary to Article 7(2) of Regulation (EEC) No.1612/68, under which a worker from one Member State is to enjoy in the territory of the other Member States the same social and tax advantages as national workers. The European Court of Justice held that the rule was capable of discriminating against migrant EU workers and stated –

*“... it is above all the migrant worker who may, on the death of a member of the family, have to arrange for burial in another Member State, in view of the links which the members of such a family generally maintain with their State of origin.”*

35. The provisions in Regulation 7(9) and (10) reflect the ECJ judgment. It is not clear to me in what way this decision would apply to the tribunal’s reasoning and its decision that a “funeral” under the 2005 regulations, after revocation of the definition of funeral, is a “burial or cremation”.

36. The tribunal has not explained on what aspect of the reasoning in *C/S/1335/2004*, it relied in reaching its decision that, despite the revocation of the definition of “funeral”, burial was an essential part of the funeral process. The regulations in force at the time defined “funeral” as “a burial or cremation”. In that case, the Commissioner concluded that it was the actual cremation that was the funeral rather than the interment in the UK. As the cremation took place in Spain the conditions for payment were not met.

37. I therefore find that the tribunal erred in law by failing to provide adequate reasons for its decision. However, the error was not material because I have decided that for the purposes of the 2005 Regulations a “funeral” is one event that involves disposal of the deceased’s body.

38. In this case, the deceased was buried in Zimbabwe, that is where her funeral took place. As this was not in the UK that essential condition in regulation 7(9) for a FEP is not met. The provisions relating to burial in the EU, or an EEA state are inapplicable to the circumstances of this case.

39. Returning to *Esfandiari*; that case involved a number of claims by recent migrants to the UK from Muslim countries. Their claims for FEPs had been rejected as the burials had taken place in their respective countries of origin. (The provisions relating to EU and EEA funerals did not apply to their claims.) The claimants argued that the provision that the funeral take place in the UK was unlawful discrimination. The Court of Appeal did not agree. In giving the judgment of the Court, Carnworth LJ observed:

*8. ... The state made provision for a suitable burial in the UK for all those of inadequate means, regardless of personal characteristics or status. There was no obligation on the state to do so, and certainly no obligation to do more. It was open to each appellant to take advantage of this provision, but each chose not to do so for understandable, but entirely personal reasons.*

40. The circumstances of the present case are similar to those in *Esfandiari* and *R(SB)23/86*. Having arranged for burial outwith the UK, the claimant is not eligible for a FEP in respect of that funeral.

**Decision**

41. The appeal is dismissed.

**Marion Caldwell QC**  
**Judge of the Upper Tribunal**

Signed on the original/authorised for issue on 23 June 2021