Neutral Citation Number: [2018] EWCA Civ 1735

Case No: C3/2015/3918

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL ADMINISTRATIVE APPEALS CHAMBER
JR/4047/2014 – [2015] UKUT 0478 (AAC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/07/2018

Before:

SIR TERENCE ETHERTON MR
LADY JUSTICE SHARP DBE
and
LORD JUSTICE LEGGATT

- -

Between:

JT	**Appellant**
- and -	
FIRST-TIER TRIBUNAL	**Respondent**
- and –	
CRIMINAL INJURIES COMPENSATION AUTHORITY	**Interested Party**
- and –	
EQUALITY AND HUMAN RIGHTS COMMISSION	**Intervener**

- -

Fenella Morris QC and **Nicola Kohn** (instructed by **Watson Woodhouse Solicitors**) for the **Appellant**
Ben Collins QC and **Robert Moretto** (instructed by the **Government Legal Department**) for the **Interested Party**
Jason Coppel QC (instructed by the **Equality and Human Rights Commission**) for the **Intervener**

Hearing date: 14 June 2018

- -

Approved Judgment

Lord Justice Leggatt:

Introduction

1. Repeatedly throughout her childhood, the appellant in this case ("JT") was sexually assaulted and raped by her stepfather in her family home. JT was born in 1963. The sexual abuse had started by the time she was five years old and continued until she was aged 17 (in 1979). Many years later JT's stepfather was prosecuted for these crimes. He was charged with eight offences: one of rape, three offences of indecent assault and three offences of indecency with a child. At a trial in November 2012 he was convicted on all counts and sentenced to 14 years' imprisonment.

2. There is a statutory scheme under which victims of crimes of violence, including sexual violence, who satisfy certain conditions are entitled to receive from the state an award of compensation for their injuries. In December 2012 JT applied for compensation under this scheme. Her application was rejected on the basis of a rule which has become known as the 'same roof' rule. This rule states that an award will not be made in respect of a criminal injury sustained before 1 October 1979 "if, at the time of the incident giving rise to that injury, the applicant and the assailant were living together as members of the same family." All the offences committed against JT were committed before 1 October 1979 and, throughout the period when her stepfather raped and sexually assaulted her, they were living together as members of the same family. JT was told that, because of that fact, no award of compensation will be made to her.

3. By contrast with JT, a relative of hers who gave evidence at the criminal trial has received an award of compensation under the criminal injuries scheme of £1,000 in respect of two incidents of indecent assault by JT's stepfather. Both incidents occurred before 1 October 1979 but, unlike JT, the relative was not barred from receiving compensation by the 'same roof' rule because she was not living as a member of the same family as her assailant when the incidents occurred.

4. In this appeal JT contends that the decision to reject her application for an award of compensation because of the 'same roof' rule was incompatible with article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention"), as incorporated into UK law by the Human Rights Act 1998, and was therefore unlawful. Article 14 requires the Convention rights to be secured "without discrimination". The central argument made on JT's behalf is that, in arranging for payments of compensation to persons who sustained injuries from serious crimes of violence before 1 October 1979, it is arbitrary and contrary to article 14 to draw a distinction between those who were living as a member of the same family as their assailant and those who were not, and to allow only persons who were not living as a member of the assailant's family to claim compensation. JT's case is supported by the Equality and Human Rights Commission, which has intervened in the proceedings.

5. JT's case is opposed by the Criminal Injuries Compensation Authority ("CICA"). CICA contends that article 14 of the Convention is not applicable in this case because JT's complaint of discrimination does not fall within the ambit of any Convention right and/or because JT has not been treated differently on a ground prohibited by article 14. CICA also argues that there has anyway been no violation of article 14 as the difference in treatment of which JT complains is objectively justifiable.

6. Before addressing the issues in dispute, I will outline the history of the 'same roof' rule and put it in the wider context of the law governing compensation of criminal injuries.

The original scheme

7. The first scheme which provided compensation to victims of crime in Great Britain was introduced in 1964. It was not established by an Act of Parliament but under the Crown's prerogative powers. Payments made under the scheme were made *ex gratia*.

8. The 1964 scheme included these provisions:

> "6. The Board will scrutinise with particular care all applications in respect of sexual offences or other offences arising out of a sexual relationship, in order to determine whether there was any responsibility, either because of provocation or otherwise, on the part of the victim …
>
> 7. Offences committed against a member of the offender's family living with him at the time will be excluded altogether."

9. Explaining the new scheme to the House of Commons on 5 May 1964, the Home Secretary, Mr Henry Brooke, noted that the idea that the victims of crimes should be compensated by state action was comparatively recent. He emphasised the experimental nature of the proposed scheme and the fact that nobody could tell how many claims there would be. He explained the decision to exclude offences committed against a member of the offender's family living with him at the time of the offence in this way:

> "We feel that the difficulties in clearly establishing the facts and ensuring that the compensation does not, in the end, benefit the offender are so great that these offences should be excluded, at least from an experimental scheme."

10. In winding up the debate, the Joint Under-Secretary of State for the Home Department, Ms Mervyn Pike, gave this further elucidation:

> "This part of the scheme was intended primarily to exclude an attack by a husband on a wife, or vice versa, where compensation might benefit the offender, and where the facts would be difficult to ascertain."

No mention was made in the debate of the position of children who might be the victims of a sexual assault or other crimes committed by a family member living with them at the time.

The 1979 reform

11. In 1979 a new compensation scheme was introduced which made a substantial change to the 'same roof' rule. Para 8 of the 1979 scheme provided:

> "Where the victim and any person responsible for the injuries which are the subject of the application (whether the person

> actually inflicted them or not) were living in the same household at the time of the injuries as members of the same family, compensation will be paid only where –
>
> (a) the person responsible has been prosecuted in respect of the offence, except where the Board consider that there are practical, technical or other good reasons why a prosecution has not been brought; and
>
> (b) the injury was one for which compensation … of not less than £500 would be awarded; and
>
> (c) in the case of violence between adults in the family, the Board are satisfied that the person responsible and the applicant stopped living in the same household before the application was made and seem unlikely to live together again; and
>
> (d) in the case of an application under this para by or on behalf of a minor, i.e. a person under 18 years of age, the Board are satisfied that it would not be against the minor's interests to make a full or reduced award."

12. The 1979 scheme applied only to injuries incurred on or after 1 October 1979 (see para 25 of the scheme). Applications in respect of injuries incurred before that date continued to be dealt with under the previous scheme (ibid) which contained the original version of the 'same roof' rule.

The Compensation Convention

13. In 1983 the Council of Europe adopted the European Convention on the Compensation of Victims of Violent Crimes. The United Kingdom ratified this Convention on 7 February 1990 and it entered into force for the UK on 1 June 1990.

14. Article 2 of the Compensation Convention imposes an obligation on a contracting state, when compensation is not fully available from other sources, to contribute to compensate "those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence." The Explanatory Report makes it clear that the crimes covered by the Convention include rape. Certain very limited circumstances in which compensation may be reduced or refused – none of which is relevant for present purposes – are set out in article 8.

The 1995 Act

15. Awards of compensation for criminal injuries were put on a statutory basis in England and Wales (and Scotland) by the Criminal Injuries Compensation Act 1995. Section 1 of the 1995 Act provides that the Secretary of State shall make arrangements for the payment of compensation to, or in respect of, persons who have sustained one or more criminal injuries and that such arrangements shall include the making of a scheme providing, in particular, for (a) the circumstances in which awards may be made, and (b) the categories of person to whom awards may be made. Section 11 provides for

Parliamentary control of the scheme by requiring a draft of the scheme to be approved by a resolution of each House of Parliament.

16. The first scheme made under the 1995 Act came into force on 1 April 1996 and applied to all applications received on or after that date. The 1996 scheme contained a rule (at para 7(b)) that no compensation would be paid where the injury was sustained before 1 October 1979 and the victim and the assailant were living together at the time as members of the same family. Where a case was not ruled out by this provision but at the time when the injury was sustained the victim and assailant were living in the same household as members of the same family, the scheme provided (in para 16) that "an award will be withheld unless:

> "(a) the assailant has been prosecuted in connection with the offence, except where a claims officer considers that there are practical, technical or other good reasons why a prosecution has not been brought; and
>
> (b) in the case of violence between adults in the family, a claims officer is satisfied that the applicant and the assailant stopped living in the same household before the application was made and are unlikely to share the same household again."

17. These rules were retained in the same form when new statutory schemes were made in 2001 and 2008.

The EU Council Directive

18. On 29 April 2004 the Council of the European Union adopted a Directive (2004/80/EC) relating to compensation to crime victims. Article 12(2) states:

> "All Member States shall ensure that their national rules provide for the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories, which guarantees fair and appropriate compensation to victims."

The 2012 consultation

19. Substantial reforms were made to the arrangements for the payment of compensation for criminal injuries made under the 1995 Act when the current scheme was introduced in 2012. The reforms were preceded by a consultation. The consultation paper published by the Ministry of Justice ("Getting it right for victims and witnesses") described a review of the scheme as "long overdue" and noted that "it takes place in a difficult financial climate" (para 23). The consultation paper explained that the aim of the government's proposals for reform was to reduce the cost of the scheme whilst protecting awards to those most seriously injured by violent and sexual crime (ibid).

20. In formulating the government's proposals, the following principles were said to have been taken into account (para 172):

- **"The need to protect payments to those most seriously affected by their injuries**, measured by the initial severity of the injury, the presence of continuing on on-going effects, and their duration.

- **Recognition of public concern for particularly vulnerable groups and for those who have been the victims of particularly distressing crimes**, even though the injury may not be evident, or the effects are particularly difficult to quantify, for example sexual assaults and physical abuse of adults and children.

- **Consideration of alternative provision**. Our proposals take into account the availability of other services and resources (e.g. state benefits) a victim may be entitled to receive to meet the needs arising from the injury.

- **Making the scheme simpler and easier for victims to understand**. Our proposals clarify the eligibility criteria and the evidence victims need to provide to make an application to the scheme.

- **Ensuring proposals comply with our legal obligations, both domestic and European**, and that we have shown due regard, through analysis and consultation, to the effects on those protected under equality legislation, for example disabled people, women and those from minority ethnic communities."

21. A high-level summary of the proposals (at para 174) stated on the subject of "eligibility":

> "We propose that eligibility to claim from the Scheme should be tightly drawn so as to restrict awards to blameless victims of crime who fully cooperate with the criminal justice process, and close bereaved relatives of victims who die as a result of their injuries…"

22. In a section which addressed the scope of the scheme in more detail, the paper stated (para 178):

> "The main purpose of the Scheme is to provide payments to those who suffer serious physical or mental injury as the direct result of deliberate violent crime, including sexual offences, of which they are the innocent victims. This purpose underpins all of our proposals, and it reflects the current Scheme."

23. The then current scheme applied a tariff to set the amount of awards made in recognition of a victim's pain and suffering. Injuries were divided into bands according to the severity of the injury and the type of offence, with the least serious injuries in Band 1 and the most severe in Band 25. For each band the amount awarded was fixed by the

tariff, with the lowest award being £1,000 for injuries in Band 1 and the highest award being £250,000 for injuries in Band 25. In the consultation paper the government proposed to remove tariff Bands 1 to 5 except in relation to sexual offences and patterns of physical abuse, to reduce the size of awards in Bands 6 to 12 (subject to the same exception) and to maintain the level of awards for the top 13 bands at their existing levels. The policy of protecting awards for victims of sexual offences was explained as follows (para 221):

> "Evidence suggests that victims of sexual offences may suffer a wide range of effects that go beyond the physical and psychological, including reduction in the quality of life, relationship problems and long-lasting emotional distress. We think that the public views these crimes as particularly serious and this is backed up by research which indicates that people are more concerned to avoid sexual violence than physical violence. We think that this wider impact upon victims and the level of public concern make these offences particularly significant. For these reasons we think awards specifically in respect of sexual offences merit being safeguarded, wherever in the tariff they currently appear."

24. The consultation paper included a section discussing "express exclusions" (paras 185-186) which specified a number of circumstances that the government intended to exclude from the scope of the scheme. No mention was made either in this section or anywhere else in the consultation paper of the intention to exclude from the scheme cases involving injuries sustained before 1 October 1979 where the victim and the assailant were living together as members of the same family at the time of the offence.

25. That rule and the intention to retain it were, however, mentioned in an Equality Impact Assessment which accompanied the consultation paper. This assessment explained the history of the 'same roof' rule as follows (paras 166-167):

> "Where crime occurred before 1 October 1979, an earlier Scheme applied which precluded compensation from being awarded if the applicant and assailant were living together in the same household. This was designed to prevent the assailant from benefiting from an award.
>
> In 1979, following a review, the rules changed. For offences committed after 1 October 1979, an award could be made where the assailant and applicant lived together so long as the assailant has been prosecuted in connection with the offence, or a claims officer considers there are good reasons why a prosecution has not been brought; and, in the case of adults in the family, the claims officer is satisfied that the applicant and assailant stopped living together and are unlikely to do so again. For offences committed before 1 October 1979, the original rules still apply."

26. The Equality Impact Assessment stated that the government intended to retain "these rules designed to prevent an assailant benefiting from an award," both in relation to incidents before and after 1 October 1979 (para 176). The only qualification to this

policy was that, in respect of incidents on or after 1 October 1979, it was proposed to remove the restriction that an award will not be made unless a prosecution has been brought (or there are good reasons why not). The reason for this was because:

> "we consider that the rules on cooperation with the criminal justice system and the requirement that the victim and the assailant no longer live together should be sufficient to ensure that the offender does not benefit from the award and, if possible, is brought to justice."

27. The Equality Impact Assessment considered the potential impact of the government's proposals on the protected characteristics of disability, race, religious belief and sex, and stated in relation to sex (para 174):

> "In the case where injury was sustained before 1 October 1979, we have considered that the majority of cases may involve female applicants who have suffered historic abuse."

28. Under the heading "Reason for policy and mitigating actions", the following explanation in the assessment was given of the proposal not to change the 'same roof' rule in relation to injuries sustained prior to 1 October 1979 (paras 177-178):

> "This rule was changed in 1979 to make it easier for victims of crime in their own homes to claim compensation. However, at that time the decision was taken to change the rules prospectively rather than retrospectively. This was a legitimate choice made at the time, and was in line with the general approach that changes are ordinarily made going forward, rather than in respect of historic claims. The rule has therefore been a feature of every Scheme since 1979.
>
> In the light of the potential impacts of retaining the rule, we have considered whether the Secretary of State, if he has power to do so, should amend the rule in relation to injuries sustained before 1 October 1979. We have concluded that it is justified to retain that rule on the basis that one of the aims of the Scheme reforms is to reduce the burden on the taxpayer and make the Scheme sustainable in the long term. On that basis, and taking into account the consultation proposals to reduce elements of compensation in the Scheme in the future, and restrict its scope, we do not propose to increase the Scheme's potential liability in an uncertain way in respect of injuries sustained between 1964 and 1979, more than 30 years ago. To open the Scheme up in this way would also involve a significant administrative burden for CICA and could create difficulties for claims officers in establishing the link between the offence and the injuries."

29. The consultation paper was also accompanied by an economic impact assessment. This did not include any estimate of what the cost of abolishing the 'same roof' rule for injuries sustained before 1 October 1979 might be.

30. The government response to the consultation, published in July 2012, announced certain changes to the detail of the proposals following the consultation but none that is material for present purposes. The response reaffirmed the principles quoted at para 20 above and stated that the final proposals "remain consistent with these principles" (para 151).

31. An updated Equality Impact Assessment was published with the government's response to the consultation. This confirmed the decision to retain the 'same roof' rule in relation to injuries sustained before 1 October 1979. The reasons for retaining this rule given in the initial assessment (quoted at para 28 above) were repeated in identical terms.

The 2012 scheme

32. The 2012 scheme came into force on 27 November 2012 and applies to applications for compensation received by CICA on or after that date (see para 2).

33. Para 4 sets out the basic requirement of eligibility for an award under the scheme as being that a person has sustained a criminal injury which is "directly attributable to their being a direct victim of a crime of violence …" The definition of a "crime of violence" in Annex B includes "a sexual assault to which a person did not in fact consent".

34. For present purposes, the key provisions of the 2012 scheme are paras 17 and 19 to 21. These state:

> "17. … a person is eligible for an award under this scheme only in relation to a criminal injury sustained on or after 1 August 1964.
>
> …
>
> 19. An award will not be made in respect of a criminal injury sustained before 1 October 1979 if, at the time of the incident giving rise to that injury, the applicant and the assailant were living together as members of the same family.
>
> 20. An award will not be made in respect of a criminal injury sustained on or after 1 October 1979 if, at the time of the incident giving rise to the injury, the applicant and the assailant were adults living together as members of the same family, unless the applicant and the assailant no longer live together and are unlikely to do so again.
>
> 21. An award will not be made if an assailant may benefit from the award."

35. The ordinary time limit for making an application for an award under the scheme is two years from the date of the incident giving rise to the criminal injury (see para 87). However, where the applicant was a child under the age of 18 on the date of the incident giving rise to the criminal injury and the incident is reported to the police after the applicant's 18th birthday, the two year period runs from the date of the first report to the police: see para 88(1). This is subject to a proviso that the application will only be accepted if a claims officer is satisfied that the evidence presented in support of the

application means that it can be determined without further extensive enquiries by a claims officer: see para 88(2). There is also a more general power under para 89 to extend the period for making an application where the claims officer is satisfied that (a) due to exceptional circumstances the applicant could not have applied earlier, and (b) the evidence presented in support of the application means that it can be determined without further extensive enquiries by a claims officer.

36. Para 125 of the 2012 scheme permits an applicant who is dissatisfied with a decision to appeal to the First-tier Tribunal.

Procedural history of this case

37. As mentioned earlier, when JT applied to CICA for an award of compensation for her injuries, her application was rejected on the ground that she is not eligible for an award because of the 'same roof' rule contained in para 19 of the 2012 scheme. An appeal to the First-tier Tribunal failed for the same reason. JT then applied to the Upper Tribunal Administrative Appeals Chamber for judicial review of that decision. Her claim for judicial review was made on a number of grounds including arguments that the 'same roof' rule discriminated against JT unlawfully on the basis of her age contrary to the Equality Act 2010 and/or the Human Rights Act 1998. Upper Tribunal Judge Turnbull dismissed the claim for reasons given in a judgment dated 1 September 2015: [2015] UKUT 0478 (AAC).

38. On this appeal the arguments based on the Equality Act 2010 have not been pursued. JT's case has been advanced solely on the basis that the decision of the First-tier Tribunal was unlawful because applying the 'same roof' rule was incompatible with article 14 of the Convention.

The issues

39. Article 14 of the Convention states:

> "*Prohibition of discrimination*
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

40. To determine whether applying para 19 of the 2012 scheme is incompatible with article 14, three questions need to be answered. The first is whether the difference in treatment of which JT complains concerns the enjoyment of a right set forth in the Convention – the test for this purpose being whether the facts of the case fall "within the ambit" of a Convention right. The second question is whether the difference in treatment is on the ground of a "status" which falls within article 14. The third question is whether the difference in treatment amounts to "discrimination" prohibited by article 14. Where the claimant has been treated differently from a class of persons whose situation is relevantly similar, this depends on whether there is an objective and reasonable justification for the difference in treatment.

41. Each of these three questions is in issue on this appeal. There are also issues as to the correct test to apply in determining whether any relevant difference in treatment was justified and as to the appropriate remedy if a violation of article 14 is found.

42. I will address these issues in turn, starting with the question of whether JT's complaint is within the ambit of a Convention right.

The test of ambit

43. As its opening words make clear, article 14 is not a freestanding prohibition of discriminatory treatment. It applies only in the context of securing the rights and freedoms set forth in the Convention. But this does not mean that the scope of article 14 is limited to cases where there has been a breach of another Convention right. The European Court of Human Rights has held that, where a contracting state goes further than the Convention requires in protecting any of the rights set forth in the Convention, it must do so in a manner compatible with article 14. In the phrase favoured by the Court, article 14 applies to those additional rights falling "within the ambit" of any Convention article for which the state has voluntarily decided to provide. Thus, in the *Belgian Linguistic* case (1979-80) 1 EHRR 252 the court held that, although the right to education protected by article 2 of Protocol 1 did not place an obligation on the state to set up a publicly funded school of any particular kind, if the state did set up such a school, it could not impose entrance requirements which were discriminatory. Likewise, the right to respect for private and family life protected by article 8 does not confer a right to adopt a child, but if the state makes legislative provision for adoption it must do so in a non-discriminatory manner: see *EB v France* (2008) 47 EHRR 21. So too article 8 does not oblige a state to allow non-national spouses of immigrants to join them, but where national legislation confers such a right it must do so in a non-discriminatory manner: see *Hode and Abdi v United Kingdom* (2013) 56 EHRR 27. Numerous further examples could be given.

44. In the present case the Convention article on which JT relies to engage article 14 is article 1 of Protocol 1 ("article 1P1"). This states:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. …"

The European Court of Human Rights has interpreted the concept of "possessions" broadly. As well as tangible property, the term has been held to include various intangible rights and legitimate expectations to payments or assets of various kinds. In the Court's earlier case law, however, rights to pensions and other benefits provided by the state were only considered to amount to "possessions" within the meaning of article 1P1 if they were financed by individual contributions made to a specific fund.

The Stec case

45. Given the variety of ways in which social security schemes are funded and the fact that there is often no direct link between contributions and benefits, this approach appeared increasingly artificial. The Grand Chamber of the European Court confronted the issue

in its admissibility decision in *Stec v United Kingdom* (2005) 41 EHRR SE18. In a section of the judgment headed "The approach to be applied henceforth", the court concluded that it was no longer justifiable to distinguish between contributory and non-contributory benefits. The court confirmed that article 1P1 does not restrict a state's freedom to decide whether to have in place any form of social security scheme and what type or amount of benefits to provide under any such scheme. If, however, a contracting state has in force legislation providing for the payment as of right of a welfare benefit – whether conditional or not on the prior payment of contributions – then "that legislation must be regarded as generating a proprietary interest falling within the ambit of article 1 of Protocol No. 1 for persons satisfying its requirements" (para 54). The court went on to hold (para 55) that:

> "In cases, such as the present, concerning a complaint under article 14 in conjunction with article 1 of Protocol No. 1 that the applicant has been denied all or part of a particular benefit on a discriminatory ground covered by article 14, the relevant test is whether, but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question…"

46. This approach has been reiterated by the Grand Chamber in later cases: see *Carson v United Kingdom* (2010) 51 EHRR 13, para 61; *Andrejeva v Latvia* (2010) 51 EHRR 28, para 79; *Stummer v Austria* (2012) 54 EHRR 11, paras 81-83. It was adopted by the House of Lords in *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63; [2009] 1 AC 311. No case was cited to us in which it has since been contested or questioned in a UK court.

The cross-appeal in this case

47. In the present case Upper Tribunal Judge Turnbull, applying the test set out in *Stec*, was in no doubt that the possibility of a claim to compensation under the criminal injuries scheme is sufficiently within the ambit of article 1P1 to mean that it can form the basis of a discrimination claim under article 14: see the decision of the Upper Tribunal at para 107. By a cross-appeal, CICA challenges that conclusion. CICA contends that the approach established by the *Stec* case is limited to welfare benefits and does not extend to compensation claims which fall outside the framework of social security legislation. It is said that awards made under the UK criminal injuries compensation scheme fall into the latter category and hence are outside the ambit of article 1P1.

48. In support of this contention, counsel for CICA emphasised the following passage of the judgment in the *Stec* case (para 50):

> "In the modern, democratic state, many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. Many domestic legal systems recognise that such individuals require a degree of certainty and security, and provide for benefits to be paid – subject to the fulfilment of the conditions of eligibility – as of right. Where an individual has an assertable right under domestic law to a welfare

> benefit, the importance of that interest should also be reflected by holding Article 1 of Protocol No. 1 to be applicable."

It was submitted that this passage indicates that the court was prepared to hold that social security and welfare benefits are protected by article 1P1 for the policy reason that in modern, democratic states many individuals are completely dependent for survival on such payments. It was said that this policy reason does not apply to compensation claims which fall outside the social security system.

The 'but for' test

49. In considering CICA's argument, ably advanced on its behalf by Mr Collins QC, I think it important to notice that there are two distinct aspects of the approach adopted by the European Court of Human Rights in the *Stec* case. The first step in the court's approach was to decide that article 1P1 applies whenever an individual has an enforceable right under domestic legislation to a welfare benefit, irrespective of whether such a right is conditional on the prior payment of contributions. The second step was to hold that, where a complaint is made under article 14 in conjunction with article 1P1 that a benefit has been denied on a discriminatory ground, the relevant test is whether the applicant would have had an enforceable right to receive the benefit in question, but for the allegedly discriminatory treatment. Later cases have shown that this 'but for' test applies not only where a benefits scheme is applied in a discriminatory manner but also where a person is excluded from a scheme in a discriminatory manner: see *Vrountou v Cyprus* (2017) 65 EHRR 31, paras 67-68.

50. Although the *Stec* case was concerned with welfare benefits, I can see no logical reason why the second step in the court's approach should be confined to cases involving such benefits. It seems to me to be an application of the general principle, mentioned earlier, that where a state creates rights under its domestic law which fall within the ambit of a Convention article, it must do so in a non-discriminatory manner. It follows from this general principle that article 14 is engaged if a person would have had such a right but for discrimination covered by article 14.

51. It is true that there are cases such as *Von Maltzan v Germany* (2006) 42 EHRR SE11 and *Roche v United Kingdom* (2006) 42 EHRR 50, relied on by CICA, where the court treated its finding that the applicant did not have a "possession" within the meaning of article 1P1 as carrying with it the further consequence that article 14 also did not apply. In those cases the court did not go on to consider whether, but for the rule of domestic law that was alleged to be discriminatory, the applicant would have had a claim that amounted to a "possession". However, the *Von Maltzan* case pre-dates *Stec* and the judgment in the *Roche* case was given just after the judgment in *Stec* and without reference to the latter decision. In more recent cases the European Court of Human Rights has treated the 'but for' test stated in *Stec* as a principle of general application where a complaint is made of a violation of article 14 in conjunction with article 1P1.

52. While many of these cases have involved welfare benefits, *Fabris v France* (2013) 57 EHRR 19 did not. The applicant in that case complained that, as a child "born of adultery", he was denied a right to inherit property under French law which he would have had if he had been a legitimate child. In considering the applicability of article 14, the Grand Chamber (at para 52) treated the 'but for' test as applicable in cases where the applicant has been denied "all or part of a particular asset" on a discriminatory

ground covered by article 14. The test was stated as being "whether, but for the discriminatory ground about which the applicant complains, he or she would have had a right, enforceable under domestic law, in respect of the asset in question" (emphasis added). See also *Wolter v Germany* (2018) 66 EHRR 13, para 51.

53. That is accordingly the test which should be applied here. The question is whether, but for the 'same roof' rule, JT would have had a claim which amounts to a "possession" within the meaning of article 1P1.

Welfare benefits payable as of right

54. CICA's more substantial argument is directed to the first aspect of the decision in the *Stec* case, which held that a right to a non-contributory benefit falls within the scope of article 1P1. I accept that this part of the decision was concerned solely with welfare benefits and does not illustrate any wider principle. I also accept that in deciding that benefits can constitute "possessions" for the purposes of article 1P1 whether or not they have been funded by individual contributions, the court attached some weight to the policy consideration that many individuals are dependent for survival on welfare benefits. That policy consideration, however, has not been treated in the case law as a limiting factor. The approach established in the *Stec* case has been applied to benefits of all kinds payable under national social security legislation. No distinction has been drawn, for example, between benefits which are means-related and benefits which are payable irrespective of a person's means.

55. In formulating the new approach to be applied, the European Court of Human Rights was concerned to adopt an interpretation of article 1P1 "which avoids inequalities of treatment based on distinctions which, at the present day, appear illogical or unsustainable": see *Stec v United Kingdom* (2005) 41 EHRR SE18, para 48. The solution adopted was to hold that article 1P1 applies to all welfare benefits to which – subject to fulfilling conditions of eligibility – an individual has an "assertable right" under domestic law (see para 50).

56. In adopting this approach, the court drew an analogy with its case law on what constitutes a "civil right" for the purposes of article 6(1) of the Convention. The court emphasised that the Convention must be read as a whole and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see para 47). It noted that the entitlement to a fair hearing in the determination of a person's "civil rights and obligations" guaranteed by article 6(1) had originally been held to apply to claims regarding welfare benefits only when they formed part of contributory schemes. However, in *Salesi v Italy* (1998) 26 EHRR 187 article 6(1) was held also to apply to a dispute over entitlement to a non-contributory welfare benefit, with the court emphasising that the applicant had an "assertable right", of an individual and economic nature, to social benefits. Drawing on this analogy, the court in *Stec* considered it to be "in the interests of the coherence of the Convention as a whole" that the concept of "possessions" in article 1P1 should be interpreted in a way which is consistent with the concept of pecuniary rights under article 6(1) (see para 48).

57. The application of article 6(1) of the Convention to claims to social security benefits has been considered by the UK Supreme Court in *Ali v Birmingham City Council* [2009] UKSC 8; [2010] 2 AC 39 and *Poshteh v Kensington and Chelsea Royal London Borough Council* [2017] UKSC 36; [2017] AC 624. In those cases the Supreme Court

recognised a distinction between social security and welfare benefits whose substance is defined precisely and which can therefore amount to an individual right of which the applicant can consider herself the holder, and those benefits which are, in their essence, dependent upon the exercise of judgment by the relevant authority. Cases in the latter category, where the award is dependent upon a series of evaluative judgments by the provider as to whether statutory criteria are satisfied and how the applicant's needs ought to be met, do not fall within the scope of article 6(1).

58. Counsel for CICA pointed out that in *Associazione Nazionale Reduci Dalla Prigionia dall' Internamento e dalla Guerra di Liberazione v Germany* (2008) 46 EHRR SE 11 (the *Italian Interns* case), para 81, the European Court of Human Rights said that there is "no necessary interrelation" between whether a claim falls within article 1P1 and whether it amounts to a right within the meaning of article 6(1). However, the point the court was making in the relevant passage was that article 6(1) is broader than article 1P1 in that, to come within article 6(1), it is not necessary to show an actual entitlement such as would constitute a "possession" and enough that a right is asserted on "arguable grounds". That point does not detract from the analogy drawn in the *Stec* case, which depends on the nature of what is asserted and not on the strength of the grounds relied on.

The WWII compensation scheme cases

59. The *Italian Interns* case was the first in a line of cases relied on by CICA which involved schemes set up to compensate victims of wrongs done during the Second World War. The argument made was that these cases represent a clear line of authority in which a distinction has repeatedly been drawn between welfare benefits, which are treated as falling within the ambit of article 1P1, and claims under compensation schemes, which do not fall within the ambit of article 1P1.

60. The applicants in the *Italian Interns* case were former members of the Italian armed forces during the Second World War who, after Italy changed sides, were detained by the German Reich in labour camps and forced to work in German industry. In 2000, Germany enacted a law which established a fund (financed equally by the German government and by German industry) to pay compensation to persons who had been subjected to forced labour by the German Reich. Former prisoners of war were not eligible to receive such payments and applicants who had been classified as prisoners of war argued that this exclusion violated article 14 in conjunction with article 1P1. In holding that article 1P1 was not applicable, the European Court of Human Rights started from the position that:

> "the Convention imposes no specific obligation on the Federal Republic of Germany to provide redress for wrongs or damage caused by the German Reich. Where the State, however, chooses to redress such wrongs and damage for which it is not responsible, it has a wide margin of appreciation. In particular, the State has a wide margin of appreciation when choosing how and to whom to compensate such wrongs…"

See the *Italian Interns* case, para 63. The court further held that the facts of the case did not attract the protection of article 14. The *Stec* case was said (at para 77) to be distinguishable for the following reasons:

> "It is true that both the present case and the case of *Stec* concerned non-contributory benefits which are partly funded by general taxation. However, while the case of *Stec* dealt with a supplementary regular payment and a regular retirement pension in the framework of social security, the subject of the instant case is a one-off payment granted as compensation for events which had occurred even before the Convention entered into force and represented, in a wider sense, a settlement of damages caused by the Second World War. The payments were made outside the framework of social security legislation, and cannot be likened to the payments in *Stec*."

61. Mr Collins submitted that the fact, mentioned in this passage, that the claims which were the subject of the *Italian Interns* case arose from events which occurred before the ratification of the Convention cannot in itself be material as the Convention applied at the time when the compensation scheme was introduced and when the applicants' claims to compensation were made. He argued that the relevance of this chronology was that, if the events had taken place after ratification, there would have been responsibility under the Convention in any event. Thus, the court was holding that, where a state creates a compensation scheme for wrongs for which it is not responsible under the Convention, such a scheme does not fall within the ambit of article 1P1.

62. I cannot accept that this is the correct interpretation of the reasoning in the *Italian Interns* case. If the German state had been liable under the Convention to compensate the applicants for the wrongs done to them, the applicants would have had no need to rely on article 1P1 or article 14. As I read the judgment, the reason for mentioning that the events in respect of which compensation was paid occurred even before the Convention entered into force was to emphasise the exceptional nature of the compensation scheme. The essential basis on which the case of *Stec* was distinguished was that claims to compensation under the scheme could not be regarded as amounting to entitlements protected by article 1P1 in circumstances where payments made under the scheme were in the nature of extraordinary, one-off, *ex gratia* payments which Germany had chosen to make outside the framework of its social security legislation. I do not read the observations of Lord Neuberger in *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63; [2009] 1 AC 311, para 32, on which Mr Collins relied, as in any way inconsistent with this interpretation.

63. The same reasoning explains the other cases in this line of authority: *Epstein v Belgium* (Application No 9717/05) 8 January 2008; *Ernewein v Germany* (Application No 14849/08) 12 May 2009; and *Association Nationales des Pupilles de la Nation v France* (Application No 22718/08) 6 October 2009. Each of those cases likewise involved a special one-off scheme for compensating victims of the Second World War. In the *Ernewein* case, for example, orphans whose fathers were known as "malgré nous" (that is, residents of Alsace and Lorraine forcibly conscripted into the German armed forces) complained that they did not receive compensation from Germany although payments were made to surviving members of the "malgré nous". In declaring the complaint under article 14 inadmissible, the court distinguished the *Stec* case on the basis that:

> "the United Kingdom government provided for a general pension scheme, whereas the German government did not provide for an all-encompassing compensation scheme under

> which the orphans of 'malgré nous' were in principle entitled to compensation."

The nature of the criminal injuries scheme

64. The terms "welfare benefit" and "social security" are not terms of art. They are capable of describing almost any form of financial support or help provided to citizens by the state to promote or protect their welfare. The principle in *Stec* has been applied broadly to a wide range of benefits including, for example, in the UK earnings-related allowances for persons with industrial injuries, income support for disabled persons, child tax credits, housing benefit, and disability living allowance.

65. In the sense relevant for present purposes, payments made by the state under the UK's criminal injuries compensation scheme are in my view to be regarded as welfare benefits. Such payments are no different in principle from, for example, benefits payable to persons who have suffered industrial injuries (with which the case of *Stec* was itself concerned) or to people who have disabilities. Awards of compensation under the criminal injuries scheme are not made because the state is responsible for causing the victim's injuries, any more than the state is responsible if an accident occurs at work or if a person is or becomes disabled. (In the limited circumstances in which the state is responsible for failing to prevent crimes, a separate claim for damages will arise: see *D v Commissioner of Police of the Metropolis* [2018] UKSC 11; [2018] 2 WLR 895.) The underlying justification for making payments to victims of violent crimes is that they have suffered a very serious misfortune which the whole community should help to compensate for reasons of "equity and social solidarity": see the second recital to the Convention on the Compensation of Victims of Violent Crimes.

66. It is notable that in the *Italian Interns* case the European Court of Human Rights regarded payments made under the German compensation scheme which was the subject of that case as "non-contributory benefits" (see the second passage quoted at para 60 above). What was held to distinguish that case from the case of *Stec* was that the relevant payments were one-off payments in respect of particular historic events made outside the framework of the state's regular social security legislation. Applying that distinction, I think it clear that the UK criminal injuries compensation scheme is not a special scheme set up to provide one-off payments of reparation for a particular historic event. It forms part of the general framework of social security legislation in this country. The fact that it falls within the budget and remit of the Ministry of Justice rather than the Department for Work and Pensions and is governed by a different Act of Parliament from the Social Security Contributions and Benefits Act 1992 and Social Security Administration Act 1992 cannot be dispositive. What matters is not how the scheme is administered and regulated but the nature of the scheme.

67. The question is then whether, applying the test established by the *Stec* case, the legislation provides for payments to be made as of right. Although payments made under the criminal injuries scheme were originally discretionary and *ex gratia* in nature (being described in *R v Criminal Injuries Compensation Board, ex parte P* [1994] 1 All ER 80 at 84 as "not a right but a privilege" and as a "manifestation of the bounty of the Crown"), that is no longer the case. Since the scheme was placed on a statutory footing in 1995, a victim of crime who fulfils the eligibility conditions has a right to an award under English domestic law. That was accepted by the Home Secretary and by CICA in *R (C) v The Home Office* [2004] EWCA Civ 234, para 41, in the context of article

6(1). It was also accepted by the court on an application to the European Court of Human Rights in that case: see *CB v United Kingdom* (Application No 35512/04) 25 August 2005, para 2.

68. Nor is the existence and scope of the criminal injuries scheme any longer purely a matter of choice on the part of the state. In accordance with the European Convention on the Compensation of Victims of Violent Crimes, which the UK has ratified, the UK now has an international obligation to provide compensation to victims of intentional crimes of violence who have suffered bodily injury or impairment of health. Such an obligation also arises under the Treaty on the European Union pursuant to Council Directive 2004/80EC of 29 April 2004 (see paras 13-14 and 18 above).

69. The necessary conclusion, in my view, is that the current criminal injuries compensation legislation in the UK is to be regarded as establishing a proprietary interest falling within the ambit of article 1P1 for persons satisfying its requirements. It follows that article 14 applies to JT's claim that she would be eligible for an award under the 2012 scheme but for discrimination on a ground prohibited by article 14.

70. In reaching this conclusion, I am fortified by the fact that it accords with the recent decision of the Court of Session (Inner House) in *MA v Criminal Injuries Compensation Board* [2017] CSIH 46; 2017 SLT 984, which has been followed by the High Court of Northern Ireland in *In re F* [2018] NIQB 7.

Status under article 14

71. Article 14 contains a list of grounds on which discrimination is prohibited. But the wording of article 14 also makes it plain that the list is illustrative and not exhaustive. Thus, the list is preceded by the words "on any ground such as" and ends with the words "or other status". It is not suggested that JT has been discriminated against on the ground of a status which is specifically mentioned in article 14. What is said is that the case falls within the words "or other status". The approach of the European Court of Human Rights has been to interpret that phrase ("toute autre situation" in the French text) broadly. As interpreted, article 14 is not restricted to grounds such as sex or race which are particularly suspect because they are commonly or historically associated with prejudice and discriminatory treatment. (Such an interpretation would in any event be inconsistent with the inclusion of "property" in the list of grounds.) In addition, while the court has repeatedly referred to the need for a distinction based on a "personal" characteristic in order to engage article 14, this has not been taken to limit the scope of "other status" to characteristics which are innate or inherent: see *Clift v United Kingdom* (Application No 7205/07) 13 July 2010, paras 58-59.

72. So, for example, as Lord Neuberger noted in *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63; [2009] 1 AC 311, para 43, military rank, residence or domicile and previous employment with the KGB have all been held by the European Court of Human Rights to fall within "other status" in article 14. As Lord Wilson observed in *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47; [2015] 1 WLR 2250, para 22, it is clear that, if the alleged discrimination falls within the scope of a Convention right, the European Court is reluctant to conclude that nevertheless the applicant has no relevant status, with the result that the inquiry into discrimination cannot proceed. The preferred approach is to take the nature of the ground into account at the subsequent stage of deciding whether the difference in

treatment complained of amounts to discrimination. That is done by requiring "very weighty" reasons to justify a difference in treatment on a ground which is particularly suspect or immutable: see e.g. the cases cited in *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42; [2008] 1 WLR 1434, para 29.

73. The same general approach has been followed by the UK's highest court. Characteristics which have been accepted by the Supreme Court as falling within the scope of article 14 include place of residence (see *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37; [2006] 1 AC 173 and *R (A) v Secretary of State for Health (Alliance for Choice and other intervening)* [2017] UKSC 41; [2017] 1 WLR 2492), "homelessness" (see the *RJM* case), a person's immigration status (see *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57; [2015] 1 WLR 3820), being a child suffering from particularly severe disabilities which required lengthy in-patient hospital treatment (see the *Mathieson* case), and being a co-habitee (see *In Re Brewster* [2017] UKSC 8; [2017] 1 WLR 519). On the other hand, in *Sanneh v Secretary of State for Work and Pensions* [2017] UKSC 73; [2017] 3 WLR 1486 the Supreme Court held that being a "*Zambrano*" carer (that is, a non-European citizen who is the primary carer of a European citizen) was not a status covered by article 14.

74. In *Clift v United Kingdom*, *supra*, the European Court of Human Rights, disagreeing with the view of the House of Lords in *R (Clift) v Secretary of State for the Home Department* [2006] UKHL 54; [2007] 1 AC 484, regarded a difference between prisoners based on the length of their sentence as falling within article 14. The decision of the House of Lords, however, remains binding on this court and that case is in any event at the outer limit of what the European Court has recognised as a "status" for the purpose of article 14. More recently, in *Minter v United Kingdom* (2017) 65 EHRR SE6 the European Court, distinguishing the case of *Clift*, held that article 14 did not apply to a difference in treatment which resulted from the application of a different sentencing regime introduced by new legislation to offenders sentenced after a particular date.

75. In the *RJM* case [2009] 1 AC 311, para 5, Lord Walker depicted the grounds covered by article 14 as falling within a series of concentric circles, with those characteristics which are innate or most closely connected with an individual's personality at the core. (He gave the examples of gender, sexual orientation, pigmentation of the skin and congenital disability.) A wider circle would include characteristics such as nationality, language, religion and politics which are regarded as important to the development of an individual's personality and reflect important values protected by the Convention. Further out in the concentric circles are characteristics that are "more concerned with what people do, or with what happens to them, than with who they are" but which may still come within article 14 – homelessness being one of these. The corollary of this is that:

> "The more peripheral or debatable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify."

This approach was endorsed by Lord Wilson, giving the lead judgment of the Supreme Court in the *Mathieson* case, para 21.

Age discrimination

76. As mentioned earlier, it was JT's case in the Upper Tribunal, and is still maintained on this appeal, that she has been discriminated against on the ground of age. There can be no doubt that age is a status for the purpose of article 14: see *Khamtokhu v Russia* (2017) 65 EHRR 6, para 62. But the complaint that JT has been treated differently on the ground of her age is unsustainable. Para 19 of the 2012 scheme which contains the 'same roof' rule does not draw any distinction based on age. The rule applies irrespective of how old the victim was when the offence occurred (or when an application under the scheme is made). The fact that the rule applies only to offences committed between certain dates does not make age the ground of distinction.

Living as a family member

77. The main and much more focused way in which the case has been advanced in this court identifies the relevant status by reference to the terms of para 19 of the 2012 scheme as that of someone who, when a victim of a violent crime, was living together as a member of the same family as her assailant. That, in my view, is undoubtedly a personal status of a kind which falls within article 14. Although not a core feature of a person's identity such as gender or sexual orientation, living with another person as a member of the same family seems to me to come within the middle of Lord Walker's concentric circles, being a status that – certainly in the case of a parental or quasi-parental relationship – is central to the development of an individual's personality and is not a matter which he or she can be expected to change. This is reflected in the fact that respect for a person's family life and home is protected in the Convention by article 8 because of its "central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community": see *Connors v United Kingdom* (2005) 40 EHRR 9, para 82.

78. On behalf of CICA, Mr Collins argued that the fundamental reason for the difference in treatment in this case is the date when the offences took place. He emphasised that different rules would have applied if JT's injuries had been sustained on or after 1 October 1979 – in which case living together as a member of the same family as her assailant would not have precluded her from receiving compensation – or if her injuries had been sustained before 1 August 1964, in which case she would not have been eligible for an award in any circumstances (see para 17 of the 2012 scheme). The reality, he submitted, is that the fundamental factor which defines why people are treated differently under the 2012 scheme is the date of the assault; but that cannot constitute a relevant "status" for the purpose of article 14.

79. If JT's complaint were that she has been treated differently from victims of similar crimes who sustained injuries on or after 1 October 1979, then this argument would, in my opinion, be a good answer to the complaint. I would accept that the date on which the injury occurred cannot constitute a status for the purpose of article 14, in the same way as the date on which a person was sentenced was held not to be such a status in *Minter v United Kingdom*, *supra*. But that is not the comparison made. JT's complaint is not directed at the distinction drawn in the compensation scheme rules between injuries sustained before and after 1 October 1979. It is directed at the distinction drawn among people all of whom sustained injuries from assaults during the same period (before 1 October 1979 and after 1 August 1964). The ground on which one group of

such persons is treated differently (by being barred from receiving compensation) from others whose situation is otherwise analogous is solely that those in the excluded group were living together as a member of the same family as their assailant when the offence was committed.

80. Once the relevant comparator group is correctly identified, I think it can be clearly seen that the difference in treatment complained of is based on a ground which constitutes a status for the purpose of article 14.

The test of justification

81. The next question is whether the difference in treatment complained of in this case constitutes "discrimination" prohibited by article 14. According to settled case law, this depends on whether the state can show an "objective and reasonable justification" for the difference in treatment, judged by whether it has a legitimate aim and there is a "reasonable relationship of proportionality" between the aim and the means employed to realise it: see e.g. *Rasmussen v Denmark* (1985) 7 EHRR 371, para 38; *Petrovic v Austria* (2001) 33 EHRR 14, para 30. It is also well settled in the case law of the European Court of Human Rights that states have a certain "margin of appreciation" in applying this test, the breadth of which will vary according to "the circumstances, the subject matter and the background": see e.g. *Rasmussen v Denmark* (1985) 7 EHRR 371, para 40; *Petrovic v Austria* (2001) 33 EHRR 14, para 38.

82. In its judgment on the merits in *Stec v United Kingdom* (2006) 43 EHRR 74, para 52, the Grand Chamber having made this point said:

> "A wide margin is usually allowed to the state under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'." [citations omitted]

Although this statement was referring to the margin of appreciation afforded to national authorities by an international court, the UK Supreme Court held in *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18; [2012] 1 WLR 1545, paras 15-20, that the "manifestly without reasonable foundation" test is also the test to be applied by a UK domestic court when examining a justification advanced for a difference in treatment in a matter of economic or social policy. This has been confirmed by the Supreme Court in a number of subsequent cases: see *R (SG and JS) v Secretary of State for Work and Pensions (Child Poverty Action Group Intervening)* [2015] UKSC 16; [2015] 1 WLR 1449, paras 11, 93; *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47; [2015] 1 WLR 3250, paras 26-27; *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57; [2015] 1 WLR 3820, paras 27, 75-77; *R (MA) v Secretary of State for Work and Pensions* [2016] UKSC 58; [2016] 1 WLR 4550, paras 36-38.

83. It is not immediately obvious how a test which requires a policy choice to be respected unless it is "manifestly without reasonable foundation" differs from a test of

irrationality. Nevertheless, it is also firmly established and is common ground in the present case that the test for justification remains one of proportionality. The canonical formulation of that test is now that of Lord Reed in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700, para 74, where he identified the assessment of proportionality as involving four questions:

> "(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter."

Put more shortly, the question at step four is whether the impact of the rights' infringement is disproportionate to the likely benefit of the impugned measure: ibid. Another way of framing the same question is to ask whether a fair balance has been struck between the rights of the individual and the interests of the community: see *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700, para 20 (Lord Sumption).

84. In *In re Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3; [2015] AC 1016, paras 46-52, Lord Mance (giving the lead judgment in the Supreme Court) discussed at some length the question of how the "manifestly without reasonable foundation" test relates to this four-stage assessment of proportionality. Lord Mance concluded that the test is applicable at the first stage, when asking whether the measure has a legitimate aim, and possibly at the second and third stages. However, at the fourth stage where the court is required to weigh the benefits of the measure against its impact on individual rights, it may be appropriate to give significant weight to the choice made by the legislature but "the hurdle to intervention will not be expressed at the high level of 'manifest unreasonableness'" (paras 46 and 52). Lord Thomas, who gave the other judgment, agreed with Lord Mance on this point (para 114). This view has since been endorsed by Lord Wilson in giving the majority judgment in *R (A) v Secretary of State for Health (Alliance for Choice and others intervening)* [2017] UKSC 41; [2017] 1 WLR 2492, para 33.

85. On this authority counsel for JT and for the Equality and Human Rights Commission submitted that the criterion of whether the policy choice made is "manifestly without reasonable foundation" is not relevant at the final stage of assessing proportionality in asking whether a fair balance has been struck between the rights of the individual and the interests of the community. Counsel for CICA disputed this, relying on other decisions of the Supreme Court in which no distinction has been drawn between different stages of the proportionality assessment in applying the "manifestly without reasonable foundation" test. They relied above all on *R (MA) v Secretary of State for Work and Pensions* [2016] UKSC 58; [2016] 1 WLR 4550, where a Supreme Court of seven justices unanimously rejected an argument that the courts below had been wrong to apply the "manifestly without reasonable foundation" test and the Supreme Court itself applied the test without referring to proportionality. Counsel for CICA also emphasised that the *Medical Costs* case and the *Alliance for Choice* case were not

concerned with the provision of state benefits: the former involved the retrospective deprivation of property and the latter was concerned with the provision of abortion services, a quite different field.

86. I do not accept that the *Medical Costs* and *Alliance for Choice* cases can be distinguished on the ground that they did not involve the provision of state benefits. Both involved matters of economic or social policy which fell squarely within the area where the court will be very slow to substitute its view for that of the executive or legislature. Moreover, there is nothing in the *Stec* case (or other jurisprudence of the European Court of Human Rights) from which the "manifestly without reasonable foundation" test derives, and no reason in principle or logic, to adopt a different and special rule in benefit cases. However, the approach endorsed in the *Medical Costs* and *Alliance for Choice* cases has not been explicitly discussed or applied in other decisions. It may be that at some point the Supreme Court will re-visit and clarify the correct analysis. That said, whether, at the stage of assessing whether a policy choice strikes a fair balance, the "hurdle for intervention" is pitched at the level of "manifest unreasonableness" or something slightly less is a point of some nicety which seems unlikely to make a practical difference in many cases. Certainly it would make no difference to my conclusions in the present case. In these circumstances I propose to apply both versions of the test.

Intensity of review

87. Although broad, the margin which the court should afford to a policy choice on a matter of economic or social strategy is nevertheless not without limit. As Lord Neuberger stated in the *RJM* case (para 57):

> "Of course, there will come a point where the justification for a policy is so weak, or the line has been drawn in such an arbitrary position that, even with the broad margin of appreciation afforded to the state, the court will conclude that the policy is unjustifiable."

In determining where this point comes, three important considerations emerge from the case law.

88. First, the fact that the hurdle for intervention is a high one does not mean that justifications put forward for the measure in question should escape careful scrutiny. "On analysis it may indeed lack a reasonable basis": see *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18; [2012] 1 WLR 1545, para 22 (Baroness Hale). Nor can this displace the fundamental principle that ultimately it is for the court to decide whether or not there has been a breach of a Convention right.

89. Second, as mentioned earlier, the strength of the reasons required to justify a difference in treatment will vary according to the nature of the ground on which the difference in treatment is based. In the *MA* case (para 37) Lord Toulson accepted that there are cases involving state benefits in which the European Court of Human Rights has spoken of a need for weighty reasons to justify a difference in treatment. He gave the example of *Andrejeva v Latvia* [2009] 51 EHRR 28, where state pension rules discriminated against the applicant on grounds of her nationality. Lord Toulson said that in that case "there was, on the face of it, no reasonable foundation for such discrimination, and in those

circumstances it was for the state to produce a good reason to justify it." In other words, the nature of the ground on which the difference in treatment is based will affect the readiness of the court to find that there was manifestly no reasonable foundation for it.

90. Third, a further important factor is whether or to what extent the values or interests relevant to the assessment of proportionality were actually considered when the policy choice was made. Thus, it is clear that where the public authority has addressed the particular issue before the court and has taken account of the relevant human rights considerations in making its decision, a court will be slower to upset the balance which the public authority has struck. But where there is no indication that this has been done, "[t]he court's scrutiny is bound to be closer and the court may have no alternative but to strike the balance for itself, giving due weight to such judgments as were made by the primary decision-maker on matters he or it did consider": *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19; [2007] 1 WLR 1420, para 47; see also paras 26, 37, 91; the *Tigere* case, para 32; and *In Re Brewster*, paras 50-52.

Intensity of review in this case

91. Applying these principles to the present case, I have already noted that the ground on which JT is barred from receiving compensation – that she was living as a member of the same family as her assailant – is not one of the 'suspect' grounds such as race or sex, which require "very weighty" reasons to justify a difference in treatment. In the case of a person such as JT who was a minor at the relevant time, however, it was a status which she had no power to change. It was not through any choice of hers that she was living as a member of the same family as her stepfather when he assaulted and raped her, starting before she was aged five. To treat a situation not of her making and which she could not alter as a ground for preventing her from receiving compensation is, on its face, unreasonable.

92. Further, the central importance of family life and home – particularly in the case of a child – to a person's identity makes the sexual abuse of a child by another family member – particularly one with parental responsibility – all the more injurious because it constitutes a grave abuse of trust. If anything, therefore, it might be thought that a victim in JT's position would have a <u>greater</u> claim to be treated as eligible for an award than a person who was assaulted by someone who was not living as a member of their family when the incident occurred. A good reason is needed to justify a rule which adopts the opposite position.

93. I have already noted that a decision was expressly taken by government to retain the 'same roof' rule when reforms were made to the criminal injuries scheme in 2012. Notably, however, there is nothing in the consultation documents which suggests that, in formulating the 2012 scheme, any account was taken of the relevant human rights considerations. As noted earlier, there was no reference to the 'same roof' rule in the consultation paper or in the government's response to the consultation. The rule was mentioned only in the Equality Impact Assessments.

94. The purpose of those assessments was to analyse the potential impact of the proposals on the matters identified in section 149 of the Equality Act 2010. Those matters are the elimination of unlawful discrimination and other prohibited conduct under the Equality Act, the advancement of equality of opportunity between those who share a characteristic protected by that Act and those who do not, and the fostering of good

relations between those who share a protected characteristic and those who do not. Thus, the only question addressed in the Equality Impact Assessments was whether it was justifiable to retain the 'same roof' rule in the light of the potential impacts of doing so on those equality issues (see the discussion quoted at para 28 above). There was no consideration of whether retaining the rule was compatible with article 14 of the European Convention nor of whether – irrespective of any impact on characteristics protected by the Equality Act – it is consistent with basic fairness to discriminate between victims of violent crimes according to whether or not they were living as a member of the same family as their assailant.

95. Just as importantly, no doubt because of the limited focus of the Equality Impact Assessments, there is no indication that any consideration was given to whether retaining the 'same roof' rule was consistent with the principles intended to underpin the criminal injuries compensation scheme and with the scheme's main purpose.

96. I have quoted (at para 22 above) the explanation given in the government consultation paper that the main purpose of the scheme is to provide payments to those who suffer serious physical or mental injury as the direct result of deliberate violent crime, including sexual offences, of which they are the innocent victims. It was said that "[t]his purpose underpins all of our proposals". It appears flatly inconsistent with that purpose to exclude from the scheme, as regards offences which occurred during a particular period, all innocent victims who were living as a member of the same family as their assailant, however serious their injuries, while at the same time awarding compensation for what may be far less serious injuries to persons who were not living together with their assailant at the relevant time. This also appears inconsistent with the policy stated in the government's consultation paper of attaching a high priority to awards for victims of sexual offences (see para 23 above).

97. I have also quoted at para 20 above the principles said to have been taken into account in formulating the 2012 scheme. None of those principles is capable of justifying the 'same roof' rule and the first two principles, in particular, are directly inconsistent with it. Excluding all applicants who were living as a member of the same family as their assailant conflicts with the principle of focusing resources on the most seriously injured. It also conflicts with the principle of recognising public concern for those who have been the victims of particularly distressing crimes such as sexual assaults on children.

98. Furthermore, although the fifth principle underpinning the reforms was that of "ensuring reforms comply with our legal obligations, both domestic and European", a footnote in the consultation paper identified the core legal framework for this purpose as the Criminal Injuries Compensation Act 1995, Directive 2004/80/EC, the Compensation Convention and article 6 of the European Convention on Human Rights so far as it relates to applications under the scheme. Article 14 of the European Convention on Human Rights was not mentioned. There is nothing to suggest that it was considered.

Justifications for the 'same roof' rule

99. Notwithstanding these points, the fact remains that the decision to retain the 'same roof' rule was a deliberate policy choice made by the Secretary of State for reasons which were given in the Equality Impact Assessments and which Parliament confirmed when it approved the 2012 scheme. On what is undoubtedly a matter of social and economic

policy, a court must afford a very wide latitude in examining the adequacy of those reasons.

100. Four justifications for the rule were given or mentioned in the Equality Impact Assessments. Although counsel for CICA did not seek to rely on them, I will first address what appear from the Parliamentary record to have been the two original reasons for including the 'same roof' rule in the first criminal injuries compensation scheme when it was introduced in 1964. Both of these reasons are referred to in the assessments. I will then consider the two main reasons given in the assessments for retaining the rule, which are those on which counsel for CICA relied.

Benefiting from an award

101. As noted earlier, the Equality Impact Assessments identified the aim of the 'same roof' rule as being to prevent an assailant from benefiting from an award. That is unquestionably a legitimate aim. But it would be hard to suggest that a rule which precludes any award from being made to an applicant who was living with their assailant at the time of an incident which occurred over 30 years ago – irrespective of their present situation – is rationally connected to that aim. There are in any case alternative and obviously better targeted means of ensuring that an assailant does not benefit from an award. Such alternative means have been adopted for victims of injuries sustained after 1 October 1979. They are now embodied in paras 20 and 21 of the 2012 scheme. Those rules comprise: (a) a general prohibition against making an award if an assailant might benefit from it; and (b) a more specific rule which prevents an award from being made in cases where the applicant and the assailant were adults living together as members of the same family at the time of the incident, unless the applicant and the assailant no longer live together and are unlikely to do so again. Until 2012 there was an additional restriction in such cases which prevented an award from being made unless a prosecution had been brought (or there were good reasons why a prosecution had not been brought). But, as described at para 26 above, this restriction was removed when the rules were revised because the government was satisfied that it was unnecessary and that the other rules were sufficient to ensure that an offender does not benefit from an award.

102. In circumstances where the rules in paras 20 and 21 of the current scheme are as a matter of policy regarded as sufficient to ensure that the assailant does not benefit from an award made in respect of injuries sustained on or after 1 October 1979, I can see no rational basis for regarding them as inadequate in cases where injuries were sustained before that date. Still less could it rationally be suggested that the 'same roof' rule is a proportionate means of achieving the aim of preventing an assailant from benefiting from an award. Nor indeed has CICA attempted to justify the existence of the rule by reference to that aim.

Difficulties of proof

103. Apart from concern to avoid benefiting the offender, the other reason given for adopting the 'same roof' rule when a criminal injuries scheme was first introduced in 1964 was concern that it would be difficult to ascertain the facts of offences which were committed against a member of the offender's family living with him at the time of the offence (see paras 9 and 10 above). There is a residual trace of this argument in the Equality Impact Assessments, where it was said that to open the scheme up to claims

in respect of injuries sustained between 1964 and 1979 "could create difficulties for claims officers in establishing the link between the offence and the injuries" (see para 28 above).

104. The fact is, however, that claims can already be made in respect of injuries sustained between 1964 and 1979 by victims who were not living as a member of the same family as their assailant at the time of the offence. The potential difficulties of investigating such historic claims have not been considered a good reason for excluding them from the scope of the scheme. Instead, those difficulties have been addressed by rules which provide that applications in respect of such injuries will only be accepted if (a) the applicant was a child on the date of the incident and makes the application within two years of the first report of the incident to the police (or due to exceptional circumstances the applicant could not have applied earlier); and (b) a claims officer is satisfied that the evidence presented in support of the application means that it can be determined without further extensive enquiries by a claims officer (see para 35 above). Given that as a matter of policy these rules are regarded as a sufficient filter to address the potential difficulties of investigating historic claims in some cases, it hard to conceive why they should not be regarded as sufficient in all cases. In particular, it is hard to see why the difficulties for claims officers in establishing the link between the offence and injuries sustained between 1964 and 1979 should be considered inherently greater in cases where the victim was living as a member of the same family as the assailant when the offence was committed (but is not now) than in other cases. It is even harder to conceive why, if the difficulties are for some reason thought to be greater, the restrictions on making historic claims already contained in the scheme might not be thought adequate to deal with them. In particular, it is hard to envisage any basis on which the requirement that a claims officer must be satisfied that the evidence presented in support of the application means that it can be determined without further extensive enquiries by a claims officer might be considered an inadequate safeguard – especially when it is considered adequate in cases where the victim and the assailant were not living together as members of the same family at the time of the offence. Even if, however, for some reason that safeguard was believed not to be enough, a justification would be needed for imposing a complete ban on accepting applications rather than imposing an additional requirement such as the requirement that an award will not be made unless a prosecution has been brought (or there are good reasons why not). That said, as this latter requirement was abolished in 2012 for cases where the victim's injuries were sustained after 1 October 1979 (and which could therefore relate to an incident which occurred nearly 40 years ago), it is not apparent why it should be thought necessary in cases where the victim's injuries were sustained before that date. In any event in JT's case there has of course not only been a prosecution but the offences have been proved beyond reasonable doubt by convictions at a criminal trial.

105. The essential point is that, if the 'same roof' rule is to be justified by reference to difficulties in ascertaining the facts, some form of rational explanation would need to be given which relates the distinction drawn by the rule to such difficulties. But none has been offered.

'Twas ever thus

106. I turn to consider the two main reasons for retaining the 'same roof' rule given in the Equality Impact Assessments. These are the reasons on which CICA relies.

107. The first is that the decision taken in 1979 to change the rules prospectively rather than retrospectively was "a legitimate choice made at the time, and was in line with the general approach that changes are ordinarily made going forward, rather than in respect of historic claims" (see para 27 above). There was some debate at the hearing of the appeal about what the general approach has been when making changes to the criminal injuries compensation scheme in terms of retrospective effect. It was pointed out by Mr Coppel QC representing the Equality and Human Rights Commission that in most cases when a new scheme has been introduced its rules have applied to all applications for compensation received after the date when the scheme came into force, even if the application relates to a historic injury. That was the approach taken when the 2012 scheme was introduced (see para 32 above). Any application for compensation received after the scheme came into force on 30 September 2012 is to be determined in accordance with the 2012 scheme rules, even if the application relates to a criminal injury sustained many years earlier. That means, for example, that if an application is made now by someone who sustained a criminal injury in 1980 from an incident which occurred when the applicant and the assailant were adults living together as members of the same family, the application will not be defeated by the fact that the assailant has not been prosecuted (or there are good reasons why a prosecution has not been brought). This is so even though that would have prevented an award from being made under previous schemes. In that sense, the rules have been changed to abolish the prosecution requirement retrospectively. There seems no reason in principle why a similar change could not have been made to abrogate the 'same roof' rule.

108. Nevertheless, I would readily accept that to change rules only in relation to injuries sustained after the rule change occurred would, generally speaking, be a legitimate policy choice which it is within the province of government to make. Moreover, I have already accepted that a complaint that different rules apply in relation to injuries sustained before and after 1 October 1979 is not within the scope of article 14 at all.

109. What I do not accept is that a policy of changing rules only prospectively is capable of justifying a decision to perpetuate existing discrimination. In circumstances where victims of violent crimes who sustained injuries before 1 October 1979 are in general eligible for awards, as they are under the 2012 scheme, in the absence of some other justification it cannot be a good reason for excluding one group of victims from being considered for awards that they were excluded before. If it were, then no discriminatory rule or practice would ever need to be changed. As it was well put by Ms Morris QC, it is not a reasonable foundation for a decision to retain an otherwise unjustifiable rule simply to say "'twas ever thus".

Containing costs

110. The principal reason given in the Equality Impact Assessments and relied on by CICA for retaining the 'same roof' rule is that removing it would have the effect of increasing the scheme's potential liability in an uncertain way and would also involve a significant administrative burden for CICA in circumstances where one of the aims of the reforms in 2012 was "to reduce the burden on the taxpayer and make the scheme sustainable in the long term" (see para 28 above). Counsel for CICA argued that, in the light of that aim, choices had to be made between those to whom compensation would be paid and those to whom it would not: if the scheme were extended for some it might have to be limited for others. It was submitted that such choices are pre-eminently choices for the democratically elected branches of government to make.

111. I fully accept that what level of resources to allocate to the criminal injuries compensation scheme and how to allocate those resources are pre-eminently choices for the Secretary of State to make with the approval of Parliament. Nevertheless, that freedom of choice is not completely unconstrained. In particular, it cannot be a sufficient reason for excluding a category of persons who have suffered injuries as a direct result of violent crimes from a scheme designed to compensate people who have suffered such injuries that doing so would save money. Although a wide margin is accorded to the Secretary of State in choosing how to allocate the funds made available for paying compensation to victims of crime, those funds must be allocated according to some rational set of criteria and not in a wholly arbitrary way. So, for example, it would not be rational let alone consistent with article 14 of the Convention to refuse to make awards to persons who sustained injuries between certain dates on the ground that they were living north of Watford when their injuries were sustained or that they are left-handed or that their assailant had dark hair.

112. In designing the 2012 scheme, the Secretary of State formulated a rational set of principles and policies for allocating the budgeted resources, which were set out in the consultation paper. It is not for the courts to question those principles and policies. But, as already discussed, preventing innocent victims who have suffered serious injuries as the direct result of deliberate violent crimes, including sexual assaults, from being considered for awards for the sole reason that their assailant was living with them as a family member at the time cannot be said to further the principles and policies underpinning the scheme. On the contrary, it is inconsistent with those principles and with the scheme's main purpose.

113. Put in terms of proportionality, saving a potentially significant and uncertain cost is undoubtedly a legitimate aim and the 'same roof' rule is at least causally connected to that aim. However, there are plainly other ways of saving money which do not involve excluding a group of applicants from the scheme on an arbitrary and irrational basis. Such an approach in any event manifestly fails to strike a fair balance between the objective of saving cost and the rights of individuals in the position of JT.

114. The arbitrary and unfair nature of the rule which prevents JT from receiving an award of compensation is starkly illustrated by the award which has actually been made to her relative (see para 3 of this judgment). I do not belittle the injuries which that person suffered as a result of two incidents of sexual assault which occurred before 1 October 1979. But it is clear that in terms of severity those incidents cannot stand comparison with the repeated sexual abuse and rape to which JT was subjected during most of her childhood, as established at a criminal trial. A scheme under which compensation is awarded to the relative but denied to JT is obviously unfair. It is all the more unfair when the reason for the difference in treatment – that JT was living as a member of the same family as her abuser, whereas her relative was not – is something over which JT had no control and is a feature of her situation which most people would surely regard as making her predicament and suffering even worse.

115. In these circumstances I have no hesitation in concluding that the difference in treatment of which JT complains is manifestly without reasonable foundation and violates article 14 of the Convention.

116. I mentioned that in the Upper Tribunal the case was argued as one of discrimination on the ground of age. Although the judge recognised the possibility that the case might be

framed as one of discrimination, in relation to those suffering injury before 1 October 1979, between people who were then living under the same roof as the assailant and those who were not, he discussed the issue of justification in essentially generic terms and did not focus on whether treating applicants differently on that specific ground is objectively justified.

117. In *A v Criminal Injuries Compensation Board* [2017] CSIH 46; 2017 SLT 984, on the other hand, the complaint of discrimination was put on the same ground as it has been on this appeal. The Court of Session (Inner House) was satisfied that the rule which bars victims who were living as members of the same family as their assailant from receiving compensation while allowing those who were not so living to do so was justified as "a prudent policy decision concerning the allocation of finite resources in a matter of socio-economic policy" (para 43). I have given respectful consideration to this decision but, for the reasons given, am unable to agree with it.

Conclusion on article 14

118. I would therefore hold that treating JT as ineligible for an award of compensation on the ground that she was living as a member of the same family as her assailant at the time when he assaulted her is incompatible with article 14 of the Convention.

119. Under section 6 of the Human Rights Act 1998, it is unlawful for a "public authority" – which includes a court or tribunal – to act in a way which is incompatible with a Convention right unless (broadly speaking) it is required to do so by primary legislation. The precise test is set out in section 6(2) but it is unnecessary to consider the test in detail as it has not been suggested that section 6(2) is applicable in this case. The 2012 scheme is contained in subordinate legislation and there is nothing in any primary legislation which requires the 2012 scheme to contain the 'same roof' rule or which prevents its removal. In particular, there is nothing in the 1995 Act under which the scheme was made which has that effect. Accordingly, section 6(1) of the Human Rights Act makes it unlawful for CICA (or any other public authority including the First-tier Tribunal) to apply para 19 of the 2012 scheme in JT's case.

Remedy

120. Section 8(1) of the Human Rights Act provides that, in relation to any act of a public authority which the court finds is unlawful, the court may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

121. In their skeleton arguments for this appeal, counsel for JT and for the Equality and Human Rights Commission invited the court, if the appeal is allowed, to make an order which grants JT's claim for an award of compensation for her injuries. As Ms Morris QC accepted in oral argument, however, the only issue raised in the First-tier Tribunal was whether para 19 of the 2012 scheme prevented an award of compensation from being made to JT. Whether, if not prevented by that rule, she is entitled to be paid an award and, if so, in what amount are not matters which have yet been determined by a claims officer or by the First-tier Tribunal. In these circumstances I would consider that the just and appropriate remedy is to declare that JT is not prevented by para 19 of the 2012 scheme from receiving an award.

122. The alternative remedy proposed by counsel for JT is simply to declare that para 19 of the 2012 scheme is incompatible with her rights under article 14 of the Convention. However, if what is envisaged is a declaration of incompatibility of the kind provided for in section 4 of the Human Rights Act, such a declaration is only appropriate where primary legislation prevents the removal of the incompatibility: see section 4(4)(b). As I have indicated, that is not the position here. Where, as here, a provision of subordinate legislation cannot be given effect in a way which is compatible with a Convention right and there is no primary legislation which prevents removal of the incompatibility, the court's duty under section 6(1) is to treat the provision as having no effect, as to give effect to it would be unlawful.

The Carmichael case

123. On behalf of CICA, Mr Collins submitted that to make any order which 'disapplies' para 19 of the 2012 scheme in this case would be inconsistent with the recent decision of this court in *Secretary of State for Work and Pensions v Jayson Carmichael and Sefton Council* [2018] EWCA Civ 548. That case concerned a cap on housing benefit imposed by Regulation B13 of the Housing Benefit Regulations 2006. The way in which the cap operates is that Regulation B13 contains rules for calculating the number of bedrooms to which a claimant for housing benefit is entitled. If the number of bedrooms in the dwelling which the claimant occupies exceeds the number of bedrooms to which the claimant is entitled on the basis of this calculation, the claimant's eligible rent is reduced by a percentage. This percentage is 14% where the number of bedrooms in the dwelling exceeds by one the number of bedrooms to which the claimant is entitled and 25% where the number of bedrooms in the dwelling exceeds by two or more the number of bedrooms to which the claimant is entitled.

124. Under the terms of the regulation, Mr Carmichael and his wife, as a couple, were only entitled to one bedroom. This was despite the fact that Mrs Carmichael, who is severely disabled, cannot share a bedroom with her husband because of her disabilities. Moreover, the regulation allowed an additional bedroom for a child who cannot share a bedroom but not where the claimant or the claimant's partner cannot share a bedroom because of a disability. In *R (MA) v Secretary of State for Work and Pensions* [2016] UKSC 58; [2016] 1 WLR 4550 the Supreme Court held that in these circumstances to treat Mrs Carmichael as not requiring a separate bedroom when calculating the number of bedrooms to which she and her husband were entitled violated article 14 of the Convention. Following that decision the Upper Tribunal made an order for Mr Carmichael's housing benefit to be recalculated without making a 14% deduction for under-occupancy. The issue in the Court of Appeal was whether the Upper Tribunal was right to make that order. The position was complicated by the fact that Mr Carmichael had received discretionary housing payments which he would not have received but for the fact that his housing benefit had been reduced for under-occupancy and which there was a real likelihood that he would not have to repay if his housing benefit were to be re-calculated so that he now received the sums previously deducted. In that event he would effectively have received double provision.

125. The argument made by the Secretary of State in the *Carmichael* case and accepted by the majority of the Court of Appeal (Flaux LJ and Sir Brian Leveson P) was that the First-tier Tribunal and Upper Tribunal had no power to disapply the Housing Benefit Regulations so as to reach the conclusion that Mr Carmichael had been underpaid housing benefit. It was not suggested that a court or tribunal can <u>never</u> disapply a

provision of subordinate legislation where to apply it would be incompatible with a Convention right and contrary to section 6(1) of the Human Rights Act. Such a suggestion would be flatly inconsistent with the Human Rights Act and with Supreme Court authority. Thus, counsel for the Secretary of State expressly accepted, as he was bound to do, that there are circumstances in which section 6(1) requires subordinate legislation to be disapplied. What he argued, and what the majority of the Court of Appeal accepted, was that there was no such power in the *Carmichael* case as there was no provision of the Housing Benefit Regulations which a court or tribunal could put its finger on as incompatible with Mr Carmichael's right under article 14 of the Convention not to be treated in a discriminatory way.

126. In particular, it was said that there was nothing unlawful in the provision which says that, where the number of bedrooms in the dwelling exceeds by one the number of bedrooms to which the claimant is entitled, the claimant's eligible rent is to be reduced by 14%. The problem was not with that provision but with the fact that Regulation B13 did not provide for Mr Carmichael to be entitled to an additional bedroom in circumstances where he and his wife could not share a bedroom because of her disability. But in order to overcome this defect, it would be necessary to re-write the regulation by adding a further category of case where an extra bedroom is allowed. That was something which only Parliament, and not the court or a tribunal, has the power to do.

127. I dissented in the *Carmichael* case. I did so because in my view there is no requirement that, in order to treat subordinate legislation as invalid and of no effect in a particular case by reason of section 6(1) of the Human Rights Act, it must be possible to identify a provision of the legislation which is of itself incompatible with a Convention right and hence unlawful: see paras 86-89 of the judgment. I also considered that the Secretary of State's argument was inconsistent with authority binding on the Court of Appeal: see paras 90-99. But the other members of the court did not agree with those views. In these circumstances, if this case had been factually analogous to the *Carmichael* case, I would have felt bound to follow the approach adopted by the majority in that case despite my belief that it is impossible to reconcile that approach with the decision of the Supreme Court in the *Mathieson* case and with other authorities.

128. However, this case is not analogous to the *Carmichael* case. There is no difficulty in the present case in identifying a particular provision of the relevant subordinate legislation which has discriminatory effect. Para 19 of the 2012 scheme is such a provision. No additional category of person eligible to receive an award needs to be added by introducing a new rule in order to achieve a result which is compatible with article 14. It is sufficient simply to treat para 19 as invalid and without effect in JT's case. There is also no feature of the present case which is in any way comparable to the fact that the claimant in the *Carmichael* case had received discretionary housing payments – a factor which Flaux LJ regarded as important in seeking to distinguish that case from the *Mathieson* case: see paras 49 and 67 of the judgment in the *Carmichael* case. In these circumstances, as we are not prevented from doing so by primary legislation, this court is free to disapply para 19. Indeed, section 6(1) of the Human Rights Act makes it unlawful to do otherwise. As Baroness Hale explained in *In Re P and others* [2008] UKHL 38; [2009] 1 AC 173, para 116:

> "… this cannot be a matter for discretion. Section 6(1) requires the court to act compatibly with Convention rights if it is free to do so."

Result

129. I would allow the appeal, set aside the decision of the Upper Tribunal, quash the decision of the First-tier Tribunal and make a declaration that JT is not prevented by para 19 of the Criminal Injuries Compensation Scheme 2012 from being paid an award of compensation under the scheme.

Lady Justice Sharp:

130. I agree.

Sir Terence Etherton MR:

131. I also agree.