OUTER HOUSE, COURT OF SESSION

[2022] CSOH 41

P92/20

OPINION OF LORD HARROWER

In the Petition of

A

Petitioner

for

judicial review of a decision by the First-tier Tribunal (Criminal Injuries Compensation)

Petitioner: Hood QC, Lazarowicz; Drummond Miller LLP
Respondents: Webster QC; Office of the Advocate General

18 May 2022

The issue

[1] Does the Criminal Injuries Compensation Authority ("CICA") discriminate unlawfully on the ground of residence among victims of crime in Great Britain by making the decision whether or not to withhold compensation, because the victims themselves have unspent convictions, vary with the rehabilitation periods applicable in the place where the crime against them was committed?

[2] CICA is the second respondent in these proceedings and administers the scheme applicable in Great Britain for compensating victims of crime (the Criminal Injuries Compensation Scheme 2012, "the Scheme"). On 1 October 2015 the petitioner applied to CICA for compensation in respect of a sexual assault that occurred in Scotland in 1997.

However, on 12 March 2012 the petitioner had herself received a community payback order following a conviction for assault. In terms of the Scheme, CICA withholds compensation from victims of crime who are themselves offenders, and whose convictions, at the time of their application, are not yet spent under the Rehabilitation of Offenders Act 1974 ("the 1974 Act"). The relevant provisions of the 1974 Act then in force provided that a conviction, for which the offender received a community payback order, would not become spent until the expiry of a period of 5 years from the date of sentence. Since the petitioner's conviction was still not spent at the date of her application, CICA decided that she was ineligible for an award and refused her application. On 21 January 2016, that decision was upheld on review. The petitioner appealed to the first respondent, the First-tier Tribunal (Criminal Injuries Compensation) ("F-tT"), on the following basis.

[3] The analogous sentence to a community payback order in England and Wales is the community order. Until the coming into force of s139(4) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"), the rehabilitation period in respect of both such orders was 5 years (albeit as a result of different provisions in the 1974 Act). But since 10 March 2014 the 1974 Act as amended by LASPO has provided that the rehabilitation period in England and Wales in respect of community orders should be 12 months, beginning with the day on which the order provides that it is to cease to have effect. Before the F-tT, the petitioner had argued that, if only she had been resident in England at the time of her offence, conviction and application, then her conviction would have been spent and she would have been entitled to compensation (paragraph 11 of her Note of Argument before the F-tT, as set out in paragraph 16 of its decision). She accepted that there had been no "deliberate" discrimination, but she argued that, indirectly, she had been discriminated

against on the ground of residence, contrary to article 14 of the European Convention on Human Rights ("the Convention") (paragraph 12 of her Note of Argument before the F-tT).

[4] The respondents appeared to accept before the F-tT that it was the rehabilitation period applicable in the jurisdiction where the applicant had committed her offence that would determine whether or not she was eligible to be considered for compensation. However, they argued that the existence of different periods of rehabilitation in these different jurisdictions was a reflection of the "differing public opprobrium attached to offending in the various parts of the United Kingdom [sic]", and, as such, it was a "legitimate consequence of the devolution settlement" (paragraph 25 of their Note of Argument before the F-tT, as set out in paragraph 17 of its decision).

[5] The F-tT refused the petitioner's appeal primarily on the ground that any discrimination arose not from the Scheme but from the separate policy choices made by the UK Parliament and the Scottish Parliament regarding what should be the appropriate rehabilitation period, respectively, for community orders and community payback orders (paragraphs 21-27 of their decision dated 4 November 2019). I address that aspect of their decision in this opinion, at paragraph 23, but the argument before me took on a rather different complexion.

[6] In their Answers to the petition, and at the substantive hearing, the respondents argued that it is the place where the applicant was injured that determined the relevant rehabilitation period. The fact that an applicant for compensation might be resident in England or Wales at the time of her application, or at any other time, was neither here nor there. Nor indeed was the fact that an applicant may have offended in England or Wales. Rather, if she sought compensation in respect of a crime committed in Scotland, then it was

the Scottish rehabilitation period that applied to her conviction (Answers, paragraphs 9 and 12).

[7] The petitioner met this argument by reworking her complaint of discrimination on the ground of residence. Once again, she accepted that the Scheme was not specifically targeted against residents in Scotland. However, she maintained her position that there had been indirect discrimination, since it was more likely, she argued, that a person would suffer a criminal injury in the jurisdiction where they reside than elsewhere within Great Britain (Note of Argument, paragraph 6). Accordingly, residents in Scotland were more likely to have their criminal injury compensation withheld on the ground of an unspent conviction than residents elsewhere in Great Britain. As a Scottish resident at the time of the offence committed against her, the petitioner was disproportionately affected by the much more stringent rehabilitation period applicable in Scotland. As a result, and relying on *DH* v *Czech Republic* (*(2008) 47 EHRR 3*, at paragraph 175), she argued that CICA had discriminated unlawfully against her contrary to article 14 of the Convention.

[8] The 1974 Act has since been amended, as regards Scottish community payback orders, by provisions which the F-tT considered achieved practically "the same result" as the changes made by LASPO in respect of community orders (paragraph 11 of its decision). It might be tempting, therefore, to conclude that this case, though no doubt important to the petitioner, is of no more than historical interest so far as the general administration of the Scheme is concerned. However, that is not the case. In what is now s.5D of the 1974 Act, the relevant rehabilitation period - or "disclosure period", as it has been re-styled by the Scottish Parliament - is 1 year from the date of conviction, or the period from the date of conviction to the date when the order ceased to have effect, whichever is the longer (the Management of Offenders (Scotland) Act 2019 ("MOOSA"), s23(2), with effect from 30 November 2020,

SSI 2020/245, regulation 2). The 1 year "rehabilitation" period, as it is still called by the United Kingdom Parliament, in respect of community orders, does not start to run until the day on which the order provides that it is to cease to have effect (and not the date when the order ceases to have effect, which of course may be earlier).

[9] The result is that the Scottish provisions in respect of community payback orders may now be described as more charitable towards offenders than their counterpart provisions in respect of community orders in England and Wales. The two jurisdictions also diverge regarding the length of the relevant rehabilitation/disclosure periods applicable to custodial sentences. So if discrimination on the ground of residence can be said to arise at all from the divergent administration of the Scheme in accordance with the separate rehabilitation/disclosure periods that exist within Great Britain, then it remains a live issue, the outcome of which may be of relevance to other applicants for criminal injuries compensation.

[10] I note in passing that the petition had been sisted for a lengthy period pending the outcome of the appeal to the Supreme Court in the case now reported as *A and B (Appellants)* v *Criminal Injuries Compensation Authority* 2021 1 WLR 3746. In the event, neither party referred me to that decision.

Relief

[11] The petition sought reduction of the F-tT's decision and declarator that she was not prevented by the terms of the Scheme from receiving an award of compensation. In the event that the court held that she was so prevented by the terms of the Scheme, the petition sought an alternative declarator that the Scheme was incompatible with her Convention rights, insofar as it discriminated against her on grounds of residence. However, at the

substantive hearing itself, senior counsel for the petitioner advised the court that she was no longer insisting upon the alternative declarator of incompatibility. As a result the petitioner's case became periled on whether or not the Scheme could be interpreted in such a way that she should not be considered ineligible for an award by reason of her unspent conviction. It is therefore necessary to set out the Scheme provisions in more detail.

The Scheme

[12] The Scheme was made pursuant to s1 of the Criminal Injuries Compensation Act 1995 ("the 1995 Act"), which empowers the Secretary of State to make arrangements for the payment of compensation to persons who have sustained criminal injuries. Any such arrangements are required to provide for the circumstances in which awards may be made, and the categories of persons to whom awards may be made. In terms of s3, the arrangements may include provision as to the circumstances in which an award may be withheld or reduced. In accordance with s11 of the 1995 Act, the Scheme was approved by a resolution of each House of the UK Parliament.

[13] Paragraph 26 of the Scheme provides that Annex D sets out the circumstances in which an award of compensation may be withheld or reduced because the applicant to whom an award would otherwise be made has unspent convictions. Annex D, paragraph 3, provides that an award will not be made to an applicant who, on the date of her application, has a conviction for an offence which resulted in a community order. A "community order" is defined as including a community payback order under the Criminal Procedure (Scotland) Act 1995 and a community order under the Criminal Justice Act 2003. However, paragraph 2 provides that paragraph 3 does not apply to a "spent conviction". The words "conviction" and "sentence", where they appear in Annex D, have the same meaning as

under the 1974 Act, and whether a conviction is "spent" is to be determined "in accordance with that Act".

Article 14

[14] Article 14 of the Convention, entitled "Prohibition of discrimination", provides:

> "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."

As its opening words make clear, article 14 is not a free-standing prohibition of discrimination. It is enjoyment only of the rights and freedoms set out in the Convention which the article requires to be secured without discrimination on any of the identified grounds. This does not mean that the scope of the article is limited to cases where there has been a breach of a Convention right. Clearly, that would have made article 14 redundant. Rather, 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.

[15] In the present case, the Convention right on which the petitioner relies in order to engage article 14 is article 1 of Protocol 1 ("A1P1"). It states that,

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

[16] The respondents conceded, but only for the purposes of these proceedings in the Outer House, that the petitioner's complaint fell within the ambit of the petitioner's A1P1 right (Note of Argument, paragraph 25). That concession was necessary in light of the

decision in *A* v *Criminal Injuries Compensation Board* [sic] 2017 SLT 984, and I shall proceed upon that basis.

Status

[17] The respondents further conceded, but again only for the purposes of these proceedings before me, that the petitioner had been treated differently on the ground of her status, as required in order for article 14 to be engaged. This was no doubt well advised in the light of recent jurisprudence, in particular *Clift* v *United Kingdom* (Application No 7205/07, 13 July 2010). As was recently emphasised by the Supreme Court, there has been a "significant shift towards taking a broad view of status under article 14 and, as a result, the concept of 'other status' must now be generously interpreted" (*A and B (Appellants)* v *Criminal Injuries Compensation Authority* 2021 1 WLR 3746, paragraph 57). However, it is still necessary to identify what that status is, not least because this will have consequences when considering the question of justification (as can be seen in *A and B*, at paragraph 44).

[18] In their Note of Argument, the respondents put it this way:

> "the ground of difference in treatment, namely the application of the provisions of the [1974 Act] as have effect in the place where the injury giving rise to an application under the scheme occurred, constitutes a 'status'".

To identify the relevant ground by reference to the application of the provisions in the 1974 Act comes perilously close to defining the applicant's status solely by reference to the differential treatment of which she complains. However, it has recently been reaffirmed by the Supreme Court (*A and B,* paragraph 66), that status must be based on some identifiable personal characteristic which is more than a mere description of the difference in treatment.

[19] In particular, it was not clear to me that the respondents were conceding that specifically the applicant's residence was the basis for the difference in treatment. After all, the respondents were quite clear that CICA applied the Scheme "irrespective of the place of residence of the applicant and the place of application for compensation as well as the place that any conviction and subsequent sentence was received and imposed" (Answer 12). The respondents did not indicate whether they accepted that residents in Scotland were more likely, at the time of their application for compensation, to have imposed upon them Scottish community payback orders than residents elsewhere in Great Britain. Nor therefore did they address whether such a difference in treatment, brought about indirectly as a result of the application of the Scheme, could be said to be one based on status.

[20] For the avoidance of doubt, neither the present petition nor the respondents' concession, was based merely on the applicant's having an unspent conviction, even though it is now clear from the Supreme Court's decision in *A and B*, that this would have been sufficient to constitute a status for the purposes of article 14 (paragraph 67). Since the Supreme Court also concluded that the Scheme's exclusionary rule based on unspent convictions was justified (*A and B*, paragraph 92), it was clear that the present petition would require to be based on some other status, such as that now contended for by the petitioner.

[21] I am prepared to accept, particularly in the light of the broad approach now taken to this matter, that the residence of the applicant is an identifiable, personal characteristic constituting a status for the purposes of article 14. In *R(RJM)* v *Secretary of State for Work and Pensions* [2009] 1 AC 311, it was said that, "the concept of 'personal characteristic' … generally requires one to concentrate on what somebody is, rather than what he is doing or what is being done to him" (*per* Lord Neuberger at paragraph 45). This is not necessarily a helpful distinction when it comes to residence, since it is neither clearly about what

somebody "is", or about what he "does" or "has done" to him. If, for example, homelessness, even if adopted by choice, can be an "other status" for the purposes of article 14 (*RJM*, at paragraphs 45-47), then I see no reason why residence, or the place where one has chosen to taken up home, should not be so regarded. In any event, the Supreme Court in *A and B*, has indicated that *RJM* was decided before the decision of the European Court of Human Rights in *Clift*, signalling the more relaxed approach to the question of status.

[22] Generally speaking, regional differences of treatment, resulting from the application of *different legislation* will not be held by the European Court of Human Rights to be explained in terms of personal characteristics. However, separate considerations apply where the differences in treatment result not from the different application of different legislation, but from *different application of the same legislation* (*Carson* v *United Kingdom* 2010 51 EHRR 13, at paragraph 70). *Carson* concerned the differential application, as between UK residents and residents overseas, of the same legislation regarding the index-linking of the state retirement pension. But as Lord Reed has explained in *R (on the application of A (A Child)* v *Secretary of State for Health* [2017] 1 WLR 2492,

> "Differential treatment [in the application of the same legislation] can be equally present whether the legislation in question is national or sub-national in origin, and whether the residence test relates to residence within the country in question or within a constituent part of it. A law which treats the residents of a place differently from non-residents therefore differentiates on the basis of personal status, within the meaning of article 14 , whether the law in question has been passed by the Parliament of the United Kingdom and applies to the whole of the United Kingdom, or has been passed by the devolved legislature of one part of the United Kingdom and applies only in that part; and whether the differentiation is between residents and non-residents of the United Kingdom, or between residents and non-residents of a part of the United Kingdom. The same must be equally true of an administrative arrangement" (at paragraph 47).

[23] In my opinion, any difference in treatment in this case arises from the differential application within Great Britain of a single piece of legislation or an administrative arrangement, namely, the Scheme. To that extent, I respectfully disagree with the F-tT which, as stated earlier, concluded that the difference in treatment in this case arose from the different policy choices of the Scottish Government, on the one hand, and the United Kingdom government, on the other. Certainly, different policy choices have been made. But I would rather hold that it is the Scheme itself which permits such differences in treatment, by incorporating the 1974 Act definition of "spent conviction", with the resulting potential for divergence between the jurisdictions to which the Scheme applies.

[24] In this case, therefore, I am prepared to accept that the separate rehabilitation periods applicable to community payback orders in Scotland, on the one hand, and community orders in England, on the other, may result indirectly in a difference in treatment between residents in the two jurisdictions. The next question is whether that difference in treatment can be justified, or whether it has a disproportionately prejudicial effect on residents in Scotland such as the petitioner, amounting to discrimination contrary to article 14 of the Convention.

[25] Before turning to that question of justification, I note in passing that different considerations may well apply to Northern Ireland to which neither the Scheme nor the 1974 Act applies. Northern Ireland has its own entirely separate rehabilitation of offenders legislation (the Rehabilitation of Offenders (Northern Ireland) Order 1978, SI 1978/1908 (NI 27), and its own scheme (The Northern Ireland Criminal Injuries Compensation (Amendment 2020) Scheme (2009)), administered by its own body (the Compensation Agency). Any differences in treatment between residents in Northern Ireland and residents elsewhere in the United Kingdom should perhaps be seen as arising from the different

application of different legislation. As such, and following *Carson*, they are not differences made on the ground of "status", and do not even require to be justified.

Justification

[26] The respondents justified the difference in treatment in the following terms. By requiring regard to be had to the 1974 Act, "including its requirement for different territorial effect", the Scheme "accommodate[d] and require[d] consideration of the different degrees of opprobrium attached to offending in different parts of Great Britain when assessing qualification for compensation". In the exercise of its jurisdiction and functions, CICA had regard to "the relevant opprobrium in the place where the harm for which compensation is sought occurred". In doing so it

> "rationally and proportionately relate[d] the economic and social aspects of the compensation payment to the place where the harm giving rise to a claim for compensation occurred … irrespective of the place of residence of the applicant and the place of application for compensation as well as the place that any conviction and subsequent sentence was received and imposed respectively" (Answer 12).

Argument

[27] The parties were broadly agreed as to the legal principles that were relevant to the question of whether any difference in treatment could be justified. In summarising these principles it is useful to distinguish between the test to be applied, on the one hand, and the intensity with which that test is to be applied, on the other. Intensity is about the degree of weight or respect to be given to the primary decision-maker. It varies according to the nature of the right at stake and the context in which the interference occurs (Lord Reed, *Bank Mellat* v *HM Treasury (No 2)* [2014] AC 700, at paragraphs 69-71).

[28] The proportionality test itself was summarised by Lord Reed in *Bank Mellat*, as follows:

> "(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" (paragraph 74, which, although expressed in a dissenting opinion, was a formulation with which Lord Sumption, giving the opinion of the majority of the court, agreed: paragraph 20).

So far as intensity of review is concerned, the following considerations apply.

[29] Firstly, when it comes to general measures of economic or social strategy, the court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" (*Stec* v *United Kingdom* (2006) 43 EHRR 47; *Humphreys* v *Revenue and Customs Commissioners* [2012] 1 WLR 1545, paragraphs 15-20).

[30] Secondly, the intensity of review will vary with the degree to which the characteristic, upon which the difference in treatment is based, is connected to an individual's personality. Lord Walker's well-known description of status grounds as a series of concentric circles figured prominently in the discussion before me. At the core were those characteristics, such as gender, or pigmentation of the skin, which are innate or most closely connected with an individual's personality. Beyond that lie characteristics such as nationality, language, politics and religion which were regarded as important to the development of an individual's personality and reflect important values protected by the Convention. Further out still lie characteristics that were "more concerned with what people do, or with what happens to them, than with who they are". The more peripheral any suggested personal characteristic may be, "the less likely it is to come within the most

sensitive area where discrimination is particularly difficult to justify" (*R(RJM)* v *Work and Pensions Secretary* [2009] 1 AC 311, at paragraph 5).

[31] Thirdly, it is relevant to consider whether and to what extent the values or interests relevant to the assessment of proportionality were actually considered when the policy was made. Where the public authority has addressed the particular issue before the court, and taken account of the relevant human rights considerations, the court will be slower to upset the balance that has been struck by the public authority. Where, for example, a statutory instrument has been reviewed by Parliament, respect for Parliament's constitutional function calls for "considerable caution" before the court will hold it to be unlawful (*Bank Mellat*, *per* Lord Sumption, at paragraph 44). Where there is no indication that that has been done, the 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 it did consider (*Belfast City Council* v *Miss Behavin' Ltd* [2007] 1 WLR 1420, paragraph 47).

[32] Fourthly, to allow the legislature a margin of appreciation is essential in a system of devolved legislative powers such as exists in the United Kingdom. In particular, a strict application of the "least restrictive means" test - the third leg of the *Bank Mellat* test - would allow only one legislative response to an objective that involved limiting a protected right (*Bank Mellat*, paragraph 75).

Argument for the petitioner

[33] Senior counsel for the petitioner criticised the respondent's justification on the following grounds.

[34] Firstly, the respondents produced no evidence to support their assertion that different parts of Great Britain regarded offending with different degrees of opprobrium. One could not reach such a conclusion simply because the Scottish Parliament did not immediately adopt an amendment to the rehabilitation period for community payback orders along the lines of that adopted by the UK Parliament for community orders. The 1974 Act should be treated as imposing "a ceiling and not a floor" regarding feelings of opprobrium. An employer, for example, would be free to disregard a previous conviction that was not yet spent. One cannot assume, therefore, that the rehabilitation periods set out in the 1974 Act reflect precisely the point at which people feel that an applicant for criminal injuries compensation is not entitled to an award.

[35] Secondly, there was no rational connection between CICA's operation of the Scheme and the stated objective that compensation should be related to the place where the harm occurred. The 1974 Act was aimed at the rehabilitation of the offender, and this should not turn on the place where she may happen to have sustained injury. The victim may have no social or economic connection with the place where she was assaulted. An English resident, convicted of an offence in England and Wales, but injured in Scotland, would not have been able to enjoy the benefit of the reforms implemented by LASPO. Section 4 of the 1974 Act, it was argued, has the effect that a person shall be treated "for all purposes in law" as a rehabilitated person. However, CICA's operation of the Scheme meant that there would be situations where it took into account convictions considered spent in the place where sentence was imposed; conversely, there would be situations where it took no account of convictions not yet spent in the place where sentence was imposed.

[36] Thirdly, as regards the level of scrutiny to be applied by the court, senior counsel argued that the degree of respect normally accorded to policy choices of the legislature had

no application in this case. There was no evidence to show that the UK had ever given any consideration to whether there would be a difference in treatment, let alone whether that would be justified as proportionate. It had failed to give consideration to any of the four elements of the *Bank Mellat* proportionality test. There was no evidence that there had in fact been any policy choice. There was no evidence that the UK Parliament applied its mind to the 1974 Act when giving its approval to the Scheme. What the court was being offered in this case was a justification *ex post facto*.

[37] Fourthly, senior counsel argued that the case also involved an element of discrimination on the more sensitive ground of nationality (citing *BBC Scotland* v *Souster* 2001 SC 458, a case concerned with discrimination on racial grounds contrary to the Race Relations Act 1976).

[38] Taken together, all these factors justified a more intense level of scrutiny when applying the proportionality test. In the alternative, senior counsel for the petitioner argued that CICA's operation of the Scheme, on the basis that an applicant's entitlement to compensation depended on the rehabilitation period applicable in the jurisdiction where the injury was sustained, was arbitrary and irrational. In the further alternative, senior counsel argued that there was no basis in the 1995 Act or the Scheme, or any other legislation, which permitted or required CICA to make entitlement to compensation depend on the rehabilitation period applicable in the jurisdiction where the injury was sustained.

Argument for the respondents

[39] Firstly, senior counsel for the respondents submitted that CICA operated in the field of social and welfare policy choices, made against a background of finite public resources, where the court will generally respect the legislature's policy choice unless it is "manifestly

without reasonable foundation". The policy considerations behind the current Scheme were clearly set out in its consultation paper, *Getting it right for victims and witnesses* (CP3/2012, January 2012, paragraphs 203-208).

[40] Secondly, the need for judicial restraint was greater where, as here, Parliament had reviewed the relevant subordinate legislation. The UK Parliament could have adopted a scheme that contained a definition of spent convictions that was specific to the particular context of criminal injuries compensation. It chose not to do, but instead approved a scheme which incorporated the provisions of the 1974 Act. While the changes brought about by LASPO to the rehabilitation periods in the 1974 Act were not brought into force until 10 March 2014 (The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No 9, Saving Provision and Specification of Commencement Date) Order 2014, SI 2014/423), LASPO had in fact already received the royal assent on 1 May 2012. Therefore, when Parliament gave its approval to the Scheme in the latter half of 2012, it did so having already made the relevant amendments to the 1974 Act. It should be taken to have been aware that it was giving effect to a scheme that would apply differentially north and south of the border. If the Scottish Parliament chose, at that stage, not to enact any corresponding amendments to the 1974 Act applicable in Scotland, or if, when it did amend the 1974 Act for Scotland, it did so in a way that continued to diverge from the provisions applicable in England and Wales, that was all entirely to be expected as a natural consequence of the devolution settlement.

[41] Thirdly, residence was a characteristic relating to what people do, or what happens to them, rather than with who they are. As such, and because the petitioner's case was based on indirect rather than direct discrimination, the level of intensity of judicial scrutiny was at its weakest.

[42] In any event, whatever level of intensity of review was adopted, CICA had adopted a reasonable and proportionate response, as set out in their operational guidance note as follows:

> "For applicants injured in England or Wales you should apply the Legal Aid, Sentencing and Punishment of Offenders Act (2012). For applicants injured in Scotland you should apply the current rehabilitation periods provided for in the Rehabilitation of Offenders Act (1974)".

To apply the rehabilitation periods applicable in the place of residence of the applicant, or the place where she was convicted or sentenced was arbitrary. The only "immutable characteristic" was the place of injury.

[43] Similar considerations applied to the petitioner's alternative argument based on irrationality. In respect of the petitioner's second alternative argument, that there was no basis in the relevant legislation for CICA's interpretation of the Scheme, the respondents' argument was that CICA's interpretation was in fact required by, or at least consistent with, the 1974 Act, "including its requirement for different territorial effect" (Answer 12). As they put it in their Note of Argument at paragraph 22, s4(1) of the 1974 Act, as amended, "required and requires that the provisions of the statute as it has effect in constituent parts of Great Britain are to be applied distinctly in each constituent part as they have effect there".

Decision

[44] I begin with the Scheme definition of "spent conviction". Senior counsel for the petitioner had argued that the Scheme referred to the 1974 Act not for a definition of spent conviction, but in order to provide a "cap" or "cut off point", that is a period of time upon the expiry of which a person, who would normally be entitled to compensation, should not be disadvantaged by reason of their past offending. There was "nothing in the Scheme", she

said, to prevent CICA taking a lower figure. I reject that argument. Annex D to the Scheme provides that "conviction" has the same meaning as under the 1974 Act, and that the question of whether or not a conviction is "spent" will be "determined" in accordance with that Act. In order to see what this entails, it is necessary to look at the 1974 Act in a little more detail.

[45] Although it is the conviction that becomes "spent" in terms of the 1974 Act, the rehabilitation periods, on the expiry of which a conviction becomes spent, are determined not by the nature of the offence, but by the sentence imposed. In adopting that general structure, and also the rehabilitation periods for particular kinds of sentence, the 1974 Act followed the recommendations of the Gardiner Committee, in its report, *Living it Down.* In broad terms, and leaving aside sentences of cashiering, discharge and dismissal from Her Majesty's Service, there were some sentences, such as a life sentence or a sentence of imprisonment for a term exceeding 30 months, which were excluded from rehabilitation altogether; sentences of imprisonment exceeding 6 months but not exceeding 30 months attracted a rehabilitation period of 10 years; sentences of imprisonment not exceeding 6 months attracted a period of 7 years; and a "fine or any other sentence subject to rehabilitation" attracted a period of 5 years. These periods were halved for offenders under 17. Sentences of detention for young offenders were included in a separate table of tariffs, while subsections 5(3) - 5(8) made provision for relatively short periods of rehabilitation applicable to a whole miscellany of sentences: some of these were specifically English, such as the conditional discharge, or binding over; others were specifically Scottish, such as the requirement to find caution, or orders imposed under specifically Scottish legislation. The Gardiner Committee anticipated that these periods might require to be amended in the light of experience, and this was reflected in s5(11) of the 1974 Act, giving

the Secretary of State power to substitute different rehabilitation periods. Since devolution, of course, that power has become exercisable by the United Kingdom government for England and Wales, and by the Scottish Government for north of the border.

[46] There was no suggestion in the 1974 Act that the rehabilitation periods specified for particular sentences should apply only in the jurisdiction where the sentence was imposed. The two tables of tariffs for adult and young offenders, respectively, as well as the rehabilitation periods for distinctively Scottish and English sentences, were applicable throughout Great Britain. As a result, it was unnecessary for the 1974 Act to make separate provision for the recognition by courts in England and Wales of sentences imposed by courts in Scotland, or *vice versa*. This may be contrasted with the provisions in respect of convictions imposed by courts outside Great Britain. By virtue of s1(4)(a) of the 1974 Act, references to a "conviction" in the Act included references "to a conviction by or before a court outside Great Britain"; and by virtue of s5(9)(d), a sentence imposed by a court outside Great Britain was to be treated "as a sentence of that one of the descriptions mentioned in [section 5] which most nearly corresponds to the sentence imposed". Such a "domestication" provision was unnecessary so far as the pan-British recognition of the sentences of the British courts was concerned, so long as there was a single code of rehabilitation periods that applied throughout Great Britain.

[47] The situation changed following the enactment of LASPO. Firstly, s1(4)(a) was amended such that, for England and Wales, references to a "conviction" included references to a conviction by or before a court outside England and Wales, and conversely, for Scotland, references to a "conviction" included references to a conviction by or before a court outside Scotland. Secondly, s5 was amended for England and Wales by stripping out any reference to distinctively Scottish sentences from the provisions relating to sentences

subject to rehabilitation, and by enacting s5(7)(f), which provides that, "a sentence imposed by a court outside England and Wales is to be treated as the sentence mentioned in this section to which it most closely corresponds". This was a fundamental conceptual change, since it implied that England and Wales, on the one hand, and Scotland, on the other, were not only separate jurisdictions, but had their own bespoke codes specifying the relevant rehabilitation periods their respective legal systems would apply to particular kinds of sentence.

[48] LASPO made no amendment, corresponding to s5(7)(f), providing for the domestication in Scotland of sentences imposed elsewhere within Great Britain. However, no such amendment was required, since s5, as it applied to Scotland, retained its specific provisions catering for distinctively English sentences. This can be made clear by reference to the community order imposed under s177 of the Criminal Justice Act 2003. Prior to the coming into force of s139 LASPO, s5(4A) of the 1974 Act provided, for the whole of Great Britain, that the rehabilitation period in respect of such an order would be 5 years from the date of conviction. Following the coming into force of s139 LASPO, however, community orders would attract, so far as England and Wales were concerned, the new rehabilitation period of 12 months, beginning with the day on which the order provides that it is to cease to have effect. So far as Scotland was concerned, s5(4A) continued to apply, so that the rehabilitation period in respect of such orders would remain at 5 years from the date of conviction. Community payback orders, so far as Scotland was concerned, continued to fall within the separate 5 year rehabilitation period reserved for "a fine or any other sentence subject to rehabilitation". However, in England and Wales, following the coming into force of s139 LASPO, such orders would be treated by virtue of s5(7)(f) in the same way as community orders, the sentence within s5 to which they most closely correspond.

[49] The result was that community payback orders would attract a different rehabilitation period in England than they would in Scotland and, conversely, community orders would attract a different rehabilitation period in Scotland than they would in England. There is no conflict here with s4 of the 1974 Act, which provides that a rehabilitated person, or in Scotland a protected person, shall be treated for all purposes in law as never having committed the offence of which they were convicted. It is just that the LASPO reforms ensured that a person might require to be treated as rehabilitated in England, but not in Scotland, and *vice versa*. (The "domestication" in Scotland of sentences imposed elsewhere within Great Britain was eventually provided for by s19 MOOSA, in what is now s5(2F) of the 1974 Act, which came into force on 30 November 2020 (SSI 2020 No 245, Regulation 2.)

[50] I would draw the following conclusions.

[51] Firstly, the drafters of the original scheme for criminal injuries compensation (in 1996), and of every scheme since (in 2001, 2008 and now 2012), have grafted the definition of what amounts to a "spent conviction", for the purposes of criminal injuries compensation, on to the definition provided in the 1974 Act. Certainly, the relevance of any spent conviction for the purposes of criminal injuries compensation has changed over the years: in the pre-2012 versions of the Scheme, a spent conviction could not be taken into account by a claims officer in his discretionary decision to withhold payment on the ground of the applicant's character; by contrast, in the (2012) Scheme, a conviction which is not spent operates as an outright bar to eligibility. But in every scheme for criminal compensation, the question of what amounts to a spent conviction has been indexed to whatever definition may be provided from time to time by the 1974 Act, and in particular to the rehabilitation periods that might be fixed from time to time for different parts of Great

Britain for particular types of sentence. In any event, as the respondents pointed out, Parliament gave its approval to the Scheme, having already made the amendments to the 1974 Act that gave rise to the differential application of the Scheme within Great Britain as regards community orders and community payback orders.

[52] Secondly, the drafters of the Scheme and its predecessors may be regarded as having had a choice. They could have adopted a bespoke definition of "spent convictions" for use exclusively in the context of criminal injuries compensation. That might have had the advantage that there would be no difference in treatment among applicants for compensation wherever they resided in Great Britain. But in choosing to refer all questions of whether a conviction was spent to whatever definition of spent conviction might from time to time be provided in the 1974 Act, the drafters ensured that the question of what amounts to a spent conviction in the field of criminal injuries compensation would be consistent with the rehabilitation of offenders in every other context to which the 1974 Act applies. No doubt the 1974 Act might give rise to a difference in treatment of spent convictions by different jurisdictions within Great Britain. But equally a bespoke definition of spent convictions specific to criminal injuries compensation would become uncoupled from every other context in which rehabilitation is provided for by the 1974 Act. Offenders would become rehabilitated for some purposes and unrehabilitated for others. Senior counsel for the petitioner advanced no criticism of the Scheme on the ground that the drafters made the wrong choice in this regard.

[53] Thirdly, the respondents' focus on the word "opprobrium" may have been something of a distraction. They said that the question of whether a conviction was spent should be determined by the rules applicable in the place where the offence against the applicant occurred. That approach, they said, both accommodated and required

consideration of the "different degrees of opprobrium attached to offending in different parts of Great Britain when assessing qualification for compensation". As a result, they may have made themselves vulnerable to the criticism, advanced by the petitioner, that there was no evidence for any differences in the degree of opprobrium that people in Great Britain might attach to offending. In my opinion, however, ensuring consistency between, on the one hand, rehabilitation for the purposes of criminal injuries compensation and, on the other, rehabilitation in general under the 1974 Act is a desirable legislative objective in itself. This is so regardless of any feelings of opprobrium that anyone anywhere might have in relation to any particular type of offending.

[54] Fourthly, there is the problem of whose law determines which rehabilitation period applies: the law where the applicant offended or the law where the injury occurred? This problem did not exist, or at least remained hidden, while there was a single code of rehabilitation periods applicable throughout Great Britain. In that situation, it may have seemed as if the rehabilitation period would simply be the period applicable in the place where the sentence was imposed. But it is now clear that the 1974 Act provides for different rehabilitation periods depending on whether that Act is being applied in England and Wales or in Scotland.

[55] Fifthly, although the Scheme is administered by CICA throughout Great Britain, it must do so in accordance with the local law. So, for example, the question of whether a crime has been committed in Scotland, in respect of which compensation may be claimed, must be determined according to the law of Scotland. In that situation, the differential territorial application of the 1974 Act suggests that the question of whether the applicant has any spent convictions should also be determined by Scots law. The respondents argued that the determination of that question by reference to the law of the place where the crime, in

respect of which compensation is claimed, was committed, has the merit that it relates the economic and social aspects of the compensation payment to the place where the harm occurred. That may well be the case, but I would prefer to say that it is justified because it ensures that victims of crime seeking compensation in that jurisdiction will be treated in the same way.

[56] I would therefore apply the *Bank Mellat* test as follows. (1) Insofar as those applying for criminal injuries compensation, who are themselves offenders, are treated differentially on the ground of their residence, such differential treatment is justified in order to achieve consistency between rehabilitation for the purposes of criminal injuries compensation and rehabilitation generally under the 1974 Act. (2) The determination of whether or not an applicant's conviction is spent according to the rehabilitation period applicable in the place where injury occurred, clearly has a rational connection to that objective. It is either required by the 1974 Act, or it is at least consistent with that Act, and it has the merit that it does not discriminate among victims of crime seeking compensation in any particular jurisdiction. (3) I was not invited to consider any less intrusive measure that could have been used without unacceptably compromising the achievement of that objective. Senior counsel did not seek to argue, no doubt having regard to the Supreme Court's decision in *A and B,* that the drafters of the Scheme should have retained the old rule that allowed the claims officer to withhold or reduce an award if it is appropriate to do so on the basis of the applicant's character as shown by her previous unspent convictions. In any event, such a rule would not have addressed what the petitioner regards as the mischief, namely, differential treatment based on residence. Nor was it suggested that the Scottish Parliament should have copied the Westminster Parliament's provisions in LASPO for England and Wales, or that the Westminster Parliament should have retained for England and Wales the

5 year rehabilitation period for community orders. (4) The objective I have identified outweighs, in my opinion, any difference in treatment that might indirectly arise from the decision to determine whether or not an applicant's conviction is spent according to the rehabilitation period applicable in the place where injury occurred.

[57] I have therefore concluded that any difference in treatment on the ground of residence is justified. I would have reached that conclusion regardless of whatever level of intensity should properly be applied. However, I would add that, in any event, in my view, it is the "manifestly without reasonable foundation" test that should apply. I say that for the following reasons. The Scheme operates in the field of social welfare policy where the courts should be slow to substitute their view for that of the decision-maker. Whether and to what extent the state should pay compensation to victims of crimes who have themselves offended is a question of political judgment in relation to the allocation of scarce resources (*A and B*, paragraph 83). Parliament approved the Scheme after LASPO had enacted the changes to the 1974 Act that resulted in a differential territorial treatment of community orders and community payback orders. And finally, since the basis for the difference in treatment relates only to the residence of the petitioner, it cannot be said to affect her core personal characteristics, where discrimination would be particularly difficult to justify. It may well be true, as Lord Simon said in *Ealing LBC* v *Race Relations Board* [1972] AC 342 (at p364A-B, in a passage cited with approval by Lord Marnoch in *Souster*), that "[t]o discriminate against Englishmen, Scots or Welsh as such would … be to discriminate against them on grounds of their national origin". However discrimination on grounds of residence is not discrimination on grounds of national origin "as such". Nationality and residence are separate characteristics, and the relationship between them was not further explored in argument.

[58] The petitioner's alternative argument from irrationality adds nothing, in my opinion, and I would reject it for the same reasons as I have set out above. Her second alternative argument was that neither the Scheme nor any other legislation either "permitted or required" CICA to make entitlement to compensation depend on the rehabilitation period applicable in the jurisdiction where the injury was sustained. To say that CICA's approach was not required by the Scheme does not go far enough, since that simply raises the question of justification, which I have already considered. If senior counsel intended to argue that CICA's approach was unlawful, because not permitted by the Scheme (or other legislation), then I reject that argument also. Whether or not the Scheme required the approach taken by CICA, for the reasons already given, it permitted it.

Disposal

[59] I shall therefore sustain the respondents' third and fourth pleas in law and refuse the petition. I shall reserve all question of expenses.