R(CFP) v First-tier Tribunal and CICA, Secretary of State for Justice (interested parties)
[2023] UKUT 145 (AAC)

IN THE UPPER TRIBUNAL **Case No. UA-2020-001235-CIC**
Formerly JR/1337/2020

ADMINISTRATIVE APPEALS CHAMBER

Between:

CFP

Applicant

- v –

First-tier Tribunal (Social Entitlement Chamber)

Respondent

and

(1) Criminal Injuries Compensation Authority
(2) Secretary of State for Justice

Interested Parties

Before: Upper Tribunal Judge Zachary Citron

Hearing date: 5 May 2023
Hearing venue: Field House, Breams Buildings, London EC4

Representation:
Applicant: Joshua Yetman of counsel, instructed by Free Representation Unit and Daniel Hallström (Free Representation Unit)
Respondent: Not represented
Interested Parties: Robert Moretto of counsel, instructed by Government Legal Department

DECISION

The application for judicial review is dismissed.

REASONS FOR THE DECISION

1. This is an application for judicial review of a decision (the "**FTT decision**") of the Respondent (the "**FTT**") issued on 24 June 2020.

2. References in what follows to

    a. the "**Scheme**" are to the Criminal Injuries Compensation Scheme 2012,

    b. "**paragraphs**" are (unless otherwise indicated) to paragraphs of the Scheme,

    c. "**1964**" are to 1 August 1964,

    d. the "**Convention**" are to the European Convention on Human Rights, and

    e. "**articles**" and "**protocols**" are to articles and protocols of the Convention.

The FTT decision being challenged

3. The salient parts of the FTT decision, in summary, were that

    a. on 20 February 2019 the Applicant, then aged 67, made a claim for a criminal injury compensation payment in respect of incidents that had occurred between 4 February 1955 and 6 December 1962, when she was between the ages of 3 and 11. The incidents had been reported to the police in 1962

    b. no one reading the case papers could fail to empathise with the Applicant in the light of the profound consequences of the sexual and physical abuse of which she complained in her application for compensation

    c. the Applicant was not legally represented in the FTT proceedings

    d. the sole and preliminary issue for the FTT was whether the Applicant's application under the Scheme was barred by the terms of paragraph 17, which provides:

> *Subject to paragraphs 87 to 89, a person is eligible for an award only in relation to a criminal injury sustained on or after [1964]*

e. The essential submission of the first Interested Party (**CICA**) was that the criminal injury was sustained before 1964 (notwithstanding its effects were felt for many years afterwards) and accordingly the application was ineligible for consideration of an award (regardless of when it was received)

f. the Applicant's position was

    i. there was a continuing injury in the form of chronic PTSD which continued after 1964 and thus there was a criminal injury which was sustained after 1964; and, in the alternative

    ii. paragraph 17 was incompatible with the Human Rights Act 1998 under certain articles of the Convention because it conferred no discretion to consider a claim in respect of a criminal injury sustained before 1964, and should be disregarded by the FTT, applying s6 of the Human Rights Act

g. if the Applicant were successful in her arguments about paragraph 17, then paragraph 88(1)(a) would apply (requiring the application for compensation to be received by CICA within the period ending on the Applicant's 20th birthday); in that event, the application would have been received more than 47 years out of time; it would then have been for CICA to consider whether to waive the time limits pursuant to paragraphs 88(2) and 89; although the issues raised by those paragraphs were not before the FTT, given the preliminary issue about paragraph 17, the hurdles to be surmounted by the Applicant (under those paragraphs) would have been formidable, and possibly insurmountable

h. the reasons given for dismissing the appeal included:

    i. the words "criminal injury sustained" refer to the initial injury which is directly attributable to the Applicant being a direct victim of a crime of violence (see paragraph 4), and not its continuing consequences

    ii. paragraph 17 is not incompatible with any Convention right incorporated into domestic law

iii. the potentially relevant Convention right was article 1 of the first protocol – if it was engaged, then the application of paragraph 17 could not constitute discrimination on the ground of other status contrary to article 14, based on dicta in *JT v First-tier Tribunal (Social Entitlement Chamber) & anor* [2018] EWCA Civ 1735.

The Upper Tribunal proceedings

4. On 29 April 2021 Upper Tribunal Judge Levenson gave permission to bring judicial review proceedings challenging the FTT decision, limited to the question of whether there is any way of departing from or disapplying the rule that compensation may not be awarded in respect of criminal injury or injuries sustained before 1964. The case management directions said: "Clearly, if the '1964 rule' has to be applied, then the challenge to the decision must fail. However, this matter merits consideration by the Upper Tribunal."

5. In around September 2022, the Free Representation Unit (**FRU**) agreed to take on the Applicant's case. I record here the Upper Tribunal's gratitude to FRU for so doing.

6. In FRU's "reply" on behalf of the Applicant dated 6 January 2023, it was argued that Judge Levenson's grant of permission to bring judicial review proceedings was broad enough to encompass "both the arguments raised before the FTT", which, according to the Applicant, were:

    a. the question of the proper construction of the word "sustained" in the Scheme; and

    b. the compatibility of paragraph 17 with the Human Rights Act 1998.

7. Mr Yetman's skeleton argument, dated 21 April 2023, framed the Applicant's two grounds as follows:

    a. "sustained" under paragraph 17 can be interpreted so as to include injuries which arise in consequence of a crime of violence which occurred before 1964;

    b. in the alternative, whether paragraph 17 discriminates against the Applicant on the basis of her other status as (i) the victim of a crime that pre-dates 1964, or (ii) her age, under article 14 of the Convention when read with article 1 of protocol 1.

8. On the day before the hearing, Mr Yetman delivered a "supplementary" skeleton arguing a third limb of status, that of sex (being a female).

9. The Interested Parties objected to the Upper Tribunal's considering the first of the Applicant's grounds, per the "response" and the skeleton argument, on the basis that it was outwith the permission given by Judge Levenson. They also objected to the Upper Tribunal's considering the "sex" limb of status, since it was a new argument not mentioned in the Applicant's "response" or the skeleton argument.

10. In my view, the Applicant's first ground is, probably, outwith the permission given by Judge Levenson; I nevertheless consent to it, under rule 32 of the Upper Tribunal's procedure rules, since

    a. the Applicant was not represented at the permission stage of proceedings;

    b. the point seems to me arguable;

    c. the Interested Parties had sufficient time to consider the point;

    d. in my view, the point is consistent with what the Applicant argued before the FTT, namely, that there was a continuing injury in the form of chronic PTSD which continued after 1964 and thus there was a criminal injury which was "sustained" after 1964; and

    e. overall, the balance of fairness and justice favours considering the ground.

11. I also consider it fair and just to consider the Applicant's "sex" status argument, since

    a. it is closely enough related to the other arguments being run by the Applicant;

    b. it is, as argued, a fairly "compact" point, based on certain numerical information in a document (the 2012 equality impact assessment published by the Government) which was, in any case, before the Upper Tribunal;

    c. Mr Moretto was, fortunately, expert enough to be able to address the tribunal at the hearing on the point, on very short notice.

12. For completeness, I decided that it would not, on balance, promote a fair and just resolution of this application, to invite further written submissions on the "sex" status argument, post-hearing; in my view, this would have engendered unnecessary delay and, unfairly, potentially enabled the Applicant to expand further upon what was, in reality, a self-contained point that was fairly and justly dealt with in oral argument at the hearing.

13. In general, I am grateful to both counsel for their very helpful submissions, in writing and orally at the hearing.

The Applicant's first ground: criminal injury was "sustained" after 1964

The Applicant's argument

14. The Applicant argued that a criminal injury can be "sustained" after 1964 (for paragraph 17 purposes) where the injury "arises" (the word used by the Applicant) post-1964 in consequence of a crime of violence which occurred pre-1964.

15. The argument runs counter to the decision of the Upper Tribunal in *R(LM) v First-tier Tribunal (CIC)* [2011] UKUT 179 (AAC), where Judge Rowland stated (at [12], and referring to paragraph 7(b) of the 2001 criminal injuries compensation scheme, which was worded like paragraph 17, except by reference to 1 October 1979 rather than 1964):

> An injury is "sustained" when it is inflicted, even though the effects may appear only some time later. Paragraph 7(b) is unambiguous and its plain effect is that compensation cannot be awarded in respect of the effects of injuries sustained before 1 October 1979.

16. The facts of *LM* were that the claimant had been subjected to physical and sexual abuse by her father and to emotional abuse by both parents; as an adult, she received psychiatric treatment and was diagnosed with PTSD and depression amongst other things. The FTT had dismissed her appeal in respect of abuse by her parents on the ground that no compensation was payable in respect of injuries sustained before 1 October 1979 due to the effect of paragraph 7(b) of the 2001 scheme. Under the 2001 scheme, criminal injury was defined as "personal injuries" of a certain kind (including, *directly attributable to a crime of violence*), and "personal injury" was defined to include

> ".. mental injury (that is temporary mental anxiety, medically verified, or a disabling mental illness confirmed by psychiatric diagnosis) and disease (that is a medically recognised disease or condition). Mental injury or disease may either result directly from the physical injury or from a sexual offence or may occur without any physical injury."

17. The Applicant sought to construct her argument about the meaning of "sustain" in paragraph 17 by reference to paragraph 4, which appears in the Scheme under the heading, *Eligibility: injuries for which an award may be made*, a section which also includes paragraphs 5, 6 and 9, which describe other circumstances in which a person *may be eligible for an award* under the Scheme. Paragraph 4 states:

> A person may be eligible for an award under this Scheme if they sustain a criminal injury which is directly attributable to their being a direct victim of a crime of violence committed in a relevant place. The meaning of "crime of violence" is explained in Annex B.

18. (It does not appear to be in contention in this case that the Applicant *was* a direct victim of a crime of violence.)

19. The Applicant argued that the wording of paragraph 4 indicates that the sustaining of a criminal injury can post-date the committing of a crime of violence of which the person in question is a victim – and so, in principle, a person who is a victim of a crime of violence committed pre-1964, could sustain criminal injury attributable to that crime, post-1964.

20. The Applicant also pointed to the fact that the 2001 scheme (considered in *LM*) did not have a provision identical to paragraph 4 (although I note that the 2001 scheme, in its definition of criminal injury, did require the injury to be directly attributable to (inter alia) a crime of violence (paragraph 8(a) of that scheme)).

The proper approach to interpreting the Scheme

21. In *R (Colefax) v First-tier Tribunal (Social Entitlement Chamber)* [2014] EWCA Civ 945 at [16-18], Briggs LJ said this in relation to statutory schemes (like the Scheme):

> … Like any other provision in a statutory scheme, it is to be interpreted, at least as a starting point, by reference to the ordinary meaning of the words used, without being distracted by an inappropriate endeavour to fit the statutory scheme within the confines of some analogous legal context, either at common law or (as in this case) under the Limitation Acts: see *S v First-tier Tribunal (Social Entitlement Chamber)* [2014] 1WLR 1313, para 19, Laws LJ, a case about a different provision in the same scheme.
>
> 17. A slightly qualified version of the same point is to be found in the judgment of Carnwath LJ in *Rust-Andrews v First-tier Tribunal (Social Entitlement Chamber)* [2011] EWCA Civ 1548, a case about the 2001 version of the Scheme. He said, at para 34:

> "In my view . . . if one looks simply at the Scheme, rather than trying to fit it in to a pre-conceived 'common law' model, this is a relatively straightforward case. The issue is not whether 'common law principles' apply. The Act answers that question in the negative, since it expressly requires compensation to be determined in accordance with the Scheme. However, as the judge I think acknowledged, that does not require the exercise to be conducted in a straitjacket, or mean that no help can be gained where appropriate from the wisdom reflected in authorities at the highest level dealing with similar issues."

> 18. To that, I would add that the requirement to give the words of a statutory scheme their ordinary meaning none the less inevitably requires those words to be construed both in the context of the scheme as a whole, and with due regard to its evident purpose.

The Upper Tribunal's analysis

22. I agree with the Applicant that, per paragraph 4, there is clearly a distinction being made between being a victim of a crime of violence, and sustaining criminal injury.

23. However, I do not think this point takes matters forward as to *when* a criminal injury is *sustained.* Nor do I think the absence of a provision identical to paragraph 4 from the 2001 scheme, is a basis for distinguishing the dicta in *LM* about the meaning of "sustaining" criminal injury, from the facts of this case.

24. Furthermore, given the principles for interpreting the Scheme summarised in the dicta above, I have not taken any material assistance from a number of authorities on "causation" under 'common law' and criminal law, cited by Mr Yetman.

25. For similar reasons, I have not benefited from the references to the Government's 2012 consultation paper that preceded the Scheme: as the Applicant argued in her second ground (and I accept), that consultation did not expressly engage with the terms of what became paragraph 17 (i.e. the question of excluding those who sustained criminal injury prior to 1964) – it therefore offers no material aid to interpretation of that paragraph.

26. I am, however, persuaded by the Applicant to this limited extent, that I do not think *LM* at [12] is a complete answer to the question of what it means to "sustain" a criminal injury. The interpolation there of "inflicted" for "sustained" works well enough for straightforward physical injury: the physical injury is "sustained" when it is "inflicted". However, *LM* does not, in my respectful view, adequately explain how, and when, criminal injury in the form of longer-term *mental* injury is "inflicted": *post-traumatic* stress disorder, based on the highlighted part of its name, might be thought to be a continuing injury of this kind. In general, it is in my view potentially unhelpful to interpret a word in a

statutory scheme by substituting a different word, as opposed to grappling with what the word selected by the drafter means, in its context.

27. The primary aids to interpreting a phrase in the Scheme are *context* and *evident purpose*, both by reference to the Scheme as a whole. As a first step in understanding when a particular criminal injury was *sustained*, it seems to me important, with an eye to *context*, to understand what the relevant "criminal injury" in question *is*.

28. "Criminal injury" is defined in the Scheme to mean an injury which appears in Part A or B of the tariff in Annex E.

29. (Under the Criminal Injuries Compensation Act 1995, schemes are to make provision for a standard amount of compensation, determined by reference to the nature of the injury; and for the standard amount to be determined in accordance with (inter alia) a table ("the Tariff") prepared by the Secretary of State).

30. In this case, the more relevant categories of injuries that appear in those parts of that tariff are

    a. "mental injury" in Part A, or,

    b. in Part B, "sexual offence where victim is a child".

31. (I note that paragraph 34 resolves the situation where both these kinds of injuries are sustained:

    > Where a person has sustained a mental injury as a result of a sexual assault, they will be entitled to an injury payment for whichever of the sexual assault or the mental injury would give rise to the highest payment under the tariff.)

32. In part A, the most relevant item under the "mental injury" heading appears to be:

    > "Permanent mental injury, confirmed by diagnosis or prognosis of psychiatrist or clinical psychologist:
    >
    > - moderately disabling
    >
    > - seriously disabling"

33. Another item under "mental injury" – "disabling mental injury confirmed by diagnosis etc" – varies according to how long it "lasts" (the minimum being

"lasting 6 weeks or more up to 28 weeks" and the maximum being "5 years or more but not permanent").

34. Note [2] there says:

> "A mental injury is disabling if it has a substantial adverse effect on a person's ability to carry out normal day-to-day activities for the time specified (e.g. impaired work or school performance or effects on social relationships or sexual dysfunction)"

35. There is arguably in note [2] a distinction being drawn between the "mental injury" and its "disabling" *effect*. Read in that light, the reference to how long the disabling "lasts" in the description of the mental injury would seem to be to the effect of the mental injury, rather than the injury itself.

36. A contrary view would be that a disabling mental injury, and its effect, are one and the same. I shall return to these conflicting interpretations below, after reviewing the relevant criminal injury in Part B.

37. In Part B, under the "sexual offence where victim is a child" heading, the most relevant entries appear to be: "sexual assault" or "non-consensual penile penetration of one or more of vagina, anus or mouth", in both cases

> "… <u>resulting in</u> permanently disabling mental illness confirmed by psychiatric prognosis
>
> - moderate mental illness
>
> - severe mental illness"

38. Here, as the wording underlined (by me) above shows, it is reasonably clear that the *injury* is the sexual assault etc; the mental illness is described as the *result*.

39. This leaves us with the question of whether it would be right to interpret criminal injury *qua* disabling "mental injury" in Part A as including the disabling effect of the injury when, in Part B, it seems quite clear that criminal injury *qua* sexual assault etc does not include the mental illness "effect" of sexual assault etc. This question is, in my view, material to *when* the criminal injury *qua* disabling "mental injury" is *sustained* – if such an interpretation is right, the criminal injury is sustained when its disabling effects are felt.

40. In my view, given that criminal injury *qua* "mental injury" in Part A can, quite reasonably, also be interpreted as distinct from the effect of the injury, it is more in keeping with the context and the purpose of the Scheme as a whole to adopt a *consistent* construction (as far as this particular point is concerned) of both mental injury in Part A and mental illness as the effect of sexual assault etc in Part B. It is also significant, in my view, that this interpretation –

distinguishing the criminal injury from its effect - is consistent with the approach to physical injury.

41. I therefore conclude that, in the context of a longer-term mental condition like PTSD, as a result of a crime of violence, the criminal injury, be it "mental injury" per Part A of the tariff or "mental illness" as an effect of sexual assault etc in Part B, is sustained when the assault, or other trauma giving rise to the mental injury, occurs (and not when the mentally disabling effects of that injury are felt).

42. It follows that the FTT decision did not err in law on this point and so the first ground of the Applicant's application fails.

The Applicant's second ground: discrimination under the Convention

43. The Applicant's second ground – if her criminal injuries are taken to have been "sustained" pre-1964 and so fall outside the Scheme by virtue of paragraph 17 – is that this paragraph unjustifiably treats her differently from other Scheme applicants on grounds of

    a. her sex; and/or

    b. her "other" status of

        i. being someone that sustained a criminal injury pre-1964, and/or

        ii. her age

    for the purposes of article 14 when read with article 1 of protocol 1.

The relevant legal provisions

44. Article 14 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.

45. Article 1 protocol 1 provides:

> 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 preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

46. Under s6(1) of the Human Rights Act 1998, it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Paragraph 17 appears in secondary legislation and is not within an exclusion from s6(1) set out in s6(2).

The relevant questions

47. Adapting [40] and [81] of *JT*, to determine whether applying paragraph 17 is incompatible with article 14, the following questions need to be considered:

    a. whether the difference in treatment of which the Applicant 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.

    b. whether the difference in treatment is on the ground of a "status" which falls within article 14.

    c. 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; in other words, does the differential treatment pursue a legitimate aim and is there a reasonable relationship of proportionality between the means employed and the aim sought to be realised?

48. There was agreement between the Applicant and the Interested Parties that the FTT was right to answer the first question above in the affirmative: in *JT* at [69] it was decided that article 14 applies to a claim for eligibility for an award under the Scheme but for discrimination under a ground prohibited by article 14.

Status arguments – is "sustaining injury pre-1964" an "other status"?

49. The following dicta from *JT* appear relevant to the first "other status" argued for by the Applicant (that of being someone who sustained criminal injury pre-1964). By way of context, *JT* was about someone who, as a child, suffered sexual assault and rape at the hands of her stepfather – but because her injuries were sustained before 1 October 1979, she did not benefit from a "prospective" (for injuries sustained on or after 1 October 1979) change in the terms of successive criminal injuries compensation schemes (including the Scheme) (removing the "same roof" rule by which compensation was not payable to a victim living together with the assailant).

> 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 paragraph 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.
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> 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* 65 EHRR SE6. 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.

50. I agree with the Applicant that the dicta in [79] of *JT* above, which I have underlined, are obiter, albeit of persuasive authority. More significantly, however, the subject of "status" was, subsequent to *JT*, addressed by the Supreme Court in *R(SC) v SSWP* [2021] UKSC 26 (Lord Reed) thus (interestingly, by reference to a post-*JT* judgement of Leggatt LJ, who delivered the judgement in *JT*):

> 69. The Court of Appeal was able to consider this issue in the light of the discussion of article 14 in *R (Stott) v Secretary of State for Justice* [2020] AC 51. Leggatt LJ agreed with the judge that, in article 14, the words from "on any ground such as" to "or other status" … were intended to add something to the requirement of discrimination. It followed that status could not be defined solely by the difference in treatment complained of: it must be possible to identify a ground for the difference in treatment in terms of a characteristic which was not merely a description of the difference in treatment itself. On the other hand, he also observed that there seemed to be no reason to impose a requirement that the status should exist independently, in the sense of having social or legal importance for other purposes or in other contexts than the difference in treatment complained of. In that regard, Leggatt LJ referred to some illustrations in the European and domestic case law, such as the judgment of the European court in *Paulik v Slovakia* (2006) 46 EHRR 10,

> where "there was no suggestion that the distinction relied upon had any relevance outside the applicant's complaint but this did not prevent the court from finding a violation of article 14" (*Clift v United Kingdom* (Application No 7205/07) (unreported) 13 July 2010,para 60).
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> 70. Applying that approach to the facts of the case, Leggatt LJ agreed with the judge that the term "sibling" was not strictly apt, as what mattered under the legislation was the number of children for whom the claimant was responsible, rather than the relationship between those children. But the basic distinction which the legislation sought to draw was a simple one, between households containing one or two children, and households containing more than two children. Being a child member of a household containing more than two children could be regarded as an individual characteristic or status for the purposes of article 14. That was so even if that status was given more precise definition by the legislation.
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> 71. I respectfully agree with that reasoning, and with that conclusion. I would add that the issue of "status" is one which rarely troubles the European court. In the context of article 14, "status" merely refers to the ground of the difference in treatment between one person and another. Since the court adopts a stricter approach to some grounds of differential treatment than others when considering the issue of justification, as explained below, it refers specifically in its judgments to certain grounds, such as sex, nationality and ethnic origin, which lead to its applying a strict standard of review. But in cases which are not concerned with so-called "suspect" grounds, it often makes no reference to status, but proceeds directly to a consideration of whether the persons in question are in relevantly similar situations, and whether the difference in treatment is justified. As it stated in *Clift v United Kingdom*, para 60, "the general purpose of article 14 is to ensure that where a state provides for rights falling within the ambit of the Convention which go beyond the minimum guarantees set out therein, those supplementary rights are applied fairly and consistently to all those within its jurisdiction unless a difference of treatment is objectively justified". Consistently with that purpose, it added at para 61 that "while . . . there may be circumstances in which it is not appropriate to categorise an impugned difference of treatment as one made between groups of people, any exception to the protection offered by article 14 of the Convention should be narrowly construed". Accordingly, cases where the court has found the "status" requirement not to be satisfied are few and far between.

51. Adopting the approach above, *the ground of the difference in treatment between one person and another* engaged in this case is whether they sustained criminal injury before, or after, 1964. It *is* possible, here, to identify the ground for the difference in treatment – as just expressed – in terms of a characteristic which was not merely a description of the difference in treatment itself (being, whether or not the person qualifies for criminal injury compensation). In my view, it is an "other status" for the purposes of article 14.

"Age" and "sex" status arguments

52. The "age" and "sex" statuses argued by the Applicant are potentially instances of *indirect* discrimination (as paragraph 17, on its terms, is entirely neutral as

to the applicant's age or sex). Lord Reed said this about indirect discrimination in *SC*:

> 49. … "The [European Court of Human Rights] has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group, and that discrimination potentially contrary to the Convention may result from a de facto situation. This is only the case, however, if such policy or measure has no 'objective and reasonable' justification, that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality' between the means employed and the aim sought to be realised": *Guberina [v Croatia* (2016) 66 EHRR 11], para 71. The judgments cited in support of that proposition included *DH v Czech Republic*. This is what is described in the Convention case law as "indirect discrimination". It can arise in a situation where a general measure or policy has disproportionately prejudicial effects on a particular group. It is described as "indirect" discrimination because the measure or policy is based on an apparently neutral ground, which in practice causes a disproportionately prejudicial effect on a group characterised by a salient attribute or status.
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> 50. The concept of indirect discrimination has only gradually come to be recognised by the European court. An early example is *Hoogendijk v The Netherlands* (2005) 40 EHRR SE22, where a requirement to qualify for a social security benefit affected more women than men. The court held that "where an applicant is able to show, on the basis of undisputed official statistics, the existence of a prima facie indication that a specific rule - although formulated in a neutral manner - in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex" (p 207). The government having failed to do so on the facts of the case, the court held that "the question therefore arises whether there is a reasonable and objective justification for the introduction of [the measure in issue]". On the facts, it was held that there was.
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> 51. The Grand Chamber adopted a broadly similar approach in *DH v Czech Republic* 47 EHRR 3, which concerned indirect discrimination on the ground of ethnic origin. That aspect of the case was highly significant, since a difference in treatment based exclusively or to a decisive extent on ethnic origin is incapable of being justified (as the court noted at para 176). As in *Hoogendijk*, the starting point was for the applicants to submit evidence (again based on official statistics) giving rise to a prima facie case, or "presumption", of discrimination on the ground of ethnic origin (paras 180, 189 and 195). The onus then shifted to the respondent government to "show that the difference in the impact of the legislation was the result of objective factors unrelated to ethnic origin" (para 195). In that regard, the government argued that the relevant difference - the disproportionate number of Roma children attending schools for children with special needs - was the result of their lower intellectual capacity, as assessed by neutral testing, and their consequent placement in appropriate schools. The court then had to consider whether that constituted an objective and reasonable justification: whether the government was pursuing a legitimate aim, and whether there was a reasonable relationship of proportionality between the means employed and

> the aim sought to be realised (para 196). Although the aim was accepted to be legitimate, the court concluded, in view of inadequacies in the testing regime, that the results of the tests were not capable of constituting an objective and reasonable justification for the difference in treatment.
>
> …
>
> 53. Following the approach laid down in these and other cases, it has to be shown by the claimant that a neutrally formulated measure affects a disproportionate number of members of a group of persons sharing a characteristic which is alleged to be the ground of discrimination, so as to give rise to a presumption of indirect discrimination. Once a prima facie case of indirect discrimination has been established, the burden shifts to the state to show that the indirect difference in treatment is not discriminatory. The state can discharge that burden by establishing that the difference in the impact of the measure in question is the result of objective factors unrelated to any discrimination on the ground alleged. This requires the state to demonstrate that the measure in question has an objective and reasonable justification: in other words, that it pursues a legitimate aim by proportionate means (see, in addition to the authorities already cited, the judgment of the *Grand Chamber in Biao v Denmark* (2016) 64EHRR 1, paras 91and 114).

53. The Applicant's "age" argument is that paragraph 17 disproportionately affects those of an age such that they could have sustained criminal injuries before 1964 – at its crudest, those that were born before 1964, and so no younger than 48 when the Scheme came into effect in 2012. As the Interested Parties argued, this is a curious way to describe indirect discrimination on account of age, particularly as, through the passage of time, the identity of the prejudiced "group", *expressed in terms of "age"*, keeps changing. In truth, the "particular group" that is adversely affected is not characterised by its age, but by reason of when they sustained criminal injury. Thus, I do not consider this to be a different "other status", than the "other status" of people having sustained criminal injury before 1964.

54. I am fortified in this conclusion by Leggatt LJ's finding in *JT*, at [76], that, in respect of the "same roof" rule (in paragraph 19 of the Scheme, excluding those who sustained criminal injury before 1 October 1979, if applicant and assailant were living together as members of the same family), the complaint of being treated differently on the ground of age was "unsustainable":

> Paragraph 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.

The status of "sex" argument in more detail

55. I now turn to the evidence pointed to by the Applicant as to why, on the principles in *Hoogendijk* and *DH*, there was a prima facie case, or

"presumption", of discrimination on the ground of sex, with regard to paragraph 17. That evidence, in context, was as follows.

56. In July 2012, prior to the making of the Scheme, the Ministry of Justice published an "equality impact assessment" (**EIA**) to accompany a consultation document it published on reform to the criminal injury compensation system. The EIA analysed the potential impact of the proposed reforms on, amongst other things, the elimination of discrimination and other conduct prohibited under the Equality Act 2010.

57. Annex B to the EIA contained evidence tables. Applicant's counsel pointed to Table 5 there, which showed that 65% of award recipients in *all tariff bands proposed to be protected*, were female, in 2010/11. (A footnote there said that the figures should be treated with caution).

58. The reference to *all tariff bands proposed to be protected*, can be explained thus:

    a. the 2012 consultation paper explained that the current tariff (i.e. the one for the criminal injuries compensation scheme (the "**2008 scheme**") in place prior to the making of the Scheme) was made up of 25 bands with the least serious injuries in band one receiving £1,000 and the most serious in band 25 receiving £250,000

    b. in its summary of the proposed reforms, the EIA said this under "The Tariff":

> Tariff payments will continue to be made to those most seriously affected by their injuries and those that have been the victim of the most distressing crimes. We will remove tariff bands 1-5 for less serious injuries and reduce payments in bands 6-12. We will protect tariff payments for all injuries in bands 13 and above of the 2008 Scheme. Awards specifically in respect of sexual offences and patterns of physical abuse will be protected, wherever in the tariff they currently appear.

59. The logic of the Applicant's argument seems to be as follows: because, in 2010/11, about 2/3 of recipients of criminal injury compensation awards in tariff bands (under the 2008 scheme) which were "protected" in the making of the Scheme were women, this means that about the same percentage of award-recipients under Scheme, once it was in effect, must be women; which in turn must mean that women comprise about the same percentage of those who, due to the operation of paragraph 17, are not receiving awards under the Scheme (because they sustained criminal injury pre-1964).

60. The Applicant's "logic" makes a number of significant assumptions that are not supported by evidence, including assumptions that:

    a. once award-recipients in tariff bands under the 2008 scheme that were *reduced* (as opposed to being *protected*, or

eliminated) in the making of the Scheme are factored in, women still remained in the significant majority of award-recipients in 2010/11;

b. there was no significant change to the pattern of award recipients, after 2010/11; and

c. the proportion of female award recipients is directly reflected in the proportion of persons who, due to paragraph 17, are not eligible for awards under the Scheme.

61. A further weakness of the Applicant's case is that it does not deal with evidence in the EIA pointing to different conclusions, such as that, per Table 13 of Annex B, the proportion of men who were victims of violent crime (4%) was double that of women (2%); and that, historically, 2/3 of claimants have been men (Table 6).

62. These weaknesses, and unsupported assumptions, in the Applicant's evidence, mean that the Applicant has fallen short of establishing a prima facie case for indirect discrimination on the grounds of sex. I will, however, at the end of the section of this decision that follows, consider whether, had I decided that there *was* prima facie indirect discrimination on grounds of sex by reason of paragraph 17, the differential treatment was objectively and reasonably justifiable.

Is there an objective and reasonable justification for the difference in treatment?

63. The question in this section of this decision is whether the different treatment accorded to those who sustained criminal injuries pre-1964, as against those who sustained them post-1964, has an objective and reasonable justification.

64. As just stated, I will also consider, "in the alternative" to my conclusion above that a prima facie case for indirect discrimination has not been made out, whether, if such a case had been made out, the differential treatment of women has such justification.

Authorities on the appropriate intensity of review (by the courts)

65. Per Lord Reed in *SC* (at [158]), a low intensity of review is generally appropriate, other things being equal, in cases (like this one) concerned with judgments of social and economic policy, so that the judgment of the executive or legislature will generally be respected unless it is manifestly without reasonable foundation. Nevertheless, the intensity of the court's scrutiny can be influenced by a wide range of factors, depending on the circumstances of the particular case, as indeed it would be if the court were applying the domestic test of reasonableness rather than the Convention test of proportionality. In particular, very weighty reasons will usually have to be shown, and the intensity of review will usually be correspondingly high, if a difference in treatment on a "suspect" ground is to be justified.

66. Per Lord Reed at [159], a mechanical approach based simply on the categorisation of the ground of the difference in treatment is to be avoided; a more flexible approach is to be taken, giving "appropriate respect to the assessment of democratically accountable institutions", as well as other relevant factors.

67. At [160], Lord Reed observed that the phrase "manifestly without reasonable foundation", as used by the European Court of Human Rights, is merely a way of describing a wide margin of appreciation. He then said at [161]:

> It follows that in domestic cases, rather than trying to arrive at a precise definition of the ambit of the "manifestly without reasonable foundation" formulation, it is more fruitful to focus on the question whether a wide margin of judgment is appropriate in the light of the circumstances of the case. The ordinary approach to proportionality gives appropriate weight to the judgment of the primary decision-maker: a degree of weight which will normally be substantial in fields such as economic and social policy, national security, penal policy, and matters raising sensitive moral or ethical issues. It follows, as the Court of Appeal noted in *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2021] 1 WLR 1151 and *R (Delve) v Secretary of State for Work and Pensions* [2021] ICR 236, that the ordinary approach to proportionality will accord the same margin to the decision-maker as the "manifestly without reasonable foundation" formulation in circumstances where a particularly wide margin is appropriate.

68. In R(*A&B) v Criminal Injuries Compensation Authority & anor* [2021] UKSC 27 (a decision of the Supreme Court published on the same day as *SC* was published) at [82] and following, Lord Lloyd-Jones explained why, based on the principles set out by Lord Reed in *SC*, it was correct of the appellants in that case to accept that the applicable test was whether the decision to adopt the Scheme was "manifestly without reasonable foundation"; a number of features of that case strongly supported this conclusion; these are also present in this case, namely

    a. that the Scheme operates in the field of social welfare policy;

    b. that the Scheme, per s11 of the Criminal Injuries Compensation Act 1995, was approved by Parliament; and

    c. that the "status" relied upon – in that case, being a victim of trafficking with a relevant unspent conviction – was not within the range of suspect reasons where discrimination is usually particularly difficult to justify.

69. The Applicant also cites [83] of *JT*, as follows:

> … 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 JSC in *Bank Mellat v HM*

Treasury (No 2) [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)* [2014] AC 700, para 20 (Lord Sumption JSC).

The parties' positions

70. The Applicant argued that paragraph 17 is an arbitrary "cut-off"; the Interested Parties argued that it is the continuation of an objective and reasonable policy of introducing schemes for compensating criminal injury with prospective effect from 1964, being the date when the first such scheme came into effect.

71. The parties were agreed that the consultation the preceded the making of the Scheme in 2012 did not turn its mind to the question of whether the Scheme should depart from its predecessor schemes so as to allow for claims for criminal injuries sustained prior to 1964; nor was there parliamentary debate on this point.

72. The Interested Parties argued that there was no reason that the consultation would have been expected to do so, given that predecessor schemes had been "prospective from 1964" since the first scheme in 1964.

73. Much debate between parties revolved around the following paragraphs from *JT*:

> 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" ... 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 ... 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. … 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".

74. Leggatt LJ went on to say, at [111-112] under the heading *Containing costs*:

> … 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.

75. The Applicant argued that Leggatt LJ's conclusion in *JT* applies *a fortiori* to paragraph 17, particularly as there is no evidence of Parliament, or the Secretary of State, directing themselves to the differential treatment of those who sustained criminal injuries pre-1964. The Applicant accepted that administrative uncertainty and cost concerns are important objectives, rationally connected to the exclusion of those who sustained criminal injuries pre-1964; however, the Applicant contended that those ends were achieved by the rules in paragraphs 87-89 (the effect of which, in this case, would, as the FTT decision pointed out, be that, because the Applicant did not send in her application by her 20th birthday, her application would only be considered if the claims officer was satisfied that, due to exceptional circumstances, she could not have applied earlier; and the evidence presented in support of her application means that it can be determined with further extensive enquiries by a claims officer).

76. The Applicant argued in the alternative that there would be other ways, apart from excluding those who sustained criminal injuries pre-1964, of saving money and ensuring administrative convenience within the Scheme.

77. The Applicant argued that excluding those who sustained criminal injuries pre-1964 was an "arbitrary" provision (picking up Leggatt LJ's language in [111] of *JT*); it cut across the principles set out in the consultation documents preceding the Scheme, which recognise the strong public interest in compensating vulnerable individuals who, like the Applicant, were blameless victims of distressing crimes.

78. Given the parties' arguments as set out above, it is necessary to present a brief history of criminal injury compensation schemes, with an eye to their "prospective from 1964" effect; and also to consider the significance of the apparent inattention to paragraph 17 in the 2012 consultation document and parliamentary approval. I now address these in turn.

Potted history of criminal injury compensation schemes and their "prospective" effect

79. The first criminal injuries compensation scheme was introduced in 1964. It was a non-statutory, ex-gratia scheme.

80. A March 1964 white paper stated that, aside from a New Zealand scheme that had come into force on 1 January 1964, no other country in the world had such a scheme. It continued

> There is thus virtually no previous experience on which to draw in assessing how a compensation scheme would work … It is impossible to forecast with any assurance … how many persons would apply for compensation, if there were a scheme, or in how many of these cases a payment out of public funds would be justified

81. Accordingly, the white paper considered "it best to start with a flexible scheme which can be altered in light of experience", describing it as "an experimental and non-statutory scheme". The white paper also stated that "it will be necessary, for practical reasons, to exclude offences occurring before the commencement of the scheme."

82. The proposed scheme was debated in Parliament in May 1964. Following that debate the scheme was revised, and an amended scheme put before Parliament on 24 June 1964.

83. The 1964 scheme provided that:

> 5. The Board will entertain applications for ex gratia payment of compensation in those cases where – …
>
> (b) the injury was incurred after the commencement of the scheme

84. The scheme for criminal injury compensation was thereafter modified in minor respects, but as published in 1967 contained the same provision as above. The 1969 scheme provided that:

> 5. The Board will entertain applications for ex gratia payment of compensation in any case where the applicant or, in the case of an application by a spouse or dependant (see paragraph 12 below), the deceased, sustained in Great Britain, or on a British vessel, aircraft or hovercraft, on or after 1st August 1964 personal injury directly attributable to a crime of violence …

85. The scheme made in 1979 provided (at paragraph 25) that "Applications in respect of injuries incurred on or after 1 October 1979 will be dealt with under the terms of this Scheme. Applications in respect of injuries incurred before that date will be dealt with under the terms of the Scheme which came into operation on 21 May 1969, except that after 31 December 1979 applications relating to injuries incurred more than three years previously will be entertained only where the Board consider it appropriate to exceptionally to waive this time limit". The effect therefore was that only applications in respect of injuries sustained after 1964 could be entertained at all, whilst applications in respect of injuries incurred more than three years prior to the application could only be considered if the time limit were exceptionally waived.

86. The next scheme came into effect on 1 February 1990. It provided (at paragraph 4) that "Applications for compensation will be entertained only if made within three years of the incident giving rise to the injury, except that the Board may in exceptional circumstances waive this requirement". Thus, unless there were exceptional circumstances, any claim for injuries incurred prior to 1 February 1987 would have been excluded.

87. Criminal injury compensation was put on a statutory footing with the enactment of the Criminal Injuries Compensation Act 1995.

88. Section 1 of that Act provides that:

> (1) The Secretary of State shall make arrangements for the payment of compensation to, or in respect of, persons who have sustained one or more criminal injuries.
>
> (2) Any such arrangements shall include the making of a scheme providing, in particular, for –
>
> > (a) the circumstances in which awards may be made; and
> >
> > (b) the categories of person to whom awards may be made.
>
> (3) The scheme shall be known as the Criminal Injuries Compensation Scheme.
>
> (4) in this Act –
>
> > … "criminal injury"… [has] such meaning as may be specified
> > "the Scheme" means the Criminal Injuries Compensation Scheme;
> > …
> > "specified" means specified by the Scheme.

89. Section 11 provides that:

> (1) Before making the Scheme, the Secretary of State shall lay a draft of it before Parliament.
>
> (2) The Secretary of State shall not make the Scheme unless the draft has been approved by a resolution of each House."

90. Section 2(1) provides:

> The amount of compensation payable under an award shall be determined in accordance with the provisions of the Scheme.

91. The first statutory scheme came into effect from 1 April 1996. Paragraph 6 of that scheme provided that:

> 6. Compensation may be paid in accordance with this Scheme:
>
> > (a) to an applicant who has sustained a criminal injury on or after 1 August 1964

92. Further schemes in 2001 and 2008 included identical provision, at paragraph 6, excluding claims for injuries before 1964.

93. The 1996, 2001 and 2008 schemes all also included time limit provisions requiring an application to be made within 2 years of the date of the incident giving rise to the injury, but allowing for that time limit to be waived if (a) it was reasonable and in the interests of justice to do so; or (b) it was practicable for the application to be considered and it would not have been reasonable to expect the applicant to have made an application within the two-year period.

94. The Scheme (i.e. the 2012 scheme) similarly provided, under paragraphs 87-89 of the Scheme, a two-year time limit for an application from the date of the incident giving rise to the criminal injury. The effect of these provisions is that a claim by a person who was a child at the date of the incident, and where the incident was reported to the police when the person was a child (i.e. the circumstances of this case), must be made by the date of the applicant's 20th birthday. Time may be extended where "(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" (paragraph 89).

Significance of apparent inattention to paragraph 17 in parliamentary approval and consultation document

95. The Applicant argued that it was significant that no attention had been paid to the exclusion of those who sustained criminal injury pre-1964, in the consultation, and Parliamentary oversight, that preceded the making of the Scheme.

96. The Applicant placed weight on *JT* at [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, "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 he or it did consider": *Belfast City Council v Miss Behavin' Ltd* [2007] 1WLR 1420, para 47; …

97. The following was said in *SC* about a case where there is little or no parliamentary debate on an issue:

> [182] … If it can be inferred that Parliament formed a judgment that the legislation was appropriate notwithstanding its potential impact upon interests protected by Convention rights, then that may be a relevant factor in the court's assessment, because of the respect which the court will accord to the

> view of the legislature. If, on the other hand, there is no indication that the issue was considered by Parliament, then that factor will be absent. That absence will not count against upholding the compatibility of the measure: the courts will simply have to consider the issue without that factor being present, but nevertheless paying appropriate respect to the will of Parliament as expressed in the legislation.
>
> [183] However, it is important to add two caveats. First, the courts should go no further than ascertaining whether matters relevant to compatibility were raised during the legislative process … The distinction between determining whether, as a question of historical fact, an issue was before Parliament, on the one hand, and determining the cogency of Parliament's evaluation of that issue, on the other hand, is real and must be respected. Undertaking a critical assessment of Parliamentary debates would be contrary to both authority and statute … Trawling through debates should not, therefore, be necessary, and is unlikely to be appropriate: a high level review of whether a topic was raised before Parliament, whether in debate or otherwise, should suffice.
>
> [184] Secondly, the courts must not treat the absence or poverty of debate in Parliament as a reason supporting a finding of incompatibility.

98. As the passages underlined by me in the above indicate, the absence of parliamentary attention to (what became) paragraph 17 in the making of the Scheme is a neutral factor, and appropriate respect is still to be paid to the will of Parliament in approving the Scheme on its terms. This is not materially inconsistent with what was said in *JT* cited above – in essence, that, without evidence of scrutiny by a decision-maker of an issue involving Convention rights, the court will need to apply its own mind to (i.e. "scrutinise") the point.

99. What about the inattention to (what became) paragraph 17 in the consultation process that preceded the making of the Scheme; and (according to the Applicant) the inconsistency between paragraph 17 and the principles that underlay that consultation? These points need to be put in context, as follows. (The underlinings in the quotations from the document that follow are mine, to help explain the conclusions I will draw below).

100. The extracts from the 2012 consultation document (*Getting it right for victims and witnesses*) highlighted by the Applicant included paragraphs 172-174 of that document: these came under the heading, "Reforming the Scheme", which followed an introductory section summarising the terms of criminal injury compensation schemes since 1964. The Applicant highlighted certain of the principles which the consultation paper, at paragraph 172, said were being taken into account in "reforming the CICS [Criminal Injury Compensation Scheme]":

    a. "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 or on-going effects, and their duration."

    b. "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."

101. The Applicant highlighted the following statement in paragraph 174, under "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 co-operate with the criminal justice process, and close bereaved relatives of victims who die as a result of their injuries."

102. At paragraph 178 of the consultation, the following was said:

> "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 victim. This purpose underpins all of our proposals, and it reflects the current Scheme."

103. At paragraph 221, under the heading "Protecting awards for victims of sexual and physical abuse", the consultation paper said:

> "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."

104. At paragraph 223 it was said:

> "We therefore propose to retain at their current level awards, in whatever band, for injuries in respect of sexual offences and physical abuse (these range from minor sexual physical acts currently in band 1 to patterns of repetitive and severe abuse in band 12). The most serious sexual offences, including rape, currently appear in bands 13 and above, where we are already planning to protect all of the awards in their entirety."

105. Interested Parties' counsel pointed to paragraphs 22-24 of the consultation document, expressing the concern that any compensation scheme must be "sustainable", noting the "difficult financial climate" in which

the review of the scheme was taking place, and saying (at paragraph 23 of the document):

> "Our proposals for reform are focused on protecting awards to those most seriously injured by violent and sexual crime. They open the way to make savings from the Scheme and rebalance the overall resources available to victims to best effect by increasing the financial reparation made by offenders in order to provide additional funding for victims services."

106. The following paragraph spoke of savings to the taxpayer of about £50m per year. It said:

> "The Government regards it as legitimate, at a time of acute financial pressure, to make its proposed saving from the CICS, being clear in doing so that payments to those in greatest need are safeguarded. There will be no change in the compensation paid under the tariff to victims of rape, other sexual offences or sustained abuse."

107. In light of the above, I do not accept the Applicant's argument that the inclusion of paragraph 17 in the Scheme was arbitrary or irrational in the context of the policy as articulated in the 2012 consultation paper: it is clear enough from the context that the Government was looking at "reform" of criminal injury compensation policy as it had evolved, via a series of schemes, since 1964; it was not devising policy "in a vacuum", so to speak; the consultation paper was focused in particular on those aspects of the 2008 scheme that should be "preserved", "safeguarded", "protected" or otherwise "not changed" (amongst other things, to avoid reducing awards to victims of sexual and physical violence), in circumstances of constrained government finances; the fact that the consultation paper was silent on changing the longstanding policy of having "prospective from 1964" schemes of criminal injury compensation, does not indicate that this aspect of the Scheme (that emerged from the consultation) was arbitrary or irrational, but rather that it was an aspect of longstanding policy that the Government did not wish to *reform*.

The core issue

108. The core issue here is relatively straightforward: is it objectively and reasonably justifiable for the Scheme to exclude those who sustained criminal injuries pre-1964, in the context of schemes for criminal injury compensation having operated "prospectively from 1964" since their inception, in the first scheme in 1964?

109. It is relevant to look at how the European human rights courts have treated new legislative regimes with prospective-only effect. The Applicant argues that this is not a case of prospective legislation since the Scheme came into being in 2012. However, I do not think this point (which goes to the legal design of criminal injury compensation in the UK, being a series of

schemes) affects in any material way the question of whether it was justifiable, in 2012, to perpetuate the policy of "prospective from 1964". Indeed, looked at technically and formally, the Scheme, which itself took effect in 2012, was made *retrospective* to 1964 as regards when criminal injury was sustained; the Applicant's complaint is that it should have been made fully retrospective i.e. without regard to when the criminal injury was sustained.

Authorities on the "core issue"

110. In *Stacey v UK* Applcn No 16576/90, the complainant serviceman had suffered injury before May 1987, the date from which the law was changed to allow servicemen to benefit from an extra-statutory system of compensation. His complaint was that he had been discriminated against as compared with those servicemen who suffered injury after May 1987. The European Commission of Human Rights held:

> As to the alleged discrimination between the applicant and servicemen injured after 15 May 1987, the Commission recalls that differential treatment arising out of a legislative change is not discriminatory where it has a reasonable and objective justification in the interests of the good administration of justice (cf. No. 9707/82, Dec. 6.10.82, D.R. 31 p. 223, pp. 226-227). In the present case, the Commission considers that the application of the statutory improvement to the procedural position by servicemen only to those injured after the date of the legislation does not appear arbitrary or unreasonable in any way. The application of such an improvement to prior claims could cause considerable difficulties in connection with the benefits received under the 1947 Act.

111. In *Twizell v UK* (2008) 47 EHRR 49, a 1999 Act introduced certain new social security payments for both men and women whose spouses had died on or after 9 April 2001. The claimant's wife had died shortly before this date and so he could not claim benefits under the new system. The European Court of Human Rights found that his non-entitlement to the new benefits was not discriminatory. It held at paragraph 24:

> The Court considers that [the new benefits] were intended to correct the undesired discriminatory situation created amongst the widowed part of the population prior to 2001 and therefore the resultant difference in treatment caused by the non-retrospective effect of the operative date — April 9, 2001 —pursued a legitimate aim. In creating a scheme of benefits it is sometimes necessary to use cut-off points that apply to large groups of people and which may to a certain extent appear arbitrary. The applicant's spouse died almost immediately before the entry into force of the 1999 Act and for that reason the applicant could not qualify for [the new benefits]. However, this is an inevitable consequence of introducing new systems which replace previous and outdated schemes. The choice of a cut-off date when transforming social security regimes must be considered as falling within the wide margin of appreciation afforded to a state when reforming its social strategy policy and in the instant case the

> impugned cut-off date can be deemed reasonably and objectively justified.

112. In *Minter v UK* (2017) 65 EHRR SE6, the European Court of Human Rights said this (at [67]):

> In *Massey* (14399/02) 8 April 2003 the applicant also invoked art.14 in conjunction with art.8 , complaining that sex offenders convicted of more recent offences than his were not subject to the requirements of the Sex Offenders Act 1997 because they had completed their sentences on the commencement date of the legislation. However, the Court considered that no discrimination was disclosed by legislative measures being prospective only or by a particular date being chosen for the commencement of a new legislative regime. The Court has subsequently confirmed this position (for a recent example, see *Zammit and Attard Cassar v Malta* (1046/12) 30 July 2015 at [70]). In this regard, it has noted that the use of a cut-off date creating a difference in treatment is an inevitable consequence of introducing new systems which replace previous and outdated schemes. However, the choice of such a cut-off date when introducing new regimes falls within the wide margin of appreciation afforded to a State when reforming its policies (see *Amato Gauci v Malta* (2011) 52 E.H.R.R. 25 at [71]).

113. (I note the criticisms of *Minter* in Supreme Court decisions: see R(*Stott) v Secretary of State for Justice* [2018] UKSC 39 at [78] and *A&B* at [57]. However, I read these as questioning its authority specifically on the issue of *status*.)

114. In sum, these European human rights authorities support – especially in the context of rule-changes reforming or improving pre-existing regimes for injury compensation or benefits – what Leggatt LJ said in *JT* at [108] that he "readily accepted": 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.

115. Furthermore, the circumstances of this case are *not* analogous to those described by Leggatt LJ at [109] of *JT*: the "prospective from 1964" policy in criminal injury compensation schemes did not *perpetuate existing discrimination*, as, prior to 1964, such schemes did not exist.

Conclusions on objective and reasonable justification for difference in treatment

116. On the basis of my finding that the relevant differential treatment in this case is that of treating those who sustained criminal injury pre-1964 differently from those who sustained such injury post-1964, my conclusion is that the differential treatment is objectively and reasonably justified, since:

a. a low intensity of review by the courts (or, from the other side of the spectrum, a wide margin of judgement for the makers of the Scheme) is appropriate, as

i. this is an area of judgement in social and economic policy;

ii. the policy is one of improving or reforming social policy by making criminal injury compensation available from 1964 onwards;

iii. the Scheme was approved by Parliament; and

iv. the grounds for differential treatment are not "suspect";

b. paragraph 17, in enacting the policy of making the Scheme "prospective from 1964", is

i. objectively reasonable, as this was when the first criminal injury compensation scheme took effect;

ii. not manifestly without reasonable foundation; and

iii. proportionate: it has a legitimate aim of stability and affordability in policy-making, by making a significant reform to public policy prospective from the date when the first criminal injury compensation scheme came into effect (as had been the case for nearly half a century at the time the Scheme was being made); it strikes a fair balance between the rights of those excluded and the interests of the wider polity in a stable and affordable regime for such compensation. I do not accept that the presence in the Scheme of rules limiting the time in which an application must be made (paragraphs 57-59) render the "prospective from 1964" rule disproportionate, as they serve a different purpose.

117. It follows that the FTT decision did not err in law on this point and so the second ground of the Applicant's application also fails.

118. For completeness, I add that, if I had found that there *was* a prima facie case of indirect discrimination on the grounds of sex, based on evidence of a preponderance of women amongst award recipients under Scheme (and an assumption that those excluded by paragraph 17 would have mirrored this preponderance of women), then I would still have found that differential treatment, on grounds of sex, objectively and reasonably justified, since:

a. whilst the differential treatment on grounds of sex undoubtedly increases the intensity of review by the courts, a flexible and nuanced approach, considering all relevant factors, is still required;

b. all the reasons set out at [116], except the one at [116a iv], remain relevant;

c. the reason for the differential treatment was, simply, that the Scheme disproportionately made awards in favour of women and so, by necessary inference, any exclusion from the Scheme affected women in the same proportion;

d. in such circumstances, the differential treatment of women by reason of a "prospective from 1964" policy can reasonably be justified, and is proportionate, since it is still striking a fair balance between the rights of those excluded and the interests of the wider polity in a stable and affordable regime for criminal injuries compensation.

Zachary Citron
Judge of the Upper Tribunal

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accidental omission (representation of Applicant) corrected
1 August 2023