Neutral Citation Number: [2024] EWHC 1703 (Admin)

Case No: AC-2023-LON-003453

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 July 2024

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE KING	**Claimant**
on the application of	
ZX	
- and -	
(1) CRIMINAL INJURIES COMPENSATION AUTHORITY **(2) SECRETARY OF STATE FOR JUSTICE**	**Defendants**

- -
- -

James Robottom (instructed by **Irwin Mitchell LLP**) for the **Claimant**
Robert Moretto (instructed by the **Government Legal Department**) for the **Defendants**

Hearing dates: 5 & 6 June 2024

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Approved Judgment

This judgment was handed down remotely at 10 am on 3 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mrs Justice Lang :

1. The Claimant is the mother of YX who sustained a gunshot wound to the head on 30 August 2016, and sadly died of complications from the injury on 20 September 2022, before his award from the First Defendant was finalised. The Claimant seeks judicial review of the terms of the Criminal Injuries Compensation Scheme 2012 ("the Scheme") under which a family member who has provided gratuitous care to a victim of violent crime, or has incurred other expenses on behalf of the victim, is no longer eligible to claim an award of special expenses under paragraphs 51 and 52 of the Scheme once the victim has died. In contrast, family members may claim for special expenses in respect of a victim of violent crime who dies from an unrelated cause, if they were financially dependent upon the victim.

2. The Claimant contended that the Scheme is therefore (1) irrational and (2) discriminatory, contrary to Article 14 of the European Convention on Human Rights ("ECHR"), read with Article 1 of Protocol 1 to the ECHR ("A1P1"). The claim under Article 8 ECHR has not been pursued.

3. The Claimant has now accepted that the Scheme cannot be read in a way that is compatible with Convention rights, under section 3 of the Human Rights Act 1998. She seeks a declaration that the terms of the Scheme are unlawful, insofar as they exclude family members, including non-dependents, who have provided gratuitous care to victims who have died as a result of a crime of violence, contrary to Convention rights and at common law.

4. The Claimant claimed damages under the Human Rights Act 1998 in respect of gratuitous care provided by her to YX in the period 29 January 2020 to 20 September 2022, totalling £75,510, and for other expenses incurred.

5. The Claimant no longer pursued the challenge (pleaded in sections 3 and 8 of the Claim Form) to the email response by the First Defendant to the Claimant's Stage 3 complaint, on 18 August 2023. The email was a response to the Claimant's administrative complaint about delay in assessing and concluding YX's claim for compensation, prior to his death. It was not concerned with the Claimant's claim for special expenses, after YX's death, and therefore could not be successfully challenged in this claim.

6. In response, the Defendants submitted that the Scheme is neither discriminatory nor irrational. The Scheme identifies those as eligible for an award as (i) direct victims of violent crime (paragraph 4); (ii) those who sustain a criminal injury by taking an exceptional and justified risk in preventing a crime (paragraph 5); and (iii) those who sustain a criminal injury while witnessing an attack on a loved one under paragraphs 4 or 5 (paragraph 6). Where the victim of crime is alive, the Scheme makes provision for awards to the victim, not to their carers or family members. Thus, claims for the cost of care and equipment can only be made by the eligible victim, not by a family member who has provided the care or purchased the equipment.

7. If a victim of violent crime dies as a result of the crime, his entitlement to an award does not survive as part of his estate (apart from funeral expenses). Instead, the Scheme makes specific provision for future support for the victim's family and dependents, under paragraphs 57-79. Qualifying relatives are eligible for bereavement

awards. Qualifying relatives may be eligible for child's payments and dependency payments (subject to a set-off in respect of any awards made to the victim before death). Awards are capped at £500,000.

8. If, however, a victim of crime dies as a result of an unrelated cause, there are only limited circumstances, under paragraphs 80-84 of the Scheme, in which a qualifying relative may claim for the victim's loss of earnings and special expenses incurred prior to death, subject to a set-off against any interim award made to the victim and an overall cap of £500,000. Those circumstances are as follows:

    i) the deceased was eligible for, but had not received, a final award under the Scheme; and

    ii) the qualifying relative was financially dependent on the deceased.

9. The Defendants submitted that Article 14 ECHR is not engaged because there is no difference of treatment on the grounds of "other status" in comparison with those in an analogous position. Alternatively, any difference of treatment is justified, in the light of the wide margin of appreciation given to Parliament and the Executive in decisions relating to measures of economic or social policy. The difference is a proportionate means of achieving the legitimate aim for allocating limited resources to those who are most likely to be financially impacted by the crime, namely the victim of crime, and if the victim dies, his dependents. Furthermore, for these reasons, the claim does not pass the high threshold for establishing irrationality.

10. The Defendants also submitted that the claim is academic, and/or no relief should be granted pursuant to section 31(2A) of the Senior Courts Act 1981, because, even if the Claimant had been able to make such a claim under the Scheme, no award would have been payable.

11. Permission to apply for judicial review was granted, on the papers, by Sweeting J. on 12 April 2024.

Facts

12. On 30 August 2016, YX, who was then aged 18, suffered a gunshot injury to his head during a violent criminal attack. The assailants were subsequently prosecuted and convicted.

13. YX suffered an acute brain injury, severe hypoxic ischaemic brain damage and extensive ischaemic injury that left him in a low awareness state, with severe cognitive impairment, tetraplegia, and lacking capacity. He was fitted with a tracheostomy and a stomach PEG. From the time of the injury, he was dependent on carers 24 hours per day for all activities of daily living.

14. The Claimant managed his affairs. On 25 June 2021, she was appointed as Health and Welfare Deputy at Reading County and Family Court.

15. YX was treated and cared for in hospital and care facilities until he was discharged home in around January 2020. The Claimant was provided with a care package at home funded by Buckingham Clinical Commissioning Group, through Oxford Health

NHS Foundation Trust. She provided care for YX herself and purchased disability equipment for him.

16. On 20 September 2022, YX died after contracting an infection and aspirating on his own vomit. These were known complications of his condition. The Coroner's Certificate dated 14 November 2022 gave as the cause of death "1a gunshot wound to head".

Statutory framework

Criminal Injuries Compensation Act 1995

17. Section 1 of the Criminal Injuries Compensation Act 1995 ("CICA 1995") 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."

18. Section 2 provides that:

> "(1) The amount of compensation payable under an award shall be determined in accordance with the provisions of the Scheme.
>
> (2) Provision shall be made for—
>
> (a) a standard amount of compensation, determined by reference to the nature of the injury;
>
> (b) in such cases as may be specified, an additional amount of compensation calculated with respect to loss of earnings;
>
> (c) in such cases as may be specified, an additional amount of compensation calculated with respect to special expenses; and
>
> (d) in cases of fatal injury, such additional amounts as may be specified or otherwise determined in accordance with the Scheme."

19. 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."

Criminal Injuries Compensation Scheme 2012

20. The Scheme was made in accordance with the statutory procedure under section 11 CICA 1995. It was approved by both Houses of Parliament and came into force in November 2012.

21. The Scheme provides, at paragraphs 4 to 6, that a person may be eligible for an award if they sustain a criminal injury which is directly attributable to their being a direct victim of a crime of violence.

22. An award may be withheld or reduced, on the grounds set out in paragraphs 22 to 29. Paragraph 25 provides that an award may be withheld or reduced where the conduct of the applicant before or after the incident makes it inappropriate to make an award or a full award.

23. The types of awards that may be made are set out in paragraphs 30-56 of the Scheme as follows:

    i) injury payments (paragraphs 32-41);

    ii) loss of earnings payments (paragraphs 42-49);

    iii) special expenses payments (paragraphs 50-56).

24. Paragraphs 57-58 of the Scheme provide that an award may also be made to certain groups of persons, in accordance with paragraphs 57 to 84, where a victim of a crime of violence person has died. Those awards are:

    i) bereavement payments (paragraphs 61-62);

    ii) child's payments (paragraphs 63-66);

    iii) dependency payments (paragraphs 67-74);

    iv) funeral payments (paragraphs 75-77);

    v) certain other payments in fatal cases (paragraphs 80-84).

25. The Scheme is not intended to fully compensate victims or dependents for the losses sustained as the result of a crime of violence. Accordingly, for example, loss of earnings are limited in scope to losses after the period of 28 weeks following the injury, and limited in their rate to the weekly rate of sick pay under the Social Security Contributions and Benefits Act 1992 (see paragraphs 42-49 of the Scheme).

26. Similarly, a special expenses payment can only be made to a person who has lost earnings or earning capacity, or has been similarly incapacitated for a period of more than 28 weeks (paragraph 50 of the Scheme).

27. Furthermore, not all losses caused by a crime of violence are recoverable. Rather, only those falling within the specific paragraphs of the scheme, such as in respect of special expenses under paragraph 52 of the Scheme, can be made.

28. Nor can those who are either not victims or their dependents make an application for compensation, other than for a bereavement award if a qualifying relative (paragraphs 61-62), or funeral expenses which are paid for the benefit of the victim's estate (paragraphs 75-77).

Special expenses payments

29. Claims for care fall within special expenses payments which include, within paragraph 52 of the Scheme, the following relevant expenses:

> "(a) the applicant's property or equipment ….
>
> (b) costs (other than in respect of loss of earnings) arising from treatment for the injury under the National Health Service or a state health service other than the National Health Service where those costs would also have arisen if the applicant were being treated under the National Health Service in England and Wales;
>
> (c) special equipment;
>
> (d) adaptation of the applicant's accommodation;
>
> (e) the cost of care in connection with the applicant's bodily functions or meal preparation;
>
> (f) the cost of supervising the applicant in order to avoid substantial danger to the applicant or another person;
>
> (g) fees payable, in England and Wales, to the Court of Protection ....
>
> ….."

30. In addition, paragraph 51 of the Scheme limits any special expenses payment as follows:

> "A special expenses payment will only be made in relation to expenses of the types listed in paragraph 52:
>
> (a) which are necessarily incurred by the applicant on or after the date of the injury as a direct result of the criminal injury giving rise to the injury payment;
>
> (b) for which provision, or similar provision, is not available free of charge from another source; and

(c) the cost of which is reasonable."

31. Accordingly, where care is provided by the state free of charge, no special expenses payment can be made. Similarly, even if non state-funded care is provided, then again no special expenses payment can be made if state-funded care is available. Furthermore, any expense must be (a) necessarily incurred, and (b) reasonable.

32. A victim may claim for the cost of care provided to him gratuitously, by any person, though typically it will be provided by a family member. In respect of costs of treatment, no payment can be made for costs of private treatment (see paragraph 52(b) of the Scheme, and the Ministry of Justice Consultation Paper CO3/2021 ("2012 Consultation Paper") (at paragraph 241)).

33. Paragraph 54 also provides that:

> "A special expenses payment will be withheld or reduced to take account of the receipt of, or entitlement to, social security benefits in respect of the applicant's special expenses."

34. Annex A to the Scheme defines social security benefits as including "all state and local authority benefits or assistance, whether paid in whole or in part from the funds of any part of the United Kingdom or elsewhere". Social security benefits potentially relevant to a care award include Disability Living Allowance or Personal Independence Payments, as well as Carer's Allowance.

Local authority duty to provide care

35. Local authorities are under a duty to carry out a care needs assessment for adults in their area where it appears they may have needs for care: section 9 of the Care Act 2014. That is the duty previously contained within section 47 of the NHS and Community Care Act 1990. A local authority is also under a duty to carry out a carer's assessment where it appears that a carer may have needs for support: section 10 of the Care Act 2014. The local authority must then determine whether the needs assessed meet the relevant eligibility criteria: section 13 of the Care Act 2014.

36. Having made such an assessment and determination, the local authority is then, pursuant to subsections 18(1) and (5) of the Care Act 2014, under a duty to meet the adult's needs for care and support which meet the eligibility criteria, unless such needs are being met by a carer (section 18(8)).

37. In determining applications for care costs, the First Defendant is likely to need access to information from the local authority as to the care package provided, so as to determine the extent to which the local authority is providing the care assessed to be necessary, and in turn to determine whether any additional care claimed for is reasonable, and not available free of charge from the state. Typically such information is set out in the local authority's written Care Assessment.

Claims following a victim's death as a result of the crime

38. In addition to claims which may be made by victims of crime, the Scheme sets out those claims which can be made by other persons following the death of the victim, in 57-74 of the Scheme, under the heading "Payments in fatal cases". Those provisions provide that:

i) all qualifying relatives are eligible for a bereavement payment of £5,500 or £11,000 (paragraphs 61-62);

ii) qualifying relatives include (within paragraph 59), spouses and partners subject to specific conditions, parents and children.

iii) only child dependents are eligible for a child payment (paragraphs 63-66).

iv) only qualifying relatives who were dependent on the victim are eligible for a dependency payment (paragraphs 67-74).

Re-opening of an award where a victim dies a result of the crime

39. Where an award has been made and the victim subsequently dies as a result of the injury giving rise to the award, an applicant may apply for the award to be re-opened: paragraphs 114–116 of the Scheme. This enables, for example, dependent relatives to apply to re-open an award to enable a dependency award to be made following the death of the victim as a result of the crime.

Payments where a victim dies for reasons unrelated to the crime

40. Paragraph 80 of the Scheme also enables dependent relatives to make a claim where the victim dies otherwise than as a direct result of the injury and an award has not been made under the Scheme. Paragraphs 80-83 of the Scheme provide as follows:

> "80. A qualifying relative of a person who has sustained a criminal injury and who has died otherwise than as a direct result of that injury may be eligible for an award if on the date the deceased died:
>
> (a) the deceased was eligible for, but had not received, a final award under this Scheme; and
>
> (b) the qualifying relative was financially dependent on the deceased.
>
> ….
>
> 82. A qualifying relative who is eligible for an award under paragraph 80 may receive a payment for:
>
> (a) the deceased's loss of earnings arising as a direct result of the criminal injury, assessed in accordance with paragraphs 42

> to 47, except that no payment will be made in respect of any loss from the date of the deceased's death; and
>
> (b) special expenses incurred by the deceased as a direct result of the criminal injury up to the date of the deceased's death, assessed in accordance with paragraphs 50 to 52 and 54 to 56.
>
> 83. Any payment made under paragraph 80 will be reduced by the amount of any award paid to the deceased."

41. Accordingly, the Scheme provides that qualifying relatives who are financially dependent on a victim (e.g. a spouse or child) may claim a dependency payment and may also claim compensation for financial losses prior to death if the death is unrelated. However, no claims for such losses may be made by those who were not financially dependent on the deceased. A claim may only be made for a dependency payment and losses prior to death by those who are financially dependent on the deceased victim.

42. Any payment made must be set off against any award already paid to the deceased.

Procedure and appeal

43. Paragraph 92 of the Scheme requires an applicant to provide such information as a claims officer may reasonably require, including in particular:

> "(c) where the application includes a claim for a payment other than in injury payment, evidence in support of that part of the application".

44. Paragraph 108 provides:

> "Subject to a direction, condition or arrangement in connection with the award under paragraph 106, the entitlement to an award only arises on the date on which the Authority receives written notice of acceptance of the determination."

45. Paragraphs 117-124 allow for an applicant to apply for an internal review of a decision of a claims officer. Such a review is carried out by a new claims officer who makes a fresh decision.

46. Paragraph 125 provides the route of appeal against the review decision to the First-tier Tribunal:

> "An applicant who is dissatisfied with a decision on a review, or a determination on re-opening under paragraph 124, may appeal to the Tribunal against that decision or determination in accordance with the rules of the Tribunal."

47. Any further challenge is then through judicial review in the Upper Tribunal in accordance with the Tribunal, Courts and Enforcement Act 2007, and the Lord Chief

Justice's Practice Direction (Upper Tribunal: Judicial Review Jurisdiction) at [2009] 1 WLR 327.

Applications to the First Defendant

48. Four claims have been made to the First Defendant:

    i) YX's personal injury claim;

    ii) the Claimant's personal injury claim;

    iii) the Claimant's bereavement claim;

    iv) the Claimant's claim for funeral expenses.

Decision 1: YX's personal injury claim

49. On 13 December 2017, the Claimant applied to the First Defendant for compensation on behalf of YX.

50. In its decision dated 27 June 2019, the First Defendant accepted that YX was eligible for an award under the Scheme as the victim of a crime of violence who had suffered a criminal injury. However, the award was reduced by 20%, under paragraph 25 of the Scheme, because of YX's conduct towards one of the assailants prior to the shooting.

51. The reduced award amounted to £149,663.20, for the brain injury, the fractured skull, and special expenses in respect of past and future Court of Protection costs. YX's claim for loss of earnings was rejected because he had not been in paid employment.

52. The decision stated that, as nursing care would be met by the State, the cost would not be covered by special expenses. The Claimant's loss of earnings, while YX was in hospital, were also not covered.

53. On 26 August 2019 the Claimant applied for a review of the decision on the grounds that the award was too low, there should not have been a reduction for conduct, and there should have been a loss of earnings award.

54. On 6 March 2020, the First Defendant made an interim award of £50,000.

55. On 1 February 2022, the First Defendant made a further interim award of £10,000.

56. As part of the determination of the review, the First Defendant supplied a Special Expenses Supplementary Questionnaire ("the Questionnaire") and Help with Personal Care Form. The Claimant provided details of YX's care, including the gratuitous care she provided to him at the time. The forms were provided to the First Defendant on 5 January 2022 by Mr Daniel Toubkin, the Claimant's then solicitor.

57. The First Defendant requested further details of YX's state funded care from Mr Toubkin. This was in order to assess the amount of any claim YX had for special

expenses under the Scheme. Under paragraph 51 of the Scheme, special expenses will not be met if provision is available free of charge from the State.

58. On 30 March 2022 Mr Toubkin requested, amongst other things, what additional financial information was required by the First Defendant to calculate the gratuitous care costs. The First Defendant responded that it required confirmation of how many hours of private care the Local Authority were paying towards each week, or details of the annual funding provided. This information was still being sought from the local authority at the time of YX's death. At the time of YX's death, therefore, the First Defendant was still in the process of determining his review application and claim, including the special expenses element.

59. On 30 September 2022, the First Defendant wrote to Mr Toubkin advising that it could not continue with YX's claim following his death. The letter stated:

> "….. The Scheme only allows a payment to be made for the deceased's injuries where we had issued a decision and received a signed acceptance before their death. Your son [YX's] application had not reached this stage, which means we cannot continue with his personal injury claim. It is our understanding that you do not yet know whether [YX's] death was related to the injuries for which criminal injuries compensation was being claimed. If his death was unrelated, although we cannot make a payment for [YX's] personal injury claim, we may be able to make a loss of earnings and/or special expenses payment to a qualifying relative who was financially dependent on [YX]. This only applies where the deceased would have qualified for a payment of loss of earnings and/or special expenses as part of their claim for compensation. Although we cannot make a payment for [YX's] personal injury claim, if it is established that his death was directly attributable to a crime of violence, we may be able to make a funeral expense payment and pay relevant qualifying relatives a bereavement payment, child's payment and dependency payment…"

60. The First Defendant explained the position in more detail in a letter to Mr Toubkin dated 5 October 2022.

61. On 7 June 2023, the Claimant made a formal complaint to the First Defendant about the length of time it had taken the First Defendant to deal with YX's claim. The complaint was escalated to stage 2 and 3. The First Defendant issued a final stage 3 complaint closure email on 18 August 2023. It stated:

> "Having fully investigated your concerns, and the response you received at stage 2 of the complaints process, it is my view the information you have been provided is fair, open, and accurate. Given the difficult circumstances that have led to you making a complaint, I am keen to avoid repeating information you have already been provided at stage 1 and 2. However, I feel it is appropriate for me to explain my findings.

> CICA are unable to provide exact or indicative timescales as to when an application will be concluded. Complex cases, such as [YX's], can take some time, often years to conclude. This is largely because of the nature of injuries, and how they may develop over time. With this in mind, CICA are reliant on third parties providing us with relevant information to support the application. I am satisfied that CICA handled [YX's] claim, including requesting and assessing information, in a timely manner. However, as Laura highlighted, I acknowledge there was a delay in progressing an interim payment request, received in August 2018. I am sorry for the distress and upset this caused.
>
> In the interest of openness, I can also confirm that CICA were awaiting information relating to Local Authority Care funding. At the time of [YX's] death, unfortunately, we had not received the full information we required. This information was required to support the application, and therefore we were unable to make a decision without it.
>
> I do appreciate the length of time [YX's] application was ongoing, and I also acknowledge that you have expressed your concerns regarding this. However, I have found no evidence that would support the view that these timescales were impacted by CICA's handling of the application….".

Decision 2: the Claimant's personal injury claim

62. The Claimant's application was made on 23 April 2018 based upon her witnessing the attack on her son, as a result of which she suffered post-traumatic stress disorder ("PTSD"). The First Defendant's award was made on 8 September 2022 in the sum of £37,543, comprising £13,500 for her mental injury and £24,043 for her loss of earnings.

Decision 3: the Claimant's bereavement claim

63. On 22 December 2022, the Claimant made a bereavement claim following the death of her son, YX. The First Defendant made an award of £11,000 on 9 March 2023.

Decision 4: the Claimant's claim for funeral expenses

64. On 22 December 2022, the Claimant made a claim for funeral expenses for her son YX. The First Defendant made an award of £5,000 on 10 March 2023.

The Claimant's current claim

65. The Defendants submitted that the claim was academic because, even if the Claimant had been able to make such a claim under the Scheme, no award would have been payable because:

    i) YX was receiving 24 hour care and some equipment from the state free of charge. By paragraph 51 of the Scheme, an award will only be made where the provision is not available free of charge, and is necessary;

    ii) the amount claimed would be extinguished by the combined set-off of (a) eligibility for social security benefits, and (b) the interim awards made by the First Defendant in the sum of £60,000;

    iii) the Claimant failed to provide any evidence in support of her claim for special expenses.

66. The Defendants submitted that the fact that there would ultimately be no award to the Claimant was important because it demonstrated that there was no detriment to her and no discriminatory lacuna in the operation of the Scheme.

67. In the event that this claim succeeds, the Defendants submitted that no relief should be granted, pursuant to section 31(2A) of the Senior Courts Act 1981, because it is highly likely that the outcome for the Claimant would not have been substantially different even if she had been eligible to make a claim under the terms of the Scheme.

68. The Claimant disputed the First Defendant's assessment of the Claimant's claim and submitted that compensation would be recoverable. For the purposes of this claim, the First Defendant calculated ZX's entitlement to special expenses and social security benefits. The Claimant objected to this exercise, on the grounds that it was speculative and based on hearsay assumptions by officers who were not decision-makers.

69. In my view, the First Defendant was entitled to adduce such evidence, in the absence of any other reliable evidence, in order to make an "in principle" calculation of the Claimant's claim.

70. It is well-established that the Court will generally not determine disputes which have become academic unless there is a good reason in the public interest for doing so, such as a discrete point of statutory construction and where large numbers of similar cases are anticipated, so that the issue will need to be resolved in the near future (see *R v Secretary of State for the Home Department ex parte Salem* [1999] 1 AC 450, [1999] 2 WLR 483).

71. Here the dispute between the parties remains live; it has not been overtaken by a change of circumstances or a fresh decision. There is a public interest in clarifying the scope of the Scheme, in case the issue raised by the Claimant affects others in future. Permission to apply for judicial review has been granted. At the hearing, the Defendants accepted that the Court should proceed to determine the grounds of claim. However, they maintained their submission that the Claimant could not succeed in obtaining an award of compensation, which they were entitled to do.

72. The claim for special expenses was not adequately particularised in the Statement of Facts and Grounds. Mr Robottom submitted that it was not necessary to particularise the claim because, in the event that the claim succeeded, he intended to apply for the claim for damages to be transferred to the County Court, or alternatively, that the Claimant could make a fresh claim to the First Defendant if the Scheme was re-drafted to enable her to do so.

73. The Defendants correctly submitted that claims for damages are required to particularised in the pleadings. They did not agree to a claim for damages being transferred to the County Court and they maintained as a primary submission that the Claimant could not be awarded compensation under the Scheme.

74. I concluded that I should address the issue raised by the Defendants that the Claimant's claim for compensation could not succeed, and that the claim for damages ought to be particularised. During the hearing, Mr Robottom made oral and written submissions on the heads of expense in the Claimant's application to the First Defendant.

Gratuitous care

75. In the Statement of Facts and Grounds, the Claimant calculated the care claim as follows:

> "If an award was to be made (leaving aside a potential claim for equipment), it would normally be calculated by multiplying the hours of care she provided to YX prior to his death by the National Joint Council pay rates spinal point 8 (currently £11.81), and reducing the total by 25% to take into account the care's gratuitous nature. The relevant hours were approximately 6,776 between 29 January 2020 and 26 May 2021, and 1,749 between 27 May 2021 and 19 September 2022:
>
> 6,776 + 1,749 x 11.81 x 0.75 = £75,510.00"

76. The First Defendant calculated an award based on the Claimant's claimed hours for both periods. The total amount would be £104,808.29. A 25% reduction, to reflect tax and national insurance, would be applied, reducing the total amount by £25,985.45. The net award would be £78,606.223. The Claimant accepted and adopted this figure.

77. The Claimant's case was that she provided personal care to YX in addition to the state-funded care. In her first witness statement, she stated that between around 29 January 2020 and 26 May 2021 ("the first period") she was the sole carer during the night, amounting to 14 hours of care daily (98 hours weekly). She also assisted and supervised the day time carer. She stated in paragraph 16 of her first witness statement that Buckinghamshire County Council advised her that "if I could not cope with only 10 hours of support, [YX] would be transferred back into the care of a residential care home. I felt that this was not in [YX's] best interests from the negative experiences he suffered when previously in such care".

78. The Claimant stated that, from 27 May 2021 to 19 September 2022 ("the second period"), Buckinghamshire County Council agreed to her request to provide 24-hour care at home. She still had to assist and supervise the carers. She was also responsible for other matters, such as ordering and collecting his medication and doing his laundry. She estimated that she was providing 24 hours care per week.

79. In her witness statement, Ms Emma Hannay, Head of Legal at the First Defendant, stated that the First Defendant had not been provided with the evidence that would have been required to make a final decision about an award in respect of care costs. The local authority Care Assessment requested by the First Defendant had still not been obtained by the Claimant's solicitor as at the date of YX's death.

80. The Claimant submitted that there was no specific requirement under the Scheme to provide the Care Assessment. In my view, an applicant for an award in respect of care is required to provide evidence of the extent and nature of the care offered by the local authority so that the First Defendant can assess whether the criteria under paragraphs 51 and 52 are met. Paragraph 92 imposes a general duty to provide such information as a claims officer may reasonably require. The local authority's Care Assessment is the document which formally sets out the care to be provided and so it is generally the most appropriate evidence of the level of state care that an applicant is receiving. If the Claimant's solicitor applied to submit the required information from the local authority in some other format, I expect that the First Defendant would have considered it. However, no such application was made by the Claimant's solicitor.

81. The Defendants submitted that the Claimant's claim for the first period was doubtful for several reasons. In the light of the medical evidence on the severity of YX's condition, it was implausible that the Claimant was left to care for him alone for 14 hours per day. The information provided to the First Defendant in the Questionnaire and assessments, which referenced his need for 24-hour care, did not suggest that the care package from the state was inadequate and that the Claimant had to provide cover for 14 hours per day. This was not raised in the pre-action letter or the original Statement of Facts and Grounds, prior to amendment.

82. In respect of the first period, the Defendants submitted that YX was in hospital for at least 3½ months, and possibly for other periods as well. During those periods the Claimant would not have been providing care. Furthermore, several of the elements of care claimed, such as ordering and taking delivery or, and storing food and medication, would not be recoverable care under the Scheme as it was not "care in connection with the applicant's bodily functions or meal preparation" as required under paragraph 52(e) of the Scheme.

83. The First Defendant's provisional assessment for the purposes of this claim was set out in Ms Hannay's witness statement. She advised that, under the Scheme, no care award would have been payable if free 24 hour care was available from the state (the NHS or the local authority). Ms Hannay advised that if, as it appeared, free 24 hour care was offered by Buckinghamshire County Council in a residential care home in the first period from January 2020 to May 2021, then no care award would have been payable under the Scheme if the Claimant decided to care for YX at home instead. In the second period from May 2021 to September 2022, the local authority provided 24 hour care when YX was at home. In my view, it is very likely that the entire claim for

gratuitous care would have been refused in respect of any period when 24-hour care was available from the state, as it would not be necessary.

Equipment

84. In the Claimant's 'Replacement Note on Special Expenses', dated 6 June 2024, the following items were claimed:

i) Nebuliser machines: £306.

ii) Nebuliser vials: £60.72.

iii) Incontinence sheets: £1,380.

iv) Cushions: £30.

v) Mouth swabs: 52.80.

vi) Exercise bike: £2,499.

vii) Air conditioner: £90.

viii) Oximeters and thermometers: £20.

Total: £4,438.52.

85. The First Defendant has not been provided with any receipts and has not had an opportunity to assess, under paragraph 51 of the Scheme, whether these items were necessarily incurred, not otherwise available free of charge, and the reasonableness of the cost. It is possible that some or all of these items would be disallowed.

Court of Protection

86. The Claimant claimed fees incurred in respect of the Court of Protection and management of YX's affairs due to lack of capacity, in the sum of £3,971.67.

Social security benefits

87. Under the Scheme, social security benefits are deducted from an award of compensation. YX received Personal Independence Payment ("PIP") - the Daily Living component and the Mobility component - both at enhanced level.

88. Ms Emma Hannay set out the calculations of YX's PIP entitlement in her witness statement, as follows:

i) PIP Enhanced Daily Living: £12,387.66.

ii) PIP Enhanced Mobility: £8,648.59.

89. In her second witness statement, the Claimant disputed the First Defendant's calculations. She stated that YX's bank records showed payments from the Department of Work and Pensions for PIP totalling £12,959.93 from January 2020 to December 2022. She added that YX may have received more benefit payments to another account which she was unable to access. In my view, this evidence is not sufficiently reliable. A statement of benefits paid ought to have been obtained from the Department of Work and Pensions.

90. The Claimant submitted that the PIP Enhanced Mobility component ought not to be deducted from any award in respect of care because, under paragraph 54 of the Scheme, the set-off was limited to "social security benefits in respect of the applicant's special expenses". The Mobility component did not relate to the special expenses for care. In the context of a personal injuries claim, the Social Security (Recovery of Benefits) Act 1997, at Schedule 2, and the NHS Guidance on recovery of benefits (April 2024), only make provision for mobility benefits to be offset against compensation for loss of mobility, and the same principle should be applicable to awards by the First Defendant. Some awards may be made for equipment relating to mobility, in which case a deduction would be appropriate.

91. The Defendants submitted that the deduction of social security payments under the Scheme is governed by the provisions of the Scheme, not by the provisions applicable to personal injury claims.

92. Annex A of the Scheme defines "social security benefits" to include "all state and local authority benefits or assistance, whether paid in whole or in part from the funds of any part of the United Kingdom or elsewhere".

93. By paragraph 54 of the Scheme "a special expenses payment will be withheld or reduced to take account of the receipt of, or entitlement to, social security benefits in respect of the applicant's special expenses". The Scheme does not restrict any set-off of the PIP Enhanced Mobility component to compensation for loss of mobility.

94. In any event, the evidence in this case showed that assisting YX with mobility and transfers was part of the care that was being provided to him. The Supplementary Questionnaire described YX as having no mobility. The Help with Personal Care form described the assistance he needed with transfers from his bed to a wheelchair and a shower chair. He was also provided with equipment to assist his mobility e.g. wheelchair, hoist, ramp, and a disability exercise bike.

95. For these reasons, I conclude that the First Defendant would be able to deduct the PIP Enhanced Mobility component from an award.

96. The First Defendant calculated the Claimant's entitlement to Carer's Allowance for the period 29 January 2020 to 20 September 2022 in the sum of £9,345.41.

97. In her second witness statement, the Claimant stated that she only claimed Carer's Allowance from January to December 2022 and she received approximately £3,000. She said she claimed Universal Credit, and received an enhanced benefit called "Carer's Element". Her total entitlement from January 2020 to December 2022 was £5,590.68. The maximum she received during the period January 2020 to December

2022 was £8,886.54, but this was subject to reductions attributable to her take home pay, and so the amount was likely to be significantly less than this.

98. The First Defendant was not aware that the Claimant was in receipt of a Universal Credit enhancement as a carer. As I have already observed, a statement of benefits paid ought to have been obtained from the Department of Work and Pensions.

99. Any deduction is applied on the basis of the benefits to which a person is entitled, even if they are not claimed. Under paragraph 98(b) of the Scheme, a claims officer may defer determination of an application until he is satisfied that the applicant has taken all reasonable steps to obtain any social security payments or other payments or compensation to which he may be entitled. Therefore any entitlement to Carer's Allowance would be deducted even if it was not claimed.

100. The Claimant submitted that Carer's Allowance ought not to be deducted from any award in respect of gratuitous care by family members because, under paragraph 54 of the Scheme, the deduction is limited to "social security benefits in respect of the applicant's special expenses", and so did not include benefits received by others in respect of their care work.

101. I do not accept this submission. Gratuitous care by family members is treated as a legitimate special expense incurred by an applicant under the Scheme and so logically social security benefits paid by the state in respect of such care should also be taken into account when assessing an award. The state paid Carer's Allowance to the Claimant to compensate for time spent as a carer for YX.

102. According to Ms Hannay's calculations, the total deduction for social security benefits should be £30,381.66. I accepted this figure.

Interim payments

103. The First Defendants made interim payments totalling £60,000.

Conclusion

104. The Claimant's claim for special expenses, taken at its highest, amounts to:

i) Gratuitous care: £78,606.22.

ii) Equipment: £4,438.52.

iii) Court of Protection and Deputyship: £3,971.67

Total: £87,016.41.

105. The deductions under the Scheme amount to:

i) Social security benefits: £30,381.66.

ii) Interim payments: £60,000.

Total: £90,381.66.

106. Thus, the deductions extinguish the sums claimed even taken at their highest, before checking and assessment by the First Defendant. In my view, it is highly likely that the claim for gratuitous care would have been refused in respect of any period when 24-hour care was available from the state, in which case the claim would be significantly reduced. Therefore the Claimant's financial claim cannot succeed.

Article 14 and A1P1 ECHR

107. Article 14 ECHR 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."

108. Article 14 is not a free-standing prohibition of discrimination. It only applies where the facts fall within the ambit of another Convention right. The Convention right relied on by the Claimant is A1P1 which 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…. ."

109. The questions to be considered in an Article 14 claim were summarised by the Supreme Court in *R (Stott) v Secretary of State for Justice* [2018] 3 WLR 1831 per Lady Hale at [207]:

> "207. In article 14 cases it is customary in this country to ask four questions: (1) does the treatment complained of fall within the ambit of one of the Convention rights; (2) is that treatment on the ground of some "status"; (3) is the situation of the claimant analogous to that of some other person who has been treated differently; and (4) is the difference justified, in the sense that it is a proportionate means of achieving a legitimate aim?"

110. These four questions are not "rigidly compartmentalised" (per Lady Hale at [14] in *Re Mclaughlin* [2018] 1 WLR 4250).

Ambit

111. In *JT v Criminal Injuries Compensation Authority* [2019] 1 WLR 1313, the Court of Appeal held that the Scheme was capable of establishing a proprietary interest within the ambit of A1P1 of the Convention, such as to engage Article 14, per Leggatt LJ at [69]. The question was whether, but for the discriminatory ground about which the

claimant complained, JT would have had a claim which amounted to a possession within the meaning of A1P1 (at [53]). It was common ground between the parties that the High Court was bound by that decision. The Defendants did not seek to argue before me that the Claimant had no proprietary interest under A1P1 because she could not establish any entitlement to a financial award, once deductions were applied.

Other status

112. The Claimant relied upon two alternative statuses and comparators.

i) Status A: as a family carer of a victim of a criminal injury who has died as a result of that injury. The relevant comparator is the family carer of a victim of a criminal injury who is alive.

ii) Status B: as the qualifying relative of a victim who died as a result as a result of criminal injury and who was not dependent on the victim. The relevant comparator is the qualifying relative of a victim who died for a reason unrelated to the criminal injury, and who was financially dependent on the deceased at the date of death.

113. Article 14 has been held to include differences in treatment based on a large number of grounds, such as nationality, sexual orientation, age, disability, mental capacity, health status, homelessness, family relationships and being a victim of domestic violence. It may include cases where a person is treated less favourably on the basis of another person's status and discrimination based on the absence of a status rather than its presence (see *Human Rights Practice: Patrick*, at 14-012, and authorities cited in the footnotes thereto).

114. There are conflicting authorities about whether a status needs to be based on an innate and immutable personal characteristic or whether any sort of distinguishing characteristic is sufficient. In the leading Strasbourg case of *Clift v United Kingdom* (App. No. 7205/07, 13 July 2010), the ECtHR rejected the argument that only an innate or inherent personal characteristic could constitute a status, and a status could be chosen or changeable.

115. In *R (Stott) v Secretary of State for Justice* [2018] UKSC 59, Lady Black summarised, at [56], the position adopted by the House of Lords prior to the decision of the ECtHR in *Clift*, and at [63], the position adopted by the Supreme Court thereafter.

116. The Claimant's starting point was the judgment of Lord Reed PSC in *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223, at [71], where he said that it was now well established that "other status" is to be afforded a wide meaning and status is an issue "which rarely troubles the European Court". Lord Reed agreed, at [69], with the approach adopted by Legatt LJ in the Court of Appeal:

> "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 that the difference in treatment complained of….."

117. The relevant principles were addressed in detail by Lord Lloyd-Jones in the Supreme Court in *R (A) v Criminal Injuries Compensation Authority* [2021] 1 WLR 3746 at [40] - [67]. Before me, both parties relied upon his conclusion, at [66]:

> "…. I agree with the observations of Lord Reed PSC on the independent existence issue in his judgment in *R(SC) v Secretary of State for Work and Pensions* …..in which he adopted the reasoning of Leggatt LJ in the Court of Appeal in that case …. Article 14 draws a distinction between relevant status and and difference in treatment and the former cannot be defined solely by the latter. There must be a ground for the difference of treatment in terms of a characteristic which is something more than a mere description of the difference in treatment….there is no requirement that the status should have legal or social significance for other purposes or or in contexts other than the difference in treatment of which complaint is made."

118. Both parties relied upon *Dudley Metropolitan Borough Council v Mailley* [2024] 1 WLR 1837 the Court of Appeal, per Simler LJ at [20(i)], confirmed that the concept of status was not "wholly redundant". There must be a ground for the difference of treatment in terms that is more than a mere description of the difference in treatment (at [47]). Simler LJ held that "other status" had not been established in that case, where the facts relied upon (the secure tenant lost capacity and vacated the property because of her dementia) were too uncertain and liable to change. Simler LJ distinguished, at [35], between loss of capacity which could, in principle, change or be reversed and "death" which is "certain in terms of its occurrence and timing".

119. The Claimant submitted that the principles set out by Simler LJ at [30] supported her case on Status A (the death of a close family member to whom she was providing care):

> "30. It is generally the case that a person's health status, including a disability and various health impairments, can fall within the term "other status". Likewise it is not in doubt that article 14 of the Convention also covers instances in which an individual is treated less favourably on the basis of another person's status or protected characteristics: see *Guberina v Croatia* (2016) 66 EHRR 11 (referred to above). An example would be where a complainant does not allege unfavourable treatment related to his or her own disability but rather on the

> basis of the disability of a close family member with whom they live and/or to whom they provide care."

120. Applying these principles to Status A, the Claimant submitted that being a carer for a family member injured by violent crime who goes on to to die from their injuries was obviously an objective, identifiable personal characteristic that existed independently of the provision under challenge. It was a status that was permanent and unchangeable. It was not a mere description of the difference in treatment. The difference in treatment is the exclusion from a financial award for care provided whereas the "other status" is being the carer of a victim who has died due to a crime of violence.

121. The Claimant made the same submissions in respect of Status B. She added that the fact that the term "qualifying relative" formed part of the status did not mean that it had no meaning independent of the Scheme. It was used only as shorthand for the close familial relationships which fall under that description under paragraph 59 of the Scheme.

122. The Defendants submitted that Article 14 did not require all differentials within a welfare scheme to be justified, and relied upon the judgment of Lord Reed in *SC*, at [37(1)] where he stated "only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of Article 14".

123. The Defendants referred to *R (Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681, at [65]; *Steer v Stormsure* [2021] ICR 1671, at [42] and *R (RJM) v Secretary of State for Work and Pensions* [2009] AC 311, per Lord Neuberger at [45] where he stated "the concept of 'personal characteristic' (not surprisingly, like the concept of status) generally requires one to concentrate on what somebody is, rather than what he is doing or what is being done to him". However, as Lord Lloyd-Jones said in *A*, at [45], this observation pre-dated the relaxation of the requirement of status in *Clift* which has been reflected in more recent decisions of the Supreme Court. It was not applied in *A* where Lord Lloyd-Jones held that being a victim of trafficking (by definition something that is done to someone) was an "other status".

124. In regard to Status A, the Defendants submitted that the Scheme does not differentiate on grounds of "being a family carer of a victim of a criminal injury who has died as a result of that injury" as no carer of a victim of a criminal injury who has died as a result of that injury, whether a family member or not, or whether caring for pay/reward or not, can make a claim for compensation.

125. The Defendants further submitted that Status A was not an identifiable group of people which had any identity independent of the alleged discrimination here. Furthermore, the purported status comprises numerous elements of things people have done themselves, or have had done to them. The status of "carer" varies with time, and the nature and extent of the care is also likely to change. This was demonstrated by the fact that the Claimant's position changed when YX died. Here the "other status" was no more than a mere description of the difference of treatment under the Scheme between different classes of people in different circumstances.

126. The same submissions applied in regard to Status B. This was not an identifiable group of people which had any identity independent of the alleged discrimination in the Scheme. Furthermore, the Scheme does not differentiate on grounds of being "the Qualifying relative of a victim who has died as a result of a criminal injury and who was not financially dependent on the deceased". No qualifying relative who was not financially dependent on the deceased can make a claim for compensation for care or special expenses under the Scheme.

127. In reaching my conclusions on the issue of "other status", I have had regard to the authorities, and in particular, the gradual judicial relaxation of the requirements to be met to establish status for the purposes of Article 14. I accept the Claimant's submission that being a carer for a family member injured by violent crime who later died from his injuries, or being a qualifying relative of a victim who died as a result of a criminal injury and who was not financially dependent on the victim, are both capable of amounting to "other status" under Article 14. Both Status A and Status B have characteristics that exist independently of the Scheme. Those characteristics are not a mere description of the difference in treatment. The difference in treatment is the exclusion from a financial award for care. On the authorities, the fact that the characteristics arose from the death of another person does not exclude the Claimant from establishing status under Article 14. Furthermore, the Claimant's status as a carer, and as a qualifying relative, who cared for her son (a victim of crime), until he died is certain and permanent. It is at least possible that there will be other people who have the same status as the Claimant. The Defendants' submissions in paragraphs 54 and 62 of their Skeleton Argument about the inaccuracies in the Claimant's descriptions of Status A and B and the comparators do not change my conclusions on status, though they are relevant to the issue of justification.

Analogous situation

128. There are many examples of cases that have been dismissed because the position of the Claimant was not analogous to that of the chosen comparator, for example, married and unmarried partners, different categories of prisoners, people with different residence or immigration status, or those with different sorts of property rights cannot be compared (see *Human Rights Practice: Patrick*, at 14-015, and authorities cited in the footnotes thereto).

129. In *Re McLaughlin*, Lady Hale held as follows:

> "24. Unlike domestic anti-discrimination law, article 14 does not require the identification of an exact comparator, real or hypothetical, with whom the complainant has been treated less favourably. Instead it requires a difference in treatment between two persons in an analogous situation. However, as Lord Nicholls explained in *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173, para 3:
>
> > "the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will

> be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."
>
> As was pointed out in *AL (Serbia) v Secretary of State for the Home Department* [2008] 1 WLR 1434, there are few Strasbourg cases which have been decided on the basis that the situations are not analogous, rather than on the basis that the difference was justifiable. Often the two cannot be disentangled.
>
> …
>
> 26. It is always necessary to look at the question of comparability in the context of the measure in question and its purpose, in order to ask whether there is such an obvious difference between the two persons that they are not in an analogous situation. …"

130. In *SC*, Lord Reed made the same point at [59], that the comparison must be made between persons who are "in a relevantly similar situation" and "an assessment of whether situations are "relevantly" similar generally depends on whether there is a material difference between them as regards the aims of the measure in question".

131. In respect of Status A, the Claimant submitted that her situation was analogous to her comparator. She was in the same position as the comparator until the point at which YX died as a result of his injury. Thereafter she has been treated differently to a family carer of a victim of a criminal injury who is alive. The core reason for the differential treatment is the death of the victim.

132. The Defendants submitted that the death of the victim means that the Claimant is no longer in an analogous situation to her comparator. Under the Scheme, only the victim is eligible to make a claim for gratuitous care, not the carer. A special expenses award for care can only be made to an applicant for the cost of care "in connection with their bodily functions or meal preparation" (paragraph 52(e) of the Scheme). The victim's entitlement to an award did not survive for the benefit of his estate.

133. The Claimant relied upon the principle in *Hunt v Severs* [1994] AC 350 in which the House of Lords considered whether an injured plaintiff, who would normally be able to claim the value of gratuitous care provided by family, could do so in circumstances where the voluntary carer was her husband and the defendant tortfeasor. Lord Bridge accepted that "the voluntary carer has no cause of action of his own against the tortfeasor" (at 358F). He distinguished the reasoning in *Donnelly v Joyce* [1974] QB

454 in which the Court of Appeal held that the loss was the plaintiff's loss and held that the underlying rationale was to enable the voluntary carer to receive proper compensation for his services (at 361E). He adopted the view of Lord Denning MR in *Cunningham v Harrison* [1973] QB 942 that the injured plaintiff holds the damages on trust for the voluntary carer, but where the carer was also the tortfeasor there was no basis upon which any payment under this head of damage should be made.

134. The Claimant sought to apply the rationale in *Hunt v Servers* to the Scheme, arguing that an equitable trust to the benefit of the carer arose by operation of law on the making of an award for special expenses for gratuitous care.

135. I accept the Defendants' submission that it is not right to import common law principles into applications for criminal injury compensation which are made under a statutory scheme, and I reject the submissions to the contrary by the Claimant. In *Rust-Andrews v First Tier Tribunal (Social Entitlement Tribunal)* [2011] EWCA Civ 1548; [2012] PIQR P7, the Court of Appeal held, per Carnwath LJ at [34]:

> "The issue is not whether "common law principles" apply, The [Criminal Injuries Compensation Act 1995] answers that question in the negative, since it expressly requires compensation to be determined in accordance with the Scheme."

136. Furthermore, I agree that the basis of the constructive trust adopted in *Hunt v Severs* is uncertain, and controversial: see e.g. *Lewin on Trusts*, 20th Ed, at 8-041; *McGregor on Damages*, 21st Ed, at 40-232 to 40-236.

137. In respect of Status B, the Claimant submitted that she was in an analogous situation to the Qualifying Relative of a deceased who died for a reason unrelated to their criminal injury and was financially dependent on the deceased at the date of death. Both have suffered precisely the same loss, in term of the gratuitous care provided. In both cases a close family member was significantly injured by a crime of violence requiring that care.

138. The Defendants submitted that the Claimant was not in an analogous situation to the comparator as she was not financially dependent on the deceased.

139. In my judgment, the Claimant's situation under Status A or Status B is not analogous or relevantly similar to the situation of her comparators. Applying the test in *SC*, her situation is materially different to the situation of her comparators, having regard to the aims of the Scheme.

140. I refer to the Defendants' Skeleton Argument at paragraph 13 and the witness statement of Ms Joanne Savage, head of a policy team in the Victims, Vulnerabilities and Criminal Law Directorate at the Ministry of Justice, at paragraphs 18 – 26. In summary:

i) The purpose of payments under the Scheme is to recognise and express public sympathy for the harm to victims injured by violent crime.

ii) The Scheme is a last resort, intended to provide compensation and support to victims who have been unable to seek or receive it through other means. It is not intended to compensate victims or their dependents for all losses, or the full extent of any losses that may have been incurred. The Scheme envisages that victims will obtain the benefit of funded state care from the National Health Service and local authorities, as well as social security benefits, and seeks to avoid duplication of provision.

iii) When the victim dies as a result of criminal injury, the victim's claim (if not yet paid) does not survive for his family members, his dependents or his estate (save in respect of funeral expenses). However, in recognition of the impact of the death, qualifying relatives are entitled to a bereavement award, and child and dependency payments, from the date of death onwards, as part of what is essentially separate provision for fatal cases. It is forward looking from the date of death.

iv) In contrast, where the cause of death is not connected to the injury, neither qualifying relatives nor child or other dependents will be able to claim any future provision. If the victim died before his claim had been paid, they will not have received any support for the loss of earnings and special expenses incurred prior to the death either. In those specific circumstances, where the victim's claim has not yet been paid, dependents may claim loss of earnings and special expenses resulting from the criminal injury. This is backward looking up to the date of death. It is an expression of sympathy and recognition of the adverse financial consequences of the criminal injury.

141. In regard to Status A, after the death of the victim YX, the Claimant was no longer in an analogous situation to her comparator. The death was a material difference. Under the Scheme, only the victim is eligible to make a claim for gratuitous care, not the carer. The victim's entitlement to an award did not survive for the benefit of his estate.

142. In regard to Status B, the Claimant is not in an analogous situation to the comparator as she was not financially dependent on the victim, YX. Financial dependency on a victim is a material difference, recognised in the Scheme as deserving of compensation. If she had been financially dependent on YX, she would have been eligible for a dependency payment. She has received a bereavement award, unlike her comparator.

Justification

Legal principles

143. The legal principles to be applied were set out by Leggatt LJ in *JT v Criminal Injuries Compensation Authority* [2019] 1 WLR 1313, at [81] – [83]:

> "81. The next question is whether the difference in treatment complained of in this case constitutes "discrimination" prohibited by article 14. According to settled case law, this depends on whether the state can show an "objective and

reasonable justification" for the difference in treatment, judged by whether it has a legitimate aim and there is a "reasonable relationship of proportionality" between the aim and the means employed to realise it: see eg *Rasmussen v Denmark* (1984) 7 EHRR 371, para 38; *Petrovic v Austria* (1998) 33 EHRR 14, para 30. It is also well settled in the case law of the European Court of Human Rights that states have a certain "margin of appreciation" in applying this test, the breadth of which will vary according to "the circumstances, the subject matter and the background": see eg *Rasmussen v Denmark* 7 EHRR 371, para 40; *Petrovic v Austria* 33 EHRR 14, para 38.

82. In its judgment on the merits in *Stec v United Kingdom* (2006) 43 EHRR 47, para 52, the Grand Chamber having made this point said:

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

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

83. It is not immediately obvious how a test which requires a policy choice to be respected unless it is "manifestly without reasonable foundation" differs from a test of irrationality. Nevertheless, it is also firmly established and is common ground in the present case that the test for justification remains one of proportionality. The canonical formulation of that test is now that of Lord Reed 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)."

144. The reasons for applying a wide margin of appreciation and the 'manifestly without foundation' test to challenges to the Scheme were set out by Lord Lloyd-Jones in *A*, at [83]-[85]:

> "83. First, the CICS operates in the field of social welfare policy where courts should normally be slow to substitute their view for that of the decision maker (*R (RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311, para 56). Furthermore, this is an area where the ECtHR usually accords a wide margin of appreciation to national courts as it explained in *Stec*, paras 51, 52, cited at para 82 above and in *Fábián v Hungary* (2017) 66 EHRR 26, paras 114, 115. The question whether and, if so to what extent, the state should pay compensation to victims of crimes of violence who have themselves committed crimes is essentially a question of moral and political judgement. Furthermore, it requires the exercise of political judgement in relation to the allocation of finite public resources. This is, therefore, a field in which the courts should accord a considerable degree of respect to the decision maker.
>
> 84. Secondly, the reasons for judicial restraint are greater where, as in the present case, the statutory instrument has been reviewed by Parliament. In *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 Lord Sumption JSC expressed the matter in the following terms at p 780, para 44:
>
> > "when a statutory instrument has been reviewed by Parliament, respect for Parliament's constitutional

> function calls for considerable caution before the courts will hold it to be unlawful on some ground (such as irrationality) which is within the ambit of Parliament's review. This applies with special force to legislative instruments founded on considerations of general policy."

> 85. Thirdly, the basis of the discriminatory treatment complained of is also relevant here. The ECtHR has identified a number of suspect grounds of differential treatment which are regarded as particularly serious, such as sex, race or ethnic origin, nationality or birth status, and which will usually require very weighty reasons by way of justification, unless outweighed by other relevant considerations. In general, the rationale is the link between the characteristic on which differential treatment is founded and a history of stigmatisation, stereotyping and social exclusion. However, in the present case the status relied upon, ie being a victim of trafficking with a relevant unspent conviction, is not within the range of suspect reasons where discrimination is usually particularly difficult to justify. Accordingly, to ask whether the measure is manifestly without reasonable foundation is an entirely appropriate test."

145. In *A*, Lord Lloyd-Jones went on to consider the complaint made that the Scheme imposed a bright line rule without the possibility of an exercise of discretion, and gave the following guidance at [89]:

> "89. In approaching this submission, a convenient starting point is the observation of Lord Bingham in relation to the nature of legislation, made in a very different context in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] AC 1312, para 33:
>
> > "legislation cannot be framed so as to address particular cases. It must lay down general rules: … A general rule means that a line must be drawn, and it is for Parliament to decide where. The drawing of a line inevitably means that hard cases will arise falling on the wrong side of it, but that should not be held to invalidate the rule if, judged in the round, it is beneficial."
>
> The drawing of dividing lines between eligibility and non-eligibility is an inevitable feature of legislation in the field of social welfare and compensation. In many cases there will be room for disagreement as to where a line should be drawn but the courts will be slow to interfere. In *RJM* [2009] 1 AC 311 Lord Neuberger of Abbotsbury, accepting that the Government was entitled to adopt the policy at issue in relation to disability premium in income support, observed at para 57:

> "The fact that there are grounds for criticising, or disagreeing with, these views does not mean that they must be rejected. Equally, the fact that the line may have been drawn imperfectly does not mean that the policy cannot be justified. Of course, there will come a point where the justification for a policy is so weak, or the line has been drawn in such an arbitrary position, that, even with the broad margin of appreciation accorded to the state, the court will conclude that the policy is unjustifiable. However, this is not such a case, in my judgment."

Similarly, in *Mathieson v Secretary of State for Work and Pensions* [2015] 1 WLR 3250 Lord Mance JSC stated at para 51:

> "Courts should not be over-ready to criticise legislation in the area of social benefits which depends necessarily on lines drawn broadly between situations which can be distinguished relatively easily and objectively."

In this regard the courts have also acknowledged the advantages of clear rules which can be readily applied. In *R (Tigere) v Secretary of State for Business, Innovation and Skills (Just For Kids Law intervening)* [2015] 1 WLR 3820 Lord Hughes JSC stated at para 60, referring to rules of eligibility for student loans:

> "All such rules are both inclusionary and exclusionary; if one grafts onto them a residual discretion they cease to be rules based on readily ascertainable facts and become rules based in part on an evaluative exercise. The truth is that clear rules, based on readily ascertainable facts, which are simple to state, to understand and to apply, have a merit of their own.""

Application of the legal principles in this case: disputed issues

146. The Claimant submitted that an enhanced degree of scrutiny was required in this case because the Claimant had no choice in the circumstances in which she found herself, as the mother and carer of a victim of violent crime.

147. I do not accept this submission. Although in *JT*, per Leggatt LJ at [91], the court took into account as a relevant factor that the claimant was a minor who had no choice in living where she did, or power to change her status, on my reading, the court did not hold that lack of choice, of itself, required an enhanced degree of scrutiny. That would be contrary to the analysis in *SC*, in particular at [157] – [162], which made no such distinction. Indeed, Lord Reed, at [114], highlighted an "other status" such as age,

which is clearly not a matter of choice, as being one which is not subject to a higher intensity of review. Nor is this a case of "stereotyping, stigma or social exclusion of the sort which explains the need for intensive scrutiny": see *R (Peiris) v First Tier Tribunal* [2023] EWCA Civ 1527, per Lewis LJ at [60].

148. The Claimant submitted that cost alone is insufficient to displace the burden of justifying discrimination. However, the Defendants do not rely on cost alone. They are entitled to rely upon the economic well-being of the country in saving expense as a legitimate objective of public policy, particularly in the context of a limited funds in a welfare benefit scheme, which can justify a difference of treatment: see *SC* per Lord Reed at [192], [202]; *Peiris* per Lewis LJ at [50] – [51].

149. The Claimant submitted that an enhanced degree of scrutiny and a narrower margin of appreciation was required in this case because there was no evidence that the discrimination in Status A has ever been considered by Parliament or the Defendants. The extent to which the values or interests relevant to the assessment of proportionality were considered when the policy choice was made affects the degree of scrutiny required by the Court: see *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420, at [47]; *R (TP) v Secretary of State for Work and Pensions* [2020] PTSR 1785 at [127], where in upholding the Administrative Court's finding of a breach in respect of transitional Universal Credit measures Sir Terence Etherton MR and Singh LJ noted "[t]he reality was that the Secretary of State had simply not placed evidence before Lewis J. which would assist him in deciding that there was a reasonable foundation for the difference in treatment".

150. The Claimant submitted that it was fatal to the Defendants' defence of justification that neither the Defendants nor Parliament had specifically considered whether a person in the circumstances of Status A or Status B should be entitled to make a claim for past special expenses.

151. I do not accept the Claimant's submissions on this issue. Under section 11 CICA 1995, the Scheme is subordinate legislation which is scrutinised by the affirmative resolution process in Parliament. The Scheme is subject to debate and must be positively approved by the resolution of each House. The separate provisions made in cases of death, either as a result of a criminal injury or for an unconnected reason, are obvious on the face of the document. It is inconceivable that they were overlooked by Parliament.

152. Historically, Parliament has actively exercised its powers of scrutiny, for example, by introducing into the proposed Criminal Injuries Compensation Scheme 1969, for the first time, a provision enabling dependents to recover a payment where the victim died otherwise in consequence of his injuries, if an award had not been made prior to death, and hardship to dependents would otherwise result. The hardship condition was removed in 1979 but the dependency requirement remained.

153. Parliament has decided and determined that only victims and dependents should be able to make claims for special expenses, and specifically determined that only those who are dependents of those who have died for reasons other than the crime of violence should be able to claim for the special losses incurred before death. It is therefore wrong to assert this is not a matter which has not been considered by Parliament.

154. In *Peiris*, per Lewis LJ at [53], the court held that "the reasons for judicial restraint are greater where the arrangements have been reviewed by Parliament (see para 84 of *R(A) v Criminal Injuries Compensation Authority*)".

155. In *SC*, Lord Reed reviewed the authorities on the use of parliamentary material in assessing compatibility with the Convention, and concluded at [182]:

> "182. It is of course true that the relevant question, when considering the compatibility of legislation with Convention rights, is not whether Parliament considered that issue before making the legislation in question, but whether the legislation actually results in a violation of Convention rights. In order to decide that question, however, the courts usually need to decide whether the legislation strikes a reasonable balance between competing interests, or, where the legislation is challenged as discriminatory, whether the difference in treatment has a reasonable justification. 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."

156. As Ms Savage described in her witness statement, the Scheme has been re-considered and revised on numerous occasions, and has been subject to a full public consultation process. The issue raised by the Claimant in this claim has not been raised in the period since she became involved with the policy of the Scheme (November 2014). In particular, it has not been raised in the context of an ongoing review of the Scheme that has involved three public consultations in 2020, 2022 and 2023. She concludes, at paragraph 26:

> "Finally, the Scheme is intended to be simple to understand and to apply. As it is publicly funded and operates as last resort, it takes into account the fact that victims are entitled to and may be in receipt of other financial support and benefits. The fact that the contention raised in this case has not, as far as I am aware, been raised before when the Scheme has operated in the way described for many years, suggests that there is not a significant or systemic unfairness in the provisions of the Scheme in fatal cases in the context of how they work in practice and in light of other support and benefits that may be available."

157. The issue raised in this claim only arises where a victim dies before an award is made. If an award has been made prior to death, it will include any eligible care claim. In

complex injury cases, or in this case where the Claimant's personal injury solicitor failed to obtain the necessary information on the care package provided by the local authority, the delay in making a final award can be lengthy. However, substantial interim payments are likely to be paid. In addition, in most cases, as in this one, the care needed will be provided by the state and so there will not be an eligible care claim. I accept the Defendants' submission that this may explain why the issue in this claim has not previously been raised as a concern. Although it is possible that, on the particular facts of an individual's case, they may not be paid for eligible gratuitous care prior to the death of the victim, this is unlikely to be the position in the vast majority of claims.

Legitimate aim and objective justification

158. In *Peiris*, which concerned the First Defendant's refusal to make a bereavement award under the Scheme to a qualifying relative who was a Sri Lankan national and not resident in the UK, Lewis LJ described the legitimate aims of the Scheme at [48] – [51]:

> "48. The context in the present case is the payment of compensation to victims of crime or their relatives. The payments made under the Scheme are, or are akin to, welfare or social benefits intended to express social solidarity or support for those affected and to address the economic consequences that they suffer as a result of being victims of crime. That is true both of victims of crime generally, and specifically in relation to the family members of deceased victims of violence. The payments for the family members of deceased victims include bereavement payments, as an expression of social solidarity or support, and other payments such as dependency payments or child payments which address the economic consequences for those who were dependent on the victim. The underlying rationale, or justification, for making payments to those affected by violent crime is that they have suffered a serious misfortune for which the whole community should help to compensate.
>
> 49. Against that background, it is apparent from reading the material in the present case that the aim underlying the reforms to the Scheme was to ensure the provision of a criminal injuries compensation scheme which was sustainable. Such a scheme was demand-led and, by 2012, cost over £200 million and was one of the most expensive in Europe. As the consultation document noted, the Scheme had to be sustainable if it were to continue to offer compensation to victims of violence. The reforms were intended to protect those most seriously injured by violent and sexual crime. They involved making savings, rebalancing the overall resources made available to victims and increasing financial reparation from offenders.
>
> 50. The aim, therefore, was to provide for a scheme for the payment of compensation for the victims of crime in a manner

> which was sustainable. As Lord Reed recognised at paragraph 202 of his judgment in *SC*, that is a legitimate aim. A system of welfare or social benefits such as child tax credit in that case, or compensation for criminal injuries in the present case, must be guided by the principle of control of expenditure.
>
> 51. In that regard, the Upper Tribunal was correct to conclude that controlling expenditure in order to provide a compensation scheme and, given the wider reforms, other services to victims was a legitimate aim (paragraph 64 of its reasons). It may be unhelpful to characterise this aim simply as an "attempt to save costs" or to regard the reforms as nothing "other than a way of attempting to control costs" as it was expressed in paragraph 83 of its reasons. The legitimate aim was to provide a sustainable basis for the allocation of social or welfare type payments for those who were the victims of violence and that necessarily involved controlling the costs of such payments."

159. The purpose of payments under the Scheme is to recognise and express public sympathy for the harm to victims injured by violent crime (see *A*, per Lord Lloyd-Jones at [90]).

160. It is intended to be simple to understand and apply (see *A*, per Lord Lloyd-Jones at [89] – [90]) and the 2012 Consultation Paper which sets out that one of the purposes is to make the Scheme "simpler and easier for victims to understand".

161. The Scheme is a last resort, intended to provide compensation and support to victims who have been unable to seek or receive it through other means. It is not intended to compensate victims or their dependents for all losses, or the full extent of any losses that may have been incurred. The Scheme envisages that victims will obtain the benefit of funded state care from the National Health Service and local authorities, as well as social security benefits, and seeks to avoid duplication of provision.

162. Given the purposes of the Scheme, I consider that there is objective justification for the difference of treatment contained within the Scheme. Compensation is directed at those who are most likely to be financially impacted by the crime, namely, the victim, or if they die, their dependents.

163. When the victim dies as a result of criminal injury, the victim's claim (if not yet paid) does not survive for his family members, his dependents or his estate (save in respect of funeral expenses). However, in recognition of the impact of the death, qualifying relatives are entitled to a bereavement award, and child and dependency payments, from the date of death onwards, as part of what is essentially separate provision for fatal cases. It is forward-looking from the date of death.

164. In contrast, where the cause of death is not connected to the injury, neither qualifying relatives, nor children or other dependents, will be able to claim any future provision. If the victim died before his claim had been paid, they will not have received any support for the loss of earnings and special expenses incurred prior to the death either. In those specific circumstances, where the victim's claim has not yet been paid, dependents may claim loss of earnings and special expenses resulting from the

criminal injury. This is backward-looking up to the date of death. It is made as an expression of sympathy and recognition of the adverse financial consequences of the criminal injury.

165. Contrary to the Claimant's submission, I consider that these are rational reasons for the difference in treatment, and that the Scheme strikes a fair balance between the different categories of persons affected by criminal violence.

166. The Claimant submits that the fact that the Scheme allows claims only by victims and their dependents does not take into account the fact that dependents are also discriminated against because they cannot recover for past care where the victim has died from the injury, but can only recover where the victim has died for a reason other than the injury.

167. In my view, this criticism is misplaced. Where the victim has died as a result of criminal injury, dependents can claim a dependency payment which may go years into the future. Where the victim has died for a reason other than the injury, dependents are not eligible for a dependency payment. Parliament has therefore legislated so as to allow some provision for dependents to recover for the past loss where otherwise they would receive nothing. But non-dependents are in a different position to the dependents, because they were not dependent on the victim for financial support and so have not lost that dependency.

168. In conclusion, applying the principles from the case law set out above, I consider that a wide margin of appreciation and the 'manifestly without foundation' test should be applied. I conclude that the Defendants have demonstrated that the differences in treatment have an objective and reasonable justification. The Scheme pursues a legitimate aim, and its provisions are proportionate to the aim sought to be realised.

169. For these reasons, the Article 14 ECHR ground does not succeed.

Irrationality

170. The Claimant submitted that she had a "common law right" to be treated equally with like cases under the Scheme, unless such discrimination could be justified on rational grounds. For the reasons set out under the Article 14 ECHR ground, the blanket exclusion of family member carers who have provided gratuitous care to victims who die from their injuries is irrational when compared with the treatment of the Status A and Status B comparators.

171. The Claimant relied upon the following authorities:

i) *Kruse v Johnson* [1898] 2 QB 91 where Lord Russell of Killowen CJ affirmed, at page 99, that byelaws could be struck down as "unreasonable" if they were "partial and unequal in their operation as between different classes".

ii) *Matadeen v Pointu* [1999] 1 AC 98, where Lord Hoffmann stated, at [109], "treating like cases alike and unlike cases differently is a general axiom of rational behaviour".

iii) *R (Cheung) v Hertfordshire County Council*, the Times, 4 April 1998 where the Master of the Rolls held that "it is a cardinal principle of public administration that all persons in a similar position should be treated similarly".

iv) *SC* per Lord Reed at [146].

172. The Defendants referred to *Pantellerisco v Secretary of State for Work and Pensions* [2021] EWCA Civ 1454, [2021] PTSR 1922, per Underhill LJ at [54] – [59], which described the high degree of respect to be accorded to the legislature in respect of social and economic policy decisions:

> "54. In *Johnson* Rose LJ noted that the Court had not received detailed submissions on the test of irrationality: see para. 48 of her judgment. The claimant had relied squarely on "the *Wednesbury* unreasonableness that has been a ground for a public law challenge since the early days of the modern jurisprudence on judicial review". Rose LJ referred to para. 90 of the judgment of Leggatt LJ and Carr J, sitting as a Divisional Court, in *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin), [2019] 1 WLR 1649. This reads (so far as relevant):
>
> > "The second ground on which the Lord Chancellor's Decision is challenged encompasses a number of arguments falling under the general head of 'irrationality' or, as it is more accurately described, unreasonableness. This legal basis for judicial review has two aspects. The first is concerned with whether the decision under review is capable of being justified or whether in the classic *Wednesbury* formulation it is 'so unreasonable that no reasonable authority could ever have come to it': see *Associated Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 233-4. Another, simpler formulation of the test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision-maker: see e.g. *Boddington v British Transport Police* [1998] UKHL 13; [1999] 2 AC 143, 175 (Lord Steyn). The second aspect of irrationality/unreasonableness is concerned with the process by which the decision was reached. …"
>
> Rose LJ observes that the challenge in *Johnson* was essentially of the first kind, and the same is true in this case.
>
> 55. No doubt taking their lead from *Johnson*, counsel before us did not feel the need to advance any detailed submissions on the test of irrationality. That being so, this is not the case in which to attempt any wide-ranging analysis. I am broadly content to adopt the very general formulation derived

from *Boddington* which appears in the *Law Society* case: it is clearly not intended to be essentially different from the time-honoured *Wednesbury* language, but, as the Divisional Court there says, the *Boddington* formulation is simpler and less tautologous.

56. It is now well-recognised that the degree of intensity with which the Court will review the reasonableness of a public law or act or decision (including a provision of secondary legislation) varies according to the nature of the decision in question. There are many authoritative statements to this effect, but I need only quote from para. 51 of the judgment of Lord Mance in *Kennedy v The Charity Commission* [2014] UKSC 20, [2015] AC 435, where he says:

> "The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called *Wednesbury* principle. The nature of judicial review in every case depends upon the context."

57. It is also well-recognised that in the context of governmental decisions in the field of social and economic policy, which covers social security benefits, "the administrative law test of unreasonableness is generally applied … with considerable care and caution" and the approach of the courts should "in general … [accord] a high level of respect to the judgment of public authorities" in that field. I take those words from para. 146 of the judgment of Lord Reed (with which the other members of the Court agreed) in *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2021] 3 WLR 428: see para. 146. In that case the Supreme Court was concerned, as here, with a challenge to the legislation relating to welfare benefits (sections 13 and 14 of the Welfare Reform and Work Act 2016). The claimants' case was that the impugned provisions contravened article 14 of the Convention, but in the part of the judgment from which I quote Lord Reed is making the point that the Strasbourg jurisprudence is in line with the approach taken by the common law, and it is the latter which he is describing. He explains the reasons for adopting a less intensive standard of review in this area, including the need for the courts "to respect the separation of powers between the judiciary and the elected branches of government" (see para. 144).

58. Although the decision in *SC* is very recent (indeed it post-dates the argument before us), Lord Reed emphasises that the approach which he sets out is well-established in domestic law. I should note in particular a statement which he quotes from the speech of Lord Bridge in *R v Secretary of State for the*

Environment, ex p Hammersmith and Fulham London Borough Council [1991] 1 AC 521 to the effect that

> "[where a] … statute has conferred a power on the Secretary of State which involves the formulation and the implementation of national economic policy *and which can only take effect with the approval of the House of Commons* [my emphasis], it is not open to challenge on the grounds of irrationality short of the extremes of bad faith, improper motive or manifest absurdity".

As is evident from the italicised words, the ministerial orders which were in issue in that case were required to be approved by resolution of the House of Commons; and Lord Bridge evidently attached weight to that fact when identifying the appropriate standard of review. Lord Sumption made the same point at para. 44 of his judgment in *Bank Mellat v Her Majesty's Treasury (no. 2)* [2013] UKSC 39, [2014] AC 700, where he said:

> "When a statutory instrument has been reviewed by Parliament, respect for Parliament's constitutional function calls for considerable caution before the courts will hold it to be unlawful on some ground (such as irrationality) which is within the ambit of Parliament's review. This applies with special force to legislative instruments founded on considerations of general policy."

Those observations were endorsed by Lord Reed in *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449, at para. 94.

59. Finally, I would repeat what I said at para. 113 of my judgment in *Johnson*, as follows:

> "I recognise, as does Rose LJ, the extraordinary complexity of designing a system such as universal credit, and that it necessarily involves a range of practical and political assessments of a kind which the Court is not equipped to judge. I also accept that in order to be workable any such system may have to incorporate bright-line rules and criteria which do not discriminate fully between the circumstances of different individuals. … I fully accept that a Court should avoid the temptation to find that some particular feature of such a system is 'irrational' merely because it produces hard, even very hard, results in some individual cases."

> I would add that the very complexity and difficulty of the exercise is bound to mean that following the implementation of the scheme it may become clear with the benefit of experience that some choices could have been made better. But it does not follow that the legislation was in the respect in question irrational as made, or that it would be irrational not to correct the imperfections once identified: the court cannot judge the lawfulness of such schemes by the standard of perfection. Whether any errors or imperfections are of such a nature or degree as to impugn the lawfulness of the relevant regulations must depend on the circumstances of the particular case, having regard to the appropriate intensity of review."

173. I accept the Defendants' submission that, for the reasons set out in respect of the Article 14 ECHR ground, the claim of irrationality cannot succeed. The Claimant's position is not the same as her chosen comparators. The distinctions between them provide a rational explanation for the differences in treatment. Therefore the Claimant cannot establish that the Scheme is irrational, in the light of the wide discretion afforded to the Secretary of State and Parliament. For these reasons, the irrationality ground does not succeed.

Conclusion

174. The claim for judicial review is dismissed.