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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM
THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY MARY MEEHAN

AND IN THE MATTER OF A DECISION OF CICAPNI

and

THE DEPARTMENT OF JUSTICE (DoJ)

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Before: Morgan LCJ, Treacy LJ & Maguire J

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TREACY LJ ***(delivering the Judgment of the Court)***

Introduction

[1] This is an appeal from the judgment of the Rt Honourable Sir Paul Girvan given on 1 February 2018 whereby he dismissed the Applicant's judicial review. There is also a cross-appeal by the Department of Justice (DoJ) in relation to some aspects of the same judgement.

Factual Background

[2] The Applicant's judicial review relates to a refusal to grant her criminal injury compensation in respect of physical and alleged sexual abuse which she suffered between February 1979 and October 1980 when she was a girl aged between 9-11 years. After the Applicant's mother died in October 1977 the assailant moved into the family home and lived as a partner of the Applicant's father. Physical abuse of the applicant by the assailant began initially involving hair pulling, tripping up the

applicant and throwing her clothes on the floor. The abuse, however, got worse. The partner had a child by her relationship with the applicant's father. Following the father's sentence of imprisonment in 1979 the assailant remained living in the home looking after the applicant and the other children. The applicant asserts that she was subjected to appalling physical and sexual abuse between February 1979 and October 1980 at the hands of the assailant. Eventually the applicant was taken into care in October 1980. She claims that as a result of intimidation she moved to Coventry in 2002. She moved back to Northern Ireland in 2008 and decided to report her abuse to the police. The assailant was prosecuted for the abuse at Belfast Crown Court in July 2013 when she pleaded guilty to several counts of child cruelty and assault occasioning actual bodily harm. Following her plea on these counts the charges relating to the alleged sexual abuse were 'left on the books' by the prosecution.

[3] After the trial the Applicant lodged an application for criminal injury compensation under the Northern Ireland Criminal Injury Compensation Scheme 2009 ["the 2009 scheme"]. Her application was refused by the deciding officer and her appeal against that decision was refused by the Criminal Injuries Compensation Appeals Panel for Northern Ireland (CICAPNI), the first respondent in her judicial review. The Panel concluded on the facts before them that the Applicant and her assailant were living together in the same household as members of the same family at the time of the abuse and, in that circumstance, no compensation could be paid to the Applicant under the terms of the 2009 scheme.

[4] The reasons given by the panel for its decision included the following:

> "... in our view, para 7(c) of the 2009 scheme acts as a complete bar to eligibility to apply for compensation where the injury was sustained before 1st July 1988 and the victim and assailant were living together at the time as members of the same family".

This finding is an expression of, and an application of, what is known in Northern Ireland as the 'same household rule', and it is this rule which is impugned in this case.

The Judicial Review

[5] The Order 53 Statement grounding the Applicant's judicial *review* is directed against both CICAPNI as the decision maker and against the Department of Justice [DoJ] which has been responsible for the terms of the scheme since that responsibility was devolved to it in 2010.

[6] In summary the Order 53 Statement claims that the decision refusing this Applicant compensation for her injuries because of the application of the same household rule:

> "is inconsistent with and in violation of the rights of the Applicant at common law and/or under the Convention."

[7] It is claimed that the same household rule constitutes an unlawful fetter on the discretion of the decision makers dealing with compensation claims, and that it is contrary to the principles established in Brownlee's Application [2014] UKSC 4. It is also claimed that it operates 'contrary to the purpose of the legislation which is to compensate the victims of crime'.

[8] In terms of Convention rights, it is claimed that the impugned provision unlawfully discriminates against the Applicant contrary to Art 14 ECHR in conjunction with Art 1 Protocol 1 (A1P1) ECHR. The operation of the same household rule is alleged to be indirectly discriminatory against women and to have a disproportionately adverse impact upon female victims of crimes committed in the home. It is also claimed that the rule discriminates against the Applicant on the basis of an "other status", namely that she was a member of the same household and/or same family as the perpetrator of the crimes against her.

Background to the 2009 Scheme in Northern Ireland

[9] The first criminal injury compensation scheme in Northern Ireland was set up by the Criminal Injuries to Persons (Compensation) Act 1968 (the 1968 Act). It excluded claims for injuries inflicted on victims who were members of the same household as their assailants. Insofar as is relevant, s. 1(3)(b) of the Act provided that no compensation could be paid:

> "if the victim was, at the time when the criminal injury was sustained, living with the offender ... as a member of the offender's household."

[10] The 1968 Act was revised by the Criminal Injuries (Compensation) (Northern Ireland) Order 1977 (the 1977 Order) but the new statute did not change the impugned rule. Art 2(b) of the 1977 Order reproduced the exclusion of same household victims in exactly the same terms as the earlier Act.

[11] The first material change to the same household rule came in the Criminal Injuries (Compensation) (Northern Ireland) Order 1988 (the 1988 Order). Insofar as is relevant this Order provided:

> "5(2) No compensation shall be paid in respect of an injury which is a criminal injury ... where the victim was, at the time when the injury was sustained, living in the same household as the person ... responsible for causing it unless the Secretary of State is satisfied—

(a) in relation to the person responsible for causing the injury ....who, when the injury was sustained, was living in the same household as the victim—

(i) that he has been prosecuted in connection with the injury or that there is a sufficient reason why he has not been so prosecuted; and

(ii) that he and the victim have ceased to live in the same household and are unlikely to live in the same household again ...; and

(b) that no person who is responsible for causing the injury will benefit from the compensation."

[12] Since 1988 therefore, it has been possible for same-household victims of criminal injuries in Northern Ireland to obtain compensation for the injuries they sustained provided the Secretary of State is satisfied as to the three statutory conditions set out above. However, this change only related to claims made from the date on which the 1988 Order entered into force. It did not operate retrospectively and therefore did nothing to address the total bar on same household claims which had been in place up to that point in time.

[13] The Criminal Injuries Compensation (Northern Ireland) Order 2002 [the '2002 Order'] empowered the Secretary of State to:

"3(1) "make arrangements for the payment ... of compensation to ..., persons who have sustained ... criminal injuries in Northern Ireland'

(2) Any such arrangements shall include the making of a scheme providing, in particular, for—

(a) the circumstances in which awards may be made; and

(b) the categories of person to whom awards may be made.

(3) The scheme shall be known as the Northern Ireland Criminal Injuries Compensation Scheme."

[14] The principle purpose of the Scheme published in 2002 was to introduce a tariff system for calculating the payments that should be made in respect of different categories of criminal injuries.

[15] In terms of eligibility to make claims, para 7 of this scheme provided:

> "No compensation shall be paid under this Scheme in respect of a criminal injury sustained by a person before the coming into operation of this Scheme unless the requirements of paragraph 84 (transitional provision) are satisfied."

[16] The transitional arrangements set out in para 84 addressed some of the difficulties faced by childhood victims of sexual abuse. It allowed those victims who had failed to lodge claims within the time limits set out in various earlier compensation systems, and whose late claims had then been refused *solely* because they were out of time, to make new claims under the 2002 scheme. This retrospective relaxation of old bars to compensation claims applied only to childhood victims of *sexual* offences, and then only if the *sole* reason for refusal of an earlier claim was that it was out of time under the then current rules. These transitional arrangements therefore made no change to the same-household bar on eligibility.

[17] The Criminal Injuries Compensation (Northern Ireland) Scheme 2009 was also introduced under the powers conferred in the 2002 Order. It explicitly re-stated the bar on eligibility for compensation of same household victims in the following paragraph:

> "7. No compensation will be paid under this Scheme in the following circumstances:
>
> ...
>
> (c) where the criminal injury was sustained before 1 July 1988 and the victim and the assailant were living together at the time as members of the same family."
>
> There are transitional arrangements in this scheme which allow certain old claims that had become time-barred to be re-ignited, but nothing in these provisions confers a retrospective right to make a claim upon victims previously excluded by the same household rule.

Rationale of the DoJ for maintaining the current bar

[18] The Department's rationale for maintaining the same household bar on claims arising between 1968 and 1988 is set out in the affidavit of Marcella McKnight, the ex-Chief Executive of the Compensation Agency and, since the devolution of policing and justice functions to the DoJ, the responsible officer for the administration of the 2009 scheme within that department.

[19] Dealing with injuries sustained between June 1968 and July 1988, she acknowledges the applicability of the same household bar and states:

> "The rationale for this bar at the time was principally an acknowledgement of:
>
> (i) the difficulties in establishing the facts; and
>
> (ii) the difficulty of ensuring that compensation did not benefit the offender."

[20] On the question whether it may be possible to update the current scheme in a manner which would remove old eligibility bars and give access to persons currently excluded by the same household rule she states:

> "It is important to note that the bars to compensation are contained in the 2002 … Scheme and not in the 2002 Order. If the intention was to remove the bars ... an amendment to the 2002 Scheme would be required. The question then arises as to whether the 2002 Order provides the power for the ... Scheme to be amended to retrospectively change the position of those who incurred injuries under previous legislation." [para 28, emphasis added.]

[21] On the general question of the possibility of amendments with retrospective effect she states:

> "The 2002 Order provides that the Secretary of State shall make a scheme providing for the circumstances in which an award may be paid and the categories of persons to whom awards may be paid (Article 3(2)). However, this broad power to make a scheme must be read with the presumption against retrospective operation in mind. This presumption means that ... an enactment is not presumed to have a retrospective operation ..." [para 29]

She continues:

> "Should the wish be to change the criteria set out in the Scheme so that those who were previously prevented from claiming ... are able to claim ... such amendments may be vulnerable to the argument that they are ultra vires." [para 30]

[22] She therefore maintains that in order to amend the schemes issued under the authority of the 2002 Order so that previously debarred claims could become eligible for compensation "it would be advisable to amend the enabling power" to expressly enable such retrospective provision because "such an express provision would be required to rebut the presumption against retrospective operation of the legislation."

[23] In relation to the operation of the schemes issued under the 2002 Order she notes that there has been a consistent thread of concern about the operation of the same household bar to some claims. For example in 2003 the Northern Ireland Affairs Committee conducted an enquiry into the effectiveness of the operation of the compensation system in which it noted that:

> "If a victim claims to have been abused before 1988, but lived in the same household as the perpetrator at the time of the abuse, he or she is barred from claiming compensation."

The Committee states:

> "We believe this has resulted in a serious flaw in the legislation."
>
> and
>
> "We are very concerned that flaws in the law governing compensation have resulted in some child sexual abuse victims being unintentionally barred from claiming compensation. We urge the Minister to take steps as a matter of urgency to remove this barrier."

[24] A review was duly carried out which concluded:

> "No matter how sympathetically one looks at the circumstances of these cases, it is not possible for this review to arrive at any other conclusion than the retention of the status quo. This is for three reasons: the difficulty in trying to establish the facts of a case ... the potential (unquantifiable) cost of claims ... and the general Government principle not to legislate

> retrospectively." [Para 14 of review document, quoted at para 52 of affidavit of Ms McKnight]

[25] On foot of her review of the history of the compensation system in Northern Ireland Ms McKnight concludes that:

> "the Department continues to believe that it is appropriate that the impugned provisions should remain in force." It is of the view that should a change be introduced that "issues of unquantifiable cost and significant administrative difficulties would arise ..."

[26] Finally, she notes the "significant financial pressures on departmental budgets" and claims that "to introduce the change sought could therefore ... make the Scheme unaffordable" and she reiterates the department's position that it is undesirable to legislate retrospectively.

The Parties' Arguments

[27] The main arguments made by Counsel are summarised below.

[28] Counsel for the Applicant (Ronan Lavery QC with Sean Mullan BL) assert in relation to the common law position:

- That the lack of any exceptionality clause in the 2009 scheme is contrary to the need for suitable flexibility - see Brownlee's Application [2014] UKSC 4;

- That: "This particular Applicant can demonstrate that the policy reasons for the restrictive approach to the same household test *do not apply to her.* Despite this the decision maker is afforded no latitude whatsoever, with extreme unfairness arising therefrom."

- They illustrate the alleged unfairness with reference to the following scenarios:

  > "i. Had the Applicant been abused by the next-door neighbour she would have been entitled to compensation;
  >
  > ii. If [the abuser] had abused the child next-door then that child would have been entitled to compensation;
  >
  > iii. If the Applicant had brought her friend home to the house and both been victims of abuse only the friend would be entitled to compensation."

- That by failing to compensate an Applicant who can demonstrate beyond reasonable doubt that she is a victim of a crime the 2009 scheme operates contrary to the purpose of the legislation which is to compensate the victims of crime.

[29] In relation to the alleged breach of the Applicant's Convention rights it is claimed that:

- the Applicant's Convention rights are engaged in this case.

This position is asserted despite the existence of two earlier Northern Irish decisions to the contrary, namely (1) Re T (unreported, Weatherup J, 30/5/06, WEAF5548), and (2) An Application by the Secretary of State for Northern Ireland [2006] NIQB 57. Both cases were decided in 2006. Counsel make the claim that Convention rights are engaged despite the presence of the authorities to the contrary on the basis of the recent decision of the Scottish Court of Inner Session in MA v Criminal Injuries Compensation Board [2017] SLT 984 ['MA']. This case involved a challenge brought by an Applicant excluded by the Scottish "same roof" rule from claiming compensation for criminal injuries she sustained at the hands of an abuser who lived under the same roof as her at the time the injuries were sustained. The same roof rule is equivalent to the Northern Irish same-household exclusion, and the compensation scheme challenged (the Criminal Injuries Compensation Scheme 2008) is equivalent to the 2009 scheme which excludes the current Applicant in this jurisdiction.

[30] Counsel claim, in line with the ruling in MA, that:

- This Applicant's claim for criminal injuries compensation is a "possession" for the purposes of Art 1 Protocol 1 [A1P1].

- Art 14 applies because this Applicant has been discriminated against on the basis of an 'other status', contrary to Art 14.

- That "had the Applicant (victim) suffered ... abuse by another abuser, other than within the same household, she would have been entitled to compensation. Accordingly this less favourable treatment is directly attributable to her "other status": that of belonging to the 'same household' as the abuser."

- Additionally/alternatively they claim that the same household rule has an indirectly discriminatory effect upon female victims of abuse by people living in the same household as them.

[31] Finally, Counsel asserts that the DoJ in the present case has failed to establish sufficient justification for its interference with the Applicant's Convention rights. They claim:

> "the implementation of the 2009 scheme constitutes a disproportionate interference with her rights, because a lesser interference can be put in place by giving the decision maker flexibility to accept claims for compensation when the Applicant can prove that the concerns underlying ... the same household test are not met in any particular case."

[32] Counsel for the Respondent (Tony McGleenan QC with Philip McAteer BL) assert, re the alleged disproportionate interference with the Applicant's rights under A1P1, that:

- The right to apply for compensation under a discretionary scheme which has been applied in accordance with its own terms does not fall within the ambit of A1P1.

- The right to apply for compensation is not a 'possession' for the purposes of A1P1 because it lacks a sufficient basis in national law. Insofar as the Court in *MA* decided differently it was wrong to do so.

- The Applicant cannot establish discrimination on the basis of any of the protected grounds under Article 14 including 'other status' such as to establish an interference with her Convention rights.

- The House of Lords decided in the case of R (LS and Marper) v Chief Constable of South Yorkshire [2004] UKHL 39 that Art 14 only applied to differences in treatment based on a personal characteristic. In R (Clift and Hindawi) v Secretary of State for the Home Department [2006] UKHL 54 it was held that a personal characteristic could not be defined by the very treatment of which a person complained, yet this is precisely what the Applicant in the present case seeks to do. The *Clift* case remains binding on lower national courts and there is no justification for failing to follow and apply it in the present case.

- The Applicant's allegation of indirect sex discrimination has not been sufficiently established by the evidence presented and therefore the Court should dismiss that claim.

- Any discrimination (which is denied) has been objectively and reasonably justified.

- The scheme impugned in this application operates in a context analogous to welfare benefits and therefore the applicable test on the issue of justification is the 'manifestly without reasonable foundation test' as articulated by the Strasbourg Court.

- The question for the court is whether there is *any* reasonable foundation for the impugned provision and, if there is, then the application must be dismissed.

[33] The Respondent asserts that there is a sufficient justification for the impugned provision because:

- The provision was the product of reflective deliberation by the legislature on a number of occasions.

- The provision is an expression of a social and economic strategy and in such areas the imposition of bright line rules are less likely to be treated as 'manifestly without reasonable foundation'.

[34] On the question of the absence of provision for exceptionality the Respondent points out:

- The application of bright line rules is not objectionable per se and such rules may have an objective justification "namely the need for legal certainty and a workable rule" (Per Lord Hoffman in Carson [2005] UKHL 37 at para 41.

- On all the facts of the present case there is an objective justification for the use of a bright line provision and the Respondent adopts the reasoning of the Court in MA on this point.

[35] On the question whether the impugned provision operates contrary the purpose of the legislation to compensate victims the Respondent states:

- "The aim of the legislation is to provide a sustainable scheme and ... the impugned provisions sit consistently with that aim. The scheme requires to be both financially sustainable and administratively workable." The inclusion of bright line rules that advance that purpose but may on occasion result in an unsatisfactory outcome for some Applicants does not undermine the purpose of the legislation overall.

The Judgment of Sir Paul Girvan

[36] In his careful decision in this judicial review Sir Paul Girvan analysed the decision in the MA case. He noted that both the Lord Ordinary and the Inner House in Scotland had been persuaded, on the basis of the ECtHR's decision in Stec v UK [2005] 41 EHRR and of subsequent authorities, that the claim came within the ambit

of A1P1 and Art 14 and that this conclusion differed from the position adopted in Northern Ireland in two earlier decisions on this question (which are referred to at para [29] above).

[37] In relation to the question whether reasonable justification had been shown for the interference with the Applicant's Convention rights he noted that the courts at both levels of the Scottish system had applied the "manifestly without reasonable foundation" test to that question and both had concluded that justification had been established. He noted that when the Scottish scheme had been updated there was a concern that wholesale abolition of the impugned provision would expose the scheme to an unknown number of new claims related to old injuries. There were concerns that this would increase the administrative burden and could give rise to difficulties in establishing causation between the offence and the injuries said to arise from it. On foot of these concerns the Inner House held that the setting of new eligibility conditions for the scheme was a policy decision which fell within the field of socio-economic policy and the allocation of scarce resources. It held that there was a reasonable foundation for a policy decision that limited the extent of the abolition of the same roof rule, and that the discriminatory provisions which resulted pursued a legitimate aim, namely to ensure the long term sustainability of the scheme.

[38] Sir Paul Girvan noted that there was a long-standing tradition that the lower courts in Northern Ireland would follow decisions issued by the Court of Appeal in England, and that there was no reason in principle why first instance courts in Northern Ireland should not also follow and apply the ratio of decisions of the Inner House where the law in the two jurisdictions was essentially the same.

[39] Sir Paul Girvan reviewed the arguments of the parties and concluded that the Applicant does have a claim under A1P1 in conjunction with Art 14 and that that *claim is based on her "other status", namely the fact that she was a member of the* same family and the same household as her abuser. He found 'what precludes her claim is not simply that she was in the same household but it was because of that and her family relationship with the abuser. It was her immutable family relationship which precluded her claim. A non-family member staying in the same household (for example a lodger or a visiting guest) would not have her claim excluded because of that status.' He did not however accept that a valid claim under A1P1 on the basis of indirect sex discrimination had been made out in the case.

[40] On the question of whether the discriminatory treatment had been justified he noted that the court in MA had found that the discrimination did pursue a legitimate aim, namely the long-term sustainability of the scheme. While accepting the Applicant's argument that opening the scheme up to claimants who could satisfy the prosecution condition would limit the extent of new exposure of the Department he noted that 'even in such cases there would have been an added administrative burden'. Overall he concluded: "I have not been persuaded that I should not follow

and apply the reasoning adopted by the Inner House in MA", and accordingly he dismissed the Applicant's case.

Developments since the Judgment was Issued

[41] Since the above judgment was issued there has been a significant legal development in England where the Court of Appeal recently issued its judgment in the case of JT v the First-Tier Tribunal and the Criminal Injuries Compensation Authority [[2018] EWCA Civ 1735]. That case involved a woman, JT, who for most of her childhood was sexually abused and raped by her stepfather who lived in the same household as her. The abuse continued until 1979 when she was 17 years of age. In 2012 the abuser was prosecuted for his crimes and sentenced to 14 years imprisonment. After his conviction JT applied for criminal injuries compensation but was refused because all the offences against her were committed before 1 October 1979 and at a time when she and her abuser lived together in the same household. She was therefore excluded from compensation by the "same roof" rule, the English equivalent to the same household/same family rule in Northern Ireland.

[42] In that case the Court decided that the Applicant did have a proprietary interest capable of protection under A1P1 and that she had been excluded from enjoyment of that interest for reasons which constituted discrimination on the grounds of an "other status" contrary to Art 14. That status was her membership of the same family as her assailant at the time the criminal injuries were sustained. The Court also held that there was no legal justification for her exclusion and, accordingly, she was entitled to access on the same basis as others in analogous situations to hers.

[43] There are now therefore two Court of Appeal level decisions, each of which reaches a different conclusion on the issue of justification.

Discussion

[44] The issues to be decided in the present appeal are as follows:

- Does this Applicant have an interest in accessing the benefits of the 2009 scheme which is sufficient to qualify as a 'possession' for the purposes of A1P1?

- If so, has she been excluded from access to that possession on a discriminatory basis?

- If so, what is the discriminatory basis?

- If she has been discriminated against, is the discriminatory treatment justified in all the circumstances of the case?

Does the Applicant have a 'possession' for the purposes of A1P1?

[45] It is convenient to start with the cross appeal in the present case which asserts that:

> "The Learned Judge erred in law in adopting and applying the reasoning in paragraphs 33-37 of the judgment of the Inner House of Session in MA ..."

This is the section of the judgment where the Scottish court concluded that the principles enunciated in the admissibility judgment in Stec could apply to cases outside the realm of welfare benefits. The Respondent in the present case disputes this finding and asserts that the payment of an award out of a discretionary compensation scheme that has been applied in accordance with its own terms is not analogous to a welfare benefit and therefore is not a "possession" capable of coming within the ambit of A1P1 at all.

[46] A similar point was made by the respondent in the case of JT and was carefully analysed by Lord Justice Leggatt in the English Court of Appeal. In his consideration of the nature of benefits available under the criminal scheme he noted:

> "The terms 'welfare benefit' and 'social security' are not terms of art. They are capable of describing almost any form of financial support or help provided to citizens by the state to promote or protect their welfare. ... In the sense relevant for present purposes, payments made by the state under the UK's criminal injuries compensation scheme are in my view to be regarded as welfare benefits. Such payments are no different in principle from, for example, benefits payable to persons who have suffered industrial injuries...." [paras 64-65].

Both the English and Scottish courts in their recent cases on this point have therefore decided that the right to claim criminal injury compensation is a possession for the purposes of A1P1.

[47] Considering the jurisprudence of the European Court on this question it is true that historically there has been a difference in approach to benefits which are contributory and those which are funded in some other way including by general taxation. The Strasbourg Court was anxious to put an end to that divergence, and in the Stec judgment it went to some lengths to set out the "approach to be applied henceforth." It stressed that in future there should be a coherent approach to the concept of "possessions" in A1P1, and one which would be consistent with the idea of "pecuniary rights" under Art 6(1). It cited with approval the earlier case of Salesi v Italy [(1998] 26 EHRR 187 in which the court had emphasised that the Applicant had an 'assertable right, of an individual and economic nature, to social benefits' and that that right attracted the protection of Art 6(1). It was the intent of Stec to generalise

that one coherent approach to all pecuniary benefits which present as candidates for Convention protection, whether that be under Art 6 or A1P1.

[48] We consider that the Applicant's right to claim the protection of A1P1 does not depend on whether the benefit she claims is or is not correctly labelled a "welfare benefit". It depends on whether or not she has "an assertable right of an individual and economic nature to social benefits". And if a payment made under a scheme created to compensate the victims of violent crime is not a "social benefit" then what is it? It is well understood that the basis of criminal injury compensation schemes is "social solidarity or the desire to express public sympathy for the victims of crime" - [see eg Report of an Interdepartmental Working Party, [1978] HMSO, ISBN: 011 340144 2, page 3].

[49] Criminal injuries compensation schemes reflect the social realisation that victims of violence inflicted by criminals suffer an arbitrary injustice which could befall anyone, that their predicament is not of their own making and that such violence is a deeply upsetting experience for anyone to have to endure. At the most basic level such schemes express the society-wide sentiments "it wasn't fair that you had to go through that, and we are sorry that it happened to you." Access to the benefits of the fund is not related to the means of the victim. Criminal violence can be inflicted on anyone, and in each case the sense of injustice and of outrage is the same. The message of social solidarity with a person suffering an arbitrary injustice is equally valid for all victims and, we suspect, the healing effect of that social support is equally important to all.

[50] For all these reasons we agree with Sir Paul Girvan and the conclusion of the courts in *MA* and *JT* that payments under criminal injuries compensations schemes are pecuniary rights which do qualify as 'possessions' for the purposes of A1P1.

Was the Applicant excluded from access to her 'possession' on a discriminatory basis?

[51] The Respondents argue that if the right to claim compensation under the 2009 scheme is a 'possession' for the purposes of A1P1, then the Applicant was never 'excluded' from it. It was just that the possession never materialised in her case as there was no sufficient basis for her claim in national law. Under the terms of the scheme she was a member of an excluded category and therefore she did not even qualify to have her claim considered. In common law terms they say the provisions of the scheme clearly excluded her from the start, and therefore she could never have had a legitimate expectation of receiving a benefit from this scheme. In Convention terms they say that no claim ever crystallised and therefore there was nothing for this Applicant to assert.

[52] The Applicant's asserts that she would have had an assertable claim under A1P1 if domestic law had not prevented her from acquiring one on a discriminatory basis.

[53] In relation to cases involving the operation of A1P1 in conjunction with Art 14, (which outlaws discriminatory treatment in relation to the enjoyment of Convention rights,) the ECtHR said in Stec*:*

> "the relevant test is whether, but for the condition of entitlement about which the Applicant complains, he or she would have had a right enforceable under domestic law, to receive the benefit in question." (para 54).

[54] So we must ask whether eligible claimants for criminal injuries compensation do have 'a right enforceable under domestic law' to receive a compensation payment from the scheme? On this point Lord Leggatt says of the English scheme:

> "Since the scheme was placed on a statutory footing ... a victim of crime who fulfils the eligibility conditions has a right to an award under English domestic law. That was accepted by the Home Secretary and by CICA in *R(C) v the Home Office* [2004] EWCA Civ 234, para 41, in the context of Article 6(1). It was also accepted by... the European Court of Human Rights in that case: see *CB v United Kingdom* (Application No 35512/04) 25 August 2005, para 2.
>
> Nor is the existence and scope of the criminal injuries scheme any longer purely a matter of choice on the part of the state. In accordance with the European Convention on the Compensation of Victims of Violent Crimes, which the UK has ratified, the UK now has an international obligation to provide compensation to victims of intentional crimes of violence who have suffered bodily injury or impairment of health." [paras 67-68]

He concluded:

> "The necessary conclusion ... is that the current criminal injuries compensation legislation in the UK is to be regarded as establishing a proprietary interest falling within the ambit of article 1P1 for persons satisfying its requirements."

[55] In relation to the 2009 scheme in Northern Ireland, its terms indicate that if Applicants fulfil the eligibility criteria they will qualify for an award under the scheme. Even the level of award to be made is largely pre-determined by the tariff system attached to the scheme. The only discretion within the scheme relates to deciding whether the access criteria are satisfied or not. The scheme is such that

once the eligibility criteria are shown to be satisfied an award of some kind will follow. We therefore hold that the 2009 scheme does establish an entitlement 'as of right' to an award for those claimants who meet the eligibility criteria of the scheme.

If the Applicant was excluded on the basis of a discriminatory ground, what was the basis of the discrimination?

[56] The only ground of discrimination seriously advanced on behalf of the Applicant is that she was excluded on the basis of the same household rule. What that rule requires in practice was explained as follows in the court below:

> "What precludes her claim is not simply that she was in the same household but it was because of that and her family relationship with the abuser (see para 7(c)). It was her immutable family relationship which precluded her claim."

[57] This finding of Sir Paul Girvan accurately reflects the decision of CICAPNI rejecting F's claim where they state:

> "... in our view, para 7(c) of the 2009 scheme acts as a complete bar to eligibility to apply for compensation where the injury was sustained before 1st July 1988 and the victim and assailant were living together at the time as members of the same family."

[58] Both expressions of the same household rule make it clear that a claim for compensation for criminal injuries will be excluded by this rule only if:

- the victim and the assailant habitually lived together in the same household at the time the injury was sustained; *and*

- they were living together as members of the same family at the relevant time.

As the learned judge in the court below emphasised in F's case:

> "It was her immutable family relationship which precluded her claim."

[59] There is no doubt that the Applicant fulfils the principle eligibility criteria governing access to an award. These relate to proving she has suffered a criminal injury. As noted above the assailant pleaded guilty to several counts of child cruelty, a count of assault occasioning actual bodily harm and following her plea to these counts the charges relating to the alleged sexual abuse were 'left on the books' at the trial. The sole obstacle to her achieving access to the scheme therefore is the eligibility criterion which excludes her because of the same household rule. If this

rule is not lawful it follows that she has an assertable claim to a benefit which is then payable as of right.

[60] Discrimination in a manner that engages Art 14 can arise when an 'other status' provides the basis for distinguishing between two sets of people who have comparable circumstances to each other. The 'other status' must also cause one of these groups to be treated differently from, and less favourably than, the other group. In the present case the same household rule was used to segregate victims of violent crimes who were living together with their assailants as members of the same family at the time their criminal injuries were sustained from all other victims of violent crimes. The group identified by the application of the rule was then 'treated less favourably' because their claims were declared ineligible for consideration while the claims of the remaining group were allowed to proceed. It is quite clear that, so far, the same household rule has all the necessary features of a discriminatory 'other status'.

[61] The European jurisprudence also requires that any claimed "other status", must be based on a 'personal characteristic' of the Applicant if it is to engage Art 14. However, 'personal characteristics' have not been treated as meaning characteristics which are innate or inherent. As Lord Justice Leggatt notes at para 73 of his judgment in *JT*, a wide range of characteristics have been accepted by the Supreme Court as engaging Art 14. These include such matters as homelessness, place of residence and the fact of being a cohabitee. On the question whether "living together as a member of the same family as the assailant" is capable of being a "status" for the purposes of Art 14 the learned Lord Justice concludes that that condition undoubtedly embodies 'a personal status of a kind which falls within Article 14." We respectfully concur with this conclusion, and indeed we can think of few better examples of what a "personal characteristic" might be.

[62] On the basis of the above evaluation we conclude that the same household rule does create an 'other status', that the Applicant in the present case was discriminated against on the basis of that status, and that the status is sufficient to engage Art 14 acting in conjunction with A1P1.

Justification

[63] The only remaining question is whether the respondent Department can show 'objective and reasonable justification' for the less favourable treatment that this Applicant received.

[64] The justifications put forward by the DoJ in Northern Ireland are set out above and may be summarised here as:

- there were good policy reasons for creating this bar when it was first introduced and those policy reasons continue to apply;

- the decision to retain the bar for cases pre-1988 was a conscious decision by a range of administrations which reviewed this matter repeatedly. It behoves this court to accord due deference to these policy choices by the legislature;

- no power exists to change this rule retrospectively and any such change would require a new enabling statute to be passed; and

- the DoJ continues to believe that any change would give rise to 'issues of unquantifiable cost and significant administrative difficulties'.

[65] The way in which the Strasbourg Court has approached justifications such as these is to ask itself whether or not they constitute 'objective and reasonable justification' for the difference in treatment. They answer the question by considering whether the justifications put forward have a legitimate aim and, if so, whether there is a 'reasonable relationship of proportionality' between the aim and the means employed to realise it: see eg Rasmussen v Denmark [1985] 7 EHRR 371 , [38]; Petrovic v Austria [2001] 33 EHRR 14, [30].

[66] The test for proportionality now most frequently cited in our courts is that of Lord Reed in Bank Mellat v HM Treasury (No 2) [2014] AC 700, [74], where he said that assessing proportionality involved answering the following 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."

[67] In cases such as the present one, which involve claims derived from Convention provisions and protected by the Art 14 principle of non-discrimination, a question arises as to how Lord Reed's proportionality tests are to co-exist comfortably with the well-recognised discretion of legislators to decide for themselves how best to deliver social and economic policies within their own territories. This wide margin of appreciation was explained as follows in Stec:

> "52. 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'."

[68] The 'manifestly without reasonable foundation' test has also been recognised as the appropriate test for domestic courts to apply when examining justifications advanced for differences in treatment of individuals in similar circumstances, especially when this occurs in the context of broad economic or social policy measures taken by domestic legislators see eg R v Director of Public Prosecutions ex parte Kebilene [2000] 2 AC 326. This approach has been confirmed more recently by the Supreme Court, for example in R (MA and Carmichael) v Secretary of State for Work and Pensions [2016] 1 WLR 4550 , [36]-[38].

[69] On the question of how the 'manifestly without reasonable foundation test' relates to Lord Reed's proportionality tests two approaches are discernible in the case law. The first was expressed as follows by Lord Wilson in the case of R (A) v Secretary of State for Health (Alliance for Choice and others intervening) [2017] 1 WLR 2492:

> "… it is now clear that, while this criterion may sometimes be apt to the process of answering the first question, and perhaps also the second and third questions, it is irrelevant to the question of fair balance, which, while free to attach weight to the fact that the measure is the product of legislative choice, the court must answer for itself ..."

The second approach has been to apply the 'manifestly without reasonable foundation' test to all four of the questions in Bank Mellat. This was the approach adopted by the unanimous seven-judge Supreme Court in Daly & Ors, R (on the application of) (formerly known as MA and others) v Secretary of State for Work and Pensions [2016] UKSC 58 which applied the 'manifestly without reasonable foundation' test to the entire proportionality analysis undertaken in that case.

[70] Applying all of the above to the present case we consider that:

(i) there is no doubt that concerns about the difficulties in establishing the facts of what happened in same household cases are real and valid concerns, as are the fears related to the risk of offenders benefitting from compensation awards made in same household cases. On any

available test it is clear that making provision to cater for these difficulties and concerns is a legitimate aim for a legislative measure;

(ii) it is also clear that the impugned measure is rationally connected to the legitimate aim identified above in that the measure absolutely obviates the risks that it addresses, just as the legislature intended that it should;

(iii) there is no doubt that a less intrusive measure could have been used to achieve the legitimate aim of containing the special risks that arise in compensation claims arising from same household violent crime. Examples of such less intrusive measures already exist in the 1988 Order in Northern Ireland, and in every compensation scheme issued in GB since 1979. All of these schemes cater for the special risks of same household cases. They do so by requiring evidence that the assailant in these cases has been prosecuted or that there is a good reason why he/she has not been prosecuted, or, in more recent iterations of the scheme, that there is evidence that the claimant has cooperated fully with the police in their investigation of the allegations against the abuser, as well as evidence that the parties no longer live together and that there is no risk of an assailant benefitting. The present applicant can provide ample evidence to meet the current legitimate legislative protections against the special risks inherent in same household cases. At the level of 'rationality', the respondents have not explained why these less intrusive measures, considered adequate to address the legitimate aims of the legislature in cases arising since 1988, are not considered adequate to address the same concerns and achieve the same aims in cases arising before that date.

(iv) The issue of 'fair balance'/ 'proportionality', has several limbs. The first matter the court must address its mind to is the 'severity of the consequences' for the people targeted by the impugned measure. In considering this we bear in mind that in the present case the restriction on access to the social good in question is permanent. This Applicant is excluded from access to compensation forever in respect of the criminal injuries which she says were inflicted on her. It is also clear from the papers in the case that no other form of effective redress or compensation is available to this victim. Whilst excluded due to an historic provision long since abolished because it was recognised to create unjustifiable anomalies, this applicant will regularly see and hear of other victims of similar, and in many cases lesser crimes, receiving compensation for the injuries and damage unjustly inflicted on them. The arbitrariness of her exclusion in these circumstances will be hard to bear and in our view it is impossible to justify by any test which could be applied to this last question. Even if the test is that the legislative policy implemented by the impugned measure must be

> 'manifestly without reasonable foundation', it is our view that, in the circumstances of the present case, that test is satisfied. We can think of no reasonable foundation for a decision to maintain in being an arbitrary exclusion of this proven victim of criminal injuries from a compensation scheme which is specifically designed to compensate such victims. This is especially true when there is incontrovertible evidence that the policy concerns which initially prompted the creation of the impugned measure that locks her out of the scheme, are not even applicable in her case. In reaching this conclusion we also have regard to the nature and purpose of the benefit she is excluded from. The initial trigger for the creation of this scheme was a wish to express social solidarity with victims of crimes of violence. Not only is this victim excluded from the financial benefits of the scheme, she is also excluded from the emotional benefits of accessing the support and sympathy of her community expressed in the pragmatic form of a compensation payment. We are acutely aware that the irrational exclusion of some victims from access to all the intended benefits of the compensation scheme may be actively damaging to the long-term prospects of recovery of these victims.

[71] In reaching this conclusion we are heartened by Lord Neuberger's dictum in R (RJM) v Secretary of State for Work & Pensions [2008] UKHL 63 where he said:

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

The only substantive argument advanced by Counsel for the respondent to justify the maintenance of this exclusion in the face of its general abolition for victims in circumstances similar to this applicant was as follows:

> "the aim of the legislation is to provide a sustainable scheme and ... the impugned provisions sit consistently with that aim. The scheme requires to be both financially sustainable and administratively workable. The inclusion of bright line rules that advance that purpose but may on occasion result in an unsatisfactory outcome for some applicants does not undermine the purpose of the legislation overall."

[72] We cannot agree with that analysis. Financial sustainability and administrative workability may be necessary pre-conditions underpinning a viable scheme but they cannot be considered to be the 'purpose' of that scheme. The

purpose of this scheme is to compensate the victims of violent crime. The present Applicant is a victim of violent crimes. Her assailant pleaded guilty to several counts of child cruelty, one count of assault occasioning actual bodily harm and following the assailant's plea the remaining charges relating to alleged sexual abuse were 'left on the books'. The grounds put forward to justify the apparently arbitrary exclusion of this victim would have to be very persuasive, especially when the practical and emotional consequences of her exclusion appear so perversely antipathetic to the purposes for which the scheme exists, and when there are so many other less intrusive measures available currently in operation which meet all the legitimate concerns that the legislators may have. Financial sustainability and administrative workability of the scheme, are very important considerations in any social package provided by legislators. However, in our view there is no justifiable, rational or lawful ground for requiring some victims of violent crime to forgo an otherwise valid claim for compensation in order that funds may be saved for distribution to other claimants whose circumstances are equally, or possibly less, deserving of support. We consider that a measure is not justifiable if it places irrational and disproportionate losses on some individuals, even if it does so in order to achieve greater benefits for others.

[73] Accordingly, we find that this Applicant must succeed in her appeal and for the reasons given, dismiss the cross-appeal. We will hear the parties as to the appropriate remedy.

Postscript

Following the remedies hearing on 30th November 2018 the court, with the consent of the parties, Ordered as follows:

THE COURT:

1. **QUASHES the decisions of Compensation Services dated 20th February 2015 and 6th March 2015 and the decision of CICAPNI of 12th November 2016 refusing the Applicant's claim for criminal injury compensation and remitting the matter back to Compensation Services for a redetermination;**
2. **DECLARES that paragraph 7 of the NI Criminal Injuries Compensation Scheme (2009) not be applied to the Applicant's remitted claim for criminal injury compensation on the basis that the application of said provision in this case would contravene her rights pursuant to Article 14 and Article 1 First Protocol;**
3. **ORDERS that the Respondent pay the Appellant's reasonable costs of the appeal and the High Court proceedings, said costs to be taxed in default of agreement.**