Case No: CO/3839/2015, CO/5189/2016

Neutral Citation Number: [2017] EWHC 2 (Admin)

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

In the Matter of an Application for Judicial Review

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/01/2017

Before :

MR JUSTICE WILKIE

- -

Between :
The Queen (on the Application of A) **Claimants**
- and -
(1) (1) Criminal Injuries Compensation Authority **Defendants**
(2) (2) The Lord Chancellor and Secretary of State for Justice

Between:

The Queen (on the Application of **Claimants**
(1) EB
(2) EC

- and –

(1) Criminal Injuries Compensation Authority **Defendants**
(2) The Lord Chancellor and Secretary of State for Justice

- -

- -

Mr Tankel (instructed by **Slater & Gordon**) for **A (Claimant) and**
Ms Luh (instructed **by Leigh Day & Co**) for **EB (Claimant)**
Mr Collins QC and Mr Moretto (instructed by **The Government Legal Department**) for the **Defendants**

Hearing dates: 13th and 14th December 2016

- -

Judgment

The Hon. Mr. Justice Wilkie :

Introduction

These are joined claims for Judicial Review pursuant to an Order dated 28th November 2016.

1. The claims raise issues concerning the lawfulness of aspects of the Criminal Injuries Compensation Scheme ("the Scheme") in its 2012 iteration, and, in particular, the question whether the Scheme, in so far as it concerns applicants for compensation who have unspent criminal convictions which resulted in a custodial sentence or community order, is unlawful because it is in breach of the European Convention on Human Rights.

2. The two claims have at their core the same two issues, but they also raise different issues with which the Court has to deal.

3. In the A case, the grounds for the claim can be stated briefly. It is contended that the provisions of the Scheme impose what is called a "blanket ban" on awards being made under the Scheme to those with an unspent conviction which led to a custodial or a community sentence. The grounds upon which, it is said, the Scheme, by those provisions, is unlawful are

    a) That it constitutes a disproportionate interference in the Claimant's rights under Article 1 of Protocol 1 (A1P1) to the European Convention on Human Rights.

    b) It is unjustifiably discriminatory contrary to A1P1 read together with Article 14 of the Convention.

    c) It is ultra vires the statutory powers pursuant to which the Scheme was made, and

    d) It is irrational.

4. The grounds in the case of EB and EB are identical to the first two grounds relied on in the case of A but, in addition, it is contended that the "blanket ban" on awards for those with an unspent conviction which resulted in a custodial or community sentence, is in breach of

    i) Article 17 of Directive 2011/36/EUof the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims (the "Anti-Trafficking Directive"), and

    ii) Article 1 of Protocol 1 read together with Article 4 of the European Convention on Human Rights

The Facts

5. The facts are relatively simple, and, to a large extent, uncontested, and I set them out briefly.

A

6.

i) The Claimant was assaulted on the 1st December 2013 by a taxi driver. He was hit over the head with a golf club, knocked unconscious, his skull and cheekbone fractured, he suffered a large temporal bleed on his brain requiring an operation. He now suffers from loss of memory and concentration, nightmares and headaches. He gave up his college course. His mother says his personality has changed since the incident.

ii) On the 16th February 2014, the Claimant applied to the Criminal Injuries Compensation Authority (CICA) for compensation in respect of that injury.

iii) On the day before that application the Claimant was involved in a domestic altercation with the partner of his friend's mother who he pushed back onto a sofa. He was subsequently convicted, on the 21st November 2014, of assault and sentenced to a 12-month community order.

iv) On 13th May 2015, a claims officer of CICA concluded that it could not make an award because the Claimant had an unspent conviction which resulted in a community order.

v) The view taken by the Claimant was that steps available to him under the Scheme, to seek a review by an officer, or to appeal to the First-Tier Tribunal, would inevitably fail as the rules do not allow for any leeway in a case such as his.

vi) The Claimant accepts that the decision of the officer was in accordance with the terms of the Scheme but contends that the terms of the Scheme are unlawful.

EB

7. The Claimants are twin brothers, nationals of Lithuania, born on the [a date in] 1986, now aged 30. After a very difficult childhood, they were placed in care.

8. In 2013 they were trafficked from Lithuania to the United Kingdom and subjected to labour exploitation and abuse. Their experiences between the dates of the 1st June and the 30th October 2013 constituted criminal offences for which, on the 22nd January 2016, the traffickers responsible were convicted receiving custodial sentences of 3½ years. Slavery and trafficking prevention orders were made under the Modern Slavery Act 2015.

9. The Claimants applied to the CICA for compensation under the Scheme on the 16th June 2016.

10. EB had been convicted of burglary on the 6th June 2010 and sentenced to 3 years imprisonment. EB was convicted of theft on the 11th December 2011 and was sentenced to 11 months imprisonment.

11. On the 7th July 2016, the CICA wrote to each of the Claimants refusing to make an award of compensation for their criminal injuries in the following terms

> "I am sorry to tell you that I have decided not to make any award because, under paragraph 26 of the Scheme, Annex D sets out the circumstances in which an award under this Scheme will be withheld or reduced because the applicant, to whom an award would otherwise be made, has unspent convictions."

12. As each Claimant had an unspent conviction which resulted in a custodial sentence, the officer was unable to make an award of compensation under paragraph 26 of the Scheme.

13. Under the Rehabilitation of Offenders Act 1974, as amended, in Edgaras' case, the sentence does not become spent until the 6th June 2020. In Edvinas' case, the conviction became spent on the 11th November 2016.

14. Neither Claimant launched a review or an appeal under the CICA Scheme on the basis that as the Scheme had been properly applied any such application for a review or appeal would inevitably fail.

Timeliness

15. In the case of A, the decision was the 15th May 2015, the claim was issued on the 13th August 2015 within the 3 months. The Defendant did not accept that the claim form was filed promptly but now does not take the point.

16. In the case of EB, the decisions challenged were made on the 7th July 2016. The claim was issued on the 7th October 2016 within 3 months. The Defendant did not accept the claim was filed promptly but now does not take a point on delay.

The Scheme

17. The first Criminal Injuries Compensation Scheme was introduced in 1964. It was non-statutory and provided for ex gratia payments.

18. The Criminal Injuries Compensation Act 1995 (the Act) was enacted and schemes from that time have been statutory, pursuant to the Act.

19. Section 1 of the Act provides:

> "(1) The Secretary of State shall make arrangements for the payment of compensation to, or in respect of, persons who have sustained one or more criminal injuries.
>
> (2) Any such arrangements shall include the making of a scheme providing, in particular, for -
>
> a. The circumstances in which awards may be made, and

b. The categories of person to whom awards may be made.

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

(4) In this Act –

"Award" means an award of compensation made in accordance with the provisions of the Scheme; …

"Compensation" means compensation payable under an award."

20. Section 11 of the Act provides

"(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."

21. Thus, the Scheme is a creature of statute and is in the form of subordinate legislation within Section 21(1) of the Interpretation Act 1978.

22. Section 2(1) of the 1995 Act provides

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

23. Section 3 of the 1995 Act is entitled "Claims and Awards". It provides

(1) The Scheme may, in particular, include provision –

a) As to the circumstances in which an award may be withheld or the amount of compensation reduced;

b) For an award to be made subject to conditions;

c) For the whole or any part of any compensation to be repayable in specific circumstances …

e) Requiring claims under the Scheme to be made within such periods as may be specified by the Scheme …"

Section 3(4) of the Act provides

"The Scheme shall include provision for claims for compensation to be determined and awards and payments of compensation to be made –

…

b. Otherwise by persons (Claims Officers) appointed for the purpose by the Secretary of State."

The Provisions of the Scheme

24. Paragraphs 4 to 21 all deal with various aspects of eligibility. Paragraphs 4 to 8 deal with injuries for which an award may be made. Paragraphs 10 to 16 deal with residence etc. Paragraphs 17 to 21 deal with other provisions. Paragraph 4 provides

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

25. Paragraph 10 of the Scheme provides

> "A person is eligible for an award under this Scheme only if: …
>
> c. One of the conditions in paragraph 13 is satisfied in relation to them on the date of their application under this Scheme."

26. Paragraph 13 and 15 of the Scheme provide as follows

> 13. The conditions referred to in paragraph 10(c) are that the person has:
>
> a) Been referred to a competent authority as a potential victim of trafficking in human beings …
>
> 14. A person who has made an application under this Scheme and satisfies a condition in paragraph 13 may request that their application under this Scheme is deferred until a final decision has been taken in relation to the referral … mentioned in that paragraph.
>
> 15. Where a person is eligible for an award under this Scheme by virtue of paragraph 10 only because a condition in paragraph 13 is satisfied in relation to them, that person shall not be eligible for an award unless, as a result of the referral or application mentioned in paragraph 13, they have been:
>
> (a) Conclusively identified by a competent authority as a victim of trafficking in human beings."

27. Paragraph 86 of the Scheme provides

> "An application for an award will be determined by a Claims Officer in the authority in accordance with this Scheme."

28. Paragraphs 22 to 29 set out grounds for withholding or reducing an award from those who would otherwise have been entitled to one pursuant to paragraphs 4 to 21.

29. Paragraphs 22 to 29 reflect the requirements of Section 3(1) of the Act which provides

"The Scheme may, in particular, include provision –

a. As to the circumstances in which an award may be withheld or the amount of compensation reduced …"

30. Paragraph 26 of the Scheme provides

"Annex D sets out the circumstances in which an award under this Scheme will be withheld or reduced because the applicant to whom an award would otherwise be made has unspent convictions."

31. Annex D provides

"1. This Annex sets out the circumstances in which an award under this Scheme will be withheld or reduced because the applicant to whom an award would otherwise be made has unspent convictions.

2. Paragraphs 3 to 6 do not apply to a spent conviction. "Conviction" "Service Disciplinary Proceedings" and "Sentence" have the same meaning as under the Rehabilitation of Offenders Act 1974 and whether a conviction is spent or a sentence is excluded from rehabilitation will be determined in accordance with that Act.

3. An award will not be made to an applicant who on the date of their application has a conviction for an offence which resulted in …

(b) A custodial sentence …

(e) A community order"

4. An award will be withheld or reduced where, on the date of their application, the applicant has a conviction for an offence in respect of which a sentence other than a sentence specified in paragraph 3 was imposed unless there are exceptional reasons not to withhold or reduce it.

5. Paragraph 4 does not apply to a conviction for which the only penalty imposed was one or more of an endorsement, penalty points or a fine under Schedule 2 to the Road Traffic Offenders Act 1988.

7. Paragraphs 2 to 6 also apply in relation to an applicant who, after the date of application, but before the date of its final determination, is convicted of an offence which is not immediately spent.

Paragraph 8 is a definition of the terms "community order" and "custodial sentence" for the purposes of this Annex.

32. Paragraph 27 of this Scheme provides

> "An award may be withheld or reduced because the applicant's character, other than in relation to an unspent conviction referred to in paragraph 3 or 4 of Annex D, makes it inappropriate to make an award or a full award."

33. Paragraph 54 and 55 provides

> "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.
>
> 55(1) A special expenses payment will be withheld or reduced to take account of the receipt of, or entitlement to, an insurance payment in respect of the applicant's special expenses …"

34. Paragraphs 86 to 97 of the Scheme concern applications. Paragraph 87 and 89 provide

> "87. … An application must be sent by the applicant so that it is received by the authority as soon as reasonable practicable after the incident giving rise to the criminal injury to which it relates, and in any event within two years after the date of that incident …
>
> 89. A Claims Officer may extend the period referred to in paragraph 87 … where the Claims Officer is satisfied that:
>
> a. Due to exceptional circumstances the applicant could not have applied earlier; and
>
> b. The evidence presented in support of the application means that it can be determined without further extensive enquiries by a Claims Officer. …"

35. Paragraph 98 is entitled "Deferring the Determination of an Application". It provides

> "98. A Claims Officer may defer determination of an application in whole or in part:
>
> a. In exceptional cases, until the end of any criminal proceedings relating to the incident giving rise to the criminal injury which the Claims Officer is satisfied are material to the determination;
>
> b. Until the Claims Officer is satisfied that the applicant has taken all reasonable steps to obtain any social security benefits, insurance payments, damages or

compensation to which the applicant may be entitled in respect of the same injury; or

c. In response to a request under paragraph 14."

36. Paragraphs 109 to 113 are entitled "Reconsideration and Repayment". Paragraph 109 to 111 provide

> "109. A Claims Officer may reconsider a determination before final payment of an award, whether or not and interim payment has been made, where the Claims Officer becomes aware of evidence or a change in circumstances which, if known prior to the determination, would have affected whether an award was made or its amount.
>
> 110(1) A Claims Officer may require repayment of all or part of an award where the Claims Officer is satisfied that evidence received after final payment has been made shows that the applicant
>
> a. has not co-operated as far as reasonably practicable in bringing the assailant to justice;
>
> b. has deliberately misled a Claims Officer in relation to a material aspect of their application; or
>
> c. has received a payment in respect of which a reduction could have been made under paragraphs 54, 55 …
>
> 111. A Claims Officer will notify the applicant in writing of a decision to reconsider a determination or to require repayment under paragraph 109 or 110."

37. Section 5 of the Act provides

> "The Scheme shall include provision for rights of appeal to the First-Tier Tribunal against decisions taken on reviews under provisions of the Scheme made by virtue of Section 4."

38. Paragraph 117 of the Scheme provides that an applicant may seek a review as to the determination of an award, and paragraph 125 provides for a right of appeal to the First–Tier Tribunal against a decision taken on review.

Rehabilitation of Offenders Act 1974

39. Section 5 of this Act is entitled "Rehabilitation Periods for Particular Sentences". Sub-section 1 excludes from rehabilitation a number of sentences including a sentence of imprisonment for life and a sentence for imprisonment for a term exceeding 48 months. Sub-section 2 of Section 5 provides for the rehabilitation periods for various sentences, beginning with the date of the conviction in respect of which the sentence is imposed, and ending at the time listed in a table set out as part of the Section. Those periods are as follows:

Custodial Sentence of more than 30 and up to 48 months – 7 years, beginning with the day on which the sentence, including any licence period, is completed;

Custodial Sentence of more than 6 and up to 30 months – 48 months, beginning with the day on which the sentence, including licence, is completed;

A Custodial Sentence of 6 months or less – a period of 24 months, beginning with the day on which the sentence, including licence, is completed;

A Fine – 12 months, beginning with the date of the conviction in respect of which the sentence is imposed.

A Community or Youth Rehabilitation Order – the end of the period of 12 months, beginning with the day provided for by the order as the last day of which the order is to have effect.

A Relevant Order – the day provided for by or under the order as the last day on which the order is to have effect.

The term "Relevant Order" includes an order discharging a person conditionally for an offence or an order binding a person over to keep the peace.

Relevant Sentencing Provisions

40. Part 12 of the Criminal Justice Act 2003 contains general provisions about sentencing. They include the following provisions.

41. Section 143 concerns determining the seriousness of an offence and provides

    i) In considering the seriousness of any offence the Court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause, or might foreseeably have caused.

    ii) In considering the seriousness of an offence committed by an offender who has one or more previous convictions the Court must treat each previous conviction as an aggravating factor if the Court considers that it can reasonably be so treated, having regard in particular to

        a) The nature of the offence … and

        b) The time that has elapsed since the conviction.

    iii) In considering the seriousness of any offence committed whilst the offender was on bail the Court must treat the fact that it was committed in those circumstances as an aggravating factor …

42. Section 148 imposes restrictions on imposing community sentences and provides

    i) A Court must not pass a community sentence on an offender unless it is of the opinion that the offence or the combination of the offence and one or more offences associated with it was serious enough to warrant such a sentence …

43. Section 152 contains general restrictions on imposing discretionary custodial sentences. It includes the following:

> "… 2. The Court must not pass a custodial sentence unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified for the offence …"

44. Section 166 contains powers to mitigate sentences and deal appropriately with mentally disordered offenders. It provides amongst other things as follows

i) "Nothing in –

a) Section 148 (imposing community sentences)

b) Section 152, 153 or 157 (imposing custodial sentences) … prevents a Court from mitigating an offenders sentence by taking into account any such matters as, in the opinion of the Court, are relevant in mitigation of the sentence."

The European Convention on Human Rights

45. Article 1 of Protocol 1 to the ECHR provides

> "Protection of Property.
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

46. Article 14 of the 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."

The Council of Europe Convention on Action Against the Trafficking in Human Beings (ECAT)

47. The United Kingdom Government signed ECAT in March 2007. Article 15(4) of ECAT required signatories to adopt

> "Such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its internal law, for instance, through the establishment of a fund for victim compensation."

Also by Article 15(4), Explanatory Report to ECAT paragraph 198, member states are required to

> "Take steps to guarantee compensation of victims. The means of guaranteeing compensation are left to the parties which are responsible for establishing the legal basis of compensation, the administrative framework and the operational arrangements for compensation schemes"

48. In March 2011, the European Union adopted a new Anti-Trafficking Directive (2011/36/EU) ("The Anti-Trafficking Directive"). The UK Government decided to opt in to The Anti-Trafficking Directive. The transposition period for the Directive expired on the 6th April 2013, so that the Directive and its obligations became directly effective in the UK from that date.

49. Article 17 of the Anti-Trafficking Directive provides that

> "Member States shall ensure that victims of trafficking in human beings have access to existing schemes of compensation to victims of violent crimes of intent."

50. Article 4 of the ECHR provides

> "1. No-one shall be held in slavery or servitude.
>
> 2. No-one shall be required to perform forced or compulsory labour."

Ground 1 in A; Ground 2 in EB –
Article 1 Protocol 1 European Convention on Human Rights

51. It is common ground that a number of distinct issues arise for consideration in connection with this Ground. They are:

i) Do any of the Claimants in these cases have a "possession" for the purposes of A1P1 by being persons who would, but for the exclusion provided for by paragraph 3 of Annex D, have an entitlement to receive payment of compensation under the Scheme?

ii) If so, did the decisions of the Officers to refuse to make an award of compensation amount to an interference with that possession?

iii) Does the operation of the Scheme, which results in an interference with the Claimants' possession, constitute a breach of A1P1, particularly given the terms of A1P1, that a person may be deprived of his possession in the public interest subject to the conditions provided for by law and by the general principles of international law, and, in particular, by what is claimed to be the

exercise by the State of its right to enforce such laws as it deems necessary and, to control the use of property in accordance with the general interest?

Issue 1 – Possessions

52. The Claimants contend that the inchoate entitlement of the Claimants to a compensation award based on their undisputed satisfying of the eligibility criteria does amount to a possession for the purposes of A1P1. Reliance is placed on ***Pressos Compania Naviera SA v Belgium (1996) 21 EHRR 301*** and ***Broniowski v Poland (2005) 40 EHRR 21***.

53. In ***Pressos***, the European Court of Human Rights held that claims were possessions for this purpose, even where they had not yet led to a judgment resulting in a final enforceable award. In ***Broniowski***, the Court said, at paragraph 129

> "The concept of "possessions" in the first part of Article 1 of Protocol No.1 has an autonomous meaning which is not limited to the ownership of material goods and is independent from the formal classification in domestic law. In the same way as material goods, certain other rights and interests constituting assets can also be regarded as the "property rights", and thus as "possessions" for the purposes of this provision. In each case the issue that needs to be examined is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No.1."

54. The Claimants also rely on ***Valkov v Bulgaria (2016) 62 EHRR 24***, where, considering a cap on pensions payments and whether amounts above the cap constituted a "possession" for A1P1 purposes, the ECtHR noted, at paragraph 85, the following

> "The applicant's pensions were first calculated in line with the general rules of the (pensions legislation). Because the amounts produced by those calculations were … above the pensions cap … their pensions were trimmed to the level allowed by the cap. The cap may thus be regarded either as a provision limiting the amount of pension after it has been calculated under the general rules, and thus amounting to an interference with a "possession" of the applicants, or as part of the overall set of statutory rules governing the manner in which the amount of pension should be calculated, and thus amounting to a rule preventing the applicants from having any "possession" in relation to the surplus."

55. The Claimants contend that the distinction identified in ***Valkov*** is helpful and that the terms of the Scheme make it clear that the provisions in question limit the amount they can recover rather than making provision for the manner in which entitlement may or may not arise initially.

56. Reliance is placed by the Claimants on the terminology of Section 3(1)(a) of the Act, paragraph 26 of the Scheme and paragraph 1 of Annex D, each of which describes the provisions as identifying the circumstances in which an award "may be withheld, or the amount of compensation reduced", and in paragraph 26, because the applicant "to whom an award would otherwise be made" has unspent convictions.

57. The Claimants contend that the Scheme is describing a situation which involves limiting or removing the amount of the award after entitlement to it had been established, rather than being part of a single composite process by which entitlement either does or does not arise in the first place.

58. The Defendants contend that there is no possession for the purposes of A1P1 and the claim falls at this first hurdle. Reliance is placed on Lord Bingham in ***R (Countryside Alliance and Others) v Attorney General and Another [2008] 1 AC 719*** at paragraph 21, to the effect that an expectation of future property is not a possession unless it has been earned or an enforceable claim to it exists. The Defendants contend that the ECtHR has made it clear that in carrying out an assessment of whether there is a civil right "it is necessary to look beyond the appearances and the language used and to concentrate on the realities of the situation" (***Roche v United Kingdom (2006) 42 EHRR 623***, at paragraph 121).

59. The Defendants contend that, under the Scheme, the applications were doomed to fail because, on the only dates which mattered: in the case of the EB brothers, the date of their application and, in the case of A, the date, between his application and before its final determination, of his unspent conviction; each Claimant had an unspent conviction which had resulted in either a custodial sentence or a community order. It is contended that the reality is that there was a single stage of processing eligibility which resulted in the answer that the Claimant was not eligible because one of the necessary preconditions was not satisfied, namely, that he was not subject to such an unspent conviction.

60. The Defendants contend that there is no question of interference with a subsisting right, the Claimants never had a right to compensation. The Defendants point out that the Scheme is expressed in different ways. At some points, the reference is to an award being withheld, in circumstances where it would otherwise be made, but paragraph 3 of Annex D says in terms

> "An award will not be made to an applicant (who has an unspent relevant criminal conviction)."

61. Reliance is also placed on a dictum of Lord Justice Sedley in ***C v Home Office [2004] EWCA Civ 234***, who observed, at paragraph 39, that the right to compensation under the Scheme could amount to a possession for the purposes of A1P1 if the claim to compensation was "manifestly well founded". The Defendants contend that, on the facts of this case, the contrary is the case. The claims for compensation were manifestly not well founded because of the existence, in each case, on the relevant date of an unspent relevant criminal conviction.

Conclusions on A1P1

62. In my judgment, the Defendants' contention is correct. None of the Claimants ever had a claim which was sufficiently well established to amount to a "possession" under the Scheme so that the imposition of the provisions of paragraph 26 and Annex D, paragraph 3, of the Scheme amounted to an interference with a possession. On the contrary, in my judgment, the Scheme provided for a single process resulting in a determination on whether the Applicant was entitled to a payment of compensation. That determination had a number of elements, but the Claimants have to satisfy all of them before he had a claim which amounted to a possession. One of the elements was that the Claimants did not fall within one of the categories described in the Scheme which disentitled the Claimants, who otherwise satisfied the criteria. All of these conditions had to be satisfied at one and the same time. There was no moment in time when the Claimants, by satisfying the eligibility criteria provided for in paragraphs 4 to 21 of the Scheme, had an enforceable claim which was then withheld by reason of paragraph 26 of the Scheme. The reality was that there was a single determination on whether an award fell to be made which included both eligibility under paragraphs 4 to 21 and withholding an award under paragraphs 22 to 29 being considered. The outcome, as simply described in paragraph 3 of Annex D, was that an award would not be made to an applicant who, on the relevant date provided for by paragraph 3 or 7 of Schedule D, had a conviction for an offence which resulted in a custodial sentence or a community order. That was part of the process by which it was determined whether the Claimants had an entitlement or had none. In my judgment, it is unrealistic to seek to divide the process into two separate parts, as a result of which, at the end of the first part, there was an enforceable claim amounting to a possession which was then interfered with by the operation of the second part. At its highest, all the Claimants could say was that he would have had a claim if paragraph 26 and Annex D had not applied, but that is a long way short of saying that he had a claim which was enforceable but for the interference with that property right as a result of the application of paragraph 26.

63. As a consequence, this claim, insofar as it is based on A1P1, falls at the first hurdle.

64. I now consider the remainder of the claims on the basis that my analysis in respect of the A1P1 possession issue is erroneous. However I first consider Article 14.

Ground 2 – the Claim under Article 14

65. The Defendants contend that there can be no claim based upon Article 14 for a number of reasons. First there has to be a right or freedom contained within the Convention. Accordingly, if the claim is not sufficiently within the ambit of A1P1 to amount to a right to property then no Article 14 claim can be sustained. The Defendants accept that the authorities indicate that the creation of a Social Security Scheme must be regarded as generating an interest sufficient to fall within the ambit of A1P1 so that the Scheme must be compatible with Article 14 (***Stec and Ors v United Kingdom [2005] 41 EHRR SE 18***). It is contended that the CICA Scheme is not part and parcel of a Social Security Scheme but involves one off payments by way of compensation.

66. The Defendants rely on the Scottish authority of ***DJS v CICA and Anor [2007] ScotCS CSIH 49,*** A Decision of the Inner House, in which a claim under the Scheme, as then drafted, was doomed to fail under national law so that the claimant did not have a possession which could be protected by A1P1, and considered there was

nothing upon which the claimant relied which undermined that conclusion. This was not, as it had been in ***Stec***, a social security and welfare benefit payment upon which individuals were dependent for survival where their importance was reflected by holding that Article 14 was applicable.

67. Reliance was placed by the Defendants on the ***"Italian Interns Case" Associazione Nationale Reduci Dalla Prigionia Dall'Internamento e Dalla Guerra di Liberazione v Germany (2008) 46 EHRR SE16***, which also distinguished ***Stec*** on the footing that

> "While the case of ***Stec*** dealt with a supplementary regular payment and a regular retirement pension in the framework of social security the subject of the instant case is a one-off payment granted as compensation for events which had occurred even before the Convention entered in to force and represented in a wider sense a settlement of damages caused by the Second World War. The payments were made outside the framework of social security legislation and cannot be likened to the payments in ***Stec***" (para 77).

68. In ***R (RJM) v Secretary of State for Work and Pensions [2008] UK HL 614 [2009] 1 AC311***, that distinction was considered and endorsed in the speech of Lord Neuberger at paragraph 31

> "… I recognise that the admissibility decision in ***Stec*** represents a departure from the principle normally applied to claims which rely on A1P1. However, ***Stec*** … was a carefully considered decision in which the relevant authorities and principles were fully canvassed and where the Grand Chamber of the ECtHR came to a clear conclusion which was expressly intended to be generally applied by national courts. Accordingly, it seems to me, that it would require the most exceptional circumstances before any national court should refuse to apply this decision.
>
> 32. I do not consider that any exceptional circumstances can fairly be said to arise here. It may well be that the conclusion in ***Stec*** was founded more on broad policy than strict logic but it is by no means exceptional for the ECtHR to found a decision on such a basis … ***Stec*** was expressly distinguished and therefore not doubted in (The Italian Interns case) on the grounds that what was involved in that case was a "one-off payment granted as compensation for events which occurred even before the Convention came into force" which was therefore "outside the framework of social security legislation" and could not be "likened to the payments in ***Stec***". "

69. The Claimants contend, however, that Article 14 comes into play even where it is not, or cannot be, alleged that there is an interference with rights. Reliance is placed on the Supreme Court decision in ***Mathieson v Secretary of State for Work and Pensions [2015] UK SC 47 [2015] 1 WLR 3250*** which concerns Disability Living Allowance in which Lord Wilson said at paragraph 17

> "For the purposes of Article 14, Mr Mathieson does not need to establish that the suspension of DLA amounted to a violation of Cameron's rights under either of those Articles … He does not even need to establish that it amounted to an interference with his rights under either of them. He needs to establish only that the suspension is linked to or … within the scope or ambit of one or other of them. How can a public authority's action be within the scope of an article without amounting to an interference with rights under it? Carson v United Kingdom (2010) 51 EHRR 369 provides an example. There the Grand Chamber of the European Court of Human Rights explained … that A1P1 did not require a contracting state to establish a retirement pension scheme but that if it did so the scheme fell within the scope of A1P1 and so had to be administered without discrimination on any of the grounds identified in Article 14 …"

70. The Claimants also rely on a Scottish decision of the Outer House in ***M [2016] CSOH 115***, which concerned a claim under the Scheme. At paragraph 29

> "Nor do I consider that because this case is outside the framework of social security legislation the reasoning in Stec does not apply. I do not read that case as being confined to social security benefits. The same approach appears to have been used in the area of immigration in ***Hode and Abdi v UK [2013] 56 EHRR 27*** at paragraph 43 and quoted at paragraph 17 of ***Mathieson***. The ***Upper Tribunal in JT v First-tier Tribunal and another 2015 UKUT 478 (ACC)*** has come to the same conclusion for the reasons for which I agree.
>
> 30. The Italian Interns case involved applicants who had been POWs during the Second World War … and so could have no legitimate expectation of a claim. It was not domestic law which excluded them …
>
> 31. I therefore with due respect do not agree with the reasoning given obiter in DJS. The petitioner here has an interest with an economic value in the form of her claim for compensation and which falls, in my view, within the ambit of A1P1 in conjunction with Article 14. As was pointed out by Lord Wilson in paragraph 17, the claimant need not establish that the decision amounts to a violation of or even an interference with her Convention rights. She need only establish the refusal of her claim is linked to or within the scope of or ambit of one or other of these Articles."

71. In my judgment there is no clear binding path through these various authorities. Whilst the case of ***Stec*** was concerned with a social security system in the full sense of the word, and the ***Italian Interns*** case has distinguished it, the facts of the ***Italian Interns*** case were extreme because of its historic context. Further, in ***R (Tigere) v Secretary of State for Business, Innovation and Skills [2015] UKSC 57 [2015] 1***

WLR 3820, a case about student loans, the Supreme Court treated that as within Article 14. In my judgment, and for the purpose of this argument, I am prepared to accept that the present claims do fall within Article 14, even though I have concluded that none of the Claimants have "a possession" within A1P1.

Other Status

72. Article 14 prohibits discrimination on a number of grounds including "other status". It is not in dispute that there is differential treatment of the Claimants on the ground of their having relevant unspent convictions as opposed to those whose treatment is different, but who do not have such unspent relevant convictions. One of the issues I have to decide is whether having such relevant unspent conviction constitutes having "a status" so that differential treatment on that basis falls within the ambit of Article 14.

73. The Claimants contend that the Courts have adopted an expansive approach to characteristics which amount to "other status". I am referred to authorities where homelessness, the choice of a particular country of residence, and previous membership of the KGB, amounted to "other status" (see respectively ***RJM 2009 AC 311***, ***Carson v UK (2010) 51 EHRR 13***, ***Sidabras v Lithuania (2004)42 EHRR 104***). The Defendants contend that Article 14 prohibits discrimination having as its basis or reason a "personal characteristic" by which such persons or groups of persons are distinguishable from each other and that an individual's history of offending and the sentence imposed for that offending cannot be such a "personal characteristic" so as to amount to a "status" for these purposes. Reliance in particular is placed on what Lady Hale said in ***R (Clift) v SSHD [2006] UKHL 54 [2007] 1 WLR 1157*** at paragraph 62

> "A difference in treatment based on the seriousness of the offence would fall outside those grounds (proscribed by Article 14). The real reason for the distinction is not a personal characteristic of the offender, but what the offender has done."

74. In ***Clift***, the issue was whether classification as a prisoner serving a determinate sentence of 15 years or more, but less than life, was a personal characteristic. Lord Bingham found it difficult to apply so elusive a test. At paragraph 28 he said

> "I would incline to regard a life sentence as an acquired personal characteristic and a lifer as having "other status", and it is hard to see why the classification of Mr Clift, based on the length of his sentence and not the nature of his offences, should be differently regarded. I think, however, that a domestic court should hesitate to apply the Convention in a manner not, as I understand, explicitly or impliedly authorised by the Strasbourg jurisprudence, and I would accordingly, not without hesitation, resolve this question in favour of the Secretary of State against Mr Clift."

75. In Lord Hope's speech at paragraph 46 he said

> "It could be said in Mr Clift's case that the length of his sentence did confer a status on him which can be regarded as a personal characteristic … as a result they are regarded as having acquired a distinctive status which attaches itself to them personally for the purposes of the regime in which they are required to serve their sentences …
>
> 49. But the Strasbourg jurisprudence has not yet addressed this question and … it is possible to regard what he has done, rather than who or what he is, as the true reason for the difference of treatment."

76. Lord Carswell and Lord Brown agreed with Lord Bingham's speech. Accordingly, it appears that the majority in the House of Lords would have been prepared to regard the length of sentence as conferring a status but for the deference paid to the Strasbourg jurisprudence.

77. ***Clift v UK [2010] EHCR 1106*** made an application to the European Court of Human Rights which was determined as application number 7205/07 on the 13th July 2010. At paragraphs 59 to 61 the Court said

> "The Court therefore considers it clear that while it has consistently referred to the need for a distinction based on a personal characteristic in order to engage Article 14 … the protection conferred by that Article is not limited to differential treatment based on characteristics which are personal in the sense that they are innate or inherent …
>
> 60. … The question whether there is a difference of treatment based on a personal or identifiable characteristic in any given case is a matter to be assessed taking into consideration all of the circumstances of the case and bearing in mind the aim of the Convention is to guarantee not rights that are theoretical or illusory but rights that are practical and effective …
>
> 61. The Government have relied in particular on the Court's conclusion in Gerger … that the distinction in that case was made not between different groups of people, but between different types of offence according to the legislature's view with their gravity to support their argument that the applicant is unable to demonstrate he enjoyed "other status". The Court observes that the approach adopted in Gerger has been followed in a number of cases but all concern special court procedures or provisions on early release for those convicted of terrorism offences in Turkey … Thus, while Gerger made it clear that there may be circumstances in which it is not appropriate to categorise an impugned difference of treatment, as one may between groups of people, any exception to the protection offered by Article 14 of the Convention should be narrowly construed. In the present case the applicant does not allege a difference of treatment based on the gravity of the

> offence he committed but one based on his position as a prisoner serving a determinate sentence of more than 15 years. While sentence length bears some relationship to the perceived gravity of the offence a number of other factors may also be relevant including the sentencing judge's assessment of the risk posed by the applicant to the public …
>
> 63. The Court, accordingly, concludes that, in the light of all the above considerations, the applicant, in the present case, did enjoy "other status" for the purposes of Article 14."

78. The Defendants accept that a majority of the House of Lords would have accorded ***Clift*** "other status" but for their perception of the position of the Strasbourg jurisprudence and that the ECtHR decided in that case that Clift did enjoy "other status" even though, as is pointed out, the seriousness of the conduct in the offending is an explicit factor provided for by the Criminal Justice Act 2003 as informing the passing of respectively a community order and a custodial sentence. However, as a matter of binding authority, the Defendant reminds me that in the case of ***R (Minter)v Chief Constable of Hampshire Constabulary [2011] EWHC 1610 (Admin) 1 WLR 1157***, the question whether the European Court of Human Rights decision removes the binding nature of the authority in ***Clift*** was considered.

79. At paragraph 46 and 47 of the Court's judgment, Lord Justice Richards said as follows

> "46. The argument depends on there being discrimination on the ground of "other status" within Article 14 … In ***Clift*** … the House of Lords decided that differential treatment of prisoners based on differences in length of sentence was not discrimination on the ground of "other status". Mr Rule … pointed to the fact that it was a decision reached with hesitation and because their Lordships considered that to decide otherwise would go beyond the existing Strasbourg jurisprudence whereas in its subsequent decision in ***Clift v United Kingdom*** … the Strasbourg Court held that the same applicant did enjoy "other status" within Article 14 in relation to the differential treatment about which complaint was made. Mr Rule submitted that we should therefore hold that the differential treatment complained of … falls within Article 14 …
>
> 47. Mr Bassu for the Chief Constable, and Mr Johnson for the Secretary of State met that line of argument by the submission that the decision of the House of Lords in Clift's case … remains binding on this Court notwithstanding the subsequent approach of the Strasbourg Court towards the interpretation of the Convention. The need for adherence to the domestic rules of precedence in such circumstances was stressed by the House of Lords in ***Kay v Lambeth Borough Council [2006] 2 AC 465*** … This was subject to a partial exception only where the facts were of an extreme character. I accept that submission. In my view this court is bound by the

decision of the House of Lords in Clift's case which provides a sufficient basis for dismissing the claimants case under Article 14 without further consideration of it …"

80. Thus, although if free from binding authority a court might conclude, in accordance with the instincts of the majority of the House of Lords, and the decision of the European Court of Human Rights in ***Clift***, that having an unspent conviction of a relevant kind is a personal characteristic sufficient to give rise to "other status" for the purposes of Article 14, it is clear from the authority of ***Minter*** and ***Kay and Ors v Lambeth Borough Council [2006] UKHL 10 [2006] 2 ac 465*** a court is presently bound by the decision of the House of Lords in ***Clift***, unless it is possible to distinguish between the length of sentence, which was determinative in ***Clift***, and the concept of an unspent conviction which is determined by a combination of the nature of the sentence passed, its length and the amount of time which has elapsed from a relevant moment under the Rehabilitation of Offenders Act scheme. In light of this unsatisfactory state of the authorities I am persuaded that ***Clift*** should be considered binding for the issue it decided. The issue in this case is, as I have described it, wider. Accordingly I conclude that I am not bound by the House of Lords decision in ***Clift***. I conclude therefore that the Claimants did have "other status" for the purposes of Article 14.

Interference

81. It is not in dispute that if, contrary to my conclusion, the Claimants did have a property right amounting to a possession by virtue of their satisfying the eligibility requirements of paragraphs 4 to 21, then the operation of the disqualifying paragraphs, in particular, paragraph 26 and Annex D, would amount to an interference so as to give rise to the question whether the interference was such that it amounts to a breach of A1P1. The position is similar in respect of Article 14.

Proportionality / Justification

82. I agree with the Claimants that, whether I am considering A1P1 on a stand-alone basis or, as the conduit through which a claim under Article 14 is to be considered, the principles are identical.

83. The Claimants accept that it is open to the Defendants to interfere with claims for compensation under the Scheme having regard to whether the Claimant has unspent convictions, the seriousness of the offence leading to such convictions, and/or to when those offences were committed. However, they contend that in order for any interference on those grounds to be proportionate, the interference must

    a) Be on a sliding scale coupled with room for discretion in exceptional cases, as used to be the case, or

    b) Failing that, at least allowing for discretion in exceptional cases.

    The complaint is essentially about what is described as the "blanket ban" approach now adopted and the absence of any element of discretion to take account of exceptional cases.

84. I am reminded that the Supreme Court in ***re Recovery of Medical Costs in Asbestos Cases (Wales) Bill [2015] AC 1016 [2015] 1 AC 1016***, ("the Wales case") identified four stages to the exercise as follows

> "1. Whether there is a legitimate aim which could justify a restriction of the relevant protected right.
>
> 2. Whether the measure adopted is rationally connected to that aim.
>
> 3. Whether the aim could have been achieved by a less intrusive measure, and
>
> 4. Whether, on a fair balance, the benefits of achieving the aim by the measure outweigh the disbenefits resulting from the restriction of the relevant protected right."

It is accepted by Defendants and Claimants that this represents the proper approach to the questions of proportionality and/or justification.

85. The Claimants contend that of those four stages, Stage 1, Legitimate Aim, requires the Court to accept the State's judgment unless it is manifestly without reasonable foundation. The second and third stages, Rational Connection and Less Intrusive Measure, are said to be exercises that the Court is best able to carry out for itself giving due deference to the decision maker. The fourth stage, the Fair Balance of Benefits and Disbenefits, involves giving significant respect to the legislature's decision, but not at the high level required for "manifestly without reasonable foundation".

86. The Defendants, whilst acknowledging that the four questions are as posed in the Wales case, invite me to conclude that, in the context of general measures of economic or social strategy, the level of scrutiny to be adopted by the Court at each stage is whether the approach taken by the State is "manifestly without reasonable foundation", and that this is the proper level of scrutiny where the State makes decisions about the distribution of public resources in the public interest (see ***R (Carson) v Secretary of State for Work and Pensions [2006] 1 AC 173*** at paragraph 16, and ***Stec*** at paragraph 52, where it was said

> "A wide margin is usually allowed to the State under the Convention when it comes to general measures of economic and social strategy … The Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation"."

87. The Defendants contend that, insofar as the Claimants contend, relying on the Wales case that, the "manifestly without reasonable foundation" test does not apply to these questions the Claimants are wrong on the following basis

i) The Wales case involved the retrospective deprivation of property which required scrutiny of particular intensity, where the legislation permitted confiscating property without compensation and retrospectively

ii) Subsequently, the Defendants point out, the Supreme Court has repeatedly reasserted the "manifestly without reasonable foundation" test in cases relating to the provision of State benefits (see ***R (SG & JS) v Work and Pensions Secretary [2015] 1 WLR 1449*** at paragraph 93, where Lord Reed said

> "The question of proportionality involves controversial issues of social and economic policy with major implications for public expenditure. The determination of those issues is pre-eminently the function of democratically elected institutions. It is therefore necessary for the court to give due weight to the considered assessment made by those institutions. Unless manifestly without reasonable foundation, their assessment should be respected."

iii) In ***Mathieson***, at paragraphs 26 to 27, it was said that the provision of State benefits is an "area where the Court should be very slow to substitute its view for that of the executive" and applied the "manifestly without reasonable foundation" test.

iv) The Supreme Court, in ***Tigere***, confirmed that the "manifestly without reasonable foundation" test applies when considering access to welfare benefits. Lady Hale, at para 27

> "This test was first developed when considering whether an interference with the rights of property guaranteed by A1P1 was in the public interest … That test has also been employed in Strasbourg and domestically when considering the justification for discrimination in access to cash welfare benefits, themselves a species of property rights protected by A1P1."

And Lord Sumption and Lord Reed, at paras 75 to 77

> "Such benefits are almost invariably selective and the criteria for selection necessarily involve decisions about social and economic policy and the allocation of resources. For this reason, discrimination in their distribution gives rise to special considerations in the case law of the Strasbourg Court … In our opinion, there is no justification for this critical departure from a test which has been consistently endorsed by the Strasbourg Court and at the highest level by the Courts of the United Kingdom …"

v) In ***R (MA and others) v Secretary of State for Work and Pensions [2016] 1 WLR 4550***, Lord Toulson (with whom the other members of the Court agreed) said

> "The fundamental reason for applying the manifestly without reasonable foundation test in cases about inequality in welfare systems was given by the Grand Chamber in ***Stec***, para 52. Choices about welfare systems involve policy decision on economic and social matters which are pre-eminently matters for national authorities."

vi) It is said to be of importance that the matter has been considered by both Executive and Parliament. In ***Bank Mellat [2014] AC 700***, Lord Sumption had said at paragraph 44 (at page 780 of the report)

> "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."

And Baroness Hale in ***Tigere*** at paragraph 32

> "Nevertheless, we are concerned with the distribution of finite resources at some cost to the taxpayer, and the Court must treat the judgments of the Secretary of State as primary decision-maker, with appropriate respect. That respect is, of course, heightened where there is evidence that the decision maker has addressed his mind to the particular decision before us … or that the issue has received active consideration in Parliament."

88. In my judgment where, as here, the challenge is not to a particular decision in applying the Scheme but is to the Scheme itself, it being accepted by the Claimants that the Scheme as it exists has been properly applied and where the Scheme has had to be the subject of affirmative resolutions of both Houses of Parliament, I am bound to approach the issue of compliance with, or breach of, A1P1 (stand-alone) or through the conduit of Article 14 on the basis identified in the series of Supreme Court or ECtHR decisions, that is, addressing the four issues, whether the adoption of the Scheme in this form was manifestly without reasonable foundation.

Application of the Test to the Scheme

The Aim

89. Both Claimants and Defendants have focussed in argument on one of the "aims" described in the course of the consultation undertaken before this Scheme was adopted. This is described as follows at paragraph 207 of the consultation document.

> "The Scheme is a taxpayer funded expression of public sympathy and it is reasonable that there should be strict criteria around who is deemed "blameless" for the purpose of determining who should receive a share of its limited funds. We consider that in principle awards should only be made to

> those who have themselves obeyed the law and not cost society money through their offending behaviour."

90. The Claimants contend that this is not a statement of aim, but is a re-statement of the discriminatory effect of the measure. The Claimants refer to other passages where the government identifies, as an aim, focussing the need to steer compensation to those with greatest need which is, of course, unconnected to the question of unspent convictions. The Claimants contend that whilst the estimate in the consultation was that the change would save a total of some £4-5 million, compared with a historic £5-10 million spent on those whose awards were reduced due to their having a criminal record, the reform of the Scheme was not a money saving exercise, but sought by saving money to facilitate channelling sufficient funds to those most in need.

91. The Defendants contend that the Claimants fail to recognise the legitimacy of preventing public money, intended for innocent victims of crime, being spent on blameworthy claimants who have been perpetrators of crime. By deciding that compensation should not be available to those with convictions leading to significant penalties, the Defendants submit that the aim pursued is legitimate. The Defendants contend that in a taxpayer funded expression of public sympathy, it is legitimate to restrict those to whom awards are made to those who are blameless. The Defendants point out that the Claimants accept it is legitimate to refuse awards on grounds of criminal conviction. Thus the complaint is in essence about the absence of discretion.

92. In my judgment, the Claimants are wrong in asserting that the statement in paragraph 207 of the consultation document is not a description of an aim. In my judgment, it is a legitimate aim to seek to ensure that the limited funds devoted to a taxpayer funded expression of public sympathy should be directed towards those who are considered "blameless", that is, who have themselves obeyed the law and not cost society money through their offending behaviour. In my judgment that is a statement of aim and it is an aim pursuit of which cannot be said to be manifestly without reasonable foundation. It is common ground that it is possible for the Scheme to have aims which may conflict, for example the aims of directing compensation towards the blameless may pull against the aim of directing compensation towards those in greatest need. In my judgment the aim described by the Defendants is a legitimate aim.

Rational Connection / Less Intrusive Measure / Fair Balance

93. Whether for A1P1 as a free-standing issue, or through the conduit of Article 14, or, in common law, on the issue of irrationality, the Claimants' approach is the same. It focuses on what is described as the "blanket ban" on compensating victims of violent or sexual crime who happen to have an unspent conviction leading to a custodial or community sentence. It is said that there is no rational connection between the aims of focussing funding on those with greatest need and this exclusionary rule.

94. The Claimants point out that there is unlikely to be any connection between the criminal conduct which gives rise to a claim for compensation and the criminal conduct which gives rise to a relevant unspent conviction. The Scheme makes no provision for any exercise of discretion on the part of the decision maker to dis-apply, whether in whole or in part, the operation of the rule, in exceptional circumstances. The rule applies equally: regardless of whether the unspent conviction arises in

respect of conduct before, after, or at the same time as the criminal injury, regardless of the respective seriousness, or otherwise, of the "unspent" conviction and the offence giving rise to the claim by the victim, regardless of other indications of the applicant's character or mitigating circumstances. The Claimants contend that the Scheme will result in hard cases.

95. The Claimants rely on authorities concerning blanket bans which take no account of individual circumstances. In ***Hirst v UK (2006) 42 EHRR 41*** (Prisoners Voting Rights case) the ECtHR said at paragraph 82

> "… The provision imposes a blanket restriction on all convicted prisoners in prison. It applies automatically to such prisoners irrespective of the length of their sentences and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important convention right, must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be …"

96. In ***S and Marper v UK (2008) 48 EHRR 50*** (Fingerprint Retention) the European Court said

> "119. The Court is struck by the blanket and indiscriminate nature of the power of retention in England and Wales … Irrespective of the nature or gravity of the offence … or of the age of the suspected offender … the retention is not time limited, the material is retained indefinitely, whatever the nature or seriousness of the offence … there exist only limited possibilities for an acquitted individual to have the data removed …
>
> 125. In conclusion, the Court finds that the blanket and indiscriminate nature of the powers of retention of the fingerprints … of persons suspected but not convicted of offences … fails to strike a fair balance between the competing public and private interest and the respondent State has overstepped any acceptable margin of appreciation in this regards …"

97. In ***Tigere***, at paragraph 37, Baroness Hale said

> "First, even if a bright line rule is justified in the particular context, the particular bright line rule chosen has itself to be rationally connected to the aim and a proportionate way of achieving it … Secondly, however, it is one thing to have an *inclusionary* bright line rule which defines all those who definitely should be included. This has all the advantages of simplicity, clarity and ease of administration which are claimed for such rules. It is quite another thing to have an *exclusionary* bright line rule which allows for no discretion to consider unusual cases falling the wrong side of the line, but equally

> deserving. Hitherto, the evidence and discussion in this case has tended to focus on whether there should be a bright line rule or a wholly individualised system. There are obviously intermediate options, such as a more properly tailored bright line rule with or without the possibility of making exceptions for particularly strong cases which fall outside it. There are plenty of precedents for such an approach, including in immigration control."

98. The Claimants observe that the subject matter of this claim is an exclusionary bright line rule.

99. The Claimants observe that the Government consulted on a less restrictive version of the change in the sense that it retained a discretion for exceptional cases. Even that, the Claimants submit, was said by respondents to the consultation to be disproportionate and unfair. However, the second Defendant introduced a Scheme more restrictive than that on which there had been consultation.

100. The Defendants contend that the provisions of the Scheme are linked with one of the major and legitimate aims, namely, the policy that, in principle, awards should only be made to those who have themselves obeyed the law and not cost society money through their offending behaviour. The Defendants point out that the Claimants accept that it is legitimate to refuse awards on grounds of criminal convictions and contends that the Claimants' case is limited to arguing that a discretion should be retained, thereby accepting the legitimacy of the aim, but questioning the proportionality of the means.

101. The Defendants observe that the Scheme is based on a sliding scale in that paragraph 3 excludes only those with more serious convictions, which attract a custodial or community sentence. Paragraph 4, which excludes or reduces an award where the applicant has a conviction for an offence where the sentence is other than a sentence specified in paragraph 3 (by implication, therefore, less serious), does include a discretion to withhold or reduce the award where there are exceptional reasons, and paragraph 5 of the Scheme excludes from its operation those with the most minor convictions.

102. Furthermore, the Defendants point out that, as exclusion from the Scheme depends not on the nature of the offence but on the nature of the sentence and, where custodial, the length of sentence, the Scheme does take into account the type and seriousness of the offence as well as mitigating factors relating to the offence and the offender. All these matters have to be taken into account by the sentencing judge and will be reflected under the 1974 Rehabilitation of Offenders Act in a longer or shorter period of rehabilitation before the conviction becomes spent. The date of the offence is a primary factor in determining, under the Scheme, whether the award will not be made because it too has a direct impact on whether the conviction is or is not spent.

103. For these reasons, the Defendants contend that the terms of the Scheme cannot be said to amount to a blanket ban merely because it does not include within it a specific discretion to be exercised on a case by case basis by the decision maker, to disapply, or reduce the extent of, its operation in dealing with an individual application for compensation.

104. The Defendants contend that, where legislation provides for rules as to who will and who will not be eligible for sums of public money, and where the decision where the dividing line should fall is for the legislature, the Courts should not interfere unless it is manifestly without reasonable foundation (***RJM,*** at paragraph 56).

105. The Defendants also cite ***Animal Defenders International v Secretary of State for Culture Media and Sport [2008] 1 AC 1312***, at paragraph 33, Lord Bingham

> "… 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 Defendants contend that it is well established that Courts should not be over-ready to criticise legislation in an area of social benefits which depends necessarily on lines drawn broadly between situations which can be distinguished relatively easily and objectively.

In ***Tigere***, at paragraph 60 Lord Hughes

> "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. An applicant can see comparatively easily whether she will qualify or not."

106. Accordingly, the Defendants contend that, insofar as the Claimants' case is that there should be a residual discretion, the State is entitled to lay down general rules and, insofar as legislation provides for rules, the decision where the dividing line will fall may not be interfered with unless the Court concludes that it is manifestly without reasonable foundation.

Conclusion

107. I accept the Claimants' argument that the adoption in 2012 of this version of the Scheme did constitute a significant change in the terms of the Scheme which applied heretofore. Where a conviction is sufficiently serious to attract either a custodial or a community sentence, no residual discretion is given to the decision maker. There is a bright line of exclusion focused on whether or not the conviction was spent at the date of the application or the date of conviction, if between the date of application and final determination.

108. However, where the conviction did not attract that kind of sentence, then the Scheme retains an element of discretion under paragraph 4, and where the conviction is of a minor nature, paragraph 5 provides that the fact of such a conviction, even though not spent, does not operate to exclude an award of compensation. A person has up to two years to make an application.

109. The Claimants are also right to say that the Courts have looked with great care at rules, in different contexts, which impact on a person's rights where there is no element of discretion by the decision maker and where what is involved is a bright line rule, the more so where the effect of the bright line rule is to exclude a person from a benefit rather than to include him or her.

110. It is undoubtedly the case, however, that where schemes such as the present have been approved by Parliament, the Court has to be extremely slow to interfere with the judgment which Parliament has exercised in passing the legislation in its particular form. I accept the Defendants' contention that the test is that even an exclusionary bright line rule may not be interfered with unless it is manifestly without reasonable foundation.

111. In my judgment, the bright line exclusionary rule provided for by paragraph 3 of Annex D, contains within it many elements of nuance and does not represent a hard and fast, one-size fits all, approach. The period during which a conviction is unspent depends on the seriousness of the offence and the circumstances of the offender as reflected in the sentence passed and the period before the offence becomes spent under the Rehabilitation of Offenders Act. Inevitably, that means that the date of the offence is highly relevant on when the conviction becomes spent. These are all variables which reflect on the seriousness of the applicant's offending, his or her history, and/or mitigating factors, and how recent the offending was as reflected in the type and custodial length of sentence.

112. Whilst one obvious way of building in flexibility to a bright line exclusionary rule is to give the decision maker a discretion to exclude or ameliorate its impact on grounds of exceptional circumstances or broader criteria, in my judgment, it cannot be said that this Scheme, passed by Parliament, is rendered manifestly without reasonable foundation by reason of the omission of such provision, particularly where, as here, Parliament has decided, in paragraph 4. to give a discretion. Therefore it must be taken to have considered the question of a discretion under paragraph 3 and decided not to adopt one.

113. In my judgment, the claim of Mr A, under Grounds 1, 2 and 4 do not succeed, and the claims of Edgaras and EB, under Grounds 2 and 4, similarly do not succeed.

A's Claim – Ground 3 – Ultra Vires

114. The claim focuses on the power given to the Secretary of State by Section 3(1)(a) to make rules which provide for the circumstances in which an award "may" be withheld.

115. Under the Scheme, applicants in Mr A's position "must" have their award withheld. The Claimant contends that the Secretary of State has exceeded the power granted by Section 3(1)(a) by making a Scheme in which an award "must" rather than "may" be withheld and that the Secretary of State has no power to include such a provision in a Scheme made pursuant to this Section.

116. Section 1(2) of the Act provides that the arrangements to be made by the Secretary of State shall include "Categories of person to whom awards may be made." The

Claimant accepts that the Secretary of State could, had he chosen, have made a Scheme that made awards only to "individuals with no unspent criminal convictions".

117. In my judgment, this is a bad point. The use of the word "may" in two places in Section 3(1)(a) does not require that the Scheme, insofar as it provides for withholding or reducing the amount of compensation, can only provide for a Scheme in which ultimate decision taker has a discretion whether or not to withhold or reduce the amount of compensation. The use of the word "may" in that context is sufficient to permit the Secretary of State to make a Scheme in which the amount of the award is to be withheld or reduced wherever the terms of the Scheme so provide. The award "may" only be withheld where those conditions are satisfied. If those conditions are satisfied then it must be withheld. It is in that sense that the word "may" is used.

118. In my judgment, therefore, Ground 3 of Mr A's claim does not succeed.

119. It therefore follows that the claim for Judicial Review of A is dismissed.

The EB Claim – Grounds 1 and 3

Ground 1

120. The Claimants contend that the mandatory exclusion of a victim of trafficking with an unspent relevant criminal conviction is incompatible with Article 17 of the EU Anti-Trafficking Directive (the Directive) because it imposes an impermissible obstacle to "access to" the Scheme for victims of trafficking such as the Claimants.

"The Directive"

121. Directive 2011/36/EU contained within its preamble the following

> "2. This Directive is part of global action against trafficking in human beings …
>
> 11. … The expression "exploitation of criminal activities" should be understood as the exploitation of a person to commit inter alia pick-pocketing, shoplifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain …
>
> 13. … The use of seized and confiscated instrumentalities and the proceeds from the offences referred to in this Directive to support victims, assistance and protection, including compensation of victims … should be encouraged …
>
> 19. … Such legal counselling and representation could also be provided by the competent authorities for the purpose of claiming compensation from the State …
>
> Article 2 - Offences Concerning Trafficking in Human Beings
>
> 1. Member States shall take the necessary measures to ensure that the following intentional acts are punishable …

[various elements of trafficking] … for the purpose of exploitation …

3. Exploitation shall include … or the exploitation of criminal activities …

Article 7 – Seizure and Confiscation

Members States shall take the necessary measures to ensure that their competent authorities are entitled to seize and confiscate instrumentalities and proceeds from the offences referred to in Articles 2 and 3.

Article 8 – Non-Prosecution or Non-Application of Penalties to the Victim

Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2.

Article 9 – Investigation and Prosecution

1. Member States shall ensure that investigation into or prosecution of offences referred to in Articles 2 and 3 is not dependent on reporting or accusation by a victim and the criminal proceedings may continue even if the victim has withdrawn his or her statement …

Article 11 – Assistance and Support for Victims of Trafficking in Human Beings

1. Member States shall take the necessary measures to ensure that assistance and support are provided to victims before, during and for the appropriate period of time after the conclusion of criminal proceedings in order to enable them to exercise the rights set out in … this Directive.

Article 17 – Compensation to Victims

Member States shall ensure that victims of trafficking in human beings have access to existing schemes of compensation to victims of violent crimes of intent."

122. Article 17 imposes an obligation on member States to ensure that victims of trafficking have access to existing Scheme of compensation for victims of violent crimes intent. It is contended that the obligation to give victims access to existing Schemes is not limited to those who qualify under the rules of the existing compensation scheme. It is submitted that access to the Scheme must allow for the

possibility of a victim of trafficking to obtain compensation. Thus, the Claimants contend, if a given victim has no prospect of obtaining compensation via the Scheme because of the operation of a mandatory exclusionary rule, then he cannot be said to have access to an existing compensation scheme in accordance with Article 17.

123. The Defendants accept that Article 17 imposes an obligation on member States to ensure that victims of trafficking have access to the existing Scheme to the extent that the Scheme must allow for the possibility of a victim of trafficking to obtain compensation. The Defendants say that what that amounts to is that the Scheme should permit victims of trafficking to make an application for compensation under the existing Scheme which enables that application to be dealt with substantively in accordance with the rules of the Scheme. The Defendants contend that, in the present case, the EB brothers did have such access. The terms of the Scheme, in 2012, were altered by the inclusion of paragraphs 10c, 13a, 14, 15a, and 16. The Defendants contend that without those provisions the victim of trafficking would not necessarily have had access to the Scheme for the purposes of enabling his or her claim substantively to be determined under paragraphs 4 to 9 and 22 to 29.

124. The Defendants contend that the argument of the Claimants that if, upon examination, a claim is bound to fail, means that the victim of trafficking does not have access to the Scheme is mistaken. A person has access to the Scheme if they can make an application when, by the terms of the Scheme, they are within the categories of person who may make an application, even though, upon detailed examination and determination, the conclusion is that they are not entitled to an award under the Scheme.

125. Reliance is placed by the Claimants in relation to Article 17 to guidance from the authorities on the interpretation of national law in the context of E.U. directives. In ***Marleasing SA [1990] ECR 1-4135*** at paragraph 8

> "In applying national law … the national court called upon to interpret it is required to do so as far as possible in light of the wording and purpose of the Directive in order to achieve the result pursued by the latter."

And, in ***Webb v EMO Air Cargo UK Ltd [1993] 1 WLR 49***, at 60, Lord Keith

> "… A national court must construe domestic law to accord with the terms of a Directive in the same field only if it is possible to do so. That means that domestic law must be open to an interpretation consistent with the Directive whether or not it is also open to an interpretation inconsistent with it."

126. The Claimants contend that, given their ordinary and natural meaning, the words "access to existing schemes of compensation" must be construed to permit the possibility of a victim of trafficking obtaining an award of compensation and that a Scheme that operates an automatic bar to any possibility of that victim obtaining compensation cannot be said to afford access to it. It is said, that the exclusion provided for by paragraph 26 of the Scheme and paragraph 3 of Annex D, operates to bar the Claimants from ever having the possibility of obtaining compensation because they have unspent relevant criminal convictions. Thus, the Scheme can never operate

in a way that achieves the result intended by Article 17 for Claimants in their particular circumstances.

127. The Claimants acknowledge that it would be permissible under Article 17 to permit the decision maker to take account of unspent custodial sentences as a relevant factor in the level of award that might be granted to a given victim, but in the absence of any discretion, the Scheme fails properly to implement the UK's obligation under Article 17.

128. Of course, ***Marleasing*** and ***Webb EMO*** concern the approach of nation courts in construing national legislation in a purposive manner so as to achieve aims of a particular directive. It is not contended by the Claimants that paragraph 26, Annex D, paragraph 3 of the Scheme can be construed other than in a way which excludes the Claimants from obtaining an award of compensation under the Scheme. Accordingly, the claim by the Claimants is to the effect that the UK government has failed to comply with its obligation under the Directive to ensure that victims of trafficking have access to existing schemes of compensation in the sense contended for by the Claimants.

129. In my judgment, there is nothing in the terms of the Directive whether the preamble or the Articles which suggests that all victims of trafficking must receive awards of compensation under national schemes made, or altered, for the purpose regardless of their circumstances and regardless of the terms of national schemes which are lawful under national law.

130. In the light of my determination of the lawfulness of the Scheme, already referred to, in my judgment there is nothing in Article 17 which does more than require the UK to secure for victims of trafficking access to the existing Scheme with all of its rules and exclusions. In my judgment it does so by, amongst other things, the provisions of paragraphs 10 to 15 already referred to. Pursuant to those arrangements, victims of trafficking can make application under the Scheme which will be, and have been, considered substantively under all the provisions of the Scheme and been determined in accordance with them.

131. Furthermore, in my judgment, the arrangements presently in place satisfy the requirements of Article 8. They are the prosecutorial discretion given to the CPS not to prosecute victims of trafficking involved in criminal activities which they have been compelled to commit as a direct consequence of being subjected to acts of trafficking, coupled with, as a backstop, the availability of any such prosecution being stayed as an abuse of the process recognised in ***R v L and ors [2013] EWCA (Crim) 991*** and, as a further backstop, Section 45 of the Modern Slavery Act 2015, which now provides a defence for slavery or trafficking victims who commit an offence attributable to slavery or relevant exploitation.

132. The Defendants contend that its analysis is confirmed by an Upper-Tribunal judgment in ***CICA v FTT and MC (UKUT JR/1309/2016)*** at paragraph 20

> "The only provision of the Directive that is relevant to compensation schemes is Article 17 and the sole requirement is that victims of trafficking be given access to existing compensation schemes and that had been done in this case.

> The Directive does not require that all victims of trafficking be given compensation regardless of the individual facts of the case."

This accords with my conclusion on Ground 1 of the EB claim.

133. In my judgment, the Claimants contention that the Scheme is to be regarded as unlawful to the extent that it involves a breach by the UK of its obligations under the Directive is not made out and insofar as the claim of the EB brothers is based on that ground, I would dismiss it.

Ground 3 – Breach of Article 1 Protocol 1 read with Article 4 ECHR

134. The Claimants contend that the content of Article 4 of the ECHR is informed by, and elaborated by, the Council of Europe Convention on Action Against Trafficking in Human Beings ("ECAT") and that, in the same way as Article 14 can come into play when considering A1P1 on the basis that I have decided, there is a separate route whereby the Scheme is to be regarded as unlawful, having regard to the United Kingdom's international obligations.

135. Article 4 of the ECHR provides that no-one shall be held in slavery or servitude, and no-one shall be required to perform forced or compulsory labour. It is common ground that those bare words fall a long way short of informing the application of A1P1 to the extent of requiring the Scheme to enable victims of trafficking to obtain compensation from the State, as the Claimants appear to suggest, in every case and whatever their circumstances.

136. The Claimants contend, however, that ***Rantsev v Cyprus and Russia (2010) 51 EHRR 1***, and ***Siliadin v France (2006) 43 EHRR 16***, involve construing Article 4 as entailing specific positive obligations on Member States beyond the bare words of Article 4.

137. In its judgment in ***Siliadin***, the Court confirmed that Article 4 entailed a specific positive obligation on Member States to penalise and prosecute effectively any act aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labour. In order to comply with this obligation, member states are required to put in place a legislative and administrative framework to prohibit and punish trafficking. This was so, because of relevant international treaties and other materials including the Palermo Protocol and ETAC.

138. In ***Rantsev***, the Court confirmed that Article 4 may, in certain circumstances, require a State to take operational measures to protect victims or potential victims of trafficking and that, under Article 4, Member States were under an obligation to investigate alleged trafficking offences.

139. The Claimants contend that, by parity of reasoning, other provisions of ECAT similarly inform Article 4 so that it involves an obligation on member states to make arrangements for victims of trafficking to receive compensation.

140. ECAT was made on 16th May 2005 and entered into force in respect of the UK on 1st April 2009, but it has never been incorporated into domestic law.

141. Article 1 sets out the purposes of the Convention: to prevent and combat trafficking in human beings, to protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims … as well as to ensure effective investigation and prosecution.

142. Article 15 addresses compensation and legal redress. Sub paragraph 3 and 4 provides

> "3. Each party shall provide in its internal law for the right of victims to compensation from the perpetrators.
>
> 4. Each party shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its internal law, for instance, through the establishment of a fund for victim compensation, or measures or programmes aimed at social assistance and social integration of victims, which could be funded by the assets resulting from the application of measures provided in Article 23."

143. Article 23 concerns sanctions and measures. Sub paragraph 3 of Article 23 provides

> "Each party shall adopt such legislative and other measures as may be necessary to enable it to confiscate or otherwise deprive the instrumentalities and proceeds of criminal offences established in accordance with Articles 18 and 20 … or property, the value of which corresponds to such proceeds."

144. Article 26 concerns non-punishment provisions and states

> "Each party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so."

145. In the explanatory report to the Council of Europe on the subject of this Convention, Article 15(4) is addressed in the following terms, at paragraph 198

> "However, … in practice there is rarely full compensation whether because the trafficker has not been found, has disappeared or has declared himself bankrupt. Paragraph 4, therefore, requires that parties take steps to guarantee compensation of victims. The means of guaranteeing compensation are left to the parties, which are responsible for establishing the legal basis of compensation, the administrative framework and the operational arrangements for compensation schemes. In this connection, paragraph 4 suggest setting up a compensation fund or introducing measures or programmes for social assistance to, and social integration of, victims. That could be funded by assets of criminal origin.

> 199. In deciding the compensation arrangements parties may use as a model the principles contained in the European Convention on the Compensation of Victims of Violent Crimes … which is concerned with the European-level harmonisation of the guiding principles of compensating victims of violent crime and with giving them binding force. EU Member States must also have regard to the Council Directive of 29th April 2004 on compensation of crime victims."

146. Article 8 of that Convention provides

> "1. Compensation may be reduced or refused on account of the victims of the applicants conduct before, during or after the crime, or in relation to the injury or death …
>
> 3. Compensation may also be reduced or refused if an award or a full award would be contrary to a sense of justice or to public policy."

The explanatory report to the European Convention on the Compensation of Victims of Violent Crime includes, in respect of Article 8, the following

> "33. … Article 8 allows compensation to be reduced or withheld where the victim is at fault.
>
> 34a. Improper behaviour of the victim in relation to the crime or to the damage suffered [this appears to reflect Article 8(1) of the Convention]
>
> 36c. Compensation repugnant to the sense of justice or contrary to public policy.
>
> States which introduce compensation schemes usually want to retain some discretion in awarding compensation and to be able to refuse it in certain cases where it is clear that a gesture of solidarity would be contrary to public feeling or interests, or would be contrary to the basic principles of the legislation of the State concerned. This being so, a known criminal who is the victim of a crime of violence could be refused compensation even if the crime in question was unrelated to his criminal activities."

147. ECAT is unincorporated into domestic law. The consequences of that were described by Lord Hoffmann in ***R v Lyons [2002] UKHL 447*** at paragraph 27 when he said

> "… The question of whether the appellant's convictions were unsafe is a matter of English law. And it is firmly established that international treaties do not form part of English law and that English courts have no jurisdiction to interpret or apply them … Parliament may pass a law which mirrors the terms of the treaty and in the that sense incorporates the treaty into

> English law. But even then, the metaphor of incorporation may be misleading. It is not the treaty but the statute which forms part of English law and English courts will not (unless the statute expressly so provides) be bound to give effect to interpretations of the treaty by an international court even though the United Kingdom is bound by international law to do so. Of course, there is a strong presumption in favour of interpreting English law (whether common law or statute) in a way which does not place the United Kingdom in breach of an international obligation …"

148. The Claimants contend that there is evidence that the courts will be influenced by a prominent strain of current public policy against trafficking as reflected in Article 4 to inform its approach when confronted with a countervailing argument based on public policy.

149. Reliance is placed on the analysis of the Supreme Court in ***Hounga v Allen [2014] UK SC 47 [2015] 1 WLR 2889***, at paragraph 52 concerning the question whether a trafficker could rely on the common law defence of illegality to defeat a claim for compensation arising from dismissal and breach of contract brought by a victim of trafficking in which Lord Wilson said

> "(There is) a prominent strain of current public policy against trafficking and in favour of the protection of its victims. The public policy in support of the application of that defence (of illegality) to the extent that it exists at all should give way to the public policy to which its application is an affront."

150. Applying that logic, the Claimants contend that, whatever maybe the legitimacy of the blanket ban on awards to those with unspent relevant criminal convictions with the aim of safeguarding the sustainability of the Scheme, there is a more prominent strain of public policy against trafficking which requires that all victims must have the possibility of compensation which defeats the blanket exclusion of victims of trafficking who have a relevant unspent conviction.

151. The Defendants contend that in ***Rantsev*** and ***Siliadin***, the positive obligation upon signatory States were to penalise and prosecute effectively any act of trafficking and to take appropriate operational measures to remove the individuals from a real and immediate risk of being trafficked. They fall far short of an obligation to provide compensation whether or not the victim is a person with unspent relevant criminal convictions.

152. The Defendants say that ***Hounga v Allen*** does no more than decide that the public policy in support of a defence of illegality, if it exists, should not provide the defence to the perpetrator of discriminatory acts and gives way to the public policy of protecting victims of trafficking.

153. The Defendants contend that, even if ECAT informs Article 4 sufficiently to enable it to be considered when assessing whether the Scheme fall foul of A1P1 itself, or in conjunction with Article 14, a close consideration of ECAT and the linked documents as set out above, makes it clear that there is no policy that all victims of trafficking

must be entitled to compensation regardless of having relevant unspent convictions. ECAT itself and the documents make it clear that the limit of the obligation is to secure access to the internal schemes in the individual Member States, and that the template to be followed in constructing such schemes is the parallel convention on compensation of victims of violent crimes and its explanatory report, which expressly provides for exclusion from compensation when making an award would be contrary to the sense of justice or to public policy such as one made in favour of a known criminal even where the crime for which compensation is sought was unrelated to his criminal activities. The parallel between these documents and the stated aim underpinning paragraph 26 Annex D paragraph 3 of the Scheme is said to be highly significant.

154. In effect, the Defendants' argument is that, if the Claimants are correct on Article 17 of the Directive, then they do not need to use Article 4 of the ECHR and Article 15(4) of ECAT, but if the Defendants are right about Article 17, then Article 4 and Article 15(4) of ECAT do not assist the Claimants.

Conclusions

155. The claims rest upon specific articles, Article 17 in the Directive, and Article 4 in the ECHR informed by Article 15(4) of ECAT. In each case, it is said that the Scheme in its current form constitutes a breach of the obligations placed upon the State pursuant to those two Articles.

156. In my judgment, as stated above, the extent of the obligations under Article 17 are clear. They are to ensure that victims of trafficking have access to the existing national scheme in the sense of being entitled to have their claim considered substantively. That is achieved under the Scheme by virtue of paragraphs 10 -15.

157. What, in my judgment, Article 17 does not do is impose an obligation on the State to compensate victims of crimes of trafficking beyond the terms of the existing national scheme. It does not, in my judgment, require a State to change the terms of its existing scheme to comply with Article 17 save by providing access to it, which it does. If, as I have concluded, the terms of an existing scheme lawfully impose eligibility criteria which an individual victim of trafficking fails to comply with or which has the effect of excluding a victim of trafficking from compensation under the Scheme, and does so lawfully, then, in my judgment, a victim of trafficking cannot expand the scope of the Scheme as it applies to him to obtain compensation outside the terms of the Scheme, nor can he contend that applying the terms of the Scheme to him, so that he is excluded from compensation, constitutes a breach of Article 17 by the State.

158. Similarly, in my judgment, the terms of Article 4 of the ECHR even if informed by ECAT, would not advance the Claimants' case as ECAT is of the same or similar effect as Article 17 of the Directive.

159. It therefore follows that the EB claims fail on the two grounds specific to them. Nor does the fact of their being victims of trafficking assist in either Ground 2 or 4 of their challenge.

Procedural Issues

160. In my judgment, the failure by the Claimants to seek a review of the decision or to appeal the decision after a review to the First-Tier Tribunal would not have constituted a bar to their seeking this Judicial Review had I been in their favour on the substance of their claims. The attack made in these claims is not to the application of the Scheme, which, it is accepted by the Claimants, has been applied in accordance with its terms. On the contrary, the claims have been required to be advanced as an attack on the lawfulness of the Scheme itself, precisely because a proper application of the terms of the Scheme excluded each of the Claimants from compensation. In my judgment it would have been futile for the Claimants to have sought a review and thereafter to have appealed to the First-Tier Tribunal. Their attack on the lawfulness of the Scheme could only properly be advanced by means of a Judicial Review. Accordingly, those procedural issues would not, in my judgment, have precluded this claim succeeding had it otherwise found favour.

161. Similarly, in my judgment, given the complexity of the issues involved, no criticism can be laid at the door of the Claimants or their advisors in taking the full three-months to consider their position and construct their arguments before issuing these claims and, had I been otherwise in favour of the claims, I would not have ruled against them on grounds of delay. The Defendants do not now so contend.

Summary of Conclusions

162. For the reasons set out above, I dismiss the claims of each of the Claimants on each of the Grounds advanced.