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2017 No. 46349

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY F FOR JUDICIAL REVIEW

AND

IN THE MATTER OF DECISIONS OF THE CRIMINAL INJURIES COMPENSATION APPEALS PANEL FOR NORTHERN IRELAND
AND
THE DEPARTMENT OF JUSTICE

_____

The Rt Hon Sir Paul Girvan

[1] This is an application by the victim of physical abuse and alleged sexual abuse whose name has been anonymised as F pursuant to an order of 27 September 2017. She suffered such abuse between the ages of 9 and 11 between February 1979 and October 1980 at the hands of a person subsequently convicted in 2013 of offences involving the physical abuse of F.

[2] The applicant sought but was refused criminal injury compensation on the grounds that she was living together with the assailant as part of the same household and same family at the relevant time. In this application the applicant seeks in effect a declaration that the provisions of paragraph 7(a) and 7(c) of the Northern Ireland Criminal Injuries Compensation Scheme 2009 ("the 2009 Scheme") are unlawful and that the continued operation of the same household and same family tests under paragraphs 7 and 18 of the Scheme are irrational, unfair and incompatible with the European Convention on Human Rights as being a disproportionate interference with the applicant's rights contrary to Article 14(1) Protocol 1 Article 1. She also asserts that the provisions unlawfully fetter the discretion of the relevant decision-maker by failing to provide any discretion for exceptionality. Mr Ronan Lavery QC and Mr Mullan act for the applicant and Dr McGleenan QC and Mr McAleese act for the Department of Justice ("the DOJ").

The court is grateful to counsel for their helpful submissions in what turned out to be a rather more complex case than might have appeared at first sight.

[3] According to the applicant's grounding affidavit after her mother's death in October 1977 the assailant moved into the family home and lived as a partner of the applicant's father. Physical abuse of the applicant by the assailant began initially involving hair pulling, tripping up the applicant and throwing her clothes on the floor. The abuse, however, got worse. The partner had a child by her relationship with the applicant's father. Following the father's sentence of imprisonment in 1979 the assailant remained living in the home looking after the applicant and the other children. The applicant asserts that she was subjected to appalling physical and sexual abuse between February 1979 and October 1980 at the hands of the assailant. Eventually the applicant was taken into care in October 1980. She claims that as a result of intimidation she moved to Coventry in 2002. She moved back to Northern Ireland in 2008 and decided to report her abuse to the police. The assailant was prosecuted in the Crown Court. After the jury were sworn the assailant pleaded guilty to counts of physical cruelty. The counts of sexual abuse were left on the books by the prosecution.

[4] In September 2013 the applicant made an application for compensation to the Compensation Services under the Northern Ireland Criminal Injuries Compensation Scheme 2009 ("the 2009 Scheme"). Her application was refused and she appealed to the Criminal Injuries Compensation Appeal Panel for Northern Ireland ("the Panel"). After what she described as a sympathetic hearing the applicant's appeal was dismissed. Written reasons were given on 24 October 2016. The Panel accepted that she had suffered a criminal injury but concluded that she was not able to claim compensation in light of the same household and same family provisions in the Scheme.

[5] The Panel decided that the applicant had been physically and mentally/ emotionally abused by the assailant who was at the relevant time her effective step-mother. The assailant moved into the family home in February 1979 at a time when she was pregnant by the applicant's father. That baby was born in June 1979. The applicant's father was sent to prison on 14 July 1979. The applicant was subject to a number of reports of Social Services from 21 February 1980. The evidence established that the assailant had taken on a mother's role for the children before the father was imprisoned and that she had sole responsibility for the children after his imprisonment. The Panel concluded that the children and the assailant were living under the same roof. The assailant and the father married after his release from prison. The Panel did not come to a decision whether the applicant had sustained an injury as the victim of sexual offences. In view of the Panel's conclusion that the applicant's claim failed under the same household test the Panel considered that it was not necessary to reach a conclusion on the issue of sexual abuse.

The relevant 2009 Scheme provisions

[6] Paragraph 6(a) provides that compensation may be paid in accordance with the Scheme to an applicant who has sustained a criminal injury as defined in paragraph 8. A criminal injury is defined as one or more personal injuries as described in paragraph 10 being an injury sustained in and directly attributable to an act occurring in Northern Ireland which is (inter alia) a crime of violence. Physical injury includes physical injury, mental injury and disease. Mental injury or disease may either result directly from the physical injury or from a sexual offence or may occur without any physical injury. Paragraph 7 of the Scheme provides:

> "7. No compensation will be paid under this Scheme in the following circumstances:
>
> (a) in respect of a criminal injury sustained by a person before the coming into operation of this Scheme unless the requirements of paragraph 86 (transitional provision) are satisfied;
>
> (b) where the applicant has previously lodged any claim for compensation in respect of the same criminal injury under this or any other scheme for the compensation of the victims of violent crime in operation in Northern Ireland; or
>
> (c) where the criminal injury was sustained before 1 July 1988 and the victim and the assailant were living together at the time as members of the same family."

Paragraph 18 provides:

> "18. (1) Where a case is not ruled out under paragraph 7(c) (injury sustained before 1 July 1988) but at the time when the injury was sustained, the victim and any assailant (whether or not that assailant actually inflicted the injury) were **living in the same household as members of the same family**, an award will be withheld unless:
>
> (a) the assailant has been prosecuted in connection with the offence, or the Secretary of State (now the DOJ) considers that there are practical, technical or other good reasons why a prosecution has not been brought; and

(b) in the case of violence between adults in the family, the DOJ is satisfied that the applicant and the assailant stopped living in the same household before the application was made and are unlikely to share the same household again.

(2) For the purposes of this paragraph, a man and woman living together as husband and wife (whether or not they are married) or same sex partners living together (whether or not they are civil partners) will be treated as members of the same family.

(3) For the purposes of this Scheme, two people are 'civil partners' if they are civil partners for the purposes of the Civil Partnership Act 2004."
(*the words in bold give rise to what has been called the same household condition*).

Paragraph 86 of the Scheme provides:

"86. Notwithstanding the provisions of paragraph 7, compensation may be paid in accordance with this Scheme in respect of a criminal injury sustained by a person before the coming into operation of this Scheme where—

(a) that person sustained the injury as the victim of a sexual offence when that person was under the age of 18;

(b) a claim is made in respect of the injury under this Scheme;

(c) where the claim is made, the time limits set out in article 5(5) of, and paragraph 2(2) and 3(2) of Schedule 2 to, the Criminal Injuries (Compensation) (Northern Ireland) Order 1988 for claiming compensation for the injury under that Order or previous statutory provisions relating to compensation for criminal injury have expired;

(d) any earlier claim for compensation in respect of the injury under that Order was refused

because it was made after the expiry of the time limits set out in article 5(5) of that Order;

(e) any earlier claim for compensation in respect of the injury under the Criminal Injuries (Compensation) (Northern Ireland) Order 1977 or the Criminal Injuries to Persons (Compensation) Act (Northern Ireland) 1968 was refused because it was made after the expiry of the time limits set out in that Order or that Act or in paragraph 2(2) and 3(2) of Schedule 2 to the Criminal Injuries (Compensation) (Northern Ireland) Order 1988; and

(f) had that person made a claim for compensation in respect of the injury under the Criminal Injuries (Compensation) (Northern Ireland) Order 1988, the Criminal Injuries (Compensation) (Northern Ireland) Order 1977 or the Criminal Injuries to Persons (Compensation) Act (Northern Ireland) 1968 before the time limit for making such a claim had expired, compensation would have been payable under that Order or (as the case may be) that Act."

Paragraph 87 provides:

"87. In determining for the purposes of paragraph 86 whether compensation would have been payable under the Northern Ireland Criminal Injuries Compensation Scheme 2002, the Criminal Injuries (Compensation) (Northern Ireland) Order 1988, the Criminal Injuries (Compensation) (Northern Ireland) Order 1977 or the Criminal Injuries to Persons (Compensation) Act (Northern Ireland) 1968 it shall be assumed that the person making the claim –

(a) complied with any requirement under those provisions to notify the commission of the injury to the police or to serve on the Secretary of State notice of intention to apply for compensation;

(b) would have made the claim in the manner prescribed under those provisions;

(c) would have complied with any requirement under those provisions as to the production to the Secretary of State of medical reports relating his injury, and would have complied with any requirement of the Secretary of State as to medical examinations, medical records, X-rays or other documents relating to his injury or medical history; and

(d) would have complied with any requirement under those provisions as to information and assistance which might lead to the identification, apprehension, prosecution and conviction of the offender."

[7] The powers of the Secretary of State under the Scheme have passed to the Department of Justice. The Department's justification for the same household condition is explained in the affidavit of Marcel McKnight who is the responsible officer of the Department of Justice for the 2009 Scheme. In her affidavit filed on 5 December 2017 she set out the background to the relevant legislation and the Scheme. It is asserted that the same household condition in the 1968 Act and the 1977 Order had the effect of excluding compensation to victims living in the same household as the perpetrators at the time when the injury was sustained. That exclusion was relaxed in 1988 under the 1988 Order. Under Article 5(2) of that Order no compensation was to be paid in respect of an injury where the victim was at the time the injury was sustained living in the same household as the person responsible for causing it unless:

(i) the person responsible had been prosecuted in connection with the injury or there was sufficient reason why he was not prosecuted;

(ii) the person responsible and the victim had ceased to live in the same household and were unlikely to live in the same household again or there were exceptional circumstances which prevented them ceasing to live together in the same household; and

(iii) no person responsible for causing the injury would benefit from the compensation if it was paid.

The Criminal Injuries Compensation (Northern Ireland) Order 2002 made provision for the introduction of a Northern Ireland Criminal Injuries Compensation Scheme. The 2002 Scheme provided that cases of sexual abuse of minors that had previously

been unsuccessful due to time limit issues could apply for compensation but the legislation that applied at the time otherwise still had to be satisfied and this included an application of the same household provision. The matter was looked at again in 2008 and the Minister decided that no change should be made with respect to historical claims and therefore the relevant provisions in the 2009 Scheme were retained. This decision was based on perceived evidential issues, unquantifiable cost if the change were made and the principle where possible legislation should not be enacted retrospectively. The Department considered that it was impossible to estimate the potential number of applications for compensation that might arise should applications be permitted by those previously prevented from doing so by operation of the same household condition. It also considered that the administrative difficulties associated with investigating such cases dating back to that period would be difficult to estimate and the related costs difficult to quantify.

The decision in MA v Criminal Injuries Compensation Board [2017] CSIH 46

[8] The petitioner MA sought compensation for criminal injuries inflicted on her by her mother in 1968 and 1973 when she was three months and five years respectively. The mother was convicted of assault. The petitioner sought compensation under the 2008 Scottish Scheme. Paragraph 70 of that Scheme was essentially the same as the Northern Ireland Scheme in relation to the "same roof" rule. The same rule in Scotland persisted under criminal injuries compensation legislation until a review of the Scheme recommended changes to the Scheme. The two explanations for the need for the rule (the difficulty of establishing the facts in same roof cases and the need to ensure that compensation did not benefit the offender) were criticised in the review. If a person was convicted no issue of difficulty establishing the facts would arise. In other cases facts could be examined with particular care to exclude collusion. No real risk of benefit to the offender would arise where a long prison sentence was imposed, where the parties were divorced or it was plain that the parties would not be living together. Otherwise special arrangements could be made to ensure that the offender did not benefit. Following the review by an inter-departmental working party in 1978 it was provided that on and after 1 October 1979 an award could be made where the victim and assailant had been living together so long as the assailant had been prosecuted or there was good reason why no prosecution had been brought. The change brought about in Scotland was thus the same as the change effected in Northern Ireland in the 1988 Order.

[9] The Inner House upheld the decision of the lower court in which the Lord Ordinary concluded that on the basis of the European Court of Human Rights decision in Stec v UK [2005] 41 EHRR and on analysis of subsequent authorities the claim came within the ambit of Article 1 Protocol 1 and Article 14. In Stec it was held that if the applicant had been denied a particular benefit on a discriminatory ground covered by Article 14 the relevant test was whether but for the condition of entitlement about which the applicant complained he or she would have a right

enforceable under domestic law to receive the benefit in question. If the state authorities decided to create a benefit scheme it must do so in a manner which is compatible with Article 14. The Lord Ordinary and the Court of Inner House of the Court of Session considered that this required the court to look beyond the same household test and asked whether the claimant would otherwise have an enforceable claim. Both lower and upper court accepted that the Stec principle could apply in the context of a criminal injury compensation scheme. The Scottish court approach was different from the conclusion reached by Weatherup J in this jurisdiction in Re T *(*WEAF5548*)* in which he held that Article 14 could not be relied on in relation to the Northern Ireland Criminal Injuries Compensation Scheme.

[10] In relation to the question whether objective and reasonable justification for interference with the appellant's right to property had been made out, applying the "manifestly without reasonable foundation" test the Inner House upheld the Lord Ordinary's conclusion that justification had been established. The original justification on the basis of difficulties of proof and a fear that the offenders might benefit was rational and understandable. The change in 1979 was made prospectively because of the difficulty of estimating the cost of wholesale abolition. The rule discriminated in imposing a bright line but it did so in a way that extended the reach of the scheme and assisted in making the scheme sustainable. The Inner House held that the policy decision in question fell within the field of socio-economic policy and the allocation of finite resources. A wider margin of discretionary judgment was to be accorded to the legislature in such cases. A central consideration was to ensure the long term sustainability of the scheme. There was a clearly expressed concern that wholesale abolition of the rule would expose the scheme to a highly uncertain degree to compensation for injuries sustained between 1964 and 1969. Concerns that wholesale abolition would increase the administrative burden and could give rise to difficulties in establishing causation between the offence and the injuries given the historical nature of the claims. This was a reasonable foundation for a policy decision which limited the extent of the abolition of the rule. The court concluded that the discriminatory provisions pursued a legitimate aim (to ensure long term sustainability). The restructure of the scheme was a prudent policy decision concerning the allocation of financial resources in a matter of socio-economic policy and neither the aim nor the means employed could be said to be manifestly without reasonable foundation. I was informed that leave to appeal the decision of the Inner House to the Supreme Court has been given by the Inner House.

The status of the Scottish decision

[11] In McCarten v Belfast Harbour Commissioners [1910] 2 IR 470 Holmes LJ said:

> "It is true that although we are not technically bound by decisions in the co-ordinate English court we have

> been in the habit in adjudicating on cases where the law of the two countries is identical to follow them. We hold that uniformity of decision is so desirable that it is better, even when we think the matter doubtful, to accept the authority of the English court and leave error, if there be error, to be corrected by the Tribunal whose judgment is final on both sides of the Channel."

This approach was adopted in Re An Arbitration between the Northern Ireland Road Transport Board and the Century Insurance Company Limited [1941] NI 77 (see Murphy LJ at 107). See also McGuigan v Pollock [1955] NI and Croft Inns v Scott [1982] 4 NIJB by Hutton J.

[12] Although these cases are in the context of following Court of Appeal decisions in England there seems to be no reason of principle why the Northern Ireland courts particularly at first instance, would not normally consider it appropriate to follow and apply the ratio of decisions of the Inner House where the law in the two jurisdictions is in essence the same.

The applicant's case

[13] Mr Lavery QC pointed out that compensation under the Scheme was disallowed under paragraph 7(c) of the Scheme if the victim and the assailant were living together as part of the same family or if the victim or assailant were living together as part of the same household under Article 3(2)(b) of the 1977 Order. The 1977 Order is relevant in relation to the alleged sexual offences in the present instance because the provisions of paragraph 86 of the Scheme which widen the time for claiming in respect of sexual offences requires the claimant to be able to show that she would have a valid claim under the 1977 Order if she had pursued the claim timeously under the 1977 Order. Counsel asserted that the provisions of paragraphs 7(a) and 7(c) are inconsistent with and in violation of the applicant's rights at common law and/or under the Convention. He argued that the Northern Ireland cases of Re T by Weatherup J and In Re An Application by the Secretary of State [2006] NIQB 57 were in error in holding that Article 14 Protocol 1 Article 1 were not engaged. Counsel pointed out that in MA v Criminal Injuries Compensation Board in Scotland the court concluded that Article 14 and Article 1 of Protocol were in play. He contended that the court in Scotland was right to so conclude but he argued that it was wrong to conclude that the interference with the Convention rights was justified. The applicant challenged the rigidity and lack of adequate discretion afforded by the 2009 scheme and relied on what Lord Kerr proposed in Re Brownlee's Application that the requirements of fairness in judicial proceedings are rarely if ever met by blanket measures of universal application. Universal policies which did not make allowance for exceptional cases would not readily meet the standards required of fairness and justice. The unfairness of the current operation of

the 2009 Scheme was highlighted by the examples of scenarios on which counsel relied:

(a) if the applicant had been abused by a neighbour she would be entitled to compensation;

(b) if the assailant had abused the applicant and at the same time had abused the child from next door the child from next door would be entitled to compensation;

(c) if a student lodger was taking a room in the house and was abused by a member of the household he or she would not be disentitled from pursuing a claim as he or she would not be a member of the family though living in the same household;

(d) children abused in residential accommodation or a school or home would not be disentitled to claim even though a principal in the institution might be *in loco parentis.*

The asserted policy's considerations underlying the blanket provision were the alleged difficulty in establishing precisely what had happened, the danger of collusion and the risk that the perpetrator would benefit from an award clearly did not apply in a case such as the present. Counsel argued that the applicant without question sustained a criminal injury proved in the case of physical abuse by the conviction of the assailant to the criminal standard. Counsel argued that the Scottish decision should not be followed notwithstanding the normal approach adopted in relation to the courts in this jurisdiction following appellate decisions on legal issues common in other jurisdictions within the United Kingdom. He contended that in the Scottish case the court had not been asked to consider a number of issues which he argued were raised in this case. Firstly, he contended that in the Scottish case the court failed to consider the question whether the provisions of the Scheme could be read down in a way which was compatible with the applicant's asserted rights under the Convention. Secondly, he contended that the Scottish court failed to address the question of the indirectly discriminatory nature of the exclusion of claims by same household victims of abuse in respect of pre-1988 abuse as compared to those suffering such abuse after 1988. He asserted that, from the evidence he relied on, the victims of domestic abuse were disproportionately females who were particularly disadvantaged by the same household principle. Thirdly, he contended that in the Scottish court it had not been argued, as he argued it should have been, that the scheme was contrary to common law fairness and was flawed procedurally by a failure on the part of the decision-makers to consider how the pre-1988 situation could have been addressed by allowing claims in same household cases using the restricted test applied in post-1988 cases (i.e. requiring evidence of prosecution etc). The reasoning of the decision-makers in relation to the formulation of the Scheme proceeded on the basis that in the pre-1988 situation it was all or nothing. The

decision-makers had not turned their mind to the question of whether within the pre-1988 cases an application of the post-1988 tests in the same household situations could have reduced the problems that they foresaw in respect of old claims. The fear of an avalanche of old cases of unknown dimensions was misplaced. There had been no investigation as to how many cases gave rise to claims under the post 1988 change in Northern Ireland or how many cases had been generated in England or Scotland following the changes in those jurisdictions in the same household condition.

Consideration

[14] As Dr McGleenan QC pointed out in his submissions, the 1988 Order was approved by Parliament. Article 5 was thus clearly approved in the legislative process. This provision permitted a prospective change in the law allowing claims in the context of same household criminal injuries but not giving retrospective effect to the change. The 2002 Order and the 2002 Scheme were approved in Parliament in 2002. The 2002 Order empowered the Secretary of State (whose powers are now vested in the DOJ) to make arrangements including making a scheme providing for the circumstances in which awards of compensation may be made. Provision was made for the making of transitional provisions. "Criminal injury" was defined as having such meaning as might be specified. The 2002 and 2009 Schemes have defined criminal injury. The 2002 Order replaced earlier legislation and it appears to confer a wide power on the Department to make provision for compensating the victims of criminal injuries. Ms McKnight in her affidavit deposes that the legislation precluded a retrospective change in rules applicable to those who would be qualified to make a claim for a criminal injury. She contends that "should the wish be to change the criteria set out in the scheme so that those who were previously prevented from claiming compensation under Section 1(3)(b) of the 1968 Act, Article 3(2)(b) of the 1977 Order and Article 5(2) of the 1988 Order are able to claim compensation such amendments may be vulnerable to an argument that they are ultra vires." Retrospective legislation has been defined as legislation which takes away or impairs any vested rights acquired under existing laws or creates new obligations imposed as a new duty or attaches a new disability in respect of transactions or considerations already passed. According to the Oxford English Dictionary of Law retrospective legislation is "legislation that operates on matters taking place before its enactment e.g. by penalising conduct that was lawful when it occurred. There is a presumption that statutes are not intended to have retrospective effect unless they merely change legal procedure." Stroud's Judicial Dictionary of Words and Phrases outlines the principle "unless there be clear words to the contrary statutes do not apply to a past but to a future state or circumstance."

[15] The imposition on a public authority of a liability to pay compensation out of public funds in situations expressly excluded under the provisions of earlier legislation would impose a liability having retrospective effect. Ms McKnight would appear to be correct in her suggestion that it would require a legislative basis.

[16] The 2002 Scheme in Para 7 provided that no compensation should be paid under the Scheme in respect of a criminal injury before the Scheme came into operation. It was subject to Para 84 which itself is to be read with Para 85. This permitted the payment of compensation to victims of sexual offences who sustained injury under the age of 18 and a claim was made under the Scheme. Such a claim was subject to the conditions of para 84(b) to (f) and assumptions were to be made that the person making the claim otherwise complied with earlier requirements in respect of notification etc. While paras 84 and 85 read together required a payment of compensation in relation to a past state of circumstance the change can be considered as merely a change of legal procedure in respect of a situation which would have been covered by earlier criminal injury legislative provision. What the change affected by para 84 did not do was to confer a right to claim compensation on a person who had no substantive right to compensation under the earlier legislative regime.

[17] The 2009 Scheme altered the 2002 Scheme. Paragraph 7 of the new Scheme is not an altogether easy provision to construe. Paragraph 7(a) is worded identically to paragraph 7 (although para 86 of the new Scheme replaced paragraph 84 of the 2002 Scheme). If paragraph 7(a) had stood alone it would be clear that only a criminal injury subsequent to the Scheme would be compensable subject to the exceptional class of victims of sexual offences covered by para 86. It is not clear why paragraph 7(c) was inserted in the Scheme. Para 86 precludes a claim under that exceptional provision in the case of family members before 1 July 1988 in any event so if it covers those exceptional cases paragraph 7(c) is otiose. The question arises as to whether paragraph 7(c) applies to criminal injuries not falling within paragraph 86 (that is to say criminal injuries which are not the consequence of a sexual offence). The question also arises as to whether paragraph 7(c) opens the door to old claims being made out of time leaving it to claimants in respect of old claims to persuade the Department to waive the time limits under paragraph 19. Neither party argued for such a proposition. Mr Lavery conceded that Para 7(a) and Para (c) read together preclude an old claim for a non-sexual criminal injury and that unless Para 7(a) is incompatible with the Convention rights of the applicant she has no claim for either a sexual or a non-sexual criminal injury. It appears be accepted by Mr Lavery that under the 2009 Scheme the applicant has no claim for compensation in relation to the injuries sustained in the non-sexual physical abuse.

[18] Paragraph 18 of the 2009 Scheme (which replicates paragraph 18 of the 2002 Scheme) precludes payment of compensation when the victim and the assailant were living in the same household unless the conditions set out in paras 18(a) and (b) are satisfied. Those conditions reflect the same test as under the 1988 Order. Paragraph 18 thus continues the same household / family condition as applied subsequent to 1 July 1988. Whatever be the true interpretation of paras 7(a), (b) and (c), 18 and 86 read with 87 in relation to claims for criminal injuries arising from non-sexual offences by non-family members, the effect of the 2009 Scheme is to preclude claims

by family members in respect of sexual offences or other criminal injuries unless after 1 July 1988 the conditions in paragraph 86 are satisfied.

[19] Dr McGleenan submitted that the right to apply for compensation under a discretionary scheme which, when applied in accordance with its explicit terms, would result in a refusal of compensation does not create a legitimate expectation of securing compensation and the matter does not fall within the ambit of Article 1 of Protocol 1 or Article 14. Such a claim did not constitute a right to a possession lacking as it did a sufficient basis in national law. He argued that Stec applied only to cases involving welfare benefits. He argued that MA was wrongly decided and that the earlier Scottish decision in DJS v Criminal Injuries Compensation Appeals Panel [2007] SC was correctly decided (and wrongly rejected in the later decision in MA).

[20] Dr McGleenan did accept that normally a court at first instance in Northern Ireland would follow and apply the ruling of an English or Scottish Appellate Court on a point of law common to the jurisdiction. He wished to reserve the point for further argument in the event of a further appeal in this case. For my own part I consider that I should follow and apply the reasoning in MA on this issue. The parameters of the width of the Stec principle have not been finally defined, as pointed out by the judgment in MA. I am content to adopt and apply the reasoning of that court in paragraphs [33] to [37].

[21] Dr McGleenan contended that as in MA the essential question is whether objective and reasonable justification for interference with the appellant's claimed right to compensation has been made out applying the "manifestly without reasonable foundation" test. In the MA judgment the court concluded that policy decision adopted in relation to the issue fell within the field of socio-economic policy and the allocation of finite resources. A wide margin of appreciation must accordingly be accorded to the legislature and State authorities.

[22] Mr Lavery contended that the applicant had been discriminated against on the basis of her status as a family member abused by someone living in the same household and on the basis of her sex as a female. Females were more susceptible to sexual abuse and physical abuse in a family-household context than males and females would thus make up a disproportionately large percentage of such victims. Dr McGleenan pointed out that in R (LS and Marper) v Chief Constable of South Yorkshire [2004] UKHL 39 the House of Lords held that Article 14 only applies to discrimination based on personal characteristics. A personal characteristic could not be defined by the very treatment of which the person complained (R (Clift) Hindawi v Secretary of State for the Home Department [2006] UKHL 54. He accepted that a different approach had been adopted by the European Court of Human Rights in Clift v The United Kingdom [2010] ECHR 7205-07 but the House of Lords decision remains binding until reconsidered. On the issue of sex discrimination he criticised

the lack of evidence put forward by the applicant to underpin her propositions and the late emergence of the point in the proceedings.

[23] I conclude that on the issue of status I should reject Dr McGleenan's argument. While it is a fact that the claimant finds herself the victim of abusive conduct in the same household context what precludes her claim is not simply that she was in the same household but it was because of that and her family relationship with the abuser (see para 7(c)). It was her immutable family relationship which precluded her claim. A non-family member staying in the same household (for example a lodger or visiting guest) would not have her claim excluded because of that status. The discrimination was not, however, based on a sexual discriminatory condition. The issue of sex discrimination raises other issues to which reference is made below.

[24] In dealing with the issue of justification I consider that Dr McGleenan was correct in his submission that the appropriate test is the "manifestly without reasonable foundation" test. The question is whether there is any reasonable foundation for the same household condition. Dr McGleenan was also correct in pointing out that the exclusion of persons living in the same household was not an oversight or aberration but a deliberate policy subject to analysis and thought. Due deference must be accorded to the legislature in its policy choice. However, as counsel accepted, a measure requires close analysis as to its effect not to the route by which the decision was generated. The application of a bright line is not itself objectionable since lines have to be drawn to make rules workable. The proportionality of a rule should not be assessed by reference to hard cases on the margins.

[25] The court in MA found that the discrimination pursued a legitimate aim, that is to say to ensure the long term sustainability of the Scheme. The estimation of exposure to historical claims was difficult. Wholesale abolition would increase the administrative burden on those administering the scheme. There could be difficulties in establishing causation between the offences and the alleged injuries, particularly given the historical nature of the claims. The restriction in the Scheme was a prudent policy decision concerning the allocation of finite resources on a matter of socio-economic policy.

[26] It is true, as Mr Lavery argued, that the opening up of claims for pre-1988 cases to claimants who could satisfy the prosecution condition in para 18 would have clearly limited the extent of the new exposure for the Department to old claims since the number of such claims would inevitably be much more restricted than would be the case in respect of claims where no prosecution had taken place or been considered. Furthermore, the investigation of the facts of such a claim would often be less problematic since there would be more prosecutorial or police evidence. Nevertheless, even in such cases there would have been an added administrative burden. The further back an investigation has to go the more difficult it would be to

trace all records and documents and police and/or prosecution files may be closed, in storage, destroyed or deleted. The difficulties in gathering medical evidence from medical records could be significant. It can be particularly difficult to get to the bottom of historic sexual abuse allegations within family/same household contexts. The use of cut off dates by a bright line rule is rational, though inevitably it can result in cases before and after the cut-off date producing different and anomalous outcomes.

[27] Mr Lavery sought to argue that I should not follow MA because in this case there is an issue of indirect sex discrimination not discussed in MA (although touched on in JT). He further argued that the Scottish Court had not considered the question of reading down the provisions of the Scheme in such a way as to avoid the discriminatory outcome. This latter point is without substance because reading down only applies if the relevant provision is otherwise incompatible with the Convention, which the Scottish Court rejected. As to indirect sex discrimination, in a case of indirect discrimination what requires to be justified is the rule itself, not the effect on the individual (see DH v Czech Republic [2008] 47 EHRR 3; R (SG) v Secretary of State for Work and Pensions[2015] UKSC 16.) Discrimination on the grounds of sex will be scrutinised less intensely if indirect than if direct. In Humphreys v Revenue and Customs Commissioners [2012] UKSC 18 Lady Hale stated that the normally strict test for justification of sex discrimination in the enjoyment of Convention rights gives ground to the manifestly without foundation test in the context of welfare benefit cases. Even if an evidential foundation has been established for his argument (which is questionable) Mr Lavery has not persuaded me that there is a valid indirect discrimination argument which should lead me to a different conclusion from that reached by the court in MA. I have not been persuaded that I should not follow and apply the reasoning adopted by the Inner House in MA.

[28] In the result the application is dismissed.