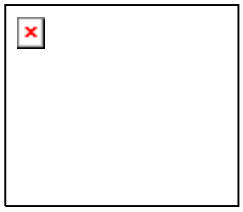

EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Osborne
Lord Mackay of Drumadoon
Lady Dorrian

[2007] CSIH 49
P1473/02

OPINION OF THE COURT

delivered by LORD OSBORNE

in

RECLAIMING MOTION

in

PETITION AND ANSWERS

in the cause

D.J.S.
Petitioner and Reclaimer;

against

(FIRST) THE CRIMINAL INJURIES COMPENSATION APPEAL PANEL; and (SECOND) THE ADVOCATE GENERAL FOR SCOTLAND
Respondents:

_____

Act: Bovey, Q.C., Sutherland; Drummond Miller, W,S. (Petitioner and Reclaimer)
Alt: Moynihan, Q.C., Lindsay; H.F. MacDiarmid, Solicitor to the Advocate General for Scotland (Respondents)

8 June 2007

The background circumstances

[1] A Criminal Injuries Compensation Scheme was set up in 1964 under prerogative powers, "the 1964 Scheme". It came into operation on 1 August 1964. The purpose of that Scheme was the provision of compensation for victims of crimes of violence. Applications for compensation to the Criminal Injuries Compensation

Board, "the Board", under the 1964 Scheme, could be entertained only where the injury concerned had been incurred after the commencement of the Scheme. Paragraph 7 of the 1964 Scheme provided:

> "Offences committed against a member of the offender's family living with him at the time will be excluded altogether."

The reasons for that exclusion were, first, the potential difficulties perceived as being involved in investigating claims based on such offences; and, second, the need to ensure that offenders did not benefit from any award made. A copy of the 1964 Scheme is No.7/3 of process.

[2] A revised Criminal Injuries Compensation Scheme was introduced in 1979, "the 1979 Scheme". It came into effect on 1 October 1979. It applied only to incidents occurring on or after that date. The principal change effected in the 1979 Scheme was to extend its operation to the victims of family violence. A copy of that Scheme is No.7/4 of process. It was succeeded by the Criminal Injuries Compensation Scheme 1990, "the 1990 Scheme", which applied to all applications for compensation received by the Board on or after 1 February 1990. A copy of that Scheme is No.7/5 of process. Both the 1979 Scheme and the 1990 Scheme were promulgated under prerogative powers.

[3] The Criminal Injuries Compensation Act 1995, "the 1995 Act", received the Royal Assent on 8 November 1995, on which date it came into force. Under section 1 of that Act, the Secretary of State was required to make arrangements for the payment of compensation to, or in respect of, persons who had sustained one or more criminal injuries. Section 1(2) provided:

> "(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 persons to whom awards may be made."

Section 3(1) of the 1995 Act provided:

"(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 specified circumstances;

(d) for compensation to be held subject to trusts, in such cases as may be determined in accordance with the Scheme;

(e) requiring claims under the Scheme to be made within such periods as may be specified by the Scheme; and

(f) imposing other time limits."

Section 11 of the 1995 Act contains detailed provisions relating to Parliamentary control of the making of the Criminal Injuries Compensation Scheme contemplated in the Act.

[4] In due course, the Secretary of State, in exercise of the powers conferred on him by sections 1 to 6 and 12 of the 1995 Act made the Criminal Injuries Compensation Scheme 1996, a draft thereof having been approved by both Houses of Parliament, "the 1996 Scheme". In terms of paragraph 83 of that Scheme, it came into force on 1 April 1996. All applications for compensation received by the Criminal Injuries Compensation Board on or after that date were to be passed to a new Criminal Injuries Compensation Authority, "the Authority", to be dealt with under the1996 Scheme. Paragraph 84 of the 1996 Scheme provided that applications

for compensation received by the Board before 1 April 1996 were to be dealt with according to the provisions of the 1990 Scheme and, where appropriate, the earlier Schemes. It should be recorded that, subsequently, the Secretary of State, in exercise of the powers already mentioned, made the Criminal Injuries Compensation Scheme 2001, "the 2001 Scheme", a draft of which had been approved by both Houses of Parliament. Under paragraph 83 of that Scheme, its provisions came into force on 1 April 2001. Applications for compensation received by the Authority on or after that date were to be dealt with under the terms of the 2001 Scheme, with certain qualifications which are not material in the present context. In terms of paragraph 84 of the 2001 Scheme, applications for compensation that had been received by the Authority or by the Board before 1 April 2001 were to continue to be dealt with according to either the provisions of the 1996 Scheme, or the provisions of the 1990 Scheme, as the case might be.

[5] It is appropriate to note certain provisions of the 1996 Scheme relating to eligibility to apply for compensation, which are important in the context of the present case. Paragraph 6 of that Scheme provides:

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

Paragraph 7 provides:

> "7. No compensation will be paid under this Scheme in the following circumstances: …
>
> (b) where the criminal injury was sustained before 1 October 1979 and the victim and the assailant were living together at the time as members of the same family."

Paragraph 8 of the 1996 Scheme defines "criminal injury" for the purposes of the Scheme as meaning "one or more personal injuries … directly attributable to: (a) a crime of violence …". Paragraph 9 of the 1996 Scheme provides that, for the purposes of that Scheme,

> " … personal injury includes physical injury …, mental injury (that is, a medically recognised psychiatric or psychological illness) and disease (that is, a medically recognised illness or condition). Mental injury or disease may either result directly from the physical injury or occur without any physical injury, but compensation will not be payable for mental injury alone unless the applicant:
>
> (a) …
>
> (c) was the non-consenting victim of a sexual offence …".

Paragraph 16 of the 1996 Scheme provides:

> "16. Where a case is not ruled out under paragraph 7(b) (injury sustained before 1 October 1979) 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, except where a claims officer 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, a claims officer 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. … ".

[6] The petitioner avers that she was born on 11 February 1964. Between Spring 1968 and August 1971 (that is between the ages of four and seven and a half years) she was sexually abused by her father. As a consequence of this abuse she sustained physical damage to her womb and is unable to have children. She also sustained damage to her mental health, as a consequence of which she has suffered from depression, has tried to commit suicide three times and has received psychiatric treatment since the age of 16. On or about 9 October 1998, the petitioner reported the matter to the police. In or about June 2001 her father pled guilty to and was convicted of indecently assaulting her. On or about 12 October 1999, the petitioner made an application for criminal injuries compensation to the Criminal Injuries Compensation Authority. Since that application was made after 1 April 1996, it required to be considered under the 1996 Scheme. In view of the terms of paragraph 7(b) of that Scheme, the petitioner was notified by a letter dated 8 November 1999 that no award of compensation would be made. The petitioner requested a review of that determination. In terms of a letter dated 27 August 2001, the Authority advised the petitioner that, as a consequence of the terms of paragraph 7(b) of the 1996 Scheme, no award of compensation could be made to her. On or about 1 November 2001, the petitioner appealed against said determination to the first-named respondent, the Criminal Injuries Compensation Appeal Panel. On or about 15 April 2002 the first-named respondent issued a decision letter of that date in which it dismissed the appeal. The reason given for that decision was the effect of the terms of the 1996 Scheme.

[7] In these proceedings, the petitioner seeks declarator and reduction of paragraph 7(b) of the 1996 Scheme, as being contrary to her rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms, referred to hereafter as "the Convention". She also seeks reduction of the decision of the first-named respondent, dated 15 April 2002, upon the same basis. The petition came before the Lord Ordinary at a first hearing on 6 January 2004. On 8 July 2004 he repelled pleas-in-law Nos.1, 2 and 3 for the petitioner, sustained pleas-in-law Nos.3, 4 and 5 for the respondents and refused the petition. Against that interlocutor the petitioner has now reclaimed to this court.

Submissions of junior counsel for the reclaimer

[8] Junior counsel commenced with an outline of the background to the case, including the history of criminal injury compensation. He drew our attention to the provisions of the 1995 Act and the 1996 Scheme under which the reclaimer's application had been made. Paragraph 7(b) of that Scheme was at the heart of the issue in this case. He then proceeded to explain how the 1996 Scheme was administered, making reference to opportunities for appeal. The first-named respondent was distinct from the Criminal Injuries Compensation Authority. Section 11 of the 1995 Act was important. It provided for a Scheme to be approved in draft by a resolution of each House of Parliament, before it was made by the Secretary of State. It was submitted that what was provided for in this section was a form of secondary legislation, which would have a bearing upon what order might be made by the court in these proceedings.

[9] Junior counsel next drew our attention to the rationale underlying the establishment of the 1964 Scheme, which was explained in a White Paper entitled

"Review of the Criminal Injuries Compensation Scheme: Report of an Interdepartmental Working Party, 1978". That lay in the concept of social solidarity, or the desire to express public sympathy for the victims of crime. The rationale was considered again in 1999 when the consultation paper, "Compensation for Victims of Violent Crime", was published. Reference was made to paragraphs 10, 11 and 21 of that document. The rationale defined in these documents was reflected in the European Convention on the Compensation of Victims of Violent Crime, subscribed at Strasbourg on 24 November 1983. This Convention set a minimum standard for the signatory states. The significance of the Convention on the issue in this case was that the Convention reinforced the rationale stated, which had a bearing on the terms of the Scheme under consideration. Counsel also referred to the Explanatory Report on the Convention. The United Kingdom was a signatory of the 1983 Convention.

[10] It was instructive to note the explanation for the exclusion expressed in paragraph 7 of the 1964 Scheme and also in paragraph 7(b) of the 1996 Scheme. It was to be found in Chapter 7 of the "Review of the Criminal Injuries Compensation Scheme: Report of an Interdepartmental Working Party 1978". Paragraph 7 had been included in the original 1964 Scheme principally for two reasons: "the difficulties of establishing the facts and the difficulty of ensuring that compensation does not benefit the offender". The Working Party considered these justifications, but concluded that the problems were not insurmountable. The Working Party recommended in principle that paragraph 7 of the 1964 Scheme should not be retained. The change it recommended in 1978 was to be for a limited period and experimental. It was submitted that the Report of the Working Party showed that it had been recognised that there was an injustice in the maintenance of the exclusion. Counsel said that he had been unable to find any explanation for the retention in paragraph 7(b) of the

1996 Scheme of the exclusion in relation to criminal activity which had occurred before 1 October 1979.

[11] Counsel then proceeded to outline four propositions to be advanced on behalf of the reclaimer. These were: (1) that the decision of the first-named respondent, dated 15 April 2002, was contrary to section 6 of the Human Rights Act 1998; the reclaimer was a victim of a violation of her rights under the Convention by reason of that decision; (2) the failure of the 1996 Scheme to include persons in the position of the reclaimer, fell within the ambit of Article 3, *et separatim*, Article 8, *et separatim* Article 1 of Protocol 1 of the Convention; (3) that in excluding persons in the position of the reclaimer from the 1996 Scheme, the reclaimer had been treated differently from comparators in analogous situations; and (4) that that difference in treatment did not have an objective and reasonable justification.

[12] Counsel went on to elaborate each of these propositions in turn. Dealing with the first proposition, and on being asked to formulate the unlawful act of which the reclaimer complained, counsel said that it was the failure, by the date of the first-named respondent's decision letter of 15 April 2002 to have paragraph 7(b) "removed" from the 1996 Scheme. The failure was not a failure of the first-named respondent, but of the Government of the United Kingdom and, in particular, of the Secretary of State for the Home Department, represented by the second-named respondent. However, a consequence of the situation was that the decision of the first-named respondent, dated 15 April 2002, was an unlawful act, even though that respondent had had no choice but to apply the terms of the 1996 Scheme. Counsel then focused attention upon the terms of section 6(2) of the 1998 Act. The 1996 Scheme was not itself "primary legislation", within the meaning of section 21(1) of the 1998 Act. Accordingly, section 6(2)(a) had no application to this situation.

Rather the 1996 Scheme was "subordinate legislation", within the meaning of the definition in section 21(1) of the 1998 Act. However, counsel submitted that the court was not dealing with what was referred to in section 6(2)(b) of the 1998 Act. It was not possible to interpret paragraph 7(b) of the 1996 Scheme in such a way as to allow that paragraph to be applied so as to avoid the violations of Convention rights about which the reclaimer complained.

[13] Those represented by the second-named respondent had acted unlawfully. By the time that the decision of 15 April 2002 was made, paragraph 7(b) of the 1996 Scheme, under reference to which the reclaimer's application required to be determined, should have been amended so as to avoid a conflict between the provisions of that Scheme and the reclaimer's rights under the Convention. In this connection it had to be noted that, in terms of section 6(6) of the 1998 Act "An act" included a failure to act.

[14] Counsel drew attention to paragraphs [137] and [138] of the Opinion of the Lord Ordinary, who had held that reduction of paragraph 7(b) of the 1996 Scheme was impossible, since, when created, that Scheme had not been open to attack. However, it was submitted that the compatibility of legislation with Convention rights fell to be determined when such an issue arose for determination, not as at the date when the legislation was enacted, or came into force. In that connection reliance was placed upon section 3(2)(a) of the 1998 Act, particularly the words "whenever enacted" employed there. However, in fact, the compatibility of legislation had to be assessed when an issue arose for determination. In this connection counsel relied on *Ghaidan* v *Godin-Mendoza* [2004] 2 A.C. 557 at para. 23, a case not put before the Lord Ordinary, *Wilson* v *First County Trust Limited (No.2)* [2004] 1 A.C. 816 and *Wessels-Bergervoet* v *The Netherlands* (2004) 38 E.H.R.R. 37.

[15] The Human Rights Act 1998 came into force on 2 October 2000. The reclaimer's application had been dated 11 October 1999. It had been refused on 11 November 1999. However, decisions on review had been made after 2 October 2000. In particular, paragraph 60 of the 1996 Scheme provided that an officer conducting a review would not be bound by earlier decisions on eligibility. It followed that the decision taken by the Authority on 27 August 2001 was a fresh decision on the merits of the matter to which the 1998 Act applied. The reclaimer was a victim for the purposes of section 7 of the 1998 Act. In this connection reliance was placed upon *R. (Hooper)* v *The Secretary of State for Work and Pensions* [2005] 1 W.L.R. 1681, paras. 52 to 59.

[16] Counsel then proceeded to elaborate his second proposition, to the effect that the failure of the 1996 Scheme to include persons, such as the reclaimer, fell within the ambit of Article 3, *et separatim* Article 8 of, *et separatim* Article 1 of Protocol 1 to the Convention. In order to found a claim for discrimination in terms of Article 14 of the Convention, there did not require to be a direct breach of a Convention right, so long as the subject-matter fell "within the ambit" of a guaranteed Convention right. If the subject-matter came within the scope of the purpose of any such right, it was "within the ambit" of the relevant article and thus sufficient to found a claim for Article 14 discrimination.

[17] For example, Article 8 of the Convention did not confer a right to a home. However, where a state decided that there was a right for homeless people to be housed that brought into play the provisions of Article 14 relating to discrimination; the provision of homeless accommodation was a method by which the state had chosen to support respect for family life and could be viewed as an aspect of it, thus falling within the ambit of Article 8. In this connection counsel relied upon *Schmidt*

and Dahlstrom v *Sweden* (1976) 1 E.H.R.R. 632, particularly at para. 39 at page 645; and *Van der Mussele* v *Belgium* (1983) 6 E.H.R.R. 163, particularly para. 43 at page 178.

[18] In order to found a complaint of discrimination, the subject-matter of the complaint had to be linked to a guaranteed right, so that it could be said to fall within the ambit of a Convention article. Now the 1995 Act and the Schemes made thereunder constituted a statutory basis on which those who qualified were given an entitlement to payment of a sum of money under any Scheme. So, the statutory basis of the Scheme provided those qualifying with a pecuniary right falling within the scope of Article 1 of Protocol 1. Domestic law had created this right to a financial payment and it was discriminatory not to allow the reclaimer such payment. This was a subject-matter to which the protection of Article 1 of Protocol 1 was afforded. Counsel submitted that there was no distinction to be drawn between this type of payment and a social security benefit, under reference to *R. (Hooper)* v *The Secretary of State for Work and Pensions*, particularly para. 88.

[19] It was the contention of the reclaimer that she had been the victim of discrimination, contrary to Article 14, on the basis of "other status". The status was that of being a member of the same household as the offender at a particular point before 1 October 1979. Had she not held that status, she would not have been disqualified. The leading decision in this area was *Willis* v *The United Kingdom* [2002] 35 E.H.R.R. 547. The statutory entitlement to receive criminal injuries compensation was based on an applicant fulfilling the statutory criteria for that payment. The basis upon which payment might be withheld or reduced for persons who satisfied the qualifying criteria was also prescribed by the rules of the Scheme. Having regard to the underlying purpose of the Scheme, the existence of statutory

rules prescribing entitlement to payment, the payment made under such a Scheme was analogous to non-contributory social welfare benefits, which had been held to be a "possession" for the purposes of Article 1 of Protocol 1. So an application for compensation under the 1996 Scheme was within the subject-matter of that article. In this connection reliance was placed on *Gaygusuz* v *Austria* (1996) 23 E.H.R.R. 364, particularly paras. 36 to 41 at page 380. That case dealt with a contributory Scheme but there was no basis for distinguishing between a contributory and a non-contributory Scheme, as appeared from *Stec* v *The United Kingdom* (2005) 41 E.H.R.R. S.E. 18 295, particularly paras. 48 to 54.

[20] Counsel then turned to consider the relevance of Article 3 of the Convention to his submissions. Article 1 of the Convention, taken along with Article 3, required States to take measures designed to ensure that individuals within their jurisdictions were not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals. Children and other vulnerable individuals were entitled to State protection against such serious breaches of personal integrity. Where there had been a breach of Article 2 or 3, in order to provide an adequate remedy, compensation for non-pecuniary damage flowing from the breach ought in principle to be available as part of a range of redresses. This fell within the subject-matter of Article 3, because the United Kingdom had chosen to provide criminal injury compensation. In this connection reliance was placed on *Z and Others* v *The United Kingdom* (2002) 34 E.H.R.R. 3, particularly para. 109. Payment of criminal injury compensation was a remedy in relation to Article 3 of the Convention.

[21] Counsel went on to consider the protection afforded by Article 8 of the Convention. The protection extended to the moral and physical integrity of the

person. The scope of the Article was not limited to preventing interference by public authorities, but might create positive obligations requiring the adoption of measures designed to secure respect for private life, even in the sphere of relations between individuals. In this connection he relied on *X and Y* v *The Netherlands* (1985) 8 E.H.R.R. 235, particularly paras. 22 and 23; *Stubbings and Others* v *The United Kingdom* (1997) 23 E.H.R.R. 213, particularly paras. 59 to 64, a case specifically concerned with childhood sexual abuse; and *DP and JC* v *The United Kingdom* (2003) 36 E.H.R.R. 14, particularly paras. 136 to 138. A civil law remedy of damages was one way of securing respect for family life; however, as appeared from the cases just cited, Article 8 did not necessarily require that States should fulfil their positive obligation to secure respect for private life by the provision of unlimited civil remedies in circumstances where criminal law sanctions were in operation. It was evident from paragraphs 48(c) and 49 of the 1996 Scheme that an award of criminal injuries compensation would be reduced to take account of the full value of any payment received as an award of damages in respect of the same injury, or that the criminal injury compensation should be repaid in full up to the amount of the other payment. Accordingly, the provision of criminal injuries compensation for crimes of violence was complementary to the remedy of damages against the perpetrator of intentionally inflicted harm. Thus what was involved here was within "the ambit" of Article 8.

[22] It was necessary to consider *August* v *The United Kingdom* (2003) 36 E.H.R.R. C.D. 115. While this case appeared to be contrary to the reclaimer's submissions, counsel's position was that it had been wrongly decided. The view of the court expressed in paragraph 3 was based on the erroneous understanding that the criminal injuries compensation scheme under consideration was an *ex gratia* one.

What was said there could have no applicability to a statutory scheme. In any event, the decision was as to admissibility only. The court had been under a factual misapprehension since, in fact, it had been dealing with a claim brought under the 1996 Scheme. It had thought that Article 14 could not operate where legal rights had not been created, although in fact they had. It was also necessary to consider *Stuart* v *The United Kingdom (Application No.41903/98)*, a case also involving sexual abuse of a child where criminal injury compensation had been refused on the basis of paragraph 7(b) of the 1996 Scheme. Once again, this was a decision on admissibility. Furthermore, the court did not refer to the 1995 Act or to the fact that the 1996 Scheme was statutory, not *ex gratia*. The court had failed to address the issue of whether Article 14 might be engaged by a statutory Scheme. It was submitted that this decision was flawed and should not be followed.

[23] Counsel next turned to support his third proposition. He submitted that for discrimination to be recognised there had to be a difference in the treatment of victims in analogous circumstances. Here the comparison was to be made between the reclaimer's position and a victim in respect of an incident occurring after 1 October 1979 and a victim before that date, who did not live in the same household as the assailant, in relation to an incident occurring between 1964 and 1 October 1979. The "status" founded upon was that of being a person who was living together with the assailant "as members of the same family", to quote the words of paragraph 7(b) of the 1996 Scheme. It was that status which was the sole basis for the difference in treatment. Paragraph 16 of the 1996 Scheme did not require to be considered; it was concerned with persons who were admitted to benefit. A difference in treatment was not *per se* discriminatory, but might be.

[24] Counsel then proceeded to elaborate his fourth proposition, to the effect that the difference in treatment identified here had no objective and reasonable justification. The proper approach to the application of Article 14 of the Convention was to be seen from *R. (Baiai)* v *The Secretary of State for the Home Department* [2006] E.W.H.C. 823 (Admin), particularly paras.116-120. There the court had repeated the test formulated by Brooke L.J. in *Wandsworth London Borough Council* v *Michalak* [2003] 1 W.L.R. 613, at page 625. Thereafter it had dealt with the extent to which that test had been reconsidered by the House of Lords in *R. (Carson)* v *Secretary of State for Work and Pensions* [2005] 2 W.L.R. 1369. However, the court in *R. (Baiai)* v *The Secretary of State for the Home Department* had concluded that Article 14 did not apply unless the alleged discrimination was in connection with a Convention right and on a ground stated in the Article. If those prerequisites were satisfied, the essential question for the court was whether the alleged discrimination, that is the difference in treatment of which complaint was made, could withstand scrutiny.

[25] It was for the party seeking to uphold a difference in treatment to justify it, as appeared from *Gaygusuz* v *Austria*, at para. 50 in the Opinion of the Commission and in the Opinion of the Court. What had to be shown was an objective and reasonable justification. Such a justification had to be convincing, although there was a margin of appreciation. In this connection counsel relied on *Chassagnou* v *France* (1999) 29 E.H.R.R. 615, particularly paras. 91 to 93. Where a measure was intended to provide social solidarity, a decision not to extend the same treatment to those in analogous situations required specific justification, as appeared from *Larkos* v *Cyprus* (2000) 30 E.H.R.R. 597, particularly at para. 31. The convincing explanation had to show how the difference in the treatment could be justified. The correct approach to the matter

of justification was explained in *Francis* v *The Secretary of State for Work and Pensions* [2006] 1 All E.R. 748, particularly in paras. 17 to 31. What had to be found was a rational justification for the difference in treatment. Before the Lord Ordinary two justifications had been relied upon, as appeared from paragraphs 9 to 18 of his Opinion, that is to say, first, the problem of proof of violence in a family context, and, second, the need to avoid collusion in a family and a risk of benefit being conferred by an award of compensation on the offender. However, difficulties of investigation were encountered in all claims having a family context arising at whatsoever time. That could not be seen as a justification. Furthermore, these alleged justifications had not been insisted on in relation to abuse occurring after 1 October 1979. The justifications advanced on behalf of the respondents were described in Answer 9 to the petition at pages 18B-19B of the reclaiming print. The first of these was that to have made the change that occurred as from 1 October 1979 retrospective would have been unfair to those victims of family violence living in family with their assailants who had applied for compensation before that date and been refused or had decided not to apply for compensation on the basis of the Scheme then in operation. However, it was not truly a justification that others than the reclaimer had been prejudiced by the decision made at that time. In that connection counsel relied on *Woods* v *The Secretary of State for Scotland* 1991 S.L.T. 197, particularly at page 199. Further, *National & Provincial Building Society* v *The United Kingdom* (1997) 25 E.H.R.R. 127, at para. 89, showed that where certain individuals challenge a decision, at their own risk and expense, and others do not, the court will not regard the former as being in an analogous position to the latter.

[26] The second justification advanced in the respondents' pleadings was the financial implications of the decision to exclude. However, the fact that a financial

implication was involved was not enough to amount to a justification for discriminatory action. Given that there existed a limited amount of money available for the purposes of criminal injuries compensation, the options were whether that limited sum should be distributed in a discriminatory manner or a non-discriminatory manner. It would have been feasible to have adopted a non-discriminatory distribution. In this connection counsel relied on *R.* v *Secretary of State for Education ex parte Schaffter* [1987] I.R.L.R. 53, particularly at para. 28. Counsel also relied on *Poirrez* v *France* (2005) 40 E.H.R.R. 2, particularly paras.43 and 49.

Submissions of junior counsel for the respondents

[27] Counsel advanced four propositions, which were to be elaborated in due course. These were: (1) the Human Rights Act 1998 did not apply to the reclaimer's application for criminal injuries compensation because it had been made before the commencement of the Act; (2) if the 1998 Act did apply, the application for criminal injuries compensation did not fall with the ambit of Articles 3 or 8 of the Convention, or Article 1 of Protocol 1 to it; (3) if any of these Articles were engaged, the differences of treatment did not fall within any of the categories of discrimination prohibited by Article 14 of the Convention, because those differences were not related to status, or to any personal characteristic; (4) if proposition (3) were wrong, there was no unlawful discrimination involved, because there was a rational justification for the differences of treatment.

[28] Before coming to make his detailed submissions, counsel pointed out that paragraph 7(b) of the 1996 Scheme had been held lawful by the European Court of Human Rights in *Stuart* v *The United Kingdom*. The same paragraph had also been supported in *R.* v *Criminal Injuries Compensation Board and Another, ex parte P*

[1995] 1 W.L.R. 845. In this connection counsel relied on the observations of Peter Gibson L.J. at pages 863H to 864C. Accordingly, paragraph 7(b) had been seen as lawful and rational; there was therefore no historical miscarriage of justice. So the observations of Lord Morton in *Woods* v *Secretary of State for Scotland* 1991 S.L.T. 197 had no application here.

[29] Counsel then turned to elaborate his first main proposition. He drew attention to the fact that the reclaimer's application was dated 12 October 1999, and was accordingly made under the 1996 Scheme. The matter of the commencement of the provisions of the 1998 Act was regulated under section 22(3) of the Act. So far as section 6 of the 1998 Act was concerned, relied upon by the reclaimer, it came into force on 2 October 2000 in accordance with Statutory Instrument 2000 No.1851. It was contended that the date of the application determined which Scheme applied and the Scheme determined the rights and obligations which vested in the parties. It was submitted that section 6 of the 1998 Act did not apply to decisions subsequent to its commencement because, first, there was a presumption that legislation did not affect vested rights; and, second, there was a presumption against legislation affecting pending proceedings. There was nothing in the 1998 Act to rebut these presumptions, which were rebuttable. What would have been required for that purpose would have been an express statutory provision, or a strong implication. In this connection, counsel relied on *Wilson* v *First County Trust Limited (No.2)* [2004] 1 A.C. 816. Here the vested right was a right to have the application considered and determined under the relevant Scheme. It was submitted that this presumption governed the situation despite the making of a decision by the first-named respondent after 2 October 2000, when section 6 of the 1998 Act had come into force. Counsel relied particularly on the observations of Lord Rodger of Earlsferry in paragraphs 186

to 188 and 193 to 197. Turning to deal with the presumption in relation to pending proceedings, counsel relied upon the same case and, in particular, the observations of Lord Rodger of Earlsferry at paragraph 198. He submitted that the proceedings here had been pending when section 6 of the 1998 came into force; there was nothing in that Act that rebutted the presumption relied upon. Counsel also drew our attention to the observations of Lord Nicholls of Birkenhead in paragraphs 16 to 22 and those of Lord Hope of Craighead at paragraph 98. Counsel also relied on the remarks of Lord Scott of Foscote in paragraphs 153 and 158.

[30] Further support for the respondents' position was to be found in *In Re McKerr* [2004] 1 W.L.R. 807, which had been concerned with the possible application of section 6(1) of the 1998 Act and Article 2 of the Convention to a death which had occurred in November 1982. The House of Lords had held that the 1998 Act was not generally retrospective and that since there had been no breach of an obligation before 2 October 2000, when the Act came into force, there could be no continuing breach thereafter. Counsel relied particularly on the observations of Lord Nicholls of Birkenhead in paragraphs 15 to 22. Reliance was also placed on *R. (ex parte Wright)* v *The Secretary of State for the Home Department* [2006] E.W.C.A. Civ 67 and particularly on the observations of Ward L.J. in paragraphs 12 and 19 and 35 and 36; also the observations of Arden L.J. at paragraph 51. Counsel emphasised that the submissions he had made under his first proposition governed the whole case. If they were sound, then the reclaiming motion failed, since it was wholly based upon the application of section 6 of the 1998 Act to the circumstances of the case. The remaining submissions that he was to make were secondary.

[31] Counsel went on to elaborate his second main proposition, to the effect that, on the assumption that the 1998 Act did have application, the reclaimer's application

for criminal injuries compensation did not fall within the ambit of Articles 3, or 8 of the Convention or Article 1 of Protocol 1 to it. It was recognised that the concept of "ambit" was difficult. It had been discussed in *M.* v *The Secretary of State for Work and Pensions* [2006] 2 W.L.R. 637. In particular, the observations of Lord Nicholls of Birkenhead at paragraphs 13 to 17 and of Lord Walker of Guestingthorpe at paragraphs 57 to 60 and 83 were helpful. It was necessary to look at the individual circumstances of each case and such decisions of the European Court of Human Rights as might be in point.

[32] Coming to the particular circumstances of the present case, it was submitted that compensation for criminal injuries did not fall within the ambit of either Articles 3 or 8 of the Convention. Counsel relied upon the decision in the case of *Stuart* v *The United Kingdom*. While it was accepted that that was a decision on admissibility only, it was nevertheless a decision of the court, which thought that the application was manifestly unfounded. It had to be stressed that, in this decision, there could be no suggestion that the case was contaminated by the misunderstanding which arose in the case of *August* v *The United Kingdom* (Application No. 36505/02) four years later. In *Stuart* v *The United Kingdom* the issue of whether the Scheme was *ex gratia* or statutory played no part in the reasoning of the court.

[33] Reverting to *M.* v *The Secretary of State for Work and Pensions*, counsel drew attention to the observations of Lord Bingham of Cornhill in paragraphs 3 to 5, concerned with the ambit of Article 8 of the Convention; also those of Lord Walker of Guestingthorpe in paragraphs 82 to 88 and of Lord Mance in paragraph 157.

[34] Counsel submitted that the authorities referred to in paragraphs 22 and 23 of the reclaimer's outline argument were not in point. They involved State responsibility for abuse or for preventing its continuance. The cases of *Z and Others* v *The United*

Kingdom, *DP and JC* v *The United Kingdom* and *E* v *The United Kingdom* were of that nature. Because of the material difference between the facts of those cases and those of the present case, the decisions were of no assistance.

[35] Counsel next turned to consider the issue of the ambit of Article 1 of Protocol 1. His submission was that the reclaimer's application did not fall within that, because she had no right to criminal injuries compensation, on account of the effect of paragraph 7(b) of the 1996 Scheme, under which her claim had to be considered. That meant that she had no "possession" to which Article 1 of Protocol 1 could relate. In support of this submission counsel relied on *Van der Mussele* v *Belgium*, which decided that Article 1 of Protocol 1 applied to existing possessions, as appeared from paragraph 48 of the judgment. Here, quite simply, there were no relevant possessions. While it was recognised that a right to bring a claim could be a possession, a right to bring a claim which was bound to fail, as was the reclaimer's claim here, was not a possession. In that connection counsel relied on *Roche* v *The United Kingdom* (2006) 42 E.H.R.R. 30, particularly paragraphs 127 to 131. The approach of the European Court of Human Rights in relation to Article 1 of Protocol 1 was simple; if there was no possession, then the matter concerned did not fall within the ambit of that article.

[36] The reclaimer had relied upon *Stec* v *The United Kingdom*. However it was necessary to notice what the case had decided. It was that, if a contracting State had in force legislation providing for the payment as of right of a welfare benefit, whether conditional or not on the prior payment of contributions, that legislation had to be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol 1 for persons satisfying its requirements, as appeared from paragraphs 48 to 55 of the decision of the Grand Chamber on admissibility. However, that decision

had no application outside the field of social security entitlements. *Matthews* v *The Ministry of Defence* [2003] 1 A.C. 1163 recognised that an arguable case was a civil right, but where there was a bar to that case, there was no civil right. *Gustafson* v *Sweden* (1997) 25 E.H.R.R. 623 simply confirmed that an arguable case was a civil right.

[37] Counsel then proceeded to elaborate his third proposition, that, in any event, any difference in treatment involved in the present case did not fall within any recognised category of discrimination under Article 14 of the Convention, since it did not relate to status or any other personal characteristic. The scope and operation of Article 14 of the Convention had been elucidated in *R. (Carson)* v *The Secretary of State for Work and Pensions* [2006] 1 A.C. 173 in paragraph 10 of the judgment of Lord Hoffmann and in paragraphs 53 and 54 of that of Lord Walker of Guestingthorpe.

[38] In the present case there was no question of discrimination or difference of treatment because of a personal characteristic; the difference in treatment was the consequence of a time requirement, as regards the date when the relevant offence had occurred. The difference in treatment was related to whether certain criminal activity had occurred before 1 October 1979, or after that date. The reclaimer was not seeking to be treated like a "non same roof" victim; only like a "same roof victim" when the injury was sustained after 1 October 1979. The only relevant comparator was another "same roof victim" of a later offence. Upon that view of the matter, there was no discrimination of the kind struck at by Article 14. No status or personal characteristic was involved. For that reason also, the reclaiming motion should be refused.

[39] Counsel then turned to elaborate his fourth proposition, to the effect that, if the difference in treatment of the reclaimer did fall within the terms of Article 14, that did

not amount to unlawful discrimination because there was a rational justification for the difference in treatment. The justification relied upon by the respondents was stated in Answer 9 of the reclaiming print. In this connection, it was appropriate for the court to look at all possible comparators, in particular, (1) "same roof victims", where the offence occurred after 1 October 1979, and (2) "non same roof victims", where the offence occurred before 1 October 1979. Counsel went on to refer to the Review of the Criminal Injuries Compensation Scheme: Report of an Interdepartmental Working Party, 1978 and the consultation paper, Compensation for Victims of Violent Crime, 1999. It was also relevant to take into account the contents of the Ministerial Statement of 23 July 1979, No.72 of process. The change made in 1979 had been prospective only. By 1996 the status quo had been retained because of that circumstance. The rationality of the post-1979 Scheme had been the subject of decision in *R.* v *Criminal Injuries Compensation Board and Another, ex parte P*. The Court of Appeal decided that the decision in 1979 to introduce a revised Scheme with prospective effect for the victims of offenders in the same household could not be called irrational. Reference was made in particular to the observations of Peter Gibson L.J. at pages 863 to 864. The approach which the court should take to a Ministerial Statement concerning policy was described in *Wilson* v *First County Trust Limited (No.2)* at para. 51 by Lord Nicholls of Birkenhead. Looking at that and at the Ministerial Statement of 23 July 1979, it was submitted that the justification for the change made was self-evident. The 1996 Scheme had simply preserved the prospective change effected in 1979. That was a normal and rational approach.

[40] Reverting to *R. (Carson)* v *Secretary of State for Work and Pensions*, in paras.14 to 17 Lord Hoffmann considered the nature of discrimination. Much depended on the nature of the difference in treatment. There were essentially two

categories of grounds of discrimination, first, what might be called the "suspect categories", such as race, gender and membership of a political party, and, second, discrimination based on the general public interest, including social policy. The present case did not fall within the first category of suspect grounds for discrimination. The justification for paragraph 7(b) of the 1996 Scheme had been general social policy. Differences of treatment of that kind were very much a matter for Government. Reliance was placed on the observations of Lord Walker of Guestingthorpe in paragraphs 53 to 58 of his judgment. The complaint here was that the change in 1979 had been prospective, but there was nothing wrong with that, as appeared from a number of authorities, including *Regina (Hooper)* v *Secretary of State for Work and Pensions*, which had involved the removal of certain restrictions for the future, as appeared from paragraph 32 in the judgment of Lord Hoffman. It was considered that the matter had been one for Parliament. Reliance was also placed on *Stec* v *The United Kingdom*, in particular on paragraphs 64 to 66. There was a wide margin of appreciation.

[41] Finally, counsel considered the issue of remedies. If the reclaimer were correct in her contentions, the court could grant a declarator as sought in Statement III(i) of the petition; reduction in terms of Statement III(iii) could also be granted, which would have the result that the case would be returned to the first-named respondent. The Secretary of State would thus have notice that there was a defect in the 1996 Scheme. However, it was submitted that it would be inappropriate to reduce paragraph 7(b) of the Scheme and the associated words in paragraph 16 of the Scheme, since these parts could not be excised without wider consequences for other parts of the Scheme, for example paragraph 7(a). Difficulties would be created by granting reduction as sought. The supposed injustice could not be cured by merely

reducing those parts of the Scheme mentioned. There would have to be a reconsideration of the whole Scheme. Section 8(1) of the 1998 Act gave the court a very wide discretion as regards the granting of a remedy. Counsel also referred to section 6(6)(a) of that Act and section 11 of the 1995 Act.

Submissions by senior counsel for the reclaimer

[42] Senior counsel adopted the submissions made by his junior. He said that he would deal with the four propositions advanced on behalf of the respondents. He began by referring to *Regina* v *Criminal Injuries Compensation Board and Another ex parte P*. In that case the Court of Appeal acknowledged that, in relation to the 1979 Scheme established by exercise of the Royal prerogative, judicial review would be available to ensure fair distribution. The Home Secretary's decision to continue the pre-1979 exclusion of claims under the "same roof" rule was not, in the circumstances, irrational. However, certain observations by members of the court diminished the force of that decision. In particular, Neill L.J. considered that the prerogative origin of a Scheme made the task of review more difficult. However, the present proceedings did not involve a challenge on the basis of irrationality. Senior counsel next relied upon *Marcks* v *Belgium* (1979) 2 E.H.R.R. 330, which highlighted the importance of the Convention, as appeared from paragraph 41 of the judgment.

[43] Turning to the respondents' first proposition, senior counsel drew attention to the terms of the 1995 Act, in particular, section 11, which dealt with parliamentary control. It had to be appreciated that the 1996 Scheme had been made by the Secretary of State, not by Parliament. The draft of the Scheme had had to have been approved by Parliament in advance of the making of a Scheme. In his submission, the action described in section 11(6) did not amount to a "proposal for legislation" within

the meaning of section 6(6)(a) of the 1998 Act. In terms of the 1995 Act, the legislation was of a secondary nature, effected by the Secretary of State. What might be called a "disapproved Scheme" would nevertheless be valid. If there were no negative resolution, the legislation would be, in law, delegated legislation.

[44] It had been argued on behalf of the respondents that the 1998 Act was not in force when the petitioner's rights under the Scheme had vested in her. Senior counsel contended that the judicial decisions complained of had been made after the commencement of the 1998 Act. That Act applied to acts and omissions without qualification and authority and logic supported the view that the rights of the reclaimer to compensation had vested at the date she made her first application. Senior counsel then referred to *Wilson* v *First County Trust Limited (No. 2).* He endeavoured to explain why the respondents' reliance upon what was said in that case concerning the effect of the 1998 Act was flawed. The reclaimer's case under paragraph 7(b) of the 1996 Scheme depended on the application of certain Convention provisions implemented by the 1998 Act. So the rights came into being on the creation of those rights by the commencement of that Act. The case of *C* v *The Secretary of State for the Home Department* [2003] E.W.H.C. 1295, relied upon by the respondents, did not vouch the proposition set forth in paragraph 26 of their outline argument. The respondents had also relied upon *In re McKerr*. However, senior counsel submitted that the circumstances of that case did not vouch the proposition that a right had vested in the reclaimer when her claim was first made. Likewise, *Regina (ex parte Wright)* v *The Secretary of State for the Home Department* was of no assistance to the court.

[45] Senior counsel then went on to consider the respondents' second proposition, to the effect that the reclaimer's application for criminal injuries compensation did not

fall within the ambit of Articles 3 or 8 of the Convention and Article 1 of Protocol 1 to it. In that connection reliance had been placed by the respondents on *M* v *The Secretary of State for Work and Pensions*. Senior counsel claimed that that case could be distinguished on its facts. There had been but a tenuous link with the private and family life of the claimant. In the present case, the provisions of paragraph 7(b) of the 1996 Scheme had a serious impact upon the reclaimer's private life. The abuse endured had had the effect of destroying respect for her private life, yet the State had deprived her of compensation. Senior counsel said that he was able to accept much of what was said in paragraph 35 of the respondents' revised written submissions. The scope of Article 8 of the Convention, however, could embrace what was discussed in Article 14. The Criminal Injuries Compensation Scheme was promoting the private life of individuals. However, the way in which that had been done was discriminatory in terms of Article 14 upon the basis of the words "or other status", in the latter Article.

[46] Senior counsel then went on to consider the impact of Article 1 of Protocol 1 to the Convention, conferring an entitlement to "the peaceful enjoyment of his possessions". He was able to agree with the contents of paragraph 51 of the respondents' revised written submissions; however, he submitted that paragraph 53 was wrong. The Article under consideration applied to criminal injury compensation payments. In this connection it was necessary to note *Stec* v *The United Kingdom*, particularly what was said in paragraph 48. Criminal injuries compensation was a civil right. What was said in paragraphs 55.1 and 55.3 of the respondents' revised written submissions was true, but of no significance. Senior counsel went on to rely on *Roche* v *The United Kingdom*. However, the present case bore more similarity to the circumstances of *Stec* v *The United Kingdom* than those of *Roche* v *The United*

Kingdom. Senior counsel then proceeded to consider in detail the circumstances of the latter case. It could not be right to say, as had been contended by junior counsel for the respondents, that because a person did not have an entitlement therefore discrimination could not be examined. In so far as there was a distinction between the two cases mentioned, the approach in *Stec* v *The United Kingdom* was to be preferred. Senior counsel then referred to *Beshiri and Others* v *Albania* (Application No. 7352/03). However, that case had little to do with the present one. It, along with *Polacek* v *The Czech Republic* (Application No. 38645/97) was concerned with the expropriation of property, not benefits. No wider principles arose from those two authorities that were of relevance to this case.

[47] In paragraphs 58.1 to 58.5 of the revised written submissions for the respondents, they had developed an argument based on the terms of Protocol 12 to the Convention, although that Protocol had not been ratified by the United Kingdom. It had been contended that, if the reclaimer's submissions were correct, this Protocol would have been otiose. He submitted that this applied not just to those circumstances that fell within the ambit of Convention rights but to any right set forth in law. The inference sought to be made upon the basis of that Protocol was unwarranted.

[48] Senior counsel turned next to consider the third proposition of the respondents, to the effect that, if one or more of the Articles of the Convention relied on were engaged, the differences of treatment involved here did not fall within any of the categories of discrimination prohibited by Article 14, because they did not relate to status or any personal characteristic. Paragraph 16 of the 1996 Scheme had been relied upon by the respondents. That was erroneous. No criticism of that paragraph had been made. It contained proper safeguards. The paragraph itself was not

discriminatory. Looking at the question of "status" in Article 14 of the Convention, it was necessary to look for personal characteristics. A person who had been the victim of crime had an immutable personal characteristic. The status involved here, upon the basis of which there had been discrimination was membership of the same household as the reclaimer's abusing father. In this connection senior counsel relied on *Francis* v *The Secretary of State for Work and Pensions*, which applied the test in *Kjeldsen* v *Denmark* (1976) 1 E.H.R.R. 711.

[49] Senior counsel next elaborated his position in relation to the respondents' fourth proposition, to the effect that, any difference in treatment did not amount to unlawful discrimination, since there was a rational justification for it. That alleged justification was explained in paragraph 73 of the respondents' revised written submissions. While sub-paragraphs (a) and (b) might be correct, that did not justify maintenance of the discrimination. In that connection reliance was placed upon paragraph 9 of the Eighth Report of the Criminal Injuries Compensation Board, which had been produced. In this connection senior counsel also made reference to *Marcks* v *Belgium* at paragraph 58.

[50] Finally, senior counsel turned to the matter of remedy. The remedies sought were set forth in Statement III of the petition. Declarator in terms of paragraph (i) was sought. Reduction of paragraph 7(b) and certain other parts of paragraph 16 of the 1996 Scheme was sought in paragraph (ii). Reduction of the decision set out in the letter dated 15 April 2002 was sought in paragraph (iii). The remedies sought were not challenged, except that of reduction of the specified parts of the Scheme. If the court were persuaded that the respondents' objection to that reduction was sound, the reclaimer's motion was that the case should be sisted to enable the Secretary of State to consider his position. However, the reclaimer's primary motion was that the

court should grant all the remedies craved. Paragraph 7(b) of the 1996 Scheme was severable from the rest of it. There was no suggestion of unacceptable adverse consequences of the reduction proposed. As regards the funds available for the purposes of criminal injuries compensation, it was understood that there was not a fixed sum available.

[51] In the same connection senior counsel made certain further points. First, the objectionable exclusion applied to persons at the heart of the 1996 Scheme, that is to say, victims of violent crime who were specifically excluded. Second, the reasons given for the exclusion were in relation to evidential problems and that the wrongdoer might benefit from an award. These were practical reasons; they did not bear upon the worthiness of the victim for an award of compensation. Third, the removal of the restriction would not give rise to adverse practical consequences. Thus there was no coherent justification for the retention of the exclusion.

Submissions of senior counsel for the respondents

[52] Senior counsel adopted the submission made by junior counsel. He also adhered to the revised outline argument. He intended to deal with six principal points: (1) the domestic application of the Convention; (2) the case of *Regina (Bono and Another)* v *Harlow District Council* [2002] 1 W.L.R. 2475 and, in particular, the question whether there existed a matter to which section 6 of the 1998 Act could apply; (3) the issue of retrospectivity; (4) the ambit of Articles 3 and 8 of the Convention and Article 1 of Protocol 1 to it, for the purposes of Article 14; the submission would be that Article 14 was not engaged; (5) assuming that Article 14 were engaged, the question of whether there was unlawful discrimination on the ground specified; and (6) general justification.

[53] Turning to the first of the foregoing points, senior counsel observed that, in relation to the domestic application of the Convention, it had to be borne in mind that what was involved was the fusing of two systems of law: first, the application of the Convention in a domestic context by virtue of the 1998 Act, the provisions of which had force only so far as provided for by that Act; and, second, the case law of the European Court of Human Rights which did not involve the doctrine of *stare decisis*. That case law involved the making of value judgments on circumstances before the court at a particular time and also featured decisions which, from time to time, were inconsistent, as between themselves. Having regard to the provisions of section 2 of the 1998 Act, it was necessary to search for trends in European decision-making. In this connection reference was made to *Stec* v *The United Kingdom* and *Roche* v *The United Kingdom*. The general approach to European case law was discussed by Lord Walker of Guestingthorpe in *M* v *The Secretary of State for Work and Pensions*. The surest guide to the European law was what the court in Strasbourg actually did. That was why the application in *Stuart* v *The United Kingdom* was important. That involved a challenge to paragraph 7(b) of the 1996 Scheme, which the court had held to be inadmissible. The observations of Lord Hoffman in *In re McKerr* were important in affirming that there were two bodies of law, international and domestic. The provisions of the Convention itself had no direct application in domestic law. Effect had been given to them in certain respects by virtue of the 1998 Act, but the source of the rights and obligations concerned was that Act. Reference was made to paragraphs 60 to 63 of Lord Hoffman's judgment. For these reasons, the date of 1 October 2000 was of importance, being the date on which the 1998 Act came into force.

[54] Moving on to the second topic with which he intended to deal, senior counsel considered *Regina (Bono and Another)* v *Harlow District Council*, where it was held that section 6(2)(b) of the 1998 Act afforded a defence only where the primary legislation could not be read or given effect to in a way which was compatible with Convention rights; where the primary legislation could be interpreted compatibly with the Convention, incompatible subordinate legislation made under it could not provide a lawful justification for acts incompatible with Convention rights. There was an error in paragraph 108 of the decision in *Ghaidan* v *Godin-Mendoza*. Senior counsel agreed that it would be competent for paragraph 7(b) of the 1996 Scheme to be quashed, if it were incompatible with the reclaimer's Convention rights. Before an issue of unlawfulness could arise under section 6(1) of the 1998 Act, there had to be an "act" of a public authority. Senior counsel conceded that here there was such an act. He did not rely to any extent on a defence under section 6(2) of the 1998 Act for the reasons given in *Regina (Bono and Another)* v *Harlow District Council*. It was not now intended to rely on the terms of section 6(2)(a) of the 1998 Act. Furthermore, it was not now contended that there was involved in the procedure for making a Scheme under the 1995 Act a "proposal for legislation" within the meaning of section 6(6)(a) of the 1998 Act. It was accepted that the Secretary of State, who made a Scheme, could be regarded as a person whose "act" fell within the scope of section 6(1) of the 1998 Act. Thus, it would be competent for the court to reduce the Scheme or part of it. Ordinary rules would determine whether it was competent to grant partial reduction. That would be so only if the objectionable part was severable. There were questions in this case as to whether paragraphs 7(b) and 16 of the 1996 Scheme were severable, since extending eligibility to some individuals might mean withholding of it to others. There was a finite sum of money voted by Parliament

available for criminal injuries compensation. That raised questions of appropriateness under section 8(1) of the 1998 Act. If a declarator were pronounced, the Secretary of State and Parliament would require to act. The reclaimer would then be at the mercy of Parliament. The 1996 Scheme would require to be amended before any benefit could be conferred upon the reclaimer, or there had to be reduction of paragraph 7(b). There could be, if appropriate, a declarator pronounced and there could be reduction of the decision affecting the reclaimer, but beyond that the court should not go.

[55] Senior counsel next turned to deal with the issue of retrospectivity. It had to be accepted that the 1998 Act was not, in general, retrospective in effect. It came into effect on 2 October 2000. However, the meaning of retrospectivity was complex, as appeared from the analysis in *Wilson* v *First County Trust Limited (No. 2)*. There were three ways in which to analyse the matter: (1) by reference to vested rights; (2) by reference to pending actions; and (3) by reference to an accrued cause of action. The second approach was the easiest to apply in the present case. There was one application made by the reclaimer in 1999. There was a refusal of that application in the first instance before 2 October 2000. At that date an appeal was pending. Looking at the third possible approach to analysis, that of the accrued cause of action, on one view, in the present case, the cause of action had accrued when the injuries were inflicted; on any view, it had accrued by the date of the application in 1999. On these approaches, under reference to what was said in *Wilson* v *First County Trust Limited (No. 2)*, the 1998 Act had no application to the reclaimer's position. Since that position was based exclusively upon rights created by the 1998 Act, derived from the Convention, it followed that the reclaimer's case must fail.

[56] Turning to the analysis of retrospectivity by reference to vested rights, there was, perhaps, greater difficulty. The difficulty was, in the submission of the

respondents, that, since the reclaimer was never eligible for compensation, there was therefore no vested right. However, viewing the matter in another way, the reclaimer did have a right to have her claim determined in accordance with the Scheme applicable to it. The application was, of course, made before 2 October 2000. Such applications could be categorised in three ways, first, those in which the applicants were ineligible in terms of the Scheme; second, those where the applicants were eligible and qualified for compensation; and, third, those in which the applicants were eligible but whose awards were withheld in terms of paragraph 13 of the Scheme. However, all three categories had this in common, that the applicants had a right to have their applications determined in terms of the Scheme applicable to them. That could properly be described as a vested right.

[57] The reclaimer contended that the coming into force of the 1998 Act on 2 October 2000 changed matters and conferred upon her a right to compensation that she had not previously enjoyed and which others, whose applications under the 1996 Scheme had been determined prior to the coming into force of the 1998 Act, had not had. Whatever analysis one adopted, the reclaimer's contention involved the 1998 Act being used to alter a pre-existing state of affairs. That was not how the Act had been held to operate. In that connection senior counsel relied on the observations of Lord Rodger of Earlsferry in *Wilson* v *First County Trust Limited (No. 2)* in paragraphs 196 to 198, Lord Nicolls of Birkenhead in paragraphs 20 to 22, Lord Hope of Craighead in paragraph 98 and Lord Scott of Foscote in paragraph 153. One could see a practical application of this approach to the operation of the 1998 Act in *Wright* v *The Secretary of State for the Home Department*, where the "continuing failure" argument had been deployed. The court had rejected the appellant's argument in

paragraphs 35 to 37. An existing state of affairs had not been altered by the coming into force of the 1998 Act.

[58] Senior counsel went on to rely in the same connection on *A* v *Hoare* [2006] E.W.C.A. Civ. 395. This and the associated cases were concerned with the interpretation of a six year limitation period applicable in English law in respect of intentionally inflicted injuries. In all of these cases, the relevant events had occurred prior to 2 October 2000. Damages actions were commenced after that date. The Court of Appeal had held that the 1998 Act did not have retrospective effect in the sense that it did not retrospectively confer upon a claimant a cause of action which he would not otherwise have had, as appeared from paragraph 47 of the judgment of the court.

[59] Senior counsel next proceeded to consider the fourth topic to be raised by him, the ambit of Articles 3 and 8 of the Convention and Article 1 of Protocol 1 thereto, in relation to Article 14. His arguments under this head were presented as a secondary submission, since, if he were correct in relation to retrospectivity, that would be an end of the case. It was a matter of agreement that Article 14 did not have independent force; it was dependent upon a matter coming within the ambit of a substantive Article. The concept of "ambit" was a loose term; the jurisprudence indicated that decision-making in relation to ambit was pregnant with the making of value judgments. The leading case was *M* v *The Secretary of State for Work and Pensions*. It was clear from that case that a tenuous link was insufficient; that a threshold or proximity test applied, raising the question of whether the situation under consideration was sufficiently close to one of the core values of a substantive Article to engage Article 14; that would depend on circumstances, on the nature of the rights

guaranteed and the sensitivity of the issues; the correct approach was to be guided by Strasbourg case law.

[60] The conclusion to be drawn from all of this was that, in determining on which side of the *Roche*/*Stec* line this case fell, it was on the *Roche* side. One was confirmed in that by looking at the fate of the application in *Stuart* v *The United Kingdom*, a decision directly in point. The cases of *Roche* v *The United Kingdom* and *Stec* v *The United Kingdom* could not be reconciled.

[61] *Beshiri and Others* v *Albania* (Application No. 7352/03) was instructive, particularly what was said in paragraphs 75 to 82. One either had a possession or one did not. Where the proprietary interest was in the nature of a claim, it could be regarded as an asset only where it had a sufficient basis in national law. If there was no asset, then Article 14 did not apply. Here, the reclaimer had no stateable case in support of her claim, so there was no Article 1 of Protocol 1 right.

[62] The threshold test, that the eligibility criteria in domestic law had to be met to enable a possession to be recognised in relation to Article 1 of Protocol 1 and Article 14, could be seen in operation in *Ghaidan* v *Godin-Mendoza* and *M* v *The Secretary of State for Work and Pensions*. In each of these cases the House of Lords was considering statutory provisions which operated differently in relation to homosexual couples. In *Ghaidan* v *Godin-Mendoza* it had been conceded that the situation was within the ambit of Article 8, which resulted in section 3 of the 1998 Act being applied to construe a spouse as including an homosexual as much as an heterosexual partner. However, in *M* v *The Secretary of State for Work and Pensions* the provision applied differently as between the different couples, but it had been decided that there was no breach of human rights. In the present case, there was no reason why the approach taken in *Stuart* v *The United Kingdom*, which was in point,

should not be followed. Such decisions were value-driven, which was why it was important to see how the European Court of Human Rights themselves had treated a particular matter.

[63] Senior counsel then moved on to deal with the fifth topic in his submissions; upon the assumption that Article 14 could have application, the question was whether there was discrimination on a ground specified in Article 14. It was submitted that there was not, because the difference in treatment was based not only on the "same roof" rule, but also on considerations of time. The comparator was not a non-family victim, but one to whom the "same roof" rule applied where the criminal injury had been sustained on or after 1 October 1979. However, because of the terms of paragraph 16 of the 1996 Scheme, there would still have been a difference in treatment between them. That suggested that the comparator was not a non-family member abused at the same time as the reclaimer, but a person who was a victim living under the same roof as the offender, where the abuse occurred on or after 1 October 1979. Thus the important point of distinction was not status, but the date at which the abuse had occurred.

[64] In connection with this part of his argument, senior counsel relied on *Regina (Parson)* v *Secretary of State for Work and Pensions* [2006] 1 A.C. 173, particularly the observations of Lord Nicolls of Birkenhead in paragraph 3, and Lord Walker of Guestingthorpe in paragraphs 53 to 58 and 61 to 63. The real issue in the case was why the complainants had been treated as they had been. The answer was that, on 1 October 1979, on an experimental basis, the applicable Scheme was amended to include "same roof" rule applicants, subject to certain conditions, which were now embodied in paragraph 16 of the 1996 Scheme. That change had been made prospective only. On the basis of consistency, successive Schemes, as they had been

changed, had been changed prospectively. Thus, the reason for the exclusion of the reclaimer's claim was that the events upon which it was founded occurred before 1 October 1979; like persons had never had a right to claim. Accordingly the same result was reached by that approach as by the comparator test; the basis for the distinction was time, not status.

[65] Finally, senior counsel dealt with the topic of justification, upon the assumption that there had been relevant Article 14 discrimination. In this connection *Regina (Carson)* v *The Secretary of State for Work and Pensions* was again of assistance. In paragraph 3, Lord Nicolls of Birkenhead indicated that the court's scrutiny might best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim are appropriate and not disproportionate in their adverse impact. The degree of scrutiny necessary and the cogency of the justification depended on the nature of the rights in question and the sensitivity of the issue. That matter was dealt with by Lord Walker of Guestingthorpe in paragraphs 55 and 57. The onus was on the respondents to demonstrate the justification. Consideration had been given to the amount of evidence required in such a situation and to the use of parliamentary materials. In that connection the observations of Lord Nicolls of Birkenhead in *Wilson* v *First County Trust Limited (No. 2)* in paragraphs 61 to 63 and 67 were helpful. If the purpose of the statutory provision was self-evident, it was not necessary to examine background material. What was important was the underlying social purpose sought to be achieved.

[66] The retention of paragraph 7(b) in the 1996 Scheme was plainly justified on the ground of (1) consistency; (2) the fact that changes are normally prospective; and (3) the need for a proper allocation of a limited budget.

[67] The observations of Evans, L.J. at page 858 in *Regina* v *Criminal Injuries Compensation Board ex parte PG* had been criticised by the reclaimer. However, the reasoning given there showed that the points made in justification of paragraph 7(b) of the 1996 Scheme were sound. In the case law of the European Court of Human Rights, prospectivity in legislation was permitted. In that connection reference was made to paragraphs 64 to 67 in *Stec* v *The United Kingdom*. The test there stated was whether the justifying rationale was "manifestly unreasonable"; in the domestic context the test was the narrower one of rationality. In any event the justification advanced for prospective reform in the present context was sound.

The decision

[68] In this petition for judicial review, the reclaimer seeks the remedies of (i) declarator that the terms of paragraph 7(b) of the Criminal Injuries Compensation Scheme 1996 are incompatible with her rights under both Article 3 and Article 8 taken with Article 14 and Article 1 of Protocol 1 taken with Article 14 of the Convention; (ii) reduction of paragraph 7(b) and the second to seventeenth words of paragraph 16 of the 1996 Scheme; and (iii) reduction of the decision set out in the letter dated 15 April 2002. The formulation of those remedies and, in particular, the terms of the declarator sought, in association with the averments made by the reclaimer and her pleas in law, make it abundantly clear that her challenge to the terms of paragraph 7(b) of the 1996 Scheme is based exclusively upon those parts of the Convention mentioned in the terms of the declarator sought.

[69] In our opinion, it is important to acknowledge that the Convention is not itself part of domestic law. As Lord Hoffman put it in *In re McKerr* in paragraph 63:

> "That proposition has been in no way altered or amended by the 1998 Act. Although people sometimes speak of the Convention having been incorporated into domestic law, that is a misleading metaphor. What the Act has done is to create domestic rights expressed in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention. They are available against specific public authorities, not the United Kingdom as a State. And their meaning and application is a matter for domestic courts, not the court in Strasbourg."

So, in a case such as this, where the reclaimer's case is exclusively based upon domestic rights derived from the Convention, but created by the provisions of the 1998 Act, the question of whether that Act has application to the relevant circumstances of the case is crucial.

[70] It is, of course, acknowledged that the criminal acts founded upon by the reclaimer occurred prior to 1 October 1979. Her application for criminal injuries compensation was dated 11 October 1999 and was received by the Criminal Injuries Compensation Authority on 13 October 1999. The application was initially rejected by letter, dated 8 November 1999, upon the basis of the effect of paragraph 7(b) of the 1996 Scheme. Thereafter the reclaimer requested a review of that determination. In terms of the letter dated 27 August 2001, the Authority advised the reclaimer that, as a consequence of the terms of paragraph 7(b) of the 1996 Scheme no award of compensation could be made to her. On or about 1 November 2001, the reclaimer appealed against that determination to the first-named respondent. On 15 April 2002, the first-named respondent issued the decision letter of that date, now sought to be reduced, in which it dismissed her appeal. Once again, the reason for that decision

was the terms of the 1996 Scheme referred to. Against that background the principal question for us is how the terms of the 1998 Act, which came into effect on 2 October 2000 upon which the reclaimer's case depends, relate to the facts of the reclaimer's case.

[71] The impact of the coming into force of the 1998 Act upon events and transactions that had been taking place before that date and legal proceedings in progress on it was the subject of consideration in the House of Lords in *Wilson* v *First County Trust Limited (No. 2).* In paragraph 186 Lord Rodger of Earlsferry observed:

> "At common law there is a presumption that a statute does not have 'retrospective' effect. The statement in *Maxwell on Interpretation of Statutes*, 12th edition, page 215 is frequently quoted:
>
> > 'Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect is clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.'
>
> The very generality of this statement rather obscures the fact that it uses the term 'retrospective' to describe a range of different effects, some more and some less extreme. It is therefore important to identify what it is about any particular provision that is said to be 'retrospective'."

[72] Thereafter his Lordship embarked upon an elaborate analysis of the different facets of retrospectivity and the manner in which the presumption to which he had

referred operated. In paragraph 193 he dealt with the nature and limitations of what has come to be recognised as a presumption against interference with vested rights. He puts the matter in this way:

> "Often, however, a sudden change in existing rights would be so unfair to certain individuals or businesses in their particular predicament that it is to be presumed that Parliament did not intend the new legislation to affect them in that respect. If undue weight is not given to his use of the term 'retrospective', Wright J. gives a strong statement of the presumption in *In re Athlumney; ex parte Wilson* [1898] 2 QB 547, 551 to 552: 'Perhaps no rule of construction is more firmly established than this - that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment.'".

His Lordship went on in paragraph 196 and 197 to consider exactly what is meant by "vested rights" for the purpose of the presumption. There he observed:

> "The courts have tried, without conspicuous success, to define what is meant by 'vested rights' for this purpose. Although it concerned a statutory rule resembling section 6(1)(c) of the Interpretation Act 1978, the decision of the Privy Council in *Abbott* v *Minister for Lands* [1895] A.C. 425 is often regarded as a starting point for considering this point. There Lord Herschell L.C. indicated, at page 431, that, to convert a mere right existing in members of the community or any class of them into an accrued or vested right to which the presumption applies, the particular beneficiary of the right must have done something to avail himself of it before the law is changed."

His Lordship goes on to observe that despite subsequent attempts at clarification, there remains a level of uncertainty as to what is meant by vested rights for this purpose.

[73] Lord Rodger of Earlsferry, in paragraph 198, proceeded to consider a further aspect of the presumption against retrospectivity, in relation to pending proceedings. There he said this:

> "The authorities refer to a further presumption, that legislation does not apply to actions which are pending at the time when it comes into force unless the language of the legislation compels the conclusion that Parliament intended that it should. A well known statement of this rule of construction is to be found in the judgment of Sir George Jessel M.R. in *In re Joseph Suche & Company Limited* (1875) 1 Ch. D. 48, 50 where he referred to 'a general rule that when the legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions do not affect them'. In *Zainal bin Hashim* v *The Government of Malaysia* [1980] A.C. 734, 742 the Board deliberately modified this rule and slightly reduced its force 'for pending actions to be affected by retrospective legislation, the language of the enactment must be such that no other conclusion is possible than that that was the intention of the legislature'".

[74] In the same case Lord Nicolls of Birkenhead grappled with the same problems. Observing in paragraph 19 that the established presumptions were vague and imprecise, he went on:

> "As Lord Mustill pointed out in *L'Office Cherifien des Phosphates* v *Yamashita-Shinnihon Steamship Company Limited* [1994] 1 A.C. 486, 524 to

> 525, the subject matter of statutes is so varied that these generalised maxims are not a reliable guide. As always therefore the underlying rationale should be sought. This was well identified by Staughton L.J. in *Secretary of State for Social Security* v *Tunnicliffe* [1991] 2 All E.R. 712, 724: 'the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree - the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended'. Thus the appropriate approach is to identify the intention of Parliament in respect of the relevant statutory provision in accordance with the statement of principle.
>
> Applying this approach to the Human Rights Act 1998, I agree with Mummery L.J. in *Wainwright* v *Home Office* [2002] Q.B. 1334, 1352, para. 61 that in general the principle of interpretation set out in section 3(1) does not apply to causes of action accruing before the section came into force. The principle does not apply because to apply it in such cases, and thereby change the interpretation and effect of existing legislation, might well produce an unfair result for one party or the other. The Human Rights Act was not intended to have this effect."

Similar views were expressed by Lord Hope of Craighead in paragraph 98 and Lord Scott of Foscote in paragraph 153.

[75] The House of Lords had again to consider the issue of retrospectivity in relation to the 1998 Act in *In re McKerr*, where it held that the Convention was not part of domestic law, save in so far as it was incorporated into the 1998 Act, and had

not been part of domestic law as so incorporated before the Act had come into force on 2 October 2000; and that the 1998 Act was not generally retrospective.

[76] A recent reiteration of this approach is to be found in *A* v *Hoare*. In paragraph 47 in the judgment of the court, delivered by Sir Anthony Clarke M.R. it was said:

> "It is common ground that the HRA does not have retrospective effect in the sense that it does not retrospectively confer upon a claimant a cause of action which he would not otherwise have had. There is ample authority for this proposition: see e.g. *Wilson* v *First County Trust Limited (No. 2)* [2004] 1 A.C. 816."

[77] In the submissions made to us on this aspect of the matter, the respondents founded upon the presumption that the 1998 Act did not operate retrospectively upon (1) vested rights; (2) pending actions; and (3) accrued causes of action. We have some difficulty in accepting the applicability of a presumption in relation to vested rights in the present context in which it is quite evident that, because of the terms of paragraph 7(b) of the 1996 Scheme, the reclaimer had no right to criminal injuries compensation, prior to the coming into force of the 1998 Act. Likewise, we have difficulty in envisaging the operation of any presumption affecting an accrued cause of action, where, for the reason just explained, the reclaimer had no such cause of action. However, in that connection we consider that the passage which we have quoted from *A* v *Hoare* is pertinent. We have insuperable difficulty in seeing how the 1998 Act could in any circumstances have retrospective effect, in the sense of conferring upon a claimant a cause of action which that claimant would not otherwise have had. It is precisely that for which the reclaimer contends in this case. However, more particularly, we are quite satisfied that the presumption that legislation does not

affect pending proceedings, described by Lord Rodger of Earlsferry in paragraph 198 in *Wilson* v *First County Trust Limited (No. 2)*, does operate in the circumstances of this case. There is nothing in the 1998 Act to demonstrate that Parliament intended that this presumption should not operate. In the factual context with which we are concerned in the present case, namely the making of a claim for criminal injuries compensation by the reclaimer on 11 October 1999, prior to the coming into force of the 1998 Act on 2 October 2000, and its processing thereafter, we are quite satisfied that the presumption does operate. There is nothing in the Act itself to rebut it. Our conclusion therefore is that the 1998 Act has no application to the reclaimer's case. In view of her exclusive reliance in this petition upon rights in domestic law, based upon the Convention, but created by the 1998 Act, the result is that the petition must be refused.

[78] While what we have just said is sufficient for the determination of this case, out of deference to the arguments which were addressed to us, we will express our opinion on certain of the other matters which were the subject of submission. In this connection we deal firstly with the submission of the respondents to the effect that the reclaimer's application for criminal injuries compensation and the subject-matter of the basis of it did not fall within the ambit of Articles 3 or 8 of the Convention, or Article 1 of Protocol 1 to it. The difficult concept of the "ambit" of an Article of the Convention was the subject of consideration in *M* v *The Secretary of State for Work and Pensions*. At paragraph 13 and the following paragraphs Lord Nicolls of Birkenhead said this:

> "13 The extended boundary identified in the Strasbourg jurisprudence is that, for Article 14 to be engaged, the impugned conduct must be within the 'ambit' of a substantive Convention right. This term does not greatly assist.

In this context ‘ambit’ is a loose expression, which can itself be interpreted widely or narrowly. It is not a self-defining expression, it is not a legal term of art. Of itself it gives no guidance on how the ‘ambit’ of a Convention Article is to be identified. The same is true of comparable expressions such as ‘scope’ and the need for the impugned measure to be ‘linked’ to the exercise of a guaranteed right.

14 The approach of the ECt HR is to apply these expressions flexibly. Although each of them is capable of extremely wide application, the Strasbourg jurisprudence lends no support to the suggestion that any link however tenuous, will suffice. Rather, the approach to be distilled from the Strasbourg jurisprudence is that the more seriously and directly the discriminatory provision or conduct impinges upon the values underlying the particular substantive Article, the more readily it will be regarded as within the ambit of the Article; and vice versa. In other words, the ECt HR makes in each case what in English law is often called a ‘value judgment’. …

15 In one respect the ECt HR jurisprudence has been more specific. Article 14 is engaged whenever the subject-matter of the disadvantage comprises one of the ways a State gives effect to a Convention right (‘one of the modalities of the exercise of a right guaranteed’). For instance, Article 8 does not require a State to grant a parental leave allowance. But if a State chooses to grant a parental leave allowance it thereby demonstrates its respect for family life. The allowance is intended to promote family life. Accordingly, the allowance comes within the scope of Article 8, and Article 14 read with Article 8 is engaged: *Petrovic* v *Austria* (2001) 33 EHRR 307, paras 27 to 30.”

[79] Similar views were expressed by Lord Walker of Guestingthorpe at paragraphs 57 to 60. In paragraph 60, he said this:

> "It was not an issue which this House had to resolve in *Ghaidan*. It is a live issue in this appeal. Though there is no simple bright-line test, general guidance can be derived from the Strasbourg case law, and it does not in my opinion lead to the conclusion that even a tenuous link is sufficient. Nor does it lead to the conclusion that precisely the same sort of approach is appropriate, whatever substantive Article is in point."

[80] In *Stuart* v *The United Kingdom*, an admissibility decision, the applicant was in a situation identical with that of the reclaimer in this case, in the sense that she was denied criminal injuries compensation upon the basis of the "same roof" rule. She sought to attack that rule upon the basis of Articles 3, 8, 13 and 14 of the Convention.

[81] The decision of the European Court of Human Rights was, of course, a decision as to the admissibility of the application and must be seen as such. However, the court dealt with the same issues as are involved in the determination of the submissions under consideration in the present case. Also, it was recognised in the debate before us that the decision in that case was not flawed by any misunderstanding as to whether the Scheme in question was an *ex gratia* Scheme or a statutory one. Accordingly, in our opinion, the decision is of assistance. At page 3 of the decision, the court noted that sexual abuse was regarded most seriously by Scottish law and was subject to severe maximum penalties. It found that the State's positive obligation under Articles 3 and 8 could not be interpreted as requiring the State to provide compensation to the victims of ill-treatment administered by private individuals. At page 4 of the decision the court said:

> "As for the complaint under Articles 3 and 8 taken in conjunction with Articles 13 and 14, the court refers to its above-mentioned finding that the scope of the positive obligation under Articles 3 and 8 does not extend to the payment by the State of compensation for injuries caused by the criminal acts of private persons. It follows that the fact about which the applicant complains, namely the denial of compensation, does not fall within the scope of Articles 3 or 8 and that Articles 13 and 14 are not, therefore, applicable."

While recognising the character of this decision as being a decision on admissibility only and while recognising that the concept of "ambit" is not expressly referred to by the court, which talks rather of the "scope of the positive obligation under Articles 3 and 8" we see no reason why we should adopt a different view to that inherent in that decision. In *M* v *The Secretary of State for Work and Pensions* at paragraph 4, Lord Bingham of Cornhill said:

> "It is not difficult, when considering any provision of the Convention, including Article 8 and Article 1 of the First Protocol … , to identify the core values which the provision is intended to protect. But the further a situation is removed from one infringing those core values, the weaker the connection becomes, until a point is reached when there is no meaningful connection at all. At the inner extremity a situation may properly be said to fall within the ambit or scope of the right, nebulous though those expressions necessarily are. At the other extremity, it may not. There is no sharp line of demarcation between the two. An exercise of judgment is called for. Like my noble and learned friend in paragraph 60 of this opinion, I cannot accept that even a tenuous link is enough. That would be a recipe for artificiality and legalistic ingenuity of an unacceptable kind."

In paragraph 87 of the same case, Lord Walker of Guestingthorpe, dealing with the legislation under consideration in that case said:

> "To that extent legislation is intended, in a general sort of way, to be a positive measure promoting family life (or, it might be more accurate to say, limiting the damage inevitably caused by the breakdown of relationships between couples who have had children). But I do not regard this as having more than a tenuous link with respect for family life."

[82] Looking at the provisions of Article 3 of the Convention, which is of course headed "Prohibition of torture", it is provided that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. As we would understand that Article, its core content reflects a concern with the infliction of torture, or inhuman or degrading treatment or punishment, in many cases, but not exclusively, by organs of authority. We do not see the commission of a crime involving the achievement of sexual gratification by an individual as readily coming within the ambit of that Article. Of course, where torture or inhuman or degrading treatment or punishment is inflicted by an organ of authority in a State, that will, frequently, also involve the commission of a breach of the criminal law by those persons actually responsible, which may fall within the ambit of Article 3 of the Convention. But, in any event, as we see it, the 1996 Scheme is distinct and separate from the core content of Article 3 of the Convention, in respect that its purpose was to provide compensation in a financial sense to certain victims of criminal conduct. Thus, looking at the matter for ourselves, we are unable to hold that the subject-matter of the reclaimer's case falls within the ambit of Article 3.

[83] Looking at the provisions of Article 8, which is entitled "Right to respect for private and family life" and which provides that everyone has the right to such respect

for his private and family life, his home and his correspondence, it would appear that the core content of the Article is the creation of protection for private and family life against factors which would assail the values protected, emanating from outside the family. That, of course, is not what was involved in the origins of this case. Furthermore, the 1996 Scheme was a means of providing financial compensation in certain circumstances to victims of criminal activity, a mechanism which is itself not directly concerned with the maintenance of the core values of Article 8. We cannot regard that Scheme as having more than, at best, a tenuous link with those core values.

[84] We turn next to consider the third provision of the Convention founded upon by the reclaimer here, Article 1 of Protocol 1. That Article is, of course, concerned with the protection of property. So far as relevant, it provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

Of course, everything depends on what is meant by a "possession", for the purposes of this Article. The effect of the Article was the subject of consideration by the European Court of Human Rights in *Van Der Mussele* v *Belgium*, where in paragraph 48 of the judgment of the court it was said:

> "The text set out above is limited to enshrining the right of everyone to the peaceful enjoyment of 'his' possessions; it thus applies only to existing possessions."

In *Roche* v *The United Kingdom*, the European Court of Human Rights was considering, in the broadest terms, a claim at the instance of a British serviceman who

participated in tests at the Portondown Barracks and who was subsequently diagnosed with medical conditions which, he suspected, were linked to those tests. In the judgment of the court consideration was given to the meaning of "possession" in Article 1 of Protocol 1. In paragraph 129 on page 637 of the judgment, the court said:

> "The Court recalls that a proprietary interest in the nature of a claim can only be regarded as a possession where it has a sufficient basis in national law, including settled case law of the domestic courts confirming it. The applicant argued that he had a 'possession' on the same grounds as he maintained that he had a 'civil right' within the meaning of Article 6(1). For the reasons outlined under Article 6(1) above, the court considers that there was no basis in domestic law for any such claim. The applicant had no 'possession' within the meaning of Article 1 of Protocol No. 1 and the guarantees of that provision do not therefore apply."

Thus, following that *dictum*, the question must be whether, in the present context, the reclaimer had a possession which could be protected by Article 1 of Protocol 1. We have no hesitation in concluding that she did not. While the reclaimer asserted a claim to criminal injuries compensation, because of the provisions of paragraph 7(b) of the 1996 Scheme, that claim must be seen as having had no basis whatsoever in national law. It was, therefore, a claim that was doomed from the outset to failure under national law. In these circumstances following the approach of the court just quoted, we would conclude that the reclaimer had no possession to be protected under Article 1 of Protocol 1. We should make clear that, following the submissions of the respondents, we consider that there is nothing in *Stec* v *The United Kingdom* which undermines the conclusion which we have just stated. We see the present situation, where paragraph 7(b) of the 1996 Scheme has prevented the reclaimer from asserting

any stateable claim as comparable with the kind of provision which was the subject of consideration by the House of Lords in *Matthews* v *The Ministry of Defence*. There is no question here of there being a procedural bar; there simply was no right. In all these circumstances, we conclude that, even if the basis of our decision were wrong and that the 1998 Act did have application to the circumstances of this case, the reclaimer's petition would have failed upon the basis that there were no "rights and freedoms set forth in the Convention", within the meaning of Article 14, to which the reclaimer's allegation of discrimination could have attached.

[85] We turn next to consider whether, assuming that the submissions of the reclaimer, which we have rejected, were well-founded, the difference of treatment under paragraph 7(b) of the 1996 Scheme, of which she complains was within one of the categories of discrimination prohibited by Article 14 of the Convention. The grounds referred to there are:

> "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 contention made here was that there was discrimination on the basis of "other status". It is that contention that we now examine. In approaching this matter we have regard to what was said in *Regina (Carson)* v *The Secretary of State for Work and Pensions*, particularly by Lord Hoffman, in paragraph 10, and Lord Walker of Guestingthorpe in paragraphs 53 to 58. The conclusion which we reach on this aspect of the case is that the circumstances here do not justify the conclusion that there might have been discrimination on the basis of "other status". It is quite plain, in our opinion, that the effect of paragraph 7(b) of the 1996 Scheme is to exclude from compensation cases where the criminal injury was sustained before 1 October 1979

and the victim and the assailant were living together at the time as members of the same family. Comparing such persons with persons who were living together with the assailant at the time as members of the same family where the criminal injury was sustained after 1 October 1979, it is evident that the distinction in treatment is based solely upon the time when the criminal injury was sustained. In our view the proper comparator is another person who was the victim in a "same roof" situation. Indeed we accept the submission of the respondents that the only proper comparator is other "same roof" victims. Thus the difference of treatment involved here cannot be seen as falling within any of the kinds of discrimination against which Article 14 is a protection. Accordingly, had it been necessary to do so, we would have held on this ground also that the reclaimer's petition would have failed.

[86] Arguments were addressed to us upon the assumption that the difference in treatment accorded to the reclaimer did fall within the scope of Article 14. It was contended that there existed, on that basis, a justification for the discrimination involved. We have reached the conclusion that we cannot properly form any view upon that matter on the basis of the somewhat limited material which is available to us in this petition. Accordingly, we offer no opinion on it.

[87] For all of these reasons, we consider that the decision of the Lord Ordinary should be affirmed and the reclaiming motion refused.