Neutral Citation Number: [2025] EWCA Civ 1608

Case No: CA-2024-002600

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)
UTJ Jacobs
[2024] UKUT 208 (AAC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 December 2025

Before :

LORD JUSTICE LEWISON
LORD JUSTICE SINGH
and
LORD JUSTICE HOLGATE

- -

Between :

R (on the application of LXR)	**Claimant/ First Respondent**
- and -	
FIRST TIER TRIBUNAL (SOCIAL ENTITLEMENT CHAMBER)	**Second Respondent**
CRIMINAL INJURIES COMPENSATION AUTHORITY	**First Interested Party/ Appellant**
SECRETARY OF STATE FOR JUSTICE	**Second Interested Party**

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Robert Moretto (instructed by the **Treasury Solicitor**) for the **Appellant** and the **Second Interested Party**
Chris Buttler KC and Jack Boswell (instructed by **Bindmans LLP**) for the **First Respondent**
The **Second Respondent** did not appear and was not represented

Hearing dates: 5-6 November 2025

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Approved Judgment

This judgment was handed down remotely at 10 a.m. on 12 December 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Singh:

Introduction

1. The First Respondent to this appeal, LXR, is entitled to anonymity pursuant to section 1(1) of the Sexual Offences (Amendment) Act 1992 ("the 1992 Act"): in accordance with that provision, no matter relating to LXR shall during his lifetime be included in any publication if it is likely to lead members of the public to identify him as the person against whom sexual offences are alleged to have been committed. When Falk LJ granted permission to appeal in this case on 11 February 2025, she confirmed, for the avoidance of doubt, that anonymity "is continued pursuant to [the 1992 Act]."

2. This appeal concerns the "re-opening" provisions in paras 114-116 of the Criminal Injuries Compensation Scheme 2012 ("the Scheme"). The main issue is whether a change in a victim's understanding of the cause of a mental injury, so that the mental injury is later attributed to a criminal act for which compensation has already been awarded (and accepted) under the Scheme, can fall within para 115(b) of the Scheme, so that the award may be re-opened.

3. LXR appealed to the First-tier Tribunal (Social Entitlement Chamber) (the "FTT", the Second Respondent before this Court) against the decision by the Criminal Injuries Compensation Authority ("CICA", the Appellant before this Court), dated 25 January 2022, to refuse his application to re-open an award made under the Scheme, which he had accepted on 19 August 2019. The FTT dismissed LXR's appeal on 9 May 2023 and gave written reasons for its decision on 4 July 2023.

4. LXR applied to the Upper Tribunal (Administrative Appeals Chamber) ("UT") for judicial review of the FTT's decision. The reason why there had to be a claim for judicial review, rather than an appeal, is that this kind of decision is an "excluded decision", so that an appeal from the FTT to the UT is not available.

5. In a decision dated 29 July 2024, UTJ Jacobs quashed the FTT's decision and remitted the matter to the FTT. The CICA appeals against that decision. The Secretary of State for Justice was joined as an Interested Party: joint submissions were made to this Court on behalf of both the CICA and the Secretary of State.

The Criminal Injuries Compensation Scheme

6. Para 4 sets out the basic eligibility requirements for an award under the Scheme:

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

7. The re-opening provisions are found at paras 114-116 of the Scheme. The key criterion relevant to this case is set out in para 115(b), which states that a claims officer may re-open an award if:

> "there has been so material a change in the medical condition of the applicant that allowing the original determination to stand would give rise to an injustice to the applicant."

8. Under para 117, an applicant may seek a review of certain decisions including a decision not to re-open an application under para 114.

9. Para 125 provides that "an applicant who is dissatisfied with a decision on a review […] may appeal to the Tribunal against that decision or determination in accordance with the rules of the Tribunal", that is to the FTT. A challenge to the FTT's decision in the UT has to be brought by way of judicial review (rather than an appeal) under section 15 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"). This is because a decision of the FTT on an appeal made in exercise of a right conferred by the Scheme in accordance with section 5(1)(a) of the Criminal Injuries Compensation Act 1995 is an "excluded decision" for the purposes of section 11 of the 2007 Act ('Right to appeal to Upper Tribunal').

Factual background

10. When he was a young child, LXR was raped and subjected to other serious sexual abuse (the "Childhood Sexual Abuse" or "CSA").

11. In 1998, LXR suffered non-physical sexual harassment from a vicar in the Royal Air Force ("the Adult Abuse"). The vicar gained pleasure from listening to LXR describe his childhood experiences of abuse.

12. On 28 February 2019 LXR submitted applications to the CICA in respect of both periods of abuse.

13. The CICA found that the Adult Abuse did not amount to a crime of violence for the purposes of the Scheme. That decision was upheld by the FTT in a decision notice dated 11 January 2021. The FTT concluded that a person of reasonable firmness would not have been put in fear of immediate violence by the Adult Abuse. LXR has not challenged that finding.

14. With regard to the Childhood Sexual Abuse, in a decision dated 15 August 2019, the CICA made an award of £11,000, which LXR accepted on 19 August 2019. In making this award, the CICA considered reports from Dr Boris Iankov (a Consultant Psychiatrist) and Joanna Rubbi (a Registered Psychotherapist). The CICA decision letter stated:

> "Both Dr Iankov and Ms Rubbi make it very clear that your mental injuries are extensive, but attribute them almost wholly

> to a separate incident. On balance, I am satisfied [the CSA] is not the primary cause of these injuries".

The decision letter said that, although LXR's award was the highest available for the sexual assault, no separate award could be made in relation to the psychological trauma suffered.

15. On 21 June 2021, LXR applied to the CICA for the award made in relation to the Childhood Sexual Abuse to be reconsidered in light of new medical evidence. The evidence in question was a report of Dr Jacqueline Pereira-Scott (sometimes referred to in the papers as Dr Scott), which stated that the primary trauma contributing to LXR's psychiatric symptoms was the CSA. LXR also provided the CICA with a copy of the FTT's decision upholding its refusal to award compensation in relation to the Adult Abuse case.

16. In a letter dated 6 July 2021, the CICA refused to re-open LXR's claim. The refusal letter stated that the new evidence did not indicate a material change in LXR's condition. The letter said:

> "I have considered the report of Dr Pereira-Scott and it is clear that [LXR] has suffered longstanding and serious mental health problems, which were directly caused by the abuse he was subjected to as a child.
>
> Dr Pereira-Scott's report does not indicate a material change in his condition since 19.8.19 (the date [LXR] accepted our offer of compensation). This means I am unable to re-open his claim on medical grounds.
>
> …
>
> The medical evidence available at the time the accepted decision was made, indicated that the childhood abuse was not the primary factor in [LXR's] condition. I understand and accept that the new evidence overwhelmingly contradicts this, however there is no scope within the Scheme to re-open or correct an inadequate decision in these circumstances.
>
> …"

17. On 24 August 2021, LXR applied to the CICA for a review of the decision and provided a letter from Dr Carolyn Law (a Counselling Psychologist) dated 23 August 2021. Dr Law's letter said that she believed there had been two aspects of material change in LXR's condition, one being his own understanding as to the cause of his condition and the other being a change in symptomatology.

18. In a letter dated 25 January 2022, the CICA stated that it could not re-open LXR's application for compensation because the decision-maker was "not satisfied there has been a substantial deterioration in [LXR's] condition since [LXR] accepted the

original award". It is that decision which was then the subject of an appeal to the FTT.

The appeal to the FTT

19. Before the FTT there were three grounds of appeal advanced on behalf of LXR. Ground 1 was that there had been a material change in his medical condition. Ground 2 was that the change was directly attributable to the period under consideration, i.e. the CSA. Ground 3 was that there was discrimination, contrary to Article 14 of the European Convention on Human Rights ("ECHR"), which is one of the Convention rights set out in Sch. 1 to the Human Rights Act 1998 ("HRA").

20. Under ground 1 two submissions were advanced. The first was that the CICA had misdirected itself as to the meaning of paras 114 and 115 of the Scheme. The second submission was that there had been a material change in LXR's medical condition, as shown, in particular, by the following three factors. The first was concerned with "diagnosis". The original award had been based on the medical evidence of Dr Iankov, who diagnosed LXR with post-traumatic stress disorder (PTSD). The updated medical evidence of Dr Pereira-Scott diagnosed him with primarily a Personality Disorder along with chronic and enduring PTSD symptoms. The second argument made was concerned with LXR's understanding of his own condition. It was submitted that the evidence of Dr Law explained that LXR is now able to understand and accept that the root of his injuries was the Childhood Sexual Abuse. It was said that:

> "This in itself is a significant change in [LXR's] condition, because of its symptomatic consequences."

In other words the change in LXR's understanding of his condition was said to be significant *because* of its symptomatic consequences. The third submission made was concerned with "symptomatic deterioration". It was said that the evidence of Dr Law is that there has been a substantial deterioration in LXR's symptoms. Those symptoms were then particularised.

21. In the skeleton argument for LXR before the FTT, submissions were made in support of ground 1 at paras 31-37. It is important to read that passage fairly and as a whole. At para 32 it was submitted that:

> "there <u>has</u> been a material change in his condition since the date of the original award. The change has occurred in three main ways: (i) diagnosis, (ii) the Appellant's own, clinically significant, understanding, and (iii) symptomatic deterioration." (Emphasis in original)

22. At para 35, the following submission was made:

> "<u>The Appellant's own clinically significant understanding of his own condition</u>: the evidence of Dr Carolyn Law …

> explains that the Appellant is now able to understand and accept that the root of his injuries was the historic abuse. This in itself is a significant change in the Appellant's condition, because of its symptomatic consequences. If something is considered clinically significant by the Appellant's treating clinicians, the CICA would need a good reason for discounting that evidence. It is artificial in the context of the Appellant's (and many others') mental health condition, caused by historic abuse, to attempt a strict delineation between the condition and his understanding of its cause (as Dr Carolyn Law explains …). Indeed, where (as the evidence set out below shows) much of diagnostic work in psychiatric injuries relies on the patient's own report of their symptoms and understanding of their traumas, a change in such understanding is of itself part of the one's medical condition." (Emphasis in original)

23. On behalf of LXR, it is now submitted by Mr Buttler KC that the final sentence of that paragraph made it clear that LXR's change in understanding was being relied on "of itself" (indeed that phrase is underlined in the original) and not simply because of its symptomatic consequences. In my view, this is to take one sentence in isolation out of its proper context. Earlier in para 35 it was submitted that:

> "This in itself is a significant change in the Appellant's condition, *because* of its symptomatic consequences." (Emphasis added)

24. Furthermore, the position is put beyond doubt, in my view, by what was said at para 37:

> "*Taken together*, a new diagnosis and primary presentation, marked deterioration in symptoms, and different understanding of one's condition (which, in relation to psychiatric injuries will be directly linked to one's condition) do amount to a significant change in medical condition. The appeal should therefore be allowed on this ground alone." (Emphasis added)

25. The decision notice of the FTT is dated 9 May 2023. Like the UT and the parties, however, I will refer to the written reasons for that decision dated 4 July 2023.

The FTT's written reasons

26. The FTT comprised Judge P Gandhi, Judge K Elias and Dr A H Al-Hillawi.

27. The issues were summarised, at para 8, as arising from the two grounds of appeal: namely whether the case should be medically reopened under paras 114 and 115 of the Scheme; alternatively whether there was a breach of Article 14 of the ECHR.

28. The FTT set out their findings of fact at paras 9-11. In particular, at para 11 they said:

> "We find that it was the treatment itself which led to a change in [LXR's] understanding of his condition and the origins of it rather than a serious change in his medical condition."

29. Under the heading "Medical Reopening", at para 14, the FTT said:

> "In summary [LXR's] case is that there has been a serious/ material change in his medical condition since he accepted the original award. This is because there has been a change in [his] understanding of the cause of his mental health difficulties and this in turn has led to an increase in his symptomology and a significant deterioration in his mental health."

30. In that passage, the FTT were, in my view, correctly encapsulating the way in which the relevant ground of appeal, and the skeleton argument in support of it, had been presented to them, in other words that a change in LXR's understanding of his medical condition was said to be significant *because* of its symptomatic consequences.

31. Having consulted the Cambridge English Dictionary and the Collins English Dictionary, the FTT said, at para 19, that:

> "Medical condition relates to a person's illness and treatment and it is clear therefore that a person's change in understanding of their condition and ability to engage with treatment as opposed to treatment is not a 'medical condition'."

32. The FTT then proceeded to consider the history of the medical evidence in LXR's case in detail. At para 24 they said:

> "*In any case* we do not accept that the evidence before us shows that there has been a material change in his medical condition between August 2019 and June 2021." (Emphasis added)

In a similar vein, at para 44, they said that it was clear from comparing the medical evidence that:

> "although his mental health has fluctuated over time it has not materially changed since 2019 when the award was accepted and 2021 when he applied for medical reopening. There is

> therefore no material change in his medical condition between August 2019 and June 2021."

33. At para 45, under the heading "Directly Attributable", the FTT said that, if they were wrong about there being no material change in LXR's medical condition, they would go on to consider whether any material change was directly attributable to the Childhood Sexual Abuse. They concluded that it was not: see in particular para 50. They said that it was clear from the evidence that the material change was not directly attributable to the crime of violence, i.e. the CSA, "but rather to a change in his own understanding of the cause of his psychological problems and because of the report of Dr Pereira-Scott …"

34. The FTT then addressed Article 14 of the ECHR at paras 52-69. They concluded that it had not been shown by LXR "that there is any difference in showing causation between those with physical and mental health injuries under the Scheme": see para 61. But, if the FTT were wrong about that, they went on to consider the issue of justification and concluded that the distinction was justified: they set out their reasoning in detail, by reference to Supreme Court authority, at paras 62-68. I will return to this below.

The claim for judicial review before the UT

35. In the claim for judicial review before the UT the way in which the first ground of challenge was formulated was that LXR "could not reasonably ascertain that his mental health injuries were attributable to the childhood abuse. The position has since changed: it is now reasonably ascertainable that his mental health injuries were caused by the CSA": see para 41 of the Summary Statement of Facts and Grounds.

36. This was also made clear in the formulation of the ground of challenge at para 3.1:

> "Giving effect to the object and purpose of the provision, 'medical condition' must be read as relating to the reasonably ascertainable medical condition."

37. In the skeleton argument on behalf of the CICA before the UT, at para 10, it was submitted that the FTT had not erred in its construction of paras 114-115 of the Scheme. At para 10.3, it was submitted that this was contrary to the reality of the facts of this case. It was said that the reality is that LXR's case is one about there being different medical evidence provided to the CICA as between 2019 and 2021, relating to the causation of his medical condition. It was submitted that the reality was not that there had been a change in his medical condition or even "reasonably ascertainable medical condition" but that he was saying that there had been a change in the medical opinion as to the cause of his condition.

38. At para 10.4, the CICA submitted that, even if LXR were right and the FTT had in some way to interpret para 115 of the Scheme as including the words "reasonably

ascertainable", his medical condition plainly was reasonably ascertainable as at August 2019. It was submitted that there were frequent references throughout the medical reports before that time to the Childhood Sexual Abuse.

39. The UT in fact rejected the submission that was advanced on behalf of LXR as to the interpretation of para 115(b) of the Scheme: see para 32 of its judgment. Nevertheless, UTJ Jacobs went on to conclude, at para 33, that:

> "… If I have understood Dr Law's evidence correctly, it is that LXR's understanding of his [symptoms] and their causes was fundamental to the nature and treatment of his condition. I see no reason why that should not be a change in his condition, provided that the Tribunal accepts that evidence."

40. This is the interpretation of the Scheme upon which Mr Buttler now fastens. He no longer pursues the argument about reasonable ascertainability which he advanced before the UT (and which was rejected) but submits that the UT was correct that a person's change in understanding of his medical condition can of itself amount to a change in that condition.

41. In view of its conclusion on the issue of interpretation of the Scheme, the UT did not feel it necessary to address the ECHR issue at all.

42. The UT gave a judgment which was wide-ranging and, at times, expressed at an abstract level. It referred to numerous authorities and purported to give guidance to the FTT on the interpretation of the Scheme. In particular, at paras 21-22, the UT was critical of the FTT's use of dictionaries. In my view, there was nothing wrong with the FTT's reference to dictionaries as one (but only one) aid to the interpretation of what are ordinary words of the English language when used in the Scheme, in particular the phrase "medical condition".

43. In my respectful view, it would have been more helpful if the UT had focussed on the particular facts of this case and the grounds of challenge before it. As will become apparent, I have reached the conclusion the FTT had not erred in law and had reached a conclusion on the facts of this case which it was entitled to reach on the evidence before it. In so far as the FTT had to decide a question of law, as to the interpretation of the Scheme, it had to do so by reference to the particular facts and the issues before it, not in the abstract.

Grounds of Appeal

44. The CICA advances three grounds of appeal before this Court:

(1) Ground 1: The UT erred in law in quashing the FTT's decision on a ground or grounds not contended or argued by LXR, and indeed on grounds contrary to his pleaded grounds. LXR was not challenging the FTT's finding that there was no material change in his medical condition. Instead, the claim for judicial review

was pleaded and premised on the basis that there was no change in his medical condition in or of itself.

(2) Ground 2: The UT erred in law and/or exceeded its jurisdiction in quashing the decision of the FTT, when the FTT had not made any error of public law in determining that the previously accepted award could not be re-opened due to there being no material change in LXR's medical condition.

(3) Ground 3: The UT's own reasoning as to the meaning of para 115(b) of the Scheme is wrong in principle.

Application to re-amend the Statement of Facts and Grounds

45. In case it is necessary to do so, an application is made on behalf of LXR to re-amend the Statement of Facts and Grounds in the underlying claim for judicial review. It is proposed that para 43 should be amended as follows:

> "As noted by the UT, the provision is *'loosely drafted'*. Applying the modern purposive approach, it must bear a broader interpretation than the FtT's dictionary-led approach. It is capable of referring to aetiology, diagnosis, symptoms, disablement, treatment and/or medication. Further or alternatively, correctly construed, the words *'so material a change in the medical condition of the applicant'* in rule 114 of the 2012 Scheme can cover ~~mean~~ a change in the reasonably ascertainable medical condition of the applicant."

46. Mr Buttler advances this so as to reflect his main submission before this Court, which is that the UT's interpretation of the Scheme is correct. As he acknowledges, this was not how the submission was put either in the FTT or in the UT.

47. I would refuse that application, which was not pressed with any vigour before this Court. In my view, it is far too late to re-amend the statement of grounds for judicial review when this Court is considering an appeal. I note that the application was made even after the grant of permission to appeal by Falk LJ. I have reached the firm conclusion that this appeal must be considered on the basis of the pleadings as they were before the UT.

48. Before I address the grounds of appeal in this case, I will summarise what has been said in the main authorities on the Scheme, or earlier versions of it.

Authorities on the Scheme

49. In *Jones v First-tier Tribunal (SEC)* [2018] EWCA Civ 2367; [2019] 1 WLR 1391 this Court had to consider the 1996 version of the scheme. Para 56 of that scheme contained the relevant provision about re-opening a case "where there has been such a

material change in the victim's medical condition that injustice would occur if the original assessment of compensation were allowed to stand …"

50. At para 27, Jackson LJ said that that provision should be construed in the following way:

> "... The correct questions for the decision-maker are: 'Would there be injustice if the earlier decision remained in place and would that injustice be the result of a change in the applicant's medical condition?' If the answer to both these questions is 'yes' the officer may, and no doubt in practice will, reopen the case. In such cases, one possible approach would be to take the account of medical change at face value and then decide whether injustice would be caused if the original decision stood. If the conclusion is that injustice would not be caused regardless of any medical change, the decision cannot be reopened, and it will then be unnecessary to engage with the often complex question of whether or not there has been a sufficiently material medical change."

51. In *R v Criminal Injuries Compensation Board, ex parte Williams* (C/1999/8155, judgment of 27 June 2000), this Court had to consider a previous version of the scheme which also contained a provision similar to what is now para 115. At para 25, Ward LJ said that the provision contained three separate elements. "The first is that there should be a change in the applicant's medical condition; secondly, that change has to amount to a serious change; but, thirdly, I would accept that the change has to be directly attributable to the original crime." In para 115 of the current (2012) Scheme, the change has to be "material" rather than "serious" but this does not affect the essence of the analysis given by Ward LJ.

52. Ward LJ continued, at para 26:

> "As to whether or not there is a change, that in my judgment is a matter for pure comparison between the condition of the applicant at the date of the original award, and his condition at the date when he is seeking reconsideration of his case. …"

53. At para 35, Ward LJ said that:

> "… Mis-diagnosis, or even mis-prognosis, in the original report is not of itself a justification for coming back for reconsideration. The test is of a serious change directly attributable to the original injury. Once that serious change is established, then the second question … for the Board will be whether or not 'injustice would occur if the original assessment of compensation were allowed to stand'."

54. Laws LJ gave a short concurring judgment, agreeing with the reasons given by Ward LJ and, in particular, expressly agreeing with what Ward LJ had said about mis-diagnosis: see para 38.

55. In *SS v CICA and FTT (SEC)* [2010] UKUT 410 (AAC), at para 26, UTJ Mesher elaborated on the principles in *Williams* and said:

> "… It might from the outside appear odd (and supportive of a flexible interpretation of a fairly loosely drafted provision) that what might be regarded as more fundamental errors of legal approach or of mistakes of material fact at the time of the original decision cannot support a re-opening of a case, but that is the state of the schemes as approved by Parliament. And CICA would no doubt say that the remedy for an applicant is and was first to get the evidence in support of his case in order by the time that a review decision is made and, if he does not accept an award directed in a review decision, to appeal against it (with an extension of the normal time limit being available). In such an appeal the overall merits of the case on the circumstances down to the date of the appeal decision would be assessed free of the restrictive conditions … for a re-opening of the case where the award has been accepted. By a 'pure comparison' must be meant a comparison of the applicant's actual medical condition as it is now known to have been at the date of the original decision with the current condition. That is how a mis-diagnosis is excluded. *Williams* is an example of a case where a mis-diagnosis at the time of the original award was later revealed, but nevertheless there was a later change in medical condition, in the effects of the two exacerbating incidents, to support a re-opening."

56. In *R (Colefax) v First-tier Tribunal (SEC)* [2014] EWCA Civ 945; [2015] 1 WLR 35, at para 22, Briggs LJ said *obiter*:

> "The power to re-open cases in paragraphs 56 to 57 will (subject to its limited availability after two years) readily accommodate the late manifestation of a new type of injury. But it is not clear that it would accommodate the late diagnosis of the requisite causal link between the crime and a medical condition which had not first appeared, or deteriorated, since the making of the claims officer's decision: see *R v Criminal Injuries Compensation Board, Ex p Williams* [2000] PIQR 339, para 35, per Ward LJ (obiter). That question does not arise directly for decision in this case (any more than it did in the *Williams* case). In my view paragraph 56 would not accommodate late diagnosis but, in view of Arden LJ's view,

> expressed tentatively during the hearing that it might do in some circumstances, I am content to leave the point open."

Ground 1

57. Under ground 1, the CICA complains that the UT erred in deciding the claim before it on the basis of an interpretation of the Scheme which was not being advanced on behalf of LXR.

58. On behalf of the CICA Mr Moretto points out that our legal system is an adversarial one, not an inquisitorial one. He relies on *Ali v Dinc* [2022] EWCA Civ 42, at para 21, where Green LJ said:

> "In *Sainsbury's Supermarkets Ltd v MasterCard Inc* [2020] UKSC 24 at paragraph 242 of the judgment of the court, the Supreme Court cited with approval the first part of paragraph 21 of Dyson LJ in *Al-Medenni* (above), and also a related passage from Lord Wilberforce in *Air Canada v Secretary of Trade* [1983] 2 AC 394, at 438F-G. Aside from the reference to these authorities, at paragraph 242, the Supreme Court said:
>
> > '[242] In the adversarial system of litigation in this country, the task of the courts is to do justice between the parties in relation to the way in which they have framed and prosecuted their respective cases, rather than to carry out some wider inquisitorial function as a searcher after truth.'"

59. I would accept, of course, that, when it comes to the finding of facts, our legal system is an adversarial one but I would not accept that a court or tribunal is necessarily bound to decide a question of *law* in the way that one or other party has argued it. The fundamental duty of a court or tribunal is to get the law right but, in reaching the right conclusion, it must act fairly. At the hearing before us it became clear that Mr Moretto does not in fact suggest that the UT did not have the jurisdiction to decide the point of law which it did. Rather his complaint is that the decision of the UT was "unjust because of a serious procedural or other irregularity in the proceedings": see CPR 52.21(3)(b).

60. As I have said, the governing principle is that the court or tribunal must act fairly. There is nothing to preclude it in principle from deciding a case on a point of law which has not been raised by one of the parties but it must fairly bring that to the attention of the parties and give them a reasonable opportunity to make submissions about it.

61. This is supported by authority. In *Hussain v General Pharmaceutical Council* [2018] EWCA Civ 22; (2018) 161 BMLR 71, the appellant had argued that it was a "plain breach of natural justice" for the decision-maker to have referred to an authority on

which the appellant had not been given an opportunity to comment. The decision-maker in question was the Fitness to Practise Committee of the General Pharmaceutical Council ("the Committee"). An appeal against a decision of the Committee had been dismissed by the High Court. In this Court Newey LJ held that it was "most unlikely" that the Committee found the authority in question to be of significant assistance: see para 57. Newey LJ then said that, in any case, reference to an authority on which a party had not been given an opportunity to comment need not involve a "plain breach of natural justice". He cited with approval paras 106-107 of my judgment in *Dill v Secretary of State for Communities and Local Government* [2017] EWHC 2378 (Admin), which cited earlier authority at the level of the High Court. In *Dill* I concluded that there was no unfairness if the decision-maker considers an authority to which reference was not made by the parties so long as the *issue* has been canvassed before them and they have had a reasonable opportunity to address the issue.

62. As a matter of principle, in my view, the touchstone is fairness: whether, in all the circumstances of a particular case, a fair procedure has been adopted. Depending on the nature of the issue and the other circumstances, it may be necessary to give the parties an opportunity to have a short adjournment, to file written submissions, perhaps after the hearing, or even to reconvene the hearing so that full submissions can be prepared and presented at a later date.

63. In the present case we have the transcript of the hearing before the UT on 26 February 2024. It seems to me to be tolerably clear that, during the hearing, the Judge did raise a possible way of viewing the meaning of "medical condition" in the present case which is consistent with his eventual judgment on the correct interpretation of the Scheme. For example, at page 7, lines 25-26 he said:

> "There are other ways of looking at it. Which is to say, that has actually changed the condition itself in a way. *That understanding is part of the condition*." (Emphasis added)

Similarly, on page 8, lines 11-12, the Judge said:

> "But it seems to be simpler for you to argue if this is the case that *understanding changes the condition*. …" (Emphasis added)

In other words, during the hearing the Judge did raise the possibility that a change in a person's understanding is sufficient to change the condition itself.

64. I do not therefore accept Mr Moretto's submission under ground 1 that this was a point of which no notice was given until the judgment of the UT was received after the hearing. I agree that it would have been better if the Judge had more clearly brought to the parties' attention that he was considering deciding the claim for judicial review on a basis that neither party had advanced before him but, in all the circumstances, I do not consider that there was any injustice caused.

65. In any event, I bear in mind that the case has now been fully argued before this Court. It raises a question of law, not one, for example, that would require the production of further evidence and so I would not allow the appeal on ground 1. It would in the

circumstances be an academic victory unless the CICA is correct on the other grounds.

Grounds 2 and 3

66. Ground 2 is essentially that the FTT had reached a conclusion of fact and that the Upper Tribunal was wrong to interfere with that conclusion on the basis that there was any error of law. This can be taken with Ground 3.

67. Ground 3 is that the Upper Tribunal's own interpretation of the Scheme, in particular the meaning of the term "medical condition" in para 115, was wrong in law.

The general approach to be taken to decisions of the UT and FTT

68. On behalf of LXR Mr Buttler urges this Court not to interfere lightly with the judgment of the UT, which is a specialist tribunal charged with the task of providing guidance to the FTT in this area of law. He relies upon the judgment of Lord Carnwath JSC in *R (Jones) v First-tier Tribunal (SEC)* [2013] UKSC 19; [2013] 2 AC 48, at paras 41-42:

> "41. … Where, as here, the interpretation and application of a specialised statutory scheme has been entrusted by Parliament to the new tribunal system, an important function of the Upper Tribunal is to develop structured guidance on the use of expressions which are central to the scheme, and so as to reduce the risk of inconsistent results by different panels at the First-tier level.
>
> 42. Promotion of such consistency was part of the thinking behind the recommendation of Sir Andrew Leggatt for the establishment of an appellate tribunal: *Tribunals for Users, One System, One Service* (March 2001), paras 6.9-6.26. It was adopted by the government in the 2004 White Paper, paras 7.14-7.21, which spoke of the role of the new appellate tier 'in achieving consistency in the application of the law'. Although the appeal from the First-tier Tribunal was to be limited to a point of law, it was observed that
>
> > 'for some jurisdictions this may in practice be interpreted widely, for instance to allow for guidance on valuation principles in rating cases. The general principle is that an appeal hearing is not an opportunity to litigate again the factual issues that were decided at the first tier. The role is to correct errors and to impose consistency of approach.' (White Paper, para 7.19.)"

69. Equally, however, as Mr Moretto reminds us, it is important to recall that it is the FTT which is the tribunal of fact in this context. As the above passage makes clear, an appeal to the UT lies only on a point of law. In the present case, no appeal was available, and so the challenge was brought by way of judicial review, but that serves to reinforce the point that the UT was only entitled to interfere with the judgment of the FTT if there had been an error of law.

70. In *Criminal Injuries Compensation Authority v Hutton and Others* [2016] EWCA Civ 1305 Gross LJ applied what had been said by Baroness Hale of Richmond in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49; [2008] 1 AC 678, at para 30, and by Lord Carnwath in *Jones*. He summarised the correct approach that should be taken both by this Court and by the UT as follows, at paras 57-58:

> "57. Pulling the threads together:
>
> i) First, this Court should exercise restraint and proceed with caution before interfering with decisions of specialist tribunals. Not only do such tribunals have the expertise which the 'ordinary' courts may not have but when a specialised statutory scheme has been entrusted by Parliament to tribunals, the Court should not venture too readily into their field.
>
> ii) Secondly, if a tribunal decision is clearly based on an error of law, then it must be corrected. This Court should not, however, subject such decisions to inappropriate textual analysis so as to discern an error of law when, on a fair reading of the decision as a whole, none existed. It is probable, as Baroness Hale said, that in understanding and applying the law within their area of expertise, specialist tribunals will have got it right. Moreover, the mere fact that an appellate tribunal or a court would have reached a different conclusion, does not constitute a ground for review or for allowing an appeal.
>
> iii) Thirdly, it is of the first importance to identify the tribunal of fact, to keep in mind that it and only it will have heard the evidence and to respect its decisions. When determining whether a question was one of 'fact' or 'law', this Court should have regard to context, as I would respectfully express it ('pragmatism', 'expediency' or 'policy', *per Jones*), so as to ensure both that decisions of tribunals of fact are given proper weight and to provide scope for specialist appellate tribunals to shape the development of law and practice in their field.
>
> iv) Fourthly, it is important to note that these authorities not only address the relationship between the courts and specialist appellate tribunals but also between specialist first-tier tribunals and appellate tribunals.

> 58. For my part, in applying this authoritative general guidance to this particular appeal, a number of considerations seem pertinent:
>
> i) First, it is the FTT – not the UT – which is the tribunal of fact and which heard the evidence.
>
> ii) Secondly, the UT's jurisdiction is limited to one of *judicially reviewing* the FTT Decision. The UT had no jurisdiction to interfere with the FTT Decision, absent a public law error.
>
> iii) Thirdly, even with the observations in *Jones* well in mind, I cannot see that this case was one calling for guidance from the UT to shape the development of law and practice in respect of claims under the Scheme. It follows that in classifying issues before the FTT as those of 'fact' or 'law', questions of context (designed to facilitate the giving of general guidance by the UT) can have, at most, only very limited bearing." (Emphasis in original)

The issues in this case

71. In Mr Buttler's submission, the correct interpretation of the Scheme accommodates both (i) cases where the causal link between the injury and index event has only become identifiable since the making of the original CICA decision (i.e. a change in the reasonably ascertainable nature of the medical condition) and (ii) cases where there has been a change in the applicant's understanding of aetiology, where that change is clinically significant in the context of the applicant's particular injury.

72. Mr Buttler submits that this broad approach is important in the context of child sexual abuse because there will often be a delayed reaction to that abuse. He submits that, if LXR had delayed making an application until the causal link with the CSA was identified, the claim would have been accepted and LXR would have been compensated for the full extent of his injuries because the CICA's guidance is that in cases relating to child sex abuse it is just to extend the limitation period unless there are compelling reasons to the contrary.

73. In particular Mr Buttler draws attention to the fact that, under para 89(a) of the Scheme, exceptional circumstances may justify a late application. At page 60, the CICA guidance states that:

> "Exceptional circumstances are more likely to exist in cases involving sexual abuse, especially where the applicant was a child at the time of the offence. This is because the silence of the victim, and ongoing psychological and emotional trauma, are well known to be direct consequences of such crimes. These effects continue into adulthood."

74. Mr Buttler also draws attention to the Diagnostic and Statistical Manual of Mental Disorders (5th edition, often referred to as "DSM-5") in relation to post-traumatic stress disorder the manual states, under the heading 'Development and Course':

> "PTSD can occur at any age, beginning after the first year of life. Symptoms usually begin within the first 3 months after the trauma, although there may be a delay of months, or even years, before criteria for the diagnosis are met. There is abundant evidence for what DSM-IV called 'delayed onset' but is now called 'delayed expression,' with the recognition that some symptoms typically appear immediately and that the delay is in meeting full criteria."

75. Mr Buttler submits that it is inherent in the definition of PTSD that there may be a delay in meeting the full criteria.

76. In my view, what this argument overlooks is that the present case is not concerned with when a claim to the CICA may *first* be made, when an extension of time may well be called for, but with the circumstances in which an *existing* award, which has been accepted by a victim of crime, may be re-opened.

77. I turn now to consider the medical evidence in this case, much (but not all) of which was before the FTT.

The medical evidence

78. As I have said earlier, the report by Dr Pereira-Scott was the main piece of new evidence that was said to warrant re-opening the award in this case. That report was before the FTT. Mr Buttler places particular reliance on the following passage:

> "In relation to the impact of the index incident with the station padre it is my impression this episode led to a *further psychological decompensation* of [LXR's] psychiatric symptoms and resulted in an exacerbation of these symptoms. Although he denied significant impact of the childhood abuse on his mental health, it appears the psychiatric symptoms arising from the abuse have been transferred and solely attributed to the index incident with the padre and treatment by the forces since.
>
> Although clearly distressing at the time, it is however not my impression the index incident solely led to a separate presentation of post-traumatic stress disorder rather exacerbated his already vulnerable mental health.

> The symptoms of the PTSD when reported in the following years in the records were noted to focus predominantly on the childhood sexual abuse and anger in relation to this.
>
> His coping mechanisms arising from his personality disorder however have led him to focus on his dissatisfaction with his applications for redress and maintains his anger towards the padre and the forces. He remains solely focused on this and dismisses any other possible explanations for his psychiatric presentation." (Emphasis in original)

79. Mr Buttler also showed us the letter by Dr Law dated 26 July 2023, which was not before the FTT but, in any event, I would observe that its contents are consistent with my understanding of what Dr Law had said previously, in evidence which was before the FTT. The 2023 letter was to the effect that LXR's change in understanding had "led to a change in symptomatology and presentation, which is what constitutes a person's medical condition": see para 1 on the first page of the letter. In para 2, Dr Law said she considered it to be clinically significant for a person to change their understanding of their condition "if the change in understanding leads to a change in symptomatology and presentation …" At para 10 of her letter, Dr Law said something to similar effect.

80. In her earlier letter of 23 August 2021, which was before the FTT, Dr Law had said:

> "When [LXR] first began his work with me, it was a fundamental feature of his presentation that he ascribed his mental health issues to a single incident of sexual abuse suffered as an adult and while serving with the RAF. Indeed this is why he was referred to VMHCTS because he believed that it was his experiences as a service person that had caused his mental health problems. However, in my professional opinion, that interpretation of his condition was inaccurate and was affecting [LXR's] presentation and ability to address and treat his condition. For the reasons I give below, I am of the view that [LXR's] current presentation amounts to a material change in his condition.
>
> Since [LXR] and I have been working together, he is now able to understand and accept that the root of his psychological injuries is the childhood sexual abuse (CSA) that he experienced for 4 years during his childhood. Until recently, his ability to explore and examine the effect of the CSA on his adult life was very limited. It was an extremely painful process for him to think about, remember and connect with the feelings that recalling this abuse evokes. It is not unusual for those who have suffered severe ongoing trauma throughout their childhood to detach themselves from and block out these experiences for long periods of their life in order to attempt to protect themselves from these overwhelmingly painful

> emotions. During our time working together, however, [LXR] has slowly been able to reconnect with the parts of himself that he had shut off and exiled for many, many years, something he has previously been unable to do. This is not an easy process and has been painful and difficult for him. It is very common for people suffering from complex post-traumatic stress disorder to shut off parts of themselves that they feel are too frightening or overwhelming to confront, but then through long term therapy, be able to gradually accept and reconnect with these parts of themselves. This is the process that [LXR] is currently undertaking."

81. It is significant that, immediately after that passage, Dr Law said:

> "These changes have led to a significant deterioration in his condition …"

In other words, as I have said earlier, Dr Law was giving evidence that there was a causal link between the change in understanding by LXR and a deterioration in his condition.

82. This is confirmed by her summary at the end of her letter where she said:

> "In summary, it is my opinion that there are two aspects of the material change in [LXR's] condition. One of these is [LXR's] own understanding as to the cause of his mental health condition, which has changed. He now understands that the historic sexual abuse has had a profound impact on his life, personality development and ability to function within relationships. The other aspect is the change in symptomatology i.e., the increase in dissociative episodes, the decrease in rage and anger, and the increase in feelings of loss, grief, sadness, powerlessness and hopelessness."

83. It is also significant, in my view, that on a fair reading of the report of Dr Iankov, dated 20 March 2017, PTSD was already being diagnosed and, moreover, it was noted that LXR had been experiencing mental health problems *prior* to the alleged incident with the vicar and was seeking psychiatric input prior to that incident. That report was considered by the CICA in making the original award, which was accepted by LXR in 2019. In particular, at paras 4.1-4.2 it was said:

> "4.1 [LXR] satisfies diagnostic criteria for Post-Traumatic Stress Disorder (ICD-10 F43.1). In [LXR's] case there is evidence of delayed response to as stressful event of an exceptionally threatening or catastrophic nature which is likely to cause pervasive distress in almost anyone. It is clear from his medical records that his mental state deteriorated

> significantly following the alleged incident. However it is also evident that he was seeking psychiatric input prior to the incident and that [LXR] was experiencing mental health problems prior to the alleged incident with the padre.
>
> 4.2 [LXR] suffered childhood sexual abuse over a lengthy period of time which according to him did not affect him significantly during his adolescent years. It is possible that the alleged incident with the padre has unlocked memories from his traumatic childhood experiences. It is also possible that the alleged questioning has led to [LXR] reliving the abuse. [LXR describes the alleged incident with the padre as an extraordinary emotional event after which he was no longer able to function normally."

84. Finally, in this context, I would note, as Mr Moretto reminded us, that as long ago as a letter dated 8 October 2007, Dr A Galloway (Specialty Registrar) expressed the opinion that:

> "Mr [LXR's] presentation was consistent with his previous diagnosis. I discussed this in full with him and he agreed that it encapsulated his long standing distress. It appears that his apparent sublimation of his feelings towards his childhood abuser are reflected in his transferential anger towards the army Padre. …"

My conclusion on grounds 2 and 3

85. In essence I accept the CICA's grounds 2 and 3. In my view, it is important to appreciate how the case was advanced before the FTT, both in terms of the evidence before it (one has to keep in mind that this was a claim for judicial review, not an appeal, and so what is important is what was before the FTT) and the legal submissions that were advanced before it.

86. We do not have a transcript of the hearing before the FTT and counsel who then appeared for LXR is no longer in the case. Nevertheless, we do have the advantage of having seen the medical evidence that was before the FTT and the skeleton argument filed by counsel then acting for LXR, to which I have referred above.

87. It is important not to dissect the different segments of the way in which the relevant ground was being presented before the FTT. It must be considered as a whole. When that is done, it is clear that what was being emphasised was that there had not only been a change in LXR's understanding of the cause of his mental health issues but that this had led to a deterioration in his symptoms.

88. I agree therefore with the CICA that the conclusion of the FTT was essentially one of fact, which it reached after consideration of detailed medical evidence. One also has

to bear in mind that the constitution of the FTT includes a medical member. In so far as the FTT gave themselves a direction of law, they did so in so far as necessary given the way that the case was presented to them. This is not an abstract exercise.

89. I have reached the conclusion that the FTT did not err in law and there was no basis for the UT to interfere with its judgment by way of judicial review.

The Respondent's Notice

90. In the Respondent's Notice, LXR invites this Court to uphold the order of the UT for the reasons that it gave; alternatively to do so on the ground that the FTT's interpretation of paras 114-116 of the Scheme is incompatible with Article 14 of the ECHR (either on an indirect discrimination or *Thlimmenos* basis) because it disproportionately adversely affects victims who sustain mental injuries as opposed to physical injuries (indirect discrimination); and/or the State has failed to make reasonable adjustments to cater for the greater difficulty in diagnosing mental injuries, particularly those sustained through child abuse (*Thlimmenos* discrimination). That is a reference to the decision of the European Court of Human Rights in *Thlimmenos v Greece* (2001) 31 EHRR 15. The *Thlimmenos* argument was abandoned by Mr Buttler at the hearing before this Court but the indirect discrimination argument was maintained.

91. Mr Buttler submits that an interpretation of paras 114-116 which excludes the possibility of re-opening an award where there has been a change in the victim's understanding as to the cause of a condition breaches Article 14 of the ECHR, read with Article 1 of the First Protocol (the right to peaceful enjoyment of possessions), and would be unlawful under section 6 of the HRA. Paras 114-116 should therefore be read down to avoid such a breach (applying section 3 of the HRA), or disapplied (applying section 6(1)).

92. Mr Buttler submits that Article 14 requires such an interpretation because:

(1) Otherwise paras 114-116 disproportionately affect victims who sustain mental injuries.

(2) The CICA bears the burden of justifying that difference of treatment. It has not shown how the aims of legal certainty and finality would be compromised if the CICA were permitted to re-open an individual application where the justice of an individual case outweighs finality.

93. In response to the ECHR argument, Mr Moretto does not dispute that this case falls within the "ambit" of Article 1 of the First Protocol and so Article 14 can in principle apply but he submits that there is no breach of Article 14. He submits that LXR's approach would itself introduce discrimination into the Scheme by creating an unjustified distinction between physical injuries and mental injuries. Further, he submits that no evidence has been provided to show that the re-opening provisions adversely affect a disproportionate number of those with mental injuries. In any event, he submits that, if there is discrimination, the re-opening provisions are a justified and proportionate means of achieving the legitimate aim of ensuring legal

certainty and finality. He emphasises that the State has a wide margin of appreciation in respect of the Scheme and that the re-opening provisions have been considered by Parliament many times but have been maintained in essentially the form they currently have.

94. In *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2022] AC 223, at para 53, Lord Reed PSC set out the approach which must be taken to a claim of indirect discrimination under Article 14:

> "… it has to be shown by the claimant that a neutrally formulated measure affects a disproportionate number of members of a group of persons sharing a characteristic which is alleged to be the ground of discrimination, so as to give rise to a presumption of indirect discrimination. Once a prima facie case of indirect discrimination has been established, the burden shifts to the state to show that the indirect difference in treatment is not discriminatory. The state can discharge that burden by establishing that the difference in the impact of the measure in question is the result of objective factors unrelated to any discrimination on the ground alleged. This requires the state to demonstrate that the measure in question has an objective and reasonable justification: in other words, that it pursues a legitimate aim by proportionate means …"

95. Against that background of principle, I turn to the issues in this case: first, has disproportionate impact been proved and, secondly, if it has, is the difference in treatment objectively justified and proportionate?

Has disproportionate impact been proved?

96. The burden of proof on this issue lies on LXR. In my view, the evidence required to prove that there is a disproportionate impact on the relevant group of persons has not been produced. The high point of Mr Buttler's argument was to rely on two specific pieces of medical evidence in the context of this particular case. In my judgment, that is not sufficient to amount to the kind of evidence which is required to establish indirect discrimination.

97. First, Mr Buttler drew our attention to the report of Dr C M Green, a consultant forensic psychiatrist, dated 18 August 2023. Mr Buttler acknowledges that he cannot rely on this evidence to impugn the judgment of the FTT on the facts of this particular case because it was not before the FTT; it post-dates that judgment. Mr Buttler does rely upon this report for the more general points made by Dr Green, in particular at para 14:

> "In addition to the above conclusions and comments on Mr [LXR's] case, my instructing solicitors have asked me a

> number of further questions, to which I provide the following responses:
>
> a. Determining clinical causality of psychiatric injuries can to a degree be dependent on the patient's own understanding of their condition and its cause. The patient's own insight into the cause of their condition is to be taken into account when assessing causality. This is much more the case in psychiatric than in physical medicine, as in physical medicine the cause of the illness is usually not linked to the patient's understanding or insight.
>
> b. In my experience it is common for a patient's own understanding of their psychiatric condition to change over time, particularly when they are receiving counselling or psychotherapy, which is a process that encourages reflection and insight.
>
> c. The patient's own understanding of their medical condition can be of clinical significance in assessing psychiatric injury, as the presence or absence of insight can form part of the psychiatric symptoms and in turn may be linked to causality.
>
> d. In my experience, inaccuracies in determining causality may be linked to the fact that the aetiology of many psychiatric conditions is unclear and often there is a multifactorial aetiology. This is not so much the case in post traumatic stress disorder, as post traumatic stress disorder is a condition which originates from specific emotionally traumatic experiences, which can usually be identified. When however there is more than one significant post traumatic stress incident it may not be clear which traumatic experience is the most important or significant in an individual developing post traumatic stress disorder. …"

98. Mr Buttler also relies on sub-sub-paragraph (iv) of para 14(e):

> "It is my opinion that a person's understanding of their condition can be a significant change and my view is that such is the case with Mr [LXR]. Insight and understanding is important in the majority of psychiatric conditions and is liable to form a component of therapy and recovery."

99. Mr Buttler submits that this, together with the evidence of Dr Law and other material filed on behalf of LXR (a consultation paper by the Law Commission on reform of the law of negligence and psychiatric injury, and academic evidence, in particular 'Problems of Diagnosis and Legal Causation in Courtroom Use of Post-Traumatic

Stress Disorder') is the only evidence which the Court has on the question of whether there is indirect discrimination so as to trigger Article 14. He submits that, although the CICA has had ample opportunity to file evidence on this issue, it has not done so and therefore there is no evidence to contradict the evidence filed on behalf of LXR.

100. I do not accept those submissions. Leaving aside any question of timing of the evidence, and in particular that most of the evidence was not before the FTT, which is significant in a claim for judicial review, the more fundamental point is that this is not the kind of evidence that is required to prove that there is a disproportionate impact against a certain sector of the population. This would require detailed statistical evidence about different sectors of the population generally, not simply the evidence of two particular doctors. Dr Green does not give expert evidence on such statistical matters even if he is qualified to do so: I do not think he purports to have that expertise.

101. Further, the Law Commission consultation paper and academic evidence were not directed to the issue of indirect discrimination raised in this appeal.

102. The same, in my view, can be said of para 14 in the letter by Dr Law dated 26 July 2023, which stated as follows:

> *"Explain whether, in your view, it is more difficult to determine causation of psychiatric injuries as opposed to physical injuries. For example, is it relevant that causation in psychiatric injuries relies on the veracity and understanding of self-reporting, rather than the observation of organic symptoms?*
>
> It is my view that it is more difficult to determine causation of psychiatric injuries as opposed to physical injuries, and I believe this often leads to inequality in decision making. The diagnosis of psychiatric injury and disorder relies largely on self-reported symptoms, and there are fundamentally no objective tests that can reliably demonstrate the presence or absence of psychological disorder and injury. This can be contrasted to the vast majority of physical conditions where organic symptoms of injury can be objectively observed. I do believe, however, that when working with a person over a long period of time, differences in behaviour and thinking/feeling patterns can be reliably observed and reported, and I have worked consistently with [LXR] for 4 years. I believe it is generally quite difficult for a person to malinger consistently and convincingly over a long period of time, and in my opinion, [LXR] is not malingering. An additional problem with relying on self-reporting is that many people, including [LXR] do not have a full understanding of the genesis of their disorder. They do not have the knowledge or language to connect how they feel and behave to the things that have happened to them in their early lives. It can be very difficult for people to acknowledge and admit that past trauma continues to have a profound effect on their day-to-day life. It is not unusual for

> people to believe that if they 'block out' the incidents that they will cease to affect them. Unfortunately, this is not the case, and actually has an adverse effect. In my 16 years of experience working with patients with trauma, this is very common."

103. In my view, Dr Law was simply giving a report on the circumstances of this particular person, LXR. In any event, her evidence, like Dr Green's, does not amount to the sort of evidence which would be required to show a disproportionate impact for the purposes of Article 14.

104. In reaching that conclusion, I do not find it necessary to decide a question of principle which was briefly canvassed at the hearing before this Court: what the role of a court or tribunal is when considering a claim for judicial review of the FTT, when that body has itself determined that there was no indirect discrimination. Is this a pure question of fact, a question of law or something in between such as a question of evaluation? We were not shown any authority on this subject. I am prepared for present purposes to proceed on the assumption (without deciding) that it is for this Court to reach its own view on whether the evidence proves indirect discrimination but I am not satisfied that it does.

105. In any event, I would not accept the breadth of Mr Buttler's submission. This is because any discrimination that arises in this case is not as between people with mental health injuries and those with physical injuries, or between disabled persons and others in society, but affects a particular class of people with disabilities. In particular Mr Buttler relies upon people who suffer from PTSD. The consequence of his submission, if accepted, could well be that there would be less favourable treatment given to other people who also have other kinds of disability, including those who have some other mental illness.

106. Even if indirect discrimination had been proved in this case, I would reject the ECHR argument because I would hold that any difference in treatment has been shown to be objectively justified and proportionate. I will first set out what has been said in recent judgments of the Supreme Court on this question before applying the principles to the present case.

Recent authorities on proportionality under Article 14

107. Mr Buttler relies on the following passages in the judgment in *SC*: paras 112-113 and para 158:

> "112 A relatively strict approach has … been adopted in cases concerned with persons with disabilities, in order to 'foster their full participation and integration in society': *Glor v Switzerland* Reports of Judgments and Decisions 2009-III, p 33, para 84 ('*Glor*'). In the more recent case of *Guberina* 66 EHRR 11, which concerned a refusal to grant a tax exemption

for persons with special accommodation needs to the father of a disabled child, the court noted that, on the one hand, a wide margin is usually allowed to the state under the Convention when it comes to general measures of economic or social strategy, including measures in the area of taxation (para 73). On the other hand, it continued:

> 'if a restriction on fundamental rights applies to a particularly vulnerable group in society that has suffered considerable discrimination in the past, then the state's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question. The reason for this approach, which questions certain classifications per se, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice could entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs.'

113 The court has also applied the same approach to a difference in treatment based on a person's being HIV positive: *Kiyutin v Russia* (2011) 53 EHRR 26, paras 63-64. The decision illustrates how the court's jurisprudence in this area can evolve over time, generally in response to a consensus emerging from international and European law, and the law of the contracting states. It is also a further illustration of the link between the need for 'very weighty reasons' and the stigmatising of particular groups in society. It was indicated in *Kiyutin* that the same approach would also apply to a difference in treatment based on a person's mental faculties.

…

158 Nevertheless, it is appropriate that the approach which this court has adopted since *Humphreys* [2012] 1 WLR 1545 should be modified in order to reflect the nuanced nature of the judgment which is required, following the jurisprudence of the European court. In the light of that jurisprudence as it currently stands, it remains the position that a low intensity of review is generally appropriate, other things being equal, in cases concerned with judgments of social and economic policy in the field of welfare benefits and pensions, so that the judgment of the executive or legislature will generally be respected unless it is manifestly without reasonable foundation. Nevertheless, the intensity of the court's scrutiny can be influenced by a wide range of factors, depending on the circumstances of the particular case, as indeed it would be if the court were applying the domestic test of reasonableness rather than the Convention test of proportionality. In particular, very weighty reasons will usually have to be shown, and the intensity of review will usually be correspondingly high, if a difference in treatment on

> a 'suspect' ground is to be justified. Those grounds, as currently recognised, are discussed in paras 101-113 above; but, as I have explained, they may develop over time as the approach of the European court evolves. But other factors can sometimes lower the intensity of review even where a suspect ground is in issue, as cases such as *Schalk*, *Eweida* and *Tomás* illustrate, besides the cases concerned with 'transitional measures', such as *Stec*, *Runkee* and *British Gurkha*. Equally, even where there is no 'suspect' ground, there may be factors which call for a stricter standard of review than might otherwise be necessary, such as the impact of a measure on the best interests of children."

108. On the same day as the decision in *SC* the Supreme Court gave judgment in *R (A) v Criminal Injuries Compensation Authority* [2021] UKSC 27; [2021] 1 WLR 3746, in which the judgment was given by Lord Lloyd-Jones JSC. That case, like the present, concerned the Criminal Injuries Compensation Scheme. In that case complaint was made under Article 14 of the ECHR that there was discrimination on the ground of the "status" of being a victim of trafficking who had a relevant unspent conviction. The Court therefore had to consider the question of justification for the differential treatment in the Scheme.

109. At para 80, Lord Lloyd-Jones said that the issue for consideration in that case was whether the exclusion from the Scheme of victims of trafficking with an unspent conviction which resulted in a custodial or community sentence, as opposed to other victims of trafficking, was justified. He concluded that it was. He drew attention to a number of features which the judgment in *SC* requires to be taken into account.

110. First, the Scheme operates in the field of social welfare policy where courts should normally be slow to substitute their view for that of the decision maker. Furthermore, this is an area where the European Court of Human Rights usually accords a wide margin of appreciation to national courts. The question whether and, if so to what extent, the State should pay compensation to victims of crimes of violence who have themselves committed crimes is essentially a question of moral and political judgement. Furthermore, it requires the exercise of political judgement in relation to the allocation of finite public resources. "This is therefore, a field in which courts should accord a considerable degree of respect to the decision maker": see para 83.

111. Secondly, the reasons for judicial restraint are greater where, as in the present case, the statutory instrument has been reviewed by Parliament: see para 84.

112. Thirdly, the basis of the discriminatory treatment complained of is also relevant. The European Court has identified a number of suspect grounds of differential treatment which are regarded as particularly serious, such as sex, race or ethnic origin, nationality or birth status, and which will usually require very weighty reasons by way of justification, unless outweighed by other relevant considerations. In general, the rationale is the link between the characteristic on which differential treatment is founded and a history of stigmatisation, stereotyping and social exclusion: see para 85.

113. At para 90, Lord Lloyd-Jones also considered that a bright line rule could be justified in the context of this compensation scheme:

> "Can a bright line rule be justified in the context of this compensation scheme? In my view it clearly can. First, we are concerned with an area of policy in which a considerable degree of latitude is accorded to the legislator as to the form and scope of the CICS. Secondly, the object of the CICS, namely the allocation of limited resources to deserving victims of crime as an expression of public sympathy, is such that the legislator is entitled to adopt a scheme which operates by clearly defined rules. In particular, it is appropriate to lay down rules as to the seriousness of offences which will disqualify possible claimants as opposed to allowing a general discretion to be applied in individual cases by claims officers. The chosen approach has the considerable advantages of clarity and consistency. Thirdly, it is significant that the CICS was approved by Parliament following an extensive process of consultation and an equality impact assessment. The government did consider the extent to which there should be a discretion exercisable in individual cases and decided to retain such a discretion in respect of unspent convictions for minor offences within paragraph 4 of Annex D but not in respect of more serious unspent offences which resulted in a custodial or community sentence within paragraph 3. I consider that it was perfectly entitled to adopt such an approach."

Proportionality in the present context

114. Applying the principles in those recent authorities to the present context, I am satisfied that any difference in treatment between people with physical injuries and those with mental injuries is one that was proportionate and justified. First, we have to bear in mind that this concerns the distribution of finite public resources in the context of a social welfare scheme. Secondly, we must bear in mind that the Scheme has to be approved by both Houses of Parliament and has been by affirmative resolution procedure. On the other hand, as Mr Buttler points out, there is some reason to think that discrimination against people with mental health issues has historically been a vice, in particular there can be stigma attached to such issues, and although this may not be a ground which is as "suspect" as race or sex, the Court must be vigorous in scrutinising the justification which is put forward.

115. Nevertheless, bearing all of those considerations in mind, I have reached the conclusion that CICA has demonstrated that the bright line drawn in this case is justified and proportionate. It is important in the interests of finality and certainty of judicial awards and for ease of administration and consistency of treatment.

116. Since the interpretation which the FTT gave to the Scheme is not incompatible with Article 14 of the ECHR, it is unnecessary to give it any other interpretation because of the impact of the HRA.

Conclusion

117. For the reasons I have given I would allow the CICA's appeal on grounds 2 and 3 and reject the arguments made about the ECHR in the Respondent's Notice. Accordingly, I would set aside the order of the UT and restore the order made by the FTT.

Lord Justice Holgate:

118. I agree.

Lord Justice Lewison:

119. I also agree.