Neutral Citation Number: [2022] EWCA Civ 86

Appeal No: C1/2021/0825

Case No: CO/2809/2020

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

Mrs Justice Stacey [2021] EWHC 1770 (Admin)
Royal Courts of Justice, Strand

London WC2A 2LL

Date: 04/02/2022

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS

LADY JUSTICE KING

And

LORD JUSTICE DINGEMANS

B E T W E E N

THE QUEEN

on the application of

CN

Appellant/ Claimant

and

THE SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE

Respondent/ Defendant

and

THE NHS BUSINESS AUTHORITY

Interested Party

Christian J Howells (instructed by **Watkins and Gunn**) for the **claimant**

Benjamin Tankel (instructed by **Government Legal Department**) for the **defendant.**

Hearing date: 25 January 2022

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Approved Judgment

“Covid-19 Protocol:

This judgment was handed down remotely by circulation to the parties’ representatives by email, and release to BAILII.

The date and time for hand-down is deemed to be 10:30am, Friday 4 February 2022.”

Sir Geoffrey Vos, Master of the Rolls:

Introduction

1.
The England Infected Blood Support Scheme (EIBSS) was established on 1 November 2017 to provide ex gratia support to those who had contracted hepatitis C virus (HCV) and human immunodeficiency virus (HIV) in general terms from unscreened blood and blood products provided by the National Health Service (the NHS). The EIBSS replaced five pre-existing schemes [1] (known together as the Alliance House organisations), which had provided similar support.

2.
Mrs Justice Stacey refused the appellant, CN, permission to apply for judicial review of a decision allegedly contained in an email dated 12 May 2020 from Joanne Miles (the Response), writing on behalf of the Department of Health and Social Care (the Department). [2] Whether or not the Response constituted a decision, CN put the claim on the basis that there had been a refusal to include persons in his position within the EIBSS. CN suffers from hepatitis B virus (HBV) which he alleges he contracted when he was given blood transfusions on or after 14 April 1989, when he underwent a bone marrow transplant at Hammersmith Hospital. It is now accepted that the NHS screened blood and blood products for HBV at least from the mid-1970s. [3]

3.
The Response explained why the Department had no plans to expand the eligibility criteria of the EIBSS to those in CN’s position as follows:

“The eligibility criteria for support implemented by the Alliance House organisations were carried over to the EIBSS. [These] criteria [did] not include infection with hepatitis B because blood donors were screened for hepatitis B from 1972. There was therefore a significantly lower probability of blood being contaminated with hepatitis B in the 1980s than for HIV and hepatitis C, for which screening was introduced in 1985 and 1991 respectively”.

4.
CN was granted permission to appeal Stacey J’s decision by Holroyde LJ on 27 August 2021 (amended on 1 September 2021).

5.
The central question in this appeal against the refusal of permission to apply for judicial review is whether it is arguable that the exclusion of HBV sufferers from the EIBSS is discriminatory and unreasonable. CN submits that it is, primarily on the grounds that it is arguable that it was contrary to article 14 read with article 8 and article 1 protocol 1 (A1P1) of the European Convention on Human Rights (the Convention). CN says that he is in a relevantly similar situation to HIV and HCV sufferers covered by the EIBSS, and that the Secretary of State for Health and Social Care (the respondent) cannot justify the difference in treatment between those infected with HBV and those infected with HIV or HCV. The respondent argues that the EIBSS does not discriminate against HBV sufferers for two main reasons. Those who contracted HBV in the 1980s (when the NHS screened for HBV) were

not in a “relevantly similar situation” to those who contracted HCV and HIV **before** screening was introduced for those conditions. The EIBSS replaced the Alliance House organisations that were limited to HIV and HCV infections contracted when there was no screening and a negligence claim against the NHS would, therefore (in contrast to a claim by someone in CN’s position), encounter significant evidential difficulties on the grounds of the state of scientific knowledge at the time. These matters provide an objective justification for the exclusion of persons in CN’s position from the EIBSS.

6.
The four grounds of appeal are, to be clear, that it was arguable that (i) CN was in a relevantly similar position to HIV and HCV sufferers, (ii) the Secretary of State could not justify the different treatment, (iii) the failure to include HBV sufferers was unreasonable, and (iv) the judge was wrong to decide that the application was out of time and to refuse to extend time for it to be made.

7.
The Secretary of State has filed a Respondent’s Notice in which he asked the court to uphold the judge on the additional basis that that the conduct complained of was not within the ambit of either article 8 or A1P1. It will be convenient to deal with that issue first.

8.
I have concluded that this appeal must be dismissed. In essence, like the judge, I do not think it is necessary to decide either whether the Secretary of State’s conduct is within the ambit of article 8 or A1P1 or whether the grounds upon which CN has been treated differently constitute a status. I am prepared to assume these points in favour of CN. The three crucial questions are (a) whether it was arguable that CN was in a relevantly similar position to HIV and HCV sufferers, (b) whether the Secretary of State can, in any event justify the different treatment, and (c) whether the application is out of time. On those questions, I have concluded that it is not arguable that CN is in a relevantly similar position, because the true comparison is either (a) with HCV sufferers who contracted their condition from unscreened blood or blood products, or (b) with HIV sufferers who would be very unlikely to be able to claim if they received treated blood or blood products. Even if there were different treatment of persons in a relevantly similar position, it is not arguable that the Secretary of State is unable to justify that different treatment. A sliding scale of intensity of review is appropriate in this case, which is concerned with judgments of social and economic policy and with disability, but the Secretary of State must nonetheless be given a wide margin of appreciation in creating an ex gratia scheme of this kind. Even if that were wrong, the judge was right to decide that this application was out of time, because the failure to include HBV sufferers in a support scheme was not a continuing act, but an act when the relevant schemes were introduced in 2004 and 2017.

9.
I will first deal with the essential factual background, the relevant authorities and legislation and the judge’s reasons, before considering the issues raised by the appeal.

<u>The essential factual background</u>

10.
CN was, as I have said, infected with HBV on or after 14 April 1989. As a result, CN has suffered serious health problems including chronic liver disease, renal failure, high blood pressure, regular loose bowels, short term memory loss, degeneration of joints, a compromised immune system, and breathlessness. He has been forced to abandon a successful food catering business in Sydney and return to the UK to receive medical treatment. He has relied on state benefits for the last 13 years.

Nothing in this judgment should be taken to indicate a lack of sympathy for CN's suffering and his economic plight.

11.
On 29 March 1995, CN issued a civil claim against the NHS and the National Blood Authority. Although CN had obtained an expert report to the effect that his infection was obtained from infected blood, he discontinued the claim when legal aid was withdrawn.

12.
CN is a core participant in the Infected Blood Inquiry (the Inquiry), chaired by Sir Brian Langstaff. The Inquiry is considering whether wider support should be available to those affected by infected blood products.

13.
On 11 August 2020, CN issued this claim contending that the decision contained in the Response or to exclude HBV sufferers from the EIBSS was (a) contrary to article 14 read with article 8 and A1P1, (b) disability discrimination contrary to section 15 of the Equality Act 2010, and (c) unreasonable. A further issue arose as to whether the claim was out of time, for the reasons detailed above.

14.
On 15 February 2021, Martin Spencer J refused CN permission to apply for judicial review on paper on the basis that the application was manifestly out of time and was not brought within time by setting up an "artificial decision through correspondence". The government had to have an ambit of discretion in setting up an ex gratia scheme, and it was not arguably irrational or unlawful to exclude those infected with HBV.

The relevant legislation and authorities

15.
Article 14 of the Convention is entitled "Prohibition of discrimination" and provides:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property birth or other status.

16.
Article 8 of the Convention is entitled "Right to respect for private and family life" and provides:

Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

17.
A1P1 is entitled "Protection of property" and 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 the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

18.
Article 14 is not, however, a freestanding right to non-discriminatory treatment. It is only a guarantee that any other Convention right will be secured in a non-discriminatory manner. It "can only be considered in conjunction with one or more of the substantive rights or freedoms set forth in the Convention or its protocols": R (SC) v. Secretary of State for Work and Pensions [2021] UKSC 26, [2021] 3 WLR 428 at [36] ("SC"). Therefore, it is not enough for CN to say that he is experiencing discrimination. He must show that he is experiencing discrimination which interferes with the exercise of another convention right, namely in this case article 8 and A1P1.

19.
It is common ground that the questions to be addressed in any article 14 claim are: (i) whether the subject matter of the complaint falls within the ambit of one of the substantive Convention rights, (ii) whether the grounds upon which the complainants have been treated differently from others constitute a status, (iii) whether the complainants have been treated differently from other people not sharing that status who are similarly situated or, alternatively, have been treated in the same way as other people not sharing that status whose situation is relevantly different from theirs, and (iv) whether that difference or similarity in treatment has an objective and reasonable justification. See Carson v. United Kingdom (2010) 51 EHRR 13 at [61] and SC at [37].

20.
When considering the third question as to whether the complainant has been treated differently from other people not sharing that status who are similarly situated Lord Reed said this at [59] in SC:

The difference is only relevant, for the purpose of assessing whether there has been discrimination, if the claimant is comparing himself with others who are in a relevantly similar situation. An assessment of whether situations are "relevantly" similar generally depends on whether there is a material difference between them as regards the aims of the measure in question.

21.
There will be some overlap between the questions of whether comparators are in relevantly similar situations and whether any differences of treatment are justified. They are not hermetically sealed questions.

The judge's decision

22.
The judge treated the article 14 challenge as the main ground for judicial review. She stated at [14] the four central questions to be addressed in an article 14 discrimination claim (see [19] above). She explained that the argument was that CN and those with HBV had been treated less favourably than those with HIV and HCV, because they had not received money and support under the EIBSS, impacting their family lives and property rights.

23.
The judge then assumed that CN had the necessary status under article 14, and dealt with the third and fourth stages, namely whether people were treated differently from those not sharing their status who were similarly situated, and objective justification. The judge seems to have regarded the

competing positions as two sides of the same coin: namely CN's case that he was treated differently, though similarly situated to those that had HIV and HCV, because he had HBV, and the Secretary of State's case, on the other hand, that CN was treated differently because he did not have HIV or HCV. It was an oversimplification to say that, because CN had HBV or did not have HCV, he had an arguable claim for discrimination. CN's circumstances were materially different from those entitled to participate in the EIBSS. CN was properly to be compared with someone who was infected with HIV or HCV **after** blood screening for those infections was introduced, not with anyone with HIV or HCV.

24.
Moreover, even assuming in CN's favour that: (a) it was sufficient for him to rely on having a different hepatitis virus to shift the burden to the Secretary of State to show objective justification, and (b) the court should adopt the stricter approach to justification on the basis that the "so-called suspect grounds" [4] (later referred to by Lord Reed at [71] in SC) were in issue, the Secretary of State had still demonstrated compelling grounds for the scope of the coverage of the EIBSS. It was reasonable for the EIBSS to cover only those infected with HIV and HCV **before** the introduction of screening. A person making a negligence claim prior to the introduction of screening would have faced difficulties because of the state of knowledge and science at the relevant time. In addition, there were far fewer known cases of HBV (only 13) than cases of HCV (over 20,000) and HIV. There was ample objective justification for different treatment even if different treatment were established. Article 14 discrimination was, therefore, not reasonably arguable.

25.
The judge dismissed the reasonableness ground for the same reasons.

26.
The judge dismissed the challenge under section 15 at [24]-[25] as not reasonably arguable and there is no appeal against that conclusion before us.

27.
On delay, the judge decided that time ran, at the latest, from the commencement of the EIBSS on 1 November 2017. Time would not be extended, because the Secretary of State would be prejudiced if it were and because CN had long been aware of his legal rights. The Response was not, in any event, a substantive decision; it simply informed CN why he was not eligible for support under the EIBSS.

Was the Secretary of State's conduct within the ambit of article 8 or A1P1?

28.
The main point made by Mr Christian Howells, counsel for CN, under this heading was that the purpose of the payments under the EIBSS was to provide payments to hepatitis sufferers and to their families. That purpose brought the claim within the ambit of article 8. Paragraph 1.3 of the NHS Business Services Authority (Infected Blood Payment Scheme) Directions 2017 (the 2017 Directions) defined the EIBSS (called the Infected Blood Payments Scheme) as "a scheme to make payments and provide support in respect of individuals infected with HIV or Hepatitis C (or both) from blood or blood products used by the NHS and to provide support to family members of such individuals". Mr Howells referred to R (Joint Council for the Welfare of Immigrants v. The Secretary of State for the Home Department) [2020] EWCA Civ 542 at [87] and [104] as requiring more than a tenuous connection between the measure challenged and the substantive right (article 8), and to SC.

29.

As regards the connection to A1P1, Mr Howells relied on Leggatt LJ's judgment in JT v. First-tier Tribunal (Social Entitlement Chamber) [2018] EWCA Civ 1735 ("JT") at [64]-[67] by analogy with the Criminal Injuries Compensation Scheme. He submitted that that case showed that the EIBSS was not ex gratia once it was made pursuant to a statutory duty. It was part of the national framework of social security (see also R (RJM) v. Secretary of State for Work and Pensions [2008] UKHL 63 ("RJM") citing Stec v. United Kingdom (2005) 41 EHRR SE 295 at [23]-[30] as to the need for the claimant to have a right or legitimate expectation to the payments).

30.
Mr Benjamin Tankel, counsel for the Secretary of State, argued that the alleged discrimination here was not connected to a right under either article 8 or A1P1. CN had no family, and he also had no entitlement or legitimate expectation to payments under the EIBSS, because the Secretary of State decided to set up an ex gratia scheme and transferred that scheme to the NHS Business Services Authority (NHSBSA) under section 7 of the National Health Service Act 2006. Paragraph 2 of the 2017 Directions was simply a means by which the Secretary of State told NHSBSA what to do.

31.
I refer to these arguments in relation to both article 8 and A1P1 at this stage, because they are relevant to the question of objective justification, which I regard as crucial. In the context of this case, however, I do not think, that I need to do more than assume for the purposes of this decision that CN has an arguable case that the Secretary of State's conduct in setting up the EIBSS was within the ambit of article 8 and A1P1.

Did t he grounds upon which CN has been treated differently constitute a status?

32.
The Secretary of State accepts that CN can show, at this stage in the proceedings, that it is arguable that he has an "other status" for the purposes of Article 14. It is therefore to be taken for the purposes of this hearing that it is also arguable that the grounds upon which CN has been treated differently constituted such a status.

Is it arguable that CN was in a relevantly similar position to HIV and HCV sufferers?

33.
Mr Howells submits that it is arguable that the ground on which CN was treated differently was simply that he was infected with HBV rather than with either HIV or HCV. He submits that it is not relevant that the EIBSS generally excludes those who received infected blood or blood products after screening was introduced for each of HIV and HCV. Screening was too uncertain to be a characteristic that is relevant to the question of whether CN is in a relevantly similar position to those benefiting from the EIBSS (see particularly the explanation of characteristics described by Lord Walker in RJM at [5]).

34.
In SC, Lord Reed said that, for the purpose of assessing whether there has been discrimination, claimants must compare themselves with others who are in a relevantly similar situation. The assessment of whether situations are relevantly similar generally depended on whether there is a material difference between them as regards the aims of the measure in question. Mr Howells submitted that there was no material difference between HBV sufferers on the one hand and HIV and HCV sufferers on the other hand as regards the aims of the measure in question. That was the correct comparison because the aims or purposes of the EIBSS (as defined in the 2017 Directions) do not

mention unscreened blood or blood products. They merely say that the EIBSS is to provide support to individuals infected with HIV or HCV. It was only the Memorandum of Understanding between the Secretary of State and the NHSBSA that identified, in relation to the eligibility criteria, the dates on which screening began for each of HIV and HCV (see [36] below).

35.
Mr Howells also submitted that the distinction between screened and unscreened blood and blood products was not a bright line. Screening for HBV was, when introduced in 1972, only partially effective, even if that effectiveness grew over time. Moreover, when screening was introduced, it was not entirely clear who had received screened blood and blood products and who had not. A person's eligibility for a scheme like the EIBSS could not be undertaken by reference to a person having received screened or unscreened blood or blood products.

36.
Mr Tankel submitted that this question and the question of objective justification had to be considered against the background that the UK operates a system of fault-based liability. That fault-based approach can be departed from, but to do so is a burden on the public purse and can impact doctor-patient relationships having an effect on treatment pathways. It was recognised in 2002 and 2003 that there was a moral responsibility to compensate the large number of HCV sufferers infected by unscreened blood and blood products. Legal claims would be expensive to defend and that was part of the reason for establishing the EIBSS. But the very existence and scope of the EIBSS was pre-eminently a discretionary decision for the Secretary of State taking the cost, the moral obligation and the fault-based backdrop into account. There were far fewer sufferers from HBV because screening had been introduced in 1972. The judge had been right to say that the correct comparison was with HIV and HCV patients given infected blood after screening commenced. The eligibility criteria were not themselves based on whether or not the blood or blood products were screened, although the cut-off date for HCV claims was September 1991 when screening was introduced. For HIV, there was no such cut-off point but the eligibility criteria made clear that NHS blood was screened for HIV from October 1985 so that it was very unlikely that HIV would have been transmitted through infected blood after that date. Thus, an individual might find it difficult to show on the balance of probabilities (as they were required by the eligibility criteria to do) that they were infected with HIV through NHS blood or blood products. CN was not eligible for the EIBSS because he did not have HCV or HIV, not because he had HBV.

37.
In my judgment, whilst Mr Howells was right to submit that the purpose of the EIBSS included in the 2017 Directions does not refer to the distinction between screened and unscreened blood or blood products, that does not mean that CN is in a relevantly similar position to those who can claim under the EIBSS. It must first be understood that the question of relevant similarity is intimately entangled with the question of whether the Secretary of State can show an objective justification for the alleged discrimination. As Mr Tankel's argument demonstrated, the reasons he adduced for saying that CN could not show relative similarity were the same as those he relied upon as an objective justification. For that reason, I move directly on to deal with justification. I have concluded that it is not arguable that CN is in a relevantly similar position, because the true comparison is either (a) with HCV sufferers who contracted their condition from unscreened blood or blood products, or (b) with HIV sufferers who would be very unlikely to be able to claim if they received treated blood or blood products

Can the Secretary of State justify the different treatment?

38.
The real question under this heading, as both sides accepted, is as to the intensity of review. Mr Howells submitted that the judge was wrong to say at [20] that the Secretary of State had "demonstrated reasonable foundation for the boundaries and terms of the scheme". It was, he said, the difference in treatment that had to be justified, not the boundaries of the scheme.

39.
Mr Howells made 6 points as to why it was arguable that the Secretary of State would not be able to justify the discrimination: (i) little weight should be given to after the event justification, where the discrimination, as here, had not been considered at the time (see TD at [53]-[54]), (ii) the Secretary of State was wrong to seek to justify the discrimination on the basis that negligence claims were easier to bring if a person was infected with screened products. Burton J in NBA at [10] had in effect said that was wrong, (iii) in any event, the question of how easy or difficult a negligence claim might be is not a rational basis for distinction, (iv) it was illogical to exclude the very small number of HBV sufferers, (v) it is inappropriate to rely on Lord Neuberger in RJM at [57] as saying that "the fact that the line may have been drawn imperfectly does not mean that the policy cannot be justified", because the line has to be justifiable and this one is not, and (vi) screening was only partially effective and was, anyway, one of a number of measures designed to prevent infection including donor questionnaires.

40.
The starting point as to intensity of review is, in my judgment, to be found in [158] of Lord Reed's judgment in SC as follows:

"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 divergence 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 Tomas 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".

See also MOC v. Secretary of State for Work and Pensions [2022] EWCA Civ 1 at [58]-[59].

41.
At [112] in SC , Lord Reed said that "[a] relatively strict approach [had] also been adopted in cases concerned with persons with disabilities". In my judgment, there is a sliding scale here. The case concerns an ex gratia scheme based on ministerial "judgments of social and economic policy in the

field of welfare benefits" (see SJ above), and also provision for disabled sufferers. The disability in question is not, however, the reason for the difference in treatment. That difference arose because the infections followed treatment with screened blood in CN's case and generally with unscreened blood in the case of those covered by the EIBSS.

42.
Moreover, I do not accept Mr Howells' basic premise that the EIBSS is analogous to the Criminal Injuries Compensation Scheme in JT . As Mr Tankel submitted, CN had no statutory entitlement or even legitimate expectation to benefit under the EIBSS. It was a scheme that the Secretary of State decided to set up, following on from the Alliance House organisations, pursuant to his ministerial functions. He then directed the NHSBSA to put the scheme in place under section 7(1) of the National Health Service Act 2006 which provides that he "may direct a Special Health Authority to exercise any functions of the Secretary of State … which relate to the health service in England". The 2017 Directions followed to give effect to the Secretary of State's decision.

43.
There are a number of reasons why, in my judgment, it is inevitable that CN will fail to establish, even arguably, that the Secretary of State lacked objective justification. First, the scheme is an exception to the regime of fault-based liability. It has been put in place to respond to a pressing moral claim. Secondly, the Secretary of State's judgment as to where to draw the line must, even taking the sliding scale I have mentioned into account, be given a wide margin of discretion. Thirdly, there is no yardstick by which the court can judge which claims are more or less deserving. That is the role of the fault-based system. In this case, for whatever reasons, the Minister decided that the negligence approach needed to be supplemented. The court cannot sensibly evaluate how easy or difficult such claims might be to bring or how costly they might be to defend; that will depend on each individual case. Fourthly, whilst I accept that the line being drawn at the time that screening was introduced is not a completely bright line delineation, the distinction between those generally being given screened and unscreened blood and blood products is intelligible and comprehensible. The eligibility criteria, as Mr Tankel explained, had a cut-off date for HCV when screening was introduced, and took into account the likelihood of blood being screened for HIV. The numbers affected by HBV were low after screening, and the Secretary of State was trying to address the major social problem created by those affected by HIV and HCV from unscreened products. In essence, the Secretary of State was obliged to draw the line somewhere to make the cost affordable. The court cannot second guess that political judgment.

44.
I would echo what Lord Neuberger said at [57] in RJM as follows: "The fact that there are grounds for criticising, or disagreeing with, [the views of the Minister] does not mean that they must be rejected. Equally, the fact that the line may have been drawn imperfectly does not mean that the policy cannot be justified. Of course, there will come a point where the justification for a policy is so weak, or the line has been drawn in such an arbitrary position, that, even with the broad margin of appreciation accorded to the state, the court will conclude that the policy is unjustifiable. However, this is not such a case, in my judgment". These words apply to this case too.

45.
I conclude, therefore, that, even if CN was in a relevantly similar position to beneficiaries of the EIBSS, it is not arguable that the Secretary of State is unable to justify that different treatment. A sliding scale of intensity of review is appropriate in this case, which is concerned with both judgments

of social and economic policy and with disability, but the Secretary of State must nonetheless be given a wide margin of appreciation in creating an ex gratia scheme of this kind.

46.
The parties did not deal separately with the question of unreasonableness or irrationality, save that Mr Howells suggested that the government could not, on that basis, take advantage of an ex post facto justification. As the judge held, however, I take the view in this case that, if the article 14 claim cannot succeed, neither can the claim based on irrationality.

Was the application out of time and, if so, should time have been extended?

47.
In the light of my previous decisions, I can deal with this issue briefly.

48.
Mr Howells relied on R (Johnson) v. Secretary of State for the Home Department [2016] UKSC 56 (Johnson), where the Supreme Court decided that the denial of automatic citizenship, which happened at birth on the grounds that the parents were not married, was a continuing event. Baroness Hale at [28] said that "[i]n this case, the denial of citizenship has a current and direct effect upon the claimant who is currently liable to action by the state, in the shape of deportation, as a result". This, according to Mr Howells, was a similar case. The failure to include in any continuing support scheme those affected by HBV contracted from infected blood or blood products is not a one-off event. That analysis overcame the problem created by R (Delve) v. Secretary of State for Work and Pensions [2020] EWCA Civ 1199 (Delve), where the Court of Appeal had held at [124]-[127], that in relation to legislation raising the state pension age for women, "[u]nlawful legislation [was] not a continuing unlawful act in the sense that the time limit for challenging it by way of judicial review rolls forward for as long as the legislation continues to apply".

49.
Mr Tankel submitted that nothing had changed since 2004. HBV sufferers were not included then and they are not included now.

50.
In my judgment, whilst Johnson might seem hard to reconcile with Delve, there is a clear distinction. On the facts in Johnson, the applicant suffered continuing and renewed effects of the discrimination by deprivation of citizenship, when offences were committed later in life. In Delve, however, the effects of the legislation were what they were as soon as it was enacted. Both CN and Johnson could, in theory, have sued from 2004 and 2017 in CN's case and from birth in Johnson's case, but the distinction is that here there are no continuing activities of the state beyond the initial acts of not including HBV sufferers in the ex gratia schemes. As Baroness Hale said at [28] in Johnson, "[t]he [ECHR] reiterated [at [39] in Posti v. Finland (2002) 37 EHRR 6] that "the concept of a 'continuing situation' refers to a state of affairs which operates by continuous activities by or on the part of the state to render the applicants victims" (see Norris v. Ireland (1988) 13 EHRR 186).

51.
In these circumstances, I consider that, since CN has known, at least since 2017, that he has a need similar to HCV or HIV sufferers covered by the EIBSS, he is out of time to bring this claim. I would not extend time in the light of my judgment as to the merits of the claim.

52.

Mr Howells submitted that there was merit in treating this claim in the same way as Mostyn J had treated the claim by those who had contracted HCV and HIV from screened blood and blood products in R (Challis) v. Secretary of State for Health and Social Care CO/3319/2020. Mostyn J granted those claimants permission and treated their claim as being within time. In my view, however, the focus there was on the blurring of the period before and after the introduction of screening, which is not the issue in this case. We do not know what arguments were addressed to Mostyn J on timing. But I emphasise that, if I had thought there was merit in CN's claim, I would have extended time for it to be brought.

Conclusion

53.
For the reasons I have tried to give briefly, I would dismiss this appeal.

Lady Justice King:

54.
I agree.

Lord Justice Dingemans:

55.
I also agree.

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[1] The Eileen Trust, the Macfarlane Trust, the Caxton Foundation, MFET Ltd and the Skipton Fund (the latter being introduced in 2004) .

[2] The Response was written in reply to a letter dated 23 April 2020 from CN's solicitors to the Department asking whether it would either (a) consider widening the remit of the EIBSS t o include sufferers of chronic HBV infection arising from contaminated blood, or (b) establish a separate scheme under which such victims can receive financial support.

[3] It is generally accepted that HBV screening has been available since 1972: see A v. National Blood Authority [2001] 3 All ER 289 (" NBA ") at [8] and Chapter 25 of the report of the Penrose Inquiry published in 2015 .

[4] Such as sex, nationality and ethnic origin.