Neutral Citation Number: [2022] EWHC 1613 (Admin)

Case No: CO/4997/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/06/2022

Before :

THE HONOURABLE MR JUSTICE SAINI

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Between :

THE QUEEN
(on the application of)
(1) AA (by her mother and litigation friend, BB) and
(2) CC (by his mother and litigation friend, DD) **Claimants**

- and –

(1) SECRETARY OF STATE FOR EDUCATION
(2) LORD CHANCELLOR AND SECRETARY OF STATE FOR JUSTICE **Defendants**

- and –

(1) THE PROPRIETOR OF H SCHOOL
(2) THE GOVERNING BODY OF L SCHOOL
Interested Parties

- -
- -

Sarah Hannett QC and **Stephen Broach** (instructed by **Irwin Mitchell LLP**) for the **Claimants**
Sir James Eadie QC and **Galina Ward QC** (instructed by **the Treasury Solicitor**) for the **Defendants**

Hearing dates: 14 June 2022

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Approved Judgment

MR JUSTICE SAINI :

This judgment is in 8 main parts as follows:

I.	Overview:	paras.[1]-[9].
II.	Statutory Framework:	paras.[10]-[24].
III.	The Facts:	paras.[25]-[41].
IV.	Article 14 ECHR: ambit:	paras.[42]-[69].
V.	Difference in Treatment:	paras.[70]-[78].
VI.	Status:	paras.[79]-[85].
VII.	Justification:	paras.[86]-[131].
VIII.	Conclusion:	paras:[132].

I. Overview

1. AA and BB, the Claimants, brought claims in the First Tier Tribunal ("the FTT") alleging disability discrimination against them by their schools (the First and Second Interested Parties), contrary to the Equality Act 2010 ("the EA 2010"). Their claims succeeded in part with the FTT finding that they had been discriminated against. They say they suffered both injury to feelings and pecuniary losses which should have been compensated by a remedy in the FTT. Neither Claimant was however entitled under the law to obtain damages in the FTT.

2. The FTT was the tribunal with exclusive jurisdiction to adjudicate upon their claims. A statutory exclusion expressly excludes such financial relief from the remedies which the FTT may award to pupils against schools in disability discrimination claims. However, that form of exclusion does not apply to those making certain other claims which are said by the Claimants to be analogous to their claims. In outline, the Claimants say that the FTT exclusion is unlawful under the Human Rights Act 1998 ("the HRA 1998") when one considers the following two analogous cases. First, there is an entitlement to seek damages when a child brings a claim in the County Court against a school under Part 6 of the EA 2010 for discrimination in relation to any other relevant protected characteristic (such as race or sex). I will refer to that group as the "Other School Complainants". Second, damages are also available when a student brings a claim against a Further Education (FE) or Higher Education (HE) institution for disability discrimination. I will refer to that group as "the FE/HE Complainants". In each of these cases the County Court may make an order for damages. In short, the complaint is, why can they get damages and not us?

3. The Claimants argue that this difference in treatment between them and these other groups constitutes a breach of Article 14 of the European Convention on Human Rights ("the ECHR") when taken with Article 1 of Protocol 1 ("A1P1"), Article 2 of Protocol 1 ("A2P1") or Article 8.

4. Given that the exclusion of financial relief is provided for by primary legislation, the Claimants seek a declaration of incompatibility pursuant to section 4 of the HRA 1998.

5. The Defendants' response is that this claim is an attempt to challenge Parliament's judgement, by primary legislation in the EA 2010 (and its predecessor legislation), to make bespoke remedial provisions for claims that the responsible body of a school has contravened Chapter 1 of Part 6 of the EA 2010 by discriminating against a person on the grounds of disability. They argue that such claims are subject to the more flexible, less adversarial and less expensive process of the FTT rather than the County Court; and that FTT is able to provide a wider and more flexible range of remedies than are available to the County Court in other types of claim brought under the EA 2010.

6. The Defendants say that the HRA 1998 claims fail at every stage of the relevant legal and factual analysis. They argue that Parliament confronted the very aspects of the legislation which are under attack, namely the exclusion of a damages remedy for persons within the Claimants' class; and that it made a deliberate choice to provide for this different, bespoke, remedial regime. They make extensive use of reference to Parliamentary materials in support of this submission.

7. The judicial review claim was issued some time ago on 17 December 2019. The procedural history explains the delays in the matter getting to a substantive hearing. Lane J refused permission to apply for judicial review "on the papers" on 24 February 2020. Farbey J then refused permission on 25 March 2020 at an oral renewal hearing. The Claimants made an application for permission to appeal and on 23 February 2021 Simler LJ granted permission and remitted the claim back to the Administrative Court for trial.

8. The Claimants do not have permission to pursue the Article 8 ECHR ground, as I explain further below. They renewed their application. The Claimants did however have permission under Simler LJ's order to pursue an Article 6 ECHR claim. That claim was abandoned at the hearing before me. It was conceded, rightly in my view, that in the light of Steer v Stormsure [2021] EWCA 887, the Article 6 complaint was not arguable. In that case, the Court of Appeal held that where a person does not have a right to a particular form of relief under domestic law, such a complaint does not fall within the "ambit" of Article 6 (I will explain the concept of "ambit" further below). The Claimants accept that this reasoning is fatal to the Claimants' Article 6 ECHR case.

9. The parties agreed that there are four main issues for me to determine: (i) is the subject matter of this claim within the "ambit" of Article 1 of Protocol 1 and/or Article 2 of Protocol 1 and/or Article 8? (ii) have the Claimants been treated less favourably than other people in an analogous position? (iii) does the "ground" on which the Claimants have been treated differently constitute a relevant "status"? and (iv) does that difference in treatment have an objective and reasonable justification?

II. Statutory Framework

10. Part 2 of the EA 2010 defines *"prohibited conduct"* (discrimination) and specifies "*protected characteristics*" (which include disability). The remainder of EA 2010 provides that discrimination is unlawful in specified contexts, subject to exceptions (some general in nature, some specific). The specified contexts include education

(Part 6 of the EA 2010), but also include, for example, services and public functions (Part 3), work (Part 5) and associations (Part 7). Part 9 of the EA 2010 deals with enforcement (i.e. where proceedings may be brought, time limits and remedies).

11. Section 6(1) of the EA 2010 provides that a person (P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities. The Defendants do not dispute that both Claimants meet this definition.

12. The EA 2010 prohibits direct discrimination (section 13), indirect discrimination (section 19), harassment (section 26) and victimisation (section 27). These forms of discrimination apply, in principle, to all protected characteristics (I have omitted certain carve-outs). There are two forms of discrimination specific to the protected characteristic of disability: discrimination arising from disability (section 15) and the requirement to make adjustments for disabled persons (sections 20 and 21).

13. Chapter 1 of Part 6 concerns schools. Section 85 imposes various obligations on the responsible body of a school not to discriminate against a prospective pupil in admitting him or her to the school or in his or her treatment whilst a pupil at the school (including exclusion from the school), not to harass or victimise a pupil, and to make reasonable adjustments. Pursuant to section 85(7), the provision applies to a school maintained by a local authority as well as to an independent educational institution. In respect of a school maintained by a local authority, the responsible body of a school is the local authority or governing body (section 85(9)(a)). In respect of Academies and independent schools, the responsible body is the proprietor (section 85(9)(b)).

14. Chapter 2 of Part 6 concerns further and higher education. It is not in issue that Section 91 places materially identical obligations on FE and HE institutions as section 85 imposes upon schools.

15. Section 113(1) provides "*Proceedings relating to a contravention of this Act must be brought in accordance with this Part*". Subsection (3) notes (relevantly) that subsection (1) does not prevent a claim for judicial review.

16. Section 114 of the EA 2010 deals with "*jurisdiction*". Section 114(1)(c) of the EA 2010 provides that the County Court has jurisdiction to determine a claim relating to a contravention of Part 6 (education). However, this does not apply to a claim falling within section 116: see section 114(3) of the EA 2010. Section 116(1) provides that a claim is within that section if it may be made to the FTT in accordance with Part 2 of Schedule 17. As such, section 114 draws a distinction between discrimination in education claims that may be made to the County Court and such claims that may be made to the FTT.

17. As to claims that may be made in the County Court, section 119(2) provides that where a County Court finds a contravention of the EA 2010 it has the power to grant any remedy which could be granted by the High Court in proceedings in tort or on a petition for judicial review. This includes an award of damages. Subsection (4) states that "*[a]n award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis)*". However (unlike the FTT: see

[] below) the County Court does not have the wider remedial power in such claims "*to make such order as it thinks fit*".

18. As to claims that may be made in the FTT, paragraph 3 of Schedule 17 to the EA 2010 provides that a claim that a responsible body has contravened Chapter 1 of Part 6 (schools) because of a person's disability may be made to the FTT by the person's parent or, if the person is over compulsory school age, the (young) person.

19. Paragraph 5 of Schedule 17 applies if the FTT finds that the contravention occurred. Sub-paragraph (2) provides that the FTT *"may make such order as it thinks fit"*. That power may, expressly, be exercised with "*a view to obviating or reducing the adverse effect on the person of any matter to which the claim relates"*: sub-paragraph 5(3)(a). But by sub-paragraph (3)(b) this does not include power to order the payment of compensation.

20. This is the statutory exclusion of an award of damages which is impugned in this claim. If, as the Claimants allege, paragraph 5(3)(b) of Schedule 17 to the EA 2010 breaches Article 14 ECHR, it is agreed that it is not possible to read the provision in a way which is compatible with Article 14. As such, it is common ground that the appropriate remedy would be a declaration of incompatibility pursuant to section 4 of the HRA 1998.

21. It is common ground that where the FTT concludes that a child or young person has been the victim of disability discrimination by a school, the FTT has no power to make an award of damages. By contrast, an award of damages could be made by the County Court in respect of a claim of discrimination by a child or young person against a school on any other protected characteristic (save for age, or marriage or civil partnership), or in respect of a disabled person claiming against a Further or Higher Education institution under section 91 of the EA 2010.

22. The Claimants contend that in most cases, a finding of discrimination by the County Court will sound in damages. They referred to Vento v Chief Constable of West Yorkshire [2002] EWCA Civ 1871; [2003] IRLR 102 at [50]-[51] and [65]. The importance of an award for damages to feelings in relation to discrimination claims was emphasised by Leading Counsel for the Claimants.

23. In respect of all other contexts (e.g. services and public functions, work, associations) the enforcement provisions require claims brought in respect of disability (including claims under sections 15 and under sections 20-21) to be brought in the same way as claims brought in respect of other protected characteristics. It is common ground that claims of disability discrimination against the responsible bodies of schools by the parents of disabled children (or, much more rarely, disabled young people themselves) are the only types of claims in which a claim in damages is precluded.

24. In broad terms, where disability discrimination by the responsible body of a school is alleged to have occurred in the admissions process there is a right to appeal against the admission decision and potentially obtain admission to the school; and, if discrimination is alleged to have occurred either against a pupil or against a former pupil (arising out of and closely connected to that relationship after they have ceased to be a pupil) a remedy can be sought in the FTT. The County Court does not have jurisdiction in either case and the challenge must be made via the appeal process or in

the FTT, and the FTT's powers, whilst in many respects much wider than those of a County Court, do not include a power to award financial compensation.

III. The Facts

25. There are a large number of witness statements. There is no relevant dispute of fact for me to resolve as regards the facts concerning the Claimants. Rather, the disputes are of a different nature where witnesses offer, for example, "opinions" as to whether the availability of financial remedies would be a good or bad thing for future compliance by schools with their EA duties in the disability context. I will distinguish below between true facts and opinions.

26. The claim is brought by two disabled children, by their parents as litigation friends. Each brought claims for disability discrimination against their school. Each was successful in part, such that the school was found to have discriminated against them. In each case, the Claimants' parents maintain that the remedies available under the EA 2010 were insufficient, and in particular that damages ought to be available as a remedy for the discrimination their children suffered. I have received witness statements from the relevant parents (BB and DD, respectively) in this regard and my summary below is essentially based on these statements. BB and DD have also provided updating statements which describe the conclusion of the FTT proceedings.

27. Emphasis is placed on the fact that at the time the claims were brought the respective children had left their schools and Leading Counsel said that the relationships between the parents/children and the schools had fundamentally broken down.

AA (First Claimant) and BB (parent)

28. AA is now an 18-year-old woman. At the time of issuing this claim AA was 16 years of age. AA was born with Foetal Alcohol Spectrum Disorder. She has global developmental delay, communication difficulties (a speech and language delay) and attachment difficulties. AA has high levels of anxiety and has difficulties with impulse control. She is a disabled person within the meaning of section 6 of the EA 2010. AA was a pupil at the First Interested Party. She was subject to a temporary exclusion on 21 September 2018, which became a permanent exclusion on 18 October 2018. AA's parents had concerns about the manner of her exclusion, as well as the educational provision made for her during her time as a pupil. On 20 March 2019 AA's parents issued a claim in the FTT against the First Interested Party alleging discrimination on the grounds of disability contrary to section 15 and 85 of the EA 2010, and a failure to make reasonable adjustments contrary to sections 20, 21 and 85. The claim form sought damages as a remedy, despite BB being aware that damages could not currently be awarded in such claims.

29. The claim concluded by consent on 16 March 2020. The First Interested Party conceded that it discriminated against AA "*in relation to the circumstances in which her time at the School concluded in September 2018*", the FTT having determined that it would not consider the alleged failure to make reasonable adjustments prior to 20 September 2018. The First Interested Party agreed to take a number of steps, which did not include the payment of compensation to AA. The school did however agree to a number of remedial steps including reviewing its policies in relation to use of

restraints, training of staff in this area, and ensuring all staff receive current training in relation to the EA 2010 and Foetal Alcohol Spectrum Disorders.

30. In BB's view, the remedies available were inadequate in that they did not include the ability to claim damages. Her recent statement explains that given the admission of unlawful discrimination she would have sought damages. BB explained the additional costs incurred by having AA at home whilst she was out of education, the lack of utility of the existing remedies given that AA would never return to her former school, and her desire to fund therapy for AA.

CC (First Claimant) and DD (parent)

31. CC is now 9 years of age. At the time of issuing this claim, CC was 6 years of age. CC has diagnoses of autistic spectrum disorder, pathological demand avoidance, sensory processing disorder and joint hypermobility. CC is a disabled person for the purposes of section 6 of the EA 2010.

32. CC attended the Second Interested Party (a maintained mainstream primary school) from September 2017 to October 2019. His parents were concerned that he was subject to inappropriate sanctions imposed by school staff, including a large number of incidents of restraint. On 2 October 2019, his parents issued proceedings in the FTT against the Second Interested Party. In a judgment dated 12 February 2021 the FTT upheld the claim of disability discrimination in one respect, namely in respect of the use of restraints between September 2017 and December 2018. The FTT ordered the Second Interested Party to send an apology to CC and to DD, and to review its policies in relation to behaviour.

33. DD (on her son's behalf) has explained why a remedy other than an award of damages was inadequate from her perspective. She explains that such remedies *"do nothing to practically assist with the damage caused by the discrimination [he] has faced. He now requires further therapy to undo the trauma he continues to suffer from. We will struggle to fund this without compensation"*. She adds that she considered it unfair that CC was treated differently to a child who has been discriminated against by the school for another reason, and that a requirement to pay compensation would encourage schools to take disability discrimination seriously. DD's updating statement describes the remedial orders made by the FTT which included both a written apology and a direction that the school carry out a review of its policies in relation to physical interventions. Like, BB she stresses that has damages been available from the FTT she would have sought such financial relief.

34. The Claimants' Solicitor, Imogen Jolley, has provided a witness statement in support of the claim. Ms Jolley is a highly respected leader in this area of education law, with substantial experience. Her views must command respect. She expresses the opinion that *"if damages were awarded against schools, we consider they would be far more likely to want to avoid such action in the future, and more likely to consider changes to their procedures as a result"*. She also explains that her experience is that the absence of damages as a remedy in the FTT for claims of disability discrimination against schools has resulted in situations where potential claimants decide not to bring a challenge. She says that this includes potential claimants whose claims had good prospects of success, in terms of establishing unlawful disability discrimination by a school.

35. The Claimants also rely upon the witness statement of Eleanor Wright, the Chief Executive of the charity SOS Special Educational Needs. She has substantial experience in this field and I give substantial weight to her opinions. She explains, *"I suspect that school governors and proprietors are likely to be more prepared to take their equality duties seriously if they are at risk of having to pay damages and/or higher insurance premiums"*. Again, that is an expression of an opinion.

36. A contrary view is expressed in the witness statement of John Middleton, a lawyer employed by the local authority that maintains the school for which the Second Interested Party is the responsible body. He says he fundamentally disagrees that the lack of a damages remedy in the FTT results in schools failing to take disability discrimination claims seriously; and expresses the opinion that there were and are very good reasons for treating disability discrimination claims in schools differently to other kinds of cases.

37. The main evidence for the Defendants in response to the claim is set out in the witness statement of Laura Bond ("Ms Bond"), Deputy Director of the SEND Policy and Strategy Division of the Department for Education. Ms Bond explains the legislative history, and the reasons underlying the establishment of what the Defendants call the "bespoke" tribunal remedy for disability discrimination in schools. She refers to the explanations given to Parliament by the responsible Minister when the scheme was originally enacted as part of the Special Educational Needs and Disability Act 2001.

38. I will address those matters in more detail below but at this stage I will set out in summary form the broad reasons relied upon to explain the primary legislation, and more specifically, the exclusion of a financial remedy). Ms Bond refers to the following matters: that the SEN and disability tribunal (now the FTT) operates in an informal and nonconfrontational manner; the legislation provides for the tribunal to have wide-ranging powers to order local authorities and schools to take certain action as a remedy for discrimination; disabled children, possibly even more than other children, need the start in life that a high-quality education can give, and it is vital for their learning and development that the effect of any discrimination be remedied in educational terms, as opposed to through financial compensation; allowing for the payment of compensation would undermine the ability of the FTT be as informal and user-friendly as desired and would risk creating a "culture of litigation", resulting in the process becoming more formal, more adversarial, and possibly more acrimonious. Finally, she makes the point that if financial compensation were available, in addition to other remedies, the tendency would be to focus on the financial rather than the educational remedy, and make less likely any positive change in the child's educational experience. Although the Claimants' described these as "ex post facto" justifications, when I asked Leading Counsel for the Claimants what was meant by this, she did not suggest that these reasons were not in fact the reasons for the remedial system chosen by Parliament. That is plainly correct. As I described in more detail below, these reasons, albeit expressed in a slightly different way, appear early in the Parliamentary record.

39. Ms Bond further explains that the rationales for the bespoke system for disability discrimination claims by school pupils continue to be as follows: effective educational remedies that prioritise good outcomes for disabled pupils; benefits to the wider group of disabled pupils in the school and its potential pupils; maximum public value from

resources; and that the system remains informal and non-adversarial. I will need to examine each of these rationales/aims in more detail below.

40. Finally, Ms Bond notes that the effectiveness of the existing system in meeting those aims is one of the subjects of the cross-Government SEND Review launched by the Department for Education in 2019. Ms Bond's successor in post, Suzy Powell, has provided an updating statement which indicates that a consultation was launched in March 2022 in the Green Paper "*SEND Review: Right support, right place, right time – Government consultation on the SEND and alternative provision system in England*". It includes the question: "*Do you consider the current remedies available to the SEND Tribunal for disabled children who have been discriminated against by schools effective in putting children and young people's education back on track?*".

41. I record at this stage that this review is a matter of general interest but in my judgment it can have no bearing on the legality of the existing remedial regime.

IV. Article 14 ECHR: ambit

42. The Claimants' case relates to the lack of availability of a particular remedy (damages) in relation to their claims. It is common ground that there is no authority that establishes the proposition that the availability or otherwise of a particular remedy of *itself* falls within the ambit of any of the rights protected by the ECHR. In that type of case, a claimant's route into the Convention is classically reliant upon Article 14.

43. Article 14 is not a freestanding prohibition of discriminatory treatment. It prohibits discrimination only in the context of the rights and freedoms set out in the ECHR: A and B v Criminal Injuries Compensation Authority [2021] UKSC 27; [2021] 1 WLR 3746 ("A and B") at [23]. The discrimination alleged (the lack of a financial remedy) must fall within what has been called the "*ambit*" of one of the substantive articles.

44. However, it is well-established that a claimant does not need to establish a violation or an interference with the substantive article to be within the ambit, merely that the discrimination is "linked to" or has a more than "merely tenuous" connection to a core value of the relevant substantive ECHR right: Mathieson v Secretary of State for Work and Pensions [2015] UKSC 47; [2015] 1 WLR 3250 at [17] and A and B at [39]. The closer the facts come to the protection of the core values of the substantive article, the more likely it is that they fall within its ambit; see In Re McLaughlin [2018] UKSC 48; [2018] 1 WLR 4250 at [20].

45. Leading Counsel for the Claimants forcefully argued that the prohibition on the award of damages in disability discrimination claims against schools is linked to, and is therefore within the ambit of, three substantive Convention rights: A1P1, A2P1, and Article 8. In her submissions, particular reliance was placed on the observations in A and B at [38] identifying and applying the Strasbourg Court's "more relaxed approach" to ambit issues when compared to the "heavy weather" made of such matters by the English courts. With that submission in mind, I turn to the Convention provisions relied upon.

Article 1 Protocol 1 ECHR (A1P1)

46. A1P1 provides as follows:

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

47. The Strasbourg Court has interpreted the concept of "possessions" broadly. As well as tangible property, the term has been held to include various intangible rights and legitimate expectations to payments or assets of various kinds.

48. The Claimants argue that in claims for discrimination against schools under the EA 2010 in respect of all protected characteristics save for disability there is what Leading Counsel called a "settled statutory right" to bring a claim for damages, a "possession" within A1P1. Similarly, it is said that in claims for disability discrimination against FE and HE institutions there is a "settled statutory right" to bring a claim for damages. It is argued that it is only the impugned measure in this case which prevents such a right arising in claims of disability discrimination by schools. Reliance was placed on Stec v United Kingdom (2005) 41 EHRR 18, where the Grand Chamber set out the test for when, for the purposes of Article 14, a claim falls within the ambit of A1P1. It was explained at [54]:

> "In cases, such as the present, concerning a complaint under Article 14 in conjunction with Article 1 of Protocol No. 1 that the applicant has been denied all or part of a particular benefit on a discriminatory ground covered by Article 14, the relevant test is whether, but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question… Although Protocol No. 1 does not include the right to receive a social security payment of any kind, if a State does decide to create a benefits scheme, it must do so in a manner which is compatible with Article 14."

49. It is common ground that the Stec test is generally applicable and not confined to welfare benefits: see JT v First-tier Tribunal [2018] EWCA Civ 1735; [2019] 1 WLR 1313 (CA) at [50]-[51]). Further, in JT Leggatt LJ held that the "*but for*" test applies not only when a benefits scheme is applied in a discriminatory manner, but also when a person is excluded from a scheme in a discriminatory manner [49].

50. The Claimants argue that the claim is within the ambit of A1P1 in one of two ways.

51. First, relying on Draon v France (2005) 43 EHRR 40: (i) a claim under the EA 2010 against the responsible body of a school for damages (save in disability cases) is a "*possession*", and (ii) but for the claim being brought on the grounds of disability and the statutory exclusion which is impugned in this claim, a claimant would have a right to that possession.

52. Second, and alternatively, even if a claim under the EA 2010 against the responsible body of a school for damages save for in disability cases is not a possession, then the

claim is within the ambit of A1P1 as a "*positive modality*" case (see A and B at [39] and JT at [50]). Relying on the modality principle, Leading Counsel for the Claimants persuasively argued that A1P1 does not impose an obligation on a State to make provision for compensation for victims of unlawful discrimination. The arguments run as follows. The United Kingdom has, by enacting the EA 2010, set out a scheme by which claimants may bring claims for discrimination, in prescribed contexts. This right extends to pupils bringing claims against the responsible body of schools. It also extends to students bringing claims against FE and HE institutions. The United Kingdom has therefore chosen to confer a form of protection on victims of discrimination. In so doing, the United Kingdom is applying a measure that has a sufficient connection with the "core" values protected by A1P1. In all circumstances, save for disability discrimination in schools, the scheme permits a court or tribunal to make an award of damages.

53. Accordingly, it is argued for the Claimants that "but for" the application of paragraph 5(3)(b) of Schedule 17, which carves claims brought on the ground of disability out of the scheme otherwise applicable to pupils bringing discrimination claims against schools, a disabled pupil would be entitled to claim damages.

54. The Defendants' response to both submissions is a short one. They argue that the Claimants do not have any "*possession*" for the purposes of A1P1 because there is no basis in national law for any claim for damages in the present context. They say this is a binary question.

55. In my judgment, the Defendants are correct in this response to the first way the A1P1 claim is put:

    i) Draon v France (2005) 43 EHRR 40 is authority for the proposition that: "*For a claim to be capable of being considered an "asset" falling within the scope of [A1P1], the claimant must establish that it has a sufficient basis in national law, for example where there is settled case law of the domestic courts confirming it. Where that has been done, the concept of 'legitimate expectation' can come into play*." (§65). By contrast, "*In a line of cases the court has found that the applicants did not have a 'legitimate expectation' where it could not be said that they had a currently enforceable claim that was reasonably established*." (§68). In Draon itself, the interference with A1P1 consisted of the abolition, by legislation, of a previously existing right to claim damages. The interference, which was conceded (§70), only arose in so far as the impugned law applied to proceedings that had been brought before it came into force and were still pending on that date (§72).

    ii) In Kopecky v Slovakia (2004) 41 EHRR, the claim was found not to be within the scope of A1P1 where there was "*no sufficiently established proprietary interest to which a 'legitimate expectation' could be attached*" (§51).

    iii) Like Draon, Pressos Compania Naviera SA v Belgium (1995) 21 EHRR 301 concerned the deprivation, by legislation, of an existing claim in domestic tort law.

56. The Draon line of authority was considered by the Court of Appeal in R (Reilly) v Secretary of State for Work and Pensions (No 2) [2017] QB 657. It was concluded

that there was no interference with A1P1 where primary legislation had retrospectively validated regulations providing for benefit sanctions, thus removing the possibility of bringing a claim for benefit that had been withheld. A right that had never legally accrued could not be a possession for the purposes of A1P1: see §115. *A fortiori*, there can be no interference where, as here, the claimed right to damages has simply never existed. There is no right to damages for disability discrimination where a claim can be made to the FTT under §3 of Part 2 of Schedule 17 to the 2010 Act. No "settled right" ever existed so as to be taken away.

57. The first way in which the A1P1 claim is put fails. I do not consider, however, that the Defendants have provided an answer to the second way ("modality") in which Leading Counsel for the Claimants put their A1P1 case. The principle as described in both JT at [50] and A and B at [39] does seem to me to apply to this case. It was rightly not disputed by the Defendants that a claim for damages is in principle capable of amounting to a possession within A1P1. On the basis of the modality reasoning, the Claimants are entitled to submit for Article 14 purpose that where the state has created a right under its domestic law which falls within the ambit of a Convention article, it must do so in a non-discriminatory manner. It follows from this general principle that Article 14 is engaged if a person would have had such a right but for discrimination covered by Article 14.

58. I accordingly proceed on the basis that the complaint falls within the "ambit" of A1P1.

Article 2 Protocol 1 ECHR

59. A2P1 provides that "No person shall be denied the right to education." A2P1 guarantees a right of practical and effective access to the existing system of state education: Sahin v Turkey (2005) 41 EHRR 8 at [136]. The Claimants argue that the issue in this case is "linked" to the Claimants' right to education, as protected by A2P1; and it is said that the link is more than tenuous. The claims which the Claimants' parents have brought on their behalf include allegations of unlawful permanent exclusion from school and the use of restraint by a school in the delivery of education. Further or alternatively, it is argued that even if A2P1 places no obligation on the state to set up a scheme by which discrimination claims may be brought against schools, if the state does so it will be required to afford effective and non-discriminatory access to it: see, by analogy, Ponomaryov v Bulgaria (2011) 59 EHRR 799 at [49].

60. The Defendants argue that the right to access education has on no view been denied or impinged. I agree. The Claimants' complaint relates not to access to education, or to a right not to be discriminated against in that access, or indeed to a system to ensure that such rights are upheld and enforced, but rather to the availability of one particular remedy: the payment of compensation damages. In my judgment, the link between the rights protected between A2P1 on the one hand, and the precise remedy available in a discrimination claim on the other, is properly to be described (at best) as "tenuous". Even on the "relaxed approach" to ambit described in A and B, the Claimants' complaint does not come close to falling within the ambit of A2P1.

Article 8 ECHR

61. Article 8 provides as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is 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."

62. Article 8 was relied upon by the Claimants in their Claim Form, but the application for permission to pursue this point was not renewed before Farbey J or the Court of Appeal, after being refused on the papers by Lane J. Indeed, I was told at the hearing that the Claimants expressly abandoned the Article 8 ground at the oral hearing before Farbey J. It was also removed from the claim which Simler LJ permitted to proceed and did not form the grant of permission to appeal. The Defendants object to the ground being raised given the earlier abandonment.

63. The Claimants need permission to rely upon Article 8, but Leading Counsel made no submission as to why there were any specific circumstances which would justify the renewal of this ground in these circumstances, other than asserting the arguability of the point. She accepted there was no good reason for it being revived now. Reference was made to Smith v Parole Board [2003] 1 WLR 2584 at [16] as to the discretion of the court. I do not find that extract to be helpful in relation to the issue before me which concerns abandonment of a ground.

64. In my judgment, it is contrary to the overriding objective and effective case management in the Administrative Court to allow a party, absent some good reason (such as a change in law or factual developments) to advance a ground consciously abandoned at an earlier stage. No such reason was presented, as Leading Counsel accepted. Her argument was essentially that if it was a matter of public interest then the abandoning party should be allowed to pursue the abandoned ground. I do not accept that as a principle given that almost all public law challenges are capable of being characterised as such. Something more than that needs to be put before the court.

65. Without prejudice to this objection, I have in fact considered the merits of the Article 8 ground. I do not consider it arguable. The Claimants say that the general availability of damages for unlawful discrimination contrary to the EA 2010 is a "modality" of the way in which the state demonstrates respect for the private life rights of persons with protected characteristics. The denial of the right to claim damages uniquely to disabled children whose parents allege they have been discriminated against by their school is said to be "obviously linked" to the right to private life protected by Article 8 of the Convention. Reliance is placed on the psychological stigma of discrimination and injury to feelings damages as a recognition of that stigma.

66. There is no domestic or Strasbourg authority which supports this submission as to breadth of Article 8, even on the "relaxed approach". Further, the two cases which are said to assist the Claimants, Smith v Lancashire Teaching Hospitals NHS Foundation Trust [2018] QB 804, Pinto v Portugal (Application no. 17484/15), provide no assistance. They each concern facts far removed from those before me, as Leading Counsel for the Claimants accepted. I do not accept that the damages remedy is a modality in the claimed analogous cases of demonstrating respect for private life.

67. In this respect, I accept the Defendants' submission that the Article 8 ground is an impermissible attempt to extend the scope of Article 14 to any situation in which discrimination is alleged. I note that the Court of Appeal in Steer (cited above) was prepared to assume, without deciding, that an interim order for the continuation of an employment relationship fell within the ambit of Article 8: [34]-[35]. There was no suggestion, however, that this would or might have been the case simply on the basis that the appellant's underlying claim in that case was based on alleged unlawful discrimination.

68. I refuse permission to amend the Claim Form to renew the Article 8 ECHR ground on both case management grounds, and because it is not arguable.

Conclusion on ambit

69. In my judgment, the issue arising and the complaint made are within the ambit of A1P1 but not within the ambit of any of the other two Convention rights relied upon.

V. Difference in Treatment

70. Before the Defendants have to show justification, the Claimants must demonstrate that they have been less favourably treated than comparators. The Claimants refer to the principle that Article 14 does not require the identification of an exact comparator, real or hypothetical, with whom the claimant has been treated less favourably. They submitted that Article 14 requires a difference in treatment between two persons in an analogous situation. It was said that unless there are very obvious relevant differences between the two situations, it is generally better to concentrate on the reasons for the difference in treatment in asking whether that difference is objectively justified: see, for example, McLaughlin at [26].

71. As I have described in my overview, the Claimants rely on two groups in analogous situations, who are treated differently in that they are able to claim damages for discrimination. The **first** person said to be in an analogous position to the Claimants is a child who brings a discrimination claim against a school under Part 6 of the EA 2010 on the ground of any other protected characteristic (save for certain exceptions). These are the "Other School Complainants". It is said that the only difference in their situation is that the Claimants rely on the protected characteristic of disability as opposed to (for example) race or sex. It is complained that the Other School Complainants are entitled to claim damages but the Claimants are not.

72. The **second** person said by the Claimants to be in an analogous situation is a student who brings a disability discrimination claim against a FE or HE institution. These are the "FE/HE Complainants". It is argued that the only material difference is their age

and the location in which they are receiving education. Again, reliance is placed on the FE/HE Complainant being able to claim damages, whereas the Claimants cannot.

73. It was persuasively argued by Leading Counsel for the Claimants that there is no very obvious relevant difference between the Claimants and these two groups so as to obviate the need for the Defendants to justify the difference in treatment of which the Claimants complain. She was however realistic in making clear in her submissions that the analogy was perhaps less convincing in relation to the FE/HE Complainants; and she focussed most of her argument on the Other School Complainant as the comparator.

74. The Defendants' response is that there is no analogy between the Claimants and the Other School Complainants or indeed the FE/HE Complainants. Leading Counsel submitted that these other complainants are bringing claims under different provisions of the 2010 Act, for which different remedies are provided. Further, he argued that even if the situations of the different groups were in principle analogous, the "*package principle*" described by the Court of Appeal in Steer at §§51-54 is relevant and applicable. I have already referred to the witness statement of Ms Bond, for the Defendants, where she identifies that there are a number of benefits to proceedings in the FTT that do not apply in the County Court. I will describe these further below when I address justification but for present purposes, I note that the Defendants submit that even if the Claimants were to establish that they are treated differently to an analogous group, this difference in treatment is not, overall, less favourable.

75. Leading Counsel for the Claimants submitted that the parts of Steer relied upon by the Defendant were obiter and/or were incorrect because they reflected EU law and not ECHR principles. I reject both submissions. The reasoning of Bean LJ in that case (to which I turn to below) was an alternative basis for the decision (see [68]) and even if obiter (contrary to my view) I do not consider the reasoning is inapplicable in ECHR cases. Before turning to those matters, I reject the HE/FE Complainants as simply not being an appropriate comparable. A student in such an institution is far removed from the situation of pupils such as the Claimants, and Leading Counsel's concessions in this regard were well-made.

76. Turning to Steer, the starting point is the reliance by Bean LJ at [51] on the case Totel v Revenue and Customs Comrs [2018] 1 WLR 4053 at [31]. Bean LJ noted that Totel concerned the principle of equivalence under EU law, but he explained that he saw no reason why it should not apply in human rights law to a comparison of the remedies available in different types of claim, an exercise which properly falls within Article 14 of the ECHR. With respect, he was plainly right in this observation and Leading Counsel for the Claimants was not able to point to any reason why the principles should be different. Bean LJ then went on to compare the remedies and concluded that the package of remedies provided to the appellant was not overall less favourable than those available to the hypothetical whistle-blower: see [53]-[54].

77. Even if I was not bound by this approach, I would respectfully adopt it. There is no magic in the concept under EU law of less favourable treatment. Like an Article 14 comparison, it raises a factual question as to whether there has been different (less favourable) treatment when the Claimants' position is compared to the comparators. The Claimants bear the burden of showing this. They have not discharged it. I accept the evidence of Ms Bond that there are substantial benefits to FTT complainants

which do not apply in the County Court. To summarise: there are no court fees or formal pleading requirements; the procedure is designed to be less adversarial and more flexible, informal and inquisitorial; there is the benefit of specialist judges who have experience and knowledge of disability issues; and the range of remedies available is far wider (being designed to put the child's education back on track). I do not consider when this package is considered in a holistic manner that the lack of a financial remedy before the FTT has been shown to establish less favourable treatment against the only proper comparator, the Other School Complainants.

78. The claim accordingly also fails on this requirement. Assuming that I may be wrong, I turn to the issue of "status".

VI. Status

79. Article 14 provides that the enjoyment of the rights and freedoms set out in the 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" (my emphasis). It provides a list of grounds on which discrimination is prohibited. The list is non-exhaustive as appears from the words "on any ground such as" and the inclusion of "other status". In the present case, the treatment of which the Claimants complain does not fall within any of the specific grounds listed in Article 14 and they must, therefore, demonstrate that they enjoy some "other status" for the purpose of Article 14.

80. As to the Other School Complainants, the Claimants rely on the status of disability. Although not within the expressly stated grounds in Article 14, it is well established that "other status" includes "disability": Mathieson (cited above) at [23]. As I understand the position, there is no dispute between the parties that disability can be a relevant status.

81. As to the FE/HE Complainants, the Claimants rely on the status of being a pupil at a school, in contrast to being a student receiving education at a FE or HE institution. In respect of this second group, the Defendants contest that there is a relevant "other status", as the group is simply a description of the operation of the legislative provisions.

82. I accept the Claimants' submission that being a "pupil" has a freestanding status, being defined as a person for whom education is being provided at a school: section 3(1) of the Education Act 1996. Similarly, legislative provisions draw distinctions between education provided in school, in further education and in higher education: see sections 2, 4 and 579 of the 1996 Act.

83. Status cannot not be defined solely by the difference in treatment complained of. It must be possible to identify a ground for the difference in treatment in terms of a characteristic which was not merely a description of the difference in treatment itself. I do not agree with the Defendants that the second "*status*" here (being a pupil at a school) is defined solely by the difference in treatment complained of (the denial of the right to claim damages to this group). Whether a person is a pupil at a school is a matter of objective fact.

84. I have not overlooked the Defendants' reliance upon Steer at [42] where Bean LJ said that the fact that a particular remedy is available in litigation of type A but not of type B does not constitute discrimination against the claimant in a type B case on the ground of her status as a type B claimant. I do not consider those observations preclude a finding that the Claimants have shown relevant "other status".

85. The Claimants have satisfied the "status" requirement.

VII. Justification

86. As in previous sections of my judgment, in this section I proceed on the basis that I am wrong in my primary conclusions in Section V (different treatment) and the issue of objective and reasonable justification of the difference in fact arises.

87. The relevant questions in respect of justification under Article 14 of the Convention were not in dispute. In determining whether the Defendants have demonstrated an objective and reasonable justification for the difference in treatment between the Claimants and the Other School Complainants and/or the FE/HE Complainants, I have to consider the following four questions:

    i) Whether its objectives are sufficiently important to justify the limitation of a fundamental right;

    ii) Whether it is rationally connected to that objective;

    iii) Whether a less intrusive measure could have been used; and

    iv) Whether, having regard to those matters and the severity of the consequences, a "fair balance" has been struck between the rights of the individual and the interests of the community.

88. Although these four questions raise analytically separate matters, together they ask a general "proportionality" question. In short, once a legitimate objective has been established and the means of achieving it meet a rational connection test, has it been shown that there is a reasonable relationship of proportionality between the aim and the means employed to achieve it?

89. The burden of proving justification is on the Defendants and it is not the scheme as a whole which must be justified but the claimed discriminatory effect. That said, it was not in issue that the Defendants may point to the whole scheme as part of the justification of the specific measure complained of. Where the complaint is in relation to part of system it is wholly unrealistic to ignore the entire system when considering the part of it which is the subject of complaint. That is particularly important in Article 14 discrimination challenges to primary legislation which create a comprehensive system regulating an area of social policy. It will be rare that it can be said that discrete parts of that system were enacted without reference to the whole.

Intensity of review

90. As to the applicable judicial approach to assessing justification and in particular proportionality, both parties relied upon R (SC) v Secretary of State for Work and Pensions [2022] AC 223 ("SC"). They each placed emphasis on different passages in

the judgment of Lord Reed who gave the single judgment, with which all of the other six members of the Court agreed. The judgment itself is lengthy and I will avoid quotation. I will summarise those principles which appear to be of particular relevance to the issues before me.

91. By way of introduction, one of the main issues which arose in SC was whether the approach to proportionality under Article 14 set out by the domestic courts, to the effect that the court will respect the policy choice of the executive or the legislature in relation to general measures of economic or social strategy unless it is "manifestly without reasonable foundation", was consistent with the approach of the Strasbourg Court.

92. Having conducted a detailed review of the Strasbourg and domestic law case law between [97]-156], Lord Reed's conclusions were set out at [157]-[185]. Lord Reed concluded that 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: [158] and my italics. That means the judgment of the legislature will "generally be respected" unless it is manifestly without reasonable foundation. That observation was made by reference to the welfare benefits context, but Lord Reed went on to express the point more generally at [161] where he said the judgment of the primary decision-maker will normally be given substantial weight in fields of economic and social policy, national security, penal policy and matters raising sensitive moral or ethical issues.

93. The intensity of review will be influenced by a wide range of factors, depending on the circumstances of the particular case. 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: [158]. But other factors can sometimes lower the intensity of review even where a "suspect ground" is in issue. 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. The standard to be applied is accordingly flexible or nuanced depending on the specific facts, including the subject-matter of the measure challenged.

Parliamentary materials

94. As to the use of Parliamentary materials, in SC Lord Reed reviewed the existing case law between [163]-[185]. Given the range of materials deployed before me and the scope of the arguments made about those materials, I need to identify the relevant principles. I note that at some points in the Claimants' written submissions arguments were made that came close to suggesting a failure of Parliament to address properly specific matters, and thus that these materials did not assist.

95. As to the law, the following principles are relevant. In carrying out an evaluation of Convention compatibility the court must compare the policy objective of the legislation with the policy objective which, under the Convention, might justify a prima facie infringement of the Convention right. When making those two comparisons, the court will look primarily at the legislation, but not exclusively so and may consider Parliamentary material. Also, in relation to the proportionality test, reference can be made to Parliamentary debates and other Parliamentary material.

However, caution needs to be exercised when such materials are considered in judicial proceedings. In particular, it is a cardinal constitutional principle that the will of Parliament is expressed in the language used by it in its enactments. So, the proportionality of legislation is to be judged on that basis. The courts are to have due regard to the legislation as an expression of the will of Parliament.

96. I also need to underline the important principle that the proportionality of a statutory measure is not be determined by the quality of the reasons advanced in support of it in the course of Parliamentary debate. In this regard, claimed lack of cogent justification in the course of Parliamentary debate is not a matter which "counts against" the legislation on issues of proportionality. That is for the reason that the court is called upon to evaluate the proportionality of the legislation, not the adequacy of the minister's exploration of the policy options or of his or her explanations to Parliament.

97. The degree of respect which the courts should show to primary legislation will depend on the circumstances. Among the relevant factors may be the subject-matter of the legislation, and whether it is relatively recent or dates "from an age with different values from the present time": [180]. Another factor which may be relevant is whether Parliament can be taken to have made its own judgment of the issues which are relevant to the court's assessment. If so, the court will be more inclined to accept Parliament's decision, out of respect for democratic decision-making on questions of political controversy. If, on the other hand, there is no indication that the issue was considered by Parliament, then that factor will be absent. However, it is important to underline that that absence will not count against upholding the compatibility of the measure. In short, a consideration of the issue by Parliament may be relevant to the court's assessment but silence on the matter in the materials is a neutral matter.

Arguments

98. The arguments on the justification issue ranged over a wide field. I will provide a broad summary.

99. The Claimants argue that the difference in treatment between the Claimants and (i) the Other School Complainants, and (ii) the FE/HE Complainants is directly discriminatory. As such, in both cases, it is for the Defendants to demonstrate that the difference in treatment is justified. They say the Defendants have failed to do so, and it does not suffice to demonstrate that the discriminatory measure is justified overall. It was forcefully argued by Leading Counsel that in respect of the Other School Complainants, the difference in treatment is on the ground of disability, a particularly "suspect" ground. They rely on R (T) v Secretary of State for Work and Pensions [2022] EWHC 351 (Admin) at [29]. It was said that cogent reasons are required here to explain why disabled pupils cannot claim damages for disability discrimination, whereas pupils who wish to claim sex or race discrimination by their schools can obtain such damages.

100. By reference to the Parliamentary materials (which I will set out below), it was argued that they in no way grapple with the potential significance of damages as a remedy to persons in the Claimants' position. I was referred to the evidence about the practical benefit which compensation would have for the Claimants if it could be awarded. Leading Counsel submitted that the only justification for the difference in treatment

advanced by the Minister to Parliament was that at the time the provision in the Sex Discrimination Act 1975 and the Race Relations Act 1976 was enacted, there was not another forum for redress. But despite the fact that the sex, race and disability provisions in respect of schools were all re-enacted in Part 6 EA 2010, the issue (and the differential treatment of disabled claimants) was not reconsidered. It was also said that the other Parliamentary extracts all concern the benefits said to pertain to the FTT system, rather than to the reason why disabled children were being treated differently to the Other School Complainants.

101. As one would expect, Leading Counsel for the Defendants emphasised the margin of appreciation as described by Lord Reed in SC. As to the legitimate aims the Defendants rely upon the evidence they have submitted including detailed reference to the legislative history which I will address below. Leading Counsel for the Defendants persuasively submitted that those aims reflect the reasons identified to Parliament by Baroness Blackstone, who was the lead Minister in the House of Lords on the Bill that became the 2001 Act. He emphasised in his oral submission that those aims were to set up a system which was centrally focussed on ensuring that swift, practical remedies for dealing with discrimination against disabled pupils at school were available. It was argued that a positive decision was taken by Parliament not to include damages within the wide remedial scheme enacted to the FTT. He underlined the point that damages claims risked undercutting the non-adversarial and informal approach considered most likely to deliver good outcomes for all disabled pupils at school. Leading Counsel argued that this was an area of social policy where more than one reasonable view of how one might structure the system can exist and the underlying aim of the entire regime was to protect children from discrimination on grounds of disability.

Analysis

102. In order to assess the Defendants' arguments on justification and the issue of "fair balance", I need to summarise the historic position prior to the legislation which is challenged. My summary is based on the witness statements and, in particular, my understanding of the exhibits to Ms Bond's witness statement and the legislation before me.

103. The modern law in England and Wales in relation to Special Educational Needs ("SEN") begins with the Education Act 1981. This followed the Warnock Report (published in 1978) which recommended an approach more focused on meeting the individual needs of each child: *Special Educational Needs Report of the Committee of Enquiry into the Education of Handicapped Children and Young People*:

http://www.educationengland.org.uk/documents/warnock/warnock1978.html

104. The Special Educational Needs Tribunal ("SENT") was created by the Education Act 1993. The jurisdiction of the SENT as originally established was solely to hear appeals against various decisions taken by local authorities during the process of assessing and making special educational provision for children with special educational needs. The Special Educational Needs and Disability Act 2001 ("the 2001 Act") amended the Disability Discrimination Act 1995 ("DDA") to make it unlawful

for schools to discriminate against a child for reasons related to their disability. I note that, previously, schools were excluded (section 19(5) DDA) from the duty not to discriminate against disabled persons. The SENT was renamed the Special Educational Needs and Disability Tribunal ("SENDIST") and the DDA was further amended to provide that a claim that a responsible body had discriminated against a child in such a way could be made to the SENDIST.

105. If the SENDIST found that such a claim was well-founded, it had power under section 28I of the DDA to (a) declare that the person had been unlawfully discriminated against and (b) if it so found, to make such order as it considered reasonable in the circumstances. As with paragraph 2 of Schedule 17 to the EA 2000, section 28I of the DDA provided that the power to make such an order could be exercised with a view to obviating or reducing the adverse effect on the person concerned of any matter to which the claim related. But it did not include power to order the payment of any sum by way of compensation.

106. From the coming into force of the 2001 Act in September 2002, therefore, the SENDIST had jurisdiction both to hear appeals in relation to special educational provision relating to local education authority decisions under what was, by then, Part 4 of the Education Act 1996 ("the 1996 Act"), and to determine claims that schools had discriminated against children on the grounds of disability and make an appropriate remedial order.

107. Following the creation of the unified tribunal system under the Tribunals, Courts and Enforcement Act 2007, the jurisdiction of the SENDIST was transferred to the Health, Education and Social Care Chamber of the FTT. Since then, Part 4 of the 1996 Act as it applied to England has been replaced by Part 3 of the Children and Families Act 2014 ("the 2014 Act"), and the statutory basis for making a claim of disability discrimination is now in the EA 2010. The FTT continues to have jurisdiction to hear both SEN appeals (under the 2014 Act) and claims for disability discrimination (under the EA 2010). The powers of the FTT where disability discrimination is found to have occurred are the same as those conferred on the SENDIST by the 2001 Act. I need to turn to passage of the Bill that became that Act in some detail.

The Special Educational Needs and Disability Act 2001 ("the 2001 Act")

108. During the passage of the 2001 Act, the responsible Minister in the House of Lords (where the Bill was considered first), Baroness Blackstone, explained the reasoning behind the provision that claims of disability discrimination in schools should be heard in the SENDIST; and the reasons for not including the awarding of financial compensation as part of its powers. The reasons were the desire to ensure a focus on the child's needs and appropriate educational remedies and that the process should remain informal and non-adversarial. Baroness Blackstone explained as follow in the House of Lords at the Second Reading of the Special Educational Needs and Disability Bill ("the Bill") on 19 December 2000:

> "The SEN and disability tribunal, operating in an informal and non- confrontational manner, will have wide-ranging powers to order LEAs and schools to take certain action as a remedy for discrimination. For example, a school or LEA might be ordered

> to change a policy that prevented visibly impaired pupils from going into a science laboratory and, additionally, ordered to provide extra tuition to enable a child to catch up on things that he or she may have missed due to discrimination. ...Several of my noble friends and the noble Lord, Lord Addington, raised the issue of financial compensation in schools. There have been calls for the SEN tribunal to award that where discrimination takes place. That is not something we intend to do. Disabled children, possibly even more than other children, need the start in life that a high-quality education can give. If, through discrimination, they are prevented from taking part in educational activities, it is vital for their learning and development that the effect of that discrimination be remedied in education terms. That is what really matters. Therefore, we propose that in the Bill the SEN tribunal should have the power to order that an educational remedy be provided. I am pleased that a number of disability organisations accept the importance of finding an e educational remedy, although I know they have concerns about cases where remedies may be somewhat more difficult to identify. We intend that the tribunal should be able to offer an appropriate remedy that offers the pupil educational recompense for the effect of discrimination".

109. In the above statement to the House of Lords, the Minister explicitly addressed the calls from certain Lords that the tribunal be able to award damages where discrimination takes place. Her words speak for themselves as to the rationale for not creating a financial remedy. It is also significant that the Minister highlighted one of the important objectives of the Bill in respect of the SENDIST, which was to keep the tribunal as informal as possible and avoid the increased use of representation. The exclusion of damages as a remedy in the 2001 Act was one of the ways in which to achieve this aim.

110. Matters did not rest there, however. Baroness Blackstone explicitly dealt again with the point at Committee Stage in the House of Lords on 6 February 2001, outlining that the awarding of financial compensation would frustrate the tribunal's status as a relaxed, non-adversarial forum in which disputes could be settled and risk creating a culture of litigation. She explained:

> "The Bill provides a wide right of redress for disabled pupils in school who have experienced discrimination. It will echo that for children with SEN, with an emphasis on remedy by educational means rather than financial compensation. That might involve allowing a pupil to participate in a theatre visit, for example, or to take part in a lesson or other activity from which he or she had been unfairly barred. If the discrimination resulted in the child missing education, a school might be ordered to provide additional tuition to allow them to catch up. The tribunal may require the school to change its policy on bullying in order to meet the needs of disabled pupils. Alternatively, it may order the school to offer the child pastoral

support to come to terms with the effect of the discrimination. All of that should put the child's education back on track, which is what we are concerned about. We are mindful of the reasons for the DRTF's [Disability Rights Task Force] recommendation that the jurisdiction of the SEN tribunal should be extended. The DRTF was impressed by the work of the tribunal in hearing SEN appeals, particularly the less formal nature of the process, which reduces the need for parents to pay for formal legal representation. Allowing for the payment of financial compensation would undermine the ability of the tribunal to be informal and user-friendly, as we want it to be, and to base its decisions on what is best for the individual child in educational terms. It might well create a culture of litigation, resulting in the process becoming more formal, more adversarial and possibly more acrimonious. It would certainly encourage greater use of paid advocates, which we want to avoid. The Committee surely does not want to jeopardise all that is good about the tribunal for the sake of what in many cases would be a very small sum of money. Financial compensation paid to parents of disabled children who have suffered discrimination may soothe feelings, but it misses the point that the child has been denied an opportunity to learn and it takes the focus away from the child's needs. I shall not pretend that financial compensation is a simple issue, though. There are clearly precedents in sex and race discrimination cases, as the noble Earl said. We are proposing financial compensation as a means of redress for cases of disability discrimination in non-school further and higher education settings. However, the sex and race discrimination legislation was introduced 25 years ago, when there was no alternative to redress through the courts. If that legislation was being enacted today, a different forum for redress might be considered appropriate. The fact that there is no financial compensation does not mean that there will be no costs for LEAs and schools that discriminate. If the tribunal orders a remedy, there is likely to be a cost to the school or LEA that has discriminated. However, the money that they spend will go directly towards improving the educational experience of the child. That is the right approach. The same arguments apply in Scotland. Educational remedies are paramount for a disabled child who has suffered discrimination in school. It is important that disabled children in Scotland, England and Wales have the same rights. We have consulted across the whole of England, Wales and Scotland on the Bill. We commissioned the University of Edinburgh to support the consultation exercise in Scotland to ensure proper coverage. We want the same provision across Great Britain because the issue of equal rights is a matter reserved to the UK Parliament. There is no reason to have a different approach in Scotland from that in England and Wales. A disabled child who is discriminated against suffers an educational loss whether he

> lives in Stirling, Sunderland or Swansea. I know that strong views are held on the issue, but, having heard what I have said about the importance of educational remedies, I hope that my noble friend and the noble Earl will not press their amendments".

111. At the Committee Stage in the House of Lords on 6 February 2001 a question was raised as to whether a child in school who has been discriminated against on grounds of disability should be in a different position in respect of compensation when compared with a non-school based child or person who has also been discriminated against. Baroness Blackstone responded as follows:

> "It is rather more difficult to specify precise educational remedies when talking about further and higher education than it is for children in schools. The circumstances are rather different. For those reasons the Government reached the conclusion that it is right with respect to school children to have a clear educational remedy to support that child's educational future. However, if a university has been found to discriminate and it has already damaged the opportunities of a young person in relation to his future career, a slightly different approach is right. Indeed, that is exactly what was recommended by the DRTF".

112. I note that the DRTF's recommendation regarding further and higher education students referred to by Baroness Blackstone's was that: "*The Department for Education and Employment should consult with interested parties on improved rights of redress for disabled students [in further and higher education] in relation to complaints of discrimination, although ultimately the new rights proposed should be exercisable through the courts or tribunals*". It is clear that the decision to provide compensation for disabled students who have been discriminated against in further and higher education settings is in line with this recommendation, through offering a position that more specifically reflects the different circumstances of disabled students and is exercisable by the County Court.

113. At Report Stage in the House of Lords on 20 February 2001, Baroness Blackstone stated:

> "... If financial compensation were available in addition to other remedies, the tendency would be to focus on the financial rather than the educational remedy and make less likely any positive change in the child's educational experience. ...We want to ensure that that relative informality and user friendliness of the tribunal is preserved so that parents will feel confident that they can bring disability cases without incurring great expense and that they will not be disadvantaged by not having any legal or other representation. We must remember that the DRTF recommended that those cases should be heard by a reconstituted tribunal. Allowing the tribunal to award financial compensation would, I am afraid, in spite of what my noble friend has just said, undermine those positive features of

> which the DRTF approved and make it less likely that children will receive the educational remedy which is so crucial to shaping their future prospects. There will be very few cases where no educational remedy for the individual child is possible. But even in those cases, the tribunal can direct an apology and a change to policies, practices and procedures to make sure that the school or LEA does not discriminate in that way again.... I find it hard to accept that money could ever properly compensate for hurt feelings. Surely it is better to focus on a change in the discriminatory behaviour. A financial award would not remove the fact that a child had suffered discrimination. Making a payment does not require the discriminator to change his or her behaviour, or even to say, "I'm sorry". However, the educational remedy will ensure that a real difference is made to the quality of the child's educational experience. From the discriminator's point of view, it may be easier to give money to get rid of a problem than tackle its root causes; for example, it would be easier for a school to pay a few hundred pounds' compensation to a disabled child than to arrange additional "catch-up" tuition for a child who has been unfairly excluded from lessons".

114. Finally, at Third Reading of the Bill in the House of Lords on 1 March 2001 Baroness Blackstone explained:

> "Where discrimination occurs in a school setting, we agree that there must be an appropriate remedy which takes account of the discriminatory behaviour. But there is another consideration—how best to ensure that people will seek that remedy. The importance of school education is such that the forum in which the remedy is to be sought must be one in which parents feel empowered to exercise their rights to challenge discrimination. Discrimination is destructive whenever it happens, but the repercussions of discrimination suffered whilst at school may last a lifetime. We must ensure that parents feel able to seek a remedy for their child. That is a necessary precursor to obtaining the remedy. As I have said before, we want to make sure that the informality and user-friendliness of the tribunal is preserved. Giving the tribunal the power to award any kind of financial compensation would threaten to overturn the concept of the tribunal being user-friendly and being informal. Educational remedies will ensure that the money spent by LEAs and schools will go to benefit the child in the best possible way by directly improving his or her educational experience. There will be very few cases where no educational remedy for the individual child is possible. But even in these cases, the tribunal can acknowledge their experience by making a declaration that unlawful discrimination has occurred—I hope that responds to the noble Earl—and direct an apology and a change to policies, practices and procedures to ensure that the

> school or the LEA does not discriminate in that way again. Children who have been discriminated against have said to me and to others that they want two things: first, an apology, and the Bill allows for that; and, secondly, they are concerned that the discrimination should not happen again. The Bill also allows for that".

115. I note that these points were reflected in The Special Educational Needs and Disability Bill Research Paper (01/29 – 16 March 2001) (House of Commons Library) which was prepared prior to the Second Reading of the Bill in the House of Commons. This paper summarised the position: "There were unsuccessful attempts at all stages in the Lords to amend the Clause on two issues: to allow the child to take the claim to the Tribunal and to allow the Tribunal to award financial compensation". On page 70 of the research paper the debates referred to above were summarised as follows:

> "The issue of financial compensation ran from Second Reading to Report. Lord Ashley, Lord Morris and Lord Addington referred to it on Second Reading. Lord Morris said that many of the disability organisations wanted awards of damages, while Lord Ashley felt that financial sanctions had a deterrent effect. He moved an amendment in Committee, supported by Baroness Wilkins and Lord Addington, to the effect that compensation should exist in addition to educational remedies. Baroness Blackstone accepted that there were precedents in sex and race discrimination legislation but felt that the introduction of such a remedy into the working of the tribunal would undermine its ability to be informal and user-friendly and might create a culture of litigation. Similar amendments were moved on Report by Lord Addington and Baroness Wilkins on behalf of Lord Ashley, who limited the payment of compensation to "exceptional circumstances". They were again rejected, as were their amendments on Third Reading. This material shows that the policy intention, which was fully explained and debated in the House of Lords as part of consideration of the Bill, was to ensure a focus on the child's needs and avoid the risk of creating a culture of litigation in a context specifically dedicated to achieving appropriate educational remedies".

The Equality Act 2010 (EA 2010)

116. It is common ground that the EA 2010 was a consolidating Act, bringing together (and widening to other forms of discrimination) the provisions of the Sex Discrimination Act 1975, the Race Relations Act 1976, the DDA and other discrimination legislation. The Explanatory Notes to the 2010 Act explain that the provisions of Schedule 17 to the 2010 Act were explicitly designed to replicate the effect of the provisions of the DDA (as amended by the 2001 Act). Although the architecture of the disability discrimination duties in the EA 2010 is different from that found in the DDA, it seems that most of the duties have broadly similar practical implications for schools.

117. All schools in England, irrespective of how they are funded or managed, have obligations under the EA 2010. The definition of disability in the EA 2010 is the same as the definition in the DDA. Section 20 of the EA 2010 sets out the reasonable adjustments duty, which includes three key requirements that apply to most providers of services. To make sure that disabled people are not at a substantial disadvantage, the requirements are: to make adjustments to any provision, criterion, or practice, to ensure that disabled people (in this case, pupils) are not placed at a substantial disadvantage compared to non-disabled people; to make alterations to physical features; and to provide auxiliary aids and services. The second and third requirements are then specifically adapted to the needs of disabled pupils in schools elsewhere in the EA 2010. So, the second requirement, to make alterations to physical features, does not apply to schools. Instead, under Schedule 10 to the 2010 Act, schools are under a duty to plan to increase accessibility, including the accessibility of the physical environment. The third requirement, to provide auxiliary aids and services, applies to schools under Schedule 13 to the 2010 Act but did not apply to them under the DDA. Under the EA 2010 there is no justification for failing to make reasonable adjustments and schools, along with other service providers, are not permitted to charge for making a reasonable adjustment

FTT procedures

118. As was the case with the SENT and SENDIST, the FTT's service (for both special educational needs appeals and disability discrimination claims) is free: unlike going to court, there are no fees involved. A contribution may also be made towards any out-of-pocket expenses incurred from attending the tribunal hearing, such as travel costs. I have noted the evidence of the increasing prevalence of lawyers in the FTT, but I accept that it seeks to be a forum welcoming to those without representation.

119. The procedure in the FTT is more inquisitorial than adversarial in terms of presenting and discussing evidence. This is a very different process to litigation in the County Court. The FTT's approach is less likely to undermine good relations between the parties than a more adversarial procedure. I note that there is further flexibility in the FTT's procedure in terms of the way decisions are reached and hearings conducted.

120. It is significant that if a disability discrimination claim is upheld, the FTT may order a wide range of remedies with the emphasis on redressing the wrong through educational means, rather than financial compensation. The aim is to put the child's education "back on track". The FTT may, for example, order an apology, or require a school to reinstate a child who has been excluded, or make any of the following orders, given as examples in the SEND4 guidance before me: training of school staff; drawing up new guidance for staff; changes to school policies; extra tuition, to make up for lost learning; changing the location of lessons or activities (but not changing physical premises); admission of thechild to an independent school if the school had previously refused; a written apology to the child; trips or other opportunities to make up for activities that the child may have missed; and in cases of permanent exclusion, an order reinstating the child at the school. These are not matters which could be the subject of an order in County Court proceedings.

Justification: overall conclusions

121. I will set out my conclusions before addressing matters of detail. I am satisfied that the Defendants have discharged the burden of justifying the alleged discriminatory treatment. I approach that issue assuming in the Claimants' favour that this is a "suspect" ground case in relation to both the Other School Complainants and FE/HE Complainants. As such, cogent justification for the discrimination must be provided. In my judgment, the evidence shows that a considered primary legislative policy decision was taken when the right to bring a claim for disability discrimination in the education context was introduced by the 2001 Act. That decision was that (a) claims alleging that the responsible body of a school had discriminated against a pupil should be brought in what was then the Special Educational Needs and Disability Tribunal, the forerunner to the FTT; and (b) the remedies available should be wider than those available in a court but should not include financial compensation. That position has been continued by Parliament in the 2010 Act. It is therefore wrong to assert that consideration was not given to whether this was in the best interests of the children concerned. In my judgment this was at the heart of the consideration given by Parliament when the system was first introduced in 2001. It was the motivating feature of the design of the system as the Parliamentary material shows.

122. As part and parcel of this system, Parliament expressly considered the issue of financial remedies but for the reasons clearly explained, a conscious decision was made as part of the overall structure to exclude financial remedies. That decision was made with knowledge of the comparison with race and sex discrimination remedies available to pupils and of the difference of treatment as between disabled school pupils and those in FE or HE institutions. I accept that a different package might have been created but a political decision (with rational reasons supporting it) appears on the evidence before me. The evidence show that there were 4 broad legitimate legislative aims. I consider that, bearing in mind the caution to be exercised in the field in issue in this case and the evidence in the Parliamentary materials, the system adopted (specifically the decision to exclude financial remedies) was rationally connected to achieving those aims and was a proportionate way to achieve these aims; and met the "fair balance" requirement. Overall, I consider the facts and context require the court to adopt a less intensive standard of review, applying the principles I have summarised above. That requires the court to defer to the political choices made.

123. I will now set out my reasons for this overall conclusion. I will begin with the legitimate aims.

Legitimate aims

(i) Effective educational remedies that prioritise good outcomes for disabled pupils

124. As I have set out above, in order to address disability discrimination in schools effectively, the FTT is able to award a wide range of remedies beyond those available in the County Court. This is different from disability discrimination in other sectors such as employment cases which are heard by an Employment Tribunal. In these cases, under section 124 of the 2010 Act (as amended by section 2 of the Deregulation Act 2015) the Employment Tribunal can make a recommendation, but not an order, "for the purpose of obviating or reducing the adverse effect on the claimant of any matter to which the proceedings relate". The Defendants were entitled as a matter of assessment to form the judgment that that was the right approach. It aims to ensure the

child gets a bespoke remedy that puts their education back on track, which meets the aim of achieving the best outcomes for the child. I accept that this also helps to foster an environment of cooperation between parents and schools. Furthermore, as stated by Baroness Blackstone at Report Stage, it may be easier for a school to "*give money to get rid of a problem than tackle its root causes*" and put the child's education back on track.

(ii) Benefits to the wider group of disabled pupils in the school and its potential pupils

125. Under the EA 2010, disability is treated differently from other protected characteristics (where the focus is on equal treatment) in that schools often must treat disabled pupils more favourably. Schools are required to make reasonable adjustments to ensure disabled pupils are not at a substantial disadvantage. For this reason, it is right and reasonable that the FTT should align with this principle and prioritise educational remedies that require schools to meet their additional duties for disabled pupils, benefitting the individual child by ensuring their education remains on track and also benefitting other disabled pupils (and potential pupils) at the school by improving practice – rather than focusing on financial compensation for individual families. While this may not directly benefit a child that has left the school, the intention is to facilitate systemic change that will benefit other disabled pupils (or potential pupils) at the school.

(iii) Maximum public value from resources

126. I also accept that the policy is intended to ensure public money is prioritised on remedies in school that promote the educational outcomes of all current and future disabled pupils at a school (such as additional tuition or changes to policies), rather than providing a cash sum directly to individual families. The focus is on achieving the best possible impact, using the resources available, on the needs of disabled pupils and potential pupils and improving the level of support and interventions that can be offered to them. I have before me evidence on cost modelling (and responsive evidence from the Claimants with a complaint about the failure to analyse existing costs risk from other forms of discrimination claims). Neither party developed oral submissions on this evidence. I do not in any event find this evidence of assistance. My concern is whether the aim of obtaining maximum value from public resources is at the level of principle a rational aim furthered by the policy: was it a rational predictive choice? I find it clearly was. It is not the role of this court to conduct its own balance sheet analysis of how far or effectively this aim of the policy achieves maximum value in pounds and pence, when compared with a regime which allows damages to be awarded. Rather, I need to be satisfied that it is a legitimate aim and that there is a rational connection between the measure complained of and achievement of that aim.

(iv) The system remains informal / non-adversarial

127. It is clear that the FTT is set up to be accessible, so that lay persons can seek redress without the need for legal representation. I will not repeat the points about its inquisitorial processes, which require the FTT to be actively involved in identifying the issues and in obtaining the relevant evidence. It is a rational approach to conclude that introducing financial compensation (and the associated complexities of assessing

the damage suffered by reference to a monetary amount) risks undermining the non-adversarial nature of the FTT. I have not overlooked the fact that lawyers do regularly appear, but some children/parents do not have lawyers and are able to take advantage of the non-adversarial approach. I agree that the introduction of financial compensation is likely to raise the stakes and increase the need for legally qualified persons to represent both sides in more cases. I also agree that allowing damages will drive an increased culture of litigation, resulting in the process becoming more formal and more adversarial – neither of which would advance the aim of the FTT which is to base its decisions on what is best for the individual child in educational terms. By introducing compensation, the focus would be taken away from being squarely on the child's needs and the best means of getting their education back on track – also undermining the potential benefits of these changes for other disabled pupils, and potential pupils, of the school.

Conclusions on justification

128. Standing back and applying the principles in SC, the Defendants are right in my judgment to submit that on balance, the impact that awarding compensation would have on the nature of proceedings in the FTT would outweigh any benefit of making compensation available. The evidence before me and in particular Parliament's detailed consideration of the issues before enacting the 2001 Act, demonstrate that the issues involve judgements that are paradigmatically legislative. Judgements needed to be, and were, made about social issues, about resources, about the priorities the scheme should have, about how most effectively to achieve those priorities, and centrally about how to ensure that the best and speediest outcomes were delivered for disabled children in education. It was a social policy decision which the court will respect in accordance with the flexible standard of review I have described above.

129. In these circumstances, any difference in treatment falling within the scope of Article 14 is justified. As to the Claimants' contention that these factors do not apply "uniquely" to disabled children in schools, that is not the relevant test. The second question in relation to proportionality is whether the reasons for the difference in treatment are rationally connected to the aim sought to be achieved, not whether they are the only possible solution or whether they might conceivably apply elsewhere. There was plainly a rational connection.

Fair Balance

130. In relation to fair balance, the Claimants' case depends on their framing of the issue as simply their being excluded from claiming damages, rather than the balanced package of procedural and substantive benefits that are in fact provided. Once that balance is seen, in my judgment their case falls away and the Defendants have discharged the burden.

131. Finally, there is no question here of an "*affront to dignity*", as is suggested by the Claimants in their skeleton. This is, rather, a case in which careful consideration has been given to the best way to ensure that claims of disability discrimination in schools can be brought effectively and effective remedies are provided to improve educational practice and provision. That is a matter of social policy system design on which views may legitimately differ. I noted above that the First Defendant is currently engaged in a process of seeking up to date views from a range of stakeholders on precisely that

issue. That is not a legal answer to the claims but that is the forum for an examination of the alternative remedial regimes.

VIII. Conclusion

132. The claim is dismissed.