*KM v First-tier Tribunal (Social Entitlement Chamber) and Criminal Injuries Compensation Authority and Secretary of State for Justice*
[2023] UKUT 239 (AAC)

**IN THE UPPER TRIBUNAL** **Case No. UA-2022-000494-CIC**

**ADMINISTRATIVE APPEALS CHAMBER**

**Between:**

**KM**

Applicant

- v –

**First-tier Tribunal (Social Entitlement Chamber)**

Respondent

and

**(1) Criminal Injuries Compensation Authority**
**(2) Secretary of State for Justice**

Interested Parties

**Before: Upper Tribunal Judge Edell Fitzpatrick**

Hearing date: 12th July 2023
Hearing venue: Field House, Breams Buildings, London EC4

**Representation:**
Applicant: Shu Shin Luh of counsel, instructed by Centre for Women's Justice
Respondent: Not represented
Interested Parties: Robert Moretto of counsel, instructed by Government Legal Department

**DECISION**

**The application for judicial review is dismissed.**

**Reasons for decision**.

The application for judicial review.

1. This is an application to the Upper Tribunal for judicial review of the

decision of the First tier Tribunal (FtT) dated 14th December 2021. In these proceedings, the Applicant was the appellant before the FtT, the FtT is the Respondent and the Criminal Injury Compensation Authority (CICA) and the Secretary of State for Justice are the Interested Parties. The FtT dismissed the Applicant's appeal against CICA's decision to refuse her application for compensation in respect of a sexual offence committed against her when she was a child. This was because, at the time she applied for compensation, she had an unspent conviction.

2. References in what follows to

a. "**CICS**"is to the Criminal Injuries Compensation Scheme 2012,
b. "**CICA"** is to the Criminal Injuries Compensation Authority,
c. "**ECHR and the Convention**" are to the European Convention on Human Rights, and
d. "**articles**" and "**protocols**" are to articles and protocols of the Convention.
e. **"CSA"** is to child sexual abuse.
f. **"Exclusionary Rule"** refers to paragraph 26 and Annex D of the Criminal Injuries Compensation Scheme 2012 which excludes victims of crimes of violence with relevant unspent convictions from receiving an award of compensation for their criminal injuries.
g. **"IPs"** is to Interested Parties

3. The FtT considered the decision of the Supreme Court in *A and B v CICA* [2021] UKSC 27 was determinative of the issues in the appeal and binding on them. The FtT therefore considered they could reach no decision other than to dismiss the Applicant's appeal, applying paragraph 26 and Annex D of the scheme (the exclusionary rule).

4. The FtT's decision was made subsequent to a telephone hearing on 14th December 2021 where the Applicant participated in the hearing and both the applicant and CICA were represented by counsel. The FtT produced a decision notice dated 14th December 2021 and provided written reasons on 3rd February 2022. The applicant applied to the Upper Tribunal for permission to bring judicial review proceedings on 13th March 2022. On 23rd August 2022, Upper Tribunal Judge Jacobs granted permission to bring judicial review proceedings of the FtT's decision.

**Grounds for Judicial Review.**

5. The Applicant advanced two grounds for Judicial Review submitting that the FtT decision was made in error of law namely;

a. The FtT erred in finding that the exclusionary rule, as applied to victims of child sexual abuse (CSA), was justified and did not breach Article 14 ECHR read with the first protocol to Article 1 thereto ('A1P1');

b. The FtT erred in finding that as there is no requirement that victims of child sexual abuse with unspent convictions be treated differently to victims of other types of crimes with unspent convictions, the exclusionary rule was justified and did not breach Article 14 read with Articles 3 and / or 8.

**The hearing of the judicial review application.**

6. I held an oral hearing of the judicial review application at Field House, Breams buildings, London on 12th July 2023. The arguments in the application were made both orally at the hearing and by way of written submissions (including skeleton arguments and a detailed grounds of resistance from the Secretary of State). The respondent, as is customary, did not participate. The applicant observed by way of CVP as she did not wish to attend in person and was represented by Ms Luh of counsel and the interested parties were represented by Mr Moretto, instructed by Government Legal Services. I express my thanks to both counsel for their comprehensive oral and written arguments.

**Factual background.**

7. No one reading the papers in this case could fail to empathise with the applicant, given the difficulties she has endured. She became a victim of child sexual abuse, aged only 8 years. This was perpetrated in approximately 1990 by a teacher at the boarding school she attended. Despite reporting the incident shortly afterwards, no prosecution was brought at the time. The perpetrator was eventually convicted of the sexual assault against her in July 2017, some 27 years after the offence was committed. In respect of the offence against the Applicant the perpetrator received a 3-year sentence, a Sexual Harm Prevention Order, and a requirement to be included on the Sex Offenders' Register for 10 years. It has since been found that he went on to commit further sexual offences against other children between the time of his sexual assault of the applicant and his eventual conviction for the offence.

8. The Applicant pleaded guilty to the offence of using threatening and abusive words or behaviour, causing harassment, alarm or distress on 21st March 2017. She was convicted and sentenced to a community order which did not expire until March 2019. She made an application for compensation in respect of the CSA on 3rd October 2017. Her application was refused on 29th November 2017.This was maintained on review on 30th January 2018.

**The Law**

The Upper Tribunal's Jurisdiction.

9. Section 15(4) of the Tribunals, Courts and Enforcement Act 2007 (the 2007 Act) provides that in deciding whether to grant relief the Upper Tribunal

must apply the principles that the High Court would apply in deciding to grant that relief on an application for judicial review. To succeed in the claim the Applicant must show that the Respondent, the FtT, has made a *material error of law.*

**The 2012 Criminal Injuries Compensation scheme and the exclusionary rule.**

10. The scheme under challenge in these proceedings was introduced on 13 November 2012 and came into force on 27 November 2012.

11. Paragraph 26 of the Scheme provides:

"*Annex D sets out the circumstances in which an award under this Scheme will be withheld or reduced because the applicant to whom an award would otherwise be made has unspent convictions.*"

12. Annex D provides:

*1. This Annex sets out the circumstances in which an award under this Scheme will be withheld or reduced because the applicant to whom an award would otherwise be made has unspent convictions.*

*2. Paragraphs 3 to 6 do not apply to a spent conviction. "Conviction", "service disciplinary proceedings", and "sentence" have the same meaning as under the Rehabilitation of Offenders Act 1974, and whether a conviction is spent, or a sentence is excluded from rehabilitation, will be determined in accordance with that Act.*

*3. An award will not be made to an applicant who on the date of their application has a conviction for an offence which resulted in:*

*(a) a sentence excluded from rehabilitation;*
*(b) a custodial sentence;*
*(c) a sentence of service detention;*
*(d) removal from Her Majesty's service;*
*(e) a community order;*
*(f) a youth rehabilitation order; or*
*(g) a sentence equivalent to a sentence under sub-paragraphs (a) to (f) imposed under the law of Northern Ireland or a member state of the European Union, or such a sentence properly imposed in a country outside the European Union.*

4*. An award will be withheld or reduced where, on the date of their application, the applicant has a conviction for an offence in respect of which a sentence other than a sentence specified in paragraph 3 was imposed unless there are exceptional reasons not to withhold or reduce it.*

*5. Paragraph 4 does not apply to a conviction for which the only penalty imposed was one or more of an endorsement penalty points or a fine under Schedule 2 to the Road Traffic Offenders Act 1988,*

> *…*
> *7. Paragraphs 2 to 6 also apply in relation to an applicant who after the date of application but before the date of its final determination is convicted of an offence which is not immediately spent.*

**The Decision of the Supreme Court in A & B v CICA [2021] UKSC 27**

13. The relevance and applicability of *A&B v CICA* [2021] UKSC 27 is a key issue in these proceedings. The Supreme Court in that case considered whether the exclusion of victims of human trafficking from compensation under the Criminal Injuries Compensation Scheme by virtue of the exclusionary rule due to the fact they had unspent convictions was unjustifiably discriminatory, in breach of article 14 taken with article 4 of the European Convention on Human Rights.

14. The claims were unanimously dismissed by the Supreme Court who found, inter alia, Article 14 of the ECHR prohibits discrimination only in the context of rights and freedoms set out in the ECHR and approved the four-stage test set out by Lady Hale in *R (DA) v Secretary of State for Work and Pensions (Shelter Children's Legal Services intervening*) [2019] 1 WLR 3289 (para 136). The four questions which arise in connection with a complaint of discrimination under article 14 ECHR are;

> (i) Does the subject matter of the complaint fall within the ambit of one of the substantive convention rights?
> (ii) Does the ground upon which the complainants have been treated differently from others constitute a "status"?
> (iii) Have they been treated differently from other people not sharing that status who are similarly situated or, alternatively have they been treated in the same way as other people not sharing that status whose situation is relevantly different from theirs?
> (iv) Does that difference or similarity in treatment have an objective and reasonable justification, in other words, does it pursue a legitimate aim and do the means employed bear a "reasonable relationship of proportionality" to the aims sought to be realised?

15. Ultimately the Court decided that there was a difference in treatment between victims of trafficking who have relevant unspent convictions and who are therefore denied compensation, and victims of trafficking who do not have such convictions and are therefore not denied compensation. Nonetheless, the Court concluded this differential treatment was justified in terms of pursuing a legitimate objective and proportionate, being no more intrusive than it needed to be and striking a fair balance between competing interests.

**The parties arguments in summary**

16. The Applicant in this judicial review seeks to distinguish her case from *A&B* agreeing that while the judgment provides an important context it is not a complete answer to her challenge. She submits the FtT was wrong to simply "read across" the conclusion in *A&B.* The Applicant argues in circumstances where the *A&B* judgment is not determinative of the question of discrimination for a subgroup of the victims of trafficking (the nexus offenders), it cannot be determinative of the same for victims of CSA. She contends there remains an open question as to whether victims of CSA should be considered "blameless victims" generally and that *A&B* does not provide the answer to this question. She argues the decision in A&B did not involve consideration of discrimination in the context of Articles 3 and 8 or A1P1 but focused, in the context of victims of trafficking, on Article 4.

17. The Secretary of State, on behalf of CICA, submits there is no basis on which it can be argued that the FtT erred in law in reaching its decision in light of the Supreme Court's judgment which is binding on it.

**The FtT decision**

18. The FtT provided a comprehensive decision in which they considered the 2012 Scheme, the parties submissions, A*&B* and the 4 stage test in relation to Article 14 as set out by Lady Hale in R *(DA) v Secretary of State for Work and Pensions (Shelter Children's Legal Services intervening*) [2019] 1 WLR 3289 (para 136) and referred to above.

19. The FtT ultimately found there was no breach of Article 14 taken together with either A1P1 or articles 3 and/or 8. It considered the decision of the Supreme Court in *A&B* was determinative of the issues they had to consider and that the Applicant's case could not be distinguished from *A&B*. As such, the decision of the Supreme Court was binding on the FtT and it could reach no decision other than to dismiss the appeal, applying paragraph 26 and Annex D of the 2012 scheme.

20. The FtT 's key findings were;

1. Ambit
A right to compensation under the Scheme falls within A1P1(para 47). This was common ground between the parties and was established in *JT v CICA* [2019] 1 WLR 1313 which was binding on the FtT. The FtT also found a right to compensation under the scheme to victims of CSA fell within the ambit of Articles 3 and 8 of ECHR (para 51).

2. Status
The FtT found being a person with unspent convictions constituted an "other status" (para 54) and being a victim of CSA was also an "other status" for the purposes of Article 14 (para 57).

3. Difference in treatment.
Victims of CSA with unspent convictions are not entitled to preferential treatment over victims of other types of crime with unspent convictions (paras 59,60,63).This relates to ground two. The FtT agrees the Scheme treats persons with unspent convictions differently to those without unspent convictions but this will only amount to unlawful discrimination if it cannot be justified (para 64) .

4. Justification
The FtT found the test to be applied was whether or not the difference in treatment was manifestly without reasonable foundation (para 65). The FtT also concluded the operation of the exclusionary rule in the Applicant's case was justified (para 72).

**Discussion and analysis of the FtT decision**

21. I consider below whether the FtT erred in law in making its decision based upon the two grounds for judicial review. I begin by considering the four-stage test in relation to whether there has been unlawful discrimination for the purposes of Article 14 ECHR as it applies to A1P1 in ground one or Articles 3 and 8 in ground two.

**First stage: Ambit**
22. The parties agreed a right to compensation under the Scheme falls within the Ambit of A1P1 as established in *JT v CICA* [2019] 1 WLR 1313. The FtT agreed. A1P1 provides;

***Protocol 1, Article 1: Protection of property***
*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.*

23. I consider the FtT were correct to do so. The FtT went on to consider whether a right to compensation under the scheme fell within the ambit of Article 3 and Article 8 of ECHR.

***ARTICLE 3***
***Prohibition of torture***
*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*

***ARTICLE 8***
***Right to respect for private and family life***

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 well-being 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.*

24. The FtT noted the law had moved on since *Stuart v UK* (Application No 41903/98, 6 July 1999) and more recent decisions have given a wider interpretation to the meaning of ambit. The FtT found that a claim to compensation under the 2012 Scheme fell within the ambit of articles 3 and 8.

25. I consider the FtT was correct in this, given the recent more "relaxed" approach to this issue taken by ECtHR as noted by the Supreme Court in *A&B* [38].

**Second stage: Status**

26. Article 14 ECHR provides 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".*

27. As the treatment of which the Applicant complains does not fall within any of the specific grounds listed in Article 14, she must demonstrate she enjoys some "other status".

28. The applicant's arguments regarding "other status" before the FtT were twofold. First as a person with an unspent conviction or, second, as a victim of CSA

29. The FtT accepted being a person with unspent conviction(s) was an "other status" for the purposes of Article 14, as this was accepted in the context of victims of trafficking having unspent convictions by the Supreme Court in *A&B* at [46] and [67] and was not disputed by the parties.

30. CICA had disputed being a victim of CSA constituted "other status "as it was not a personal characteristic, relying on "what had been done to a person rather than what a person was". However the FtT noted the "more generous " approach to status referred to by the Supreme Court in *A&B* notably in the decision of the ECtHR in *Clift v United Kingdom* (Application No 7205/07, 13 July 2010, para 55) and were not persuaded by CICA's argument that the phrase used by Lord Lloyd- Jones in *A&B* "*being a victim of trafficking*

*….is plainly a personal identifiable characteristic to which many important legal consequences attach*"[46] precluded a victim of CSA having "other status". The FtT did not accept it was a necessary condition of having an other status that important legal consequences must flow from being a victim of that particular type of crime (paragraph 57). The FtT found being a victim of CSA was an "other status" for the purposes of Article 14. I consider the view taken by the FtT on this point is correct.

**Third stage: Difference in treatment**

31. The applicant submitted there had been a difference in her treatment based on two alternative arguments before the FtT depending on which status was relied on.

32. Firstly regarding "other status" as a victim of CSA she argued the blanket exclusionary rule was discriminatory on the basis it fails to treat victims of CSA differently from victims of other types of crime with unspent convictions. She submitted this is contrary to Articles 3 and 8 of ECHR. This argument is advanced in ground two.

33. The FtT concluded victims of CSA were not entitled to preferential treatment (paragraph 60) in light of the Supreme Court's decision in *A&B* in particular [71] where Lord Lloyd-Jones states;
*"I readily accept that people trafficking is a particularly grave crime and that its victims, who are often vulnerable, can suffer grievously. However, many other crimes are no less serious, their victims equally vulnerable and the consequences they suffer at least as grievous. I am unable to identify any feature of the offence of people trafficking which could require preferential treatment to be accorded in the present context to victims of trafficking over victims of other serious crime."*

34. The Supreme Court avoided the concept of a "hierarchy" of victims and the FtT, correctly in my view, concluded that this argument by the applicant must fail.

**The "nexus offender "argument**

35. This argument relates to the second limb of the test for difference in treatment ie failure to treat differently persons whose situations are significantly different. It focuses on the comments the Supreme Court made in relation to nexus offenders in *A & B* in particular at paragraph 75;
*"For present purposes, I am willing to assume that it is arguable that victims of people trafficking who have committed criminal offences in connection with their being trafficked - who might be termed "nexus offenders" - are entitled to be treated differently in certain respects from other offenders."*

36. There was no nexus between the offending by the appellants in *A&B* (for which they held unspent convictions) and the people trafficking offences

of which they were the victim (in respect of which they made the compensation claim). The appellants did not come within the nexus offender category as the offences for which they held unspent convictions occurred some time prior to the trafficking (and in another jurisdiction).

37. The Applicant submits as the decision in *A&B* is not determinative of the question of discrimination for a sub group of victims of trafficking (the nexus offenders), it could not be determinative of the same for victims of CSA. The appellant argues it remains an open question as to whether victims of CSA should be considered "blameless victims" generally and that *A&B* does not provide the answer to this question.

**Does the applicant come within the category of " nexus offender"?**

38. The FtT ultimately found it had not been established either way whether there was a direct causal link between the applicant's status as a victim and her offending or whether her offending was wholly unrelated to her status as a victim. As such the FtT did not find the applicant was a "nexus offender". As the Applicant did not fall within this category the issue on differential treatment in this context did not arise.

39. This was a factual finding or at least an evaluative judgement. The argument was made before the FtT who had the benefit of hearing from the Applicant and her legal representative and had sight of a significant portion of the applicant's medical records. Counsel for the Applicant submitted it may have been the case that the CSA the applicant suffered as a child caused or made her more likely to offend as an adult.

40. This point was also argued before me. Counsel for the applicant referred to, inter alia, evidence contained in the REA (The *Impact of Child Sexual Abuse Rapid Evidence Assessment,* July 2017) which found studies showing that victims and survivors were found to be 1.4 times more likely to have contact with the police and almost five times more likely to be charged with a criminal offence than those who have not experienced child sexual abuse. I note this evidence refers to the victims of CSA in general. Counsel also referred to the applicant's own written evidence of the impact this event had had on her and referred to mental health difficulties which were documented in her medical records.

41. Counsel for the Secretary of State argued the vast majority of CSA victims do not go on to commit further offences. It was also argued there was no evidence specifically linking the particular offence committed in 2017 to the assault in 1990 but that there were a number of other potential factors, unfortunately, including ,inter alia, violence in a domestic context which may have explained any existing condition aside from the assault in 1990.He argued the appellant had not established she was a "nexus offender" and the FtT were correct in relation to their findings on this issue.

42. I am satisfied there was no error of law in the FtT's conclusion on this point. The threshold for interfering with the FtT's factual findings or evaluative judgements is high. I would have to conclude that it was a finding or judgment that no reasonable tribunal properly instructed could have come to on the evidence available (see for example Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 or Edwards (Inspector of Taxes) v Bairstow [1956] AC 14) . Having considered this issue and the evidence in relation to it carefully, I conclude that the FtT was entitled, on the evidence, to conclude that the applicant had not established either way whether there was a direct causal link between her status as a victim and her offending or that her offending was wholly unrelated to her status as a victim. As such she had not established, she came within the category of nexus offenders.

43. The FtT also agreed with the reasoning of the Supreme Court (paragraph 75) that nexus offenders cannot provide a basis for requiring differential treatment for ***all victims*** (of trafficking) ***who have committed offences*** including non-nexus offenders. The FtT considered the same reasoning applied to victims of CSA. I consider they were correct to do so.

**The blameless victim.**

44. The Applicant also contends that it remains an open question as to whether victims of CSA should be considered "blameless victims" generally and that *A & B* does not provide the answer to this question. Again, it is submitted that this might give rise to a difference in treatment (or a failure to treat the Applicant differently in the context of the second limb of stage 3 (see paragraph 14 above) between the Applicant and other (blameworthy) victims which amounts to unlawful discrimination for the purposes of Article 14 of the ECHR.

45. The Applicant's counsel placed reliance at the FtT and before me on the proposition that she was a blameless victim in the context of CSA. Counsel for the Applicant relied on the concept of the "blameless victim" in the context of the Criminal Injuries Compensation Scheme ('CICS'). This is referred to at para 207 of the Consultation Document Getting it right for victims and witnesses (2012).

> "The Scheme is a taxpayer funded expression of public sympathy and it is reasonable there should be strict criteria around who is deemed "blameless" for the purpose of determining who should receive a share of its limited funds. We consider that, in principle, *awards should only be made to those who have themselves obeyed the law and not cost society money through their offending behaviour".*

46. Lord Lloyd-Jones refers specifically to blameless victims at paragraph 70 of *A&B* where it is noted that CICS is a scheme which is intended to aid blameless victims of crime in their recovery. The appellants in that case

argued that there was a need to afford more generous treatment to victims of trafficking in relation to the exclusionary rule because of their status and vulnerability. It was not accepted by the Supreme Court that victims of trafficking generally should be given preferential treatment over other victims [71].In the circumstances of this case, where it has not been accepted the applicant was a nexus offender, I do not consider this affords a basis on which to distinguish the decision of the Supreme Court in *A&B.*

47. The FtT did not find there was a direct causal link between the applicant's status as a victim and her offending and she was not therefore a nexus offender. I have found there to be no error of law in that finding for the reasons set out above.

48. For the same reasons, the argument in relation the Applicant being a blameless victim must fail because it does not arise on the facts. The Applicant had an unspent conviction at the time of her application for compensation to the Scheme which the FtT did not consider she had established was directly causally linked to her status as a victim of CSA. As such, given she had engaged with the criminal justice system as a result of her own offending, she could not come within the definition of "blameless victim" as referred to at paragraph 45 above. The FtT was entitled to conclude that it was unable to find that the Applicant committed the offence which invoked the exclusionary rule as a result of or *in connectio*n with her being a victim of CSA (for which she sought compensation). As such there can be no requirement the Applicant as a victim of CSA with unspent convictions be treated differently from victims of other types of crimes with unspent convictions. The Applicant's case based on Article 14 read with 3 and 8 , ground two, fails at this stage.

49. On the alternative ground it was accepted by the Interested Parties the scheme treats persons with unspent convictions differently from those without unspent convictions. This will only amount to unlawful discrimination if it cannot be justified.

**Fourth stage; Justification**

50. In *A&B* the Supreme Court referred to *Stec v United Kingdom* (2006) 43 EHRR 47 relation to justification. The ECtHR referred to justification in the following terms;

> "51. … *A difference of treatment is … discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The contracting state enjoys a margin of appreciation in*

*assessing whether and to what extent differences in otherwise similar situations justify a different treatment.*

*52. The scope of this margin will vary according to the circumstances, the subject matter and the background. As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention. On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'."*

51. The Supreme Court in *A&B* also noted [83], as CICS operates in the field of social welfare policy courts "should normally be slow to substitute their view for that of the decision maker." It was also noted in *A&B* as the basis of the discriminatory treatment complained of was not a "suspect ground" the test manifestly without reasonable foundation was appropriate. Finally, the Court took account of the views expressed in The Consultation Document (Ministry of Justice Consultation Paper CP3/2012, January 2012, Getting it right for victims and witnesses (Cm 8288)) as stated at para 207, given the scheme is a tax payer funded expression of public sympathy, it is reasonable there should be strict criteria around who should receive a share of its limited funds. It commented at paragraph 87 of *A&B*;
*"This is clearly a legitimate aim."*

52. Many, if not all, of these considerations apply to the instant case. When considering justification, the FtT noted the IPs accept the scheme treats persons with unspent convictions differently to those without unspent convictions, but that treatment will only amount to unlawful discrimination if it cannot be justified.

53. As before in the FtT, both parties agreed before me the test to be applied was whether the difference in treatment was manifestly without reasonable foundation. The FtT noted the Supreme Court in *A&B* found the exclusionary rule, including the absence of any discretion to make an award where a person had an unspent conviction, was justified.

54. At paragraph 92 Lord Lloyd-Jones held;
*"I consider, therefore, that the difference in treatment on grounds of other status resulting from Annex D is justified. The measure has the legitimate objective of limiting eligibility to compensation to those deserving of it. Furthermore, the measure satisfies the requirement of proportionality. It is rationally connected to the objective. The measure is no more intrusive than it requires to be and it strikes a fair balance between the competing interests.*

*Wilkie J and the Court of Appeal were clearly correct in concluding that it cannot be regarded as manifestly without reasonable foundation."*

55. The FtT has addressed the Applicant's arguments on justification at paragraphs 65-72. In particular, it refused to distinguish *A&B* on the three grounds advanced by the applicant's counsel;

(i) On the basis the offending may have been caused by being a victim of CSA as a child. I will refer to this as the "nexus argument" and have dealt with this at paragraphs 35-43 above. I consider the FtT were entitled to come to this conclusion. It also noted at paragraph 68 of the written reasons the "nuanced rules" referred to by the Supreme Court at paragraph 91 of the judgment in *A&B,* allowing mitigation to be considered by the sentencing court, was considered to be a significant point by the FtT.

(ii) The FtT disagreed with what I will refer to as the "consultation point" (ie the consultation process and Equality Impact Assessment carried out prior to the introduction of the scheme) at paragraph 69 of their written reasons. I consider they were entitled to do so and they have clearly set out their reasons.

(iii) The recommendation argument. The FtT noted the point raised by counsel for the applicant regarding the recommendation that the Independent Inquiry into Child Sexual Abuse made in their Interim Report in April 2018 that the CICA scheme is revised so "awards are not automatically rejected in circumstances where an applicant's criminal convictions are likely to be linked to their CSA".

56. The FtT, correctly in my view, took the view whether the scheme is changed *in the future* is a matter for Parliament. The scheme must be applied as it was at the date of the decision under review. This point was also re-argued before me, and I agree with the approach taken at the FtT. In any event the FtT did not find the Applicant was a "nexus offender", a decision they were fully entitled to come to.

## Conclusion

57. There was no error of law in the FtT's decision or its conclusions. I am satisfied that there was no unlawful discrimination nor breach of art. 14 (for the purposes of A1P1 or Articles 3 and 8) in the application of the exclusionary rule to the Applicant in denying her the right to compensation in circumstances where she was a victim of CSA but went on to commit an offence for which she held an unspent conviction. I am satisfied that there was no error of law in the FtT finding that there was no basis to justify preferential/ a difference in treatment for victims of CSA with unspent convictions because it was unable to find that the Applicant was a nexus offender and that any difference in her treatment was justified in any event.

58. I do not accept the Applicant's argument that the decision of the Supreme Court in *A&B* is of contextual significance only and not dispositive in relation to this application. The FtT, correctly in my view, concluded the decision in *A&B* and the Supreme Court's conclusion regarding the operation of the exclusionary rule applies in this case. There are not grounds on which to distinguish it. The decision of the Supreme Court is binding on the FtT and the Upper Tribunal.

59. The FtT did not make a material error of law and neither ground for judicial review succeeds. It is therefore not necessary for me to consider the issue of remedy.

60. For the reasons set out above I dismiss this application for judicial review and confirm the decision of the FtT to dismiss the Applicant's appeal against the refusal of compensation.

**Edell Fitzpatrick**

**Judge of the Upper Tribunal**

**Authorised for issue 31 August 2023**