UKSC 2018/0224

IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

B E T W E E N:

RR

Appellant

- and -

(1) THE SECRETARY OF STATE FOR WORK AND PENSIONS
(2) SEFTON BOROUGH COUNCIL

Respondents

- and –

(1) LIBERTY
(2) CHILD POVERTY ACTION GROUP
(3) PUBLIC LAW PROJECT

Interveners

CASE FOR THE INTERVENERS

INTRODUCTION

1 The Interveners, Liberty, the Child Poverty Action Group ("**CPAG**") and the Public Law Project, are non-governmental organisations intervening in the public interest, pursuant to r. 16(1)(a) of the Supreme Court Rules 2009. The Interveners have experience in assisting indigent litigants before statutory tribunals and courts.

2 In light of this expertise, the Interveners support the Appellant's First Ground of Appeal (but make no submissions on the second). They submit that public authorities, including the First-tier and the Upper Tribunal, have a duty under the Human Rights Act to disapply secondary legislation where its application would be incompatible with rights guaranteed by the European Convention on Human Rights ("**Convention**"), irrespective of whether it is possible to identify a particular provision that can be textually severed and disapplied.

3 The Interveners adopt below the abbreviations and defined terms used in the Statement of Facts and Issues and the Appellant's Case.

4 The Interveners submit, in summary, as follows:

(a) The tribunal system plays an essential part in vindicating the rule of law. It is a long-established principle that tribunals, like courts, are obliged to treat as inapplicable (or disapply) legislation that is *ultra vires* or is incompatible with EU law. When disapplying legislation to the extent that it is *ultra vires* or contrary to EU law, there is no requirement to identify a particular provision that is textually severable from the rest. Whenever a tribunal or court has found that the application of subordinate legislation would discriminate unlawfully against a particular class contrary to either Article 14 of the Convention or EU law, it has sought to eliminate that discriminatory effect by requiring that the claimant be given the same substantive benefit as his or her comparator, without considering whether (or how) the legislation could or should be "rewritten" in its application to other cases.

(b) The dispute in *Carmichael CA* between the majority and Leggatt LJ is a narrow one. Where the application of subordinate legislation would be incompatible with Convention rights, does the tribunal's duty to treat that legislation as inapplicable (or disapply it) depend on being able to identify a provision that is textually severable? The answer is "No". The majority's approach is contrary to the scheme of s. 6 HRA; contrary to the established approach to invalidity of subordinate legislation at common law; contrary to the policy (reflected in s. 7 HRA and in the White Paper that preceded it) that human rights disputes should be dealt with in the fora appropriate to their subject matter, rather than in specialist proceedings; constitutionally unorthodox by permitting public authorities to rely on secondary legislation as a shield to avoid complying with the obligation imposed on them by Parliament in primary legislation; and contrary to the rule of law.

(c) The majority judgment in *Carmichael CA* would also mean that, in order to vindicate their Convention rights, claimants would have to bring two sets of proceedings – one in the tribunal and a second in the courts claiming damages under the HRA. This would give rise to serious practical difficulties, both for the courts and for individual claimants. It is relevant in this regard that courts (unlike tribunals) are not designed to be readily accessible to parties who are not legally represented; impose fees for issuing proceedings; and generally require losing parties to pay their opponents' costs. The availability in principle of fee remission

and legal aid are not a complete answer to these practical problems, because the need to apply for these may itself operate as a significant disincentive to vulnerable claimants (even if they are available). In addition, non-legally trained welfare advisers (who often represent claimants before the FTT) do not have the expertise to assist with proceedings in court; and damages claims may be substantively legally complex. Even if a claimant were to overcome these obstacles, there is no guarantee that a claim for damages under the HRA would provide an adequate remedy.

THE ROLE OF TRIBUNALS IN VINDICATING THE RULE OF LAW IN THE FACE OF SUBORDINATE LEGISLATION IN CONFLICT WITH A SUPERIOR LEGAL NORM

A. The Tribunal system

5 The development of the tribunal system was described by Lady Hale in *R (Cart) v Upper Tribunal* [2011] UKSC 28; [2012] 1 AC 663, [11]-[13]. The jurisdictions were and remain diverse, but they share a number of common characteristics (ibid. at [13]):

> "…They were set up by statute to administer complex and rapidly changing areas of the law. Their judges were expected to know this law without having to have lawyers for the parties to explain it to them. Their members were expected to have relevant expertise or experience in the subject matter of the dispute, not only so that they would be able to adjudicate upon factual issues without the help of lawyers for the parties, but also so that the parties could feel confident that the overall balance of the panel (for example between employers and employees) would produce impartial results…."

6 One problem of the system as it initially developed was that tribunals were administered by individual departments of state and as such were not, or were not seen to be, sufficiently independent of the department responsible for the scheme in question (ibid., at [14]-[15]). This (together with other issues) was addressed by the TCEA, enacted following Sir Andrew Leggatt's report *Tribunals – One System, One Service* in 2001. As explained in the Explanatory notes to the TCEA (§§10-12):

> "10. Until now, most tribunals have been created by individual pieces of primary legislation, without any overarching framework. Many have been administered by the government departments responsible for the policy area in which that tribunal has jurisdiction. Those departments are sometimes responsible for the decisions which are appealable to the tribunal.
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> 11. In the report of his Review of Tribunals… Sir Andrew Leggatt recommended extensive reform to the tribunals system. He recommended

that tribunals should be brought together in a single system and that they should become separate from their current sponsoring departments. He recommended that such a system be administered instead by a single Tribunals Service, in what was then the Lord Chancellor's Department.

12. The Government agreed and published its response to the report in the White Paper *Transforming Public Services: Complaints, Redress and Tribunals* in July 2004."

7 The new, simplified framework for tribunals under the TCEA came into force on 3 November 2008. It can be summarised as follows:

(a) **FTT:** The FTT hears appeals from individuals, primarily against decisions of the State, as guaranteed by the statutory scheme in question. It consists of its judges and other (non-lawyer) members. It sits in seven different chambers, dealing with a range of disputes: General Regulatory; Health, Education and Social Care; Immigration and Asylum; Property; Social Entitlement; Tax; and War Pensions and Armed Forces Compensation.

(b) **UT:** There is a right to appeal to the UT on a point of law arising from a decision made by the FTT (other than an excluded decision) (s. 11). The UT may then set aside and either remit or re-make the decision of the FTT (s. 12). If it remakes the decision, it may make any decision which the FTT could make if it were remaking the decision (s. 12(4)). It sits in four chambers: Administrative Appeals; Immigration & Asylum; Lands; and Tax & Chancery. The UT is a superior court of record (s. 3(5)), and may also hear claims for "judicial review" (s. 15). High Court judges routinely sit in the Upper Tribunal.

(c) **Appeals:** There is a right to appeal to the relevant appellate court arising from decisions made by the UT (other than an excluded decision) (s. 13). In England and Wales, the relevant appellate court is the Court of Appeal; in Scotland it is the Court of Session. The relevant appellate court may set aside and either remit or remake the decision of the UT (s. 14(2)). If it remakes the decision, it may make any decision which the UT could make if it were remaking the decision (s. 14((4)). There is provision for "leapfrog" appeals from the UT to the Supreme Court on points of law of general public importance (see ss. 14A-14C), as utilised in this appeal.

8 At Appendix 1 the Interveners reproduce a diagram, updated on 5 February 2019, setting out in detail the structure and jurisdiction of the tribunals under the TCEA.

B. The role and function of the Tribunals

9 Sir Andrew Leggatt explained in his 2001 report, §2.18:

> "In origin, many tribunal functions started within the administrative process. Tribunals were established because it was clear that the citizen needed an independent means of challenging possible mistakes and illegalities which was faster, simpler and cheaper than recourse to the courts. Tribunals are an alternative to court, not administrative, processes. They will keep the confidence of users only in so far as they are seen to demonstrate similar qualities of independence and impartiality to the courts."

10 This is reflected in the rules of the Tribunals: r. 2 of the Tribunal Procedure (FTT) (SEC) Rules 2008 provides that the overriding objective is to "enable the Tribunal to deal with cases fairly and justly", including by "avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; [and] using any special expertise of the Tribunal effectively".

(a) Almost 20 years after Sir Andrew Leggatt's report, the tribunal system is responsible for a very significant caseload. From October to December 2018 alone, 97,900 cases were begun in tribunals, and there were 98,900 disposals.[1] Tribunals cover a vast range of subject matter: from disputes about rent and land valuations to appeals against deportation from the United Kingdom; from regulated services such as charity and gambling to appeals in respect of criminal injuries compensation; and from complex tax cases to benefits appeals. Social security cases make up a significant portion of the caseload of the tribunals: there were between 46,282 to 60,992 Social Security and Child Support appeals launched each quarter from Q4 2017/2018 to Q3 2018/2019.[2]

11 In 2016, the Lord Chancellor, Lord Chief Justice and the Senior President of Tribunals noted as follows in *Transforming our justice system: summary of reforms and consultation* (p. 15):

> "Tribunals are an essential component of the rule of law. They enable citizens to hold the state and employers to account for decisions that have a significant impact on people's lives. The hallmark of the tribunals system

[1] Ministry of Justice Tribunals and Gender Recognition Statistics Quarterly, October to December 2018 (Provisional), published 14 March 2019, p. 2. These figures include the employment tribunals.

[2] Ibid., p. 3.

is the delivery of fair, specialist and innovative justice. That must not change."

12 The tribunals also play an important role in ensuring access to justice. *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 concerned the legality of an order increasing fees in the Employment Tribunal and Employment Appeal Tribunal. In the context of access to those tribunals,[3] Lord Reed noted as follows at [68]:

> "At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other."

13 This was so not only in cases of general importance, but in more mundane cases too: ibid at [71].

14 Even prior to the introduction of the TCEA, it was observed that the right of access to a tribunal "is just as important and fundamental as a right of access to the ordinary courts": *R v Secretary of State for the Home Department, ex parte Saleem* [2000] EWCA Civ 186; [2001] 1 WLR 443, 457H-458C (Hale LJ). Indeed, given the function of the tribunals constituted by the TCEA – to determine the legality of decisions made by the Executive – the public and constitutional importance in maintaining access to them is at least as great as it is in maintaining access to the Employment Tribunal.

C. The duty of tribunals to treat as inapplicable (or disapply) legislation that is *ultra vires* or incompatible with EU law

15 The tribunals were established to take decisions in individual cases. But, in making decisions in individual case, tribunals have often been required to consider and rule on

[3] Employment tribunals sit outside the system described above, but are "added tribunals" pursuant to s. 42(1) TCEA: see the diagram at Appendix 1.

submissions about the validity of legislation – and, if they find it invalid, to treat it as inapplicable (or, to use the term favoured in EU law, disapply it).

16 In *Chief Adjudication Officer v Foster* [1993] AC 754, Lord Bridge (with whom the other members of the Appellate Committee agreed) held as follows at 766:

> "My conclusion is that the [social security] commissioners have undoubted jurisdiction to determine any challenge to the *vires* of a provision in regulations made by the Secretary of State as being beyond the scope of the enabling power whenever it is necessary to do so in determining whether a decision under appeal was erroneous in point of law. I am pleased to reach that conclusion for two reasons. First, it avoids a cumbrous duplicity of proceedings which could only add to the already over-burdened list of applications for judicial review awaiting determination by the Divisional Court. Secondly, it is, in my view, highly desirable that when the Court of Appeal, or indeed your Lordships House, are called upon to determine an issue of the kind in question they should have the benefit of the views upon it of one or more of the commissioners, who have great expertise in this somewhat esoteric area of the law."

But this was far from a new development. As Lord Bridge pointed out at 761:

> "the Court of Appeal's decision in the instant case runs counter to the practice of the social security commissioners established by a long series of decisions, both by single commissioners and by tribunals of commissioners, holding that they had jurisdiction to decide and in fact deciding issues as to the vires of secondary legislation. Some of those decisions have been reviewed by the courts without any previous suggestion that issues of *vires* were beyond the jurisdiction of the commissioners."

And, he added at 763, this "long series of decisions" had started as long ago as 1976.

17 The conclusion in *Foster* was in line with the principle that legislation that is *ultra vires* its enabling Act is of no legal effect (i.e. a nullity): see *Boddington v British Transport Commission* [1999] 2 AC 143 (which established that a defendant to criminal proceedings for breach of a by-law could plead the invalidity of the by-law as a defence before the Magistrates' Court), at 158 (Lord Irvine of Lairg LC); see also *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [56] (Lord Carnwath).

18 Both before and since the decision in *Foster*, tribunals have accepted arguments that secondary legislation is ultra vires and accordingly treated it as void and inapplicable. In *Howker v Secretary of State for Work and Pensions* [2002] EWCA Civ 1623, [2003] ICR 405, the Court of Appeal (Peter Gibson, Mance and Hale LJJ) made clear that the social security commissioners had jurisdiction to determine whether a regulation was

invalid on any ground which might have allowed a challenge to its validity by way of judicial review, including grounds alleging procedural invalidity: see esp. Hale LJ at [52], endorsing a passage from Lord Diplock's speech in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, 365:

> "My Lords, in constitutional law a clear distinction can be drawn between an Act of Parliament and subordinate legislation, even though the latter is contained in an order made by statutory instrument approved by resolutions of both Houses of Parliament. Despite this indication that the majority of members of both Houses of the contemporary Parliament regard the order as being for the common weal, I entertain no doubt that the courts have jurisdiction to declare it to be invalid if they are satisfied that in making it the minister who did so acted outwith the legislative powers conferred upon him by the previous Act of Parliament under which the order purported to be made, and this is so whether the order is *ultra vires* by reason of its contents (patent defects) or by reason of defects in the procedure followed prior to its being made (latent defects)."

19 Tribunals are also required to disapply primary or secondary legislation insofar as it is inconsistent with EU law. The obligation is long-standing: see Case 106/77 *Simmenthal* EU:C:1978:49, [1978] 3 CMLR 263, [17], [21] & [24]. It was recently restated by the Grand Chamber of the European Court of Justice in Case C-378/17 *Minister of Justice and Equality v Workplace Relations Commission* EU:C:2018:979, [2019] 2 CMLR 13, [38]:

> "As the Court has repeatedly held, the duty to disapply national legislation that is contrary to EU law is owed not only by national courts, but also by all organs of the State—including administrative authorities—called upon, within the exercise of their respective powers, to apply EU law."

20 The obligation has long been recognised as applicable to tribunals in the UK. For recent examples, see *R (Benkharbouche) v Embassy of the Republic of Sudan* [2017] UKSC 62; [2017] 3 WLR 957 (where the Supreme Court accepted that the Employment Appeal Tribunal had been correct to disapply primary legislation that contravened directly effective EU law) and *Gubeladze v Secretary of State for Work and Pensions* [2017] EWCA Civ 1751, [2018] 1 WLR 3324 (where the Court of Appeal dismissed an appeal from a finding by the UT that the Accession (Immigration and Worker Registration) (Amendment) Regulations 2009 were contrary to EU law and so fell to be disapplied).[4]

[4] An appeal by the Secretary of State against the Court of Appeal's judgment is currently before the Supreme Court. It was, however, common ground that the Regulations must be disapplied if (contrary to the Secretary of State's case) they contravene EU law.

D. The mechanics of disapplication

21 It is common ground that tribunals have no power to quash subordinate legislation. This is because (in general[5]) the function of the tribunals is limited to deciding individual cases rather than entertaining challenges to legislation.

22 This means that, once a tribunal has decided that subordinate legislation is *ultra vires* in its application to the case (or class of case) before it, it is not generally necessary for a tribunal to consider questions such as whether and if so how the legislation can be "blue pencilled" or how it should be given effect in other cases. Thus, Leggatt LJ was correct to note at [87] of *Carmichael CA:*

> "Even in a case where subordinate legislation is held to be *ultra vires*, it is not necessary to identify words which can be deleted with an imaginary blue pencil in order to find that the legislation is invalid and unenforceable only in some cases, provided that its invalidity in those cases does not substantially change the purpose, operation and effect of the legislation. That was established by the decision of the House of Lords in *Director of Public Prosecutions v Hutchinson* [1990] 2 AC 783 . In so holding, the case to which Lord Bridge of Harwich (with whose speech the other Law Lords agreed) attached most significance was an earlier decision of the House of Lords in *Daymond v Plymouth City Council* [1976] AC 609 . In *Daymond's* case a statutory instrument required a rating authority to collect a charge referable to sewerage services 'from every person who is liable to pay the general rate in respect of a hereditament'. A householder whose property was not connected to a sewer brought an action for a declaration that the charging provision did not apply to him. The House of Lords held that, under the enabling legislation, there was no power to impose the charge on an occupier whose house was not connected to a sewer. There was no suggestion in any of the speeches that any particular part of the text could be severed or that the invalidity of the charging provision in relation to properties not connected to sewers affected the validity of the legislation in relation to properties which were not so connected: see *Hutchinson's* case, pp 810–811."

23 As Leggatt LJ went on to observe at [88]-[89], this is consistent with the scheme of s. 6 of the HRA, for the reasons given in the Appellant's Case. In short, s. 6(1) imposes an obligation not to act incompatibly with Convention rights, which is qualified only by s. 6(2). The obligation is imposed on all public authorities, including courts and tribunals (s. 6(3)(a)). The result is that where – as here – s. 6(2) does not apply, both the primary decision-maker and the tribunal as a public authority are precluded from acting so as to give effect to subordinate legislation if that would be incompatible with the Convention rights of a party.

[5] Save where the UT is exercising its statutory judicial review jurisdiction.

24 That is why, whenever a tribunal or court has found that the application of subordinate legislation would discriminate unlawfully against a particular class contrary to either EU law or Article 14 of the Convention, it has sought to put the claimant in the position of the comparator (thus eliminating the discriminatory effect), without considering whether (or how) the legislation could or should be "rewritten". Thus, by way of example:

(a) In *Hockenjos v Secretary of State for Work and Pensions* [2004] EWCA Civ 1749, [2005] 1 FLR 1009, there was no justification for treating parents who were not the primary carer (mostly men) as ineligible for child supplement. The discrimination was contrary to EU law. In the result, while it was for the Secretary of State to decide how to rewrite the legislation for the future (see at [75]), so far as the result in the individual case was concerned, the claimant had to be put in the same position as his comparator (see at ([76]-[93], [115]-[131] and [181]-[202]).

(b) In *Francis v Secretary of State for Work and Pensions* [2006] 1 WLR 3202, there was no justification for treating the claimant less favourably than other categories of individual entitled to a maternity grant. This was discrimination contrary to Article 14 of the Convention. How to rewrite the legislation for the future was up to the Secretary of State, but in the individual case, the court declared that the claimant was entitled, by virtue of s. 6(1) of the HRA, to the maternity grant to which the legislation entitled his comparators (see at [31]).

(c) In *In re G (Adoption: Unmarried Couple)* [2009] AC 173, the House of Lords held that Northern Ireland subordinate legislation precluding adoption by an unmarried couple discriminated against the applicants on grounds of marital status. The discrimination engaged Article 14 of the Convention and was unjustified. The remedy was to put the claimants in the same position as their comparators (a married couple) would have been by making a declaration that it was unlawful to reject them on the ground that they were not married: see at [38] (Lord Hoffmann), [116] (Lady Hale) and [144] (Lord Mance).

(d) In *Mathieson v Secretary of State for Work and Pensions* [2015] 1 WLR 3250, the Supreme Court held that provisions of subordinate legislation suspending payment of disability living allowance in respect of children who had been in hospital for more than 84 days discriminated within the meaning of Article 14 of

the Convention in favour of children who had been in hospital for a shorter period. In the result, the applicant was entitled to the benefit, though it was not possible to say whether other children who had been in hospital for more than 84 days might also be so entitled: [49] (Lord Wilson) and [61] (Lord Mance).

(e) In *MM & SI v Secretary of State for Work and Pensions* [2016] UKUT 149 (AAC), the UT held that a "past presence requirement" for disability living allowance in secondary legislation amounted to unlawful discrimination against refugees and their family members and was contrary to both EU law and Article 14 of the Convention. Judge Markus QC re-made the decision, disapplying the offending provision in the relevant regulations as a matter of EU law, and holding (correctly) that "the same result follows from the application of [s. 6 HRA]": [114].

(f) In *In re Brewster* [2017] UKSC 8, [2017] 1 WLR 519, the Supreme Court declared that the rules of the Local Government Pension Scheme in Northern Ireland (contained in subordinate legislation) discriminated contrary to Article 14 of the Convention against unmarried couples by requiring them (but not married couples) to make a formal nomination before being entitled to survivor's benefits under the scheme. The result was not merely a general declaration that the subordinate legislation was incompatible with the claimant's Convention rights, but an individualised declaration that the claimant was entitled to receive a survivor's pension under the scheme: see at [68] (Lord Kerr, with whom the other members of the court agreed).[6] The reasoning in *Brewster* has since been (correctly) held to be directly applicable against local authorities with materially similar schemes: see *Elmes v Essex County Council* [2019] 1 WLR 1686, [133]-[135] (Walker J).

[6] In this respect, the form of relief was equivalent to that available in EU law where legislation (primary or secondary) is shown to be contrary to directly effective EU rights. Compare *Walker v Innospec* [2017] UKSC 47, [2017] ICR 1077. In that case, the Supreme Court held that a pension scheme rule limiting survivor's benefits to same sex spouses was incompatible with the claimant's directly effective rights, notwithstanding a clear provision in the Equality Act precluding claims for sexual orientation discrimination in respect of pension referable to service before 2005. The result was a declaration not only that the relevant provisions of domestic legislation were incompatible with EU law but also that they must be disapplied, with the effect that his husband was entitled (without the need for any further action to amend the incompatible legislation) to a spouse's pension: see [74] & [76] (Lord Kerr with whom on this point all the other members of the Court agreed). Flaux LJ was therefore wrong to proceed on the basis that a different approach applied under EU law (see *Carmichael CA*, [57]).

THE APPROACH OF THE MAJORITY IN *CARMICHAEL CA* IS CONTRARY TO CONSTITUTIONAL PRINCIPLE AND CANNOT BE SUPPORTED

A. The narrow scope of the dispute in this case

25 In *JT v First-tier Tribunal* [2018] EWCA Civ 1735, [2019] 1 WLR 1313, Leggatt LJ, this time giving a judgment with which the other members of the Court of Appeal (Sir Terence Etherton MR and Sharp LJ) agreed, identified correctly the narrow scope of his disagreement with the majority in *Carmichael CA*. In *JT*, the claimant had sought compensation for a criminal injury caused by her stepfather but was denied that compensation because the Criminal Injuries Compensation Scheme precluded awards in respect of injuries occurring before 1 October 1979 where the victim and perpetrator were part of the same household. The Court of Appeal held that this part of the scheme (para. 19) constituted unjustified discrimination against the claimant contrary to Article 14 of the Convention. On the question of remedy, Leggatt LJ said this about the majority judgment in *Carmichael CA* at [125]:

> "The argument made by the Secretary of State in the *Carmichael* case and accepted by the majority of the Court of Appeal (Flaux LJ and Sir Brian Leveson P) was that the F-tT and UT had no power to disapply the Housing Benefit Regulations so as to reach the conclusion that Mr Carmichael had been underpaid housing benefit. It was not suggested that a court or tribunal can never disapply a provision of subordinate legislation where to apply it would be incompatible with a Convention right and contrary to section 6(1) of the Human Rights Act . Such a suggestion would be flatly inconsistent with the Human Rights Act and with Supreme Court authority. Thus, counsel for the Secretary of State expressly accepted, as he was bound to do, that there are circumstances in which section 6(1) requires subordinate legislation to be disapplied. What he argued, and what the majority of the Court of Appeal accepted, was that there was no such power in the Carmichael case as there was no provision of the Housing Benefit Regulations which a court or tribunal could put its finger on as incompatible with Mr Carmichael's right under article 14 of the Convention not to be treated in a discriminatory way."

26 *JT's* case was not analogous to Carmichael's because in *JT's* case there was a feature of the scheme (para. 19), which the Court could "put its finger on" as giving rise to the discriminatory treatment. It followed that the correct remedy was to "to treat paragraph 19 as invalid and without effect in JT's case" (see at [128]) and to declare that she was not prevented by that paragraph from being paid an award of compensation under the scheme (see at [129]).

27 It follows that the question of law on which the Court of Appeal's decision turned is a narrow one. Where the application of subordinate legislation would be incompatible with Convention rights, does the tribunal's duty to treat that legislation as inapplicable (or disapply it) depend on being able to identify a provision that is textually severable?[7]

B. The Interveners' legal submissions

28 The Interveners' legal submissions can be shortly stated.

29 **First**, as the Appellant has explained, s. 6(1) HRA imposes on any public authority, including a court or tribunal, an obligation not to act incompatibly with Convention rights. Save in cases where s. 6(2) applies, the obligation is unqualified. There is no support in the language of the HRA for the suggestion that the obligation depends on whether the provision giving rise to the incompatibility is textually severable. To suggest that the obligation depends on identifying a particular incompatible provision that the court can "put its finger on" (as Leggatt LJ put it) is to conflate the hard-edged obligation in s. 6(1) (not to act incompatibly) with the qualified interpretative obligation in s. 3 (to construe legislation compatibly so far as it is possible to do so). The application of s. 6, in the face of incompatible subordinate legislation, involves no process of interpretation at all: it is necessary precisely because the legislation cannot be construed compatibly under s. 3. Thus, as Lady Hale explained in *In re G (Adoption: Unmarried Couple)* [2008] UKHL 58; [2009] 1 AC 173 at [116]:

> "The courts are free simply to disregard subordinate legislation which cannot be interpreted or given effect in a way which is compatible with the Convention rights. Indeed, in my view this cannot be a matter of discretion. Section 6(1) requires the court to act compatibly with the Convention rights if it is free to do so."[8]

[7] Even if, contrary to these submissions, the Court of Appeal was correct to insist on identifying a discrete severable provision, the decision in *Carmichael SC* did in fact identify such a provision in the Carmichaels' case. It declared that "Jacqueline Carmichael has, as a result of the application to her of Regulation B13 Housing Benefit Regulations 2006, suffered discrimination contrary to Article 14 of the ECHR, on the basis set out in the judgment of the court." Severing reg. B13 does not prevent operation of the rest of the HB scheme. So it would have been perfectly possible to decline to give effect to the provision (reg. B13) identified by the Supreme Court as contravening Ms Carmichael's Convention rights. In particular, there was no need to consider either whether reg. B13 could lawfully be applied in other cases, or whether an amended reg. B13 would be compatible with Convention rights.

[8] The same point is made by Leggatt LJ in *JT v FTT* [2018] EWCA Civ 1735; [2019] 1 WLR 1313 at [122]: "Where, as here, a provision of subordinate legislation cannot be given effect in a way which is compatible with a Convention right and there is no primary legislation which prevents removal of the incompatibility, the court's duty under section 6(1) is to treat the provision as having no effect, as to give effect to it would be unlawful."

30 **Second**, the suggestion that disapplication of incompatible subordinate legislation depends on the identification of a particular provision giving rise to the incompatibility is at odds with the position adopted by common law courts in relation to *ultra vires* subordinate legislation. As Leggatt LJ pointed out in *Carmichael CA* at [87], the courts have expressly rejected a textual approach to the severability of *ultra vires* provisions in subordinate legislation. If subordinate legislation would conflict with its parent Act in a particular category of cases, the correct approach is to regard it as inapplicable to that category of cases, provided only that – in substance – its purpose, operation and effect is not substantially altered. There is no reason to suppose that, in enacting s. 6(1) of the HRA, Parliament intended the courts to go back to the rejected textual approach when dealing with this new species of *ultra vires* act.

31 **Third**, the effect of the approach of the majority in *Carmichael CA* is that claimants in the position of the Appellant in this case will be required to pursue their remedy in two separate sets of proceedings. That (as well as erecting considerable obstacles in the way of particularly vulnerable claimants – see below) is contrary to the intention and express terms of the HRA. Section 7(1) provides in terms that a person who claims that a public authority has acted (or proposed to act) in a way which is made unlawful by s. 6(1) may bring proceedings against the authority "in the appropriate court or tribunal" and may rely on the Convention right or rights concerned "in any legal proceedings" (provided he or she is a victim). Parliament imposed express limits on the courts that could grant declarations of incompatibility under s. 4 (see s. 4(5)), but no such limits on the courts or tribunals in which a claim alleging breach of s. 6(1) could be brought. Insofar as it is suggested that the HRA is ambiguous on this point, the White Paper which preceded it in October 1997 (*Rights Brought Home: The Human Rights Bill*, Cm 3782) makes the intention clear in its Introduction and Summary:

> "The Government prefers a system in which Convention rights can be called upon as they arise, in normal court proceedings, rather than confining their consideration to some kind of constitutional court. Courts and tribunals will be able to award whatever remedy, within their normal powers, is appropriate in the circumstances."

That is the consequence of Parliament legislating "to bring rights home", i.e. to bring the remedy as close as possible to the wrong: *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, [42].

32 **Fourth**, there is nothing constitutionally unorthodox about imposing on public authorities (including courts and tribunals) the duty to act compatibly with Convention

rights, even in the face of contrary subordinate legislation. On the contrary, it is the approach of the majority in *Carmichael CA* that is constitutionally unorthodox. As Lord Diplock explained in *Hoffmann La Roche* (in the excerpt cited by Hale LJ in *Howker*: see §19 above), it is entirely orthodox that courts and tribunals should treat *ultra vires* subordinate legislation as inapplicable. That applies to all courts and tribunals (even Magistrates' Courts: see *Boddington*). When a court or tribunal treats subordinate legislation as *ultra vires* and to that extent inapplicable, it is not usurping a legislative function, but respecting the supremacy of Parliament by giving effect to the primary legislation that limited the powers of the subordinate legislature.[9] The same is true when a court gives effect to s. 6(1) HRA in the face of incompatible subordinate legislation. Precisely this point was made in the White Paper *Bringing Rights Home* (at §2.12):

> "The courts will, however, be able to strike down or set aside secondary legislation which is incompatible with the Convention, unless the terms of the parent statute make this impossible. The courts can already strike down or set aside secondary legislation when they consider it to be outside the powers conferred by the statute under which it is made, and it is right that they should be able to do so when it is incompatible with the Convention rights and could have been framed differently". (Emphasis added.)

The reference to the ability to "strike down or set aside" secondary legislation which is incompatible with the Convention makes it clear that the intention was to impose on courts an obligation akin to that which applies when faced with *ultra vires* subordinate legislation. As is clear from s. 6(3), the power applies to both courts and tribunals.

33 **Fifth**, and relatedly, the effect of the majority judgment in *Carmichael CA* is to permit the Executive to act contrary to the obligations imposed on it by Parliament, as interpreted by the courts. In the Urgent Bulletin circulated on the day the Supreme Court handed down its decision in *Carmichael SC*, the Secretary of State said this:

> **"Effect of the judgment**
>
> 4. No immediate action needs to be taken by local authorities (LAs) following this judgment. The Court did not strike down the legislation underpinning the size criteria. As such LAs must continue to apply the rules when determining Housing Benefit claims as they did before today's judgment and the judgment does not require any LA to re-assess the HB of

[9] To the same effect, see *R (PLP) v Lord Chancellor* [2016] UKSC 39; [2016] AC 1531, [23], where Lord Neuberger (with whom the other members of the Court agreed) noted that by quashing *ultra vires* subordinate legislation "the court is preventing a member of the Executive from making an order which is outside the scope of the power which Parliament has given him or her by means of the statute concerned".

existing claimants. LAs should continue to award DHPs to claimants who they consider require additional financial support.

5. The Department is considering the Court's judgment and will take steps to ensure it complies with its terms in due course. The Department will notify LAs once a decision has been taken."

As the UT noted in *Carmichael UT* at [51], this was contrary to the assumption which had been operating in previous cases. It was also contrary to the rule of law, because it advised local authorities to continue to act in a way which the Supreme Court had said was unlawful.

34 **Sixth**, the approach of the majority in *Carmichael CA* is contrary to the binding authority of this Court in *Mathieson*. As Leggatt LJ pointed out at [98]-[99] of *Carmichael CA*, that ought to have been sufficient even if *Mathieson* were not part of a consistent line of authority on the point (which it is – see §25 above). The effect of the Supreme Court's judgment in that case was, as Lord Wilson (with whom Lady Hale, Lord Clarke and Lord Reed agreed) pointed out at [48], not just that the relevant provisions were found to be discriminatory, but also that the FTT should have allowed the appeal. To the same effect, see Lord Mance (with whom Lord Clarke and Lord Reed agreed) at [61]. What was necessary was an individualised decision, disapplying the relevant legislation in the applicant's case and leaving to the Secretary of State any decision as to the wider adjustments required as a result of the decision.

THE INTERVENERS' SUBMISSIONS ON THE PRACTICAL RAMIFICATIONS OF THE MAJORITY JUDGMENT IN *CARMICHAEL CA*

35 The effect of the majority judgment in *Carmichael CA* was identified by Flaux LJ at [67]: "to the extent that the first respondent had suffered any loss as a consequence, his remedy lay in bringing a claim for damages in the civil courts under section 8(2) of the Human Rights Act." That has a number of practical disadvantages, which can and should properly be taken into account.

36 **First**, it means that claimants will – in practice - have to bring two sets of proceedings, not one, to obtain a remedy. That is because, even in a case where there is a strong case that subordinate legislation is incompatible with Convention rights if interpreted in the way the Government contends, it may be difficult to predict whether the tribunal will hold that legislation can be interpreted compatibly under s. 3 HRA. That point will have to be tested in the tribunal and, if (and only if) the tribunal finds the legislation cannot be interpreted compatibly, a second set of proceedings will then be necessary. The

undesirability of multiple proceedings is as relevant here as it was in *Foster*: see at p. 766H (Lord Bridge). The result would be to place a burden on the court system, not only because of the increased volume of claims, but also because of the need to manage the interaction between tribunal and court claims.

37 **Second**, such multiplicity of proceedings would place a further burden on individual claimants, who would be required to pursue both an appeal and a further claim. It cannot simply be assumed it will be practically feasible for claimants to pursue separate claims. In the social security context in particular, the appropriate route is likely to be a civil claim for damages[10] (likely in the County Court, although potentially also in the High Court). In relation to such a claim, the Interveners highlight the following significant obstacles:

(a) **Accessibility: specialist assessment and informal procedures**. Tribunal judges are legally qualified and are often specialists in the complex statutory regimes that govern appeals. Moreover, tribunals have the ability to call on specialist non-legal members of the panel such as doctors (or in other spheres, chartered surveyors, ex-service personnel, or accountants), to assess the claims of appellants. Combined with tribunal procedures, which are designed to be informal and inquisitorial, access to justice in the tribunal is designed to be readily available: see r. 2 of the Tribunal Procedures (FTT) (SEC) Rules 2008, set out above. An assumption that civil claims are as similarly accessible should be treated with caution.

(b) **Representation**. In light of the informal procedures before specialist judges in the tribunals, it is expected that many appellants will represent themselves or appoint a non-legal representative.[11] Indeed, in a 2010 Consultation Paper, the Government stated that legal aid for advocacy before most tribunals is not justified "given the ease of accessing a tribunal and the user-friendly nature of the

[10] In certain circumstances a judicial review claim may also be possible. On the accessibility of judicial review, see: J. Tomlinson and R. Low-Beer, *Financial Barriers to Judicial Review: An Initial Assessment* (Public Law Project, London 2018); V. Bondy, L. Platt and M. Sunkin, *The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences* (Public Law Project, 2015); Sir Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (London, 2009).

[11] The Tribunal Procedure (First-Tier Tribunal) (Social Entitlement Chamber) Rules, 2008 S.I. 2008 No. 2685 (L. 13), 21 August 2015, rule 11. This means that welfare rights advisers often assist those in the FTT.

procedure".[12] By contrast, the relatively low value of the claims is likely to make it difficult for claimants to successfully seek legal aid funding, and empirical research on the experience of litigants in person in civil claims demonstrates that such litigants are at significant disadvantage.[13]

(c) **Time for disposal**. The necessity for dual proceedings would slow the ultimate disposal of the dispute.

(d) **Fees**. Fees can be a significant barrier to access to justice, as the Supreme Court made clear in *UNISON*.[14] This is particularly the case for applicants for social security, who are likely to have limited resources. An appeal of a social security decision to the FTT is free of charge,[15] and there is no hearing fee. By contrast, in a civil damages claim, there are both issuing and hearing fees.[16] While it may often be the case that claimants are eligible for fee remission, the need to apply for remission may itself act as a significant disincentive to progressing claims.

(e) **Costs liability**. In the FTT in a social security context, an appellant is not liable to pay costs if he or she loses their appeal, and the Tribunal has no power to award costs.[17] Appellants may be able to claim reasonable expenses for attending a social security FTT hearing.[18] In civil claims, however, the general rule that costs follow the event applies, subject to the discretion of the court.[19] This

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[12] *Proposals for the Reform of Legal Aid in England and Wales*, Consultation Paper CP12/10, November 2010, §4.153. This is one of the reasons that legal aid for proceedings in the First-tier Tribunal (Social Entitlement Chamber) is not available.

[13] G. McKeever, L. Royal-Dawson, E. Kirk, and J. McCord, *Litigants in person in Northern Ireland: barriers to legal participation* (Ulster University, 2018).

[14] See further, for example, A. Adams and J. Prassl, "Vexatious Claims: Challenging the Case for Employment Tribunal Fees" (2017) 80(3) *Modern Law Review* 412.

[15] HMCTS *Court and Tribunal Fees* https://www.gov.uk/court-fees-what-they-are

[16] HMCTS *Civil and Family Court Fees EX50* (March 2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/789201/ex50-eng.pdf For money claims, fees will be from £35 for a court issued claim for up to £300.

[17] The Tribunal Procedure (First-Tier Tribunal) (Social Entitlement Chamber) Rules, 2008 S.I. 2008 No. 2685 (L. 13), 21 August 2015, rule 10.

[18] The Tribunal Procedure (First-Tier Tribunal) (Social Entitlement Chamber) Rules, 2008 S.I. 2008 No. 2685 (L. 13), 21 August 2015, rule 21.

[19] Section 51, Senior Courts Act 1981; CPR, R.44.2.

exposure, even if limited,[20] may be a disincentive, particularly for those with limited resources and whose claims may in any event not be large.

(f) **Attrition.** Experience of social security systems demonstrates that the more stages a claimant has to pass through to achieve a benefit then the more likely it is that they will withdraw from the system.[21] A separate follow-on damages action is likely to have a similar effect, particularly given the number of steps through which an applicant is likely to need to proceed (including applications for fee remission, application for legal aid, the issuance of a formal claim, providing written evidence etc).

(g) **Institutional knowledge and understanding.** As explained in the witness statement of Carla Clarke, a solicitor at CPAG with significant experience in the welfare system, professional lawyers are rarely involved in assisting litigants before the tribunals in social security cases, where most litigants are on low incomes, there is no legal aid and there are no costs recovery provisions suitable for conditional fee arrangements. The vast majority of individuals are self-represented, or at most have access to lay welfare rights advisers. Those advisers are well versed in social security law and are routinely engaged in conducting appeals in the FTT. They do not, however, see themselves as providing legal advice or legal assistance, and therefore often do not pursue appeals to the UT or consider judicial review as an option. Self-represented appellants are even less likely to do so. For example, out of a total of over 1.5 million requests for mandatory reconsideration between October 2013 and February 2017, of which an unknown number were refused on the grounds of lateness, only 9 pre-action letters were sent challenging such a refusal, all by CPAG.[22] Moreover, while welfare rights advisers do use HRA arguments in appeals, it is Ms Clarke's

[20] Small claims under £5,000 fall under fixed costs arrangements, whereas claims over £5,000 will fall under the fast track and costs are not fixed save for the trial itself. Those with legal aid have more limited exposure in any event.

[21] See *e.g.* Oral evidence of HH Judge Robert Martin to the House of Commons Work and Pensions Committee inquiry, Employment and Support Allowance and Work Capacity Benefits, HC Paper No.1212 (Session 2014-15), Oral Evidence, 7 May 2014, Q.96; R. Thomas and J. Tomlinson, "A Different Tale of Judicial Power: Administrative Review as a Problematic Response to the Judicialisation of Tribunals" (2019) (3) *Public Law* (forthcoming) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3254119&download=yes (both in respect of mandatory reconsideration). Other academic work on administrative justice systems has identified this issue, see *e.g.* S. Halliday and D. Cowan, *The Appeal of Internal Review: Law, administrative justice, and the (non-)emergence of disputes* (Oxford: Hart Publishing, 2003), pp.138-140.

[22] Paragraphs [15] and [16].

experience (and that of her colleagues at CPAG) that it is extraordinarily rare to pursue a HRA damages claim: in the collective experience of those at CPAG, that has only happened once.[23]

(h) **Substantive complexity**. While social security law is notoriously complex,[24] as set out above, tribunals are well versed in that law and the process is designed to allow appellants to articulate their claims within that system. It cannot be assumed that claims for damages under the HRA in the county courts will operate in the same way: not only will the social security law at the heart of the issue be complex, the academic literature explains that there is an extensive debate as to the substantively complex nature of human rights damages.[25] This has focused in particular on the "balancing" element in human rights claims, as well as potentially complex issues in quantification.[26] As well as calculating the benefit to which a person would have been entitled (a task well suited to the tribunals but less familiar to the courts), the court will have to assess the award of damages necessary to afford just satisfaction to the claimant, and (given the terms of s. 8 HRA) whether it is just and appropriate to make such an award.

38 **Third**, even if a claimant overcomes the obstacles in the way of pursuing a separate damages claim, it is far from clear that he or she is likely to receive any damages award:

(a) If the appellants/claimants in question have received DHPs, it is not clear whether or not an award of damages would be necessary to afford just satisfaction to the claimant, or that it would be just and appropriate to make such an award. Flaux LJ appears to have thought that it would not: see *Carmichael CA*, [67].

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[23] Paragraphs [21] and [22].

[24] For example, see: N. Harris, "Complexity in the law and administration of social security: is it really a problem?" (2015) 37(2) *Journal of Social Welfare and Family Law* 209.

[25] The leading text is: J.N.E. Varuhas, *Damages and Human Rights* (Oxford: Hart, 2016). See also: R. Clayton, "Damage limitation: the courts and the Human Rights Act damages" [2005] Public Law 429; J. Varuhas, "A Tort-Based Approach to Damages under the Human Rights Act 1998" (2009) 72 *Modern Law Review* 750; J. Steele, "Damages in tort and under the Human Rights Act: remedial or functional separation" (2008) 67 *Cambridge Law Journal* 606; D. Fairgrieve, "The Human Rights Act 1998, damages and tort law" [2001] *Public Law* 695.

[26] J.N.E. Varuhas, *Damages and Human Rights* (Oxford: Hart, 2016), p.361: "If one takes account of all possible hurdles, legal and non-legal, that a human rights damages claimant must overcome, to add the further hurdle of an interest-balancing approach at the remedies stage would begin to strike overall balance away from protection of fundamental interests, which is the very aim of human rights law, and in favour of other interests, public and governmental."

(b) Even if the appellants/claimants in question overcome the various obstacles identified above (including being awarded legal aid), and are awarded damages under the HRA, there is a significant risk that any damages they eventually receive will be eliminated by operation of the statutory charge over those damages (in favour of the Legal Aid Agency).

(c) In any event, it is not clear how such damages could take account of any future loss that the claimant would be likely to suffer between the date of the judgment and the point when the legislation is amended.

CONCLUSION

39 For these reasons, the Court should allow the Appellant's First Ground of Appeal.

MARTIN CHAMBERLAIN Q.C.

TOM ROYSTON

JENNIFER MacLEOD

5 June 2019