Neutral Citation Number: [2014] EWHC 2182 (Admin)

Case No: CO/8003/2013

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 4th July 2014

Before :

MRS JUSTICE LANG

- -

Between :

THE QUEEN
on the application of

(1) CAITLIN REILLY (No. 2)
(2) DANIEL HEWSTONE **Claimants**

- and -

THE SECRETARY OF STATE
FOR WORK AND PENSIONS **Defendant**

- -

Mr Tom Hickman (instructed by **Public Interest Lawyers**) for the **Claimants**
Mr James Eadie QC & Ms Amy Rogers (instructed by the **Treasury Solicitor**) for the **Defendant**

Hearing dates: 17th & 18th June 2014

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MRS JUSTICE LANG DBE

Mrs Justice Lang

1. The Claimants seek a declaration of incompatibility, under section 4, Human Rights Act 1998 ("HRA 1998"), on the ground that the Jobseekers (Back to Work Schemes) Act 2013 ("the 2013 Act") is incompatible with their rights under Article 6 and Article 1 of the First Protocol ("A1 P1") to the European Convention on Human Rights ("ECHR").

2. This claim follows on from *R (Reilly & Wilson) v. The Secretary of State for Work and Pensions* [2013] UKSC 68; [2013] 3 WLR 1276 ("Reilly No. 1"), brought by Ms Reilly, the First Claimant in this claim.

3. On 22nd January 2014, Ouseley J. adjourned the permission application to be heard orally as a "rolled up hearing", with the substantive hearing to proceed immediately thereafter, should the Court grant permission. With the agreement of the parties, I heard submissions on both the permission application and the substantive claim together. I wish to record my gratitude to Mr Eadie QC and Mr Hickman for their excellent written and oral submissions and to Ms Rogers for her industry and expertise.

History

4. The Claimants, who were unemployed at the relevant time, were both in receipt of the social security benefit known as Jobseekers Allowance (JSA). According to Mr Guest, senior civil servant in the Department of Work and Pensions ("DWP"), JSA is a subsistence-level benefit payable to persons who are actively seeking employment. The amount payable depends upon a jobseeker's circumstances, but in 2013/14 it was £56.80 per week for 16-24 year olds, and £71.70 for those aged 25 or over.

5. Both Claimants were required to participate in unpaid "work for your benefit" schemes, introduced by the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 ("the 2011 Regulations"). Pursuant to the Regulations, JSA could be withheld from those who refused to participate, as a sanction.

6. The First Claimant complied with the requirement and so did not suffer any sanction. However, attendance on the scheme meant she was unable to continue her voluntary work in a museum, which she hoped would lead to a career in museums. She was not sent any written notification, as required by the 2011 Regulations, and she was misinformed about the nature of the scheme by the Jobcentre adviser.

7. Together with Mr Wilson (who is not a Claimant in this second judicial review claim), she brought the first judicial review claim, *Reilly No. 1*. In the Administrative

Court, on 6th August 2012, Foskett J. held that there had been a breach of the notification requirements in reg. 4(2)(e) of the 2011 Regulations but rejected the Claimants' other grounds of challenge. After this judgment, the standard-form letters of notification were revised to overcome the defects identified by the Court.

8. The Court of Appeal allowed the Claimants' appeal and dismissed the Defendant's cross-appeal holding:

   a) the 2011 Regulations were *ultra vires*, because they did not include a prescribed description of the schemes as required by section 17A Jobseekers Act 1995; and

   b) the notification requirements in reg. 4(2)(c) and (e) of the 2011 Regulations had not been met (in Ms Reilly's case because she received no written notification and in Mr Wilson' case because the standard-form letter was defective). In consequence, there was no valid requirement to participate in the schemes and no valid sanction could have been imposed.

9. The Court of Appeal rejected the Claimants' other grounds, including the submission that the requirement to participate in the schemes was a breach of Art. 4 ECHR, which prohibits forced or compulsory labour.

10. On 12th February 2013 (the day upon which the Court of Appeal handed down its judgment in *Reilly No. 1*), the Defendant made the Jobseeker's Allowance (Schemes for Assisting Persons to Obtain Employment) Regulations 2013 ("the 2013 Regulations") which corrected the flaws which the Court of Appeal identified in the 2011 Regulations. In accordance with usual practice, the 2013 Regulations only applied prospectively, from the date when they were made.

11. The 2013 Act came into force a month later on 26th March 2013. It had the effect of (1) retrospectively validating the 2011 Regulations, which the Court of Appeal had held to be *ultra vires*; and (2) retrospectively validating all notification letters that had failed to comply with the requirements of reg. 4 of the 2011 Regulations; and (3) retrospectively validating sanctions which had been imposed pursuant to the 2011 Regulations.

12. This claim, challenging the 2013 Act, was issued in the Administrative Court on 26th June 2013.

13. In a judgment handed down on 30th October 2013, the Supreme Court found that the 2011 Regulations were *ultra vires*, for the reasons identified by the Court of Appeal, and that Mr Wilson's standard-form notification letter did not comply with reg. 4(2)(c). The Supreme Court also held that the Defendant owed a common law duty of fairness to the Claimants to provide them with sufficient information about the

schemes to enable them to make meaningful representations to the decision-maker before a notice requiring their participation was served upon them. The Court rejected the Claimants' other grounds, including the submission that the requirement to participate in the schemes was a breach of Art. 4 ECHR, which prohibits forced or compulsory labour.

14. However, by the date of the hearing before the Supreme Court, 30th July 2013, the 2011 Regulations, together with the letters of notification issued pursuant to the 2011 Regulations, had already been retrospectively validated by the 2013 Act. Therefore the Supreme Court allowed the Secretary of State's appeal, but the order expressly stated, in paragraph 1, that the appeal was "allowed on the basis only that the Jobseekers (Back to Work Schemes) Act 2013 has come into force". In the hearing before me, Mr Eadie QC and Mr Hickman agreed that paragraph 2 of the order had been erroneously drafted. To give effect to the Court's judgment, it should have been formulated in similar terms to paragraph 1, allowing the Secretary of State's appeal against the decision that there had been a breach of the notification requirements in reg. 4(2) on the basis of the 2013 Act. It appears that the Defendant did not cross-appeal against the Court of Appeal's declaration that the Defendant acted unlawfully in requiring Ms Reilly to participate in the Scheme, presumably because she was not sent any letter of notification. Although the Court of Appeal's declaration in favour of Ms Reilly was not appealed, at the hearing Mr Eadie QC rejected the suggestion that it had remained in force following the 2013 Act and the order of the Supreme Court, allowing the Defendant's appeal. However, when the draft of this judgment was circulated, counsel for the Defendant sent a note to me saying: "The Secretary of State accepts that the declaration in favour of Ms Reilly has remained in force following the 2013 Act and the Order of the Supreme Court. The declaration reflects the fact that no letter was sent to Ms Reilly. That position is not affected by the 2013 Act."

15. The Supreme Court declined the Claimants' request to decide whether the retrospective validation was compatible with the ECHR, preferring to leave that question to be decided in the second judicial review claim which had already been issued by the date of the hearing. The Court expressed no view about the merits of that claim but it was a reason why it decided to hear and determine the appeal on the original grounds (per Lord Neuberger and Lord Toulson at [41]), even though the 2013 Act had rendered those grounds academic.

16. The Second Claimant was not a party in *Reilly No. 1*. but his position was affected by it. After initial attendance on a scheme for some months, the Second Claimant refused to participate further, and so his JSA payments were stopped for four specified periods by way of sanction. In total, JSA was withheld for nearly 37 weeks between 4th May 2012 and 28th March 2013, causing him financial hardship. He appealed successfully against the first three sanctions to the First-tier Tribunal ("FTT") which found that the standard-form notifications he had been sent did not meet the requirements of reg. 4 of the 2011 Regulations. It followed that the directions to participate in the schemes and the sanctions imposed for non-participation were unlawful. There remains a pending appeal by the Defendant to the Upper Tribunal against the FTT's decision, which was stayed pending the outcome of *Reilly No. 1*. The Second Claimant's appeal to the FTT against the fourth sanction was also stayed

pending the outcome of *Reilly No. 1*. He has also been subject to JSA sanctions under other provisions at other times.

17. In his witness statement, the Second Claimant states that he has been in receipt of JSA since 2008. He struggled to find suitable work during the recession, particularly because he received a criminal caution, which acted as a barrier to employment. The caution has since been overturned. He has attended DWP employment schemes in the past. He ceased to attend the Work Programme because he could not afford to wait for his travel expenses to be reimbursed and he felt that the menial work offered did not enhance his skills or improve his prospects of finding long term work. The Defendant's evidence gave examples of his lack of co-operation, and use of intemperate language towards DWP staff.

Submissions

18. The Claimants submit that the 2013 Act was incompatible with the Claimants' rights under Art. 6. It was an intervention in the ongoing proceedings in *Reilly No. 1* which had the effect of determining the litigation in the Defendant's favour by retrospectively validating his unlawful acts. It thereby deprived both Claimants of a fair determination of their civil rights and obligations, contrary to Art. 6. The First Claimant failed in the Supreme Court when otherwise she would have succeeded in upholding her victory in the Court of Appeal. The Second Claimant succeeded in the FTT on the grounds that the notification requirements under reg. 4 of the 2011 Regulations were not met, but the Upper Tribunal is bound to find that any such defect has been retrospectively validated, and he has no other tenable grounds of appeal. His pending appeal against the fourth sanction on those grounds will fail for the same reason.

19. The Claimants rely upon the ECtHR authorities (referred to below) to the effect that it is contrary to the rule of law, protected by Art. 6, for a State to legislate in the course of ongoing legal proceedings to decide the issues before the court, when it does so to its own advantage, as a party to the dispute. Such an interference with Art. 6 rights **c**an only be justified by "compelling grounds in the public interest". They submit that no such compelling grounds exist in this case.

20. The Second Claimant also relies upon A1 P1, claiming that by withholding his JSA, the Defendant deprived him of a "possession" to which he was entitled. He submits that the deprivation cannot be justified as being in the public interest.

21. The Defendant's response is that the 2013 Act did not interfere with the Claimants' rights under Art. 6 or A1 P1. In relation to Art. 6, the First Claimant had not been deprived of JSA, and she had been able to pursue her legal challenge to the Supreme Court. Although the effect of the 2013 Act is that the Second Claimant can no longer rely upon the invalidity of the 2011 Regulations or the defective notification under reg. 4, it is still open to him to argue that there was good cause for his failure to

participate in the work programme in the forthcoming appeal to the Upper Tribunal. Moreover, the Second Claimant's entitlement to JSA did not constitute a 'possession' within the meaning of A1 P1.

22. Alternatively, the Defendant submits that any interference with the Claimants' rights under Art. 6 was justified by 'compelling grounds in the public interest' (applying the test in the ECtHR authorities to which I refer below). If the Second Claimant's JSA was a 'possession' within the meaning of A1 P1, then deprivation of it was justified in the public interest. The cost of repaying JSA to all those who had been unlawfully sanctioned was high. Those who would otherwise be liable to sanctions for refusing to participate in work programmes should not be entitled to gain a windfall and escape sanctions as a result of a technical challenge to the Regulations.

The statutory scheme

Jobseekers Act 1995

23. JSA is a benefit which is payable pursuant to the provisions of the Jobseekers Act 1995 ("JSA 1995"). Section 1(2) provides that a claimant is entitled to JSA if certain conditions are met. The conditions include that the claimant is available for employment, has entered a jobseeker's agreement which remains in force, is actively seeking employment and is not engaged in remunerative work. Subject to retirement age, there is no limit upon the period of time during which JSA may be claimed.

24. Section 17A was added to the JSA 1995 by the Welfare Reform Act 2009 introducing for the first time a power to "require" jobseekers to undertake unpaid work.

25. Section 17A(1) provides statutory authority for "imposing" a "requirement" on persons "to participate on schemes" (s.17A(1)), which may "require participants to undertake work, or work-related activity…" (s.17A(2)). The intended purpose of these schemes was to "assist [claimants] to obtain employment" (s.17A(1)). Such work was specifically excluded from the National Minimum Wage Act 1998.

26. Section 17A makes provision for regulations to prescribe specified matters, including at ss (1):

> "Regulations may make provision for or in connection with imposing on claimants in prescribed circumstances a requirement to participate in schemes of any prescribed description that are designed to assist them to obtain employment." (emphasis added)

27. Section 35 defines "prescribed" as specified in or determined in accordance with regulations.

28. In a section headed "Denial of Jobseeker's Allowance" section 19 sets out circumstances in which JSA will not be payable, even if the eligibility conditions are satisfied. These circumstances include failure to comply with jobseeker's directions; failure to take up a place on a training or employment scheme or losing it through misconduct; loss of employment voluntarily or through misconduct and failure to pursue a reasonable employment opportunity.

Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 ("the 2011 Regulations")

29. The 2011 Regulations were laid before Parliament on 31 March 2011 and came into force on 20 May 2011.

30. The 2011 Regulations made provision for the selection of persons to participate on a scheme (reg. 3), for notification of certain matters (reg. 4), and they also provided for sanctions for non-participation (regs. 6 - 8).

31. Reg. 2 set out the interpretation of certain terms used in the 2011 Regulations. It included the following:

> "the Employment, Skills and Enterprise Scheme" means a scheme within section 17A (schemes for assisting persons to obtain employment: "work for your benefit" schemes etc.) of the Act known by that name and provided pursuant to arrangements made by the Secretary of State that is designed to assist claimants to obtain employment or self-employment, and which may include for any [sic] individual work-related activity (including work experience or job search)."

32. Reg. 3 was titled "Selection for participation in the Scheme". It merely stated that, "[t]he Secretary of State may select a claimant for participation in the Scheme."

33. The notice provisions in reg. 4 were as follows:

> "Requirement to participate and notification
>
> (1) Subject to regulation 5, a claimant ("C") selected under regulation 3 is required to participate in the Scheme where the Secretary of State gives C a notice in writing complying with paragraph (2).

> (2) The notice must specify—
> (a) that C is required to participate in the Scheme;
> (b) the day on which C's participation will start;
> (c) details of what C is required to do by way of participation in the Scheme;
> (d) that the requirement to participate in the Scheme will continue until C is given notice by the Secretary of State that C's participation is no longer required, or C's award of jobseeker's allowance terminates, whichever is the earlier;
> (e) information about the consequences of failing to participate in the Scheme."

34. Reg. 6 provided that a claimant who failed to comply with any requirement notified under reg. 4 is to be regarded as having failed to participate in the Scheme.

35. Reg. 7 provided that a claimant who failed to participate must show good cause for that failure. In deciding whether or not a clamant had shown good cause for the failure, "the Secretary of State must take account of all the circumstances of the case, including in particular C's physical or mental health condition".

36. Reg. 8 made provision for benefit sanctions for failure to participate on a scheme under the 2011 Regulations "without good cause". The "period specified" was two weeks for a first failure to participate, four weeks in respect of a second failure, and 26 weeks on a third failure to participate.

37. This provision was replaced as of 22 October 2012 by reg. 7 of the Jobseeker's Allowance (Sanctions) (Amendment) Regulations 2012 ("the 2012 Regulations"). Reg. 2(2) revised the sanction periods upwards so that a first sanction could be four weeks or 13 weeks (depending on the "level" of seriousness of the claimant's actions), 13 or 26 weeks for a second failure and up to 156 weeks for more than two failures at the "higher" level.

38. A variety of schemes were established under the 2011 Regulations, including:

a) The sector-based work academy ("sbwa") scheme, which is intended to provide a short period of unpaid work for those most likely to be able to obtain employment.
b) The Community Action Programme ("CAP") which provides an extended 26-week placement for the long-term unemployed.
c) The Work Programme which is a 2 year work programme for the longer-term unemployed, delivered by contracted providers.

Jobseeker's Allowance (Schemes for Assisting Persons to Obtain Employment) Regulations 2013 ("the 2013 Regulations")

39. The 2011 Regulations were revoked upon the coming into force of the 2013 Regulations (section 1(14) of the 2013 Act).

40. On 12th February 2013, the 2013 Regulations were laid before Parliament, and made. Reg. 1 states that they came into force at 6.45 pm on 12th February 2013. The Secretary of State formally recorded in the SI that, by reason of the urgency of the matter, it was inexpedient to consult with representative organisations, pursuant to section 176(2) of the Social Security Administration Act 1992 ("SSAA 1992"), or to refer the proposals to the Social Security Advisory Committee, pursuant to section 173(1)(a) SSAA 1992.

41. Reg. 3 provides descriptions of the prescribed schemes, thus addressing the flaw in the 2011 Regulations which had rendered them *ultra vires*. It states:

> "3.— Schemes for Assisting Persons to Obtain Employment
>
> (1) The schemes described in the following paragraphs are prescribed for the purposes of section 17A(1) (schemes for assisting persons to obtain employment: "work for your benefit" schemes etc) of the Act.
>
> (2) Day One Support for Young People is a scheme comprising up to 30 hours per week in a work placement for the benefit of the community and up to 10 hours per week of supported work search over a period of 13 weeks, for any claimant aged between 18 and 24 years who has less than 6 months work history since leaving full-time education.
>
> (3) The Derbyshire Mandatory Youth Activity Programme is a scheme delivered in the Derbyshire Jobcentre Plus District comprising up to 30 hours per week of work-related activity for the benefit of the community and up to 6 hours per week of supported work search over a period of 8 weeks, for any claimant aged between 18 and 34 years.
>
> (4) Full-time Training Flexibility is a scheme comprising training of 16 to 30 hours per week, for any claimant who has been receiving jobseeker's allowance for a continuous period of not less than 26 weeks ending on the first required entry date to the scheme.
>
> (5) New Enterprise Allowance is a scheme designed to assist a claimant into self-employed earner's employment comprising guidance and support provided by a business mentor, access to a loan to help with start-up costs (subject to status) and a

> weekly allowance for a period of 26 weeks once the claimant starts trading.
>
> (6) The sector-based work academy is a scheme which provides, for a period of up to 6 weeks, training to enable a claimant to gain the skills needed in the work place and a work experience placement for a period to be agreed with the claimant, and either a job interview with an employer or support to help participants through an employer's application process.
>
> (7) Skills Conditionality is a scheme comprising training or other activity designed to assist a claimant to obtain skills needed to obtain employment.
>
> (8) The Work Programme is a scheme designed to assist a claimant at risk of becoming long-term unemployed in which, for a period of up to 2 years, the claimant is given such support as the provider of the Work Programme considers appropriate and reasonable in the claimant's circumstances, subject to minimum levels of support published by the provider, to assist the claimant to obtain and sustain employment which may include work search support, provision of skills training and work placements for the benefit of the community."

42. Reg. 4(1) provides that, "The Secretary of State may select a claimant for participation in a scheme described in regulation 3."

43. Regulation 5 mirrors the notice requirements contained in regulation 4 of the 2011 Regulations.

Jobseekers (Back to Work Schemes) Act 2013

44. The 2013 Act received royal assent and came into effect on 26 March 2013.

45. Section 1 of the 2013 Act provides retrospective authority for the 2011 Regulations:

> "1. Regulations and notices requiring participation in a scheme
>
> (1) The 2011 Regulations are to be treated for all purposes as regulations that were made under section 17A of the Jobseekers Act 1995 and other provisions specified in the preamble to the 2011 Regulations and that came into force on the day specified in the 2011 Regulations.
>
> (2) The Employment, Skills and Enterprise Scheme mentioned in the 2011 Regulations is to be treated as having been, until

> the coming into force of the 2013 Regulations, a scheme within section 17A(1) of the Jobseekers Act 1995.
>
> (3) The following are to be treated as having been, until the coming into force of the 2013 Regulations, programmes of activities that are part of the Employment, Skills and Enterprise Scheme—
>
> (a) the programmes described in regulation 3(2) to (8) of the 2013 Regulations, and
>
> (b) the programme known as the Community Action Programme,
>
> and references to the scheme are to be read accordingly."

46. Subsections (4)-(6) provide retrospective lawful authority for defective notices under the 2011 Regulations:

> "(4) A notice given for the purposes of regulation 4(1) of the 2011 Regulations (requirement to participate and notification) is to be treated as a notice that complied with regulation 4(2)(c) (details of what a person is required to do by way of participation in scheme) if it referred to—
>
> (a) the Employment, Skills and Enterprise Scheme, or
>
> (b) a programme of activities treated under subsection (3) as part of the scheme.
>
> (5) A notice given for the purposes of regulation 4(1) of the 2011 Regulations is to be treated as a notice that complied with regulation 4(2)(e) (information about the consequences of failing to participate) if it described an effect on payments of jobseeker's allowance as a consequence or possible consequence of not participating in the scheme or a programme of activities.
>
> (6) Regulation 4(3) of the 2011 Regulations (notice of changes in what a person is required to do by way of participation in scheme) is to be treated as if at all times—
>
> (a) it required the person in question to be notified only if the changes in the requirements mentioned in regulation 4(2)(c) were such that the details relating to those requirements specified in—
>
> (i) a notice given to the person under regulation 4(1), or
>
> (ii) a notice given to the person under regulation 4(3) on an earlier occasion,
>
> were no longer accurate, and
>
> (b) it required the person to be notified only of such changes as made the details inaccurate."

47. Subsections (7)-(9) make like provision in respect of the Mandatory Work Activity Scheme, which had been established under the Jobseeker's Allowance (Mandatory Work Activity Scheme) Regulations 2011 ("the 2011 MWA Regulations"), also made under section 17A JSA 1995.

48. Subsections (10) and (11) give retrospective effect to the provisions relating to the imposition of penalties for failure to comply with the 2011 Regulations and the 2011 MWA Regulations:

> "(10) The penalty provisions are to be treated (notwithstanding the amendments made by the 2012 Regulations) as having effect after the relevant time as they did before the relevant time, in relation to a failure to comply with the 2011 Regulations or, as the case may be, the Mandatory Work Activity Scheme Regulations that occurred or began to occur before the relevant time.
>
> (11) In subsection (10) and this subsection—
>
> "the penalty provisions" means—
>
> (a) in the case of a failure to comply with the 2011 Regulations, the provisions relating to the imposition of a penalty for such a failure that had effect before the relevant time;
>
> (b) in the case of a failure to comply with the Mandatory Work Activity Scheme Regulations, the provisions relating to the imposition of a penalty for such a failure that had effect before the relevant time;
>
> "the relevant time" means the time at which the 2012 Regulations came into force" (i.e. 22 October 2012).

49. Subsection (12) makes explicit that unlawful sanctions imposed under those regulations are retrospectively validated:

> "(12) A penalty imposed on a person before or after the coming into force of this Act for—
>
> (a) failing to participate in a scheme within section 17A(1) of the Jobseekers Act 1995, or
>
> (b) failing to comply with regulations under section 17A of that Act,
>
> is to be treated as lawfully imposed if the only ground or grounds for treating it as unlawfully imposed is or are removed by subsections (1) to (10)."

50. Section 2 provides for an independent report on the operation of the sanctions.

Retrospective legislation

51. Retrospective legislation may be defined as law making which alters the future legal consequences of past actions and events. The longstanding objections to retrospective legislation are described in *Bennion on Statutory Interpretation* (6th ed.) p. 291:

> "Dislike of *ex post facto* law is enshrined in the United States Constitution and in the constitutions of many American states, which forbid it. The true principle is that *lex prospicit non respicit* (law looks forward not back).[1] Retrospective legislation is 'contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law'.[2] The basis of the principle against retrospectivity is 'no more than simple fairness, which ought to be the basis of every legal rule'.[3]
>
> … Retrospectivity is artificial, deeming a thing to be what it was not. Artificiality and make-believe are generally repugnant to law as the servant of human welfare. So it follows that the courts apply the general presumption that an enactment is not intended to have retrospective effect. As always, the power of Parliament to produce such an effect where it wishes to do so is nevertheless undoubted."

52. The doctrine of the sovereignty of Parliament, and the absence of a written constitution, mean that the UK Parliament has an unfettered power to legislate retrospectively, if it sees fit. The courts have no power to strike down primary legislation. Section 4, HRA 1998 conferred upon the courts a new power to declare that legislation is incompatible with the ECHR. Such a declaration does not affect the validity of the impugned provision, nor does it bind the parties. If the relevant Minister considers that there are compelling reasons to take remedial action, he may by order make such amendments to the primary legislation as he considers necessary (s.10 HRA 1998) and the remedial order will be laid before Parliament for approval pursuant to Schedule 2.

53. Retrospective legislation may amount to a violation of human rights. The retrospective creation of criminal offences and heavier penalties is prohibited by Art. 7 ECHR as well as the Universal Declaration of Human Rights 1948 and the International Covenant on Civil and Political Rights 1966. The prohibition on retroactivity in criminal cases is also a principle of our domestic law. In *R v Rimington* [2006] 1 AC 459, Lord Bingham identified (at [33]):

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[1] Jenk Cent 284; 2 Co Inst 292
[2] Phillips v Eyre (1870) LR 6 QB 1, per Willes J. at 23….
[3] L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co. Ltd [1994] 1 AC 486, per Lord Mustill at 525

> " two guiding principles: no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done."

54. The ECHR and other human rights conventions do not prohibit retrospective legislation outside the criminal sphere. Although the courts hearing civil claims are alert to the potential dangers of retrospective legislation, it is recognised that such measures may be justified in the public interest. Challenges to retrospective legislation made under Art. 6(1) and A1 P1 raise distinctly different considerations, which I now turn to consider.

Article 6 ECHR

(1) Legal principles

55. Art. 6(1) protects the fundamental principle of the rule of law which, as declared in the Preamble to the Convention, is part of the common heritage of the signatories and thus underpins all Articles of the Convention (*Golder v UK* (1979-80) 1 EHRR 524, [34]).

56. The principle of the rule of law requires member states to ensure access to independent and impartial courts for the resolution of "civil rights and obligations", in accordance with fair procedures. It imposes an obligation on member states to respect the court process and to comply with judgments delivered by the courts (*Iatridis v Greece* (1999) 30 EHRR 97, [58]).

57. The principle of the rule of law also constrains member states from legislating in a manner which affects the judicial determination of a dispute involving the State or private parties. Such an intervention by the executive is only permissible on compelling grounds of the public interest.

58. In *Zielinkski & Ors v France* (2001) 31 EHRR 19, the ECtHR held that the French legislature had acted in breach of Art. 6(1) by passing retrospective legislation in respect of allowances payable to staff in social security offices during the course of ongoing litigation in which the State was a party. The ECtHR stated, at [57]:

> "The Court reaffirms that while in principle the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws, the principle of the rule of law and the notion of a fair trial contained in Article 6 preclude any interference by the legislature–other on compelling grounds of the general interest

> –with the administration of justice designed to influence the judicial determination of a dispute."

59. The ECtHR found, at [59], that there were no compelling grounds justifying legislative intervention while proceedings were pending. Among other factors, the financial risk adverted to by the Government could not warrant its action in substituting itself for the courts in order to settle the dispute.

60. In *Stran Greek Refineries v Greece* (1995) 19 EHRR 293, the ECtHR found a violation of Art. 6 when the Greek legislature enacted a law which purported to provide an authoritative interpretation of a previous statute, concerning an oil and gas concession, that was the subject of ongoing legal proceedings between the State and a private entity. The Athens Court of First Instance and Athens Court of Appeal had rejected submissions by the Greek government, seeking to invalidate a substantial arbitration award against it. The legislature intervened with its amending enactment shortly before an appeal to the Court of Cassation. The ultimate effect of the intervention was that the Government's appeal was successful.

61. The ECtHR said, at [46]:

> "..Greece undertook to respect the principle of the rule of law. This principle, which is enshrined in Article 3 of the Statute of the Council of Europe, finds expression, *inter alia*, in Article 6 of the Convention. …. As regards disputes concerning civil rights and obligations, the Court has laid down in its case law the requirement of equality of arms in the sense of a fair balance between the parties."

62. The Court had regard to the "timing and manner" of the legislation and stated that, "[i]t is […] an inescapable fact that the legislature's intervention in the present case took place at a time when judicial proceedings in which the State was a party were pending" (at [47]). The Court rejected the Greek Government's contention that the fact that inter partes proceedings continued demonstrated that the parties had enjoyed a fair trial, stating:

> "49. The Court is not persuaded by this reasoning. The requirement of fairness applies to proceedings in their entirety; it is not confined to hearings inter partes. There can be no doubt that in the instant case the appearances of justice were preserved, and indeed the applicants did not complain that they had been deprived of the facilities necessary for the preparation of their case. The principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute. The wording of paragraphs 1 and 2 of section 12 taken together effectively excluded any meaningful examination of the case by the First

> Division of the Court of Cassation. Once the constitutionality of those paragraphs had been upheld by the Court of Cassation in plenary session, the First Division's decision became inevitable.
>
> 50. In conclusion, the State infringed the applicants' rights under Article 6(1) by intervening in a manner which was decisive to ensure that the imminent outcome of proceedings in which it was a party was favourable to it. There has therefore been a violation of that Article."

63. The Court also found a violation of A1 P1.

64. In *Scordino v Italy* (No. 1) (2007) 45 EHRR 7, the ECtHR found a violation of Article 6 where the Government enacted a law in 1992 which altered the awards of compensation for expropriated land from the market value approach which applied to pending proceedings. The ECtHR reached this conclusion notwithstanding that the law in force at the time of the expropriation order giving rise to the applicants' compensation proceedings had been less favourable to the applicants than the new law of 1992.

65. The Court rejected the Italian Government's submissions that (1) the law was part of a political process that had started in 1971 that sought to move away from the general expropriation law and the 1865 law "did not correspond to the political, economic and social" views of the Italian parliament ([122]); (2) the 1992 law had been inspired by budgetary considerations ([123]); and (3) the law was general and not designed to influence ongoing litigation ([124]).

66. The ECtHR concluded:

> 130 …Accordingly, even though the proceedings were not annulled under s.5 bis of Law No.359/1992, the provision in question, which was applicable to the judicial proceedings that the applicants had instituted and which were pending, had the effect of definitively modifying the outcome by defining retrospectively the terms of the debate to their detriment. Although the Government submitted that the legislative provision was not aimed specifically at the present dispute, or any other dispute in particular, the Court considers that, as it was immediately applicable, it had the effect of frustrating proceedings then in progress of the type brought by the applicants. The manifest object, and the effect, of the impugned provision was in any event to modify the applicable rules relating to compensation, including in the case of judicial proceedings then in progress to which the state was a party.
>
> …..

> 132 In the Court's view, the Government have not demonstrated that the considerations to which they referred, namely, budgetary considerations and the legislature's intention to implement a political programme, amounted to an "obvious and compelling general interest" required to justify the retrospective effect that it has acknowledged in certain cases."

67. The Court also found a violation of A1 P1.

68. The Defendant relied, in particular, upon the case of *National & Provincial Building Society & Ors v United Kingdom* (1997) 25 EHRR 127 in which the ECtHR found that legislation to close an unforeseen tax loophole was compatible with Art. 6(1) notwithstanding that it determined legal proceedings in favour of the UK Government.

69. The case concerned changes in the accounting periods for the payment of income tax on investors' savings held by building societies introduced by section 40, Finance Act 1985. There was a 'gap' period between the end of the previous accounting periods and the start of the new regime. The Income Tax (Building Society) Regulations 1986 ("the 1986 Regulations") made transitional provisions which required societies to make payments for the 'gap' period. This resulted in double taxation, but if the payments were not made, some building societies would enjoy a tax-free period and thus obtain a windfall. The Woolwich Building Society issued legal proceedings challenging the vires of the 1986 Regulations. In response Parliament passed section 47(1) Finance Act 1986 to authorise the levying of tax for the gap periods. The 1986 Regulations were subsequently held to be invalid by the House of Lords, despite section 47. Parliament retrospectively validated the 1986 Regulations by the Finance Act 1991, but exempted the Woolwich Building Society. The other building societies commenced judicial review and restitution claims in 1991 challenging the validity of the Treasury Orders, which had been based on the 1986 Regulations. Parliament then passed the Finance (No. 2) Act 1992 which retrospectively validated the impugned Treasury Orders and effectively extinguished the legal claims of the other building societies.

70. The Court found, at [109], that the other building societies had launched their claims to take advantage of the technical loophole exposed by the Woolwich litigation. The Court's reasons for finding that there was no violation of Art. 6 are at [112]:

> "..the Court is especially mindful of the dangers inherent in the use of retrospective legislation which has the effect of influencing the judicial determination of a dispute to which the State is a party, including where the effect is to make pending litigation unwinnable. Respect for the rule of law and the notion of a fair trial require that any reasons adduced to justify such measures be treated with the greatest possible degree of circumspection.

> However, Article 6(1) cannot be interpreted to prevent any interference by the authorities with pending legal proceedings to which they are a party…. in the cases at issue the interference caused by .. the 1992 Act was of a much less drastic nature than the interference .. in the *Stran Greek Refineries .. v Greece* case. In that case the applicants and the respondent state had been engaged in litigation for a period of nine years and the applicants had an enforceable judgment debt against the State in their favour. The judicial review proceedings launched by the applicant societies had not even reached the stage of an *inter partes* hearing. Furthermore, in adopting … the 1992 Act with retrospective effect the authorities in the instant case had even more compelling public interest motives to make the applicant societies' judicial review proceedings and the contingent restitution proceedings unwinnable than was the case with the enactment of section 53 of the 1991 Act. The challenge to the Treasury Orders created uncertainty over the substantial amounts of revenue collected from 1986 onwards.
>
> It must be observed that the applicant societies in their efforts to frustrate the intention of Parliament were at all times aware of the probability that Parliament would equally attempt to frustrate those efforts having regard to the decisive stance taken when enacting section 47 of the Finance Act 1986 and section 53 of the 1991 Act. They had engaged the will of the authorities in the tax sector, an area where recourse to retrospective legislation is not confined to the United Kingdom, and must have appreciated that the public interest considerations in placing the 1986 Regulations on a secure legal footing would not be abandoned easily."

71. The Court found that there was no violation of A1 P1.

72. The Defendant also relied upon two other cases which adopted a similar approach to the *National & Provincial Building Society v UK* case.

73. First, *Ogis-Institut Stanislas & Ors v France* Apps 42219/98, 54563/00 in which the ECtHR held that there was no violation of Art. 6 where the French legislature enacted legislation which retrospectively reduced the rate of reimbursement for pension and other benefits for private sector school staff. When the legislation was enacted, the applicants' claims were at varying stages of the legal process but none was concluded.

74. The ECtHR found that, although there was ongoing litigation between the private schools and the regional authorities regarding the rate of reimbursement due to them, the legislation was "clearly and compellingly in the public interest" (at [72]). The private schools knew that the order granting them the higher rate had been drafted in

error. They were trying to take advantage of a technical defect and benefit from a windfall, as in the case of *National & Provincial Building Society v UK*. It was foreseeable that the State would seek to correct the mistake.

75. The Court also found that there was no violation of A1 P1.

76. Second, *EEG-Slachthuis Verbist v Belgium* App. 60559/10, a slaughterhouse company challenged legislation which retrospectively validated a royal decree passed in 1987 imposing compulsory contributions to an animal health and production fund. In 1991 the European Commission found the scheme contrary to EU law and in 1994 the ECJ and Belgian courts required repayment of contributions to certain claimants. In 1998 there was a partial codification of the 1987 decree, providing for reimbursement only in respect of imported animals, not domestic ones. The Government claimed that the true purpose of the legislation was to correct two defects in the original legislation, namely, discrimination in respect of imported animals and the failure to notify the European Commission in advance, not to intervene in the court proceedings (at 16).

77. The ECtHR rejected the application under Art. 6 as manifestly ill-founded, at pages 16 - 18. The legislation did not call into question past judicial decisions as it was passed before the applicant had obtained a judgment in his claim. The purpose of the legislation was to correct technical defects in the original legislation and to fill a legal vacuum. The applicant could not reasonably have expected that the State would take no action. Its intervention was foreseeable and was made on clear and compelling public interest grounds. It remained open to the applicant to bring a legal challenge to the lawfulness of the new legislation under community law.

78. The Court also found that there was no violation of A1 P1.

79. The Defendant relied also upon *Tarbuck v Croatia* App. 31360/10, in which the applicant claimed compensation under the Code of Criminal Procedure for detention without trial after his prosecution for espionage was abandoned, pursuant to the General Amnesty Act granting immunity in connection with the Homeland War between 1990-1996.

80. The ECtHR reiterated the general principles against retrospective legislation in the course of civil disputes, observing that they were “essential elements of the concepts of legal certainty and protection of litigants’ legitimate trust” (at [39]). The Court concluded that there were compelling public interest reasons justifying the retrospective amendment. Compensation pursuant to The Code of Criminal Procedure was intended for those who had been unlawfully detained or convicted, which was not the case here. It was not “absolutely unforeseeable” that new legislation would be enacted to address the “legal gap” in respect of those who had been released under the General Amnesty Act. The legislation had been enacted at an early stage, after the claim had been issued but before there had been any judgment. For these reasons, the Court found that there was no violation of Art. 6.

(2) The issues in this claim

81. The principles which I draw from the case law cited above are that, although Parliament is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws, the principle of the rule of law and the notion of a fair trial and equality of arms contained in Article 6(1) "precludes any interference by the legislature .. with the administration of justice designed to influence the judicial determination of a dispute" (*Zielinkski* at [57]) or "influencing the judicial determination of a dispute to which the State is a party" (*National & Provincial Building Society v. UK* at [112]). This can only be justified in law "on compelling grounds of the general interest" (*Zielinkski* at [57]) and "any reasons adduced to justify such measures be treated with the greatest possible degree of circumspection" (*National & Provincial Building Society v. UK a*t [112]). These principles have been cited with approval by the Supreme Court in *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868, per Lord Reed at [122].

82. Although these principles emanate from decisions of the ECtHR, in my view they also accurately reflect fundamental principles of the UK's unwritten constitution. The constitutional principle of the rule of law was expressly recognised in section 1, Constitutional Reform Act 2005. It requires, *inter alia*, that Parliament and the Executive recognise and respect the separation of powers and abide by the principle of legality. Although the Crown in Parliament is the sovereign legislative power, the Courts have the constitutional role of determining and enforcing legality. Thus, Parliament's undoubted power to legislate to overrule the effect of court judgments generally ought not to take the form of retrospective legislation designed to favour the Executive in ongoing litigation in the courts brought against it by one of its citizens, unless there are compelling reasons to do so. Otherwise it is likely to offend a citizen's sense of fair play.

83. In my judgment, these principles are applicable in this case, for the reasons I set out below.

84. First, I consider that Art. 6(1) is engaged. Case law has established that rights to social security benefits, whether contributory or state-funded, can constitute "civil rights" within the meaning of Art. 6.[4] Both Claimants were eligible to receive JSA and were in receipt of the benefit. Both were pursuing legal claims to determine their "civil rights and obligations". The First Claimant was pursuing a judicial review claim (*Reilly No. 1*) against an arm of the State, in which she challenged the lawfulness of the decision to require her to participate in an unpaid work scheme or face a sanction, namely, loss of JSA for a prescribed period. The Second Claimant was pursuing statutory appeals against decisions made by the Secretary of State for Work and Pensions to require him to participate in an unpaid work scheme and to impose sanctions, namely loss of JSA for prescribed periods when he refused.

[4] e.g. *Feldbrugge v. Netherlands* (1986) 8 EHRR 425; *Salesi v Italy* (1998) 26 EHRR 187 (Art. 6(1) applies to non-contributory welfare benefits)

85. Second, the Secretary of State for Work and Pensions was the opposing party in both the judicial review claim and the appeals. The 2013 Act was promoted by the Secretary of State and enacted by the UK Parliament on 26th March 2013. It was directly targeted at resolving the litigation in *Reilly No. 1* (unlike cases such as *EEG-Slachthuis Verbist v Belgium* and *National & Provincial Building Society v UK* (at [110]). It amounted to an interference in ongoing legal proceedings brought by the First Claimant, as it influenced the judicial determination in favour of the Secretary of State and it is likely to do so in the Second Claimant's forthcoming appeals. Both Claimants had obtained judgment in their favour in their respective claims before the 2013 Act was passed, distinguishing their claims from cases such as *Tarbuck v Croatia*, *EEG-Slachthuis Verbist v Belgium* and *National & Provincial Building Society v UK*.

86. At the date when the 2013 Act came into force, the First Claimant's litigation was well-progressed. She had succeeded, at least in part, in the Administrative Court and the Court of Appeal. The Secretary of State's appeal to the Supreme Court against the judgment of the Court of Appeal was pending. The 2013 Act retrospectively validated the defects in the 2011 Regulations upon which the First Claimant had successfully relied in *Reilly No. 1* to establish that the decision to require her to participate in the scheme, under threat of sanction, was unlawful. As a result, by the time her case reached the Supreme Court, the outcome on her successful grounds was a foregone conclusion: the Secretary of State would succeed on the basis of the 2013 Act.

87. The Second Claimant has appealed successfully to the FTT in respect of three sanctions imposed, on the basis of *Reilly No. 1*. He obtained judgment in his favour on 28th November 2012, before the 2013 Act was enacted. Pending the final outcome of the appeals in *Reilly No, 1,* the Secretary of State refused to implement the FTT's decision and the appeal to the Upper Tribunal was stayed. The Second Claimant's appeal to the FTT against the fourth sanction was also stayed.

88. The outcome of *Reilly No. 1* is highly likely to be determinative of the issues in his appeals, even taking into account the point that the FTT judgment was based upon Foskett J's decision on reg. 4(2)(e) which was not upheld by the Supreme Court. If the 2013 Act had not been passed, the FTT judgment would have been upheld on the other grounds in *Reilly No. 1*. Although the Second Claimant's appeals have not yet been determined, there is no doubt that the Upper Tribunal must now overturn the determination of the FTT in his favour, which was based upon the invalidity identified in *Reilly No. 1*. Appeals on grounds of 'good cause' are unaffected by the 2013 Act, but the Second Claimant did not succeed on that basis, and is unlikely to do so now.

89. Mr Eadie QC submits that the Supreme Court's judgment leaves open a ground of appeal based upon a breach of the common law duty of fairness. The Supreme Court held that fairness required that a claimant should have access to such information about the scheme as he or she may need in order to make informed and meaningful representations about participation before a decision requiring him or her to participate is made. However, the Upper Tribunal must now accept that there was a valid prescribed description of the scheme in the 2011 Regulations and that valid

notification was given under reg. 4 of the 2011 Regulations. The purpose of these requirements in the Regulations is *inter alia* to meet the requirements of fairness. Within such a statutory framework, which already provides for a defence of "good cause", it will only be exceptionally that an individual claimant can point to particular unfairness on the facts of his or her case. I have seen Mr Eadie's written submissions to the Upper Tribunal in the Second Claimant's appeal in which he argues that there was no breach of the common law duty of fairness in his case and that the Secretary of State's appeal should succeed, which I find seriously undermine his submission that the Second Claimant has any real prospect of success in the Upper Tribunal.

90. Third, on the evidence, I do not consider that Parliament's retrospective validation of the unlawful acts would have been foreseeable by the Claimants. Even Government Ministers described it as an exceptional course of action. I accept the evidence of the First Claimant in her witness statement, at [4-5], where she states that it never crossed her mind that the Government would legislate to validate retrospectively the regulations and notices if she succeeded in her claim. The usual course would be to amend the regulations prospectively to correct the error.

91. Mr Eadie QC placed some weight on the statement from the Minister for Employment, Mark Hoban MP, who announced on the day of the Court of Appeal judgment that the Government was "considering a range of options to ensure we do not have to repay these sanctions". I do not consider that this statement put the Claimants on notice that Parliament would retrospectively validate the sanctions in their cases as they had already been declared unlawful by the courts. Moreover, Mr Hoban made his statement long after the First Claimant issued her claim and the Second Claimant issued his appeals, so it could not have been operative on their decisions to issue legal proceedings. In the ECtHR jurisprudence, foreseeability is a relevant factor if the applicants ought reasonably to have foreseen that the State would intervene from the outset of their claim. It is relevant to the overall question of the fairness of the intervention. The First Claimant's litigation was well-progressed. The absence of foreseeability distinguishes this case from cases such as *National & Provincial Building Society* and *Ogis-Institut Stanislas & Ors v France*.

92. The Defendant submits that there were compelling grounds in the public interest for the retrospective legislation in this case. In support of the Defendant's submissions, I have had the benefit of reading two witness statements of Mr C. Guest, senior civil servant in the DWP, and the documents exhibited thereto. These include information about the operation of JSA and work schemes; extracts from Hansard, statements to Parliament, the Impact Assessment, explanatory notes, and documents relating to Mr Hewstone's claims.

93. Lord Freud, Parliamentary Under Secretary of State (Minister for Welfare Reform), explained the reasons for the Bill at the Second Reading in the House of Lords on 21 March 2013:

> "…we need the Bill to provide certainty that the Government are not in a position where we will have to repay previous

benefit sanctions, and can impose sanctions where decisions have been stayed, in respect of claimants who have failed to take part in employment programmes without good reason. We have made it clear that we will take steps to ensure that claimants cannot expect a sanction refund as a result of this judgment, and there is a compelling public interest for taking those steps.

The Bill does not overturn previous appeals that have succeeded on the basis of good cause and it does not prevent claimants from appealing a sanction on the basis of good reason. Instead, it ensures that claimants who have failed to participate with no good reason do not obtain an undeserved windfall payment. We estimate that such a windfall could cost the public purse up to £130 million. That is money that would be better spent on people who take their responsibilities seriously, and it is in the public interest that we ensure this.

There is also an important public interest, as the Court of Appeal recognised, in getting people back to work by ensuring that jobseeker's allowance is paid only to those who are actively seeking employment and who engage with attempts made by the state to achieve that end, and that those who do not do so face the appropriate consequences. The Bill will protect this public interest by ensuring that those who have not engaged with attempts made by the state to return them to work face the appropriate consequences, rather than receiving an undeserved windfall.

The Government respect the general principle that Parliament should not legislate to reverse the effects of the judgments of the court for past cases unless the situation is exceptional. However, it is entirely proper to enact such legislation if there is a compelling reason to do so. There is a compelling reason here on three grounds: first, the cost involved; secondly, the claimants affected do not deserve a windfall payment; and, thirdly, this is an unusual case in social security legislation where a court or tribunal has a retrospective effect.

I have said that we fundamentally disagree with the court's verdict with respect to the lawfulness of the ESE Regulations and the notices given under them. We believe that those regulations were correctly drafted. They were drafted to be flexible enough to encompass a wide range of programmes designed to support jobseekers into work. There was no clear and identified need to go further than the ESE regulations in order to lawfully mandate claimants to our schemes.

…..

> Nevertheless, following the High Court judgment we revised all referral notices to comply with the judgment and sent letters clarifying the position to the then claimants impacted by the decision. That allowed us to continue to operate the schemes as intended.
>
> It is right that we are able to operate our schemes as intended, giving jobseekers the opportunity to improve their chances of moving into work, with appropriate consequences for those who fail to take up that opportunity. It is right that government resources are targeted on those claimants who are actively seeking employment and taking all reasonable steps to improve their chances of securing employment and that resources are not wasted on those who have not met their responsibilities."

94. Later in the same debate, Lord Freud said:

> "In almost all cases regarding social security decisions, the decisions of a court or tribunal are only prospective in nature. That is because the most common way in which to challenge a social security decision, including the underlying regulations, is to bring an appeal to the First-tier Tribunal. If that happens, the normal route is followed and the decision of the tribunal will not have a retrospective effect because of Section 27 of the Social Security Act 1998. It is only because there is an anomaly in the text of Section 27 that it does not apply to judicial review cases."

95. Lord Freud was aware of the concerns about the legality of the proposed legislation because it had been brought to his attention by the report of the Constitution Committee. One of its members, Lord Pannick, told the House:

> "this Bill contravenes two fundamental constitutional principles. First, it is being fast-tracked through Parliament when there is no justification whatever for doing so. Secondly, the Bill breaches the fundamental constitutional principle that penalties should not be imposed on persons by reason of conduct that was lawful at the time of their action. Of course, Parliament may do whatever it likes – Parliament is sovereign – but the Bill is, I regret to say, an abuse of power that brings no credit whatever on this Government."

96. Mr Eadie QC submits that the Court should not consider the criticisms made by the Claimants of the expedited passage of the Bill through Parliament. Parliamentary proceedings are a matter for Parliament, not the court (see Art 9, Bill of Rights 1689). Although section 4, HRA 1998 empowers the Court to consider the compatibility of legislation with the ECHR in a manner not anticipated in 1689, I agree that the Court's concern is with the substance of the legislation and the reasons for it, not

parliamentary procedure. Nonetheless I observe that the absence of any consultation with representative organisations, and the lack of scrutiny by the Joint Committee for Human Rights or the Social Security Advisory Committee, may have contributed to some misconceptions about the legal justification for the retrospective legislation.

97. One such misconception related to the effect of *Reilly No. 1*. In the House of Commons, the largest opposition party (the Labour Party) did not oppose the Bill or its expedition, which assisted its successful passage through Parliament. Liam Byrne MP, Shadow Secretary of State for Work and Pensions, speaking in the debate on 19th March 2013, explained that the reason the Labour Party was not opposing the Bill was "because this Bill restores the general legal power of the DWP to issue sanctions". This statement was inaccurate, in my view. The DWP retained its legal power to issue sanctions. The Secretary of State had replaced the ultra vires 2011 Regulations with the lawful 2013 Regulations on 12th February 2013, the day on which the Court of Appeal handed down its judgment. The DWP had corrected its defective standard-form notices after the judgment in the Administrative Court, given in August 2012, and if necessary, could have done so again following the judgment in the Court of Appeal which found that the notices failed to comply with sub-paragraph (c), as well as (e), of reg. 4(2) of the 2011 Regulations. Therefore the DWP had not lost its general power to impose sanctions. The problem was that the courts had found that sanctions under the 2011 Regulations had been unlawfully imposed.

98. There were also misconceptions about the effect of section 27 Social Security Act 1998. Lord Freud was correct in saying that, where a court or tribunal finds in a test-case appeal that the DWP has erred in law, other claimants will only benefit prospectively. They are not able to rely on the effect of the decision in respect of the period prior to the tribunal's decision. However, the restriction in section 27 was deliberately limited in scope to ensure compliance with the ECHR, as the extracts from Hansard produced by Mr Hickman demonstrate. The effect of section 27 is that the following categories of claimants may benefit in respect of the period prior to the tribunal's decision:

a) the claimant/s who brought the test case;

b) other claimants whose appeals to the FTT or higher tribunals or courts were pending at the date of the test case decision;

c) claimants whose cases had been 'stockpiled' at the date of the test case decision i.e. where the DWP had deferred its decision under s.25(2) & 3(a), Social Security Act 1998, which is a power typically exercised pending the outcome of a test case.

99. Under the 2013 Act, none of the claimants in categories (a) to (c) above are able to rely on the court rulings in *Reilly No. 1* in respect of any period prior to those judgments. So the 2013 Act was not bringing *Reilly No. 1* into line with the normal rule for appeals. It was introducing a more draconian provision, unique to this cohort

of claimants. This was not explained or justified by Lord Freud at the time. Nor is it explained or justified by Mr Guest, who said at paragraph 33 of his witness statement; "It was therefore considered to be consistent with s.27 to enact retrospective legislation to achieve the same result". I consider that this statement is inaccurate.

100. Mr Guest said in his witness statement, at paragraph 34, that the Secretary of State and the DWP had considered whether to exclude those who had already appealed to the FTT, but decided against it. The reasons given were that it would be difficult to draft legislation which applied only to some claimants and not others. It would also be difficult to identify the claimants who had appealed, and on what grounds. In any event, the public interest arguments against repayment of benefit applied equally to them.

101. Regrettably this reasoning does not grapple with the Art. 6(1) issues. Those claimants who had brought judicial review claims or appeals required special consideration because the 2013 Act was potentially an interference with their ongoing legal claims. Although neither Ms Reilly nor Mr Wilson had outstanding claims for JSA, they were seeking declaratory relief and a successful outcome before the Supreme Court. The effect of the 2013 Act was that the declarations granted were superseded and their claims were dismissed.

102. In a pre-action protocol response, the Treasury Solicitor estimated the number of appellants as follows:

a) approximately 2,475 appeals to the FTT have been stayed pending the Supreme Court judgment;

b) approximately 37 appeals to the Upper Tribunal, and applications for permission to appeal, have been stayed pending the Supreme Court judgment;

c) in approximately 25 cases the FTT has determined an appeal against the Secretary of State on the basis of *Reilly No. 1*. In 19 of those cases, permission is being sought to appeal out of time. In 6 of those cases the Secretary of State did not lodge an application for permission to appeal in time and the benefit has been repaid.

103. The DWP Equality Impact Assessment estimated that 221,000 – 259,000 sanctions had been issued under the 2011 Regulations valued at a total of £80 - £99 million, which was liable to be repaid. No allowance was made for appeals which might succeed on 'good cause' grounds.

104. These figures were said to be "net of the estimated number of appeals", which I assume refers to pending or concluded appeals on *Reilly No. 1* and 'good cause' grounds. The number and estimated value of the appeal cases was not provided.

105. On examining the figures in the Impact Assessment, one can see that the total figure of repayments of "up to £130 million" is an estimate. The total figure in the Impact Assessment is £110 to £130 million. Somewhat confusingly, the total figure also includes 59,000 sanctions which had been 'stockpiled' (i.e. the sanction decision has been deferred). These are not repayments. The reason they have been included is that, if the sanctions were imposed, the DWP would save £20 - £21 million by withholding JSA.

106. The total figure of "up to £130 million" also includes sanctions imposed and decisions stockpiled under parallel regulations – the Jobseeker's Allowance (Mandatory Work Activity Scheme) Regulations 2011 – which were not in issue in *Reilly No. 1*. The lawfulness of the sanctions is in doubt, because they are drafted in a similar way to the 2011 Regulations.

107. I readily understand that a government faced with the prospect of substantial repayments would consider it in the public interest not to pay them. Particularly since the DWP aims to reduce its benefits bill as part of the overall deficit reduction programme. However, it is apparent from the ECtHR's judgments, such as *Scordino* and *Zielinkski*, that financial loss alone is not a sufficiently "compelling reason in the public interest". If it were, then retrospective legislation of this kind would be commonplace.

108. I accept Mr Hickman's point that the DWP would have had to pay these sums in benefits if the claimants had agreed to participate in the work schemes, so they would or should have been budgeted for in 2011 and 2012, as anticipated expenditure. When sanctions are imposed, it is a financial saving for the DWP.

109. The obligation to repay arose as a result of a series of misjudgments by the DWP. Potential flaws in the Regulations were identified at an early stage by the House of Lords Select Committee on the Merits of Statutory Instruments (29th report), referred to by Foskett J at [44 – 48] and by Pill LJ at [60]. Mr Hickman questioned whether it was fair for unemployed claimants who were only receiving a subsistence-level benefit to bear the burden of the DWP's mistakes.

110. The DWP did not provide to Parliament details of the number of claimants with pending or concluded appeals or judicial review claims, or their value. The cost of making JSA repayments to these sub-groups, so as to avoid a potential breach of Art. 6(1), would have been significantly cheaper than making repayments to all claimants who had been unlawfully sanctioned. In my view, it would have been a more proportionate response to the problem which the Government faced. This option was not made available for Parliament's consideration.

111. I assume that the reason why the Art. 6(1) issues were not fully considered by Parliament was because the Secretary of State and Parliament had been advised that the Bill was compatible with the ECHR. Mr Guest sets out in his witness statement, at

[41], the Government's statement under section 19(1)(a) HRA 1998 explaining why the Bill was considered to be compatible with the ECHR. It stated:

> "43. In the event that it were to be considered that the proposed legislation interfered with property rights under Article 1 of Protocol 1 of the ECHR, the Government considers that any such interference is justified as there are compelling public interest reasons for doing so, given the significant cost to the public purse of repaying previously sanctioned benefits, and as the aim of the proposed legislation is intended to restore the law to that which Parliament intended.
>
> 44. A claimant might also argue that legislation which removes their right to a refund of sanctioned benefits or allows the Secretary of State to impose a sanction, notwithstanding the Court of Appeal's decision, is a breach of their right of access to court under ECHR Article 6.
>
> 45. If no legal claim has been brought on the grounds that the ESE Regulations are ultra vires and/or that the notice issued under them is non-complaint prior to the enactment of the proposed legislation, the Government considers that Article 6 is not engaged at all since the claim to entitlement to benefit , and any dispute regarding a benefit decision thereon which would require access to the courts remains hypothetical.
>
> 46. Similarly, for cases where the Secretary of State has not yet made a sanction decision, the Government considers that Article 6 will not be engaged as there will be no potential dispute about the right – the effect of the legislation will be that there can be no right to object to the sanction on the notice or vires grounds.
>
> 47. Even if the proposed legislation would interfere with a right of access to court, the Government considers that the interference is justified for similar reasons as for Article 1 of Protocol 1.
>
> 48 These issues were considered in Stran Greek Refineries and Stratis Andreadis v Greece (09.12.1994) and National & Provincial Building Society v UK (23.10.1997). As with that latter case, the legislation would have the effect of closing a loophole in order to give effect to the original intention of Parliament, which is not disputed."

112. I consider that the statement in paragraphs 47 & 48 was unsatisfactory for two reasons.

113. First, it did not set out the relevant test to be applied by Parliament, and so did not explain to Parliament that it was being asked to justify a departure from the legal norm, which would only be lawful if made for compelling reasons in the public interest.

114. Second, the statement erred in concluding that this case was directly comparable to *National & Provincial Building Society v UK* because "the legislation would have the effect of closing a loophole in order to give effect to the original intention of Parliament, which is not disputed."

115. The key features in *National & Provincial Building Society v UK* which distinguish it from this case are:

a) the Government had already passed validating retrospective legislation (Finance Act 1991) before the applicant building societies commenced their claims and so they could have been under no illusions that further legislation would be forthcoming if it was required to enforce the payment of tax due;
b) the ECtHR found that the applicant building societies were seeking to frustrate the intention of Parliament and exploiting a loophole (at [112]);
c) the Finance Act 1991 expressly exempted the Woolwich Building Society, which had brought the original claim, from any retrospective effect. The ECtHR affirmed the appropriateness of this, at [118];
d) the ECtHR found that the decision to legislate was not targeted at the applicants' legal proceedings (at [110]), which had not even reached an inter partes stage ([112]).

116. In my judgment, it is not accurate to characterise the flaws in the 2011 Regulations, and the notices served, as a technicality or a loophole, comparable to those identified in *National & Provincial Building Society v UK* and *Ogis-Institut Stanislas v France.* In *Reilly No. 1,* courts at the highest level held that important issues of principle were at stake.

117. In the Court of Appeal, Sir Stanley Burnton said, at [74]:

> "..any scheme must be such as has been authorised by Parliament. There is a constitutional issue involved. The loss of jobseeker's allowance may result in considerable personal hardship, and it is not surprising that Parliament should have been careful in making provision for the circumstances in which the sanction may be imposed… "

118. Pill LJ said at [63]:

> "Regulation 4 recognises the need to give appropriate information to claimants. That requirement reflects administrative law principles applicable when it is proposed by

> regulation to impose sanctions. Claimants must be made aware of their obligations and of the circumstances in which, and the manner in which, sanctions will be applied."

119. It is noteworthy that the Supreme Court agreed to hear the Secretary of State's appeal, even though the 2013 Act had made the appeal academic, because "the issue may be of some significance in the drafting of regulations generally" (per Lord Neuberger and Lord Toulson at [41]).

120. In relation to the failure to include descriptions of the prescribed schemes, they said, at [47],

> "…it seems clear to us that regulation 2 does not satisfy the requirements of section 17A(1). The courts have no more important function that to ensure that the executive complies with the requirements of Parliament as expressed in a statute. Further, particularly where the statute concerned envisages regulations which will have a significant impact on the lives and livelihoods of many people, the importance of legal certainty and the impermissibility of sub-delegation are of crucial importance. The observations of Scott LJ in *Blackpool Corpn. v Locker* [1948] 1 KB 349, 362 are in point: "John Citizen" should not be "in complete ignorance of what rights over him and his property have been secretly conferred by the minister" as otherwise "For practical purposes, the rule of law.. breaks down because the aggrieved subject's remedy is gravely impaired"."

121. Lords Neuberger and Toulson emphasised the importance of providing sufficient information about the scheme at [64-65]:

> "64. …the administration of a scheme by which a person may be required to engage in unpaid work on pain of discontinuance of benefits is a matter of considerable importance to a claimant for jobseeker's allowance. (It is also of significance to the public at large, which has a legitimate interest in the way that public funds are disbursed and in proper steps being taken to encourage and assist such claimants to obtain full employment). For the individual, the discontinuance or threat of discontinuance of jobseeker's allowance may self-evidently cause significant misery and suffering…"
>
> "65. Fairness therefore requires that a claimant should have access to such information about the scheme as he or she may need in order to make informed and meaningful representations to the decision-maker before a decision is made."

122. Lord Freud and other Government spokesmen have emphasised that the purpose of the 2013 Act was to give effect to Parliament's original intentions, thus implying that the judgments of the Court were not in accordance with Parliament's intentions. However, it was Parliament's intention, as evidenced in section 17A(1) JSA 1995, that the regulations would include prescribed descriptions of schemes, and so it would not be open to the DWP to introduce such schemes from time to time, as it thought fit. The Courts found that the 2011 Regulations failed to give effect to Parliament's intention. The 2013 Regulations, made by the Secretary of State and laid before Parliament, have remedied that defect.

123. Similarly, it was Parliament's intention, evidenced by section 17A(5), that claimants would be notified of the requirement to participate in a scheme, and could not be sanctioned without formal notice being given. Regulation 4 of the 2011 Regulations, made by the Secretary of State and laid before Parliament, imposed detailed notice requirements on the DWP. The Courts found that the Secretary of State had failed to comply with the requirements of reg. 4, thereby failing to give effect to Parliament's intention. The DWP has now revised the standard-form notices, thus remedying the defects.

124. Overall, the scheme should now be operating as Parliament intended, thanks to the supervisory jurisdiction of the Courts.

125. In cases where the courts or tribunals have held that benefit has been unlawfully withheld from claimants, contrary to the terms of the legislative scheme, I do not agree that repayment would be "an undeserved windfall", as Lord Freud described it. They are merely receiving their legal entitlement.

126. It would be unjust to categorise the claimants in *Reilly No. 1* as claimants "who have not engaged with attempts made by the state to return them to work" and who should therefore "face the appropriate consequences, rather than receiving an undeserved windfall", as Lord Freud put it in his speech. Foskett J., having had the opportunity to examine the facts of the individual claimants in detail, found at [186]:

> "In relation to Miss Reilly and to Mr Wilson it is important that it is appreciated that each has been actively looking for work: they have not taken their objections to the overall scheme as a means of avoiding employment and seeking simply to rely on benefits. Miss Reilly had (and, one hopes, still has) a primary career ambition. Her original complaint arose from what she was wrongly told was a compulsory placement on a scheme that (a) impeded her voluntary efforts to maintain and advance her primary career ambition and (b) having embarked upon it, from her perspective, did not offer any worthwhile experience on an alternative career path. It is not difficult to sympathise with her position from that point of view. Mr Wilson had more fundamental objections to a compulsory unpaid scheme (which indeed it was in his case) which, from his perspective, was not

> tailored to his own needs and would impede his continuing efforts to find employment, but again there is no suggestion in his case that he would not take suitable employment if he could find it."

127. The Court of Appeal recorded that the Judge's findings of fact about the circumstances of the claimants in *Reilly No. 1* were not challenged (at [18]). It seems likely that, among the many thousands of JSA claimants, there will be others who do not fit the stereotype presented by Lord Freud on behalf of the DWP, as well as some who do.

128. In conclusion, having scrutinised the Defendant's justification for the 2013 Act with "circumspection", I do not consider that there were "compelling grounds of the general interest" to justify the interference with the Art. 6(1) rights of the Claimants to a judicial determination of their claims, for the reasons set out above. Therefore there was a violation of Art. 6(1). My reasoning only applies to the minority of claimants who pursued claims in the courts or tribunals.

129. Finally, I reject the Defendant's submission that the Court should not find a violation of Art 6(1) in cases such as these if there is not also a violation of A1 P1, relying on a passage in *R (St Matthews (West) Ltd & Others v Her Majesty's Treasury & Others* [2014] EWHC 1848 (Admin) at [91]-[92], which cited Lord Brown in *AXA General Insurance Ltd v Lord Advocate* [2012] 1 AC 868. In *AXA*, the Lord Ordinary had found that there was no violation of Art. 6(1) on the facts of the case, and that ruling was not appealed to the Supreme Court. In considering the alternative claim under A1 P1, Lord Brown said, obiter, that "the appellants have never thereafter sought to return to [the Art. 6(1) claim] – understandably, I think, because a challenge of this nature must in reality stand or fall upon the effect of the legislation generally. It would be absurd to strike down legislation like this … merely because pending actions are included within its scope." (at [80]). At [83], Lord Brown expressed his view that the Art. 6(1) test of "compelling grounds of public interest" would not have been satisfied, but the lower test under A1 P1 ("in the public interest") was satisfied. In my judgment, if the appellants had been able to establish a violation of Art. 6(1), the Court could not, and indeed would not, have refused to uphold their claim on the basis that an alternate claim under A1 P1 had not been established. This would be contrary to both ECtHR and domestic law and practice. The rights protected by Art. 6(1) and A1 P1 differ in nature, and there are legitimate reasons for allowing a greater or lesser interference with those rights by the State.

Article 1 of Protocol 1 ECHR

130. The Second Claimant also applies for a declaration of incompatibility under A1 P1. (The First Claimant suffered no loss of benefit and therefore cannot rely on A1 P1). A1 P1 provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

131. The first issue is whether or not A1 P1 is engaged: has the Second Claimant been "deprived" of his "possessions"?

132. The Second Claimant's primary submission is that A1 P1 is clearly engaged because he was in receipt of a monetary benefit (a "possession") of which he was deprived by the State when the sanctions were imposed.

133. I accept that it is no longer open to the Defendant to argue that a non-contributory benefit wholly funded by the State, such as JSA, cannot constitute a possession under A1 P1, following the judgment of the Grand Chamber of the ECtHR in *Stec v United Kingdom (Admissibility)* (2005) 41 EHRR SE18, which was applied in the UK in *R. (on the application of RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311, per Lord Neuberger at [31-32].

134. However, under UK domestic law, the Second Claimant's right to JSA depends upon whether he meets the conditions for receipt of the benefit. He must be (1) eligible and (2) not denied payment on conduct grounds under sections 17A or 19 JSA 1995. This applies continuously, not just at the date of initial application and approval.

135. The eligibility requirements are listed in section 1, JSA 1995. Some of the eligibility requirements are objectively verifiable (e.g. age, residence), others may depend upon an exercise of judgment by the DWP on behalf of the Secretary of State (e.g. available for work and actively seeking work).

136. Under the statutory scheme for the imposition of sanctions, pursuant to section 17A and the 2011 Regulations, a claimant is liable to a sanction if he has failed to participate in a scheme in accordance with the requirements notified to him. If the Secretary of State decides that (1) a claimant has failed to participate in a scheme, and (2) that he has not shown good cause for that failure, the consequence will be that the claimant is treated as subject to sanctions and JSA is 'not payable' for a future period which is specified by regulation (see section 17A(5) & (6) JSA 1995 and reg. 8, 2011 Regulations). More extensive provision for non-payment on conduct grounds is set out in section 19 JSA 1995 which was later used as the statutory basis for JSA sanctions.

137. By way of illustration, on 18th May 2012, the DWP sent to the Second Claimant a Decision notice stating:

> "My decision is that a sanction is imposed for the period 25/05/12 to 21/06/2012…This is because [the Second Claimant] failed, without good cause, to participate in the Work Programme and the Employment, Skills and Enterprise Scheme…"

138. In my judgment, the legal effect of the decision was that the Second Claimant did not meet the conditions for payment of JSA for a specified period of time in the future. The Second Claimant was not deprived of an existing "possession" because this was not a revocation of benefit previously received, nor a demand for repayment of the JSA. The mere fact that he had been paid JSA in respect of an earlier period did not entitle him to continuing payments in the future if he no longer met the necessary conditions.

139. I do not consider that this analysis is inconsistent with *Moskal v Poland* (2010) 50 EHRR 22 in which the ECtHR held:

> "38. The principles which apply generally to cases under art. 1 of Protocol No. 1 are equally relevant when it comes to social and welfare benefits. In particular, art. 1 of Protocol No. 1 does not create a right to acquire property. This provision places no restriction on the contracting state's freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme. If, however, the contracting state has in force legislation providing for the payment as of right of a welfare benefit – whether conditional or not on the prior payment of contributions – that legislation must be regarded as generating a proprietary interest falling within the ambit of art. 1 of Protocol No. 1 for persons satisfying its requirements.
>
> 39. In the modern democratic state many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. Many domestic legal systems recognise that such individuals require a degree of certainty and security and provide for benefits to be paid – subject to the conditions of eligibility – as of right. Where an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding art. 1 of Protocol No, 1 to be applicable.
>
> 40. The mere fact that a property right is subject to revocation in certain circumstances does not prevent it from being a "possession" within the meaning of art.1 of Protocol No. 1, at least until it is revoked. On the other hand where a legal entitlement to the economic benefit at issue is subject to a

> condition, a conditional claim which lapses as a result of the non-fulfilment of the condition cannot be considered to amount to "possessions" for the purposes of art. 1 of Protocol No. 1."

140. It is clear from this statement of principle that, in order to establish a property right, the applicant must fulfill the requirements for receipt of the benefit at the relevant time.

141. In accordance with general principles of administrative law, the sanction decisions were effective and lawful unless or until overturned. This is confirmed by section 17, Social Security Act 1998 which provides that decisions made by the Secretary of State are final unless and until revised or superseded or finally overturned on appeal.

142. The Second Claimant successfully appealed to the FTT, obtaining a determination that the non-payment of JSA pursuant to three sanction decisions had been unlawful. The legal effect of the FTT determination was that the Second Claimant was entitled to JSA payments in respect of those periods and they constituted "possessions" within the meaning of A1 P1. However, the Secretary of State appealed to the Upper Tribunal and refused to repay the benefit pending the outcome of *Reilly No. 1*, pursuant to reg. 16 Social Security and Child Support (Decisions and Appeals) Regulations 1999. The appeal is due to be heard in August 2014. If, as is likely, the Secretary of State succeeds on appeal, the effect of the Upper Tribunal's decision will be that the Second Claimant is not entitled to JSA payments in respect of the relevant periods under domestic law and therefore they do not constitute "possessions" within the meaning of A1 P1.

143. However, Mr Hickman submits, in the alternative, that the Second Claimant had a reasonable expectation that the JSA benefits would be paid to him if his legal claim was successful. The case law of the ECtHR has established that an applicant may have a "possession" for the purposes of A1 P1 if he has an "asset", in the form of a claim, in respect of which the applicant can argue that he has a "legitimate expectation" of obtaining "effective enjoyment of a property right" (*Kopecký v Slovakia* (2005) 41 EHRR 43, [35]). The property in issue in that case was some gold and silver coinage confiscated in the course of criminal proceedings. However, as explained by the ECtHR at [52], not every claim constitutes an "asset":

> "… the Court's case law does not contemplate the existence of a "genuine dispute" or an "arguable claim" as a criterion for determining whether there is a "legitimate expectation" protected by [A1 P1]. … On the contrary, the Court takes the view that where the proprietary interest is in the nature of a claim it may be regarded as an "asset" only where it has a sufficient basis in national law, for example where there is settled case law of the domestic courts confirming it."

144. Mr Hickman relies on the following cases in which a claim has been regarded as an "asset", and therefore a "possession" within the meaning of A1 P1:

a) *Stran Greek Refineries* (supra). The ECtHR found that the applicants had a sufficient propriety interest to amount to a "possession" under A1 P1, as they had obtained a final and binding arbitration award and the lawfulness of the award had been upheld in the court of first instance and on appeal.

b) *Pressos Compania Naviera SA v Belgium* (1995) 21 EHRR 301. The ECtHR held that a claim for damages in tort against negligent ships' pilots was a possession under A1 P1. In December 1983, the Court of Cassation reversed previous authority and held that the pilots could be personally liable in tort. The legislature enacted legislation in 1988 establishing an immunity for pilots.

c) *Draon v France* (2006) 42 EHRR 40. Legislation was enacted which changed the existing law and prevented parents of children recovering damage in negligence claims against a health authority for "special burdens" arising from a child's disability. The applicants had an ongoing legal claim under this head, for which they had received interim payments. France conceded before the ECtHR that the applicants had a "possession" within A1 P1 because they had an existing claim, based on settled case law, and a legitimate expectation of obtaining damages.

145. Mr Hickman also referred to *AXA General Insurance Ltd v HM Advocate* (supra), where legislation was enacted by the Scottish Parliament, reversing the effect of case law, and imposing a liability in damage upon employers who wrongfully exposed individuals to asbestos. This imposed a corresponding liability on the employers' insurers. Their financial resources were held to be "possessions" for the purposes of A1 P1. This was an unusual case. I do not find that it assists the Second Claimant since the "possessions" in question were the accumulated assets of the insurers, not a claim to welfare benefits.

146. In my judgment, although the Second Claimant had a good arguable case, it did not qualify as an "asset" for the purposes of A1 P1. Unlike the authorities relied upon by Mr Hickman, the Second Claimant's claim to JSA was not founded upon a body of settled case law in force at the time. *Reilly No. 1* raised novel points. The correct legal analysis was uncertain. Although the Claimants in *Reilly No. 1* had been successful in both the Administrative Court and the Court of Appeal when the 2013 Act came into force, the basis upon which they were successful differed; the only point of agreement was that was a breach of reg. 4(2)(e). The Supreme Court took a different view to both the Court of Appeal and the Administrative Court, finding that there was no breach of reg. 4(2)(e), though agreeing with the Court of Appeal that the 2011 Regulations were ultra vires and that there had been a breach of reg. 4(2)(c). Although the Second Claimant's appeal had succeeded in the FTT on the basis of the Administrative Court's decision that there was a breach of reg. 4(2)(e), it was this analysis that was found to be erroneous by the Supreme Court.

147. I accept the Defendant's submission that the Second Claimant's only reasonable expectation was that his appeal would be determined in accordance with the law as it stood from time to time.

148. For these reasons, I conclude that the Second Claimant has not been deprived of his "possessions" within the meaning of A1 P1.

Conclusions

149. I grant permission to apply for judicial review on all grounds.

150. I conclude that:

a) the Jobseekers (Back to Work Schemes) Act 2013 was incompatible with the Claimants' rights under Art. 6(1) ECHR;

b) Article 1 of the First Protocol to the ECHR was not engaged.

151. I grant a declaration in the following terms: "It is declared that the Jobseekers (Back to Work) Schemes Act 2013 is incompatible with the Claimants' rights under Article 6(1) of the European Convention on Human Rights, as given effect by section 1 of the Human Rights Act 1998".