OUTER HOUSE, COURT OF SESSION

[2016] CSOH 71

P414/15

OPINION OF LADY SCOTT

In the petition

ELIZABETH HUNTER

Petitioner;

against

(FIRST) STUDENT AWARDS AGENCY FOR SCOTLAND; (SECOND) THE SCOTTISH MINISTERS; (THIRD) THE RIGHT HONOURABLE LORD WALLACE OF TANKERNESS, THE ADVOCATE GENERAL FOR SCOTLAND; and (FOURTH) THE RIGHT HONOURABLE FRANK MULHOLLAND, QC,THE LORD ADVOCATE

Respondents:

for

Judicial Review of the decision of the Student Awards Agency for Scotland of 29 April 2014 to refuse the petitioner's application for a student loan under the Education (Student Loans) (Scotland) Regulations 2007

Petitioner: Irvine; Balfour + Manson LLP
Respondents: Springham; Scottish Government Legal Directorate

20 May 2016

[1] This is an action for judicial review of a decision of 29 April 2014 by the Students Awards Agency for Scotland (SAAS) ("the first respondents") to refuse the application of the petitioner for a student loan under the Education (Student Loans) (Scotland) Regulations 2007 ("the 2007 Regulations"). That decision was made in accordance with the terms of Regulation 3(2)(ii) of the 2007 Regulations which restricts eligibility for a loan to persons under the age of 55 years. The action is raised on two grounds. Firstly, the petitioner claims that this decision and the relevant regulations unlawfully discriminate against her in violation of article 14 along with article 2 (protocol 1) of the European Convention on Human Rights ("the Convention") and fall to be reduced. Secondly, that the Scottish Ministers ("the second respondents") failed to assess the discriminatory effects of the 2007 Regulations as regards age and thereby acted in breach of the public sector equality duty ("PSED") imposed by section 149 of the Equality Act 2010 ("the EA").
[2] The issues raised under these grounds are rehearsed below at paragraph 4. The relevant legislation is listed in an addendum to this opinion and is reproduced in the first volume of authorities lodged by parties.
[3] The first ground raises a devolution issue and the Advocate General and the Lord Advocate are also respondents to the petition.

The issues

[4] The issues arising within the two grounds of review were as follows:

Ground 1: Whether the decision taken under Regulation 3(2) of the 2007 Regulations to refuse the petitioner a student loan was in violation of her right not to be discriminated against under Article 14 of the Convention. Within this argument the following discrete issues arise:

1. Do the facts fall within the ambit of A1P1 which protects the right to property?

2. In the alternative, do the facts fall within the ambit of A2P1 which protects the right to education?

3. If so, in respect of either (1) or (2), does the engagement of Article 14 result in an infringement of the right against age discrimination?

4. Is any such infringement of Article 14 justified or disproportionate?

5. If disproportionate, is Regulation 3(2) of the 2007 Regulations capable of being read in a way which is not discriminatory and within the devolved competence?

6. If not, what is the appropriate remedy?

Ground 2: The second respondents are in breach of their PSED in terms of section 149 of the EA.

If so, in the circumstances, is any order or remedy necessary?

The petitioner

[5] The petitioner was born on 7 December 1958. She left school at 16 with 2 'O' levels. The petitioner is single and has no dependents. Prior to 2011, she had been out of work for a period of around 30 years. She had previously trained as a hairdresser but required to leave work after 5 years due to ill-health. She was reliant on welfare benefits as her source of income. In 1992 she became the full-time carer for her elderly father until his death in January 2014. She has no pension. She is now 56 years old.

[6] In 2011, the petitioner enrolled on a cookery course. She had been thinking for some time about establishing her own catering business and wanted to secure a qualification to that end. She wanted to improve her situation and to do something with her life. She has a friend who runs a successful outside catering firm. She is familiar with the work which is involved with doing so and wishes to run a similar operation. She has received advice in this regard from a lecturer at the college who also runs a catering business. She is confident that, with her age and experience, she will be able to make her own catering business a success.

[7] The course on which the petitioner enrolled in 2011 was the NC Professional Cookery (Bronze) at Motherwell College (now New College Lanarkshire) (the "College"). She subsequently progressed to the NC Professional Cookery (Silver). On completion of the "silver" programme a student may progress to the NC Professional Cookery (Gold). In the course of the 2013-2014 academic year she was invited by the College to undertake a City & Guilds Professional Cookery Diploma instead. She was encouraged to do so as the City & Guilds qualification is internationally recognised and offers greater employment opportunities. The petitioner graduated from the City & Guilds course in June 2014.

[8] The petitioner then enrolled on an HNC in Hospitality Management. The course start date was on or around 22 August 2014. The HNC course programme includes modules in "Financial Control", "Accounting" and "Hospitality Supervision". The petitioner considers the breadth of coverage offered by the HNC, in particular in relation to management and accounting, to be vital in order to make any catering business a success.

[9] Prior to enrolling on the HNC, the petitioner had been in receipt of a college bursary in respect of her studies. The bursary awarded to the petitioner consisted of a payment in the region of £430 per month (6/2 in process). That payment assisted with, but did not cover, the petitioner's living expenses and travelling expenses from her home in Coatbridge to the College campus in Motherwell.

[10] In 2014, after enrolling on the HNC in Hospitality, the petitioner applied to the first respondents for a student loan to fund her living expenses in undertaking her studies during the 2014-2015 academic year.

[11] On 29 April 2014, the first respondents wrote to the petitioner to advise that she was not eligible to apply for this student loan on the basis of her age. The decision of the first respondents was made pursuant to the 2007 Regulations.

[12] She was subsequently issued with a letter confirming her eligibility for support with tuition fees, and the amount of the bursary awarded in lieu of the student loan. The bursary which was awarded to the petitioner works out at around £63 per month which amount does not cover her travelling expenses to the College campus in Motherwell and she is left with an income shortfall of around £300 per month.

The Student Loan

[13] The general scheme of support by way of student loans is contained within the affidavit of the second respondents' policy officer (7/1 of process). The student loan in question is, as stated above, provided for under the 2007 Regulations which came into force on 1 August 2007. Regulation 3(2)(b)(ii) of the 2007 Regulations provides that a person shall be eligible for a loan in connection with their undertaking a designated course if that person is:

> "(ii) aged 50 or over and under the age of 55 on that day and Scottish Ministers are satisfied that person intends to enter employment after completion of the course".

Applications for a student loan or "student living loan" are made to the first respondents who decide whether the student is eligible for the student loan. That loan is a regulated lending agreement between an eligible student and the Student Loans Company ("the SLC") who are responsible for administering payment and repayment of the loan. The SLC is a non-profit making government-owned organisation. It administers various loans and grants to students in universities and colleges in the UK. In Scotland, interest on student loans is charged at either the Bank of England base rate plus 1 per cent or in line with the Retail Price Index ("RPI"), whichever is lower. In England, the rate charged is RPI up to a maximum of RPI plus 3 per cent.

[14] A student loan offers distinct advantages over and above standard commercial lending. There is no fixed term repayment period. No repayment obligation arises until the April following the date of graduation. No repayment is required at all unless and until an individual's annual income exceeds £17,335. An individual will thereafter be expected to repay 9 per cent of his or her annual income over and above that amount. Interest on a student loan is linked to inflation in line with the RPI. The value of the amount paid back will thus be equivalent in real terms to the amount borrowed.

[15] The increase to the state pension would mean that the petitioner at the time of her application would have approximately 12 years of working life.

Ground 1: Whether the decision taken under Regulation 3(2) of the 2007 Regulations to refuse the petitioner a student loan was in violation of her right not to be discriminated against under article 14 of the Convention

Article 14

[16] It is helpful to consider the scope of Article 14 under the Convention and the protection against discrimination at the outset. Article 14 provides that:

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

In this context it was agreed between the parties that "other status" includes a distinction drawn on grounds of age and that article 14 is not a "free-standing" prohibition on discrimination, but rather applies only where the facts at issue fall "within the ambit" of one or more of the Convention's substantive provisions. There was however some dispute as to the scope of the expression "within the ambit".

[17] The starting point therefore for the petitioner was that the facts in issue, namely, the decision to refuse the petitioner's loan application under the terms of regulation 3(2)(b)(ii) of the 2007 Regulations, falls within the ambit of a Convention right. The petitioner advanced two arguments. Firstly, that the facts fall within the ambit of A1P1 the right to property. Secondly, in the alternative, they fall within A2P1 the right to education. If, as the respondents argued, I did not find the facts fell within either of these Convention rights, then article 14 is not engaged and the petitioner's first argument for review fails at the outset.

ISSUE 1: Do the facts fall within the ambit of A1P1 which protects the right to property?

[18] The petitioner accepted that the terms of A1P1 required an entitlement to a "possession" before the protection to the right of property under the article applied. It was submitted that it was sufficient to establish such a right to possession to demonstrate an established interest with an economic value.

[19] Here, the state has provided a regulated lending agreement which offers distinct advantages over and above standard commercial lending. It was submitted that such provisions of economic advantage constitute an established interest (for those eligible) with a clear economic value and thereby constitute a "possession" for the purposes of A1P1. Logically, the fact that the claimant is not eligible for the loan because of a discriminatory condition, does not prevent the claimant establishing this interest. Reliance was placed upon the admissibility decision of the Grand Chamber in *Stec* v *United Kingdom* [2005] 41 EHRR SE 18. This was a case where it was claimed that legislative provisions for a non-contributory state benefit to be paid by way of compensation to employees as a result of illness or accident at work were denied on discriminatory grounds. The Grand Chamber (at [53]-[54]) accepted the provision of the state fell within the ambit of A1P1:

> "(if a state) ..has in force legislation providing for 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."
>
> "[54] In cases, such as the present, concerning a complaint under Art.14 in conjunction with Art.1 of Protocol No.1 that the applicant has been denied all or part of a particular benefit on a discriminatory ground covered by Art.14, the relevant test is whether, but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question. …… Although Protocol No.1 does not include the right to receive a social security payment of any kind, if a State does decide to create a benefits scheme, it must do so in a manner which is compatible with Art.14. It follows that the applicants' interests fall within the scope of Art.1 of Protocol No.1, and of the right to property which it guarantees. This is sufficient to render Art.14 applicable."

[20] The essential purpose of A1P1 is to protect the right to property and the right to have the use of possessions. Whilst this is given a broad interpretation, in my view, it does not extend to a right to acquire what one does not already have, regardless of the interest of the individual in doing so (see Clayton & Tomlinson 18.80). The claimant must have an established right to the possession in the sense of having a legal and enforceable right to it. It does not require to be a right of ownership - but some form of legally recognised and enforceable entitlement. This could include welfare benefits claimed as of right. It could include a claim with economic value or interest - provided that claim was enforceable. As it was put in the passage in Stec *supra* the test is "but for" the condition of entitlement about which the applicant complains he or she would have had a right, enforceable under domestic law, to receive the benefit in question.

[21] Here, whilst I accept that the petitioner has an interest in obtaining the student loan and I accept that but for the disputed condition she is eligible - this means only that she is otherwise qualified to apply for the loan. The student loan is not a welfare benefit provided for as of right. It was not suggested she has an enforceable claim to the loan. I am not therefore persuaded that her application, seeking to acquire the student loan, amounts to a substantive interest or possession protected by and therefore within the ambit of A1P1.

ISSUE (2): Do the facts fall within the ambit A2P1 which protects the right to education?

[22] Article 2 Protocol 1 provides:

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

This article provides protection for the right to education. It was agreed by parties that the protection of the right to education under this article did not impose an obligation on the state to provide, or fund, tertiary education. Rather it provides to people the "the right in principle to avail themselves of the means of instruction existing at any given time" (*Belgian Linguistics case (no2)* [1968] 1 EHRR 252 at p281).

[23] In keeping with the general requirement that Convention rights require to be "practical and effective", this right carries with it the inherent obligation of practical and effective access to any education that has been put in place - *Artico* v *Italy* (1981) 3 EHRR 1; *Sahin* v *Turkey* [2005] 44 EHRR 99 at [136]-[137]; *Altinay* v *Turkey* (Application No37222/04) (9 July 2013 at [13].

Petitioner's submissions

[24] The petitioner argued in this context that this access - which is an inherent part of the provision of education - forms the purpose of the relevant 2007 Regulations here. The provision of the student loan here enables access to those who do not have the means to maintain living costs whilst undertaking the educational course involved. In this way the loans provision comes within the ambit of A2P1. Reliance was placed on the decision in *R(Kebede)* v *Secretary of State for Business Innovation and Skills* [2014] PTSR 92 involving similar loan provision.

Respondents' submissions

[25] The respondents submitted that a student loan making provision for maintenance was one step removed from education and fell to be distinguished from loans related to tuition fees. This loan was not necessary to access the educational provision. Reliance was placed on the decision of the Court of Appeal in England in in *R (Douglas)* v *North Tyneside MBC* [2003] EWCA Civ 1847.

Discussion

[26] It is important at the outset to recognise that this Article conveys express and direct protection to education, and, in distinction to other public services, Strasbourg has pointed out that "[i]n a democratic society, the right to education … is indispensable to the furtherance of human rights [and] plays … a fundamental role …" (*Şahin (2007) 44 E.H.R.R. 5* at [137]). Where the state does not choose to make provision for funding for those wishing to pursue higher education it is obliged to operate such a scheme compatible with the requirements of Article 14 (*Pomomaryov* v *Bulgaria* [2014] 59 EHRR 20).

[27] Here it was agreed that the 2007 Regulations had been made for the very purpose of "encouraging greater access to higher education, primarily for those wishing to improve their skills and qualifications" (answer 13 in the petition). The provision made for this loan is designed to further that overall purpose. That, it seems to me, provides a clear link to the provision of education and the ambit of A2P1.

[28] There is clear authority that the requirement to pay tuition fees falls within the ambit of A2P1 - *Pomomaryov supra*; *R (Hurley)* v *Secretary of State for Business, Innovation and Skills* [2012] EWCH 201 at [40]). I do not see any distinction in principle between a loan to pay fees in order to access education and a loan to pay living costs in order to access education. The loan regulations here are designed to enable access.

[29] The petitioner has received support in tuition fees from the Scottish Government and in addition, the petitioner receives a small bursary awarded by her college. Viewed in the round it was submitted that access had been provided for by the respondents. But these factors do not detract from the purpose of this particular loan within that package of provision, to secure effective access to the education provided. Indeed the fact that the rest of this package is provided to someone like the petitioner but nonetheless fails to enable access, serves to underline the practical significance of this loan. If someone in the position of the petitioner, whilst having been accepted to the course and receiving financial support for fees, is unable to undertake or

complete the course, then the reality is that the loan is "necessary" for the right to education to be practical and effective.

[30] The decision of the Court of Appeal in England in *R (Douglas)* v *North Tyneside MBC* [2003] EWCA Civ 1847 concerned regulations similar in terms to the 2007 Regulations. In that case the claimant had applied for a loan to assist with his living costs. His application was rejected on the grounds that he was not eligible under the (then) Regulations, being aged over 55. The Court of Appeal rejected the claim for judicial review, finding that the loan arrangements in the (English) Regulations "can be described as a facilitator of education but they are one stage removed from the education itself" (Scott Baker LJ at [56]) and as such were not sufficiently linked to the provision of "education" within the ambit A2P1.

[31] This view was departed from in *R(Kebede) supra*, which concerned student loans to assist in covering the cost of tuition fees. The court found that the arrangements for funding an individual's access to higher education fell within the ambit of A2P1. The court rejected the submission of the Secretary of State that the loan was one step removed from education and was not persuaded by the approach taken in *Douglas*, the facts of which were viewed as "very particular". I agree with the decision and reasoning of Burnett J. in *R(Kebede*) (at [33]) where, in rejecting the argument in Douglas, he observed:

> "[st]ate support for the discharge of fees by way of loans will be, for a very large number of people, the only practical way of paying them. It is therefore an important feature in providing practical and effective access to university education"

This observation applies equally in my view to a maintenance loan. To view such loans as "one step removed" seems to me to take a technical and narrow approach to assessment of the scope of the ambit of the A2P1 and is inconsistent with the jurisprudence that rights need to be practical and effective and not theoretical or illusory.

[32] Finally, I consider the decision in *R (Tigere)* v *Secretary of State for Business, Innovation and Skills* [2015] 1 WLR 3820 by the Supreme Court supports the petitioner's argument. The Supreme Court was considering the English Regulations in terms of which the claimant was ineligible for a student loan on account of her immigration status and decided that the loan came within the ambit of A2P1. Albeit there was a generalised concession made by the Secretary of State that, in certain circumstances eligibility for a financial support is capable of coming within the ambit of the article.

[33] I am satisfied that there is no real distinction to be drawn between student loans which support payment of fees and a student loan which pays living expenses, as both carry the same purpose under the respective regulations, namely, to secure practical and effective access to the education provided. Just as making it prohibitively expensive for some students to gain access to higher education would make the right to education illusory - as in (*R)Tigere (* Lady Hale at [24]) - so too would the absence of living support for those students who need it in order to take up the education offered, render the right illusory. It was agreed the need for this support was recognised in the 2007 Regulations and regulation 3(2) was intended to address it. Accordingly it is my conclusion that this student loan falls within the ambit of the right to education under A2P1.

ISSUE 3: Does The Engagement Of Article 14 Result In An Infringement Of The Right Against Age Discrimination?

[34] That being so the respondents are required to operate the scheme under the 2007 Regulations without discrimination and the petitioner's right to non-discrimination under article 14 of the Convention is engaged. There was no dispute over this. Further there was no dispute that the relevant regulation here, Regulation 3(2)(b)(ii), does ostensibly discriminate on the basis of age and that in making the decision in the application of this regulation to the petitioner, she was treated differently on a relevant basis.

[35] However, the right against discrimination under article 14 is not absolute. It appears to be well-settled that the principle of non-discrimination which it sets down will only be violated if there is no "reasonable and objective" justification for the distinction concerned (for example *Belgian Linguistic Case* at p284 para [10]). In this context the issue which arises here is whether the application of regulation 3(2)(b)(ii) to the petitioner and the resulting difference in treatment, is justified.

ISSUE 4: Is Any Such Infringement Of Article 14 Justified Or Disproportionate ?

[36] The basic criterion to determine whether or not any difference in treatment is justified is long recognised within Strasbourg jurisprudence. The existence of justification requires to be assessed in relation to both the aim and effects of the measure under consideration. Put simply, the difference in treatment firstly has to pursue a legitimate aim, and secondly, there also has to be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. There was no dispute - nor could there be - that the regulations and their application pursued a legitimate aim or purpose - namely of encouraging greater access to higher education, primarily for those wishing to improve their skills and qualifications.

[37] Accordingly the question of justification here turns on the whether the decision in the application of the 2007 Regulations to the petitioner was proportionate.

[38] Before embarking on an assessment of proportionality the court has to decide what the appropriate test to be applied is, in the sense of the intensity of review that is appropriate. This was a matter of considerable dispute between parties and indeed is a hotly contested issue within current case law.

ISSUE 5: What Is The Appropriate Test Of The Degree Of Review To Applied In Assessing Justification?

[39] The dispute between parties focussed on whether, in the circumstances here, as submitted by the respondents, the approach or "test" for justification under article 14 of the Convention is whether or not the measure at issue is "manifestly without reasonable foundation". Or, as submitted by the petitioner, this test was pitched too high and the straightforward test should be applied. That is weighing and balancing the respective public and private interests and all the relevant factors to decide whether the measure adopted achieves a fair or proportionate balance.

Manifestly without reasonable foundation

[40] The expression "manifestly without reasonable foundation" derives from decisions in Strasbourg where the European Court of Human Rights ("ECtHR") has considered that a wide margin of appreciation should be allowed to member states when it comes to general measures of political, economic or social strategy. In such an area the ECtHR has stated it will respect the member state's policy unless it is manifestly without reasonable foundation - as seen for example in respect of welfare benefits in *Stec* supra at [52]:

> "A wide margin is usually allowed to the state under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the court will generally respect the legislature's policy choice unless it is 'manifestly' without reasonable foundation."

This same high threshold test has been employed in domestic courts in respect of measures taken within the areas of welfare benefits and national security policy. It is well established that when it comes to welfare benefits and rights under A1P1 along with article 14 that this test was appropriate and applied to every stage, that is both to consideration of the legitimate aim and the proportionality of the means employed to achieve same. For example, the affirmation of this high threshold test made by the Supreme Court in *Humphreys* v *Revenue and Customs Commissioners* [2012] UKSC 18 which was a case involving sex discrimination where normally a strict test for justification applies, and in the case of *R(SG)* v *Secretary of State for Work and Pensions (Child Poverty Action Group intervening)* [2015] UKSC 16 which concerned differential treatment indirectly arising from the imposition of the benefit cap on housing benefit. In the Court of Session in *A* v *Secretary of State for the Home Department* [2017] CSOH 62 concerning a claim of discrimination in the context of a decision to refuse indefinite leave to remain (falling within the ambit of article 8) Lord Philip also applied the high threshold test - but there is no discussion of this test and it is not clear whether any issue of its application was raised.

[41] Here however the issue is of discrimination within the ambit A2P1, the right to education. Here the position in respect of application of this test - as conceded by the respondents - is not so clear. The comparable case is that of *R(Tigere) supra* which involved a claim of discrimination based on eligibility under

the immigration rules within the ambit of A2P1. The Supreme Court was divided as to the appropriate test as regards the intensity of the review to be undertaken. Baroness Hale and Lord Kerr favoured the established rule of proportionality, whilst Lord Hughes simply considered in the facts of that case application of either test would be met. Lords Sumption and Reed robustly dissented. Lord Reed stated at [75]:

> "Student loans are provided out of public funds on terms which are much more advantageous to students than any commercial alternative. They are a form of state benefit. Such benefits are almost invariably selective and the criteria for selection necessarily involve decisions about social and economic policy and the allocation of resources. For this reason, discrimination in their distribution gives rise to special considerations in the case law of the Strasbourg court. The test is to be found in the decision of the Grand Chamber of the European Court of Human Rights in *Stec v United Kingdom*, 43 EHRR 1017 , at para 52".

The respondents urged me to adopt this test for the reasons given in the (joint) dissenting judgement.

[42] This dissenting judgement has as the starting point the categorisation of the student loan in question as a state financial or welfare benefit - see paras [69] and [75]. This test is described as having been "consistently endorsed by the Strasbourg court and at the highest level by the courts of the United Kingdom" and it is suggested that the approach taken by Baroness Hale is an unjustified departure from this (at [77]).

[43] But this consistent application of the high threshold test is confined, at least in domestic terms, to cases concerning welfare or state benefits. I respectfully agree with Baroness Hale that education is rather different (at [28]). As indicated above, education is a right that enjoys direct protection under the Convention. Its importance is emphasised in *Ponomaryov* v *Bulgaria* [2014] 59 EHRR 20 at [54]-[55]):

> "54 Having thus clarified the limits of its inquiry, the Court starts it by observing that a state may have legitimate reasons for curtailing the use of resource-hungry public services—such as welfare programmes, public benefits and health care—by short-term and illegal immigrants, who, as a rule, do not contribute to their funding. It may also, in certain circumstances, justifiably differentiate between different categories of aliens residing in its territory. For instance, the preferential treatment of nationals of Member States of the European Union—some of whom were exempted from school fees when Bulgaria acceded to the Union —may be said to be based on an objective and reasonable justification, because the Union forms a special legal order, which has, moreover, established its own citizenship.
>
> 55 Although similar arguments apply to a certain extent in the field of education—which is one of the most important public services in a modern state—they cannot be transposed there without qualification. It is true that education is an activity that is complex to organise and expensive to run, whereas the resources that the authorities can devote to it are necessarily finite. It is also true that in deciding how to regulate access to education, and in particular whether or not to charge fees for it and to whom, a state must strike a balance between, on the one hand, the educational needs of those under its jurisdiction and, on the other, its limited capacity to accommodate them. However, the Court cannot overlook the fact that, unlike some other public services, education is a right that enjoys direct protection under the Convention. It is expressly enshrined in art.2 of Protocol No.1 to the Convention. It is also a very particular type of public service, which not only directly benefits those using it but also serves broader societal functions…"

Accordingly I respectfully disagree with the suggestion that there is no difference in principle with welfare benefits because the benefit here concerns access to the important right to education and is within the ambit of A2P1. I consider that is the appropriate categorisation - not one which is to equiperate all state loans with welfare benefits. Accordingly I agree with the reasons given by Baroness Hale in *R(Tigere) supra* for rejecting the high threshold test, which reasoning applies to the similar circumstances here.

[44] Further as a matter of logic the margin of appreciation applied by Strasbourg to member states does not necessarily mean it should be transposed to the exercise undertaken by the domestic court to the

executive or legislature (see Lord Hoffman in *In re G (Adoption - Unmarried Couple)* [2009] 1 AC 173 at p 189A-B para [32] and [37]; Lord Wilson in *Mathieson* v *Secretary of State for Work and Pensions* [2015] 1 WLR 3250 at p3262C). Although of course it may well be appropriate in some contexts - as has been seen in its application to welfare benefits.

[45] The test of "manifestly without reasonable foundation" is a very high threshold test. Indeed it is, in effect, not a test of proportionality at all but the application of a degree of judicial restraint. It is the employment of a margin of appreciation which operates as a practical barrier to substantive review.

[46] The test of proportionality generally requires the court to undertake substantive review in the sense of considering and weighing up whether the balance struck by the decision maker between competing interests is fair. There has been a definite shift in approach by domestic courts in judicial review from rationality to proportionality as the correct yardstick where limitation or infringement of Convention rights is concerned(*R (Daly)* v *Secretary of State for the Home Department* [2001] 2 AC 532 at p 547). This is because of the approach taken by Strasbourg and because of the duty of the court under section 6 of the Human Rights Act 1998 ("the HRA") to secure Convention rights.

[47] Proportionality review, especially at the stage of justification, places the onus on the decision maker to justify the rights interference - in the sense that it was proportionate to legitimate aim (not that it was the right decision). Applying a test of "manifestly without reasonable foundation" it seems to me does not engage with the merits of a decision or measure, unless on the face of if it that decision or measure has no proper or rational basis. I agree with the petitioner that it comes close to *Wednesbury* manifest unreasonableness in the sense of considering whether what was decided or promulgated was out with the bounds of reason. This does not sit easily with the general approach to review of proportionality.

[48] I agree with the approach taken by Lord Mance in *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] 2 WLR 481 where Lord Mance, having heard argument on the point and having accepted there is Strasbourg authority which tests aim and public interest by asking whether it was manifestly unreasonable, stated at [52]:

> "… the approach in Strasbourg to at least the fourth stage [i.e. proportionality] involves asking simply whether, weighing all relevant factors, the measure adopted achieves a fair or proportionate balance between the public interest being promoted and the other interests involved. The court will in this context weigh the benefits of the measure in terms of the aim being promoted against the disbenefits to other interests. Significant respect may be due to the legislature's decision, as one aspect of the margin of appreciation, but the hurdle to intervention will not be expressed at the high level of "manifest unreasonableness". In this connection, it is important that, at the fourth stage of the Convention analysis, all relevant interests fall to be weighed and balanced. That means not merely public, but also all relevant private interests. The court may be especially well placed itself to evaluate the latter interests, which may not always have been fully or appropriately taken into account by the primary decision-maker … domestic courts cannot act as primary decision makers, and principles of institutional competence and respect indicate that they must attach appropriate weight to informed legislative choices at each stage in the Convention analysis … But again, and in particular at the fourth stage, when all relevant interests fall to be evaluated, the domestic court may have an especially significant role"

This fits with the duty of this court under section 6 of the HRA. Under section 6 the legislature has imposed an obligation on the domestic court to give effect to Convention rights and when it comes to reviewing the compatibility of executive decisions with the Convention and it must do so, where it is relevant and necessary (see Lord Sumption in *R (Lord Carlile* v *Home Secretary (SC(E) [2014]* UKSC 60 at [30]).

[49] In this context it seems to me the domestic court requires to go further than traditional review and to have a more intense scrutiny involving a balancing exercise in assessing proportionality by having regard to the circumstances, which may involve a substantive review. Where a Convention right is restricted the

intensity of review must be higher than what is reasonable - Lord Bingham in *R (SB)* v *Governors of Denbigh High School* [2007] 1 AC 100 at para [29] – [30].

[50] Accordingly I am satisfied for these reasons that in the context of the significance of the right to education, here, at the stage of justification, the question of proportionality must be a straightforward question of law for the court.

ISSUE 6: Is the infringement of Article 14 along with A2P1 justified ?

[51] I am satisfied that the established four stage test of proportionality given by Lord Reed in the case of *Bank Mellat* v *Her Majesty's Treasury (No 2)* [2014] AC 700 should be applied here. In that case at paragraph [74], Lord Reed considered the test of proportionality to require the court to ask itself the following questions: (i) whether the objective of the measure is sufficiently important to justify the limitation of a protected right; (ii) whether the measure is rationally connected to the objective; (iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (iv) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective to the extent that the measure will contribute to the achievement of that objective, the former outweighs the latter.

[52] In essence, the question at stage (i) is whether there is a legitimate aim which is agreed here. The question at (iv) is whether the impact of the infringement on the individual is disproportionate to the likely public benefit it will bring or whether a "fair balance" has been struck. The onus is upon the respondents to establish the decision to refuse the loan in accordance with Regulation 3(2)(b)(ii) is justified.

[53] At the outset I recognise that article 14 depends on the circumstances, subject matter and ground of discrimination. The Convention jurisprudence recognises certain grounds of discrimination as core grounds (or "suspect" grounds). These require particularly weighty reasons to justify the discrimination. Discrimination on the ground of age is not a "suspect" ground and I have taken account of this in the balancing exercise.

[54] Here the decision to refuse the application for the student loan was solely based on regulation 3(2)(b)(ii) that the petitioner was under the "cut off" age of 55. There is no evidence available as to the intention behind the particular "cut off" in the relevant regulation. The respondents accepted that there was no information available as to the thinking behind selecting the cut off, but submitted it is entirely legitimate for there to be an age beyond which a student loan is not available and for a cut off to be made. If this was accepted then it was submitted it is for the second respondents to decide where to "draw the line", not the court.

[55] I accept as a general proposition that a cut off or a blanket rule which interferes with Convention rights may well be reasonable, for example where an objective basis is shown that it will reduce the overall impact on resources. But the cut off chosen which gives rise to the discriminatory effect on the petitioner must be rationally connected to the aim or objective and be a proportionate way of achieving it (Baroness Hale *R(Tigere*) *supra* at [37]). Lines drawn still require to be examined as to whether they are proportionate and such examination is not to substitute the courts drawing of the line, but to assess where it has been drawn is justified. A cut off on the basis of age is not justifiable unless it can be shown to be rationally connected to the legitimate aim of the decision maker or regulations involved.

[56] In the present case, as stated above, the primary purpose of student loans, is:

> "to encourage greater access to higher education, primarily for those wishing to improve their skills and qualifications, and hence to improve the skills and qualifications of the workforce".

This is the legitimate aim.

[57] In addition, the respondents submitted that a subsidiary aim to the Regulations is to seek to encourage younger people to enter the workforce. This it seems to me is a legitimate objective and a cut off of 55 years of age in this context makes sense or is rationally connected to that aim. But the difficulty for respondents is that this is not the agreed primary purpose which is much broader and without qualification and is a purpose which corresponds to the circumstances of the petitioner.

[58] The scheme of the Regulations does seek recovery of the loan by repayment by recipients who have obtained employment. Under the relevant regulations a person who does not obtain employment, or who

does not obtain employment with a sufficiently high salary, is not required to repay the loan. The loan is cancelled from the 35th anniversary from the date when the borrower became liable to repay the loan.
[59] The respondents' submitted that it is "much less likely" that a loan provided to a student aged 55 or over (compared to a younger student) will be repaid or repaid in full and this was a reasonable basis for providing the cut off at 55. I do not find this persuasive. Even if this was a reasonable assumption at the time the Regulations were made, it is not such at the time of this decision to refuse the loan to this petitioner. It cannot now be assumed - absent objective support - that a person aged 55 (with 12 years working life) has much less opportunity for employment, or that any such employment is liable to be so short as to significantly reduce the prospects of repayment. Indeed the circumstances of this petitioner suggest repayment is a realistic prospect.
[60] These provisions for repayment in the Regulations are combined along with provisions giving powers to investigate the prospect of repayment (regulation 5(5) and (6)) and a "safety valve" provision within regulation 3(2)(ii) itself which applies to those over 50 but under 55 seeking student support, whereby they require to satisfy the respondents that they intend to enter employment. All are designed to protect against loss and secure a reasonable recoupment of the resources paid out. Accordingly the Regulations already provide protection for finite resources and the need for the cut off at 55 is in my view weakened.
[61] In support of the argument regarding pressure on resources, the respondents presented a document (7/3) which was produced in November 2014 in response to the Equality and Human Rights Commission questioning the issue of age discrimination in the relevant Regulation (see below). This document was a projection of likely costs if regulation 3(2) was amended to raise the age of ineligibility from 55 to 60 years. I note that it proceeds on an assumption that there would be 100% take up of those aged 55 which assumption is questionable. As rehearsed above I accept in principle that the application of the 2007 Regulations involves the use of finite resources and I respect that the respondents are required to balance their effect on those resources and that a cut off may be appropriate. Nonetheless I still need to consider whether the line drawn is proportionate and a fair balance has been struck. I did not find this document containing an assessment conducted after the decision applying the Regulation to this petitioner of assistance.
[62] Considering all of the above and after weighing the various factors I am not persuaded that there is a sufficiently clear and rational connection between the cut off in regulation 3(2)(b)9ii) and the primary aim of encouraging access to education. Indeed there is inherent conflict. Reviewing the relevant regulations in the round, including provision of the safety valve for those over 50 and under 55, I am not satisfied there is no less intrusive measure which could be employed, and I do not consider a "fair balance" has been achieved.
[63] Accordingly I am not satisfied that Regulation 3(2) is proportionate. As such the decision made in applying that regulation to the petitioner is in violation of her article 14 right against age discrimination.

ISSUE 7: If disproportionate then does the decision refusing the student loan fall to be reduced as unlawful ?

[64] Importantly in my view the first respondents' decision to refuse the loan was in accordance with regulation 3(2)(b)(ii). That decision had to be made by the terms of the Regulations and as such under the HRA in terms of section 6(2)(a) then section 6(1) of the HRA does not apply. In other words, the first respondents as the public authority could not have acted differently and their decision was lawful (Lord Rodger in *Ghaidan* v *Godin-Mendoza* [2004] UKHL 30 at [107]-[108]). Clearly then the issue necessarily arises as to whether regulation 3(2)(b)(ii) is compatible with the Convention. This requires consideration of section 3 of the HRA.

ISSUE 8: Is Regulation 3(2)of the 2007 Regulations capable of being read in a way which is not discriminatory and within the devolved competence?

[65] Section 57(2) of the Scotland Act 1998 ("the SA") provides that a member of the Scottish Government has no power to make any subordinate legislation so far as the legislation is incompatible with any of the Convention rights. Section 101(2) of that Act provides that any of the subordinate legislation made, confirmed or approved, or purporting to be made, confirmed or approved, by a member of the Scottish Government, is to be read as narrowly as is required for it to be within competence, if such a reading is

possible. Since this case concerns compatibility with a Convention right, the starting point is to construe the legislation as required by section 3(1) of the Human Rights Act 1998.

[66] The petitioner submitted there was nothing to prevent an interpretation being given read and given effect to in a way which is compatible with article 14. It is my duty under section 3 of the HRA to do so in so far as it is possible. The far reaching scope of what is possible was outlined in the well-known opinion of Lord Nicholls in *Ghaidan supra* at page [572]:

> "the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is "possible", a court can modify the meaning, and hence the effect, of primary and secondary legislation."

At the same time, in the opinion of Lord Rodger, the words implied must "go with the grain of the legislation". The petitioner submitted in regulation 3(2)(b)(ii) substituting a different number for 55 would go with the grain and intention of the Regulations and have the appropriate substantive effect. Certainly the intention of the Regulations as a whole is to provide "living support" for those in need to enable access to education provision. But the terms of regulation 3(2)(b)(ii) are plain. They can only be read as creating a cut off of eligibility at the age of 55. I have concluded that cut off offends article 14. I do not see how in terms of section 3(1) of the HRA it is possible to read this in a way to make it compatible. I do not accept the petitioner's submissions that the court can read this regulation so as to give substantive effect, commensurate with the rights of the petitioner. The petitioner did not suggest an alternative Convention-compatible reading of that part of the Regulations. If I were to substitute a different number for "55" then I would be going against the plain purpose of what the Regulation provides for and thereby stray into legislating. I have also considered whether in seeking to read the provision narrowly whether I can sever the cut off from the safety valve introduced for those over 50. But this necessarily is limited to those under the 55 cut off. Revision of the Regulations it seems to me is for parliament. It is worth noting here that the second respondents have in any event embarked upon a review of the Regulations addressing the issue of age discrimination and an equality assessment is underway (see below).

[67] I agree with the respondents' position was that even with the strong interpretive duty under section 100(1) of the SA that it would not be possible to read regulation 3(2)(b) in any way other than that those aged 55 and over are not eligible for a maintenance loan.

ISSUE 9: What Is The Remedy?

[68] Accordingly I have concluded that regulation 3(2)(b)(ii) is incompatible. As such it is *ultra vires* being out with the legislative competence of the Scottish Parliament. This finding ought not to extend any further than is necessary to deal with the facts of the case, and it is important that accrued rights which are not affected by the incompatibility should not be interfered with (*Salvesen* v *Riddell* [2013] UKSC 32 at [57]). This means that this decision about the lack of legislative competence is limited to regulation 3(2)(b)(ii). Decisions as to how the incompatibility is to be corrected, for the past as well as for the future, no doubt informed by the review underway, must be left to the Scottish Parliament guided by the Scottish Ministers.

[69] Counsel for the respondents sought a further hearing to hear submissions on the powers of the court under section 102(2) of the SA. Section 102(1) of the SA provides that this section applies where a court decides that a member of the Scottish Government does not have the power to make, confirm or approve a provision of subordinate legislation that he has purported to make, confirm or approve. Section 102(2) is in these terms:

> "The court or tribunal may make an order–
>
> (a) removing or limiting any retrospective effect of the decision, or
>
> (b) suspending the effect of the decision for any period and on any conditions to allow the defect to be corrected."

I am content to accede to this submission. I will suspend the effect of my findings and order a further hearing to address the courts' powers under section 102(2) of the SA and the orders, if any, that the court should make to deal with the consequences.

GROUND II: Contravention of section 149 of the EA by the second respondents

[70] Section 149(1) of the EA imposes a PSED on specified public authorities which includes the second respondents (Schedule 19).

[71] Section 149 provides in so far as relevant as follows:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> …
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
>
> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
>
> (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
>
> (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low."

Relevant here is the requirement that a public authority in the exercise of its functions has due regard to the need to eliminate discrimination and advance equality of opportunity as between persons who share a relevant "protected characteristic" (such as age) and persons who do not share it. In the context of age, the duty is as between persons of different age groups, whether of a particular age or a range of ages (section 5 of the EA) and age is a relevant protected characteristic for the purposes of section 149(1). All of this was agreed between the parties.

[72] Arden LJ in *R (Elias)* v *Secretary of State for Defence* [2006] 1 WLR 3213 at p3268 para [274]) has made clear that the PSED is intended to be "an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation" and one of the aims of the EA is to address the fact that:

> "discrimination in educational and other opportunities can lead to a reduction in the pool of available candidates for further education and employment. This hinders social and economic progress since it means that society loses the benefits of the talents of these individuals and the different perspectives that they can bring to the solution of the problems facing business or society. Society benefits when each individual realises his or her potential and thus this process should not be impeded by unlawful discrimination"

That purpose would seem to encompass the position of the petitioner here.

Does the PSED under section 149 apply and if so, when is it triggered?

[73] The PSED came into force on 5 April 2011 so no positive duty as regards age existed prior to this date. It is established - and it was not disputed - that the duty under section 149 is a continuing one (*Rv (Brown)* v *Secretary of State for Work and Pensions* [2009] PTSR 1506). That being so the essential issue in dispute here was when this PSED was triggered.

[74] The submissions of the respondents focussed on the PSED being a general duty which arises in formulating and making policy. That is of course correct but the duty goes further than this. The duty on the public authority arises not only in respect of policies but to the "exercise of their functions". It arises not only into the "formulation" of policies or changes made, but also to their implementation. The duty being a continuing one must also arise in the exercise of such policies. It was accepted by the respondents that where an issue arises in the situation of a pre-existing policy which is brought to the respondents' attention, then this could trigger the duty and require the public authority to have due regard to advance equality and address any potential discrimination. I am satisfied that the duty is properly described in the decision in *R (BAPIO Action Ltd)* v *Royal College of General Practitioners* [2014] EWHC 1416 (Admin) at 29 where it states:

> "The duty is to have regard to the need to eliminate discrimination and advance equality of opportunity in the exercise of public functions, whether or not it is contemplated that there will be a change in the manner in which those functions are exercised. If there are grounds to believe that the manner in which public functions is being exercised is not fulfilling the statutory goals then due regard must be had to exercising them in a manner which does."

The petitioner submitted there were three particular "grounds to believe" an issue arose here which triggered the PSED. These were-

I. the increase in the pensionable age under section 13 of the Pensions Act 2007.

II. the equivalent statutory instrument to the 2007 Regulations in England & Wales being amended in 2006 to increase the discriminatory age limit (which is the subject of this petition for judicial review) to 60.

III. in the implementation, in 2012, of amendments to the 2007 Regulations by The Education (Fees, Awards and Student Support) (Miscellaneous Amendments) (Scotland) Regulations 2012.

The amendments to the 2007 Regulations included a specific amendment to Regulation 3 of the 2007 Regulations by inserting the following:

> "(2A) Paragraph (2)(b) does not apply to a student undertaking a vocational course leading to a Postgraduate Diploma or to a Postgraduate masters degree."

This amendment therefore disapplied the age limit as regards the eligibility for tuition fee loans of students of certain vocational courses.

[75] Without needing to go further, I am satisfied that such grounds to believe are established when the second respondents made amendments to regulation 3 of the 2007 Regulations. Reasonable scrutiny in respect of an issue regarding loans to those without age limitation in one part of that regulation ought to have involved the realisation that there was an issue of age in respect of regulation 3(2)(ii) which imposes

such a stark age cut off and is - as the petitioner submitted - evidently discriminatory. The fact these amendments were a different part of the Regulations and that living loans were not affected is to take too narrow a view. I conclude that these amendments were sufficient to trigger the statutory duty. No assessment by the second respondents as to the impact of the 2007 Regulations on the protected characteristics was undertaken at that time.

[76] I was advised however that a review is currently underway. This has arisen as a result of compliance notices issued by the Equality and Human Rights Commission by letters in December 2014 (7/6 and 7/7 of process). The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 (SSI 2012/162, regulation 5(5)) make provision for authorities to review and revise existing policies and practices. The duty is for the authority to "make such arrangements as it considers appropriate" to carry out such a review. The 2012 Regulations came into force in May 2012, and are only enforceable by such a compliance notice issued by the Equality and Human Rights Commission (Equality Act 2006, section 32(11)). Whilst underway that review is not yet completed. This review includes an equality impact assessment.

[77] In this context the respondents submitted firstly, the existence of a system of review under these regulations "strongly suggested" a parallel duty of review did not arise under section 149. I do not accept this submission. The existence of the 2012 Regulations does not in itself fulfil or replace the PSED imposed. Indeed the fact that, in 2014, compliance notices were issued about the relevant regulation rather suggests that there was a failure, at least prior to that date and at a time when the decision was made to refuse the loan to the petitioner on the basis of her age. I am satisfied that there was such a failure.

[78] Secondly, the respondents submitted, the fact that there is a review underway shows due regard is being taken to the relevant regulation and there is no breach of the PSED because it is sufficient for compliance to conduct a review and any further order was unnecessary. The details of this review are not before me. I note from the case law of cases regarding the PSED under section 149 that where a review has been made the detail and scope of any such review is provided and subject to close examination by the court (for example *Honor Watt Petr* [2015] CSOH 117). Further, the fact of this review does not address the period prior to December 2014, from 5 April 2010 onwards. For these reasons I do not accept the fact of this review is sufficient to render any order unnecessary.

Decision

[79] For the reasons given above, I find the following:

1. Regulation 3(2)(b)(ii) of the 2007 Regulations is incompatible with the petitioner's rights under article 14 read with article 2 (protocol no 01) of the Convention and such is out with the competence of the second respondents and falls to be reduced.

2. The decision of the first respondent of 29 April 2014 to refuse the petitioner's application for a student loan being made in pursuance of regulation 3(2)(b)(ii) of the 2007 Regulations, which regulation I have found to be *ultra vires* falls to be reduced.

3. The second respondents failed in their duty imposed by section 149 of the EA 2010 and declarator of said failure falls to be pronounced.

As a result, I am minded to repel the petitioner's first and second pleas-in-law, sustain the petitioner's third and fourth pleas-in-law and repel the respondents' pleas-in-law.

[80] In respect of these findings regarding the *vires* of the relevant regulation I accede to the request to put this case out by order to hear submissions in respect of the powers of the court and the orders that may be made under section 102(2) of the SA.

[81] I will reserve meantime all questions of expenses.

ADDENDUM:

1. **Relevant Legislation :**

(a) Education (Scotland) Act 1980, section 73

73 Power of Secretary of State to make grants to education authorities and others.

The Secretary of State may out of money provided by Parliament apply, in accordance with regulations made by him, such sums as he thinks necessary or expedient for any or all of the following purposes:—

(a) the payment of grants to education authorities;

(b) the payment of grants to universities;

(c) the payment of grants to the managers of educational establishments;

(d) the payment of grants to any other persons

(i) for providing education or educational services; or

(ii) in respect of expenditure incurred or to be incurred by them for the purposes of, or in connection with the provision (or proposed provision) of, education or educational services.

(e) the payment of grants to persons to assist the carrying out of educational research;

(f) the payment of allowances or loans to or in respect of persons

(i) undertaking; or

(ii) who have undertaken courses of education;

(g) providing for any other educational expenditure approved by him.

(b) Scotland Act 1998, sections 54, 57, 101 and 102

54 Devolved competence.**E+W+S+N.I.**

This section has no associated Explanatory Notes

(1) References in this Act to the exercise of a function being within or outside devolved competence are to be read in accordance with this section.

(2) It is outside devolved competence—

(a) to make any provision by subordinate legislation which would be outside the legislative competence of the Parliament if it were included in an Act of the Scottish Parliament, or

(b) to confirm or approve any subordinate legislation containing such provision.

(3) In the case of any function other than a function of making, confirming or approving subordinate legislation, it is outside devolved competence to exercise the function (or exercise it in any way) so far as a provision of an Act of the Scottish Parliament conferring the function (or, as the case may be, conferring it so as to be exercisable in that way) would be outside the legislative competence of the Parliament.

57 EU law and Convention rights.**E+W+S+N.I.**

This section has no associated Explanatory Notes

(1) Despite the transfer to the Scottish Ministers by virtue of section 53 of functions in relation to observing and implementing obligations under EU law, any function of a Minister of the Crown in relation to any matter shall continue to be exercisable by him as regards Scotland for the purposes specified in section 2(2) of the European Communities Act 1972.

(2) A member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with EU law.

(3) Subsection (2) does not apply to an act of the Lord Advocate—

(a) in prosecuting any offence, or

(b) in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland,

which, because of subsection (2) of section 6 of the Human Rights Act 1998, is not unlawful under subsection (1) of that section.

101 Interpretation of Acts of the Scottish Parliament etc.**E+W+S+N.I.**

This section has no associated Explanatory Notes

(1) This section applies to—

(a) any provision of an Act of the Scottish Parliament, or of a Bill for such an Act, and

(b) any provision of subordinate legislation made, confirmed or approved, or purporting to be made, confirmed or approved, by a member of the Scottish Executive, which could be read in such a way as to be outside competence.

(2) Such a provision is to be read as narrowly as is required for it to be within competence, if such a reading is possible, and is to have effect accordingly.

(3) In this section "competence"—

(a) in relation to an Act of the Scottish Parliament, or a Bill for such an Act, means the legislative competence of the Parliament, and

(b) in relation to subordinate legislation, means the powers conferred by virtue of this Act.

102 Powers of courts or tribunals to vary retrospective decisions.**E+W+S+N.I.**

This section has no associated Explanatory Notes

(1) This section applies where any court or tribunal decides that—

(a) an Act of the Scottish Parliament or any provision of such an Act is not within the legislative competence of the Parliament, or

(b) a member of the Scottish Executive does not have the power to make, confirm or approve a provision of subordinate legislation that he has purported to make, confirm or approve.

(2) The court or tribunal may make an order—

(a) removing or limiting any retrospective effect of the decision, or

(b) suspending the effect of the decision for any period and on any conditions to allow the defect to be corrected.

(3) In deciding whether to make an order under this section, the court or tribunal shall (among other things) have regard to the extent to which persons who are not parties to the proceedings would otherwise be adversely affected.

(4) Where a court or tribunal is considering whether to make an order under this section, it shall order intimation of that fact to be given to—

(a) the Lord Advocate, and

(b) the appropriate law officer, where the decision mentioned in subsection (1) relates to a devolution issue (within the meaning of Schedule 6),unless the person to whom the intimation would be given is a party to the proceedings.

(5) A person to whom intimation is given under subsection (4) may take part as a party in the proceedings so far as they relate to the making of the order.

(6) Paragraphs 36 and 37 of Schedule 6 apply with necessary modifications for the purposes of subsections (4) and (5) as they apply for the purposes of that Schedule.

(7) In this section—

- "intimation" includes notice,

- "the appropriate law officer" means—

(a) in relation to proceedings in Scotland, the Advocate General,

(b) in relation to proceedings in England and Wales, the Attorney General,

(c) in relation to proceedings in Northern Ireland, the Advocate General for Northern Ireland.

(c) Human Rights Act 1998, sections 3, 6 and Schedule 1

3 Interpretation of legislation.**E+W+S+N.I.**

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

6 Acts of public authorities.**E+W+S+N.I.**

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section "public authority" includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

SCHEDULE 1**E+W+S+N.I.** THE ARTICLES

PART I **E+W+S+N.I.** THE CONVENTION RIGHTS AND FREEDOMS

ARTICLE 14 **E+W+S+N.I.** *Prohibition of discrimination*

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

PART II**E+W+S+N.I.** THE FIRST PROTOCOL

ARTICLE 1 **E+W+S+N.I.** *Protection of property*

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

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.

ARTICLE 2 **E+W+S+N.I.** *Right to education*

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

(d) Equality Act 2010, section 149

149 Public sector equality duty**E+W+S**

This section has no associated Explanatory Notes

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).
(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.
(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) tackle prejudice, and
(b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.
(7) The relevant protected characteristics are—

- age;
- disability;
- gender reassignment;
- pregnancy and maternity;
- race;
- religion or belief;
- sex;
- sexual orientation.

(8) A reference to conduct that is prohibited by or under this Act includes a reference to—

(a) a breach of an equality clause or rule;
(b) a breach of a non-discrimination rule.

(9) Schedule 18 (exceptions) has effect.

(e) Education (Student Loans) Scotland Regulations 2007/154 (SSI 2007/154), Regulations, 3 Eligible students

This section has no associated Executive Note

3.—(1) The Scottish Ministers may pay a loan, in accordance with the provisions of section 73(f) of the Act and these Regulations, to or in respect of an eligible student.
(2) Subject to and in accordance with these Regulations a person shall be eligible for a loan in connection with their undertaking a designated course if that person–

(a) is a person mentioned in Schedule 1;

(b) is–

(i) under the age of 50 on the first day of the first academic year of the course; or

(ii) aged 50 or over and under the age of 55 on that day and the Scottish Ministers are satisfied that that person intends to enter employment after completion of the course;

(c) is not eligible for a loan in relation to an academic year of the course under the Education (Student Loans) Act 1990, the Education (Student Loans) (Northern Ireland) Order 1990, the Teaching and Higher Education Act 1998, the Education (Student Support) (Northern Ireland) Order 1998 or any regulations made under any of the foregoing;

(d) is not eligible to receive in relation to the academic year–

(i) a bursary or award of similar description under section 63 of the Health Services and Public Health Act 1968(1) the amount of which is not calculated by reference to their income; or

(ii) any allowance under the Nursing and Midwifery Student Allowances (Scotland) Regulations 2007(2);

(e) is not in breach of any obligation to repay any loan;

(f) where the designated course is a part-time course, has already received fewer than 8 loans in connection with that person undertaking one or more part-time courses;

(g) where the designated course is a part-time course, on the relevant date–

(i) has attained the age of 25 years;

(ii) is married or in a civil partnership;

(iii) has no parent living; or

(iv) has been self-supporting out of earnings for periods aggregating not less than 3 years.

(3) Notwithstanding that a person satisfies the requirements specified in paragraph (2), a person shall not be eligible for a loan if–

(a) that person has, in the opinion of the Scottish Ministers, shown themselves by their conduct to be unfitted to receive a loan; or

(b) the designated course is a part-time course and the person holds a first degree from an educational institution in the United Kingdom or a comparable qualification from an educational institution outside the United Kingdom.

(4) For the purposes of paragraph (2)(e) and (f) "loan" means a loan made under the Act, the Education (Student Loans) Act 1990, the Education (Student Loans) (Northern Ireland) Order 1990, the Teaching and Higher Education Act 1998, the Education (Student Support) (Northern Ireland) Order 1998 or under any regulations made under any of the foregoing.

(5) A person in respect of whom the first day of the first academic year of the course is on or after 1st August 2007 shall not, at any one time, be eligible for support for more than one designated course.

Applications for loans

This section has no associated Executive Note

5.—(1) A student shall apply for a loan, not exceeding the maximum amount applicable in that student's case, in connection with undertaking a course by completing and submitting to the Scottish Ministers an application in such form as the Scottish Ministers may require.

(2) The completed application shall include such information as the Scottish Ministers require, including the following particulars:–

(a) the student's United Kingdom national insurance number;

(b) the student's most recent student loan account number, if any; and

(c) the names, addresses and telephone numbers of two persons who know the student.

(3) The completed application shall also include a declaration by the student that–

(a) the particulars given in the form are correct to the best of their knowledge and belief;

(b) the student will notify the Scottish Ministers of any change in those particulars which might affect their eligibility for a loan; and

(c) the student will, if required to do so, repay to the Scottish Ministers–

(i) any amount paid to them which exceeds for whatever reasons the amount of loan to which that student is entitled under these Regulations; and

(ii) any amount lent to them, together with interest and applicable charges and penalties, in accordance with the Act and any regulations made thereunder from time to time.

(4) The application form must reach the Scottish Ministers by such date as they may determine from time to time (and different dates may be determined by them in respect of loans for different courses) unless the Scottish Ministers consider that, having regard to the circumstances of the particular case, the time limit should be relaxed, in which case the application must reach the Scottish Ministers not later than such date as they specify.

(5) A student shall demonstrate eligibility for a loan by providing such evidence as the Scottish Ministers may require.

(6) The Scottish Ministers may take such steps and make such inquiries as they consider necessary to determine whether the student is eligible for a loan.

(7) If the Scottish Ministers determine that a student is eligible for a loan they shall notify that student of that fact and of the maximum amount of loan applicable in their case, and thenceforth the student shall be an "eligible student" for the purposes of these Regulations.

(8) In any case where the Scottish Ministers–

(a) determine that the maximum amount of loan which has been notified to an eligible student in relation to an academic year should be increased (including an increase from nil), as a result of a reassessment of the student's contribution or otherwise; and

(b) consider that the increase in the maximum amount does not result from the eligible student–

(i) failing to provide information promptly which might affect eligibility for a loan or the amount of loan for which they are eligible; or

(ii) providing information which is inaccurate in any material particular,

they shall notify the increased amount to the eligible student who may apply to borrow an additional amount which when added to the amount already applied for shall not exceed the increased maximum.

(9) Where an eligible student who has submitted an application for a loan in accordance with paragraph (1) has not applied for the maximum amount of loan to which they are entitled in relation to an academic year under the preceding paragraphs that student may apply to borrow an additional amount, which when added to the amount already applied for shall not exceed the maximum applicable in their case.

(10) An application under paragraphs (8) or (9) shall be made by completing and submitting to the Scottish Ministers an application in such form as they may require by such date as they may determine from time to time (and different dates may be determined by them in respect of loans for different courses) and shall contain a declaration by the eligible student in the terms set out in paragraph (3).

(f) The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 (SSI 2012/162), Regulation 5(5)

Duty to assess and review policies and practices

This section has no associated Executive Note

5.—(1) A listed authority must, where and to the extent necessary to fulfil the equality duty, assess the impact of applying a proposed new or revised policy or practice against the needs mentioned in section 149(1) of the Act.

(2) In making the assessment, a listed authority must consider relevant evidence relating to persons who share a relevant protected characteristic (including any received from those persons).

(3) A listed authority must, in developing a policy or practice, take account of the results of any assessment made by it under paragraph (1) in respect of that policy or practice.

(4) A listed authority must publish, within a reasonable period, the results of any assessment made by it under paragraph (1) in respect of a policy or practice that it decides to apply.

(5) A listed authority must make such arrangements as it considers appropriate to review and, where necessary, revise any policy or practice that it applies in the exercise of its functions to ensure that, in exercising those functions, it complies with the equality duty.

(6) For the purposes of this regulation, any consideration by a listed authority as to whether or not it is necessary to assess the impact of applying a proposed new or revised policy or practice under paragraph (1) is not to be treated as an assessment of its impact.

(g) Equality Act 2006, section 32(11)

32Public sector duties: compliance noticeE+W+S

This section has no associated Explanatory Notes

(1) This section applies where the Commission thinks that a person has failed to comply with a duty under or by virtue of section 149, 153 or 154 of the Equality Act 2010 (public sector equality duty).

(2) The Commission may give the person a notice requiring him—

(a) to comply with the duty, and

(b) to give the Commission, within the period of 28 days beginning with the date on which he receives the notice, written information of steps taken or proposed for the purpose of complying with the duty.

(3) A notice under this section may require a person to give the Commission information required by the Commission for the purposes of assessing compliance with the duty; in which case the notice shall specify—

(a) the period within which the information is to be given (which shall begin with the date on which the notice is received and shall not exceed three months), and

(b) the manner and form in which the information is to be given……

(11) Legal proceedings in relation to a duty by virtue of section 153 or 154 of the Equality Act 2010 —

(a) may be brought by the Commission in accordance with subsection

(8) above, and

(b) may not be brought in any other way.