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Case No: CO/10675/2011 & CO/10573/2011

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/07/2012

Before :

THE HONOURABLE MR JUSTICE SALES

- -

Between :

The Queen on the application of	**Claimants**
(1) S	
(2) KF	
- and -	
Secretary of State for Justice	**Defendant**

- -
- -

Ms Kate Markus (instructed by **Scott Moncrieff & Associates**) for the **First Claimant**
Mr Hugh Southey QC (instructed by **Prisoners Advice Service**) for the **Second Claimant**
Mr Jonathan Auburn (instructed by **Treasury Solicitors**) for the **Defendant**

Hearing dates: 9-10/5/12

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Approved Judgment

Mr Justice Sales :

Introduction

1. There are before the Court two claims for judicial review of two Prison Service Instructions issued by the Secretary of State for Justice ("the Secretary of State") to governors of prisons regarding the exercise by them of discretion regarding the imposition of deductions from earnings by prisoners working for private employers on release schemes outside prison, to raise funds to be paid to Victim Support, a body providing support for victims of crime. The first Instruction under challenge is PSI 48/2011 issued on 4 August 2011 and taking effect from 8 August 2011. The second Instruction under challenge is PSI 76/2011 issued on 20 December 2011 and coming into force to replace PSI 48/2011 with effect from 1 January 2012.

2. The first claim is brought by S, who is a male prisoner aged 40. He is in an open prison serving an indeterminate prison sentence. He has had a full-time job with a private employer doing manual work outside the prison since June 2011. At the hearing, he was represented by Ms Markus, who submits that PSI 48/2011 was unlawful and PSI 76/2011 is unlawful on the grounds that they violate Article 1 of Protocol 1 ("A1P1", protection of property) to the European Convention on Human Rights ("the ECHR"), as incorporated into domestic law under the Human Rights Act 1998 ("the HRA").

3. The second claim is brought by KF, who is a female prisoner with an unspecified number of children. She is in an open prison. She is serving a sentence of four years. Her release date is 9 August 2012. She attends college on release from prison for two days a week, so could only work part time if she was able to find work outside prison. She says she has decided not to seek work outside prison because of the possible impact on her of the levy, travel costs and such like (it seems that she has not approached the governor of her prison to see if any relief from the levy might be granted in the particular circumstances of her case). At the hearing she was represented by Mr Southey QC, who submits that PSI 48/2011 was unlawful and PSI 76/2011 is unlawful on the grounds that they violate A1P1 (relying in that regard on the submissions made by Ms Markus on behalf of S) and also on the grounds that they violate Article 7 (no punishment without law) and Article 14 (prohibition of discrimination) of the ECHR. He submits that they violate Article 7 because they have the effect of imposing a heavier penalty than the one applicable at the time KF's criminal offence was committed. He submits that they violate Article 14 because, although on their face they are applicable equally to men and women in prison, they in practice have an excessive and disproportionate detrimental impact on women and so involve unlawful indirect discrimination contrary to Article 14. In support of that submission he placed particular reliance on *DH v Czech Republic* (2008) 47 EHRR 3, GC. He also submits that the Instructions were and are unlawful because they were issued by the Secretary of State without his having due regard to the need to promote equality for women, as he was obliged to do under section 149 of the Equality Act 2010.

4. S and KF were substituted late on in the proceedings for other claimants. The Secretary of State agreed to this, because the intention was that there should be suitable test cases for challenging the lawfulness of the two Prison Service Instructions.

The legal framework and the promulgation of the Prison Service Instructions

5. The Prisoners Earnings Act 1996 ("the PEA") makes provision allowing for introduction of a regime governing deductions from prisoners' earnings. The Act did not come into force upon enactment. It was only commenced in 2011.

6. Section 1 provides:

> "**1.— Power to make deductions and impose levies.**
>
> (1) This section applies where—
>
> (a) a prisoner is paid for enhanced wages work done by him; and
>
> (b) his net weekly earnings in respect of the work exceed such amount as may be prescribed.
>
> (2) Where the prisoner's net weekly earnings fall to be paid by the governor on behalf of the Secretary of State, the governor may make a deduction from those earnings of an amount not exceeding the prescribed percentage of the excess.
>
> (3) Where those earnings fall to be paid otherwise than as mentioned in subsection (2) above, the governor may impose a levy on those earnings of an amount not exceeding that percentage of the excess.
>
> (4) In this section—
>
> "enhanced wages work", in relation to a prisoner, means any work—
>
> (a) which is not directed work, that is to say, work which he is directed to do in pursuance of prison rules; and
>
> (b) to which the rates of pay and productivity applicable are higher than those that would be applicable if it were directed work;
>
> "net weekly earnings" means weekly earnings after deduction of such of the following as are applicable, namely—
>
> (a) income tax;
>
> (b) national insurance contributions;
>
> (c) payments required to be made by an order of a court; and
>
> (d) payments required to be made by virtue of a maintenance calculation 1 within the meaning of the Child Support Act 1991. …"

7. For the purposes of the PEA, "prescribed" means prescribed in the Prison Rules: section 4(2). The challenges in the present proceedings involve prisoners who undertake enhanced wages work for private employers. The relevant sub-section of section 1 is therefore sub-section (3), which provides that the prison governor in each case may impose a levy up to a level specified as prescribed in the Prison Rules.

8. Section 2(1) of the PEA provides:

> "**2.— Application of amounts deducted or levied.**
>
> (1) Amounts deducted or levied under section 1 above shall be applied, in such proportions as may be prescribed, for the following purposes, namely—
>
> (a) the making of payments (directly or indirectly) to such voluntary organisations concerned with victim support or crime prevention or both as may be prescribed;
>
> (b) the making of payments into the Consolidated Fund with a view to contributing towards the cost of the prisoner's upkeep;
>
> (c) the making of payments to or in respect of such persons (if any) as may be determined by the governor to be dependants of the prisoner in such proportions as may be so determined; and
>
> (d) the making of payments into an investment account of a prescribed description with a view to capital and interest being held for the benefit of the prisoner on such terms as may be prescribed."

9. Before the PEA was brought into effect, careful consideration was given within the Ministry of Justice to the question whether the Act should be activated and, if it was, what levy regime should be introduced pursuant to it. This culminated in a paper dated 27 July 2010 by Simon Greenwood of the Offender Safety, Rights and Responsibilities Group of the National Offender Management Service which set out proposals drawn up in light of information gathered from a number of prisons. The priority for Ministers was provision for victim support (section 2(1)(a) of the PEA). There would be significant administrative costs associated with implementation of a regime under the PEA, so it was important to keep it as simple as possible, leading to the recommendation that it should be limited to providing victim support and that funds raised should not be split amongst a number of different objectives. The paper noted that care should be taken not to dis-incentivise prisoners from working, whilst also seeking to generate sufficient revenue to make the exercise worthwhile in policy terms. After proposing a threshold of about £20 a week, the paper stated: "An appropriate balance might suggest a figure of 40% for all eligible prisoners".

10. In December 2010 the Government issued a Green Paper entitled "Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders" which addressed a wide range of proposals, of which activation of the PEA was one. An initial equality screening of the potential impacts of those policy proposals was published along with the Green Paper, and questionnaires about this were sent to a range of persons and bodies with an interest in treatment of prisoners. The discussion in the initial equality screening in relation to the PEA was limited, since it was one proposal among many and the proposal was at a high level of abstraction - the specific proposals for the detailed regime in rule 31A of the Prison Rules and the Prison Service Instructions only came later. The document included statistics about the breakdown of the prison population; pointed out that men are disproportionately represented in custody compared to the national population and that there is more capacity in the prison estate for men to work in prisons than women; and so observed that there would be the potential for a disproportionate impact of the implementation of the PEA in relation to gender, which would be considered as the policy was developed in more detail.

11. Very little was said about the activation of the PEA by persons responding to the equality questionnaires in respect of the Green Paper. A single response said that care should be taken to ensure that any regime under the 1996 Act "doesn't negatively impact on particular groups, i.e. women, and their children." There were consultation events in relation to the Green Paper in early 2011, but these did not focus to any degree on the proposal to activate the PEA.

12. On 21 June 2011 the Secretary of State issued a full Equality Impact Assessment ("EIA") in relation to the Green Paper. It stated that an EIA on the implementation of a regime under the PEA would be published separately.

13. In the event, the Secretary of State decided that the PEA should be brought into effect and a deductions regime established under it. In order to give effect to the regime allowed for by the PEA, a new rule – rule 31A - had to be introduced into the Prison Rules. Rule 31A provides:

> "**31A. Prescription of certain matters in respect of prisoners' earnings**
>
> (1) The amount prescribed for the purpose of section 1(1)(b) of [the 1996 Act] is £20.
>
> (2) The percentage prescribed for the purpose of section 1(2) if the 1996 Act is 40%.
>
> (3) All amounts deducted or levied under section 1 lf the 1996 Act shall be applied for the purpose referred to in section 2(1)(a) of the 1996 Act.
>
> (4) Victim Support is prescribed as a voluntary organisation to which payments may be made under section 2(1)(a) of the 1996 Act."

14. The effect of this, when read with section 1 of the PEA, is that where a prisoner undertakes enhanced wages work for a private employer, the excess of their wages above £20 a week may be subject to a deduction by the prison governor of up to 40%, which is deducted and paid to Victim Support.

15. Before rule 31A was promulgated, an EIA was published by the Secretary of State in July 2011. It included the following:

> "**2. Introduction**
>
> 2.1 The Government outlined its intention to implement the Prisoners' Earnings Act 1996 ("the 1996 Act") at paragraph 58 of December 2010's Green Paper 'Breaking the Cycle': Effective Punishment, Rehabilitation and Sentencing of Offenders' (Cm.7972).
>
> 2.2 Implementing the 1996 Act is part of the Government's drive to make prisoners pay their debt to society and to victims of crime in particular. The 1996 Act allows for deductions to be taken from, or levies imposed on prisoners working outside the prison for external employers, and for the money deducted or levied to be provided to Victim Support, who provide services to victims of crime across England and Wales.
>
> 2.3 The 1996 Act applies to prisoners doing work they are not required to do in accordance with the Prison Rules and for which they earn an enhanced rate of pay. In practice the application of the Act will be to those in open conditions working outside of the prison for external employers. This is a small group of prisoners, currently up to 500 in number, with 'enhanced wages' (that is, more than they would earn for work which they are required to do and primarily in category D prisons). It would potentially, though currently does not, also capture those working in closed prisons that volunteer for non-core prison work and receive enhanced pay.
>
> 2.4 Clause 103 of the Legal Aid, Sentencing and Punishment of Offenders Bill will give the Secretary of State a more flexible power, with the ability to include more prisoners in the scheme of deductions and levies. A further EIA will be written in order to cover the changes that will come with the implementation of clause 103.
>
> 2.5 Deductions or levies will be taken or imposed, after tax, National Insurance and other court-ordered payments, from earnings over £20 per week, subject to a 40% maximum rate and no upper limit on the earnings from which deductions or levies are taken. The deductions or levies will be provided to Victim Support.
>
> **3. Methodology and evidence sources**

3.1 The Green Paper "Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders" was published in December 2010. A Screening Equality Impact Assessment was published alongside the Green Paper. This provided an initial analysis of the potential equality impacts of the proposed implementation of the Prisoners' Earnings Act 1996 alongside other proposed reforms in the Green Paper on the protected characteristics, the promotion of equality of opportunity and the elimination of unlawful discrimination.

3.2 This equality impact assessment does not repeat the analysis from the screening assessment. Instead, it provides a more detailed analysis of the category D population, compared to the rest of the prison population so that the direct impact of the proposed change can be estimated.

3.3 The data on the prison population includes details of prisoners' gender, age, ethnicity, nationality, physical disability and religion. Information is not held centrally on gender reassignment, sexual orientation, pregnancy and maternity or marriage and civil partnership.

3.4 During the consultation period, following publication of the Green Paper, a series of discussions were held with a wide range of stakeholders including two that were specifically focused on equality issues. A Women's Workshop was held to address women's policy issues raised by the Green Paper. Over 60 delegates attended and included representation from Criminal Justice System professionals, academics and volunteers. An Equalities Engagement event was also held to improve our understanding of the likely equality impacts of all the Green Paper proposals and, where necessary, how they could be modified or mitigated. This event was attended by over 50 delegates representing all of the protected groups. In addition to the 1,200 responses received from the written consultation, an equality questionnaire seeking views on possible impacts of all the Green Paper proposals and any additional evidence that might be available was sent to 240 stakeholders. Seven responses were received and these, along with the 1,200 responses to the consultation were reviewed.

4. Analysis

4.1 Respondents to 'Breaking the Cycle' were almost universally in favour of the implementation of the 1996 Act. Where concerns were raised, they did not tend to focus on equalities issues.

4.2 Nevertheless, during the initial screening process for 'Breaking the Cycle' it was acknowledged that there was a potential for disproportionate impacts as a result of the

> implementation of the 1996 Act when compared to the general population.
>
> 4.3 We now have March 2011 data for both the total prison population and category D prison population. This means we can conduct a more detailed analysis of any potential disproportionate impacts on category D prisoners in comparison to the total prison population. Please see Annex A for details.
>
> 4.4 A limited number of prisoners also work out of category C prisons. This means we cannot rule out disproportionate impacts on those who work out of category C prisons. However, the majority of the prisoners who work out of prison are from category D prisons and therefore data from category D prisons is used as a proxy for all those working out of prison. …
>
> 4.6 *Sex*. Quantitatively, there are no expected differences in proportions of prisoners of a particular sex when comparing the total prison estate to category D prisons. However, qualitatively, concern was raised during the consultation about women prisoners who were primary carers being adversely affected by the proposed reduction in their income. We do not however hold data that links the wages and the sex of those prisoners working out of prison. Therefore, we cannot rule out a potential for disproportionate impact in relation to sex."

16. Prison Service Instructions are issued by the Secretary of State pursuant to his power of superintendence of prisons in section 4 of the Prison Act 1952. Section 4(1) of that Act provides:

> "The Secretary of State shall have the general superintendence of prisons and shall make the contracts and do the other acts necessary for the maintenance of prisons and the maintenance of prisoners."

17. On 4 August 2011, the Secretary of State issued PSI 48/2011. PSI 48/2011 provided, so far as relevant, as follows:

> "**1. <u>Background</u>**
>
> 1.1 The Government is implementing the Prisoners' Earnings Act 1996 (PEA). Under the terms of the Act, which will come into force on 26 September, it is envisaged that prisoners who are undertaking paid work in the community and earning in excess of £20 a week, will be subject to the

> imposition of a levy amounting to 40% of their remaining earnings ("the excess"). The levy is applied to earnings over £20 per week, so if a prisoner earns £25 per week net, the levy is made only from £5 per week, not the full £25. The levy will be paid to Victim Support, a national charity which works in partnership with numerous other such groups, with a view to the support of victims and communities. The PEA defines "net weekly earnings" as weekly earnings after deduction of such of the following as are applicable, namely-
>
> (a) income tax
>
> (b) national insurance contributions;
>
> (c) payments required to be made by an order of a court; and
>
> (d) payments required to be made by virtue of a maintenance assessment within the meaning of the Child Support Act 1991.
>
> 1.2 This instruction is relevant only to prisoners who are undertaking paid work in the community as described in this instruction. …
>
> 1.10 Government policy is that levies should be made under the Act on earnings of prisoners working outside the prison for outside employers. However, as the Act stipulates that Governors may impose a levy, it would be open to Governors to decide not to do so in a particular case, for example where there are very exceptional circumstances. See also para. 2.1.12 below.
>
> ***Mandatory actions***
>
> *1.11 Governors must ensure (subject to para 1.10 above) that:*
>
> *- from 26th September, a levy is imposed in accordance with this instruction; …*
>
> **Prisoner complaints and appeals**
>
> 2.1.13 Any complaints from prisoners or appeals against being required to pay the levy will fall to be dealt with under the normal prisoner complaints process (see PSO 2510) …"

18. This PSI was accompanied by a statement of policy, issued by the Secretary of State, as to the approach which prison governors should follow in exercising their discretion under section 1(3) of the PEA (read in light of rule 31A of the Prison Rules) in making deductions from prisoners' earnings, as follows:

"*Exceptional Circumstances*

The Government has set out its commitment to ensuring that offenders make meaningful reparations to victims and society. One of the ways in which this will be done is through the implementation of the Prisoners' Earnings Act 1996.

Government policy is that levies should be made on earnings of those prisoners working outside the prison for outside employers. However, because the Act stipulates that Governors may impose a levy it is open to Governors to decide not to do so in a particular case.

Any applications by prisoners to be exempted from the levy must be considered on their individual merits, having regard to the circumstances of the individual prisoner.

In light of Government policy, we anticipate that exemptions from the levy will be infrequent and will only be granted in very exceptional circumstances.

This note gives guidance as to the factors that we recommend Governors consider when considering exempting a prisoner from the levy.

- Where applications for exemptions are based on a prisoner's claim that they or their family will suffer severe financial hardship as a result of the levy, we recommend that Governors consider how long the prisoner has been working out prior to the imposition of the levy, and therefore how their financial commitments have changed.

- We also recommend that consideration is given as to whether the prisoner's financial commitments result from financial activity that is in fact prohibited under PSO 4465 Prisoners' Financial Affairs.

- We recommend that Governors give particular scrutiny to applications for exemptions resulting from travel costs, and in particular those applications that arise from unusual circumstances, for example where a prisoner with a disability incurs a significantly greater travel cost than a non-disabled prisoner undertaking the same journey.

- If considering an exemption, Governors should aim to be reasonably satisfied as to the accuracy of the facts claimed. The onus of producing documentation to substantiate the application should be on the prisoner. Until such time as the application for an exemption has been determined, it would be reasonable for the prisoner to be prevented from working out.

> - Any decision to exempt the prisoner from the imposition of the levy must be recorded on the prisoner's personal file."

19. The thrust of the claimants' case under A1P1 is that the requirement in PSI 48/2011, repeated in PSI 76/2011, that prison governors should make deductions at the full 40% rate of the excess of enhanced earnings above £20 a week, subject only to such a narrow class of exemption in "exceptional" or "very exceptional" circumstances, is far too intrusive an interference with prisoners' rights under A1P1. In order to be lawful, the Instructions should allow prison governors a much greater discretion to respond to the individual circumstances and needs of prisoners.

20. Before issuing PSI 48/2011 the Secretary of State undertook a further EIA, which included the following:

> "**Aims**
>
> What are the aims of the policy?
>
> The Government outlined its intention to implement the Prisoners' Earnings Act 1996 in the Green Paper "Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders". Implementing the 1996 Act is part of the Government's drive to make prisoners pay their debt to society and to victims of crime in particular. The Act allows for deductions to be taken from, or levies imposed on prisoners working outside the prison for external employers, and for the money deducted or levied to be provided to Victim Support.
>
> The implementation of the Act and the over arching policy are the responsibility of Justice Policy Group in the Ministry of Justice and is covered by their EIA. The aim of the NOMS PSI is to explain the purpose of the Act and the process of taking the levy. …
>
> **Stakeholders and feedback**…
>
> Do you have any feedback from stakeholders, particularly from groups representative of the various issues, that this policy is relevant to them?
>
> The draft Prison Service Instruction that explains the Act and the relevant deduction/levying processes was shared with relevant stakeholders. Prisoners (in the course of stakeholder group discussions and through correspondence from a specific prisoners' council) have also provided comments in response to the Government's decision to implement the Act.
>
> **Impact**

Could the policy have a differential impact on staff, prisoners, visitors or other stakeholders on the basis of any of the equalities issues?

The Government's intention is that the levy will apply to all prisoners who have been assessed as suitable to undertake paid work in the community and who meet the test set out in the Act in terms of their being liable to deductions or the imposition of a levy. The intention is that the same proportion of the excess earnings will be levied in all cases. Therefore all prisoners will be affected equally in cash terms.

It has been suggested that the impact of this will be greatest on prisoners who face the longest and most expensive journeys to work. It has further been suggested that this may impact on BME prisoners as they tend to live and work in the major conurbations that are a long way from the open prison sites. However, this is based on a misconception that prisoners in open prisons should be undertaking work placements near their discharge address. The purpose of working out is to gain work experience to assist with future employment, and it is not necessary for this employment to be at the home location if that is a long way from the prison.

We have considered whether disabled prisoners might find the levy more punitive if they face extra travel to work costs. However, many able bodied prisoners use their own cars to get to and from work and the arrangements for disabled prisoners are unlikely to be any more expensive. However, Governors have discretion to make concessions in exceptional cases.

Local discretion

Does the policy allow local discretion in the way in which it is implemented? If so, what safeguards are there to prevent inconsistent outcomes and/or differential treatment of different groups of people?

The Act gives Governors a discretion that cannot be fettered. However, the Government's policy is that the levy will be made and that offenders will contribute to victim support. It has been conveyed to Governors that it is expected that the levy will be taken in all but the most exceptional cases.

Summary of relevance to equalities issues …

Gender (including gender identity) No …"

21. On 20 December 2011, the Secretary of State issued PSI 76/2011, to come into effect and replace PSI 48/2011 on 1 January 2012. Before issuing PSI 76/2011 a further EIA was prepared, which was in similar terms to that prepared for PSI 48/2011.

22. PSI 76/2011 provides:

> "**1. Background**
>
> 1.1 The Prisoners' Earnings Act 1996 (PEA) and related Rules came into force on 26 September. Under the terms of the Act, prisoners who are undertaking paid work in the community and earning in excess of £20 a week may be made subject to the imposition of a levy amounting to up to (and including) 40% of their remaining earnings ("the excess"). The levy is applied to earnings over £20 per week, so if a prisoner earns £25 per week net, the levy is made only from £5 per week, not the full £25. The levy is paid to Victim Support, a national charity which works in partnership with numerous other such groups, with a view to the support of victims and communities. The PEA defines "net weekly earnings" as weekly earnings after deduction of such of the following as are applicable, namely-
>
> (a) income tax
>
> (b) national insurance contributions;
>
> (c) payments required to be made by an order of a court; and
>
> (d) payments required to be made by virtue of a maintenance assessment within the meaning of the Child Support Act 1991.
>
> 1.2 This instruction is relevant only to prisoners working outside the prison for outside employers.
>
> 1.3 This instruction replaces PSI 48/2011. The changes from the previous instruction are as follows:-
>
> - A new Annex, Annex B, contains guidance to Governors on the exercise of their discretion under the Act to impose a levy at less than 40% (see paragraph 1.11)
>
> - A revised PEA 001 form is introduced enabling Governors to vary the level of deductions made by the Shared Service Centre.
>
> Desired outcomes
>
> 1.4 Governors will consider imposing a levy on the earnings of prisoners who are undertaking paid work in the community as described in this instruction. …

1.11 It is the Government's policy that the discretion which Governors have to impose the levy should generally be exercised in favour of imposing it. However, Governors do still retain a discretion as to whether to impose a levy in each case, and at what level. Annex B provides guidance on the exceptional circumstances in which it may be inappropriate to impose a levy. See also para 2.1.13 below.

Mandatory actions

1.12 Governors must ensure that

- They consider imposing a levy in accordance with this Instruction;…

2. Operational instructions

Level of deductions

2.1.1 As set out in paragraph 1.1, the Act and related Rules set the maximum level of deductions as being 40% of the excess of net weekly earnings over £20. Net weekly earnings are calculated after deduction of income tax, national insurance, and court ordered and child support payments. However, Governors have discretion to set the levy at a lower rate, or not to impose it, in individual cases. …

Reductions and exemptions to the Levy

2.1.14 Where a prisoner has applied for an exemption from, or reduction in, the levy, Annex B provides guidance on some of the types of exceptional circumstances governors might wish to consider when deciding whether or not to exempt a prisoner from the levy, or to reduce the amount of levy to be imposed. …

Prisoner complaints and appeals

2.1.18 Any complaints from prisoners or appeals against being required to pay the levy will fall to be dealt with under the normal prisoner complaints process (see PSO 2510). …

Annex B

Exceptional Circumstances

The Government has previously set out its commitment to implementing the Prisoners' Earnings Act 1996.

Government policy is that levies should be made on earnings of those prisoners working outside the prison for outside employers. However, because the Act stipulates that

Governors may impose a levy it is open to Governors to decide not to do so, or to impose a levy at a rate lower than the maximum permitted 40%, in a particular case (but see instructions at section 2 for an explanation as to how this is effected for prisons using the Shared Service Centre.

Any applications by prisoners to be exempted from the levy (or to have the levy reduced), must be considered on their individual merits, having regard to the circumstances of the individual prisoner.

In light of Government policy, we anticipate that exemptions from (or reductions in) the levy will be infrequent and will be granted only in exceptional circumstances.

This note gives guidance as to the factors that we recommend Governors consider when considering exempting a prisoner from the levy, or reducing it.

- If the prisoner can show that the imposition of the levy at the rate at which it is being imposed would lead to the prisoner or their family suffering severe financial hardship, then this may constitute an exceptional circumstance leading to reduction or non-imposition of the levy. Governors may wish to consider whether the prisoner normally (ie when not in prison) has responsibility for the care or maintenance of a child or children, and whether the imposition of the levy at the rate at which it is imposed would damage the prisoner's relationship with that child or those children. When considering applications on the basis of severe financial hardship, Governors may wish to consider the length of time for which the prisoner was working out prior to imposition of the levy, and therefore how their financial commitments have changed.

- We also recommend that consideration is given as to whether the prisoner's financial commitments result from financial activity that is in fact prohibited under PSO 4465 Prisoners' Financial Affairs (PSO 4465 will shortly be superseded by PSI 1/2012).

- (From 1 January 2012) We recommend that Governors consider applications for exemptions or reductions reflecting travel costs where these are substantial in proportion to earnings, and in particular those applications that arise from unusual circumstances, for example where a prisoner with a disability incurs a significantly greater travel cost than a non-disabled prisoner undertaking the same journey.

- If considering an exemption, Governors should aim to be reasonably satisfied as to the accuracy of the facts claimed. The onus of producing documentation to substantiate the application should be on the prisoner.

- Any decision to exempt the prisoner from the imposition of the levy must be recorded on the prisoner's personal file.

This is not an exhaustive list of the matters that may be taken into account."

23. It may be noted that PSI 76/2011 is in slightly different terms from PSI 48/2011. At paragraph 1.11 it refers to the "exceptional circumstances" (rather than "very exceptional circumstances", the term employed in PSI 48/2011 and the associated policy guidance) in which it would not be appropriate to impose the full 40% levy. Also, Annex B to PSI 76/2011 states in terms that it does not set out an exhaustive list of the matters to be taken into account when considering whether a case is exceptional or not.

24. However, I do not consider that these are material differences for the purposes of legal analysis. The difference between "exceptional" or "very exceptional" circumstances is, in context and having regard to the similarity of the factors to be taken into account, a minor one of degree. Although the policy guidance associated with PSI 48/2011 did not say that the list of factors was not exhaustive, it was clearly implicit from the terms of that guidance and the fact that it only purported to be guidance that governors could have regard to other matters as well, if they thought fit, in deciding whether a case was exceptional or not.

25. To put the deductions regime in context, the proportion of the total prison population affected by the regime is very small. Out of a total prison population of many thousands, only 335 prisoners were in outside paid work as at 31 March 2012. Of the 500 or so women prisoners held in Category D (open) prisons, only about 5% (about 25 or so at any one time) are subject to the levy.

26. Prisoners who do paid work within prison can earn only about £10 a week, i.e. around half the amount of earnings from outside work which are exempt from the levy by virtue of the operation of the £20 threshold set out in rule 31A of the Prison Rules.

27. Working outside a prison is entirely voluntary for a prisoner. There are incentives to do so, in the form of the ability to earn more than they could do by working within prison and to have the opportunity to demonstrate that they are responsible individuals and suitable for release. However, prisoners who work outside prison may lose other sources of financial support provided by the Prison Service to other prisoners, such as grants to cover the cost of home visits. Therefore, individual prisoners may be expected to make a cost-benefit assessment in relation to their own particular situation when deciding whether to apply for and undertake work outside prison. The imposition of the levy under the PEA can obviously have an impact on such assessments, which will vary from prisoner to prisoner.

28. According to information supplied by the Secretary of State, a significant number of requests (particularly when assessed in the context of the small number of prisoners employed in work outside prison) have been received asking governors to exercise their discretion to waive the levy. In the period to the end of 2011 (i.e. under PSI 48/2011) 16 such requests were received. In the period between 1 January 2012 and 31 March 2012 (i.e. under PSI 76/2011) 92 such requests were received. Of these 108 requests, 69 resulted in a waiver of some part of the full 40% levy.

29. S has a small car which he needs to use to get to his place of work. It appears from his witness statement that he has been granted a partial exemption from the full effect of the levy, to assist him with fuel costs. He says that after the levy is deducted from his earnings he is left with around £140 each week (as compared with about £210 before the levy was applied, and which may also be compared with the figure of about £10 a week for the vast majority of prisoners). This makes it "extremely hard" for him now to cover his expenses of running his car and so forth, saving anything for his release or doing anything to support his family. He considers that he would be better off financially if he were not working outside the prison, as he would then be eligible to receive money towards his travel costs for home leaves and day release and might receive financial assistance upon release.

30. The claimant KF has not sought to apply for a waiver of levy, but witness statements in relation to other female prisoners put forward as representative show that requests for waiver are given serious consideration. For example, in relation to one prisoner (also with the initials KF) a request for a waiver was made and it seems that this was not refused out of hand by the prison governor (Miss Goligher), but only after examination of witness KF's expenses and those of her children and on the grounds that further documentation and evidence would be needed. It is also clear from Miss Goligher's statement dealing with the case of the previous claimant whom claimant KF has replaced that Miss Goligher did allow a waiver of levy in that case to assist that prisoner with rehabilitation upon release.

31. It appears from the statistics provided by the Secretary of State and from the evidence relating to these particular cases that prison governors are prepared to consider requests by prisoners for waiver of levy in the particular circumstances of their cases on their merits. They do not treat the Prison Service Instructions as having the practical effect of eliminating substantially all discretion in deciding whether the full 40% levy should be deducted from prisoner earnings.

32. In October 2011, the organisation called "Unlock" (the National Association of Reformed Offenders) published a policy paper entitled "The Victims Levy: Undermining rehabilitation, A report on the effect of Prison Service Instruction 48/2011 and the case for its rescission". The paper called attention to the potential impact of the levy in deterring prisoners from seeking work outside prison and as tending to undermine objectives such as assisting prisoners to earn and save money to help them get settled after release, encouraging prisoners to take personal responsibility for planning and saving, and assisting them to earn money to support their families, including children. It called for the levy to be rescinded.

33. In these proceedings, evidence was adduced from the Howard League for Penal Reform and from the Prison Governors' Association which set out similar concerns about the effects of the levy upon prisoners.

34. It is also relevant to set out in this judgment parts of Prison Service Order 4800 on Women Prisoners issued on 28 April 2008 ("PSO 4800"), on which Mr Southey relied in his submissions, as follows:

> **1. Introduction** …
>
> 1.2 It is important to establish appropriate consistent standards for the treatment of women prisoners, for implementation across the estate.
>
> 1.3 This PSO is written against the background of the new Gender Equality Duty (GED) which took effect in April 2007. The GED places a statutory General Duty on all public authorities
>
> - to eliminate unlawful discrimination
>
> - to eliminate harassment
>
> - to promote equality of opportunity between men and women
>
> 1.4 Criminal justice agencies need to produce evidence and outcomes to show all three strands have been considered. The Act allows provision of services to one sex in certain circumstances, such as establishments providing special care or supervision to one sex to meet general needs.
>
> 1.5 A Gender Specific Standard is being introduced to ensure the different needs of women are consistently addressed across the estate as well as the generic standards which are also applicable in male prisons. Women's establishments will be audited against this from April 2009. The Standard will be kept under review with the aim that it will, in due course become a comprehensive Standard for women's prisons, replacing a number of the current generic Standards.
>
> 1.6 It is important to note that although some aspects of how imprisonment affects a woman is clearly gender specific and will only apply to her and not a male prisoner (an example would be facilities for pregnant women), other elements of imprisonment are likely to impact women differently or to a significantly different degree and therefore it is appropriate to set a different standard. …
>
> 2.2 Women more frequently than men are the main carers of children. They are often single parents. Two-thirds of women prisoners are mothers. Only one quarter of children of women prisoners live with their biological or current fathers. Only 5% of children stay in their own homes after mother's imprisonment. …

DAY-TO-DAY LIVING:

1. Incentives and Earned Privileges (IEP)

Women are more likely to be attracted by incentives that offer closer contact with their family and friends such as longer and more frequent visits. However, losing a parent to imprisonment is often an extremely damaging life event for a child and it is one of the international rights of the child that they are able to keep contact with their parent unless it is not in the child's best interest.

On average women use the telephone more often to maintain relationships and contact with children. Women often try to continue managing family issues and problems from within prison, although this is obviously very difficult. …

DAY-TO-DAY LIVING:

3. Property and Clothing

Most male prisoners wear prison issue clothing and exchange dirty for clean from the prison laundry.

Women do not wear uniform and have not for many years. It is generally recognised that part of the rehabilitation for many women prisoners involves the ability to maintain and raise self-esteem. Self-esteem is linked for many women with personal appearance. Many women will want to have regular changes of clothing, to have varied clothing, to use make up and dress their hair.

This means that women need greater amount of clothing than men and thus will need access to more property - including toiletries – particularly lifers and women serving long sentences.

Many women prisoners however will enter prison with nothing and have little or no access to outside money or clothing. …

DAY-TO-DAY LIVING:

9. Prison Shop

Women will generally need to purchase a wide range of toiletries, make-up and hair brushes etc. The ability to look after her personal appearance will be critical to many women's self-esteem. Women from BME groups will have specific needs. (See Section L)…"

PATHWAYS TO RESETTLEMENT

5. Finance, Benefit and Debt

Poverty is often a permanent feature of the lives of ex-offenders and the process of obtaining state benefit can be a complicated one.

Managing to organise well enough to live within a budget and to meet deadlines is a priority that women offenders often recognise is important, but which they can find difficult to achieve.

72% of prisoners surveyed were in receipt of benefits before coming into prison, 81% claimed benefits on release, 48% had history of debt. For a third of the prisoners their debt problem had worsened in prison.

Organisations such as Unlock can provide information and training on personal finance for offenders. …

PATHWAYS TO RESETTLEMENT:

6. Children and Families

The 2003 resettlement survey showed that half of all women prisoners had dependent children (including stepchildren) under 18.

There is evidence to suggest a link between the maintenance of supportive family ties and reduction in re-offending.

It is accepted that women prisoners are more likely to try to "run" their families from inside prison than male prisoners. This is partly due to the distance many are from home but many more men than women have supportive partners at home bringing up the children. Women from Black and Minority Ethnic backgrounds may disproportionately received even less visits.

Some women living in abusive and exploitative relationships may need long-term support and assistance to break free.

Some visitors to women may be abusive associates or even "pimps". Some women may have been abused by partners or other family members other than partners and may not welcome visits from some family members.

Having a parent or close relative in prison is a significant risk factor for children becoming involved in criminality. Losing a parent to imprisonment is often an extremely damaging life event for a child. 30% of prisoners' children suffer significant mental health problems, compared with 10% of the general child population.

> Child Protection must be at the centre of all work involving families in women's prisons including the visitors' centre.
>
> Most children will need to speak to their mothers frequently and visit her. They may however find the visiting experience frightening, boring or confusing. How prisons manage the visiting experience can make an enormous difference in the experience of the child and whether they will want to come again.
>
> We should recognize that not all families are child-centred but family members may still need support.
>
> While in custody many women face having their children enter the "looked after" system or be adopted. This can be a traumatic experience both for the woman and children and the staff supporting her.
>
> Voluntary and Community section organisations provide support at prisons for families and children. Their work needs to be well facilitated by management, appropriately supported and understood by the whole establishment."

35. Mr Southey relied on these passages in PSO 4800 to show that the Secretary of State recognises that women prisoners may have particular needs. In the context of his submissions based on Article 14 and section 149 of the Equality Act 2010, Mr Southey submitted that the Secretary of State had not paid proper attention to these identified potential needs of female prisoners when he issued PSI 48/2011 and PSI 76/2011.

Legal analysis

36. The effect of section 1(3) of the PEA and rule 31A of the Prison Rules is that a discretion is conferred on a prison governor to levy deductions from a prisoner's enhanced earnings in an amount up to 40% of the excess of those earnings over £20 a week. Any prison governor deciding whether to exercise that discretion or not in the case of a prisoner is obliged, by virtue of section 6(1) of the HRA, to act in a way that is compatible with the prisoner's Convention rights under that Act. No Prison Service Instruction issued by the Secretary of State is capable of detracting from that legal obligation. Accordingly, if following the guidance in PSI 48/2011 or PSI 76/2011 in the case of any prisoner would involve the prison governor in a violation of the prisoner's rights under A1P1 or Article 14, the governor would have to disregard the guidance and act so as to safeguard those rights of the prisoner.

37. Notwithstanding that the Prison Service Instructions would be legally irrelevant and inapplicable in such circumstances, I am satisfied that they may themselves be subject to judicial review by reference to the Convention rights of prisoners, in order to determine whether the guidance they contain is compatible with those rights. The guidance is intended to inform how prison governors behave, and such guidance may

be reviewed to ensure that it is not in a form liable to mislead or induce unlawful actions by those to whom it is directed: *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112; *R (Suppiah) v Secretary of State for the Home Department* [2011] EWHC 2 at [137] per Wyn Williams J ("… a policy which is in principle capable of being implemented lawfully but which nonetheless gives rise to an unacceptable risk of unlawful decision-making is itself an unlawful policy").

38. Although under the relevant legal regime the relevant discretion has been conferred on prison governors, they may be expected to give considerable weight in exercising their discretion to the guidance in the Prison Service Instructions. Such Instructions are issued by the Secretary of State in exercise of his power of superintendence in relation to the operation of prisons contained in section 4 of the Prisons Act 1952 and with a view to producing a common approach across all prisons, avoiding capricious differences arising in the treatment of individual prisoners. Indeed, in ordinary circumstances I think prison governors would act unlawfully if they failed to give significant weight to the guidance in such Instructions when deciding how to exercise their discretion. Therefore, if the Instructions do give guidance which, if followed, would lead to prison governors acting in breach of Convention rights, it is important that they should be struck down as themselves being unlawful.

39. The Claimants say that the effect of the Prison Service Instructions, when read in the context of rule 31A of the Prison Rules (which requires that any deduction from enhanced earnings should be directed to victim support, rather than the other potential objectives allowed for by the PEA), is to suggest that prison governors are far too limited as regards the extent to which they can relieve prisoners from having deductions made from their enhanced earnings. To take the full amount of the deduction out of prisoners' earnings, subject only to allowing relief in exceptional cases, with the consequence that the deducted monies are paid away to victim support (rather than, say, to support the prisoners' own families) involves breaches of their Convention rights.

40. The Secretary of State also has to comply with his duties under section 149 of the Equality Act 2010 when issuing Prison Service Instructions.

The challenge based on A1P1

41. A1P1 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."

42. The Article contains three rules:

> "The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of the peaceful enjoyment of possessions. The second, in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.
>
> However, the three rules are not "distinct" in the sense of being unconnected: the second and the third rules are concerned with particular interferences with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule." (see *National and Provincial Building Society v United Kingdom* (1998) 25 EHRR 127, para. [78])

43. The interference with prisoners' "possessions" or property (in the form of money earned by them as enhanced earnings while on release from prison) involved in application of the deductions regime constituted by the PEA, rule 31A and the Prison Service Instructions is lawful, in the sense required by A1P1: see *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46; [2011] 3 WLR 871 at [116]-[123] per Lord Reed JSC.

44. In relation to the aim of the interference – to require prisoners to make a contribution to the costs of supporting victims of crime – and the proportionality of the interference, the Strasbourg case law indicates that a state is afforded a wide margin of appreciation under A1P1 in setting rules in contexts which call for broad social and economic judgments, involving the requirement of payment of taxes or compulsory contributions for legitimate public purposes. The ECtHR will only find that the state has acted in violation of A1P1 if it proceeded on the basis of a judgment in relation to action taken to promote a legitimate public interest which was "manifestly without reasonable foundation": see e.g. *James v United Kingdom* (1986) 8 EHRR 123, esp. at para. [46]; *National and Provincial Building Society* at paras. [79]-[80]; and the review of the authorities in *SRM Global Fund LLP v Commissioners of HM Treasury* [2009] EWCA 788 at [43]-[60] and *AXA General Insurance Ltd* at [29]-[41] (Lord Hope DPSC) and [107]-[134] (Lord Reed JSC).

45. In my judgment, the deductions proposed to be made from prisoners' enhanced earnings are closely analogous to a tax to be levied on them, hypothecated to the purposes of victim support. The PEA, rule 31A of the Prison Rules and the Prison Service Instructions reflect social and economic judgments made by Parliament and the Secretary of State as to whether and what reparation payments should be made by prisoners out of enhanced earnings while in prison, and as to what ends the funds so raised should be applied. In a taxation context, the Strasbourg case-law confirms that the authorities enjoy a wide margin of appreciation: see e.g. *National Federation of*

Self-Employed v United Kingdom (App. 7995/77) 15 DR 198; *National and Provincial Building Society* at paras. [79]-[80]; *Burden v United Kingdom* (2007) 44 EHRR 51, paras. [54] and [60] (the case went on to the Grand Chamber – (2008) 47 EHRR 38 - which analysed it differently and did not have to address the question of justification of interference with possessions). It is legitimate for the state to operate a tax regime by reference to broad categories and general rules, without drawing fine distinctions between particular cases: *Burden* (2007) 44 EHRR 51 at para. [60]; also see *Carson v United Kingdom* (2010) 51 EHRR 13, paras. [61-62] and *James v United Kingdom* (1986) 8 EHRR 123 at paras. [51] and [69] (rejecting, by reference to the wide margin of appreciation applicable, the applicant's complaints that the leasehold enfranchisement legislation in issue in that case was insufficiently tailored to exclude benefits for wealthy tenants or unmerited 'windfall profits' in individual cases). In my view, the imposition of a special tax upon prisoners in receipt of enhanced earnings for the purposes of securing hypothecated funding to support the victims of crime in the present case falls well within the national authorities' margin of appreciation, in line with these authorities.

46. That conclusion is reinforced by judgments of the ECtHR in the context of imposition of exactions upon prisoners for legitimate public purposes, relied upon by the Secretary of State, where again the margin of appreciation to be applied is wide: *Stummer v Austria*, ECtHR, Grand Chamber judgment of 7 July 2011, esp. at paras. [89], [101]-[103] and [109]-[110] (an aspect of the social security scheme whereby prisoners were not credited with contributions to the state pension fund in relation to their remuneration from prison work was found to be compatible with A1P1, with a wide margin of appreciation being applied in view of the fact that the issue was "closely linked to issues of penal policy, such as the conception of the general aims of imprisonment, the system of prison work, its remuneration and the priorities in using the proceedings from it, but also to issues of social policy reflected in the social security system as a whole. In short, it raises complex issues and choices of social strategy, which is an area in which States enjoy a wide margin of appreciation …": para. [101]); and *Laduna v Slovakia*, ECtHR, judgment of 13 December 2011, esp. at para. [84] (a scheme whereby, when a prisoner received money from his family, he was required to pay half as a contribution to the state in respect of the cost of his imprisonment was found not to violate A1P1 in view of the wide margin of appreciation to be afforded to the state).

47. In this case, in light of the wide margin of appreciation which is applicable, I consider that there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised and that a fair balance is struck between the general interests of the community and the requirements of the protection of the individual prisoners' fundamental rights, such that prisoners subject to deductions from their enhanced earnings do not bear an individual and excessive burden (cf *James v United Kingdom* at para. [50]):

    i) In general terms, it is legitimate for the state to focus a special contributions or taxation regime upon prisoners, with a view to generating funds to support the victims of crime. It is reasonable to assess that there is a particular link between the legitimate aim of providing funds for victim support and prisoners who are in a position to receive enhanced earnings which means they are in a position distinct from the general tax-paying public and may properly be

subject to an obligation to make payments to assist with reparation to victims. The position of prisoners is also distinct from that of ordinary tax-payers, because, as they are accommodated in prison, they do not have to bear the full range of the usual costs of living which ordinary tax-payers have to bear;

ii) Although there will inevitably be differences in the way in which the regime impacts upon individual prisoners, it is – in view of the wide margin of appreciation applicable - fair and proportionate to frame the applicable rules in terms of the broad category of prisoners who receive enhanced earnings: see para. [45] above. It might well be the case, in light of the authorities cited there, that A1P1 does not require that allowance should be made for any individual cases within the general category to be taken outside the operation of the deduction rules; but the proportionate nature of the rules to be applied is reinforced by the availability of a discretion for prison governors to grant relief from the levy to prisoners in exceptional cases, in accordance with the guidance in the Prison Service Instructions. On the evidence, the discretion to grant relief in exceptional cases is in practice exercised and cannot be regarded as a dead letter. There is no requirement under A1P1 for the category of case to be allowed relief from the rules to be framed in wider terms;

iii) The legitimacy of the interference with prisoners' enhanced earnings under the regime is further supported by consideration of the context in which enhanced earnings come to be earned. Enhanced earnings can only be earned as the result of the exercise of a concession to prisoners to allow them out of prison to work. Working outside prison is an entirely voluntary matter for a prisoner, so it is their choice whether, knowing of the deductions regime, they will wish to continue to do so. If they choose not to, there will be no relevant interference with their rights under A1P1. A1P1 does not create a right for prisoners to have the opportunity to work on release from prison without being subject to the deductions regime;

iv) The level of enhanced earnings is much higher than the level of earnings possible from working within prison, and even when the deductions regime is applied it will only lead to deductions once a threshold level of earnings of £20 a week (about twice the weekly wage which can be achieved from work within prison) has been crossed. The application of the threshold and the level of the deduction (at only 40%) mean that there remains a considerable benefit for prisoners as a result of being allowed to work outside prison. The deductions regime does not destroy the essence of the right to enjoy the property earned by prisoners in the form of enhanced earnings;

v) The deductions regime only applies prospectively, so a prisoner who chooses to work outside prison to gain enhanced remuneration knows in advance that his enhanced earnings will be subject to the deductions regime. Where it is known when a particular asset is received that it comes subject to certain conditions or that its retention is precarious and cannot be regarded as an absolute entitlement, it is easier to establish the proportionality of an interference giving effect to that conditionality or precariousness attaching to the asset: see e.g. *National and Provincial Building Society v United Kingdom* (1997) 25 EHRR 127, paras. [67]-[70]; *Jahn v Germany* (2006) 42 EHRR 49, GC, paras. [101], [106] and [116]; *Depalle v France* (2012) 54 EHRR 17, GC,

paras. [67], [80]. [86] and [91]-[92]; *Göbel v Germany*, ECtHR, judgment of 8 December 2012, paras. [49] and [51]; and see *AXA General Insurance Ltd* at paras. [128]-[129] and [132] (Lord Reed JSC).

48. The Claimants sought to meet these powerful points in favour of the Secretary of State by submitting that he is not entitled in these domestic proceedings to take the benefit of the margin of appreciation which would be afforded by the ECtHR to the United Kingdom as an ECHR Contracting State in proceedings in Strasbourg. They relied on the decision of the House of Lords in *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 AC 173 for the submission that the Court should itself make its own judgment and decide what guidance should be given to prison governors regarding the exercise of their discretion, without deferring to the judgment of the Secretary of State as expressed in the guidance in the Prison Service Instructions. They also submitted that the Secretary of State had not conducted an exercise weighing up all relevant matters bearing on whether it was legitimate in terms of A1P1 for the guidance to purport to limit the circumstances in which prison governors should not make deductions of the full amount authorised by rule 31A to a narrow class of exceptional cases, and for that reason also no margin of appreciation should be allowed and the Instructions should be struck down as unlawful.

49. I do not accept either of these submissions. I deal with them in turn below.

(a) Re G *and the margin of appreciation*

50. In my view, the proper starting point in relation to the first argument is the definition of the Convention rights in the HRA. Under section 6(1) of the HRA, the obligation of prison governors in exercising their discretion under rule 31A and the obligation of the Secretary of State in issuing Prison Service Instructions is to act compatibly with Convention rights as so defined.

51. Section 1(1) of the HRA provides in relevant part:

> "In this Act 'the Convention rights' means the rights and fundamental freedoms set out in –
>
> (a) Articles 2 to 12 and 14 of the Convention,
>
> (b) Articles 1 to 3 of the First Protocol …"

Section 1(3) provides that "The Articles are set out in Schedule 1" to the Act, that is to say, for ease of reference.

52. Section 21(1) of the HRA sets out various definitions of terms used in the Act, including as follows:

> "'the Convention' means the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4th November 1950 as it has effect for the time being in relation to the United Kingdom; …
>
> 'the First Protocol' means the protocol to the Convention agreed at Paris on 20th March 1952'"

53. Therefore, reading section 1(1) of the HRA with the definitions in section 21(1), the Convention rights are defined, so far as relevant for this case, as the rights set out in the ECHR (i.e. the international instrument to which the United Kingdom is a party) "as it has effect for the time being in relation to the United Kingdom" together with the rights set out in the First Protocol (again, the international instrument to which the United Kingdom is a party). The definition of "the First Protocol" is not expressly qualified by the words at the end of the definition of "the Convention", but in context it is clear that both definitions are intended to operate in the same way – that is to say, by reference to the way in which both international instruments have effect for the time being in relation to the United Kingdom. That effect is determined, in part, by operation of the margin of appreciation applied by the ECtHR in determining whether there has been any violation of Convention rights.

54. The definition of "Convention rights" in the HRA – the relevant rights which are introduced into domestic law by operation of that Act: see *In re McKerr* [2004] UKHL 12; [2004] 1 WLR 807 - therefore incorporates the concept of the margin of appreciation when those rights fall to be applied under section 3(1) of the HRA in interpreting legislation and under section 6(1) of the HRA when determining the lawfulness of actions by public authorities. In my view, this indicates that the domestic courts are required to interpret the Convention rights by applying the same margin of appreciation when assessing the lawfulness of conduct of public authorities under section 6(1) as the ECtHR would apply when assessing the lawfulness of conduct of the national authorities from the perspective of an international court.

55. That view is supported by other provisions of the HRA which indicate that the Convention rights in the HRA are to be applied and enforced to the same extent as the Convention rights in the ECHR and its Protocols. In particular, section 2(1) provides that:

> "A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any … judgment … of the European Court of Human Rights"

As is well known, the concept of the margin of appreciation is deeply embedded in the case law of the ECtHR, featuring in hundreds of judgments. By requiring that this case law must be taken into account when the domestic courts determine questions arising in connection with a "Convention right", as that term is employed in the HRA, Parliament has indicated that an equivalent to the margin of appreciation should be applied by the domestic courts. In the domestic cases, the equivalent principle is often described as a discretionary area of judgment, following the terminology employed by Lord Hope of Craighead in *R v Director of Public Prosecutions, ex p. Kebilene* [2000] 2 AC 326 at 381; and see *AXA General Insurance Ltd* at [32] (Lord Hope DPSC) and [131] (Lord Reed JSC).

56. The ambit of the Convention rights is directly governed by the concept of the margin of appreciation as it falls to be applied under the ECtHR's case law. Where the ECtHR applies the margin of appreciation so as to conclude that a state has not violated a Convention right when it acts in a particular way, the necessary corollary is that the Convention rights of the individual applicant did not extend to a right to

require the state to refrain from acting in that way. Contrary to the submission of the Claimants, I do not think it is easy to separate out the content of the rights from the application of the margin of appreciation. By way of example, the margin of appreciation may be central to determination whether a state owes a positive obligation under Article 8(1) – see *Evans v United Kingdom* (2008) 46 EHRR 36, para. [75] – or whether it has infringed the right to a fair trial under Article 6(1) – see *Ashingdane v United Kingdom* (1985) 7 EHRR 528, para. [57]).

57. The principle that in interpreting and applying the Convention rights in the HRA the domestic courts should ordinarily mirror the interpretation and application of the Convention rights in the ECHR by the ECtHR has been affirmed in many cases at the highest level. It is only necessary to cite the unanimous judgment of a bench of nine Supreme Court Justices in *Pinnock v Manchester City Council* [2011] UKSC 6; [2011] 2 AC 104, at [48], as follows:

> "This court is not bound to follow every decision of the European court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in constructive dialogue with the European court which is of value to the development of Convention law: see e.g. *R v Horncastle* [2010] 2 AC 373. Of course, we should usually follow a clear and constant line of decisions by the European court: *R (Ullah) v Special Adjudicator* [2004] 2 AC 323. But we are not actually bound to do so or (in theory at least) to follow a decision of the Grand Chamber. As Lord Mance pointed out in *Doherty v Birmingham City Council* [2009] 1 AC 367, para. 126, section 2 of the 1998 Act requires our courts to 'take into account' European court decisions, not necessarily follow them. Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line."

58. The Supreme Court has also adopted an approach of taking care not to press the application of Convention rights further than one can be reasonably confident the ECtHR would go: *Ambrose v Harris (Procurator Fiscal)* [[2011] UKSC 43; [2011] 1 WLR 2453, esp. at [14]-[26] (Lord Hope DPSC); [73] and [86] (Lord Brown JSC); and [101]-[105] (Lord Dyson JSC). At para. [19] Lord Hope, drawing on the leading judgment of Lord Bingham in *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323 at [20], said:

> "Lord Bingham's point, with which I respectfully agree, was that Parliament never intended to give the courts of this country the power to give a more generous scope to those rights than that which was to be found in the jurisprudence of the Strasbourg court. To do so would have the effect of changing

> them from Convention rights, based on the treaty obligation, into free-standing rights of the court's own creation. ”

59. Contrary to the submission of the Claimants, I do not think that the statement of principle in *Pinnock* can sensibly be interpreted as not covering the vast swathes of ECtHR judgments in which the application of the margin of appreciation is at the heart of the decision. Given how fundamental the margin of appreciation is for the application of the Convention rights by the ECtHR in so many cases and the absence of any reservation in relation to that part of the ECtHR's jurisprudence in this statement of principle, I think it is clear that the Supreme Court intended the statement to operate as guidance for itself and the lower courts to follow the ECtHR's judgments, including where they apply a margin of appreciation. For recent examples of the Supreme Court doing just that, see *AXA General Insurance Ltd*, in particular at [29]-[41] (Lord Hope DPSC) and [107]-[134] (Lord Reed JSC); and *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18; [2012] 1 WLR 1545, in particular at [15]-[20] (Baroness Hale of Richmond JSC, with whom the rest of the Court agreed). The judgments of the majority in *Ambrose* point to the same conclusion.

60. This conclusion is further reinforced, in my view, by having regard to the object and purpose of the HRA. Consideration of fundamental constitutional values associated with the rule of law and democracy indicate again that Parliament intended that in interpreting the Convention rights and deciding whether they had been violated the domestic courts should not go beyond what one might expect the ECtHR to do, after taking into account any applicable margin of appreciation.

61. Perhaps the most important provision in the HRA is section 3(1), which has the effect of requiring the courts to change the ordinary meaning to be given to provisions in legislation, so far as it is possible to do so, in order to produce a new interpretation which is compatible with Convention rights. This necessarily creates a significant new degree of uncertainty about the meaning of legislative provisions since, in addition to working out their meaning according to ordinary established canons of construction, further processes of reasoning are now required to determine what relevant Convention rights might say, whether the ordinary meaning of the legislative provisions is to be regarded as incompatible with those rights and, if so, whether it is "possible" to change the ordinary meaning of those provisions so as to produce a new meaning which is compatible with those rights. The HRA thus has a significant impact on the stability of the meaning of legislative provisions and the difficulties involved in trying to arrive at their final determinative content when applying them in particular cases, which is in tension with rule of law values concerning the accessibility, ease of interpretation and predictability of application of such provisions. In my judgment, it is reasonable to infer that Parliament can only have intended to produce such effects where clear and compelling reasons existed to do so: those reasons are, as explained in the White Paper which preceded the HRA (*Rights Brought Home: The Human Rights Bill,* Cm. 3782) and as appears from the provisions of the HRA itself, to give effect in domestic law to rights of the same ambit and effect as the rights contained in the ECHR - "to make more directly accessible the rights which the British people *already* enjoy under the Convention .. [i]n other words, to bring those rights home" (para. 1.19 of the White Paper, emphasis

added). I do not think Parliament intended to authorise the domestic courts to do more than this. It did not intend, for example, that the domestic courts should be authorised to produce idiosyncratic interpretations of the "Convention rights" in the HRA so as to find an incompatibility between the ordinary meaning of legislative provisions and those rights – giving rise to the court's special power of interpretation under section 3(1) of the HRA or the possibility of grant of a declaration of incompatibility under section 4 (and the exceptional Henry VIII powers which would flow from that under section 10 of and Schedule 2 to the HRA) – where the ECtHR would have found there was none.

62. Section 3(1) of the HRA, where it applies, authorises what is in effect a re-drafting of statutory provisions by the courts in light of their interpretation of the Convention rights, in tension with the usual expectation that it is for the democratically elected legislature to lay down the law in statutory provisions formulated by itself, with a meaning directly given by its own (collective) intention. Again, I consider that Parliament can only be taken to have intended to create, by enacting the HRA, such a significant modification of the usual position for the same clear and compelling reasons as identified above. These points of principle appear to me to be reflected in Lord Hope's statement at para. [19] of his judgment in *Ambrose v Harris*, quoted above.

63. In support of their submissions, the Claimants sought to rely on the lead judgment given by Laws LJ in the Court of Appeal in *SRM Global Fund LLP v Commissioners of HM Treasury* [2009] EWCA 788, concerning the nationalisation of Northern Rock plc under the Banking (Special Provisions) Act 2008. However, I consider that on a proper reading the judgment in that case is against the Claimants and, rather, points to the same conclusion as the analysis set out above. In his judgment, Laws LJ included the following observations under the heading "A Note on the Margin of Appreciation":

> "57. The margin of appreciation is, of course, the doctrine of an international court: it recognises a certain distance of judgment between the Strasbourg court's overall apprehension of the Convention principles and their application in practice by the national authorities. As between the States Parties different and varying social and political exigencies will arise; and different and varying solutions will commend themselves. As Lord Hope said [in *R v DPP, ex p. Kebilene* [2000] 2 AC 326 at 380], "the national authorities are in principle better placed to evaluate local needs and conditions than an international court". The Convention principles cannot always be applied uniformly between one State and another. The margin of appreciation accommodates this circumstance.
>
> 58. Since it is a doctrine of an international court, how can the margin of appreciation inform our decision, the decision of a municipal court? Our duty under the HRA is to enforce the Convention rights, and by s.2(1)(a) we are obliged to "take into account" the jurisprudence of the Strasbourg court. In fulfilling this duty it seems to me that we ought, if we can, to ascertain the scope of the discretion – the width of the margin – which

> the Strasbourg court would be likely to accord to the legislature in enacting the compensation provisions of the 2008 Act. If they lie within the margin, other things being equal there will be no violation of A1P1.
>
> 59. It is to be noted that the rationale of the margin of appreciation is not limited to the relative disadvantage suffered by an international court in the task of evaluating local needs and conditions. It has a close affinity with a municipal doctrine: the margin of discretion, or deference (now a less favoured expression), which our courts will pay to the judgment of public decision-makers in matters of discretion or policy. In *Kebilene*, after describing the margin of appreciation, Lord Hope referred to "an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention". This "margin of discretion" is given on democratic grounds; it respects the elected arms of government. But this is also an element, and an important one, in the margin of appreciation. I have already cited paragraph 46 of [*James v United Kingdom* (1986) 8 EHRR 123]. A careful reading of that text discloses two dimensions of the margin's justification. The first, to be sure, is the international court's relative disadvantage. But interwoven with this is the democratic imperative. Let me repeat an extract from paragraph 46:
>
> "[T]he decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation."

The Claimants sought to submit that the observations of Laws LJ at para. [59] are confined to situations in which Parliament legislates to set a rule, but I do not read them as so limited (see his references in very general terms to “public decision-makers”, an “elected body or person” and “the elected arms of government”). The Court then went on in its analysis of the application of the Convention rights contained in the HRA to apply the same margin of appreciation as it considered that the ECtHR would apply in the circumstances of the case: see paras. [73]-[78].

64. For all the reasons given above, I consider that this Court should apply the same margin of appreciation in favour of the Secretary of State (and in favour of prison governors who follow the guidance given by the Secretary of State) when assessing the lawfulness of the Prison Service Instructions as the ECtHR would apply if assessing their lawfulness in proceedings in Strasbourg. The authorities make it clear that a wide margin of appreciation is applicable in relation to the legal regime and

guidance to be applied, such that the Prison Service Instructions or decisions taken following the guidance in them would only be found to have violated A1P1 if manifestly without reasonable foundation.

65. Judged by that standard, I consider it is clear that the Instructions do not violate A1P1 and do not give guidance to prison governors which would lead them to take decisions which would violate A1P1. Therefore the Instructions do not create any risk of unlawful action by prison governors in breach of their statutory obligation, under section 6(1) of the HRA, to act compatibly with prisoners' Convention rights as set out in A1P1.

66. Should the decision of the House of Lords in *In re G (Adoption: Unmarried Couple)* be taken to change any of this? I do not think that it should. The House of Lords decided that a fixed rule in Northern Ireland which excluded unmarried couples from being able to be assessed on the particular merits of their specific circumstances as to whether they might be suitable persons to adopt a child was irrational and would violate Article 14 of the ECHR. The first instance court and the Court of Appeal in Northern Ireland had come to the opposite conclusion by reference to the case law of the ECtHR. The argument of counsel in the House of Lords (see [2009] 1 AC at pp. 175-179) appears all to have been directed to the interpretation and application of the ECtHR jurisprudence in the circumstances of the case, and did not address the possibility that the domestic courts might do anything other than seek to interpret and apply the Convention rights in the HRA in the same way.

67. The majority in the House of Lords considered that, on proper analysis, in circumstances where the adoption system called for detailed examination of the particular circumstances of potential adopters and where it could be expected that in *some* cases such detailed examination of the circumstances of an unmarried couple would be likely to show that it would be in the interests of a child to be adopted by such a couple, it was irrational for the relevant legislation in Northern Ireland to include a general rule preventing unmarried couples in all cases from adopting a child. For the reasoning regarding the irrationality of and lack of objective justification for the rule, see paras. [16] and [18]-[20] (Lord Hoffmann), [53]-[54] (Lord Hope), [110]-[112] (Baroness Hale) and [134]-[135] and [143]-[144] (Lord Mance). In the light of the conclusion that the rule was irrational and without any objective or reasonable justification, it is perhaps unsurprising that the majority concluded that the ECtHR would itself have found that it violated Article 14, read with Article 8: see paras. [25]-[29] (Lord Hoffmann), [50]-[54] (Lord Hope) and [125] (Lord Mance). In my view, on a proper reading of the speeches, this represents the *ratio decidendi* of the decision, and is consistent with the analysis set out above in this judgment.

68. In the alternative, Lord Hoffmann ([29]-[37]), Lord Hope ([50]) and Lord Mance ([126]-[130]) each indicated that he would be disposed to conclude that, even if the ECtHR would itself have found the rule in question to be compatible with Convention rights on the basis of affording a margin of appreciation to the United Kingdom, the domestic court should nonetheless find that the rule *did* violate Convention rights by interpreting and applying those rights for itself in a different way. Ms Markus' first position on this was that this part of the reasoning was *obiter*, but that I should treat it as persuasive. Later, she changed her position and submitted that this part of the reasoning was part of the *ratio decidendi.*

69. I was not convinced by this latter submission. This part of Lord Hope's reasoning was, I think, plainly *obiter*, having regard to the tentative way in which he expressed himself at para. [50] and by his emphasis that, in agreement with Lord Hoffmann and Lord Mance, he regarded "the dilemma" (i.e. the dilemma which would arise if there truly were a difference in view between the ECtHR and the domestic courts) as less acute than Baroness Hale - Baroness Hale, by contrast, said she was unsure that Strasbourg would regard the rule as falling within the United Kingdom's margin of appreciation ([115]) and therefore placed greater weight on the alternative analysis ([116]-[123]). Lord Hope also understood himself to be agreeing with Lord Hoffmann and Lord Mance ([56]), which suggests that he understood their references to the alternative reasoning as *obiter*. I think, on the best reading of both their speeches, that is right. I am fortified in coming to that conclusion by the fact that there seems to have been an absence of argument on the issue (so it seems reasonable to construe what they said as indeed being intended to turn primarily on their conclusion that the ECtHR would itself have found that there was a violation of Convention rights; and the fifth member of the Appellate Committee, Lord Walker, in dissenting, did not find it necessary to address the alternative argument in any detail: see [79]), that there was not full consideration by them of the range of relevant matters canvassed above and that the alternative reasoning does not appear to have been adverted to or followed subsequently in the domestic case law, including in many judgments of the House of Lords and the Supreme Court since then.

70. But even if I am wrong about that, and the alternative reasoning is to be taken to be part of the *ratio decidendi* of the case, I do not consider that it would lead to any different conclusion on the analysis in the present case. The duty to act compatibly with Convention rights under section 6(1) of the HRA applies to a court just as to other public authorities: section 6(3)(a). Plainly in some situations it will be a court which, by reason of the internal distribution of powers by the constitutional arrangements within the United Kingdom, has authority to make a judgment which falls within the scope of the margin of appreciation afforded to the United Kingdom under the ECHR. That would be so where a court has to consider whether it could develop the common law in some way: it might have to ask whether its taking that step would be compatible with Convention rights and its duty under section 6(1) of the HRA, and in answering that question might be entitled to conclude that it would not breach those rights or that duty by developing the law in that way because such a development would fall within the margin of appreciation. In other words, it is not essential in every case to which the margin of appreciation might be relevant that action taken to fall within that margin should be action taken by the legislature (and see para. [37] of the speech of Lord Hoffmann in *In re G* and paras. [59]-[64] of his speech in *R (SB) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100). But, as Lord Hoffmann makes clear in his speech in *Denbigh High School*, it does not follow from this observation that a court is always entitled to substitute its own view of what should be done (falling within the margin of appreciation) for that of the legislator or some other public authority which is authorised under the constitutional law of the United Kingdom to make the relevant decision.

71. The majority in *In re G* thought that special circumstances applied in that case (the irrationality of the rule and absence of any reasonable objective justification for it) which would justify the court stepping in. In the present case, however, it is the Secretary of State and, in due course, prison governors who are authorised under

English law to make the relevant decisions; there is nothing irrational in what the Secretary of State has done or in what he proposes prison governors should do; and there are no special circumstances whatever which would justify the Court stepping in to substitute its judgment for that of the Secretary of State. An analysis similar to that adopted by Lord Hoffmann in paras. [59]-[64] of his speech in *Denbigh High School*, in which he found that the relevant margin of appreciation should be applied in relation to what the school had done in that case, is appropriate here.

(b) Failure of the Secretary of State to carry out a balancing exercise by reference to A1P1

72. This submission of the Claimants can be dealt with more shortly. In my judgment, the absence of a balancing exercise by the Secretary of State conducted expressly by reference to A1P1 (or any other Convention right) does not have the consequence that the Secretary of State and, in due course, prison governors are not entitled to the benefit of application of the wide margin of appreciation which is appropriate in this area. The Claimant's submission is contrary to the decision of the House of Lords in the *Denbigh High School* case: see especially paras. [27]-[31] (Lord Bingham), [41] (Lord Nicholls), [59]-[68] (Lord Hoffmann), [91] (Lord Scott) and [94] (Baroness Hale). It is also contrary to the decision of the House of Lords in *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19; [2007] 1 WLR 1420. These decisions are in line with the approach of the ECtHR and reflect it. For decades after the United Kingdom accepted a right of individual petition to the ECtHR in 1966 until the coming into effect of the HRA in 2000, the Strasbourg Court applied a margin of appreciation in relation to actions taken by British public authorities even though they did not approach their decisions by express consideration of the relevant Convention rights. It should also be pointed out that it remains the case that under the HRA the domestic courts have to assess the compatibility with Convention rights of statutes (whether passed before or after the coming into effect of the HRA), and in doing so regularly apply a margin of appreciation or allow for a discretionary area of judgment even though the Parliamentary debates leading to enactment will very often not have involved express reference to specific Convention rights (and in any event could not properly be scrutinised by the courts to ascertain whether they had or not).

73. Therefore it is clear, in my view, that expressly referring to some applicable Convention right in the course of deciding what action to take, and conducting an examination of the issue explicitly by reference to a framework of legal analysis given by that right, cannot be regarded as in any sense the "price" to be paid if a public authority wishes to have the benefit of any relevant margin of appreciation when the court assesses whether it has violated that Convention right. In the present case, the Secretary of State did give careful consideration to the regime and guidance which should be applied in relation to prisoners' enhanced earnings and is plainly entitled to be accorded the full margin of appreciation appropriate in relation to the application of A1P1 in a context like this.

74. Accordingly, I find that the guidance in the Prison Service Instructions was and is compatible with prisoners' rights under A1P1 and may properly be followed by prison governors in deciding how to exercise their discretion under rule 31A of the Prison Rules.

Article 7

75. In the case of the claimant KF, Mr Southey sought to maintain a distinct objection to the Prison Service Instructions based upon Article 7(1) of the ECHR, which provides:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

76. Mr Southey submits that the imposition of deductions from enhanced earnings of prisoners amounts to the imposition of a heavier penalty than was applicable at the time the criminal offence was committed (where that was before the introduction of the deductions regime in 2011). In support of this submission, he sought to rely on the judgment of the ECtHR in *Welch v United Kingdom* (1995) 20 EHRR 247, which concerned the imposition of a confiscation order under the Drug Trafficking Offences Act 1986 to deprive the applicant of the proceeds of certain drugs offences committed before the 1986 Act was brought into force. In that case, the ECtHR found that there had been a violation of Article 7(1).

77. In the very different context of the present case, however, I consider that Mr Southey's argument should be rejected. The guidance in *Welch* points against there being any violation of Article 7(1) here. In *Welch* the ECtHR emphasised that, for Article 7(1) to apply, the measure in question had to be connected with a criminal offence in the requisite sense and that the imposition of a confiscation order under the 1986 Act regime was "dependent on there having been a criminal conviction" (para. [29]). It also assessed the nature and purpose of the measure, and found that there were significant features of the regime (including that the confiscation order was directed to the proceeds involved in drug dealing and was not limited to actual enrichment or profit, the discretion of the trial judge to take the culpability of the accused into account when fixing the amount of the order and the possibility of imprisonment in default of payment by the offender) which, when considered together, "provide a strong indication of … a regime of punishment" (para. [33]).

78. But in the present context, there is no requisite connection between the offence committed by a prisoner and the application of the deductions regime in relation to enhanced earnings; nor does the deductions regime have elements which indicate that it is punitive, in its object or effect, in relation to the offence committed by the prisoner. In both respects, the points made at para. [47] above are relevant. It is a matter of choice for a prisoner whether he will seek work outside on day release from prison, and in making that choice he knows about the deductions regime which will be applied if he does. It will still often be to his advantage to take on such work. It is not because of his commission of his offence that a prisoner becomes subject to the deductions regime (which was the important connection between offence and confiscation order in *Welch*); rather, it is because he makes a choice when in prison to seek work on release from prison that the deductions regime will be applicable to him. Furthermore, the deductions regime does not have the features indicative of a punitive object or effect highlighted by the ECtHR in *Welch*; rather, it has all the hallmarks of a tax or contributions regime aimed at prisoners generally, applicable only when they

choose to work on release from prison, not variable in its application according to assessment of the individual culpability of any prisoner, and not featuring punishment of the prisoner for any action taken by him (the possibility of non-payment does not arise, since the system operates by deduction by the prison authorities, and a prisoner cannot be punished for opting not to seek work for enhanced wages).

Article 14

79. Article 14 of the ECHR provides:

> "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."

80. The present case falls within the ambit of A1P1, so Article 14 applies. Mr Southey submits that, in relation to the claimant KF (a female prisoner), the Prison Service Instructions involve a violation (or prospective violation) of Article 14 because they apply the same deductions regime to men and women without distinction whereas – he says – the Secretary of State has shown by the terms of PSO 4800 (concerning the position of women in prison) that women have special needs beyond those of men, such that a more generous regime should have been formulated for application to women. He submits that, even if the deductions regime is compatible with A1P1 in relation to each of the group of male prisoners and the group of female prisoners, taken separately – as I have found above – female prisoners such as KF are still entitled to complain under Article 14 by comparing their position with male prisoners.

81. Most of the Strasbourg cases under Article 14 are concerned with cases of direct discrimination, where a set of rules is applied which afford different treatment on their face to one group (say, men) as compared with another group (say, women). But in a number of authorities in recent years the ECtHR has held that Article 14 is capable of application in cases of indirect discrimination, where a set of rules is applied which provide on their face for the same application across a range of groups of persons, but where it can be said that one group suffers disproportionate detriment as a result and ought properly have a different rule formulated for application to them, to take account of their different position: see *Thlimmenos v. Greece* (2001) 31 EHRR 15, para. [44]; *Jordan v. United Kingdom* (2001) 37 EHRR 52, para. [154]; *McShane v UK* (2002) 35 EHRR 23, para. [135]; *Pretty v. United Kingdom* (2002) 35 EHRR 23, paras. [88]-[90]; *Hoogendijk v. Netherlands* (2005) 40 EHRR SE22, at pp. 206-207; and *DH v Czech Republic* (2008) 47 EHRR 3, GC, esp. paras. [175] and [184]. It is fair to say that the law is in a state of development in this regard. There are differences in context between direct discrimination claims under Article 14 and indirect discrimination claims under that provision which mean that some adaptation of the established principles applicable in relation to direct discrimination claims is appropriate.

82. In my judgment, the usual framework for addressing claims of direct discrimination by reference to some relevant status under Article 14 (are the comparators in an

analogous situation? Is there objective justification for the difference in their treatment?) falls to be adapted so as to ask:

i) is a general rule or practice being applied to two or more relevant groups – here, men and women – which are *not* in a relevantly analogous position? As the ECtHR put it in *Hoogendijk v Netherlands* at pp. 206-208: "… persons whose situations are significantly different must be treated differently … An issue will arise under Article 14 … when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different"; and

ii) is the similarity in treatment objectively justifiable, in the sense that it had a legitimate aim and bore a reasonable relationship of proportionality to that aim? See e.g. *Thlimmenos v Greece* at para. [44] and *Hoogendijk v Netherlands* at pp. 206-208.

I consider that KF's claim based on Article 14 fails under both (i) and (ii).

(i) Non-analogous position

83. In this context, it is relevant to assess the extent to which women and men are either in an analogous position (so that it is legitimate to apply the same set of rules to them) or in a non-analogous position (so that it may not be appropriate to apply the same rules to them, and the state should be required to show objective justification for doing so) by reference to the legitimate objective of the deductions regime and the way in which it operates in relation to the relevant Convention rights of both men and women under A1P1.

84. The legitimate objective of the deductions regime is to raise funds to assist in providing support for the victims of crime. There is no significant difference to be drawn between male and female prisoners, as general categories of person, in terms of pursuing that objective.

85. Analysis under A1P1, as set out above, shows that the impact of the deduction rules on both men and women is justified and lawful for the purposes of their rights under that provision. Mr Southey's submission is that, despite that being the case, female prisoners should be subjected to a more generous deductions regime, which would either leave them as a class better off than male prisoners or would allow greater scope in their case for prison governors to grant them relief from deductions. That would involve a requirement that the interests of the victims of crime should be sacrificed (to the extent that rules had to be formulated and applied so that women made less contribution than men to fund victim support) to the objective of giving preferential treatment to female prisoners to correct for their position in relation to men, alternatively the formulation of rules so that male prisoners generally suffered a greater level of deduction to make up for sums not collected from female prisoners (which would in turn create a greater risk that a violation of the Convention rights of male prisoners under Article A1P1 might occur, and hence jeopardise the entire policy).

86. This feature of the argument, however, serves in my view to indicate that as a matter of practical reality and justice, female prisoners are not in a significantly different

position from male prisoners for the purposes of assessment under Article 14 in light of the objective of the deductions scheme. The strength which Parliament and the Secretary of State are entitled to attribute to the public interest in requiring prisoners to make a contribution to provision of funds for victim support, the compatibility of the deductions rules in the case of both male and female prisoners with their rights under A1P1, and the apparent injustice of requiring a direct sacrifice of the interests of victims of crime (innocent third parties, distinct from the state), to promote some discrete asserted interest of female prisoners as a group, taken together, tend to show that male and female prisoners should be regarded as in an analogous position, such that there are no significant grounds for regarding the application of a single set of rules to them all as *prima facie* questionable or such as to call for the state to make out a case of objective justification in relation to it. In that respect, the position in the present case seems to me to be different from that in, say, *DH v Czech Republic* (which concerned a set of rules and practices supposedly designed to meet the educational needs of all children, where it was determined that they were in fact applied in circumstances where they did not properly achieve that objective).

87. I also consider that KF has failed to show that there is any significant differential impact of the deductions regime on female prisoners as a matter of practical application, to a level which might cross the threshold required to be satisfied before the state is to be called upon to assume a burden of establishing to the satisfaction of the court that the regime is objectively justified. In that regard it should be borne in mind that it is KF's case that the state should create a set of rules which explicitly differentiates in their treatment of men and women, which is a form of direct discrimination which usually calls for especially close scrutiny under Article 14. Accordingly, I consider that the threshold to be overcome before the state is to be called upon to justify *not* differentiating between men and women should be high.

88. In this case, there is no statistical evidence which shows that there is in practice a greater detrimental impact on female prisoners as a group arising from application of the deductions rules than on male prisoners. A basis in statistical evidence is not always required in order to show indirect discrimination (see *DH v Czech Republic* at para. [188]), but in the absence of such a basis an applicant needs to be able to point to other evidence to show that application of a rule or practice involves a substantially different detrimental effect on one group or another. In that regard I refer to the ECtHR's reference in *Hoogendijk v Netherlands* at p. 207 to the need for an applicant to be "able to show … the existence of a *prima facie* indication that a specific rule – though formulated in a neutral manner – in fact affects a clearly higher percentage of women than men …". I do not consider that KF has discharged this burden on the evidence in this case. Simply referring to PSO 4800 is insufficient.

89. The sorts of detrimental effects said to flow from application of the deductions rules - such as impeding the ability of prisoners to save for their release to assist with their rehabilitation into the community, or to earn money to help support their families and children or simply to engage in the world of work and assumption of personal responsibility for their own finances – are all capable of affecting men as well as women. The impact in any individual case will depend upon the particular circumstances of that case, and it is difficult to generalise (in the absence of statistical information) to say that female prisoners in the small group who work for enhanced earnings are more likely than male prisoners who work for enhanced earnings to be

detrimentally affected by application of the deductions rules. PSO 4800 identifies some particular difficulties women may experience in prison, but men may experience similar or different difficulties. It cannot be said in bald terms, as in effect Mr Southey sought to say, that PSO 4800 shows that female prisoners have a greater need of cash then male prisoners and so should be entitled, *prima facie*, to call for a different deductions regime to be applied to them.

90. Moreover, even if it were the case that women could be said to be significantly more likely to have greater needs to retain their enhanced earnings without deduction, the deductions regime already allows for adjustment for that, by the availability of a discretion to prison governors to grant relief from deduction to prisoners falling within the guidance regarding exceptional circumstances given in or in relation to the Prison Service Instructions. That guidance addresses the sort of situation in which a prisoner might be said to have a particularly pressing need to retain their enhanced earnings without deduction. If female prisoners in some cases really do have special needs beyond those of male prisoners, so that the deductions regime should not be applied in its full rigour in relation to them, it is reasonable to expect that the individual cases in which that may be true are capable of being identified by prison governors applying their discretion in accordance with the guidance and for the deductions regime to adjust to accommodate any greater preponderance of pressing need on the part of female prisoners.

(ii) Objective justification and proportionality

91. Even if, contrary to my view above, the circumstances are such as to call for the state to show that there is objective justification for applying the unified deductions regime to both male and female prisoners, I consider that application of a unified regime is objectively justified. The unified regime has been devised for a legitimate objective properly relevant to both male and female prisoners (to raise funds for victim support) and its equal application to both men and women is proportionate to that objective. In relation to both points, in formulating the deductions regime Parliament and the Secretary of State (and, in applying it, prison governors) are entitled to the benefit of a wide margin of appreciation.

92. In my judgment, a wide margin of appreciation is applicable because:

i) As set out above, the deductions regime involves choices in the area of economic and social policy in relation to which a wide margin of appreciation is also applicable under Article 14: see e.g. *Stec v United Kingdom* (2006) 43 EHRR 47, para. [52]; *Carson v United Kingdom* (2010) 51 EHRR 13, paras. [61]-[62]; *James v United Kingdom*, supra, paras. [75]-[77]; *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18; [2012] 1 WLR 1545 at [15]-[20] (Baroness Hale JSC);

ii) When dealing with direct discrimination in relation to particular "suspect" categories (such as sex or race) the margin of appreciation tends to be narrow, though it may be broadened by other factors such as those referred to in (i) above: see e.g. *Stec v United Kingdom* at para. [52] and *Humphreys v Revenue and Customs Commissioners* at [15]-[20]. But where alleged indirect discrimination is in issue, which is not an effect which the relevant rule or practice is directed to achieving (see *DH v Czech Republic* at para. [194]), the

weight to be attributed to the other legitimate public interests which the rule or practice is intended to promote may properly be taken to be greater. The underlying rationale of the prohibition against discrimination in Article 14 is to ensure that individuals are accorded equal respect: see *R (Carson and Reynolds) v Secretary of State for Work and Pensions* [2005] UKHL 37; [2006] 1 AC 173 at [14]-[17] (Lord Hoffmann). Where a rule, such as the deductions rules, has been promulgated which treats everyone the same way regardless of their sex, race and so on, it has on its face sought to accord equal respect to all. Moreover, such a rule may be regarded as seeking to balance the Convention rights of everyone to equal treatment, since if the state promulgated one rule for men and a different, more generous rule for women, the men's own Convention rights under Article 14 not to be subject to discrimination would be in issue. Where the state seeks to balance competing Convention rights, that is a factor which indicates that wide margin of appreciation may be applicable: see e.g. *Dickson v United Kingdom* (2008) 46 EHRR 41, GC, para. [78]; and

iii) The notion of a fair balance between the interests and rights of individuals and the general interest of the community underlies the whole of the Convention and informs its interpretation and application: see e.g. *Brown v Stott* [2003] 1 AC 681, 704. Having regard to the very wide range of potential indirect discrimination claims which could in theory be brought in respect of any general rule under Article 14 (based on any aspect of the various forms of "status" covered by the Article), state authorities will not at the point of promulgating the rule be distinctly on notice of all or any potentially indirectly discriminatory effects it might have, but rather will legitimately be focusing – as here – on other public interest reasons for adopting the rule. It therefore seems to me that the approach to justification of a rule which is alleged to be indirectly discriminatory should usually involve a wider margin of appreciation for the state authorities than in the case of adoption of rules which differentiate on their face between different classes of person, where those authorities are on notice when they promulgate the rules that distinctions are being drawn which they should, in principle, be willing and able to explain and justify. By way of example, in *Chapman v United Kingdom* (2001) 33 EHRR 18, a case concerning application of neutrally expressed planning rules to prevent a gypsy establishing a mobile home on land which she had bought in the Green Belt, where there was evidence of generally inadequate provision of caravan sites which could accommodate the gypsy way of life, the applicant's complaints under Articles 8 and 14 were dismissed, with the ECtHR applying a wide margin of appreciation and emphasising the complexity and sensitivity of the issues (para. [94]: see sub-para. (i) above), the substantial problems which might arise under Article 14 if gypsies were given preferential treatment to accommodate their special position (para. [95]: see sub-para. (ii) above) and that the law was not aimed against gypsies as a group (para. [97]).

93. Applying the wide margin of appreciation which is appropriate in relation to KF's complaint under Article 14, the unified deductions rules applicable to male and female prisoners are in my judgment objectively justified. They have been promulgated in order to promote a legitimate public policy objective (that prisoners

should make a contribution to support victims of crime) and they are formulated in a way which is proportionate to that objective. There is a strong interest in keeping the rules simple and clear, so as to keep the costs of administering them within reasonable bounds and hence maximise the funds which can be made available for victim support and so as to reduce the scope for prisoners to complain of unfairness in the way they are treated as compared with others. The proportionality of the deductions rules (or, putting it another way, the absence of any improper or excessive disproportionate effect upon female prisoners) is underwritten by the width of the margin of appreciation to be applied in assessing their compatibility with Article 14, as set out above.

94. That conclusion is also reinforced by the availability of the discretion for prison governors to grant relief from deductions in exceptional cases, which is a feature of the regime which allows prison governors to respond to the special needs of female prisoners which may be made out on a case by case basis. A female prisoner is able to refer to PSO 4800 to the extent it might offer support for her application to a prison governor to be treated as an exceptional case so as to attract relief from having deductions made.

95. For the reasons set out above, I therefore dismiss KF's claim based on Article 14.

Section 149 of the Equality Act 2010

96. Section 149(1) of the Equality Act 2010 provides, inter alia, that a public authority must, in the exercise of its functions, "have due regard" to the need to "advance of equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it." In this case, the relevant characteristic relied upon by Mr Southey on behalf of the claimant KF is sex. Section 149(3) provides:

> "Having due regard to the need to advance equality of opportunity between persons who share a relevant 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."

97. In his submissions on this part of the case, Mr Southey placed particular reliance on a series of propositions summarising the approach said to be applicable under section

149, as set out in the judgment of Walker J in *R (W) v Birmingham City Council* [2011] EWHC 1147 at [151]. However, as Mr Auburn for the Secretary of State correctly pointed out, Walker J makes it clear that the series of propositions were agreed between the parties in that case to provide the relevant framework to be applied and were not the subject of argument. I therefore found that case of less assistance than other authorities in which the court itself has had to determine what constitutes "due regard" for the purposes of section 149 (or the legislative equality provisions which preceded it).

98. In a leading authority in this area, *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141 (concerning the application of one of the preceding equality provisions, section 71 of the Race Relations Act 1976, in the context of a decision by a planning inspector affecting gypsies and travellers), Dyson LJ said this in the lead judgment at para. [31]:

> "In my judgment, it is important to emphasise that the section 71(1) duty is not a duty to achieve a result, namely to eliminate unlawful racial discrimination or to promote equality of opportunity and good relations between persons of different racial groups. It is a duty to have due regard to the need to achieve these goals. The distinction is vital. Thus the Inspector did not have a duty to promote equality of opportunity between the appellants and persons who were members of different racial groups; her duty was to have due regard to the need to promote such equality of opportunity. She had to take that need into account, and in deciding how much weight to accord to the need, she had to have due regard to it. What is due regard? In my view, it is the regard that is appropriate in all the circumstances. These include on the one hand the importance of the areas of life of the members of the disadvantaged racial group that are affected by the inequality of opportunity and the extent of the inequality; and on the other hand, such countervailing factors as are relevant to the function which the decision-maker is performing."

Dyson LJ also emphasised at [36]-[37] and [40] that the equality duty in section 71 of the 1976 Act is concerned with substance rather than form: "The question in every case is whether the decision-maker has *in substance* had due regard to the relevant statutory need" ([37], emphasis in original). Since the planning inspector did in substance have regard to difficulties faced by gypsies, it was not necessary for her to refer in terms to the section 71 duty and, indeed, it was "immaterial whether she was aware of the existence of [that duty]" ([40]). These observations are all equally applicable to the duty under section 149, which has now replaced the section 71 duty and is, in relevant part, expressed in similar terms.

99. Although a substantial body of cases has built up in relation to the previous equality duties and now the duty in section 149 of the 2010 Act, and I was referred to many decisions, they typically provide illustrations of the basic approach identified by Dyson LJ in *Baker*. Two further points taken from the cases should be mentioned here. First, where a decision-maker does give substantive consideration to equality issues, the evaluation of equality impacts of a particular decision by the decision-maker will only be treated as unlawful where it is "unreasonable or perverse" (the standard applied by the Court of Appeal in *R (Domb) v London Borough of Hammersmith and Fulham* [2009] EWCA Civ 941, at [72]; and see *Baker* at [34] per Dyson LJ and *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC

3158 (Admin) at [82]). Secondly, in reviewing equality issues before acting, a decision-maker is entitled to focus on the main aspects of equality impacts which present themselves for consideration, rather than engaging in a minutely detailed process of inquisition into all possible equality impacts and ramifications of a decision: see in particular *R (Bailey) v London Borough of Brent* [2011] EWCA Civ 1586, at [77]-[83] (Pill LJ) and [102] (Davis LJ). The risk of adverse equality impacts along a particular dimension (whether it be potential direct or indirect discriminatory effects, and whether by reference to any particular aspect of the wide range of specified protected characteristics set out in section 149(7) of the 2010 Act) has to present itself with a sufficient degree of prominence before it can be said that the "due regard" obligation in section 149(1) and (3) requires the decision-maker to proceed further to examine the possible implications of its decision along that particular dimension. It is for that reason that, as pointed out by Davis LJ in *Bailey* at [90], the failure in a particular case to advance particular equality impacts as objections before a decision is taken "is … at least capable of being relevant when considering whether 'due regard' (that is to say, regard which is appropriate in all the circumstances) was given for the purposes of s. 149 in any particular case."

100. In the light of the guidance in the cases, I consider that there was no breach of the section 149 equality duty on the part of the Secretary of State when he promulgated the Prison Service Instructions. The implementation of the deductions regime proceeded in steps, from bringing the PEA into force (with consultation with relevant bodies involved with prisons, prisoners and penal policy directed to that question), to promulgating rule 31A (with a further EIA at that stage) to promulgating the Prison Service Instructions (with yet further EIAs at that stage as well). As is clear from the documents and from the evidence of Mr Smith on this part of the case, the Secretary of State plainly sought to have regard to the equality impacts of the deductions regime before bringing it into effect. In the course of consultation there was no major objection raised based on alleged disproportionate impact upon female prisoners as opposed to male prisoners: see para. [11] above and the review in the EIA on rule 31A at para. [15] above. The Secretary of State reviewed such information as was reasonably available regarding possible equality impacts. The assessment cannot be described as perverse or unreasonable: the Secretary of State was entitled to conclude that, while in the absence of available evidence the potential for disproportionate impact in relation to sex could not be ruled out (para. 4.6 of the EIA on rule 31A: para. [15] above), overall the indications were that there would not be a significant differential impact of the Prison Service Instructions on female prisoners as opposed to male prisoners (see the EIAs on the Prison Service Instructions: paras. [20] and [21] above). He is not to be treated as somehow estopped from denying that there would be a disproportionate impact on female prisoners because of the terms of PSO 4800: prisoners, whether male or female, will very often face complex and difficult problems and challenges in their lives, varying widely depending on their individual circumstances far more than on the basis of their sex. Moreover, the one point made in a single response to consultation (that care should be taken not to have a negative impact on women and their children: para. [11] above) was capable of being accommodated by the discretion left to prison governors and the guidance on exceptional cases which the Secretary of State issued: para. [18] above and Annex B to PSI 76/2011 set out at para. [22] above.

Conclusion

101. For the reasons set out above, I dismiss the challenges to PSI 48/2011 and PSI 76/2011 on all grounds.