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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY TADEUSZ STACH FOR JUDICIAL REVIEW

IN THE MATTER OF DECISIONS BY THE DEPARTMENT FOR COMMUNITIES AND THE DEPARTMENT FOR WORK AND PENSIONS

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THE RT. HON. SIR PAUL GIRVAN

Introduction

[1] This is a judicial review application brought by Tadeusz Stach, a Polish national and EU citizen, who entered Northern Ireland pursuant to his right to free movement within the EU with a view to finding employment in Northern Ireland. The application raises a number of very complex questions relating to the question whether his rights as an EU citizen exercising his right to freedom of movement as a jobseeker had been infringed by the United Kingdom authorities. More particularly the issue for ultimate determination relates to the validity of the Housing Benefit (Habitual Residence) Amendment Regulations (Northern Ireland) 2014 ("the 2014 Regulations"). It is the applicant's case that the failure of the United Kingdom authorities to provide him with access to housing benefit as a jobseeker from February 2017 was unlawful and in breach of Articles 2, 3, 8 and 14 of the European Convention on Human Rights. Although in its original form the application raised a myriad of questions (including a challenge to an administrative removal decision, a notice of liability to detention and a challenge to a refusal to grant unemployment and support allowance) it is common case that the issue for determination in the case as it currently stands relates solely to the question of the unavailability of housing benefit to persons finding themselves in the position of the applicant. As set out in the Notice of Motion of 7 November 2017 the relief sought is (a) an order of certiorari quashing Article 10 of the 2014 Regulations as amended; (b) a declaration that the ongoing failure to provide the applicant with access to housing benefit from February 2017 is unlawful and in breach of Articles 2, 3, 8, and 14 of the European Convention on Human Rights (ECHR); (c) damages; (d) costs; and (e) such further and other relief as the Court may deem appropriate.

[2] In the course of proceedings the Order 53 statement developed and was amended from time to time. However, the parties are agreed that the relevant Order 53 Statement is the third amended Statement of Claim. It must be recorded that the pleadings in this application are untidy and confusing. They exemplify the dangers that arise when judicial review applications are allowed to grow, develop, change and take on a life of their own. The lack of clarity in identifying the relevant and core issues has made the task of managing the judicial review application far from an easy one. However, the tighter framework brought to the case in its later stages now enables the parties and the court to focus on the key central issues. It is necessary also to point out that the organisation of the papers in the case did not ease the task of the court. As has often been pointed out by courts care needs to be taken to ensure that papers are reduced to what is relevant to the case omitting material which is not going to be cited or relied on. Parties should always endeavour to prepare core bundles with care. In relation to exhibited documents often only the relevant portions need to be exhibited and if another party considers that more needs to be seen it can call for the production of the entire document or other allegedly relevant portions. As it was many authorities which were of peripheral or no relevance were copied and pressed into over bulging files. In the course of the hearing authorities were quite properly added to the bundle of cases but in a piecemeal way. If the initial core bundle of authorities had been presented omitting many pages of irrelevant cases the new authorities could have been incorporated into the appropriate bundle with the index then updated. Practitioners should be aware that over weighty files containing surplusage have to be dragged round court rooms and chambers and constitute a waste of manpower and paper. Files come apart because of excess contents. None of this assists the court in resolving the issues. Such an approach to the presentation of cases increases costs unnecessarily and is contrary to the overriding principle of efficiency and the avoidance of unnecessary costs.

[3] In this application the applicant is represented by Mr Southey QC and Mr McGowan. Dr McGleenan QC and Mr Best appeared for the Department of Work and Pensions. Dr McGleenan QC and Mr Corkey appeared on behalf of the Department of Communities. The court is grateful to counsel for their very full and detailed written and oral submissions.

The Devolution Notice

[4] A devolution notice pursuant to Schedule 10 paragraph 10 of the Northern Ireland Act 1998 was issued on 13 February 2018. The applicant gave notice that he claimed (a) an order of certiorari quashing regulation 2 of the Housing Benefit (Habitual Residence) (Amendment) Regulations (NI) 2014; (b) a declaration that the failure to provide the applicant with access to housing benefit from February 2017 until he ceased to be an EU jobseeker was unlawful and in breach of Articles 2, 3, 8, and 14 of the European Convention on Human Rights and European Union law and hence contrary to section 24 of the Northern Ireland Act 1998; (c) in the alternative, a declaration that the failure to make provision to avoid the applicant

becoming homeless while he was an EU jobseeker was a breach of Articles 2, 3, 8, and 14 of the European Convention on Human Rights (ECHR); (d) a declaration that the enactment of regulation 2 was a breach of section 75 of the Northern Ireland Act 1998; (e) damages, including damages equivalent to the housing benefit to which the applicant would have been entitled had the ultra vires Regulations not been enforced; damages necessary to ensure the applicant receives just satisfaction for the breach of his ECHR rights such damages to include damages for the distress caused by him being homeless; and damages for any violation of his rights under European Union law.

[5] The devolution notice set out the applicant's contentions as to why the said relief should be granted. It is asserted that the applicant was and remains unable to access housing benefit and therefore emergency accommodation provided or funded by the state. This resulted in him being rendered street homeless from in or around May 2017 until 7 September 2017, and raises a real risk that he will be rendered street homeless in the near future. The inability of the applicant to access housing benefit is due to the operation of regulation 10(5) of the 2014 Regulations as amended by regulation 2 of the Housing Benefit (Habitual Residence) (Amendment) Regulations (Northern Ireland) 2014, which are consequently unlawful, as these Regulations result in discrimination in the protections provided by Article 45 of the Treaty on the Functioning of the EU ("TFEU") and are therefore a breach of Article 18 TFEU. In particular, EU jobseekers who enjoy a right to remain are denied housing benefit payable to equivalent UK and Irish nationals. The applicant complains that his rights under Article 2, 3 and 8 of the European Convention on Human Rights were infringed during the period from in or about May 2017 until 6 September 2017, and will be infringed in the future. That was a foreseeable and real risk flowing from the enactment of regulation 2 of the 2014 Regulations in circumstances in which no adequate alternative provision was made in relation to street homelessness. As a consequence, regulation 2 is ultra vires and the applicant should have been paid housing benefit. It is further asserted that the Regulations unlawfully discriminate on the grounds of nationality or "other status" contrary to Article 14 ECHR within the ambit of Articles 2, 3, 8 and Article 1 of the First Protocol insofar as they deny access to housing benefit for those such as the applicant who are job seeking EEA nationals from third countries who have a right to reside in the jurisdiction. The Regulations were introduced in breach of the obligation to have regard to the need to promote equality of opportunity between persons of different racial groups contrary to section 75 of the Northern Ireland Act 1998. In particular, without prejudice to the generality of that claim, it is asserted that it was not properly open to the respondent to conclude that the Regulations in question did not have any significant implications for equality of opportunity when they were targeted at a particular racial group (namely EU nationals other than UK and Irish nationals). That is particularly true when the equivalent assessment in England and Wales reached a contrary conclusion. To the extent that the Court finds that the applicant's rights under Article 2, 3 and 8 of the European Convention on Human Rights were infringed during the period from in or about May 2017 until 6 September 2017 but that regulation 2 of the Housing Benefit (Habitual Residence) (Amendment)

Regulations (NI) 2014 is not ultra vires, it is asserted that the respondent acted unlawfully by failing to ensure that alternative provision was available to the applicant to avoid street homelessness.

The evidential context

[6] In view of the complex history of the matter the court asked the parties to seek to agree the relevant facts. An agreed set of facts was put before the court. The applicant came to Ireland in 2011 and worked for a period in Dublin. He came to Northern Ireland on 31 October 2015 looking for work as a jobseeker. He failed to obtain a jobseeker's allowance ("JSA") not being resident in the UK for three months. He was unable to support himself and he asserts that he ended up having to sleep rough. In April 2016 he went to Galway but returned to this jurisdiction again in September 2016. In November he applied for JSA stating that he had resided in the UK since October 2015. He was interviewed on 15 December 2016. He was refused the allowance as it was considered that he had not provided evidence that he was resident in the UK prior to 11 November and consequently failed the three months test (Reg 85A(2)(a) of the Jobseekers Allowance Regulations(NI) 1996). He reapplied on 10 February 2017. The claim was considered to be defective. On 7 March an interview was completed and habitual residence was confirmed. However, a Home Office paper stated that he was a person without leave and he was asked to provide evidence that he had permission to work. On 27 April 2017 he received a National Insurance number. In due course new evidence was provided in relation to his JSA. Although on 24 March he was in receipt of a decision stating that he had a right to reside as a jobseeker he did not receive any money. On 13 April he was told that he was not entitled to work and on 19 May he was informed that he was not entitled to JSA as he was not entitled to work. In the light of new evidence provided in relation to his claim it was eventually accepted the he had been resident in the UK and satisfied the three months' residence requirement from and including 1 January 2017. The decision to refuse JSA was revisited and he was awarded JSA for the period 1 January 2017 to 22 June 2017 and from 27 June to 21 November when he would be subject to a genuine prospect of work test under Regulation 85A and Regulation 6 of the Immigration (EEA) Regulations 2006. JSA was awarded in the period 27 June – 16 August 2017, also for the period 8 January – 30 August 2017 and 31 August – 25 October 2017. After that date regular fortnightly payments of £146.20 commenced. The applicant failed his genuine prospect of work interview on 16 November 2017. The last effective date of claim was 15 November 2017. On the agreed statement of facts it is accepted that no claim for housing benefit appears to have been made before 23 September 2017. A claim on that date was dismissed as the applicant failed to provide information or evidence to enable his claim to progress.

[7] Notwithstanding the muddled history and the confused and confusing bureaucratic processes in which the applicant became entangled, for present purposes the issue is whether the fact that the applicant neither received nor was entitled to housing benefit in the period 11 November 2016 to 16 November 2017

entitles him to the relief he seeks in the present proceedings bearing in mind that he was entitled during that period to reside in Northern Ireland as a jobseeker in accordance with his rights as a EU citizen. During that period there were times when the applicant slept rough being unable to find or pay for accommodation. The court has not received any very clear evidence of what exactly was involved in the rough sleeping and the degree of discomfort and indignity involved although the court can draw the common sense conclusion that a person such as the applicant obliged to sleep rough will inevitably face grave discomfort, real risk to health and physical and mental well-being, considerable personal indignity and an enhanced risk of physical and verbal abuse by others.

The applicant's case

[8] Mr Southey contended that due to a combination of policies implemented and decisions taken by the Home Office and by the Department of Communities the applicant was effectively prevented from working. Two key factors behind this were the Home Office notice IS/96 stating that he was not permitted to work unless he was an EEA national and the applicant's inability to obtain a National Insurance Number. The applicant was also unable to obtain welfare benefits for a significant period and therefore had no access to any funds from in or around September 2016 until shortly after this application was lodged in August 2017. The applicant's lack of employment and welfare benefits rendered him "street homeless" in or around May 2017. He was left in these circumstances until back-payments of JSA, based on which he could afford a deposit and some months' rent. His inability to access housing benefit, and therefore emergency accommodation, was and remains unlawful.

[9] The applicant contends that the denial of housing benefit was unlawful because it prevented access to emergency accommodation in circumstances where the applicant was rendered destitute and roofless. He had not been advised of any emergency accommodation that does not require housing benefit. The evidence demonstrates that housing benefit is needed to reliably obtain emergency accommodation. As such the applicant's challenge is to the amendment to the regulations that deprived the applicant of any entitlement to housing benefit, or access to emergency accommodation to avoid the need for him to sleep on the streets. The statutory basis for the applicant's inability to access housing benefit is regulation 2 of the Housing Benefit (Habitual Residence) Amendment Regulations (Northern Ireland) 2014. This amended regulation 10 of the Housing Benefit Regulations (Northern Ireland) 2006. The amendment provides that a person is to be denied housing benefit where his only right to reside falls within regulation 10(4) of the 2006 Regulations (which defines a habitual residence test). The rights of residence that fall within regulation 10(4) include a jobseeker (as defined by regulation 6(1) of the Immigration (European Economic Area) Regulations 2006 (2006/1003). It is clear that the amendment prevented the applicant obtaining housing benefit as he is a jobseeker. The state's response to the applicant's challenge

is essentially that the denial of housing benefit was legitimate to prevent 'social or benefit tourism'.

[10] Street homelessness gives rise to inhuman or degrading treatment. The applicant is vulnerable in that he has been diagnosed as suffering from alcohol dependency syndrome. He was referred to mental health services after a suicide attempt. The effect of street homelessness upon the applicant is clear. He found the experience humiliating. He did not feel safe and had no means of protecting himself. It impacted on his mental health. Rough sleepers are likely to have physical health problems such as chest pains, breathing problems, ulcers and hypothermia. Homeless people with alcohol dependency were 28 times more likely to have emergency admissions to hospital than the general public. Rough sleepers are 11 times more likely to suffer mental health problems. Four in ten people have recorded mental health problems. Alcohol and substance misuse are more dominant. GP access is a problem. The age of death for homeless people is on average 30 years younger. There is also evidence of the risk of physical harm faced by rough sleepers. One study found that 30% of rough sleepers had faced physical violence and 6% had been sexually assaulted.

[11] Article 3 ECHR imposes a positive obligation on the state to protect individuals from a real risk of inhuman or degrading treatment (e.g. Đorđević v Croatia app 41526/10 at [139]). A real and immediate risk is one that is 'present and continuing' and one which is not 'fanciful' (Rabone v Penine Care NHS Trust at [38] – [39]). In MSS v Belgium and Greece (2011) 53 EHRR 2 at para 252-254 the Grand Chamber of the European Court of Human Rights ('the ECtHR') appeared to accept that Article 3 had been violated where a person had allegedly spent months living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live. In R (Limbuela) v SSHD [2006] 1 AC 396 Baroness Hale stated:

> "It might be possible to endure rooflessness for some time without degradation if one had enough to eat and somewhere to wash oneself and one's clothing. It might be possible to endure cashlessness for some time if one had a roof and basic meals and hygiene facilities provided. But to have to endure the indefinite prospect of both, unless one is in a place where it is both possible and legal to live off the land, is in today's society both inhuman and degrading. We have to judge matters by the standards of our own society in the modern world, not by the standards of a third world society or a bygone age. [78]"

Being rendered street homeless is or can amount to inhuman or degrading treatment contrary to Article 3 and Article 4 of the Charter of Fundamental Rights of the

European Union ('Article 4')). It is particularly likely that homelessness breaches Article 3 if the homeless person is vulnerable (Selmouni v France (1999) 29 EHRR 403 at [99] – [100]).

[12] Counsel submitted that the applicant's period of street homelessness amounted to a violation of his rights protected by Articles 3 and 4. The applicant was a vulnerable person. It was not an answer to say that the applicant always had a right to return to Poland. The applicant had no financial resources, was in ill health physically and mentally, and was alcohol dependent. As a consequence, there is good reason to believe that he could not afford to return home even had he been sufficiently well to consider that as a possibility. The fact that the applicant was street homeless did not mean that he did not continue to enjoy the right to seek employment within the United Kingdom as a matter of European Union law (e.g. R (Gureckis) v Secretary of State [2017] EWHV 3298 at [96]). The argument that the applicant can return to Poland should be viewed in light of the speech of Lord Brown in Limbuela at paras [99] – [100]. The applicant was exercising fundamental rights safeguarded by EU law. He was unable to claim other welfare benefits. As a consequence, he was in an analogous situation to asylum seekers. The particular issue that arises is the denial of housing benefit. The denial of housing benefit raises human rights issues for two reasons. Firstly, at the time that the applicant was without any source of income, there was a real and immediate risk that he would become street homeless in breach of Articles 3 and 4. In those circumstances, the failure to make payments to avert that risk was a breach of the state's duties under Articles 3 and 4. There was a breach of the substantive obligations imposed by those Articles. Secondly, there is a close link between the provision of access to emergency accommodation (which requires a payment of housing benefit) and the core values which Articles 3 and 4 (as well as Article 8 of the European Convention on Human Rights) seek to protect. Housing benefit is plainly intended to be a tool to reduce homelessness. As a consequence, the failure to extend housing benefit to EU jobseekers such as the applicant comes within the ambit of Articles 3 and 8 (whether or not those Articles have been engaged and breached). Counsel submitted that this submission finds support in the reasoning in R (Clift) v SSHD [2007] 1 AC 484 (at [16]). A way of testing whether the housing benefit is within ambit is to consider whether the ECtHR would tolerate discrimination in relation to housing benefit on grounds of race or gender (Clift at [66]). Mr Southey also submitted that Article 2 of the European Convention on Human Rights was potentially engaged by a denial of housing benefit in light of the impact upon mortality of street homelessness but he accepted that Article 2 is unlikely to be engaged if Article 3 is not. It was also accepted that Article 2 adds little in terms of rights that flow from its engagement.

[13] In relation to Article 14 counsel argued that the applicant was denied access to housing benefit on the basis of his status as an EU national jobseeker who does not have UK or Irish nationality. In the light of R (S) v Chief Constable of South Yorkshire [2004] 1 WLR 2196 at [42]) it is necessary to address the following issues (i) the matters complained about come with the ambit of a right protected by the European Convention on Human Rights; (ii) whether there is a difference in

treatment; (iii) whether there is differential treatment on a ground potentially prohibited by Article 14 (this requires consideration of whether the difference in treatment is based upon a status that comes within the scope of Article 14); (iv) whether the others who are said to receive differential treatment are in a truly analogous situation; and (v) whether the differential treatment is justified. The denial of housing benefit comes within the ambit of Articles 2 and 3 (for the purposes of Article 14). It also comes within the ambit of Article 8 (R (MA) v SSWP [2016] 1 WLR 4550 at [49]). It comes within the ambit of Article 1 of the First Protocol (Stec v United Kingdom (2006) 43 EHRR 47 at [53]). The applicant was denied housing benefit in circumstances in which UK nationals (and some other foreign nationals) are able to claim housing benefit. In particular, jobseekers who are UK nationals are able to claim housing benefit. The difference in treatment is on the basis of a status that comes within the scope of Article 14. A general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group (e.g. DH v Czech Republic (2008) 47 EHRR 3 at [175]). Although not all EU nationals will be disadvantaged by the housing benefit rules, it is clear that foreign nationals (including EU nationals) will be disproportionately prejudiced. As a general rule, a generous meaning should be given to other status (e.g. R (RJM) v Secretary of State for Work and Pensions [2009] AC 311 at [42]). In Bah v United Kingdom (2012) 54 EHRR 21, the ECtHR held (at [45]–[46]) that immigration status could amount to a 'status' for the purposes of Article 14 even though it is not immutable or inherent (which was then conceded to be the case in R (Tigere) v SSBIS [2015] 1 WLR 3820 at [26]). Essentially it is the applicant's status under the Immigration (European Economic Area) Regulations 2006 (2006/1003) that determined his eligibility for housing benefits. The applicant and other EU nationals facing homelessness have precisely the same interests in obtaining funding to avoid homelessness as UK nationals. Unless there are very obvious relevant differences between the two groups in issue, it is better to concentrate on the reasons for the difference in treatment and whether they amount to an objective and reasonable justification: AL (Serbia) v Secretary of State for the Home Department [2008] 1 WLR 1434, per Baroness Hale, at [23]-[24]. The issue is whether there is a justification for the differential treatment. It is the *differential* treatment that must be justified (Bank Mellat v HM Treasury (No 2) [2014] AC 700 at [27]). As a consequence, the issue is whether it is legitimate to deny the applicant a benefit intended to prevent homelessness in circumstances in which UK nationals receive that benefit. In *MA* the Supreme Court held that challenges to benefit schemes based on Article 14 need to demonstrate that the difference in treatment is 'manifestly without reasonable foundation.' In Clift v United Kingdom, app 7205/07 the ECtHR held that "the Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment ... The scope of this margin will vary according to the circumstances, the subject-matter and the background. A wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. ... the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" ... While in principle a similar wide margin of

appreciation applies in questions of prisoner and penal policy, the Court must nonetheless exercise close scrutiny where there is a complaint that domestic measures have resulted in detention which was arbitrary or unlawful. [73]". The importance of the rights in issue is relevant when assessing the margin of appreciation. If is concluded that the subject matter comes within the ambit of Article 3, that implies a high intensity review. Whatever margin of appreciation applies, it is submitted that the discrimination in issue is disproportionate. EU nationals face the same risk from street homelessness as UK nationals. However, only UK nationals are provided with housing benefit. That is despite the fact that EU nationals have a right to remain.

[14] While the justification put forward is expressed to be based on a desire to prevent 'social tourism' a jobseeker cannot be described as a tourist since he is exercising a fundamental EU right to enter the UK's labour market. In Tigere Baroness Hale and Lord Kerr commented that:

> "It is quite another thing to have an exclusionary bright line rule, which allows for no discretion to consider unusual cases falling the wrong side of the line but equally deserving. Hitherto the evidence and discussion in this case has tended to focus on whether there should be a bright-line rule or a wholly individualised system. There are obvious intermediate options, such as a more properly tailored bright line rule, with or without the possibility of making exceptions for particularly strong cases which fall outside it. There are plenty of precedents for such an approach, including in immigration control. [37]"

In enacting the impugned regulations no consideration appears to have been given to a system that would enable EU nationals facing street homelessness to avoid that. The fact that Articles 3 and 4 are in issue does not give rise to any particular rights. In light of the matters above, the failure to provide for any discretion within the exclusionary rule precluding job seeking EU nationals from accessing housing benefit should therefore be regarded as in breach of Article 14.

[15] In respect of the prohibition on discrimination under Article 18 of the EU Treaty counsel argued that Article 45 of TFEU establishes the right of workers to free movement. The fundamental nature of this right is clear from recitals 1 and 2 of Directive 2004/38/EC provide that:

> "Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid

> down in the Treaty and to the measures adopted to give it effect.
>
> The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the Treaty."

In Zambrano v Office national de l'emploi [2012] QB 265 the Court of Justice of the EU held that Article 20 of the TFEU conferred a right of residence on an EU citizen directly, even when their circumstances fell outside those set out in Directive 2004/38/EC ([39]-[45]). Similarly, the applicant's right to free movement was established by the Treaty and he may rely on this directly. That explains why the express limitation upon rights to benefits within Article 24(2) of Directive 2004/38/EC does not assist the respondent. There is a second reason why Article 24(2) does not assist the respondent. There is no doubt that jobseekers have a right to reside (Article 14(4)(b) of Directive 2004/38/EC). Article 51(1) of the Charter of Fundamental Rights of the European Union makes it clear that the Charter applies when implementing EU law. In R (Zagorski) v Secretary of State for Business, Innovation and Skills [2011] HRLR 6 Lloyd Jones J held that a field was occupied by EU law even where the issue was whether the member state decided to implement a derogation [71] (see also R (Sandiford) v Secretary of State [2013] 1 WLR 2938 at [26]). As a consequence, counsel argued , it is clear that the Charter applies because what is in issue is the extent to which the right to reside has been facilitated and whether there is good reason to depart from the general right to equivalent benefits to those paid to UK nationals. The Charter imposes equivalent standards to those imposed by the European Convention on Human Rights (Articles 4, 7, 21 and 52(3)). As a consequence, it is clear that benefits can be required to meet those standards.

[16] The Explanatory Memorandum to the Housing Benefit (Habitual Residence) Amendment Regulations (Northern Ireland) 2014 relies on the following matters as a justification for those regulations:

> "The Westminster Government has given commitment to tighten its measures to curb migrants' access to social security state benefits. … [3.1]"

The Explanatory Memorandum went on to note that historically housing benefit was paid to those with a right to reside who actually resided in the United Kingdom [3.2]. The 2014 Regulations cause people such as the applicant to be treated as a person from abroad even though he has a right of residence. The fact that UK nationals with a right of residence can claim housing benefit is discrimination prohibited by Article 18 of the TFEU. This provides that:

> "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination."

In Patmalniece v SSWP [2011] 1 WLR 783 the Supreme Court considered the application of a differential habitual residence test to state pension credit. Mr Southey sought to identify two significant differences between the issues raised in Patmalniece and those raised in this case. Those who were able to claim the benefit in question included jobseekers. That is significant as it meant that the Secretary of State was able to argue that the rule was intended to prevent benefit tourism. The benefit in question in that case was not one that provided protection against a right as fundamental as that protected by Articles 3 and 4. In Patmalniece the Supreme Court concluded that a rule may be indirectly discriminatory if it is liable to affect nationals of other member states more than nationals of the UK. Clearly the Housing Benefit rules regarding habitual residence are likely to affect nationals of other member states more than nationals of the UK. Where there is indirect discrimination, there is a need to consider whether that discrimination can be justified on objective considerations independent of nationality and was proportionate (Patmalniece at [36]). In this case, the Explanatory Memorandum demonstrates that the Housing Benefit (Habitual Residence) Amendment Regulations (Northern Ireland) 2014 (98/2014) were expressly directed at foreign nationals by excluding EU jobseekers. That is a group of people who can only be foreign nationals. As a consequence, the discrimination cannot be justified on objective considerations independent of nationality. In addition, the exclusion of EU jobseekers from housing benefit is disproportionate. EU jobseekers are exercising fundamental rights while they remain in the UK. A denial of housing benefit places jobseekers at risk of street homelessness. In the context of EU law, it is clear that the requirement of necessity requires it to be demonstrated that there is no other equally effective measure that is less restrictive of rights. It is difficult to see why schemes could not be adopted that focus housing benefit (or an equivalent benefit) on EU jobseekers at risk of street homelessness.

[17] Counsel argued that the Explanatory Memorandum to the Housing Benefit (Habitual Residence) Amendment Regulations (Northern Ireland) 2014 stated that the Department considered that an equality impact assessment was not necessary. The affidavit filed on behalf of the respondent refers to an equality screening in relation to the 'Removal of Access to Housing Benefit for Jobseekers who are not classed as being habitually resident in the UK'. This cites Article 7 of Directive 2004/38/EC as authority for the proposition that EU nationals seeking work require sufficient resources. Section 75(1) requires a public authority to have 'due regard' to the need to promote equality of opportunity 'between persons of different … racial group'. 'Racial group' is given the same meaning as in the Race Relations (Northern

Ireland) Order 1997 (1997/869). Regulation 5(1) of the 1997 Order makes it clear that a racial group includes a group defined by nationality. The phrase 'due regard' is also used in section 149 of the Equality Act 2010 (as well as in earlier legislation). In England and Wales it is well established that judicial reviews can be brought challenging a failure to have due regard. The duty is not a duty to achieve a result but to have *due regard* (R (Baker) v SSCLG [2008] LGR 239 at [31]). The duty to have *due regard* is the regard that is appropriate in all the circumstances. These include on 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 such countervailing factors as are relevant to the function which the decision-maker is performing (R (Baker) v SSCLG [2008] LGR 239 at [31]. If there is an impact on a large number of vulnerable people, many of whom fall within one or more of the protected groups, the *"due regard"* necessary is very high (R (Hajrula) v London Councils [2011] EWHC 448 (Admin) at [69]). Applying the principles set out above, there was a plain failure to have "due regard" (as required by section 75). The amendment to the Housing Benefit Regulations by the Housing Benefit (Habitual Residence) Amendment Regulations (Northern Ireland) 2014 (98/2014) was explicitly aimed at reducing access to housing benefit for EU nationals. It could not have legitimately been concluded that there would be no significant implications for equality of opportunity, given that the restriction of access to housing benefit was explicitly on the basis of nationality (which comes within the definition of race under the Act). The impact of such a limitation would inevitably disadvantage EU nationals in their ability to obtain stable accommodation, and therefore reduce their job prospects, in contrast with job seeking UK or Irish nationals. The subject matter of the decision was an important one as it would potentially give rise to a risk of homelessness. The equality screening form is also flawed because it misstates EU law. It is simply not correct to state those seeking work must have sufficient resources. The position is more complex. It was contended that these submissions were not inconsistent with the judgment of the Court of Appeal in Re Neill's Application [2006] NI 278. Neill was concerned with a different issue. By reason of paragraph 2(1) of schedule 9 to the Northern Ireland Act 1998, certain public authorities are required to submit equality schemes to the Equality Commission. The Court of Appeal stated that the challenge before it was essentially a failure to comply with such a scheme [27]. In that context it was held that schedule 9 provided an alternative remedy. The Court of Appeal expressly commented that it was not holding that judicial review would never be permitted where section 75 was in issue [30]. It appeared to accept that one context in which a challenge might succeed was where there were 'substantive breaches' of section 75. This application is plainly a substantive challenge to a failure to comply with section 75. It is difficult to see how schedule 9 provides an alternative remedy. The issue in this case does not relate to an equality scheme. The challenge is that there was a breach of section 75 when a particular decision was taken. Schedule 9 provides no mechanism for dealing with such a complaint.

Discussion

The principle of free movement under EU law

[18] The principle of freedom of movement of workers was a founding principle of the European Community originally established in Article 48. The principle is essentially replicated in Article 45 of the TFEU. Article 45(2) forbids discrimination based on nationality between workers of member states as regards employment, remuneration and conditions of work and employment. It entails the right to accept offers of employment actually made, to move freely, to stay in a member state for the purpose of employment in accordance with provisions governing employment of nationals laid down by laws, regulations and administrative actions and to remain in the territory of a member state having been employed in that state subject to conditions to be embodied in regulations to be drawn up by the Commission.

[19] While it was argued that the strict wording of the Treaty provisions only gave the right to move freely within the EU to accept offers of employment actually made, the ECJ rejected that interpretation and held that freedom of movement for workers formed one of the foundations of the Community and consequently the provision must be given a broad interpretation. The freedom entailed the right of nationals of member states to move freely within the territory and to stay there for the purposes of seeking employment. (See R v Immigration Appeal Tribunal ex parte Antonissen [1991] ECR 1-745, Tsiotres v Landeshauptstadt Stuttgart C171-91 and Collins v SSWP (KC-138-02) [2004] 3 WLR 1236.

[20] This broad approach opened the doors to mass movement of workers within the EU moving from areas where work was short or ill-paid to areas where better opportunities were thought to be available. The consequent movement of EU citizens in particular resulted in the arrival in the United Kingdom of a very large number of job-seekers. This migration has produced major economic and political consequences. Indeed it is hardly contentious to say that these consequences played a major part in the growth of antipathy to the EU amongst large sections of the population in the UK and in no small measure contributed to the decision by UK voters to leave the EU.

[21] Closely connected to the growing rejection of the principle of freedom of movement within the EU there has been a growing public antipathy to the payment of benefits to (inter alios) European job-seekers who arrived in the country without having contributed in the past to the funding of the benefits claimed. The amounts involved and the perceived unfairness of the making of such benefits available to European jobseekers produced political pressure to adjust the system to reduce the ready availability of such benefits for job-seekers who are not in work and thus not contributing to society.

Directive 2004/38/EC

[22] The Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 ("the Directive") deals with the right of citizens and their family

members to move and reside freely within the territory of the member states and amended earlier regulations. Recital 10 of the Directive recognises that persons exercising rights of residence should not become an unreasonable burden on the social assistance system of the host member state. While recognising the right of residence for a period not exceeding three months without any conditions or formalities other than the need to hold a passport or identity card the right of residence for periods in excess of three months should be subject to conditions as long as beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host state. An expulsion measure should not be the automatic consequence of recourse to the social assistance system. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers save on the grounds of public policy (Recital 16). In accordance with the prohibition on grounds of nationality Union citizens and their family members should enjoy equal treatment with nationals in areas covered by the Treaty subject to specific provisions as provided by the Treaty and secondary law. Recital 21 provides:

> "However it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of job-seekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or their family members, or maintenance assistance for studies, including vocational training, prior to acquisition of the right to permanent residence, to those same persons."

[23] Following the terms of the recitals Chapter III of the Directive in dealing with the right of residence provides in Article 6 for the automatic right of residence for up to three months without conditions other than the need to have a valid ID card or passport. Article 7 so far as material provides:

> "(1) All Union citizens shall have the right of residence on the territory of another Member State for a period no longer than three months if they:
>
> (a) are workers or self-employed persons in the host Member State; or
>
> (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) are enrolled at a private or public establishment accredited or financed by the host Member State on the basis of legislation or administrative practice for the principal person following a course of study …

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

(2) The right of residence provided for in paragraph (1) shall extend to family members who are not nationals of a Member State accompanying or joining the Union citizen in the host Member State provided that such Union citizen satisfies the conditions referred to in paragraph (1)(a), (b) or (c).

(3) For the purposes of paragraph (1)(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances.

(a) he/she is temporarily unable to work as a result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office.

(c) he/she is in duly recorded involuntary unemployment after completing a fixed term employment …

(d) he/she embarks on a vocational training …"

Article 14 provides:

"(1) Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

(2) Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.

……..

(4) By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:

(a) the Union citizens are workers or self-employed persons, or

(b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged."

Article 24 provides that

"1. Subject to such specific provisions expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence. Paragraph (2) then provides:

2. By way of derogation from paragraph (1), the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b) nor shall it be obliged prior to acquisition of the right of permanent residence to grant maintenance aid for studies including vocational training, consisting in student

> grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families."

The relevant Housing Benefit Regulations

[24] The relevant provision of the Housing Benefits Regulations in issue in this case is to be found in the Amendment Regulations of 2014 which amended Regulation 10 of the Housing Benefit Regulations (Northern Ireland) 2006. While the Housing Benefit Regulations and the Amendment Regulations are not well or clearly drafted the consequence of the amendment in question is correctly stated in the explanatory memorandum. The purpose of the instrument was to amend the 2006 Regulations so that European Economic Area nationals coming to the UK to seek work are not entitled to housing benefit even if they are receiving income based job-seekers allowance. The background section to the memorandum records that the UK Government had given a commitment to tighten its measures to curb migrants' access to social security state benefits. As well as meeting the conditions of entitlement, EEA jobseekers must satisfy the habitual residence test. This requires both a right to reside and actual habitual residence. The 2014 Regulation, if valid, amends the 2006 Regulations so that EEA job-seekers are classed as persons from abroad. They are not to be classed as habitually resident and therefore are not entitled to housing benefit. In this convoluted way an EEA job-seeker who cannot be classified as an EEA worker is no longer entitled to housing benefit under the 2014 Regulation (if it is validly enacted). The applicant was not an EEA worker at any material time. He was a job-seeker who did not have entitlement to housing benefit under the 2014 Regulation.

Relevant authorities

[25] In Mirga v Secretary of State for Work and Pensions and Samin v Westminster City Council [2016] UKSC the Supreme Court dealt with issues relating to two EU citizens claiming entitlement to benefits. Ms Mirga was a Polish woman who claimed income support. She had worked briefly but did not qualify as an EU worker. Mr Samin, originally an Iraqi who had later acquired Austrian citizenship, entered the UK, had not worked at all in the UK and was seeking housing assistance. Each claimant was refused benefits on the ground that they did not have a right of residence. The claims were dismissed ultimately by the Supreme Court. Lord Neuberger in the course of his judgment stated:

> "[45] Accordingly, when one turns to the 2003 Accession Treaty and the 2004 Directive, I consider that, because Ms Mirga has not done 12 months' work in this country, she cannot claim to be a "worker", and, because she is not a "job-seeker", "self-employed", a "student", or "self-sufficient", it would seem to follow that she can be validly denied a right

> of residence in the UK, and therefore can be excluded from social assistance. In those circumstances, it must follow that Article 21.1 TFEU cannot assist her.
>
> [46] The fact that Ms Mirga may have to cease living in the UK to seek assistance in Poland does not appear to me to assist her argument. Although the refusal of social assistance may cause her to leave the UK, there would be no question of her being expelled from this country. I find it hard to read the 2004 Directive as treating refusal of social assistance as constituting a species of constructive expulsion even if it results in the person concerned leaving the host member state. As I see it, the Directive distinguishes between the right of residence and the act of expulsion. However, quite apart from this, the Directive makes it clear that the right of residence is not to be invoked simply to enable a national of one member state to obtain social assistance in another member state. On the contrary: the right of residence is not intended to be available too easily to those who need social assistance from the host member state.
>
> [47] Mr Samin's first argument appears to me to face similar difficulties. The Article 18 right which he relies on does not constitute a broad or general right not to be discriminated against. First, its ambit is limited to the scope of the Treaties, which means that it only comes into play where there is discrimination in connection with a right in the TFEU or another EU Treaty. Secondly, the Article 18 right is without prejudice to any special provisions contained in the Treaties. That brings one back to the argument raised on behalf of Ms Mirga."

Lord Neuberger referred to Dano v Job Centre Leipzig [2015] 1 WLR 2519 in which the ECJ concluded that Article 24 of the 2004 Directive and Article 4 of Regulation 83-2004 concerning the co-ordination of social security systems:

> "must be interpreted as not precluding legislation of a Member State under which nationals of other Member States are excluded from entitlement to certain special non-contributory cash benefits within the meaning of Article 70(2) of Regulation 883-2004, although those benefits are granted to nationals of the host Member State who are in the same situation,

> insofar as those nationals of other Member States do not have a right of residence under Direction 2004-38 in the host Member State."

(see also Alimanovic (Case C-67-14) EU:C:2015:597).

[26] In addition in that case the appellants sought to rely on lack of proportionality bearing in mind all the circumstances of their individual respective cases. The Supreme Court rejected this line of argument upholding the bright line adopted by the Secretary of State to exclude persons falling within the context in which Mirga and Samin found themselves. Lord Neuberger concluded that it was unrealistic to require an individual examination of each particular case. He stated at paragraph [69] and [70]:

> "[69] Where a national of another Member State is not a worker, self-employed or a student, and has no, or very limited, means of support and no medical insurance … it would severely undermine the whole thrust and purpose of the 2004 Directive if proportionality could be invoked to entitle that person to have the right of residence and social assistance in another Member State, save perhaps in extreme circumstances. It would also place a substantial burden on a host Member State if it had to carry out a proportionality exercise in every case where the right of residence (or indeed the right against discrimination) was invoked.
>
> [70] Even if there is a category of exceptional cases where proportionality could come into play, I do not consider that either Ms Mirga or Mr Samin could possibly satisfy it. … Neither of them had any significant means of support or any medical insurance, and neither had worked for sustained periods in this country. The whole point of their appeals was to enable them to receive social assistance, and at least the main point of the self-sufficiency test is to assist applicants who would be very unlikely to need social assistance."

[27] Neither Mirga or Samin fell within the category of job-seeker (see Lord Neuberger at [36]). The question arises as to whether the reasoning in Mirga applies in the context of a job-seeker such as the applicant who never became a worker. The applicant did not have a right of residence within Article 7 as he was not a worker under 1(a) and he was not a student under 1(c). He could qualify for a right of residence after three months if he had sufficient means not to become a

burden on the social assistance system. But he did not have such resources. He did not fall within Article 7(3). An EU citizen only has the right of residence provided for in Article 7 so long as he meets the conditions set out therein. While he had no right of residence as such he could not be automatically expelled. A Union citizen cannot be expelled for so long as he can provide evidence that he is continuing to seek employment and has a genuine chance of being engaged. Such an EU citizen is in a kind of legal limbo not having a right of residence as such but at the same time de facto being allowed to stay in the company while he is seeking work. As Lord Neuberger pointed out in Mirga while the refusal of social assistance may lead to a person having to leave the UK as a result of lack of support that does not amount to an expulsion.

[28] The ECJ in European Commission v UK (14 June 2016) held that it is in principle for the legislature of each member state to lay down the conditions creating the right to social security benefits. It cannot be inferred that EU law precludes a national provision under which entitlement to social benefits is conditional on a claimant having a right to reside lawfully in the Member State. There is nothing to prevent in principle the grant of social benefits to Union citizens who are not economically active subject to the requirement that those citizens fulfil the conditions for possessing a right to reside lawfully in the State. The need to protect the finances of the host Member State justifies in principle the possibility of checking whether residence is lawful when social benefit is granted in particular to persons who are not economically active. In EC v UK the concept of an economically inactive person is not defined. On one view a jobseeker who comes to the country without a job, does not find a job and does not work and thus contributes nothing to the national or local economy could be considered to be not economically active. On the other hand he is lawfully in the country, on the job market looking for work and with a prospect of obtaining work until the point is reached when it can be properly decided he has no prospect of work. Nevertheless, the Directive makes a distinction between a worker and those who are job-seekers who are not yet workers.

[29] In Patmalniece v Secretary of State for Work and Pensions [2011] UKSC 11 the issue in the appeal was whether the conditions of entitlement to State Pension Credit ("SPC") was compatible with EU law which prohibited discrimination between nationals of different member states. For the purposes of the scheme a person was or was not to be treated as being in GB if he was not habitually resident in the UK. Regulation 1408/71/EC provided for the application of social security schemes to employed persons and their families moving within the EU. The Regulation applied to SPC. One of the categories of persons to which it applied was employed persons. Regulation 3 prohibited both direct and indirect discrimination. In 2005 Mrs P, a Latvian, claimed SPC, but was refused because she did not have a right to reside in the UK. She claimed that the requirement that she had to reside in the UK was directly discriminatory. The Supreme Court held that all UK nationals would satisfy the test of a right to reside whereas other nationals would not, but not all UK

nationals would satisfy the requirement of habitual residence. In the result the conditions for SPC were not directly discriminatory but were indirectly discriminatory. A difference in treatment amounting to indirect discrimination could be justified only if it was based on objective considerations independent of the nationality of the persons concerned. The majority in the Supreme Court held that the conditions pursued a legitimate aim and were independent of the nationality of the persons affected. The aim was to ensure claimants were economically and socially integrated in the UK thereby protecting the State against benefit or social tourism. Lady Hale noted that it is logical that if a person does not have a right under EU law to reside in a particular state the state should not have the responsibility under EU law for ensuring their minimum level of subsistence.

[30] Lord Hope said:

> "[46] The Secretary of State's justification lies in his wish to prevent exploitation of welfare benefits by people who come to this country simply to live off benefits without working here. That this is a legitimate reason for imposing the right of residence test finds support in Advocate General's opinion in Trojani v Centre Public d'Aide Sociale de Bruxelles [2004] ECR 1-7573.

Lord Hope went on to state at paragraph [52]:

> "… The Secretary of State's purpose was to protect the resources of the United Kingdom against resort to benefit, or social tourism by persons who are not economically or socially integrated with this country. This is not because of their nationality or because of where they have come from. It is because of the principle that only those who are economical (sic) or socially integrated with the host member state should have access to its social assistance system. The principle, which I take from the decision in Trojani, is that it is open to member states to say that economical or social integration is required. A person's nationality does, of course, have a bearing on whether that test can be satisfied. But the justification itself is blind to the person's nationality. The requirement that there must be a right to reside here applies to everyone, irrespective of their nationality."

He did add at para[70]:

> "But it is a basic principle of community law that persons who depend on social assistance will be taken care of in their own member state."

[31] Lady Hale at [107] stated:

> "The AIRE Centre intervene in support of the appellant, essentially to argue that the correct mechanism to protect the public purse against non-economically active claimants from other EU countries is, not to deny those who are lawfully present the basic means of subsistence, but to remove those who have no right to remain here: in other words, compulsorily to expel them rather than to starve them out. The Court in Trojani pointed out at paragraph 45 that:
>
> > 'it remains open to the host Member State to take the view that a national of another Member State who has recourse to social assistance no longer fulfils the conditions of his right of residence. In such a case the host Member State may, within the limits imposed by Community law, take a measure to remove him. However, recourse to the social assistance system by a citizen of the Union may not automatically entail such a measure'."

Earlier at [103] she said:

> "The question is whether it is legitimate to limit these benefits, entitlement to which under the Regulation depends upon the member state in which the claimant resides, to people who are entitled to reside in that member state. In answering that question, it is logical to look at the European law on the right to reside. If nationals of one member state have the right to move to reside in another member state under EU law, it is logical to require that they also have the right to claim these special non-contributory cash benefits there – in other words that the state in which they reside should be responsible for ensuring that they have the minimum means of subsistence to enable them to live there. But if they do not have the

> right under European Union law to move to reside there, then it is logical that that state should not have the responsibility for ensuring their minimum level of subsistence."

[32] Reading Patmalniece and Mirga together the conclusion to be drawn is that the 2014 Regulation is not incompatible with community law. As noted Mirga is authority for the proposition that there is no broad or general right not to be discriminated against under the Treaty. The Article 18 TFEU right is limited to the scope of Treaties. It only comes into play where there is discrimination in connection with a right under the Treaties or other EU provisions. The Article 18 right was without prejudice to any special provisions in the Treaty. Article 24 of the Directive specifically provides that by way of derogation to the equal treatment obligation arising under Article 24(1) host member states are not obliged to confer entitlement to social assistance during the first three months or the longer period in Article 14(4)(b). When the various provisions of the Directive and the Treaty are read together in the light of EC v UK and Mirga the conclusion to be drawn is that the state is entitled to exclude a job-seeker such as the applicant from any entitlement to housing benefit. Such an exclusion could not be categorised as disproportionate. A fair reading of Mirga applied in the context of EU jobseekers is that the 2014 Regulation is not invalid as a matter of EU law. The respondent is entitled to rely on Patmalniece as authority to support the proposition that if there is discrimination in this case it is indirect discrimination. They are also entitled to rely on Patmalniece as establishing that Regulation such as the 2014 Regulation has the legitimate purpose of ensuring that a claimant has achieved economic or social integration in the UK as pre-condition of entitlement to the benefit.

The Convention issues

[33] Under the Directive Article 37 provides that the provisions of the Directive shall not affect laws and provisions laid down by a member state which would be more favourable to a person covered by the Directive. As noted the applicant argues that the 2014 Regulations are incompatible with the Convention rights and the rights arising under the Charter of Rights. It is the applicant's case that even if the impugned 2014 Regulations stands up to scrutiny under EU law if the provision is incompatible with the Convention rights and/or section 75 of the Northern Ireland Act the provision would be invalid and leave un-repealed the earlier provision that conferred on job-seekers entitled to a jobseeker allowance access to housing benefit. It is thus necessary to determine whether the applicant is correct in his contentions in relation to the Convention and Charter rights. Inasmuch as I have dismissed the EU law argument for incompatibility the rights under the Charter appear to add nothing to the Convention law points raised by the applicant and thus it is necessary to focus on the Convention issues.

[34] Dr McGleenan argued that the applicant's Convention challenge to the validity of the Regulation should be rejected on the grounds that it was based on a

challenge to a legislative provision rather than on a challenge to an alleged unlawful act by a public authority which the applicant as a victim suffered. He called in aid in Re Application of the Northern Ireland Human Rights Commission [2018] UKSC**.** However, as Mr Southey pointed out, in Burden v UK [2008] 47 EHRR 38 the ECtHR held that it is open to a person to contend that a law invalidates his rights in the absence of an individual measure of implementation if he is required either to modify his conduct or risk being prosecuted or if he is a member of a class of people who risk being directly affected by the legislation. It is thus open to the applicant to claim to be a victim under the Human Rights Act if the consequence of the impugned legislation is that his Convention rights were infringed by the provision.

[35] The applicant's case is that EU job-seekers such as he are inevitably potentially exposed to the risk of being subjected to inhuman and degrading treatment by having to sleep rough in circumstances in which they are deprived of recourse to housing benefit which would protect them from the need to sleep rough. Subjecting a person to enforce rough sleeping over a protected period can in certain circumstances constitute inhuman and degrading treatment. In Limbuela v Secretary of State for the Home Department [2006] 1 AC at 396 asylum seekers who claimed to be destitute had been refused support under Section 95 of the Immigration and Asylum Act 1999 on the ground that they had not claimed asylum as soon as reasonably practical after arrival in the UK within Section 55 of the 2002 Act. The Secretary of State contended that support was not necessary to prevent a breach of the Convention rights under Section 55. In that case the claimants had been sleeping in the open and had no means of obtaining money to buy food other than by a reliance on charity. They claimed that their Article 3 rights had been infringed. The Supreme Court held that the decision to withdraw support from them was an intentional act for which the Secretary of State was directly responsible. The court had to look at the context and facts of the particular case including factors such as the age, sex and health of the claimants and the likely time to be spent without a required means of support. It had to consider whether the entire package of work restriction and deprivations which surrounded the claimants were so severe that it could be described as giving rise to inhuman and degrading treatment. The threshold of severity would in the ordinary case be crossed were a person deprived the support was obliged to sleep in the street or was seriously hungry or unable to satisfy basic needs of hygiene.

[36] Lord Bingham at [7] stated:

> "I would accept that in a context such as this, not involving the deliberate infliction of pain or suffering, the threshold is a high one. A general public duty to house the homeless or provide for the destitute cannot be spelled out of Article 2. But I have no doubt that the threshold may be crossed if a late applicant with no means and no alternative sources of support, unable to support himself is by the

> deliberate action of the state denied shelter, food or the most basic necessities of life. …."

Lord Hope said that it is necessary to ask whether the entire package of restrictions and deprivations that surround the case is so severe that it can properly be described as inhuman and degrading treatment. Lord Scott pointed out that it is not the function of Article 3 to prescribe the minimum standards of social support for those in need. That is a matter for the social legislation of each signatory state. If individuals find themselves destitute to a degree apt to be described as degrading that derogation may well be a shameful approach to the humanity of the estate but without more does not engage Article 3. The situation is different if the state bars the individual from basic social security and from state benefits to which he would otherwise be entitled. The policy in question is only a lawful policy if it does not lead to breaches of Article 3. Lord Browne at [102] said that the "imminent street homelessness would of itself trigger the Secretary of State's requirement under Section 6 of the Human Rights Act 1998 to provide support (if only by way of night shelters and basic sustenance; I acknowledge that degrading treatment could be avoided by the provision of less even than the modest support made available under Section 95."

[37] There are clear points of distinction between the situation faced by the asylum seekers in Limbuela and the situation arising in the present case. EU job-seekers are in a situation quite different from that of bona fide asylum seekers who cannot safely return to their own country. The asylum seeker situation inevitably results in their home countries avoiding any responsibility for them. However, as Lord Hope pointed out, it is a basic principle of community law that persons who depend on social assistance will be taken care of in their own member state. EU job-seekers are not deprived of all benefits as they are entitled to job-seekers allowance which provides some financial assistance. EU jobseekers are voluntary residents in the country who must take the country's benefit system as they find it. The fact that a person by his own actions is largely responsible for deterioration in his own health may deprive him of the ability to claim that he is a victim of a breach of Article 3 (see O'Rourke v UK 26 June 2001). If a person is destitute and has a pre-existing care need the case may be referred to Social Services and the Health and Personal Social Services (Northern Ireland) Order 1972. Where there is no apparent vulnerability or care or support needs the Northern Ireland Housing Executive can refer the person to relevant voluntary support organisations, charitable and church groups, food banks and other agencies. Its housing solution and support model enables staff to use support directories for each of the local areas to draw on relevant networking organisations and contacts in the area to provide advice and assistance. The Housing Executive can also put people in touch with agencies such as the Salvation Army, Red Cross and the Polish Welfare Agency, external multi-disciplinary homeless support teams may also provide assistance. There are thus a range of agencies which can provide assistance to homeless EU jobseekers. In the Supreme Court it was considered that the duty in Limbuela arose "as soon as the asylum seeker makes it clear that there is an imminent prospect that a breach of Article 3 will occur because

the conditions which he or she is having to endure are on the verge of reaching the necessary degree of severity". In the case of the applicant there is nothing to suggest that he sought to bring to the attention of the authorities that he was facing street homelessness or was particularly vulnerable. In the result I conclude that the applicant has not established that the 2014 Regulations infringe or are incompatible with his Article 3 rights. I do not consider that Article 2 adds anything.

[38] I am not persuaded that the applicant can rely on any breach of Article 8. In Chapman v UK [2001] 33 EHRR 399, 42728 paragraph [98] the court said that:

> "It is important to recall that Article 8 does not in terms give the right to be provided with a home. Nor does any of the jurisprudence of the court acknowledge such a right ….. Whether the state provides funds to enable everyone to have a home is a matter for political not judicial decision."

[39] Dr McGleenan did not seem to take serious issue with the proposition that the case may well come within the ambit of Article 1 Protocol 1 having regard to Stec v UK [2006] 43 EHRR 47. He argues, correctly in my view, that for the same reasons as set out above in connection with the reasoning in Patmalniece the issue is one of indirect not direct discrimination. He argues, again correctly in my view that the appropriate legal test is the "manifestly without reasonable foundation test" as articulated in the Strasbourg authorities. Counsel further contended correctly that in the context of social security provisions a wide margin of appreciation must be afforded to the legislature and state authorities. The policy underlying the impugned provision and its rationale are explained in the affidavits of Ms McCleary. The habitual residence test was in response to a legitimate concern about benefit tourism and to avoid abuse of the system. The impugned provision reflected wider GB provision and pursuant to the requirement for a single system of social security, transport and pensions in the UK it was necessary to avoid the consequences of a lack of parity. The issues arising had been considered by the Social Development Committee and the Social Security Advisory Committee. It seems clear that the introduction of the provision was not an oversight but part of a deliberate choice of policies delivered by the decision to reduce benefit tourism and indeed, it may be added, to reflect the difference of approach adopted and permitted by the EU authorities in distinguishing between workers and job-seekers who have not yet become workers. Furthermore, as counsel pointed out, the issue is to be determined not by reference to any of the shortcomings in respect of the formation of policy but by the effect of the provision. As discussed in Patmalniece and in Carson the application of a bright line is within the proper range of responses open to the state authorities in respect of the issues to be addressed by the policy adopted. In the result it must be concluded that the impugned provision pursued a legitimate aim and that there was a reasonable foundation for the policy. The applicant has failed to establish that the provision should be struck down on this ground.

Section 75 Northern Ireland Act 1998

[40] Section 75 requires "due regard to be had to the need to promote equality of opportunity". At paragraph [42] of my judgment at first instance in Re Neill cited with approval by the Court of Appeal at Re Toner [2006] NI 278 at 285:

> "The way in which the 'due regard' duty is enforced is provided for in Schedule 9. The history of the background to the drafting of the 1998 legislation bears out the clear impression emerging from the wording of Section 75 that Schedule 9 represented the legislature's decision as to how effect would be given to the enforcement of Section 75 duties. The width, ambit and boundaries of the concept of equality of opportunity are not particularly clearly delineated. Parliament appears to have opted for a wide concept and recognised that giving effect to the obligation to have due regard to the need to promote equality of opportunity would call for structured assessment, consultation, monitoring and publicity. It has in Schedule 9 set out a quite complex machinery for the introduction and approval of equality schemes and mechanisms for ensuring compliance with such schemes. Alleged breaches of schemes are to be the subject of investigation and reporting with political consequences. It appears that the legislature, no doubt by way of a political compromise, opted for that route to remedy breaches of schemes rather than by conferring rights to be asserted by action or other litigious means. The consequence in the present instance is that the 2004 legislation is not open to challenge in the way provided for in relation to Section 76."

The Court of Appeal pointed out at paragraph [27]:

> "It is important, we believe to focus on the context of the present dispute … at the kernel of this is the avowed failure of the NIO to comply with its equality scheme. This is precisely the type of situation that the procedure under Schedule 9 is designed to deal with. Equality schemes must be submitted for the scrutiny and approval of the Commission is charge with the duty to investigate the complaints that a public authority has not complied with its scheme or else to explain why it has decided not to investigate and has

> given explicit powers to bring any failure on the part of the authority to the attention of Parliament and the Northern Ireland Assembly.
>
> [28] It would be anomalous if a scrutinising process could be undertaken parallel to that by which the Commission has the express statutory remit. We have concluded that this was not the intention of Parliament. The structure of the statutory provision is instructive in this context. The juxtaposition of Sections 75 and 76 with contrasting enforcing mechanisms for the respective obligations strongly favour the conclusion that Parliament intended that in the main at least the consequence of a failure to comply with Section 75 would be political whereas the sanction of legal liability would be appropriate to breaches of the duty contained in Section 76."

In the context of the applicant's argument that the alleged breach of section 75 invalidated the impugned regulation it is to be noted that at paragraph [31] the court stated:

> "It should perhaps be observed that even if judicial review is available to challenge breaches of Section 75 it is by no means automatic that in a situation where legislation has been enacted following a breach it would be thereby rendered invalid. Much will depend on the nature of the breach and the availability of other effective remedies. Again however further comment on this should await instances where the issues arises directly."

[41] In this case for the reasons set out above the 2014 Regulation represented the outcome of a valid weighing of relevant considerations both under EU and Convention law producing a Regulation which was not incompatible with either EU or Convention law. Article 7 of the Directive imposes on certain EU nationals seeking work a requirement to have sufficient resources to avoid becoming a burden on the host state. This requirement of itself leads to an inevitable distinction that affects the opportunities of individuals subjected to the requirement to have resources if they wish to be in the country. The *due regard* to equality of opportunity to which section 75 refers inevitably must take account of this EU law requirement. Section 75 cannot be read as overriding the Directive provision. Much clearer wording would be required for section 75 to be interpreted as conferring a more favourable domestic law right on a EU job-seeker for the purposes of Article 37 of the Directive.

Conclusion

[42] In the result for the reasons set out above the application is dismissed. I shall hear counsel on the question of costs.