Neutral Citation No: [2020] NICA 4 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **McC11146** *Delivered:* **10/01/2020**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

ON APPEAL FROM THE HIGH COURT OF JUSTICE
(JUDICIAL REVIEW)

_____

Between:

TADEUSZ STACH

Appellant:

and

DEPARTMENT FOR COMMUNITIES and DEPARTMENT FOR WORK AND PENSIONS

Respondents:

_____

Before: Stephens LJ, McCloskey LJ and Maguire J

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Glossary

DFC	**Department For Communities**
DWP	**Department For Work and Pensions**
ECHR	**European Convention on Fundamental Rights and Freedoms**
ECtHR	**European Court of Human Rights**
EEA	**European Economic Area**
EU	**European Union**
HB	**Housing Benefit**
JSA	**Jobseeker's Allowance**
SSAC	**Social Security Advisory Committee**
UK	**United Kingdom**

McCloskey LJ (delivering the judgment of the court)

Introduction

[1] Tadeusz Stach ("*the Appellant*") appeals against the judgment of Sir Paul Girvan delivered on 30 November 2018 and consequential order dismissing his application for judicial review against the Department for Communities ("*DFC*") and the Department for Work and Pensions ("*DWP*"). The Appellant is a Polish national and, hence, an EU citizen and EEA national. His essential challenge is directed to a provision of Northern Ireland subordinate legislation which had the effect of excluding him from the possibility of obtaining housing benefit ("*HB")* – and thus emergency accommodation – during a period when he claimed to be a freely moving, or migrant, EU citizen seeking employment in this jurisdiction as a so-called "jobseeker".

[2] The essence of the Appellant's judicial review challenge is neatly encapsulated in the following passage from [1] of the first instance judgment:

> "…. 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."

The Appellant complained of his inability to qualify for housing benefit from February 2017. We observe at the outset that certain dates and periods in the Appellant's account are vague and imprecise. The discretionary public law relief sought has included from the beginning an order of certiorari quashing the impugned statutory provision.

The Appellant

[3] The Appellant entered Northern Ireland on 31 October 2015, his ambition being to secure employment. During the months which followed he had to sleep rough on certain dates. In April 2016 he went to the Republic of Ireland. He returned to Northern Ireland in September 2016. It is common case that his first attempt to obtain publicly funded assistance was in November 2016 when he applied for Jobseeker's Allowance ("*JSA*"). This stimulated an interview by DFC or its predecessor on 15 December 2016. The claim was refused.

[4] The Appellant's interaction with DFC or its predecessor continued intermittently during the next ensuing year approximately. It was marked particularly by further failed attempts to secure JSA. This culminated in a revised decision of DFC, made on 23 August 2017, whereby JSA was awarded, partly in a backdated fashion, for (a) the period 01 January 2017 to 22 June 2017 and (b) the further period 27 June 2017 to 21 November 2017. The amount was just under £80 per week. He was awarded JSA during the period 01 January to 21 November 2017. The reason for the cessation on 21 November 2017 was his failure to satisfy the "*genuine prospect of work*" criterion (*infra*) when interviewed on 16 November 2017. The Appellant's first claim for Housing Benefit ("HB") was made on 23 September 2017. It was refused. In the statement of agreed facts it is recorded that the refusal was due to the Appellant's failure "*… to provide information and evidence required …*"

[5] At [7] of his judgment the trial judge stated:

> "… 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 [relief] …. 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."

The judge continued:

> "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 wellbeing, considerable personal indignity and an enhanced risk of physical and verbal abuse by others."

These proceedings were initiated on 21 August 2017. This court has been informed that the Appellant continues to reside in Northern Ireland. The statutory provisions and amendments noted in the immediately ensuing paragraphs applied directly to the Appellant and had the effect of excluding him from the payment of HB.

The Respondents

[6] The Department for Communities ("DFC") is one of the Northern Ireland departments, so designated by the Departments (Northern Ireland) Order 2015. It is the Department with responsibility for administering certain statutory benefits, including HB and JSA. Its predecessor, the Department for Social Development, was responsible for the measure challenged by the Appellant. The Department for Work and Pensions ("DWP") is the corresponding authority in England and Wales.

[7] Pursuant to the policy of parity between Northern Ireland (on the one hand) and England and Wales (on the other) in the spheres of social security provision and pensions, the impugned statutory provision was the product of parallel legislative proposals and their ensuing adoption in both jurisdictions. DWP was considered to be the "*policy* owner" and it took the lead in the pre-legislative exercises. This policy has a statutory basis: see s 87 of the Northern Ireland Act 1998.

The Impugned Statutory Provision

[8] The statutory provision which the Appellant challenges is regulation 10 of the Housing Benefit Regulations (Northern Ireland) 2006 (the "*2006 Regulations*"), as amended (hereinafter "*the impugned statutory provision*"). The material amendment was effected by regulation 2 of the Housing Benefit (Habitual Residence) (Amendment) Regulations (Northern Ireland) 2014 (the" *HB Regulations 2014*"). The amendment took effect from 01 April 2014. (See also the further detail in [29] – [33] *infra*)

[9] In a nutshell, prior to the aforementioned commencement date EEA nationals who travelled to the United Kingdom and qualified for the receipt of income-based JSA were entitled to receive HB also, thus providing a gateway to emergency accommodation, as those in receipt of JSA were thereby treated as satisfying the statutory condition of being liable to pay rent (in summary). Their entitlement to these two benefits sprang from their ability to satisfy the statutory habitual residence test. The effect of the impugned amendment was that two conditions had to be satisfied by claimants seeking income-related benefits, namely (a) being habitually resident in the United Kingdom, Channel Island, Isle of Man or Republic of Ireland and (b) having a legal right to reside in any of those places. As a result of the amendment EEA nationals were subsumed within the category of "*persons from abroad*", whose members could not satisfy the habitual residence test. The effect of this was that from 01 April 2014 EEA nationals were no longer eligible for HB. Thus migrant EU citizen jobseekers were excluded from the possibility of receiving either

JSA or HB during the initial three months of their residence in the UK. The JSA three months residence requirement is contained in regulation 85A(2)(a) of the Jobseeker's Allowance Regulations (NI) 1996 , which came into operation on 30 April 2006 (inserted by Regulation 4 of the Social Security (Persons from Abroad) (Amendment) Regulations (NI) 2006). Notably, asylum claimants were expressly excluded from the revised regime.

[10] The impugned statutory provision was not introduced in isolation. It was, rather, one of a series of measures all driven by the same policy aim at around the same time. These included limiting access to statutory benefits after six months for certain EEA nationals namely jobseekers and those with retained worker status; the provision of statutory guidance to housing authorities concerning the application of a residency test of two years as a pre-requisite to EEA migrants accessing social housing; and regulating their access to the National Health Service. This is detailed further in [29] – [33] *infra.*

[11] There are three particular features of the litigation matrix to be highlighted. First, prior to the operative date of the impugned statutory provision migrant EU citizen jobseekers would have satisfied the statutory habitual residence test and, thus, would have qualified for receipt of HB, with the result that they would have been unlikely to have been either homeless or roofless persons. Second, the impugned legislative change does not adversely affect those belonging to the category of United Kingdom national jobseekers. Third, the legislative change adversely affects returning United Kingdom nationals, whether jobseekers or others, who are unable to satisfy the revised habitual residence test. Members of this group, in common with members of the Applicant's notional group, have the classification of "*persons from abroad*".

[12] Some appreciation of the relevant taxonomy is useful. HB is a non-contributory means tested publicly funded benefit. It does not have the status of social security benefit in domestic law. It is funded out of general taxation. It would be considered a measure of "*social assistance*" in EU law terms. It is not, again in the EU law context, a "*portable benefit*". This means that payments to an EU citizen who moves from the United Kingdom to another EU Member state would cease.

The EU Legal Framework

[13] The EU legal framework of relevance to this appeal is constituted by a miscellany of provisions of both primary and secondary EU law. By way of preface, there is no provision of EU law requiring a host Member State to pay unemployment benefit or any comparable form of social assistance to EU migrant jobseekers. The starting point must be the constitutionally supreme measure of EU law in the equation, namely the Treaty on the Functioning of the European Union (the "*TFEU*"). Article 20 TFEU is the core provision in this litigation context:

> "1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
>
> 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
>
> (a) The right to move and reside freely within the territory of the Member states …..
>
> [and three other specified rights]
>
> **These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.**"
>
> [Emphasis added.]

Article 18(1) TFEU provides:

> "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."

[14] At this juncture, it is appropriate to consider a decision of the Court of Justice of the European Communities (the "*CJEU*") which has had a clearly identifiable influence on subsequently adopted provisions of EU legislation of relevance to this appeal. In *R v Immigration Appeal Tribunal, ex parte Antonissen* [1991] 2 CMLR 373 ("*Antonissen*") the CJEU gave consideration to the scope of the free movement rights of unemployed persons under Article 48(3) EEC. The applicant, a Belgium national, challenged an order deporting him from the United Kingdom (the "UK") to his country of origin in circumstances where he had resided in the UK, initially unemployed and later as a convicted offender, during a period of some three years. The basic question of law was whether Article 48 EEC conferred rights on a migrant EU citizen merely seeking employment in the host Member State. The operative UK legal rule prescribed a maximum sojourn of six months for non-UK EU citizens. The CJEU decided as follows, at [21]:

> "In the absence of a Community provision prescribing the period during which Community nationals seeking employment in a Member State may stay there, a period of six months, such as that laid down in the national

> legislation at issue in the main proceedings, does not appear in principle to be insufficient to enable the persons concerned to apprise themselves, in the host Member State, of offers of employment corresponding to their vocational qualifications and to take, where appropriate, the necessary steps in order to be engaged and, therefore, does not jeopardise the effectiveness of the principle of free movement. **However, if after the expiry of that period the person concerned provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged, he cannot be required to leave the territory of the host Member State.**"
>
> [Our emphasis.]

[15] *Antonissen* was decided in 1991. Thereafter the EU evolved substantially. One of the most important features of this evolution was the advent of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 (the "*Citizens Directive*"). Some of the substantive provisions of this measure of secondary EU law must be considered in our determination of this appeal. We shall also have regard to certain of its recitals, bearing in mind the *Marleasing* principle that as a national court we are bound to give effect to the wording and effect of the Directive considered as a whole (Case 106/89 *Marleasing* [1990] ECR 4135).

[16] The following recitals in the Citizens Directive [2004/38/EC] are material:

> "(1) 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.
>
> (2) 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.
>
> (3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive

persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.

(9) Union citizens should have the right of residence in the host Member State for a period not exceeding three months without being subject to any conditions or any formalities other than the requirement to hold a valid identity card or passport, without prejudice to a more favourable treatment applicable to jobseekers as recognised by the case-law of the Court of Justice.

(10) Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions.

(16) As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or jobseekers as defined by the Court of Justice save on grounds of public policy or public security.

(21) 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 jobseekers, 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 of permanent residence, to these same persons.

(31) This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of an ethnic minority, property, birth, disability, age or sexual orientation."

[17] The material provisions of the Citizens Directive are the following:

Article 1

"[1] This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;

(b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;

(c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.

Article 2

[2] For the purposes of this Directive:

(1) 'Union citizen' means any person having the nationality of a Member State;

(2) 'family member' means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

(3) 'host Member State' means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

Article 6

[6] 1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.

Article 7

[7] 1. All Union citizens shall have the right of residence on the territory of another Member State for a period of 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 its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

- have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by

such equivalent means as they may choose, that they 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; or (d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

(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 the 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 jobseeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a jobseeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

4. By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided

for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner.

Article 14

[14] 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.

In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.

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

[24] 1. Subject to such specific provisions as are 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.

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."

[18] The Citizens Directive was transposed into domestic United Kingdom law by the Immigration (European Economic Area) Regulations 2006 (the "*EEA Regulations*"). Regulation 6 defines the term "*qualified person*":

> "(1) In these Regulations, 'qualified person' means a person who is an EEA national and in the United Kingdom as -
>
> **(a) A jobseeker;**
>
> (b) A worker;
>
> (c) A self-employed person;
>
> (d) A self-sufficient person; or
>
> (e) A student."

The category of relevance to this appeal is highlighted. Regulation 6(4) continues:

> "For the purpose of paragraph 1(a), a 'jobseeker' is a person who satisfies the conditions in paragraphs (5) and (6)."

Per regulation 6 (5) and (6):

> "(5) Condition A is that the person –
>
> (a) Entered the United Kingdom in order to seek employment; or
>
> (b) Is present in the United Kingdom seeking employment, immediately after enjoying a right to reside pursuant to paragraph (1)(b) to (e) (disregarding any period during which worker status was retained pursuant to paragraph (2)(b) or (ba)).
>
> (6) Condition B is that the person can provide evidence that he is seeking employment and has a genuine chance of being engaged."

The derogation in Article 24(2) of the Citizen's Directive was implemented in UK law by the Social Security (Persons from Abroad) (Amendment) Regulations (NI) 2006 in conjunction with the EEA) Regulations, operative from 30 April 2006. Asylum claimants were expressly excluded.

[19] Certain observations are appropriate at this juncture. First, the nexus between Condition B of Regulation 6(6) and Article 14(4)(b) of the Citizens Directive is immediately apparent. Second, the origins of this twofold test are readily traceable to the decision of the *CJEU* in *Antonissen.* Third, the Article 14(4)(b)/Condition B criteria are a reflection of two of the clearly identifiable themes of the Citizens Directive namely that citizenship of the Union is subject to specified limitations and conditions in both EU primary and secondary legislation (as stated explicitly in Article 20 TFEU) and migrant EU citizens exercising their right of residence should not become an unreasonable burden on the social assistance system of the host Member State during initial residence.

[20] It is convenient to summarise the material provisions of the Citizens Directive:

> (i) EU citizens seeking to exercise their right of free movement do so subject to the limitations and conditions specified in the relevant measures of primary and secondary EU law.
>
> (ii) The only condition or formality to be satisfied by a migrant EU citizen to acquire the right of residence in the host Member State for a maximum period of three months is possession of a valid identity card or passport.

(iii) The basic three month right of residence of the migrant EU citizen and their family members is subject to not becoming an unreasonable burden on the social assistance system of the host Member State.

(iv) Migrant EU citizens in a host Member State may qualify for a more extensive right of residence: they do so by providing evidence that they are continuing to seek employment and have a genuine chance of becoming employed.

(v) Neither the migrant EU citizen nor their family members may be expelled if (a) the EU citizen is a worker or self-employed person or (b) the EU citizen has entered the territory of the host Member State in order to seek employment and can provide evidence of continuing to seek employment and a genuine prospect of becoming employed.

(vi) Subject to any provision of primary or secondary EU law, the treatment of EU citizens residing in the host Member State "*on the basis of*" the Directive and that of the nationals of such Member State shall be equal.

(vii) However, the host Member State is empowered to derogate from the foregoing requirement of equal treatment in respect of "*… entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b) …*"

[21] Some reflection on the word "*jobseeker*" and its plural incarnation is appropriate. Neither is defined in any measure of EU law. Nor is there any definition in the EEA Regulations. This term appears five times in the Citizens Directive. The transposing measure, the EEA Regulations, has adopted precisely the same term. We consider that its meaning must be the same in both contexts. The ordinary and natural meaning of an EU citizen "*jobseeker*" is, in our view, a person who has made the transition from one Member State to a host Member State in search of employment.

The ECHR Rights Engaged

[22] The Appellant's case invokes two of the ECHR rights which are protected under the machinery of the Human Rights Act 1998. First, Article 3:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Second, Article 1 of The First Protocol:

> "1. 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 interests and subject to the conditions provided for by law and by the general principles of international law.

2. 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."

The Respondents' Evidence

[23] The summary which follows in [23] – [36] is augmented by a discrete segment of evidence relating to the Appellant's third challenge more conveniently considered in [105] – [110] *infra.* Historically, the habitual residence test was first introduced in 1994 in the context of Income Support, HB and Council Tax Benefit, in response to wider concerns about so-called "benefit tourism", by the Income Related Benefits Schemes (Miscellaneous Amendments) (No 3) Regulations 1994. During the decade which followed no major alteration ensued. The following averment of the DWP deponent is noteworthy:

> "*The purpose of the test was to place the conditions on entitlement to income-related benefits on a similar footing to the eligibility conditions for the state benefits of other EEA member states. For example, the social assistance schemes in some Member States incorporate a length of residence or the holding of a residence permit as a test of their eligibility.*"

[24] In his statement to the House of Commons on 23 February 2004 the Secretary of State for the Home Department said:

> "After 1 May, citizens of accession states will be free to travel across all EU borders. Our position has always been clear—that the UK would benefit from all new EU citizens working legally, paying taxes and national insurance. That is an alternative to illegal working, which would fuel the sub-economy and undermine existing conditions of work. But we will take every step to ensure that our benefit system is not open to abuse. We have already tackled benefit tourism by tightening the habitual residence test. Today, we are building on that by announcing measures that will ensure that those who come here from the accession countries but do not work will not be able to claim benefits.

> This is a coherent and sensible package of measures that builds on the principles and policies laid out by the Government over the past three years. We believe that proper, legal, managed migration is good for Britain and fair to genuine workers from the accession countries. Whether they are plumbers or paediatricians, they are welcome if they come here openly to work and contribute. At the same time, it is clearly not right that people should be able to come here, fail to get a job and then enjoy access to the full range of public services and social security benefits.
>
> Therefore, the second element of the package that we are announcing today is that those who wrongly believe that they can move here to claim benefits without working should be in no doubt that they cannot do so. They cannot draw benefits without themselves contributing to the rights and entitlements that should go hand in hand with the responsibilities and duties. For two years, possibly longer, we will require accession nationals to be able to support themselves. If they are unable to do so, they will lose any right of residence and will have to return to their own country."

On 9 March 2004 the Under Secretary of State for DWP stated:

> " … the Home Secretary introduced measures to restrict the financial support available to [EEA] citizens who failed the habitual residence test (HRT). This means that local authorities can normally pay only for travel costs home for an individual or, if the person has dependent children, temporary accommodation until travel can be arranged.
>
> There have been no other changes in the HRT. However, the Government intend to introduce measures to ensure that nationals of accession states who are in the UK but who cannot find work, or will not work, will not have access to income support, income-based jobseeker's allowance, pension credit, housing benefit and council tax benefit. After 12 months of working legally without interruption, citizens of these EU accession states will be entitled to the full range of UK benefits.
>
> These measures will build on those in the Nationality, Immigration and Asylum Act 2002 to prevent certain

> classes of ineligible person obtaining support or assistance."

[25] At this stage the Citizens' Directive came into operation. The Social Security Advisory Committee ("SSAC") considered and reported on the Social Security (Habitual Residence) Amendment Regulations 2004. The Government responded. In May 2004 the entitlement to certain social security benefits and housing assistance was amended so that a person could not be 'habitually resident' unless they had the 'right to reside' in the Common Travel Area (the UK, the Channel Islands, the Isle of Man or the Republic of Ireland). This was in response to concerns about the impact of the 2004 enlargement of the EU.

[26] On 30 April 2006, the Rights of Residence Directive 2004/38/EC came into force, giving everyone, including economically inactive people, a right to reside throughout the territory of the EU for an initial period of three months. The UK Government amended the rules on access to benefits so as to exclude those who had a right to reside solely on the basis of the new Directive.

[27] On 25 March 2013 Prime Minister Cameron made a speech which included the following passage:

> "So, by the end of this year, and before the controls on Bulgarians and Romanians are lifted, we are going to strengthen the test that determines which migrants can access benefits. And we're going to give migrants from the EEA – from the European Economic Area – a very clear message. Just like British citizens, there is no absolute right to unemployment benefit. The clue is in the title: Jobseeker's Allowance is only available to those who are genuinely seeking a job.
>
> You will be subject to full conditionality and work search requirements and you'll have to show you're genuinely seeking employment. And if you fail that test, you will lose your benefit. And, as a migrant, we're only going to give you six months to be a jobseeker. After that, benefits will be cut off unless you really can prove not just that you are genuinely seeking employment but also that you have a genuine chance of getting a job. We are going to make that assessment a real and robust one and, yes, it also will include whether your ability to speak English is a barrier to work.
>
> And to migrants who are in work but then lose their jobs, the same rules will apply. Six months and then, if you can't show you have a genuine chance of getting a job,

> benefits will be cut off. That means that EEA migrants who don't have a genuine chance of getting work after six months will lose their right to access certain benefits. So, yes, of course they can still come and stay here if they want to, but the British taxpayer will not go endlessly paying for them anymore."

In an article in The Financial Times on 23 November 2013, the Prime Minister wrote:

> "We are changing the rules so that no one can come to this country and expect to get out of work benefits immediately; we will not pay them for the first three months. If after three months an EU national needs benefits – we will no longer pay these indefinitely. They will only be able to claim for a maximum of six months unless they can prove they have a genuine prospect of employment.
>
> We are also toughening up the test which migrants who want to claim benefits must undergo. This will include a new minimum earnings threshold. If they don't pass that test, we will cut off access to benefits such as income support. Newly arrived EU jobseekers will not be able to claim housing benefit.
>
> If people are not here to work – if they are begging or sleeping rough – they will be removed. They will then be barred from re-entry for 12 months, unless they can prove they have a proper reason to be here, such as a job."

[28] Responding to a question in the House of Commons concerning the habitual residence test on 13 January 2014, the Secretary of State for Work and Pensions said:

> "Migrants must now meet a much tougher habitual residence test than before, showing the efforts they have made to find work before coming to the UK and that their English language skills are not a barrier to getting a job. They must also have been resident in the UK for three months before being able to access out-of-work benefits. We have plans to make it even stronger, by introducing a minimum earnings threshold, with tougher questions on whether work is genuine, and jobseekers from the European economic area will not receive housing benefit."

As appears from the foregoing statements, the progressive enlargement of the EU was one of the factors driving the policy which underpins the impugned statutory

provisions. Following the accession of Romania and Bulgaria in 2007 other Member States were entitled to derogate from the free movement of the workers of those States for a time limited period of seven years. This transitional arrangement ended on 31 December 2013.

[29] As part of the Government's plan to regulate access to the United Kingdom's social security system, and to combat so-called "*benefit tourism*", the Home Office introduced new measures affecting EEA nationals and returning United Kingdom nationals from 1st January 2014, via the Social Security (Habitual Residence) (Amendment) Regulations 2014, the Jobseeker's Allowance (Habitual Residence) (Amendment) Regulations 2013, and the Housing Benefit (Habitual Residence) (Amendment) Regulations 2014.

[30] In the House of Commons in June 2014 the Secretary of State for Work and Pensions stated:

> "Our reforms have ended a situation in which migrant workers had indefinite access to jobseeking benefits, which we inherited from the previous Labour Government. Since April, we have banned access to housing benefit. From July, migrant workers will have their claims to jobseeker's allowance stopped if they have claimed for six months and cannot show that they have found employment. I intend to tighten this up further still.
> …
>
> I am in discussions with colleagues from various countries in the European Union. Many of them, including the Dutch and the Germans, have made it clear that they essentially support our direction of travel and that some kind of change must be made to the regulations. The German Chancellor made Germany's position clear, saying that the EU is "not a social union" and there cannot be de facto immigration into other EU social systems."

[31] The Jobseeker's Allowance (Habitual Residence) (Amendment) Regulations (NI) 2013 amended the Jobseeker's Allowance Regulations (Northern Ireland) 1996 with effect from 1 January 2014. The Social Security (Habitual Residence) (Amendment) Regulations (Northern Ireland) 2014 came into operation on 31 May 2014. The HB Regulations 2014 came into operation on 1 April 2014, amending the 2006 Regulations. All of these statutory measures were considered and approved by the Northern Ireland Assembly Social Development Committee

[32] In furtherance of its duty under section 75 of the Northern Ireland Act 1998 (*infra*) DFC conducted an equality screening exercise in relation to the "*Removal of Access to Housing benefit for Jobseekers who are not classed as being habitually resident in*

the UK" (considered in greater detail in [103] – [104] *infra).* This was completed on 19th February 2014 and approved on 13th March 2014.

[33] The HB Regulations 2014 mirror the Housing Benefit (Habitual Residence) Amendment Regulations 2014 which apply in Great Britain. Together they gave effect from 1 April 2014 to central Government policy to restrict the availability of certain public benefits to migrant EU citizens. The SSAC reported, with recommendations, on the English measure on 30 June 2014. The Government's response was published on 20 November 2014.

[34] One of SSAC's recommendations in relation to homelessness was that "*the Government, as a matter of urgency by the end of autumn 2014, consider what is needed in order to mitigate these potential unintended and harmful effects and to publish it findings*." The Government responded:

> "6. The Government wishes to deter EEA migrants from coming to the UK if they do not have a firm offer of or realistic chance of securing work. Those who come to the UK to look for work should ensure that they have sufficient resources to pay for their accommodation needs, as well as other support that they or their family may need while here.
>
> 7. The best option for those EEA migrants who are unable to find work, who lack savings or support networks and who are at real risk of ending up destitute is to return home. There is a London reconnections service, funded by the Greater London Authority, and run by the homelessness charity, Thames Reach, which helps vulnerable rough sleepers from the EU return home. Local authorities (LAs) themselves may help reconnect those who are destitute as an alternative to rough sleeping. Further, the Department for Communities and Local Government (DCLG) has funded a voluntary sector led "Before You Go" awareness campaign in home countries about the dangers of coming to the UK without appropriate support such as a job, accommodation or some money in case there are short-term difficulties. This is run by the homelessness charity, Passage."

At paragraphs 20 and 21 the Government further stated:

> "20. We agree with the Committee that EEA migrants should make informed choices before they come to the UK, not after they arrive, as Government policy is that

> migrants should come here in order to contribute to our economy.
>
> 21. We brief our Embassies regularly about changes to migrants' access to benefits so that their communications can inform those citizens who are considering coming to the UK from another country. For example, ahead of introducing the recent changes to EEA migrants' access to benefits, DWP provided tailored information about each measure which has been used by the UK's labour attachés to provide specific advice to the employment services in their countries. This is so that the information given to potential migrants is relevant and reflective of the current position."

Thereafter a House of Commons Briefing Paper was prepared. This examined the background to the changes effected by the 2014 amendments and their likely impact.

[35] Turning to the Northern Irish context, certain aspects of the evidential matrix are reflected in [37] of the judgment of Sir Paul Girvan:

> "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."

[36] Summarising, the measure reflected in the impugned statutory provision, in tandem with the other statutory measures noted above, was designed to protect the UK's benefits system and to discourage those with no established social or economic connection with the UK from migrating from another EU Member State to the UK without a firm offer of employment or imminent prospects of work. Notably the concerns prompting these measures were not confined to the UK Government. Rather they were shared by the governments of other Member States, as

demonstrated by the joint letter from the UK, Austria, Germany and Netherlands Governments to the EU Council of Ministers and EU Commission relating to the burdens imposed by EU migrants on the welfare systems of host countries and exhorting changes to the relevant EU rules. Furthermore, the habitual residence requirement, first introduced in the UK in 2004, was common to certain other EU Member States.

The Appellant's Case

[37] The judge noted that the Order 53 Statement had, via several amendments, evolved from time to time. He lamented the "*lack of clarity in identifying the relevant and core issues*". Based on the ultimate incarnation of the Order 53 Statement and the devolution notice under Schedule 10 to the Northern Ireland Act 1998, the judge recorded, at [5], the essential factual basis of the Appellant's claim namely that from an unspecified date *circa* May 2017 until 07 September 2017 he had been street homeless and, further, claimed to be at risk of a recurrence of this predicament. This was claimed to have arisen from the operation of the impugned statutory provision and the Appellant's consequential inability to qualify for HB. The judge stated at [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."

[38] As recorded by the judge, the Appellant complained that his rights under Articles 2, 3 and 8 ECHR had been infringed during the aforementioned period. Next the judge noted the separate complaint of unlawful discrimination against the Appellant contrary to Article 14 ECHR within the ambit of Articles 2, 3 and 8 and Article 1 of The First Protocol. The judge then recorded that the Appellant's case had a third element, namely an asserted breach of section 75 of the Northern Ireland Act 1998. We shall examine each of these challenges in turn.

The Article 3 ECHR Claim

[39] It is clear from the Notice of Appeal, the joint "*Statement of Legal Issues*" (compiled pursuant to the direction of this court) and the submissions on behalf of the Appellant that of the three ECHR rights featuring in the trial judge's summary (*supra*) this appeal is confined to the judge's rejection of the Appellant's Article 3 ECHR case only. The Appellant's case embodies elements of the general and the particular, as the following passage in counsels' skeleton argument demonstrates:

> "The Appellant's case is that a failure by the State to ensure rough sleeping generally, and in his particular case, is avoidable amounts to inhuman and degrading treatment."

Notably, the Appellant founds his Article 3 case on culpable omission, to be contrasted with the deliberate infliction by the State of proscribed treatment. Two particular features of his asserted vulnerability are highlighted: first, the diagnosis of alcohol dependency syndrome; and, second, his referral to mental health services following a suicide attempt (neither being dated).

[40] There is authoritative guidance on the correct approach to this species of Article 3 complaint. In *R (Limbuela) v Secretary of State for the Home Department* [2006] 1 AC 396 the three litigants were asylum claimants who were refused the statutory benefit known as asylum support (under s 85 of the Immigration and Asylum Act 1999), dedicated to destitute asylum claimants, on the basis of the lateness of their asylum claims, by the exercise of a separate statutory power contained in s55 of the Nationality, Immigration and Asylum Act 2002. The impugned decisions were a species of certification. The claimants were in receipt of no other form of public or adequate charitable benefit or support and claimed to be destitute. They had either been sleeping in the open or were faced with the imminent prospect of having to do so. They were the subject of the separate statutory prohibition on asylum claimants taking employment and were entirely reliant on charitable sources, who had made clear that they were not sufficiently resourced to adequately help the members of this group. The claimants asserted a breach of Article 3 ECHR in these circumstances. The claims succeeded at first instance (a decision upheld on appeal, by a majority), the court concluding that based on the evidence there was an imminent prospect that the claimants would find themselves the subject of inhuman or degrading treatment.

[41] The Secretary of State's appeal to the UK Supreme Court was dismissed unanimously. The court held that a public authority was obliged to refrain from conduct which would breach the absolute prohibition enshrined in Art 3. A decision to refuse payment of the benefit was an intentionally inflicted act. It was not necessary that the degree of severity which amounted to a breach of Art 3 had already been reached before the certification power was capable of being exercised. In order to determine whether the margin had been crossed it was necessary to ask whether the treatment to which the asylum claimant was being subjected by the entire package of restrictions and deprivations that surrounded him was so severe that it could properly be described as inhuman or degrading treatment. A state of destitution that qualified the asylum claimant for support under s 95 of the 1999 Act would not be enough. A proactive duty arose as soon as the asylum applicant made clear that there was an imminent prospect of a breach of Art 3. This duty was grounded in s 6 of the Human Rights Act. The factors which would come into play in the assessment included the asylum applicant's gender and state of health, the extent to which he or she had explored all avenues of assistance that might be expected to be available and the length of time that had been spent and was likely to be spent without the required means of support. The exposure to the elements that resulted from rough sleeping, the risks to health and safety thereby generated, the effects of lack of access to toilet and washing facilities and the humiliation and sense

of despair that attached to those who suffered from deprivations of that kind were all relevant.

[42] All of the judgments stressed the restrictions placed on asylum seekers, which meant that if they found themselves destitute they were generally prohibited from seeking work to support themselves. There was also rejection of the Government's suggested 'wait and see' test: an imminent prospect of suffering proscribed Art 3 treatment was the applicable criterion. The Supreme Court offered no single universal test but suggested that if there were persuasive evidence that a late asylum applicant was obliged to sleep in the street, save perhaps for a short and foreseeably finite period, or was seriously hungry, or unable to satisfy the most basic requirements of hygiene the threshold would, in the ordinary way, be traversed. In passing, some commentators have suggested that this decision broadened the scope of inhuman and degrading treatment in Art 3 beyond the ECtHR's interpretation, as it overtook *Chapham v UK* [2001] 33 EHRR 399 (see for example Palmer, A Wrong Turning: Art 3 ECHR and Proportionality, 65 CLJ 438)

[43] Lord Bingham of Cornhill addressed the Art 3 threshold in these terms, at [7]:

> "Treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs to any human being. As in all Article 3 cases, the treatment, to be proscribed, must achieve a minimum standard of severity and 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 3. 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 Bingham added at [9]:

> "It is not in my opinion possible to formulate any simple test applicable in all cases. But if there were persuasive evidence that a late applicant was obliged to sleep in the street, save perhaps for a short and foreseeably finite period, or was seriously hungry or unable to satisfy the most basic requirements of hygiene, the threshold would, in the ordinary way, be crossed."

[A "late applicant" denotes an asylum claimant whose application for refugee status had in the Government's opinion been unreasonably delayed, the result being the unavailability of the asylum support benefit.]

[44] The speech of Lord Hope of Craighead identifies three central elements of Article 3: the absolute prohibition on State infliction of any of the specified forms of proscribed treatment; subjecting the State to "*a primarily negative obligation ….. to refrain from inflicting serious harm on persons within their jurisdiction*"; and, in appropriate contexts, the imposition of a positive obligation on the State "*…. to do something to prevent its deliberate acts which would otherwise be lawful from amounting to ill treatment of the kind struck at by* [Article 3]". See [46] – [47]. At [54], reflecting on the jurisprudence of the ECtHR, Lord Hope stated:

> "[The ECtHR] has also said that the assessment of this minimum is relative, as it depends on all the circumstances of the case such as the nature and context of the treatment or punishment that is in issue. The fact is that it is impossible by a simple definition to embrace all human conditions that will engage Article 3."

At [55] Lord Hope added that in determining whether the threshold test is satisfied, the court will be "*… taking all the facts into account ….*" This theme is also clear in [57]:

> "Withdrawal of support will not in itself amount to treatment which is inhuman or degrading in breach of the asylum seeker's Article 3 Convention right. But it will do so once the margin is crossed between destitution within the meaning of [the statute] and the condition that results from inhuman or degrading treatment within the meaning of [Article 3]."

[45] Lord Brown, for his part, eschewed the categorisation of the State's obligations and conduct within the Article 3 framework as negative or positive, active or passive. He stated at [92]:

> "*The* real issue in all these cases is whether the State is properly to be regarded as responsible for the harm inflicted (or threatened) upon the victim."

He added at [93] and [94]:

> "In particular this seems to me the better approach in cases like the present where the essence of the complaint is that the victims have been subjected to degrading treatment …
> In cases of alleged degrading treatment the subjective attention of those responsible for the treatment (whether by action or inaction) will often be relevant. What was the motivation for the treatment? Was its object to humiliate or debase?"

Lord Brown, finally, acknowledged the special situation of asylum claimants, at [100]:

> "…. asylum seekers, it should be remembered, are exercising their vital right to claim refugee status and meantime are entitled to be here. Critically, moreover, unlike UK nationals, they have no entitlement whatever to other state benefits."

[46] The fact sensitive nature of the inquiry to be conducted in every Art 3 case is clear from [55] of the speech of Lord Hope and decisions of the ECtHR such as *O'Rourke v United Kingdom* [Application No 39022/97], noted by Lord Hope at [60] (and see further [62] *infra*). This theme also emerges in the judgments of Lord Scott of Foscote, at [70] and Baroness Hale of Richmond at [78] who, referring to "*rooflessness*" and "*cashlessness*", stated:

> "… 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."

She added, at [79], that there can be no "*hard and fast rules*", while concurring with the "*practical guidance*" contained in [7] of the speech of Lord Bingham (noted above).

[47] In cases where treatment proscribed by Article 3 ECHR has not yet occurred, but may be looming, there is a well-established test to be applied. It is borrowed from the Article 2 jurisprudence. See, for example, *Re E* [2008] UKHL 66 (*infra*). The test is whether the asserted risk of falling prey to the proscribed treatment is "*real and immediate*". As decisions such as *Rabone v Pennine NHS Trust* [2012] 2 AC 72 make clear, a risk is "*real*" where it is "*a substantial or significant risk and not a remote or fanciful one*": per Lord Dyson JSC at [38]. In the same case the Supreme Court endorsed Lord Carswell's analysis in *In Re Officer L* [2007] 1 WLR 2135, at [20], that an "*immediate*" risk is one that is "*present and continuing*". Lord Dyson elaborated at [39]:

> "The idea is to focus on a risk which is present at the time of the alleged breach of duty and not a risk that will arise at some time in the future."

The main decision in this jurisdiction is *In the Matter of an Application by Officers C, D, H and R* [2012] NICA 47, considered in *Re Jordan's Application* [2014] NIQB 11 at [111] – [114].

[48] The decision in *Rabone* also draws attention to the test to be applied in Art 2 (and, by extension, Art 3) cases where the so-called "*positive*" obligation, which requires public authorities to take appropriate steps to safeguard the lives of those

within their jurisdiction, is in play. This triggers the application of the so-called "*Osman*" duty: see *Osman v United Kingdom* [2000] 29 EHRR 245 at [115]. In *Watts v United Kingdom* [2010] 51 EHRR SE 6 the ECtHR framed the governing test in these terms at [83]:

> "For the court to find a violation of the positive obligation to protect life, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The Court reiterates that the scope of any positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, including in respect of the operational choices which must be made in terms of priorities and resources. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising."

[49] The decision in *Re E* is worthy of note as this was an Art 3 positive obligations case. Baroness Hale, having cited with approval the statement of Lord Brown in *Limbuela* at [92] (*supra*) continued at [10]:

> "… there must be some distinction between the scope of the State's duty not to take life or ill treat people in a way which falls foul of Article 3 and its duty to protect people from the harm which others may do to them. In the one case there is an absolute duty not to do it. In the other, there is a duty to do what is reasonable in all the circumstances to protect people from a real and immediate risk of harm. Both duties may be described as absolute but their content is different."

The speech of Lord Carswell makes clear, at [44], what might be termed the "bridge" linking Art 2 with Art 3 in cases where the so-called "positive" State obligation is in play. At [45] Lord Carswell cited in full *Osman*, paragraphs [115] – [116], observing:

> "The extent of the positive obligation obviously cannot be regarded as absolute as the negative obligation."

Lord Carswell continued at [48]:

> "It is in my opinion quite clear from [116] of **Osman** that the obligation placed upon the authorities in an Article 2

> case is to do all that could reasonably be expected of them to avoid a real and immediate risk to life, once they have or ought to have knowledge of the existence of the risk. **I cannot suppose that the obligation under Article 3 is different in kind and the Strasbourg jurisprudence confirms this ….**"
>
> [Emphasis added.]

At [50] and [51] Lord Carswell referred to the "*principle of reasonableness*" and the "*test of reasonableness*".

[50] The Appellant's Article 3 ECHR case is that this is a positive obligations case and not one complaining of the deliberate State infliction of proscribed treatment. We consider that the preponderance of judicial views in the cases noted *ante* (and in others) favours the application of the prism of positive and negative obligations. Furthermore the jurisprudence of the ECtHR is replete with illustrations of the positive obligation on the State to take proactive steps to prevent the infliction of proscribed treatment, demonstrated in decisions such as *A v United Kingdom* [1999] 27 EHRR 611, *Z v United Kingdom* [2001] 34 EHRR 97 and *E v United Kingdom* [2003] EHRR 519. In domestic law other prominent decisions include *R(Munjaz) v Ashworth Hospital Authority* [2005] UKHL 58 (at [78] – [80] especially) and *Secretary of State for the Home Department v AP* [2010] UKSC 26. While it is clear from decisions such as *R (Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364 that the distinction between the State's negative and positive obligations may in certain contexts be challenging, the case presented to this court was based firmly on an asserted breach of the respondent Departments' positive obligations to the Appellant. This will become particularly clear when we consider the arguments based on the Citizens Directive.

[51] At this juncture we turn to consider the EU law dimension of the Appellant's first challenge. The main provisions and principles are outlined at [13] – [20] above. Article 24(2) of the Citizens Directive unequivocally empowers every Member State of the EU to derogate from the general principle of equality of treatment specified in Article 24(1) in a manner which could foreseeably give rise to significant hardship and suffering for the migrant EU citizen jobseeker in the host Member State during a not insubstantial period. Any reaction of initial surprise or concern is quickly tempered when one takes into account the other provisions and principles of the Directive highlighted above. In particular and inexhaustively:

(i) The freedom of movement within the EU territory of the EU citizen jobseeker is subject to such limitations and conditions as are specified.

(ii) The migrant EU citizen exercising free movement rights should not become an unreasonable burden on the social assistance system of the host Member State during the initial period of residence particularly.

(iii) It is a basic principle of EU law that persons who depend on social assistance will be taken care of in their own Member State: see *Patmalniece v SSHDWP* at [80], *infra.*

(iv) From the above principles and the Directive as a whole it is not difficult to identify a further, implied principle that the migrant EU citizen jobseeker is expected to be self-sufficient during his initial period of residence in the host Member State.

[52] Some elaboration of (iv) above is appropriate. If the migrant EU citizen jobseeker, for whatever reason, has not made the necessary plans and arrangements for short term self-sufficiency this will not automatically preclude the exercise of the right of free movement. However, the presumptively free choice exercised, both initially and subsequently, coupled with that person's ability to escape from their predicament, will qualify as material factors to be reckoned in the court's evaluation of all relevant circumstances in the event of an Article 3 complaint materialising. The migrating EU citizen jobseeker is, as the judge stated, voluntarily resident in the host Member State. The only qualification which we would make to this proposition is to add the words "*as a general rule*", to cater for possible cases of involuntary or unavoidable presence.

[53] Mr Southey sought to argue that within the words "*where appropriate*" there is an unexpressed qualification that the derogation permitted by Article 24(2) imposes on the host Member State a positive obligation to provide (unspecified) support measures avoiding homelessness for the migrant EU citizen jobseeker during the initial period of residence. We identify no merit in this argument. We consider "*where appropriate*" to be an unremarkable, unsophisticated phrase to be accorded its ordinary and natural meaning. No principle of EU legislative construction to the contrary was advanced. We consider it clear that in this specific context the words "*where appropriate*" simply serve to draw attention to, and differentiate, the two separate periods of time in question. The draftsman could equally have used equivalent terms such as "*as the case may be*", "*alternatively*" or "*where applicable*". Insofar as this construction requires any reinforcement it is readily provided by the French text ("*le cas echeant*"). We have also taken note of those other provisions of the Citizens Directive where this linguistic tool is employed.

[54] For the same reasons we discern no merit in Mr Southey's further submission that Article 24(2) prohibits adoption of the impugned statutory provision. We do, however, consider that there is an implied safety net in Article 24(2). This provision neither expressly nor impliedly absolves Member States of their obligations under Article 3 ECHR and its EU Charter equivalent, Article 4 which, of course, is embedded in a measure of constitutionally supreme EU law. In short, the derogation which Article 24(2) permits is subject to Member States' observance of these independent obligations (and, logically, other material ECHR and Charter obligations), each entailing the protection of a fundamental right.

[55] Certain generalisations about street homelessness are readily accepted by this court. Those who experience this plight suffer multiple deprivations. They are exposed to significant physical and mental health risks. If they have pre-existing mental or physical vulnerabilities or disabilities, these are likely to be exacerbated. Uncertainty, fear, humiliation and anxiety will be typical features. The trial judge adopted, broadly, the same approach, at [7] of his judgment. These reflections, which are general in nature, serve to expose four of the governing principles, interlocking in nature.

[56] First, as stated in *Limbuela*, Art 3 ECHR does not impose on the State a general public duty to house the homeless or provide for the destitute (per Lord Bingham at [7]). In this respect, it is appropriate to contrast the express duty in Art 13 of the European Social Charter (a Council of Europe measure) which, arguably, could provide the foundation for a duty of this species if it formed part of the corpus of municipal law:

> **"Article 13 – The right to social and medical assistance**
>
> With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake:
>
> (1) to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;
>
> (2) to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;
>
> (3) to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;
> (4) to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953."

Second, every case will be unavoidably fact sensitive. Third, cases where homelessness or destitution is the result of deliberate action on the part of the State may engage a threshold less exacting in the court's assessment of whether the

offending treatment attains the requisite minimum standard of severity. Fourth, in every case there is an exacting threshold to be overcome in order to determine whether the circumstances of the person concerned have entered the realm of proscribed State treatment.

[57] The trial judge, at [37], considered both the Art 3 ECHR claim of the Appellant individually and migrant EU citizen jobseekers as a group. With regard to the Appellant, he concluded:

> "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."

The judge also addressed extensively the "group" element of the arguments advanced on behalf of the Appellant, at [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 jobseekers 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 jobseekers are not deprived of all benefits as they are entitled to jobseekers 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 "

[58] Focusing firstly on the Appellant's individual Art 3 claim, it is in our view clear that the judge, correctly, applied his mind to a range of material circumstances: the distinction between an EU citizen migrant jobseeker and an asylum claimant; the basic principle of EU law that persons who depend on social assistance will receive appropriate care in their own Member State; the availability of host Member State social assistance following the initial period of three months sojourn; the consideration that migrant EU jobseekers are "*voluntary residents*"; the possibility of some members of this group qualifying for State funded assistance; the functions of the Northern Ireland Housing Executive; the services provided by voluntary support organisations and groups; and, finally, the fact that the Appellant did not seek to bring to the attention of the authorities that he was facing street homelessness or was particularly vulnerable until an advanced date in the narrative (by which stage he had received a substantial backdated payment of JSA).

[59] It is appropriate to elaborate briefly on this latter, purely factual issue. As already noted, the period of street homelessness asserted by the Appellant began on an unspecified date in May 2017 and had an alleged duration of some three to four months, ending on 07 September 2017. The judge made a specific finding that the Appellant had not brought his homelessness to the attention of the authorities until he first claimed HB on 24 September 2017. In compliance with one of the case management directions of this court the parties prepared a joint document identifying any areas of disagreement with the central findings and conclusions of the judge. In the relevant paragraph within this document it is stated that the Appellant "*takes issue with*" this finding. No elaboration, in particular no cross reference to any of the contents of the bundles of evidence, is provided. This was not rectified in any way in the submissions of counsel for the Appellants (Mr Hugh Southey QC, with Mr Malachy Magowan of counsel) at the hearing.

[60] Furthermore, the specific submission of Mr McGleenan QC (with Mr Philip McAteer and Ms Rachel Best, both of counsel), on behalf of the respondent Departments that the Appellant did not claim HB until 23 September 2017 was not

disputed. Indeed, on further probing evidence it is clear that this has the status of an agreed fact. We would add that there is no evidence that the Appellant remained, or became, homeless subsequent to the latter date. Furthermore, when this court conducted a review hearing on 21 June 2019 it was assured by counsel for the Appellant that their client was not homeless. We note further that the Appellant was awarded JSA in respect of *inter alia* the period 08 January to 25 October 2017 – per [6] of the judgment at first instance, - albeit we take cognisance that this was in part backdated.

[61] The schedule provided jointly in compliance with this court's case management directions contains input from all parties. With the exception of the single and limited passage noted in [58] above, the most striking feature of the Appellant's input is its general, abstract content. This in our judgement reflects the intrinsic frailty of the Appellant's individual Article 3 claim. This is reinforced by the notable emphasis in counsels' submissions on the asserted general impact of the impugned statutory provision. Furthermore, as demonstrated above, at the stage when the Appellant first claimed HB he had been in receipt of JSA (backdated by around seven months) for a period of approximately one month. His initial claim for JSA (in November 2016) had been disallowed on the basis of his failure to satisfy the three months residence requirement. However, he received JSA subsequently, backdated to February 2017. It is clear that the delay in making subsequent payments of JSA to him was unrelated to the operation of the impugned statutory provision. They were, rather, attributable to assorted practical and bureaucratic issues. His position was no different from that of any UK national experiencing comparable hurdles and frustrations. The Appellant's arguments did not engage with this analysis.

[62] It is appropriate at this juncture to highlight the correct approach to be adopted by an appellate court. The relevant principles were summarised in the recent decision of this court in ***Kerr v Jamison*** [2019] NICA 48:

> ***"Governing Principles***
>
> [35] Some basic dogma must be recognised at this juncture. This is not a court of first instance. It is rather an appellate court. The adjectives perverse, irrational and aberrant have a legal grounding, being traceable to a series of principles to be derived from the decided cases. The jurisdiction of the Court of Appeal to review findings of both fact and law is clear. See for example *Ulster Chemists v Hemsborough* [1957] NI 185 at [186] – [7]. Where invited to review findings of primary fact or inferences the appellate court will attribute weight to the consideration that the trial judge was able to hear and see a witness and was thus advantaged in matters such as assessment of demeanour, consistency and credibility: see for example

Kitson v Black [1976] 1 NIJB at 5 – 7. The review of the appellate court is more extensive where findings are made at first instance on the basis of documentary and/or real evidence. However, even where the primary facts are disputed the appellate court will not overturn the judge's findings and conclusions merely because it might have decided differently: *White v DOE* [1988] 5 NIJB 1. The deference of the appellate court will of course be less appropriate where it can be demonstrated that the first instance judge misunderstood or misapplied the facts. See generally *Northern Ireland Railways v Tweed* [1982] 15 NIJB at [10]–[11].

[36] There is a valuable exposition of the role of this court in *Heaney v McAvoy* [2018] NICA 4 at [17]–[19]:

> '[17] Generally an appeal is by way of rehearing. The rehearing is conducted by way of review of the trial, including any documentary evidence, and the trial testimony is not re-heard. In most appeals the hearing consists entirely of submissions by the parties and questions put to the parties by the judges. New evidence is not generally admissible unless it can be shown that it is relevant and that the evidence could not with reasonable diligence have been brought before the original trial.
>
> [18] The Court of Appeal is entitled to review findings of fact as well as of law but the burden of proof is on the appellant to show that the trial judge's decision of fact is wrong. On a review of findings made by a judge at first instance, the rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The first instance hearing on the merits should be the main event rather than a try-out on the road to an appeal.

> [19] Even where factual findings and the inferences drawn from them are made on the basis of affidavit evidence and contemporaneous documents without oral testimony, the first instance judgment provides a template and the assessment of the factual issues by an appellate court can be a very different exercise. Impressions formed by a judge approaching the matter for the first time may be more reliable than the concentration on the appellate challenge to factual findings. Reticence on the part of the appellate court, although perhaps not as strong where no oral evidence has been given, remains cogent (see DB v Chief Constable [2017] UKSC 7).'"

DB was, in common with this case, a judicial review appeal. Pausing to review the agreed statement of legal issues at this juncture, it is apparent that the only aspect of the trial judge's assessment of evidential and factual matters raised by the Appellant is that of "*whether the matters relied upon by the learned judge were sufficient to prevent a violation of Article 3*". All of the judge's assessments of factual matters were undertaken in the litigation context described by him in a little detail in [2] and at the beginning of [6] of his judgment. The matters highlighted in these passages serve to illuminate the underpinning of the *DB* principle.

[63] The argument of Mr Southey faintly questioned the trial judge's citation of *O'Rourke v United Kingdom* [Application No 39022/97, 26 June 2001]. There the ECtHR declared inadmissible the applicant's complaint that he had suffered a violation of Art 3 ECHR through having had to sleep rough on the streets in consequence of his eviction from local authority accommodation. There are two noteworthy features of the Court's decision. First, it held that his suffering post-eviction did not attain the level required to engage Art 3. Second, drawing attention to the applicant's refusal of subsequent offers of both temporary and permanent accommodation the court reasoned that he was largely responsible for the deterioration in his health which had occurred (and, by reasonable extension, the circumstances of which he was complaining). We consider that this decision illustrates two entrenched principles. First, the inquiry to be carried out in every Art 3 case will be intensely fact sensitive. Second, a person's failure or refusal to avail of avoidance or mitigation measures will form part of the overall matrix to be evaluated by the court in its determination of whether the Art 3 threshold is overcome in any given case.

[64] There was no serious suggestion that the judge failed to formulate the correct legal test. For the reasons elaborated we conclude that his application of this test

was unimpeachable. In particular there can be no criticism of the facts, factors and circumstances which he identified as relevant.

[65] The Appellant's "group" Article 3 challenge must fail, for essentially the same reasons. In the agreed statement of legal issues the only expressed challenge in this respect entails the contention that the judge erred in his description of migrant EU citizen jobseekers as "*voluntary residents*" in the host Member State. This court can discern no merit in the argument that this entails an error of law on the part of the judge. It is abundantly clear that the judge did not employ this term in any legal or technical sense. To describe a migrant EU citizen jobseeker in general terms as someone who is voluntarily resident on the territory of a host Member State is a purely factual statement. We accept that in certain individual circumstances this factual description might not be apt: for example the migrant EU jobseeker who should objectively and rationally return to his country of origin but is by mental incapacity incapable of rational decision making. However, its generality cannot be impeached. Furthermore, there is no suggestion that it is anything other than unerringly correct in the case of this Appellant. For the reasons elaborated this court rejects all elements of the Appellant's Art 3 ECHR claim.

The Article 14 ECHR Claim

[66] The second element of the Appellant's case is that in consequence of the impugned statutory provision he has been the victim of unlawful discrimination contrary to Art 14 ECHR within the ambit of Art 3 and Art 1 of The First Protocol. The Appellant's case has at all times been one of indirect discrimination. In mid – hearing an application to amend to add a separate complaint of direct discrimination was made, without any draft amended pleading. The court refused this on the grounds of lack of advance notice to the respondent Departments or the court, egregious lateness and a lack of *prima facie* merit. The court also recalled, as we do now, that in his opening submissions Mr Southey stated that "*the ultimate issue in this appeal is proportionality*".

The Article 14 ECHR Framework

[67] Every claim of this kind must be examined in an orderly and structured way. This is illustrated most recently in the Northern Irish appeal of *Re McLaughlin* [2018] UKSC 48. In *Re Lennon's Application* [2019] NIQB 68 (which followed soon thereafter) the High Court, taking its cue from the *McLaughlin* "template", formulated a series of questions which, with some minor adaptation to the present appellate context, are the following:

(i) What is the status of the Appellant?

(ii) Can the Appellant lay claim to an "*other status*" within the embrace of Article 14 ECHR? (recognising the overlap of (i) and (ii)?

(iii) If the "*other status*" hurdle is overcome, is the Appellant the victim of differential treatment when compared with others in an analogous situation?

(iv) Does the Appellant's case fall within the ambit of any of the substantive Convention rights invoked?

(v) If the above hurdles are overcome, is such differential treatment on the ground of the Appellant's Article 14 protected status?

(vi) If all of the foregoing hurdles are overcome, is the differential treatment justified: more specifically, has the public authority concerned discharged its burden of establishing justification? And does the application of the test of proportionality to the professed legitimate aim satisfy the benchmark of manifestly without reasonable foundation?

(*Lennon* at [34])

[68] In *Lennon* the court further stated at [43]:

> "It appears to me that one can at almost any stage of a discrimination analysis introduce the salutary reminder of Lord Nicholls in *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173 at paragraph 3:
>
> > '… the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact'."

This can be linked to the analysis of Lord Nicholls in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 at [10], which was that it was impossible to answer the "comparator" question without deciding why the complainant was

treated in the offending way: fundamentally, this would raise the question of whether such treatment was on an impermissible ground. The passage quoted from *Carson* is readily traceable to [10] of *Shamoon* followed by [11]:

> "This analysis seems to me to point to the conclusion that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others."

Reference to the observations of Lady Hale in *R (DA and Others) v Secretary of State for Work and Pensions* [2019] UKSC 21 ("*DA*"), at [132] – [133] also seems apposite:

> "These are cases about equality and equality is the most complicated and difficult of all the fundamental rights, even without the delicate context of entitlement to welfare benefits. A professional lifetime of struggling with equality issues has persuaded me that some degree of complexity is inevitable and we should not apologise for it ….
>
> The delicacy arises because these are cases about equality in an area, not principally of social policy, but of economic policy."

Lady Hale added that *McLaughlin* was in her view a "*more clear-cut*" case.

Other Status and Ambit

[69] The Appellant cannot lay claim to any expressed status within Art 14. There is no CJEU decision or domestic decision binding on this court on whether the members of the notional EU wide group of migrant EU citizen jobseekers possess an "*other status*" within the embrace of Art 14 ECHR. Furthermore the status on which he relies does not partake of a personal characteristic such as race or gender and is at some distance from the core of Art 14 in consequence. While recognising that this issue may require more detailed examination in a suitable future case, this court is prepared to assume, without formally deciding, this in the Appellant's favour. The court will similarly assume that the Appellant's case satisfies the ambit test vis-à-vis

the two substantive Convention rights invoked. In this way the court will concentrate its attentions on what lies at the heart of this discrete claim, namely the inter-related issues of legitimate aim and proportionality.

Legitimate Aim

[70] At [23] – [36] above the court has devoted some attention to the evidence of the respondent Departments relating to the aims underpinning the impugned statutory provision. Consistent with his submission noted in [66] above, Mr Southey accepted in argument that the aim underpinning the impugned statutory provision is a legitimate one. Notwithstanding this concession we consider it appropriate to bring definition to the aim. Phrases such as "*benefit tourism*" are, in this context, mere political shorthand or jargon. The aim is the legitimate one of seeking to protect public finances by endeavouring to prevent their abuse and promoting the social and economic integration of UK residents. To borrow a familiar term, the impugned statutory provision seeks to protect the economic and social wellbeing of the country. We consider this aim to be harmonious with the principles and provisions of the Citizens Directive highlighted above. We refer also to our anterior analysis in [36] hereof. Its legitimacy is beyond plausible dispute.

[71] The critical question therefore becomes: is the impugned statutory provision a proportionate means of pursuing the legitimate aim? The test to be applied in the court's determination of this issue is found in the recent decision of the Supreme Court in *DA* (*supra*).

Proportionality: manifestly without reasonable foundation

[72] *DA* represents the most comprehensive recent exposition by the Supreme Court of the correct approach to Art 14 ECHR cases, providing welcome clarity on certain important issues. In the context of the instant proceedings its most arresting feature is the unequivocal espousal by the majority of the "manifestly without reasonable foundation" test in the determination of the issue of justification in Art 14 cases. The decision also makes a contribution to the frequently challenging issues of "other status" and comparators. There is much learning in the five judgments delivered.

[73] Lord Wilson, delivering the main judgment of the majority, suggested that where the court, in a Convention context, inquiries into the justification of the effect of a measure of economic or social policy and, more specifically, the question of fair balance there are two possible approaches, namely the court answers the question for itself or applies the test of manifestly without reasonable foundation: see [64]. Lord Wilson's espousal of the second of these approaches was expressed in trenchant terms: see [65]. This is followed by an important passage in [66]:

> "When the state puts forward its reasons for having countenanced the adverse treatment, it establishes justification for it unless the complainant demonstrates

> that it was manifestly without reasonable foundation. But reference in this context to any burden, in particular, to a burden of proof, is more theoretical than real. The court will proactively examine whether the foundation is reasonable; and it is fanciful to contemplate its concluding that, although the state had failed to persuade the court that it was reasonable, the claim failed because the complainant had failed to persuade the court that it was manifestly unreasonable."

[74] Lords Carnwath and Hodge, in separate majority judgments, concurred with Lord Wilson's endorsement of the test of manifestly without reasonable foundation. As Lords Reed and Hughes agreed with Lord Carnwath, it follows that this test was endorsed by five of the seven members of the Court. In passing, the very recent consideration of this issue by a Chamber of the ECtHR, in *JD & A v The United Kingdom (*Applications Nos 32949/17 and 34614/17), a 5/2 majority decision, did not feature in the parties' arguments. The majority confined the "manifestly without reasonable foundation" test to contexts where "*... an alleged difference in treatment resulted from a transitional measure forming part of a scheme carried out in order to correct an inequality*" (at [88]). As the robust joint dissenting judgment demonstrates this may prove controversial and will, predictably, feature in future decisions of the UKSC and the Grand Chamber. Our decision in this case is made in a context shaped by s 3(1) of the Human Rights Act and the doctrine of precedent whereby this court is bound by the decision in *DA.*

[75] The dissenting judgments of Lady Hale and Lord Kerr are described by Lord Wilson as "powerful". Both espouse a more expansive constitutional role for the court in cases where alleged discriminatory treatment arises in the field of government economic policy. They highlighted in particular that the ECtHR's adoption of the margin of appreciation in cases of this kind need not necessarily be replicated at the level of the domestic court. This is expressed with particular clarity at paragraphs [167]-[171] of the judgment of Lord Kerr. In holding that the statutory measures under challenge constituted an unjustifiable interference with the Appellant's rights under Art 8 ECHR and Art 1 of The First Protocol, the dissenting judges concluded, in the words of Lady Hale at [157], that:

> "…the weight of the evidence shows that a fair balance has not been struck between the interests of the community and the interests of the children concerned and their parents."

[76] The submissions of the parties concentrated on three cases in particular. Chronologically, the first is *European Commission v United Kingdom* [2016] 1 WLR 5049. This concerned a measure of domestic UK legislation which required persons claiming certain social security benefits, namely child benefit and child tax credit, to

have a right to reside in the UK. The CJEU ruled that this was compatible with the relevant provisions of EU law, stating at [68]:

> "It is clear from the court's case law that there is nothing to prevent, in principle, the grant of social benefits to Union citizens who are not economically active being made subject to the requirement that those citizens fulfil the conditions for possessing a right to reside lawfully in the host Member State."

The alternative contention of the Commission was that the impugned measure of domestic UK law gave rise to direct, or indirect, discrimination prohibited by the EU measure in question. The CJEU stated the following at [76]:

> "… a host Member State which, for the purpose of granting social benefits, such as the social benefits at issue, requires a national of another Member State to be residing in its territory lawfully commits indirect discrimination."

[77] The impugned domestic legal rule was considered to be indirectly discriminatory as a residence condition would be more easily satisfied by UK nationals than those of other Member States: see [78]. The court then examined the question of whether such indirect discrimination was "*… appropriate for securing the attainment of a legitimate objective and* [does not] *go beyond what is necessary to attain that objective*" see [79]. The legitimate aim identified was that of protecting public finances, the court stating at [80]:

> "It is clear from the court's case law the need to protect the finances of the host Member State justifies in principle the possibility of checking whether residence is lawful when a social benefit is granted in particular to persons from other Member States who are not economically active, as such grant could have consequences for the overall level of assistance which may be accorded by that state …."

The court held that the impugned checks, which were not systematic but dictated by the circumstances of individual cases, were compliant with Article 14(2) of the Citizens Directive (see [17] *supra*) and proportionate.

[78] The second of the three cases is *Patmalniece v Secretary of State for Work and Pensions* [2011] 1 WLR 783. There a retired EU citizen, a Latvian national resident in the UK, was refused State pension credit, a means tested non-contributory benefit, on the ground that she could not satisfy the statutory test of residence. The ultimate outcome was the affirmation of this decision. The issues were indirect discrimination, legitimate aim and proportionality. The TFEU provisions in play

were Arts 21, 42 and 45. Certain material provisions of secondary EU law were also engaged. In considering the complaint of direct discrimination, Lord Hope, at [27]-[28] explained in some detail how the effect of the impugned measure of domestic legislation was that not all UK nationals would be able to meet the statutory test of habitual residence, particularly those returning to the UK following a lengthy sojourn abroad. Lord Hope concluded, at [35], that the domestic legal rule was indirectly discriminatory as it was more likely to be satisfied by a UK national than a national of another Member State. Accordingly, justification was required.

[79] The purpose (or legitimate aim) in play was, distilled from the Secretary of State's evidence thus (see [38]):

> "The underlying purpose was said to be to safeguard the United Kingdom's social security system from exploitation by people who wished to come to this country not to work but to live off income-related benefits, while allowing those who come here genuinely to work to have access to them: para 4 of Cm 6181. The purpose of the habitual residence test was to prevent benefit tourism. It was believed to be not unreasonable to expect people who were not economically active, whatever their nationality, to show that they had decided to live indefinitely in the United Kingdom and had a right to reside here before being entitled to benefits funded by the UK tax-payer: paras 13-17. In para 45 he gave this further explanation:
>
> > 'As already explained, the Government considers that it is not unreasonable to concentrate benefits on people who have a particularly close connection with the UK or to expect people to have a right to reside in the UK before they become entitled to income-related benefits funded by the UK tax-payer. The EC Directives governing the right of those who are economically inactive to reside in other member states have been in place since the early 1990s. Before the current Immigration (European Economic Area) Regulations 2000, the Immigration (EEA) Order 1994 made clear – in line with those Directives – that EEA nationals who were economically inactive (for example, retired people) had to have sufficient

> resources to avoid their becoming a burden on our social assistance system in order to be entitled to reside in the UK without having leave to remain. The Government's proposals merely seek to bring the income-related benefit rules into line with this long-standing requirement'."

The Secretary of State's justification was framed in the following terms at [41]:

> "The justification that was given in para 45 of the Secretary of State's statement is repeated in the agreed Statement of Facts and Issues, para 33:
>
> "The justification advanced by [the Secretary of State] for the discriminatory effect of regulation 2 of the 2002 Regulations is to protect the resources of the United Kingdom by refusing means-tested benefits to non-economic European Union migrants who cannot support themselves and that there is a principle of EU law that Member States were entitled not to grant social assistance to non-economically active nationals of other EU Member States."

A lack of social integration, in addition to a lack of economic integration, also featured in the justification: see [42].

[80] Lord Hope continued his assessment of the Government's justification at [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 … this is a legitimate reason for imposing the right of residence test … 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."

He continued at [48]:

> "The justification is founded on the principle that those who are entitled to claim social assistance in the host Member State should have achieved a genuine economic tie with it or a sufficient degree of social integration as a pre-condition for entitlement to it."

Lord Hope reasoned further at [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 economically or socially integrated with the host Member State should have access to its social assistance system … 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."

[81] Lord Hope concluded that justification unrelated to nationality had been established. His broader conclusion was that both legitimate aim and proportionality had been established. Baroness Hale expressed her agreement with Lord Hope in these terms at [103]:

> "If nationals of one Member State have the right to move to another Member State under European Union 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."

[82] The third of this trilogy of cases is *Mirga v Secretary of State for Work and Pensions* [2016] UKSC 1. There one of the Appellants was an EU citizen, a national of Poland, whose application for income support was refused on the ground that she could not satisfy the statutory requirement of having a right of residence in the UK. Lord Neuberger, with whom all members of the court agreed, stated at [46]:

> "… the [Citizens 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."

The court noted the decision of the Grand Chamber of the CJEU in *Dano v Job Centre Leipzig* [2015] 1 WLR 2519 that a right of residence under the Citizens Directive is a lawful prerequisite to nationals of other Member States qualifying for certain social assistance benefits. To like effect was the decision in *Alimanovic* [2016] 2 WLR 208.

[83] It is evident that, for Lord Neuberger, the most important consideration was that the free movement right conferred by Article 21(1) TFEU is qualified in nature: it is expressed to be "*subject to the limitations and conditions laid down in the Treaties and the measures adopted to give them effect*" (see [20] *supra*). His pithy statement at [54] is illuminating:

> "… a Union citizen can claim equal treatment with nationals of a country, at least in relation to social assistance, only if he or she can satisfy the conditions for lawful residence in that country."

Adding:

> "Thus, it was confirmed [in *Dano* and *Alimanovic*] that Article 24(2) of the 2004 Directive was, in effect, a valid exception to the principle of non-discrimination."

[84] Lord Neuberger, finally, considered – and rejected – both Appellants' challenges based on proportionality. He stated at [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 (as is sadly the position of Ms Mirga and Mr Samin), 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."

This passage also makes clear that legislative measures of the kind under challenge in this appeal may legitimately be addressed to groups and provide what might be termed "*group*" solutions for the mischief to which the legitimate aim is directed.

[85] The preceding *excursus* through the three cases which featured most prominently in the parties' arguments on this element of the Appellant's case points towards the conclusion that they provide strong support for the legitimate aim and

proportionality advanced by the respondent Departments. There are, of course, differences. However, these are comfortably outweighed by the material parallels, both factual and legal. Mr McGleenan submitted that these decisions, *Patmalniece* in particular, confound the Appellant's Art 14 ECHR case.

[86] Given that the differential treatment asserted by the Appellant pursues a legitimate aim the next question is whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. The ECtHR has stated repeatedly that differential treatment must "*… strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention*" (see, for example *Belgium Linguistic Case No 2* [1968] 1 EHRR 252 at [9]).

[87] Mr Southey submitted that a measure is not proportionate if a less restrictive and less intrusive device which is equally effective is available. The argument on this was extremely limited. This court is cognisant of decisions in which this argument has featured. The single illustration of *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, at [2] – [27] especially (per Lord Sumption JSC) will suffice in this context. No specific cases were opened in support of counsel's argument. While there was a brief reference to *R (Lumdon) v Legal Services Board* [2015] UKSC 41 in the skeleton argument this was not developed. The court has taken note of the Supreme Court's examination of the "less restrictive alternative" principle at [55] – [67] especially. The Appellant's argument did not invoke any of the specific categories identified in the analysis of Lord Reed. The absence of absolute or rigid legal rules in Lord Reed's exposition is noteworthy. Thus it has been held that even where a non-discriminatory alternative mechanism capable of achieving the same aim is demonstrated this is not *per se* determinative of proportionality: see for example *Inze v Austria* [1987] 10 EHRR 394 at [44] which decided that it was one of the factors to be weighed in the balance of the broad matrix. The particular context is invariably of critical importance.

[88] The court, taking this argument at its zenith and recognising that the Appellant does not bear any burden of proof in this respect, is unable to identify any evidence, direct or inferential, of an available less restrictive and efficacious measure. Mr Southey did not point to anything of this kind. The written argument simply queried why a less restrictive measure had not been devised. Evidential basis for such measure, in a case replete with affidavits, there was none. This was reinforced when in response to judicial questioning there was brief reference to the evidence of checks in the form of interviews (confined to the factual matrix of the Appellant's case): this evidence is extremely limited in nature and is further impoverished by the Appellant's protestations that his ability to recount the content of interviews in his affidavits was seriously hampered by his lack of English.. Furthermore, this suggestion at no time formed part of the Appellant's pleaded case. Fundamentally, there is no evidential foundation which would warrant the conclusion that such measures would be efficacious to further the legitimate aim in play. The "less restrictive alternative" argument is devoid of substance and merit.

[89] Mr Southey sought to attack the justification evidence of the respondent Departments. He suggested that there is no evidence that the impugned statutory measure will necessarily achieve its aim. The frailty in this and other related submissions is twofold: such arguments neglect both the test of manifestly without reasonable foundation and the related principle that the margin of appreciation of the State is at its widest regarding measures of this kind. This is a principle of impeccable pedigree and longevity, traceable to both the early case law of the ECtHR, for example *James v United Kingdom* [1986] 8 EHRR 123 at [46] especially and the earliest human rights decisions of the UKSC and its predecessor: see for example *R v DPP, ex p Kebeline* [2000] 2 AC 326 at 379ff and, later, *AXA Insurance v HM Advocate and others* [2011] UKSC 46 at *inter alia* [32], [124] and [131]. Neither *Lumdon* nor any of the cases cited therein was invoked in support of this discrete contention.

[90] Furthermore, there is no legal principle that detailed calculations and predictions of a scientific or actuarial kind are a necessary pre-requisite to justification being demonstrated. The present case is one where, as in *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246 (at [77] especially), there is no scientifically proven foundation for the efficacy of the impugned measure. However, in the context of a wide margin of appreciation it does not follow *ipso facto* that the impugned statutory provision is manifestly without reasonable foundation.

[91] We consider that in this sphere the justification of an impugned measure on the basis of rational evaluative judgements and predictions in a context of limited evidence, statistical or otherwise, is capable of sufficing. Objectively demonstrated future success and efficacy, whether guaranteed or probable, is not required. This is compatible with the broad margin of appreciation which the State is accorded in matters of social and economic policy. The more so where, as here, the impugned measure is plainly compatible with a series of relevant EU law provisions and principles. Furthermore, where the "*other status*" in play within the Art 14 ECHR framework is not one of the so-called "suspect" grounds such as gender or race the extent of the State's latitude is logically greater.

[92] The impugned statutory provision being, *par excellence*, a measure of economic and social policy, the question for this court (per *DA*) is whether the Applicant's challenge establishes that the impugned statutory provision is "*manifestly without reasonable foundation*". For present purposes we do not distil from the judgment of Lord Wilson in *DA* that the Appellant has any burden of proof in this respect. This is an issue which may require further consideration in a suitable future case. We approach this issue on the simple basis that the burden of demonstrating justification – in other words a legitimate aim and a measure proportionate thereto – rests on the respondent Departments. We consider that the determination of this issue entails an evaluative judgement on the part of the reviewing court, both at first instance and on appeal. This exercise requires the court to give effect to all of the legal rules and principles identified above. By its nature it also embraces the possibility that one court might reasonably differ from another in

their conclusions. Given the Art 3 ECHR dimension of the Appellant's case we have approached this task with careful scrutiny.

[93] The several principles and provisions of EU law highlighted throughout this judgment combine to fortify and justify the foundation upon which the impugned statutory provision rests. The protection of the resources of the host Member State concerned, the UK, is legitimate. The desire to prevent exploitation of the welfare benefits of the host Member State is equally legitimate. So too the imperative of promoting social integration. EU law specifically permits the provision of differing treatment in the realm of social assistance to nationals of the host Member State (on the one hand) and nationals of other Member States who are not economically or socially integrated in the host Member State (on the other). The latter group includes migrant EU citizen jobseekers. The host Member State can lawfully deny social assistance to the migrant EU citizen jobseeker (and others) during the initial period of residence of three months and for longer in certain circumstances. Furthermore it is a basic principle of EU law that those in need of social assistance will receive the appropriate care in their own Member State. Juxtaposing the broader legal framework in tandem with the policy justification proffered by the respondent Departments, we consider that the impugned statutory provision has a solid foundation which comfortably exceeds the merely rational, tenable or reasonable. It plainly satisfies the test of manifestly without reasonable foundation. While we consider that it also satisfies other more intrusive formulations of the proportionality/justification test, we observe that the Appellant's case was not put in this way. To summarise, the proportionality of the impugned statutory provision is clearly demonstrated.

Differential Treatment

[94] While the foregoing conclusion is determinative of the Appellant's Art 14 ECHR claim, we shall nonetheless examine the discrete issue of differential treatment. The question is uncomplicated: does the impugned statutory provision give rise to differential treatment? The answer depends upon whether (a) there is a group of persons which may properly be compared with the group with which the Appellant identifies, namely migrant EU citizen jobseekers entering and residing in the United Kingdom in search of work and (b) the two groups are treated differently in some material fashion. The basic, and undisputed, premise is that the migrant EU citizen jobseeker will not qualify for HB during the first three months of his residence in the UK. Mr Southey submitted that the appropriate comparator group is UK national jobseekers, to whom this restriction does not apply. There is no dispute that the payment of HB is a means whereby street homelessness, the mischief of which the Appellant complains, may be averted. We have already noted that the Appellant's case does not engage with the analysis in [61] above.

[95] The quest for remunerative work is the only feature which the two groups share in common. There are significant differences between the two groups. First, the right of free movement of workers, including jobseekers, is a qualified one, as is

their right of residence in the UK. No comparable restrictions apply to UK national resident jobseekers. Second, there is a specific provision of EU law – Article 24(2) of the Citizens Directive - which authorises treatment differentiating between the members of the two groups identified. Third, the main factor on which the Appellant relies, namely the exercise of a fundamental EU law right, does not apply to any member of the second group. In further contrast, all members of the second group are resident in the United Kingdom pursuant to the statutory rights conferred on them by their British nationality. Furthermore, only members of the comparator group are eligible for certain UK statutory benefits. Given these several factors we reject the comparator group invoked by the Appellant: there are simply too many material differences between the two.

[96] Furthermore, there is merit in Mr McGleenan's submission that the comparison between the group identified by the Appellant, namely migrant EU citizen jobseekers, and non-economically active British nationals returning to the UK from abroad is a closer one, given particularly that certain members of this latter cohort do not qualify for HB as they do not satisfy the habitual residence test. This serves to highlight the differences between the Appellant's group and his chosen comparator group.

The Section 75 Challenge

[97] Finally, the Appellant asserts a breach of section 75(1) of the Northern Ireland 1998 (the "*1998 Act*"). This provides:

> "A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity –
>
> (a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
>
> (b) between men and women generally;
>
> (c) between persons with a disability and persons without; and
>
> (d) Persons with dependents and persons without."

The operation of section 75 of and Schedule 9 to the 1998 Act is set forth *in extenso* in *Re Neill's Application* [2006] NI 278.

[98] Schedule 9 provides for the enforcement of a public authority's duties under Section 75 and is given effect by section 75(4). Paragraph 1 of the schedule outlines the role of the Equality Commission as follows: -

"The Equality Commission for Northern Ireland shall-

(a) keep under review the effectiveness of the duties imposed by section 75;

(b) offer advice to public authorities and others in connection with those duties; and

(c) carry out the functions conferred on it by the following provisions of this Schedule."

By paragraph 2(1) of the Schedule all public authorities (except those notified by the Commission that the sub-paragraph does not apply to them) must submit an equality scheme to the Commission. Under paragraph 4(1) the scheme must show how the authority proposes to fulfil its obligations under section 75 and by paragraph 4(2) the scheme must set out the authority's arrangements in relation to a number of specified functions. The relevant function for present purposes is to be found in paragraph 4(2)(b) which requires that a statement be made as to the arrangements for assessing and consulting on the likely impact of policies adopted or proposed to be adopted by the authority on the promotion of equality of opportunity. Paragraph 4(3)(a) requires a scheme to conform to any guidelines which are issued by the Commission with the approval of the Secretary of State. By paragraph 6(1) the Commission may approve the scheme or refer it to the Secretary of State.

[99] Under the rubric 'Duties arising under equality schemes' paragraph 9(1) and (2) of Schedule 9 provide:

"9. - (1) In publishing the results of such an assessment as is mentioned in paragraph 4 (2) (b), a public authority shall state the aims of the policy to which the assessment relates and give details of any consideration given by the authority to-

(a) measures which might mitigate any adverse impact of that policy on the promotion of equality of opportunity; and

(b) alternative policies which might better achieve the promotion of equality of opportunity

(2) In making any decision with respect to a policy adopted or proposed to be adopted by it, a public authority shall take into account any such assessment and consultation as is mentioned in paragraph 4(2)(b) carried out in relation to the policy."

Paragraph 10 deals with complaints. If the Commission receives a complaint made in accordance with paragraph 10 it must investigate it or give reasons for not doing so. By sub-paragraph (2) the complaint must be made in writing by a person who

claims to have been directly affected by the failure of the public authority to comply with an equality scheme. There is no time limit for making a complaint.

[100] The manner in which complaints are to be investigated is provided for in paragraph 11 of Schedule 9. These sub-paragraphs deal with transmission of the Commission's investigation report to the Secretary of State (NI) and notifying him of a failure of a public authority to take action recommended by the Commission. Where, as a result of an investigation carried out under paragraph 11, the Commission believes that a government department may have failed to comply with an equality scheme it may lay before Parliament and the Northern Ireland Assembly a report of its investigation.

[101] This limb (the third and final) of the Appellant's case is encapsulated in the contention that the HB Regulations 2014 were adopted in breach of s 75(1). Two immediate observations are apposite. First, as already demonstrated, the Appellant's challenge is confined to one provision only of the 2014 Regulations, namely regulation 2, which amended the habitual residence test in regulation 10 of the 2006 Regulations. Second, this element of the Appellant's case is directed solely to DFC as DWP was not, in the language of s 75, "*carrying out ... functions relating to Northern Ireland …*"

[102] The Appellant's case is based on the "*racial group*" element of s 75(1)(a). By s 75(5) "*racial group*" attracts the meaning contained in the Race Relations (NI) Order 1997. Under regulation 5(1) of the latter measure "*racial group*" includes a group defined by nationality. The Appellant's group is Polish nationals. The comparator group put forward is UK nationals.

[103] The "*function relating to Northern Ireland*" being carried out by DFC's predecessor was that of amending the legislation and devising the impugned statutory provision. This *"function"* also reposes in part in s 87 of the 1998 Act, the statutory parity provision Act (see [6] above). The specific duty in performing this function was to have "*due regard*" to the need to promote equality of opportunity between members of the two aforementioned groups.

[104] The s 75(1) duty, incontestably, is one of means and not result. So much has been recognised in the context of the equivalent English statutory provision, being s 149 of the Equality Act 2010: see *R (Baker) v Secretary of State for Communities and Local Government* [2008] LGR 239 at [31]. "*Due*" regard denotes the degree of regard that is appropriate in all the circumstances. These will include the importance of the potentially affected areas of life of the members of the disadvantaged group; the extent of the inequality to be inflicted; and such countervailing factors as pertain to the function which the authority concerned is performing: *Baker* (*ibid*). A high level of due regard is required in cases where large numbers of vulnerable people, many of whom fall within one or more of the protected groups, are potentially affected by the measure in question: *R (Hajrula) v London Councils* [2011] EWHC 448 (Admin) at [69].

[105] The Appellant's case is not that DFC's predecessor failed to have regard to the need to promote equality of opportunity between the two groups identified above: rather the case is made that due regard was not given. Plainly this contention requires a sufficient evidential foundation. To the material evidence we now turn.

[106] The Appellant's case is founded on the "Section 75 Policy Screening Form". This was completed by DFC's predecessor prior to the final adoption of the impugned statutory provision. It contains the following noteworthy passages:

> "[The proposal] will help to avoid unnecessary costs to the benefit system through a reduction in housing benefit case load and expenditure by discouraging EEA nationals from coming to the UK with the primary intention of claiming benefits. Since housing benefit would remain available to EEA citizens who are in work, self-employed or retain their worker status, the measure would also provide an increased work incentive to EEA jobseekers."

In the following passage it is recorded that certain categories of UK nationals returning to the UK following a long absence will be similarly affected. In a later section identified "*different needs, experiences and priorities*" of each of the section 75 categories had to be noted. This elicited the following assessment:

> "*There is no evidence to suggest that people of different racial or ethnic group* [sic] *have different needs, experience and priorities in relation to the policy.*"

In a separate section the "*likely impact on equality of opportunity*" on each of the section 75 groups had to be specified. The "*racial/ethnic group*" category was completed in these terms:

> "We do not expect there to be any adverse impact on people of different racial groups."

The Appellant attacks this discrete assessment.

[107] The several ingredients of the aforementioned screening decision include the following: Article 7 of the Citizens Directive; the decision in *Patmalniece* that the requirement of possessing a right to reside was a proportionate response to the legitimate aim of protecting UK public finances and, further, that this is not based on nationality; and the principle that EU Member States may justifiably require economic or social integration as a pre-requisite to receipt of social assistance measures. Based on this reasoning the screening decision was that an equality impact assessment was not required.

[108] Mr Southey contrasted the DWP "Equality Analysis". This was an assessment of the equivalent proposed statutory measure in England and Wales.

This is of relevance given the parity policy. The DWP assessment contained the qualification that accurate evidence of the extent to which ethnic minorities could be affected by the measure proposed may not be available, urging "*some caution*" accordingly. Government policy that "*…. migrants should contribute to this country and not be drawn here by the attractiveness of our benefits system*" was noted. The analysis continues:

> "It is possible that the new policy may put some migrants in a difficult financial position and that this may disproportionately affect those of ethnic minority origin. It is important to note that while this policy measure will remove access to HB and EEA jobseekers, they are not left without UK state support. They can claim JSA (IB) for a period and in certain circumstances they may be able to apply for support from the Local Authority. Local Authority support is subject to statutory criteria. ….."

The final impact assessment was in these terms:

> "The government recognises the contribution that migrants from the European Economic Area (EEA) makes to the UK economy and welcomes migrants coming to this country to work. The package of measures which restricts access to benefits to jobseekers from other Member States is necessary to protect the UK's benefits system and to discourage people who have no established connection or who have broken their connection with the UK from migrating here without a firm offer of employment or imminent prospect of work. For this reason it is legitimate to allow access to HB only to those EEA migrants who are workers or are self-employed; and not those whose status is as a jobseeker."

[109] The DWP equality analysis contains the following further passage of note:

> "One key uncertainty in estimating the effect of the policy is a lack of evidence about the number of EEA migrants that have been assessed to have 'worker' or 'retained worker' status by decision makers. Both retained workers and jobseekers may claim income-based JSA and administrative data do not identify claimants' status. In order to infer how many HB claimants passported *(sic)* from income-based JSA would be exempt from the measure through their status as a retained worker we have had to make a number of assumptions ….

> There is further uncertainty over the likely behavioural response to the policy. Firstly, it is hard to predict the impact the policy will have on migration. It is possible that the reduction in social security support for migrant jobseekers will deter some EEA nationals from moving to the UK. A reduction in migration would have consequences for the wider economy that are difficult to quantify."

The equality analysis finishes in these terms:

> "The second option, namely the removal of access to HB for EEA jobseekers is preferred. This is because it will make it less easy for migrants to access the benefits system without contributing through tax or social security contributions. This will lead to a reduction in welfare expenditure."

[110] Other evidence indicates that the impugned statutory provision was the subject of discussion by members of the Northern Ireland Assembly Committee for Social Development in advance of an approval resolution. In England and Wales the SSAC compiled a detailed submission which was provided to the relevant Minister. This Committee, in substance, questioned the sufficiency of the evidential foundation for the proposed measure. It queried the DWP data (noted above). It questioned whether the new measure would "*prove to be an effective disincentive*". It drew to the Minister's attention the individual experiences of certain respondents. The Committee noted the comments of all respondents that homelessness would increase in consequence of the impugned measure. The Committee made two recommendations which, in summary, exhorted (a) robust arrangements to monitor and evaluate the impact of the measure and (b) the calculation of costs and/or savings accurately with a view to a policy review the following year. Measures mitigating harmful consequences were also urged.

[111] DWP responded to the SSAC's submission. Its response reiterated the policy aim of protecting the benefits system and discouraging migration by persons with little or no connection with the UK and without a firm offer or imminent prospect of work. The provision of additional funding to Local Authorities was noted, with further funding for "*new burdens*". Measures to ensure cross-departmental action were noted. Mention was also made of legal safeguards to protect EEA and non-EEA workers from exploitation.

[112] Given that the impugned statutory provision was the product of a parity policy the court considers that all of the foregoing evidence generated in the two jurisdictions falls to be considered. The contrary was not argued: indeed the Appellant's arguments drew on the evidence of both respondent Departments. The starting point in any assessment of evidence of this kind is that s 75(1) of the 1998

Act did not oblige DFC's predecessor to achieve equality of opportunity for persons of different racial (national) groups in adopting the impugned statutory provision. Rather the duty was to *have due regard to* the need to promote such equality of opportunity. Section 75(1) is designed to ensure that this need is taken into account in the formation of policy options and consequential legislative measures. S 75 also contemplates, implicitly, that scientifically accurate evidence of the future equality effects of a policy or legislative proposal may not be available. This is consonant with the obligation being one of means and not result. Furthermore, s 75 *implicitly* recognises an outcome entailing a measure which does not achieve full equality of opportunity for all of the specified groups. The effect is that a government policy which may result in inequality of treatment can be lawful. In this way the legislature has entrusted to the executive the inter-related tasks of identifying the public interest and balancing the strength and importance of this with the s 75(1) requirement.

[113] The central criticism of the screening exercise conducted by DFC's predecessor is directed to the statement reproduced in [106] above. It is important to recognise that this embodies an expression of opinion, an evaluative assessment, a matter of judgement. It is an answer to a question about a "*likely*" future impact. The answer required a prediction. The prediction was made in a context where concrete evidence, firm data were limited. But evidence there was. The terms of the screening pro-forma explicitly directed the author of the response to any evidence bearing on the predicted likely impact. An earlier section of the form collated evidence, consisting mainly of data, under the rubric of "*Section 75 category – race – details of evidence/information*". This aspect of the screening exercise is not challenged by the Appellant. Nor is there any suggestion, much less evidence, that it was not considered by the author. The DWP prediction was also based on certain data, albeit of limited value which was explicitly recognised. We consider that, properly analysed, the Appellant's line of attack is directed to the formation of a predictive evaluative judgement, with a specified evidential foundation, on the part of the author in the circumstances noted.

[114] We consider that, in principle, a court will be slow to find merit in an attack of this species. Exposed in the manner undertaken above the correct legal analysis would seem to be that this is a *Wednesbury* irrationality challenge. This is reinforced by recalling the elementary dogma that this is an application for judicial review, entailing resort to a court of supervisory superintendence and not an appeal on the merits. Furthermore, we remind ourselves that the onus rests on the Appellant to make good this discrete ground of challenge: see *JG v The Upper Tribunal* [2019] NICA 27 at [34]. Considering the relevant evidence in its totality and viewed through the legal and factual prisms which we have identified our conclusion is that DFC's predecessor acquitted its obligation under s 75(1) of the 1998 Act. The Appellant has failed to discharge the burden of establishing the contrary. The same result would readily follow application of the alternative mechanism of broad judicial evaluative judgement eschewing burden and standard of proof.

[115] Insofar as neither explicit nor implicit in the foregoing paragraphs we further adopt the reasoning and conclusion of the judge at [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 jobseeker for the purposes of Article 37 of the Directive. "

The Appellant's arguments did not engage with this reasoning.

[116] There is one further dimension of the Appellant's s 75 challenge which must be considered. This is encapsulated in the Respondents' Notice in these terms:

> "… section 75 sets out exactly how the duties under the section should be enforced (through the mechanisms provided by Schedule 9 and paragraphs 10 and 11 thereof in particular), there was therefore an alternative remedy available. In respect of same, the allegation made in this regard is not amenable to judicial review and the relevant ground should be dismissed on that basis as well as on the merits."

This contention can be traced to the argument advanced successfully on behalf of the respondent both at first instance and on appeal in *Neill* (*supra*). There the Court of Appeal at [26] quoted with approval the judgment of Girvan J at first instance:

> "Girvan J drew a contrast between the sanctions provided for in section 76 of the 1998 Act in relation to discrimination perpetrated by a public authority and the manner of enforcing an authority's duties under section 75. At paragraph [42] of his judgment he said:-

> ‘[42] The way in which the "due regard" duty [in section 75] is enforced is provided for in Schedule 9. The history of the background to the drafting of the 1998 legislation … bear[s] 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 reasoned and held at [28]:

> “It would be anomalous if a scrutinising process could be undertaken parallel to that for which the Commission has the express statutory remit. We have concluded that this was not the intention of Parliament. The structure of the statutory provisions is instructive in this context. The juxtaposition of sections 75 and 76 with contrasting enforcing mechanisms for the respective obligations

> contained in those provisions strongly favour the conclusion that Parliament intended that, in the main at least, the consequences 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."

At [30] the court acknowledged the possibility that a challenge by judicial review may nonetheless be available in certain circumstances.

[117] The decision in *Neill* promulgates a strong general rule. Its juridical aetiology can be traced to two interrelated principles of unassailable pedigree, namely (a) judicial review is a remedy of last resort and (b) any alternative remedy should normally be exhausted, therefore, prior to recourse to judicial review. These principles are expounded in *Re Ballyedmond Castle Farm's Application* [2000] NI 174. The out-workings of *Re Neill* are illustrated in *Re Toner's Application* [2017] NIQB 49 at [160] – [166] especially.

[118] The Appellant's arguments sought to circumvent the forbidding hurdle of *Re Neill* by, in substance, focusing on s 75(1) to the exclusion of Schedule 9. This we consider defeated by the elementary principle that the statute must be considered as a whole and, further and more specifically, that s 75 and Schedule 9 combine to form a unitary statutory code. The Appellant's arguments also, properly exposed, entail the contention that the asserted breach of s 75(1) in the present case is freestanding of, and does not entail a parallel breach of, the duties imposed on DFC's predecessor by its equality scheme. No examination of the equality scheme was undertaken. We consider that this attempt to divorce s 75 from DFC's statutory equality scheme finds no support in the statutory provisions considered as a whole. We would add that we consider it inconceivable that any asserted breach of s 75(1) would not entail examination of compliance with the relevant authority's statutory scheme and vice-versa. All of the foregoing is reinforced beyond peradventure by paragraph 4(1) of Schedule 9, which provides:

> "*A scheme shall show how the public authority proposes to fulfil the duties imposed by section 75 in relation to the relevant functions.*"

[119] For the reasons elaborated the Appellant's s 75 ground is dismissed on this further basis.

Conclusion

[120] We dismiss the appeal and affirm the judgment and order of Sir Paul Girvan. The Appellant's legal representatives, belatedly, formulated certain questions to be referred to the CJEU under Article 267 TFEU. As this court is not a final court of appeal a reference is not obligatory. This court has experienced no difficulty in the

identification and application of the relevant principles and provisions of EU law in determining the issues in this appeal (see *R v Stock Exchange, ex p Else* [1993] QB 534). Thus the threshold test is not satisfied. The reference application is without merit and we refuse it accordingly.