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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND (QUEEN'S BENCH DIVISION)

RYAN TAYLOR

Appellant:

-and-

THE DEPARTMENT FOR COMMUNITIES AND THE DEPARTMENT FOR WORK AND PENSIONS

Respondents:

Representation

Appellant: **Mr Hugh Southey QC and Mr Steven J McQuitty (of counsel) instructed by Kristina Murray Solicitors**

Respondents: **Mr Tony McGleenan QC and Mr Aidan Sands (of counsel) instructed by the Departmental Solicitors Office and the Crown Solicitor's Office**

Before: McCloskey LJ and Maguire LJ

Judgment No: 2

McCloskey LJ (delivering the judgment of the court)

Preface

This court, with a differently constituted judicial panel, delivered an earlier judgment herein on 18 February 2022. As appears from para [45] thereof an "unless order" was made. The appellant having complied with this, the hearing of the appeal substantively was conducted on 25 March 2022. The appellant is challenging certain provisions of subordinate legislation, rehearsed in para [4] *infra*, pursuing declaratory relief, on the ground that they are unlawful being in contravention of

article 1 of The First Protocol in conjunction with article 14 ECHR (the pure article 8 ECHR challenge at first instance no longer being pursued). His application for judicial review was dismissed at first instance. The statutory framework, the evidential framework and the progress of the proceedings are rehearsed extensively in paras [1] – [10] of the court's earlier judgment, which it is convenient to reproduce in substance.

Introduction

[1] This is an appeal in judicial review proceedings. The parties are Ryan Taylor ("*the appellant*") on the one hand and the Department for Communities ("*DFC*") and the Department for Work and Pensions ("*DWP*"), collectively "t*he respondents"*, on the other. The Northern Ireland Housing Executive ("*NIHE*") has been recognised as having the status of interested party and, in response to the court's direction, confirmed, very properly, that it did not seek to participate actively in this appeal.

[2] This case concerns the taxpayers' funded benefit known as Housing Benefit ("*HB").* HB is administered by NIHE on behalf of the Department for Communities. In a nutshell, HB is designed to assist those on low income living in rented accommodation who satisfy the statutory qualifying requirements by paying their rent, rates and service charges. The appellant is said to be a member of this class.

[3] The appellant appeals against the order of deputy high court judge Friedman, consequential upon his judgment delivered on 18 December 2020 – [2020] NIQB 78 - dismissing the application for judicial review. By this judgment the court determines the respondents' application for an order striking out the appeal on the grounds that the appellant has failed to discharge his duty of candour to the court both at first instance and on appeal; has failed to comply with the requirements of Order 53, Rules 5 and 6 and Order 41 of the Rules of the Court of Judicature; has not established that he is a victim within the compass of section 7(1) of the Human Rights Act 1998 ("*HRA 1998*"); and is pursuing an appeal which constitutes a misuse of the process of the court. There is a further contention that in the event of the appeal proceeding there is no basis upon which the court could, in the exercise of its discretion, provide the appellant with a remedy of practical benefit to him.

The Impugned Statutory Provisions

[4] We gratefully adopt the judge's outline of the governing statutory framework, which is contained in the Housing Benefits Regulations (Northern Ireland) 2006, as amended by the Social Security (Miscellaneous Amendments) Regulations (Northern Ireland) 2013 (67/2013) ('*the 2006 Regulations'*):

> "[37] Regulation 7(13) of the 2006 Regulations, provides that, subject to regulation 7(17), a person shall be treated as occupying a dwelling house as his home while he is temporarily absent within Northern Ireland if (a) he

intends to return to occupy the dwelling as his home; (b) the part of the dwelling normally occupied by him has not been let or sublet; and (c) the period of absence is unlikely to exceed 13 weeks. This is the period of deemed occupation for all people to whom it applies, irrespective of the reason for their absence from their home.

[38] Regulation 7(17) provides that a person to whom regulation 7(16) applies shall still be treated as occupying his home during any period of temporary absence not exceeding 52 weeks beginning from the first day of that absence. The list of ten exceptions in regulation 7(16) contains limited categories of persons who are absent for special reasons, which includes other than remand prisoners, the hospitalised, those caring for them, those seeking refuge from domestic violence, and various forms of study and training: see regulation 16 (c) (ii) - (x).

[39] In its original form the list included (at Reg. 16(c)(i)), persons "detained in custody on remand pending trial or, as a condition of bail, required to reside in a dwelling, other than the dwelling he occupies as his home or, detained pending sentence upon conviction".

[40] The ten exceptions are essentially, involuntary; and nine of them are for benign reasons of absence that would be contrary to the public interest not to support, at least for some finite period. Those detained pending sentence upon conviction, would be different in that respect, but as already demonstrated, it could well be important to await the sentence to establish whether the convicted person will be released as a result of time served. That much was recognised in the English Court of Appeal decision of R(Waite) v Hammersmith & Fulham LBC and the Secretary of State for Social Security ([2002] EWCA Civ 482) [2003] HLR 3 §41.

[41] In order to be entitled to temporary absence beyond 13 weeks, regulation 7(16)(d) also requires that "the period of… absence" for the person that falls within one of the ten exceptions contained in Regulation 7(16)(c), "is unlikely to exceed 52 weeks or, in exceptional circumstances, is unlikely substantially to exceed that period". By regulation 7(17) the maximum period for those in deemed occupation in respect of a vacant property is 52 weeks in all the exceptions contained in

regulation 7(16)(c). There is no discretion to extend that time once 52 weeks have passed."

Factual Matrix

[5] The following chronology of material dates and events, to include paras [6] – [9], was complete and accurate when the first judgment of this court was given. It then evolved via the court's reception of fresh evidence: see paras [11] – [12] *infra*.

1. The appellant's tenancy of 162 Joanmount Gardens, Belfast ("*the house")* apparently began on 1 June 2019. His rent was paid by HB. The identity of the landlord is far from clear.

2. The appellant was remanded in prison following revocation of his bail on or about 9 September 2019. The payments of HB continued.

3. On 9 December 2019 the appellant was sentenced to eight months imprisonment.

4. As a result, the payment of HB in respect of the house ended immediately. This was communicated in the NIHE decision of 10 December 2019.

5. The appellant's sentence of imprisonment was completed on 2 April 2020, whereupon his status reverted to that of remand prisoner in respect of further offences.

6. These proceedings were initiated on 11 March 2020.

7. Between 10 December 2019 and 2 April 2020 it is not altogether clear either that the appellant's tenancy subsisted or (if it did) rent was somehow paid. There is an assertion, unsupported by any documentary evidence, that the rental payments of £425 per month were made by the appellant's mother in respect of the months December 2019 to February 2020. According to the affidavit sworn by the appellant's solicitor on 3 March 2020 the appellant's mother would be unable to pay the rent for that month. In an affidavit sworn by the appellant's mother on the same date, the deponent made the same claim. In a later unsworn, undated and unsigned draft statement the mother claimed that she was able to pay the rent for April 2020 "*contrary to my expectations …*" There is a further assertion of a "*very real risk*" that she would be unable to do this subsequently. There is a further draft, unsworn, unsigned and undated statement from the appellant's mother, evidently compiled *circa* May/June 2020, claiming that she would be unable to pay the rent for the months of July and August 2020. This document is silent as regards the months of May and June.

(In passing, it is evident that these two draft statements were generated for the purpose of the two interim relief applications.)

8. A full hearing of the judicial review application was scheduled for 22 April 2020. That was adjourned because of the COVID-19 pandemic. Thereafter the appellant was the beneficiary of two interim relief orders of the High Court, dated 1 May 2020 and 22 June 2020 respectively (see *In re Ryan Taylor's Application* [2020] NIQB 46 and [2020] NIQB 52). Pursuant to these orders the payments of HB should in theory have been restored: once again there is no documentary evidence of this. (Neither of these rulings and neither of these orders is included in the core hearing papers: the court has had to access them independently).

9. The appellant was released on bail on 18 August 2020.

10. Deputy judge Friedman gave judgment on 18 December 2020: see [2020] NIQB 78.

11. The appellant's bail was revoked and he was further remanded into custody on 15 February 2021. On 21 June 2021 he was sentenced to three years imprisonment.

12. HB was last paid to the appellant on 3 July 2021 – some seven months ago. There is no evidence before the court relating to payments of rent or HB since then.

[6] Summarising, the appellant, said to have had the status of tenant since 1 June 2019, was arrested and remanded in custody from 9 September 2019; on 9 December 2019, pursuant to a custodial sentence, he became a sentenced prisoner for a net period of four months; between the two aforementioned dates the payment of his rent out of public funds by *HB* had continued; this was discontinued with effect from *circa* 9 December 2019; his sentence served, the appellant reverted to the status of remand prisoner with effect from 2 April 2020; these proceedings having been initiated just beforehand, on 11 March 2020, the High Court granted interim relief on 1 May 2020, the effect whereof that the HB payments were due to be reinstated; the High Court renewed this interim relief order on 22 June 2020; on 18 August 2020, having been granted bail the appellant apparently returned to reside at the premises; his bail having been revoked he reacquired the status of remand prisoner from 15 February to 21 June 2021; the last payment of HB was made on 3 July 2021*; the appellant became a sentenced prisoner again with effect from 21 June 2021; on 17 August 2021 his application for leave to appeal against sentence was refused.

[7] The identity of the appellant's landlord was unclear from the outset of the proceedings and, at this remove – some two years later – remains a mystery. In the only affidavit sworn by the appellant – his first – he described himself as "*a Housing Executive Tenant.*" This was repeated in the only affidavit sworn by the appellant's

mother and in the only affidavit sworn by the appellant's solicitor. This assertion is patently incorrect. It is a matter of profound concern that this misstatement about a self–evidently fundamental factual issue has appeared in three sworn affidavits.

[8] The reason for the immediately foregoing analysis is that the only documentary evidence pertaining to the tenancy, a document which *on its face* is a tenancy agreement, has the following features. First, it describes the landlord as "John Neill and Son of 232 Ormeau Road, Belfast …" Second, the "*Signed by the Landlord/Agent*" section of the document is blank. Third, the "*Signed by the Witness*" section is similarly blank. Fourth, this document is exhibited to the affidavit of the appellant's mother and not that of the appellant.

[9] In the NIHE affidavit, provided in draft (*circa* April/May 2020) the Housing Benefit Operations Manager deposed that the agency identified in the document purporting to be a tenancy agreement is a letting and property management agency, adding that this may not be the "*actual landlord*." In the same document one finds the averment:

> "Ms Taylor avers that she spoke to the Applicant's landlord on 1 April 2020 to try to agree a short rent holiday but he refused, stating that the rent must be paid on time. Ms Taylor has not disclosed the name of the person to whom she spoke and whether in fact she spoke to the landlord, whoever that may be, or to the landlord's agent."

This was followed by the second of the mother's unsworn, unsigned and undated draft statements, together with an unsworn, unsigned and undated draft statement in the name of the appellant's solicitor. Notably, neither of these attempted to address the aforementioned issues raised in the NIHE affidavit.

[10] As will become apparent, this court afforded to the appellant and his legal representatives ample opportunity to address and rectify the multiple evidential deficiencies and queries in the papers. A period exceeding four months was made available for this purpose. The invitation was not taken up.

The New Evidence

[11] Bearing in mind the terms of its "unless order" and the public law character of these proceedings the court adopted a reasonably liberal approach to the new evidence adduced by the appellant in the wake of the earlier judgment. Altogether eight new affidavits materialised. Some of these were reincarnations of what had previously been unsworn, unsigned and undated draft statements. Others contained entirely new evidence. The appellant is fortunate that these swathes of affidavits were not the subject of greater controversy and a more austere approach by the court.

[12] Via these new affidavits the evidential framework outlined above is augmented in the following way. First, in the span of two newly sworn affidavits the appellant makes the following material averments:

(i) On 23 December 2021 he resumed his tenancy of the relevant dwelling. His rent and rates are funded by Social Security benefits, comprising Universal Credit ("*UC*") and PIP, totalling some £688 per month.

(ii) Since the commencement of his tenancy around 1 June 2019 all of the dealings have been with the estate agents in question. The payments of HB were made directly to them. The tenancy agreement is exhibited.

(iii) The averment in his grounding affidavit that he was a Housing Executive tenant was erroneous.

(iv) From January 2020 to August 2020 the appellant's rent was paid by a combination of his mother's voluntary payments and the reinstatement of the HB pursuant to interim relief orders of the court.

(v) Following the appellant's release on bail a new phase began and HB was paid in respect of the period September 2020 to June 2021. During the latter half of this period the appellant was, once again, a remand prisoner. He then converted to the status of sentenced prisoner. This triggered further voluntary payments of rent by his mother for the period July 2021 to January 2022.

The various materials exhibited to the appellant's further affidavits provide, broadly, reasonable corroborative evidence of his averments. It is unnecessary to dwell on the other new affidavits filed.

The Appellant's Challenge

[13] What follows in the next two paragraphs is borrowed from paras [11] – [12] of the court's first judgment.

[14] What precisely is the appellant challenging? In the amended Order 53 pleading the focus of his challenge is not any decision, determination or omission on the part of either respondent. Rather, his challenge is directed exclusively to the two provisions of the 2006 Regulations rehearsed in [4] above. Notably, the relief sought is an order quashing these provisions and/or a declaration that they are unlawful. Equally of note there is no claim for damages. The grounds disclose that this is a pure human rights challenge. The appellant contends that the two impugned provisions of the 2006 Regulations are unlawful as they are –

> "…. in breach of the Convention rights of the [appellant] under articles 8, article 1 of The First Protocol and Article 14 (within the ambit of those other Articles) ECHR"

with a resultant breach of section 24(1)(a) of the Northern Ireland Act 1998. However, in the original pleading the challenge is also directed to the aforementioned decision of NIHE (not a respondent). Furthermore, a reconfiguration of the challenge to specified provisions of the 2006 Regulations was mooted at an early stage, inconclusively, by the appellant's representatives. This court proactively raised this issue, fundamental in nature, in September 2021. Remarkably, the appellant's representatives failed to address it, then or subsequently.

[15] The application for judicial review was dismissed. The deputy judge, in an admirably detailed and thoughtful judgment, found against the appellant: see [2020] NIQB 78. It is convenient at this juncture to note just one passage from the judgment, at para [2]:

> "No benefit system could likely afford, or justify, paying housing benefits to subsidise indefinite or prolonged periods of absence from a home occasioned by imprisonment. However, it has been a feature of social security law for several decades to secure the permission of temporary absence for both remand and sentenced prisoners for short periods, although the statutory regime under challenge in these proceedings has afforded greater temporal latitude to remand prisoners."

The judgment was promulgated on 18 December 2020.

The Issues

[16] The appellant's case, as ultimately presented, did not entail any contention that the impugned statutory provisions infringe his rights under article 8 ECHR or article 1 of The First Protocol. Rather, his reliance on these two Convention provisions was explicitly in conjunction with article 14.

[17] The court considers that this appeal raises two fundamental issues:

(i) Has the appellant established the status of victim of a Convention Right/s violation within the compass of section 7 of the Human Rights Act 1998 (hereinafter "*section 7*")?

(ii) If "yes", are the impugned statutory provisions unlawful being in conflict with Article 1 of The First Protocol, both considered in conjunction with article 14?

The Section 7 Victim Issue

[18] It is convenient to draw on paras [37] – [40] of this court's first judgment and we do so in the next four paragraphs.

[19] In *Senator Lines GMBH v Austria and Others* [2006] 21 BHRC 640 the Grand Chamber of the ECtHR, in determining whether the particular application was admissible, reflected on the concept of "*potential victim.*" Referring to concrete examples in its jurisprudence, the court recalled one case where an alien's removal had been ordered but not enforced and another where a law prohibiting homosexual acts was capable of being, but had not been, applied to a certain category of the population which included the applicant. The judgment continues, at page 11:

> "However, for an applicant to be able to claim to be a victim in such a situation **he must produce reasonable and convincing evidence of the likelihood that a violation affecting him personally will occur; mere suspicion or conjecture is insufficient** ..."
> [emphasis added]

[20] In *Burden v United Kingdom* (2008) 24 BHRC 709 (App no 13378/05) the applicants were elderly unmarried sisters. They owned a house in their joint names worth £875,000. Each had made a will leaving all her property to the other. By ss 3, 3A and 4 of the Inheritance Tax Act 1984 inheritance tax of 40% would be levied upon the death of each. The government contested the admissibility of the application on the grounds that the applicants could not claim to be 'victims' of any violation (under article 34 ECHR) as the complaint was prospective and hypothetical, given that no liability to inheritance tax had actually accrued and might never accrue.

[21] Rejecting his argument, the Grand Chamber reasoned and concluded as follows. In order to be able to lodge a petition in pursuance of article 34, a person, non-governmental organisation or group of individuals had to be able to claim to be the victim of a violation of the convention rights. In order to claim to be a victim of a violation, a person had to be directly affected by the impugned measure. The ECHR did not, therefore, envisage the bringing of an *actio popularis* for the interpretation of the rights set out therein or permit individuals to complain about a provision of national law simply because they considered, without having been directly affected by it, that it might contravene the convention. It was, however, open to a person to contend that a law violated his rights, in the absence of an individual measure of implementation, if he was required either to modify his conduct or risk being prosecuted or if he was a member of a class of people ***at "real risk"*** of being directly affected by the legislation. Given their age, the wills they had made and the value of the property each owned, the applicants had established that there was a real risk that, in the not too distant future, one of them would be required to pay substantial

inheritance tax on the property inherited from her sister. Accordingly, both were directly affected by the impugned legislation and thus had victim status

[22] Plainly a vague or fanciful possibility of a future Convention violation will not suffice. In short, "*risk*" in this context denotes *real risk*. This requires, per *Senator Lines*, a reasonable and convincing evidential foundation.

[23] In the next ensuing paragraph of its earlier judgment the court observed, at para [41]:

> "The evidential matrix bearing on this issue is barren for the reasons explained. However, having regard to the order we propose to make, the court will reframe from determining this issue conclusively."

As noted above, the evidential matrix is now considerably expanded.

[24] The appellant's contention that he possesses victim status has four components: his rent was paid by HB until his criminal justice status progressed from that of remand prisoner to sentenced prisoner; this conversion of status triggered the discontinuance of the HB payments; this conversion of status further gave rise to the appellant's mother paying his rent for certain months and the interim relief orders of the High Court compelling the reinstatement of the HB payments for other months; and, finally, the appellant returned to live in his rented accommodation following completion of his sentence/s. Reliance was expressly placed on the newly sworn affidavits.

[25] The central thrust of the argument developed by Mr McGleenan QC and Mr Sands of counsel was that neither the impugned statutory provisions nor the specific decision of NIHE in December 2019 gave rise to any detriment suffered by the appellant. In particular, and fundamentally, he did not lose his rented accommodation. On the contrary, his tenancy subsisted throughout. It was further submitted that if and insofar as the appellant is at risk of forfeiting his tenancy and losing his accommodation at some time in the future the court must focus on the operative cause – namely his voluntary re-offending – rather than the impugned statutory provisions.

[26] For the purposes of this discrete exercise, the court will assume that the Convention breach asserted by the appellant is established. Neither party takes issue with how the court formulated the correct approach in principle in its earlier judgment, reproduced in paras [19] – [22] above.

[27] We take as our starting point that there is no evidence that the appellant is an actual victim of a Convention breach in the terms formulated in his challenge. If and to the extent that this was initially contended, this fell away following promulgation of this court's first judgment. In short, the appellant suffered no loss of

accommodation, his tenancy was neither interrupted nor forfeited and he has sustained no financial loss. Thus the question is whether he falls within the class of "*potential victim*" recognised in the *Senator Lines* decision.

[28] We reiterate what was said at para [40] of this court's earlier judgment. Plainly, a vague or fanciful possibility of a Convention violation will not suffice. In short "*risk*" in this context denotes *real risk*. This requires, per *Senator Lines*, a reasonable and convincing evidential foundation.

[29] In the context of the present case, the application of these tests requires the court to look to the future and, in doing so, to make a predictive evaluative judgment of possible future events, duly informed by past events in the appellant's life. In performing this exercise, the evidential realities and limitations of the appellant's case must be confronted. The appellant has sworn three affidavits spanning a period of some two years. Furthermore his case relies on multiple other affidavits. The feature common to all of these affidavits is their narrow focus: they are mainly concerned with the appellant's tenancy, the payments of HB, the discontinuance of these payments, the mechanisms whereby rent payments were nonetheless maintained, the appellant's periods in remand custody and his sentenced custody periods.

[30] What the court knows about the appellant, with the exception of certain objectively incontestable facts such as periods of detention and sentences of imprisonment, derives from what the appellant has chosen to reveal by admissible evidence. In essence, the court knows only that the appellant, during a period of approximately 2½ years commencing in mid-2019, has committed certain offences which have given rise to separate periods of remand custody and sentenced custody, all of comparatively modest dimensions; and throughout the period under scrutiny he has succeeded in maintaining his payments of rent for the accommodation in question via a combination of his remand prisoner status and the commendable financial efforts of his mother, aggregated with a minor contribution arising out of the grant of interim relief at first instance. While the court knows that the appellant has previously committed offences giving rise to short sentences of imprisonment the evidence provided does not include his criminal record. Nor does it encompass pre-sentence reports or kindred materials. The evidence regarding the appellant's previous and current life situation and circumstances is threadbare.

[31] Stripped to its essentials, the appellants section 7 victim status case reduces to the assertion of a future possibility, namely that he might at some unspecified time and during some unspecified period be convicted of a criminal offence forfeiting the payment of HB or its funded equivalent in consequence and being unable to fund his rental payments in any other way. Thus laid bare, the multiple imponderables in his case are self-evident. The appellant has not made the case that he is, for example, an irredeemable recidivist, an incurable career criminal. He has produced no evidence of, for example, an incurable or untreatable medical condition, psychological condition or addiction pointing to a real risk that in the future he will not only

reoffend but will reoffend in a manner giving rise to a custodial disposal. Furthermore, the totality of the evidence before the court establishes a real possibility that if the necessity should arise in the future his mother will continue to fund his rental payments, to be contrasted with a real possibility that this will not occur. The latter is of course a theoretical possibility: however the court's predictive evaluative judgment in this respect must be informed by past events, an alertness to reality and the application of common sense.

[32] In addition to the foregoing, the appellant presumably presents before this court as a person who aspires strongly to be a law abiding citizen. There is nothing in the evidence, direct or inferential, displacing this assessment. Viewed even more panoramically, there is of course a risk that every member of the population will commit a criminal offence punishable by imprisonment. This risk may be said to be enhanced in the case of those who have previously done so. But the analysis can go no further, given the paucity of the evidence presented to this court in respect of this offender.

[33] The foregoing analysis is in fact sensitive in nature. It is unavoidably based on the evidence before the court, the limitations of such evidence and such limited inferences as may legitimately be made. This analysis impels inexorably to the conclusion that the appellant, whose legal challenge is exclusively of the human rights variety, is not a victim within the compass of section 7 of the Human Rights Act. If and insofar as he wishes to assert victim status in some future scenario, his constitutional and article 6 ECHR right of access to a court will enable him to do so.

[34] In consequence of the foregoing conclusion the appeal must be dismissed. However, the court will, nonetheless, consider the second ground of appeal (a) to cater for the possibility that the foregoing conclusion is incorrect and (b) in recognition of the parties' investment in the arguments advanced.

The Article 14 ECHR issue

[35] Satisfaction of the "ambit" test being undisputed, the parties joined issue on the questions (a) "*or other status*", (b) relevantly analogous situation and (c) justification.

"Or other status"

[36] The "*other status*" asserted by the appellant was that of convicted prisoner. It was submitted that an "*other status*" is capable of being something defined or imposed by law. The status of convicted prisoner, it was argued, is something innate, inalienable. A generous approach to this issue was urged. In support of these submissions the court was reminded of *R (Stott) v –Secretary of State for Justice* [2020] AC 51 at [81], *Re Ryan* [2021] NICA 42 at [57], *Re Cox* [2021] NICA 46 at [54] and *SC v Secretary of State for Work and Pensions* [2021] UKSC 26 at [69] and [71]. The Court

was invited to endorse the conclusion of the trial judge on this issue at paras [136] – [137].

[37] On behalf of the respondents Mr McGleenan QC and Mr Sands submitted that the appellant's status should be formulated in the broader terms of *a sentenced prisoner who is subject to the HB statutory regime and thus at risk of losing his accommodation by discontinuance of the HB subsidy.* Mr McGleenan based this, the first part of his submission, on *inter alia* para [533] of the concurring judgment in the recent decision of this court in *Re Allister and Others' Applications* [2022] NICA 15:

> "Ultimately, I consider the issue to be one of proximity, or nexus. There must be some reasonable, discernible connection between the 'other status' asserted and one or more of the characteristics contained in the defined category. A precise analogy is not required. But there must be some linkage. In cases where there is no such connection, the status advanced will not suffice. Equally, I consider that it cannot have been intended that in cases where the connection is remote, distant or tenuous, when juxtaposed with the members of the defined category, this will be sufficient."

It was submitted that whether the appellant's status is defined in the terms asserted by him or formulated by the respondents, the result is the same: both fail to satisfy this test.

[38] The respondent's second submission on this issue is that the appellant's asserted status conflicts with the principle that for article 14 purposes an "*other status*" cannot be defined by the measure said to be unlawfully discriminatory. This was the unanimous position of the Supreme Court in *R v Doherty* [2017] 1 WLR 181 at para [63] per Lord Hughes. As observed in *Haringey LBC v Simawi* [2019] EWCA Civ 1770 this was part of the *ratio* of the unanimous decision of the Supreme Court, to be contrasted with the *obitr* character of the relevant passages in *Stott*.

[39] The third submission advanced on behalf of the respondents draws on the concurring judgment of Lord Walker in *R (RJM) v SSWP* [2009] AC 311 at para [5]. This invites reflection on the contrast between personal characteristics which are innate, largely immutable and closely connected with an individual's personality (on the one hand) and (on the other) those belonging towards the outer orbit of the notional concentric circles which relate mainly to what a person does or what happens to them rather than who they are. Characteristics of the latter *genre* are, in principle, unlikely to fall within article 14.

[40] An obvious attraction of the respondent's three submissions is that they are based on the few principles emerging with tolerable clarity from the UK and Strasbourg jurisprudence reviewed at paras [492] – [530] of *Allister*. Furthermore,

while the requirement of having been convicted of an offence and sentenced to imprisonment is a *sine qua non* of the measure of which the appellant complains, the present case, in contrast with other article 14 prisoner's cases, does not concern issues such as treatment in prison or length of sentence. This is not for example one of those familiar article 5 ECHR ambit case raising issues of arbitrary grounds for detention or continuing detention.

[41] On the contrary, the present case, correctly exposed, concerns a person who became a convicted prisoner losing his HB payments for a period of some few months in consequence, pursuant to the impugned statutory provisions, while maintaining his tenancy because his rent was paid by other means. This short formulation of the appellant's factual and legal situation serves to give definition to his status. It demonstrates that the article 14 ECHR status espoused by the appellant – see para [36] above – is far too narrow. It omits incontrovertibly material elements of the personal and legal state of affairs pertaining to him. The foregoing features are the essential ingredients of his situation for the purposes of article 14. In passing, they stand in contrast with the features and circumstances of other prisoners' cases which have aroused judicial concerns about potentially discriminatory treatment offending against the standards of justification and proportionality, with the liberty of the individual frequently in issue.

[42] Thus the first of the respondents' submissions succeeds. The effect of the foregoing analysis and conclusion is that the respondents' second submission also prevails. In short, the appellant is driven to define his status by reference to the impugned statutory provisions. Based on our analysis of the established article 14 ECHR jurisprudence and principles, this is unsustainable.

[43] We consider that the third of the respondents' submissions must similarly prevail. Summarising, taking the appellant's case on this issue at its zenith for the purposes of this exercise, there is no identifiable nexus, however remote, between his "*other status*" and any of those in the article 14 list. Inalienability by operation of law cannot upset this assessment. The appellant's status is self–conferred, assumed by him as a matter of presumably rational choice. If and insofar as the "nexus"/ "polycentric circles" test is incorrect in law, no alternative test was canvassed on behalf of the appellant.

[44] Giving effect to the foregoing analysis and reasoning, we conclude that the appellant does not possess an "*other status*" falling within the scope of what is protected by article 14 ECHR via section 6 of the Human Rights Act.

Relevantly Analogous Situation

[45] The comparator group espoused by the appellant is that of unconvicted, or remand, prisoners. The submission advancing the viability of this comparison had three elements: the members of both groups have the same interest in their place of residence being available to them upon future release from detention; both groups

"*have rights to retain* [HB] *while imprisoned*" (taken from counsel's skeleton argument); and there is no lawful justification for the differential treatment.

[46] In determining this discrete issue we adopt the approach contained in para [538] of *Allister*:

> "It is always necessary to look at the question of comparability in the context of the measure in question and its purpose, in order to ask whether there is such an obvious difference between the two persons that they are not in an analagous situation."

Lord Nicholls' formulation of the test of "*… an obvious, relevant difference between the claimant and those with whom he seeks to compare himself* [such] *that their situations cannot be regarded as analogous*" in *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 17 at para [3] is orthodox dogma.

[47] In determining this issue the court cannot resort to bright luminous lines or litmus tests. Rather, the judicial task is one of evaluative judgment. The court must stand back and panoramically survey the main features and elements of the two groups under scrutiny and the "situations" – a favoured ECtHR word - of both. In performing this task there is some assistance to be derived from the world of reported cases.

[48] In *R (Waite) v Hammersmith and Fulham LBC* [2002] EWCA Civ 482 both the factual and legal frameworks closely resembled those of the present case. The court decided that where a person (the claimant) convicted of murder and consequentially ordered to be detained at Her Majesty's Pleasure and later released on licence but subsequently recalled to prison on account of alleged re-offending and awaiting a Parole Board decision on his fate is insufficiently similar to a remand prisoner for the purposes of advancing precisely the same article 14 claim as that of the appellant in the present case: see paras [41] – [42]. The appellant's riposte to this decision is to suggest that it is distinguishable because the court in *Waite* found the differential treatment to be justified. We reject this submission because justification formed no part of the court's reasoning on the issue of analogous situation which forms a discrete, freestanding compartment of its judgment.

[49] We consider that there are multiple differences between remand prisoners and sentenced prisoners. The common thread of deprivation of liberty does not undermine this simple statement of the legal and factual realities. While the decision in *Waite* is not binding on this court as a matter of precedent we consider the reasoning of both the first instance and appellate courts persuasive and propose to follow the decision accordingly. In thus differing from the trial judge we are not persuaded by his conclusion at para [143] that *Waite* is distinguishable on its facts. The appellant in *Waite*, if anything, was in a more closely analogous situation to that of remand prisoners than the appellant in the present case.

[50] Thus we resolve the issue of analogous situation in favour of the respondents. We shall, however, revisit this discrete conclusion in our consideration of the final issue, that of justification, given the approach canvassed by Lord Nicholls in *Carson* at para [83], Lady Black in *Stott* at paras [137] – [138] and Baroness Hale in *AL (Serbia)* at paras [23] - [26] and *Re McLaughlin* [2018] 1 WLR 4250 at para [24] , noted by this court in *Re Ryan* [2021] NICA 42 at para [58]. The essence of this approach is that in certain instances it is preferable not to sever the issue of reasonably analogous situation from that of justification.

Justification

[51] "Justification", in this context, requires judicial examination of the impugned statutory provisions by enquiring into any legitimate aim pursued and, subject thereto, the question of whether the impugned measure is a proportionate means of achieving same.

[52] The submissions on behalf of the appellant have the following main ingredients: it is the differential treatment which must be justified and not the treatment itself; the intensity of review by the court and the margin of appreciation available to the State depend upon the individual circumstances; there is no bright line test, such as that of manifestly without reasonable foundation to be applied; there is no justification for any bright line rule separating convicted and unconvicted prisoners in the matter of HB payments; alternatively, the line under scrutiny has not been drawn correctly; the distinction made between the two groups is not reflected in the more recently introduced statutory benefit of UC; the impugned distinction may produce arbitrary consequences, for example where there are sentencing delays in the criminal justice system or tactical delays on the part of a remand prisoner; and the impugned measure undermines the importance of rehabilitation of convicted prisoners.

[53] The respondents retort, in summary: where the State draws the line in matters of eligibility for HB falls squarely within its margin of appreciation; decisions about the allocation of finite State resources in the sphere of welfare benefits frequently involve difficult and borderline choices and value judgments; the function of the court is not to usurp that of the legislature or executive in the social and economic field; the impugned measure is the product of a balancing exercise by the legislature weighing the interests of taxpayers and those of the members of the population likely to be affected by its operation; and the choices made were plainly rational.

[54] Focusing more closely on the substance and effect of the impugned measure the submissions on behalf of the respondents highlight that all prisoners are accommodated at public expense; state resources in the field of providing housing to the population and related welfare benefits are finite; there is a massive unmet

demand for housing in Northern Ireland generally and in Belfast particularly; one aspect of this is the fact of several thousand persons deemed homeless and in priority need; protracted vacancies in the accommodation stock are antithetical to addressing these mischiefs and the rehabilitation of convicted prisoners is but one ingredient of a complex equation.

[55] Distilled from the respondents' affidavit evidence and supporting documentary evidence, the justification for the impugned measure has the following assorted ingredients: the temporary absence rules are a recognition of the reality that absences from a dwelling occupied as a person's home can sometimes be unavoidable; there are acute social housing shortages; prison accommodation, with all its facilities and services, is, in common with HB, funded by the public purse; the discontinuance of HB will not necessarily result in any person belonging to the category of temporarily absent tenants losing their dwelling; the rehabilitation of convicted prisoners is but one of a multiplicity of factors to be balanced; specially devised arrangements are in place to address the risk of a time spent prisoner being homeless upon discharge from prison; *inter alia* such persons can claim UC (housing costs) in the same way as any other claimant; and one of the factors in the policy grounding the impugned measure, which has now been in existence for some 25 years, was that of public and media criticism.

[56] All of the factors and circumstances outlined in paras [54] – [55] above combine to form a unified whole. It was within this equation that those elected to make decisions about the allocation of finite State resources adopted the impugned measure. One of the features of the context was that of opposition from certain quarters to what was ultimately adopted and this too was reckoned.

[57] The issue before the court, therefore, is the far from atypical one common to most welfare benefits human rights challenges. Some of the general principles to be applied are rehearsed in *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26. Two of these principles are directly applicable here. First, this case does not involve differential treatment on any of the so-called "*suspect*" grounds or, indeed, on any of those belonging to the defined article 14 category, with the result that less intensive judicial review is appropriate. Second, linked to the first, the State generally enjoys a broad margin of appreciation in matters of economic or social strategy. There are two further principles identifiable in later passages in the judgment, at paras [182]-[184] which are also germane in the present context. The first of these is that the exercise of combing through materials evidencing the legislature's prior consideration of an impugned legal rule before its adoption is not a legitimate judicial function. The second, linked to the first, is stated in uncompromising terms at para [184]:

> "Secondly, the courts must not treat the absence or poverty of debate in parliament as a reason supporting a funding of incompatibility."

This is of obvious significance where, as in the present context, the challenge is directed to a measure of subordinate legislation, irrespective of whether it was adopted by parliament via the affirmative resolution or negative resolution procedure.

[58] We take into account also the joint analysis of Lord Sumption and Lord Reid in *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57 at paras [86] – [94]. While these two Supreme Court Justices constituted a minority of two regarding the outcome of this appeal, a distinction must be made between the sustainability of their analysis in these passages and their status of judicial minority as regards the outcome. Furthermore, these passages were adopted fully in *Z v Hackney LBC* [2020] UKSC 40 at para [85] ff.

[59] In their extensive treatise of the issue of "bright line rules" in cases involving differential treatment, Lords Sumption and Reid stated at paras [88] – [90]:

> "88. Those who criticise rules of general application commonly refer to them as 'blanket rules' as if that were self-evidently bad. However, all rules of general application to some prescribed category are 'blanket rules' as applied to that category. The question is whether the categorisation is justifiable. If, as we think clear, it is legitimate to discriminate between those who do and those who do not have a sufficient connection with the United Kingdom, it may be not only justifiable but necessary to make the distinction by reference to a rule of general application, notwithstanding that this will leave little or no room for the consideration of individual cases. In a case involving the distribution of state benefits, there are generally two main reasons for this.
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> 89. One is a purely practical one. In some contexts, including this one, the circumstances in which people may have a claim on the resources of the state are too varied to be accommodated by a set of rules. There is therefore no realistic half-way house between selecting on the basis of general rules and categories, and doing so on the basis of a case-by-case discretion. The case law of the Strasbourg court [the European Court of Human Rights] is sensitive to considerations of practicality, especially in a case where the Convention [the ECHR] confers no right to financial support and the question turns simply on the justification for discrimination. In Carson v United Kingdom (2010) 51 EHRR 13 [51 EHRR 13], which concerned discrimination in the provision of pensions

according to the pensioner's country of residence, the Grand Chamber observed, at para 62:

> 'as with all complaints of alleged discrimination in a welfare or pensions system, it is concerned with the compatibility with article 14 of the system, not with the individual facts or circumstances of the particular applicants or of others who are or might be affected by the legislation. Much is made in the applicants' submissions and in those of the third party intervener of the extreme financial hardship which may result from the policy. … However, the court is not in a position to make an assessment of the effects, if any, on the many thousands in the same position as the applicants and nor should it try to do so. Any welfare system, to be workable, may have to use broad categorisations to distinguish between different groups in need … the court's role is to determine the question of principle, namely whether the legislation as such unlawfully discriminates between persons who are in an analogous situation.'

This important statement of principle has since been applied by the European Court of Human Rights to an allegation of discrimination in the distribution of other welfare benefits such as social housing: Bah v United Kingdom [54 EHRR 21] at para 49. And by this court to an allegation of discrimination in the formulation of rules governing the benefit cap: R (SG) v Secretary of State for Work and Pensions (Child Poverty Action Group intervening) [2015] 1 WLR 1449, para 15 (Lord Reed JSC).

90. The second reason for proceeding by way of general rules is the principle of legality. There is no single principle for determining when the principle of legality justifies resort to rules of general application and when discretionary exceptions are required. But the case law of the Strasbourg court has always recognised that the certainty associated with rules of general application is in many cases an advantage and may be a decisive one. It serves 'to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case by case basis': Evans v United

> Kingdom (2007) 46 EHRR 728, at para 89. The Court of Justice of the European Union has for many years adopted the same approach to discrimination cases, and has more than once held that where a residence test is appropriate as a test of eligibility for state financial benefits, it must be clear and its application must be capable of being predicted by those affected: Collins v Secretary of State for Work and Pensions (Case C-138/02) [2005] QB 145, para 72, Förster v Hoofddirectie van de Informatie Beheer Groep (Case C-158/07) [2009] All ER (EC) 399, para 56. As Advocate General Geelhoed acknowledged in considering these very Regulations in Bidar [R (Bidar) v Ealing London Borough Council (Case C-209/03) [2005] QB 812], para 61:
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> > 'Obviously a member state must for reasons of legal certainty and transparency lay down formal criteria for determining eligibility for maintenance assistance and to ensure that such assistance is provided to persons proving to have a genuine connection with the national educational system and national society. In that respect, and as the court recognised in Collins, a residence requirement must, in principle, be accepted as being an appropriate way to establish that connection.'"

We consider it clear that the State's adoption of bright line rules in the discrete sphere of discontinuance of HB by the application of the temporary absence rules, as endorsed by the Court of Appeal in *Obrey v Secretary of State for Work and Pensions* [2013] EWCA Civ 1584, is vindicated by the later treatment of this topic in the UKSC jurisprudence.

[60] We have outlined above the main ingredients of the justification for the impugned measure advanced by the respondents and the legal principles to be applied. This exercise impels inexorably to the conclusion that justification is amply established in the present case. It is not for this court to second guess either the constituent elements of the policy which was formed or the legislative choice adopted to give effect thereto. This is a paradigm case of choices made by the legislature in the distribution of finite State resources in the field of socio-economic policy. For the reasons explained, the margin of appreciation in play lay towards the notional outer limits and, correspondingly, the intensity of judicial review lies towards the outer limits of restraint. The attack mounted on behalf of the appellant demonstrates that in matters of this kind imperfections, superficially attractive anomalies and elements of unevenness can frequently be identified. However, in the

present case, these in our judgment fall measurably short of overcoming the elevated threshold in play.

[61] Finally, we return to the issue of analogous situation, as promised in para [50] above. We do so on the premise that the court erred in detaching this issue from the more compendious question of why the differential treatment inherent in the impugned measure was adopted. The "why" question will always be deceptively simple because it can be formulated with such facility. However, the "why" answer, while it may be susceptible to the mechanism of summary, will frequently be one of a little complexity. As we have set out above the constituent elements of the answer, we shall supply it in summary form. The differential treatment of sentenced and remand prisoners resulting from the operation of the impugned measure is attributable to the adoption of a policy choice containing the various ingredients set out in [50] – [52] above. Approached in this way, we have supplied a factual response to a factual question. We have affirmed above the sustainability in law of this response.

Conclusions

[62] Summarising, the appeal must be dismissed because the appellant is not a "victim" within the compass of section 7 of the Human Rights Act. If this primary conclusion is incorrect, his human rights challenge fails on its merits in any event.

[63] For the reasons given, which do not mirror precisely those of the trial judge, we affirm his decision and dismiss the appeal. The respondents' cross appeal entails a challenge to two discrete conclusions of the trial judge, favourable to the appellant, namely those relating to the article 14 ECHR issues of "*other status*" and analogous situation. For the reasons given we allow the cross appeal in full.