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IN THE COUNTY COURT OF NORTHERN IRELAND
SITTING AT LAGANSIDE COURTS

IN THE MATTER OF A STATUTORY APPEAL UNDER THE HOUSING (NORTHERN IRELAND) ORDER 1988

DJAMILA BOUDJAJA

Appellant

v

Northern Ireland Housing Executive (NIHE)

Respondent

Mr M Hayward BL (instructed by Phoenix Law) for the Appellant
Mr C Sherrard BL (instructed by NIHE Legal Department) for the Respondent

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HER HONOUR DEPUTY JUDGE MURRAY

Introduction

[1] This is a statutory appeal against a decision of the respondent whereby it refused to consider the appellant for homelessness assistance under the Housing Orders. It concerns both the appellant's eligibility for consideration for housing and homelessness assistance ("housing assistance") and also whether she met the test for homelessness. It involves an analysis of the interplay between provisions in immigration legislation and housing legislation in light of the provisions of the EU Withdrawal Agreement legislation and associated EU treaties, EU directives and the EU Charter of Fundamental Rights.

The amendment issue

[2] The respondent raised an issue as to whether the appeal comprised a challenge to the decision on eligibility alone or whether it was a wider challenge to the entirety of the decision which dealt with both eligibility and the

homelessness test. The appellant, therefore, made a formal amendment application which in the event was unopposed.

[3] I dealt with this at the outset of the hearing and granted the amendment (insofar as I needed to do so) because it was agreed that there was no prejudice to the respondent, no time point arose and that the hearing could proceed to deal with all matters. The Notice of Appeal was therefore amended to include the respondent's full decision and not only the eligibility element of that decision. Costs were reserved.

The anonymity application

[4] At the outset of the hearing Mr Hayward made an application for anonymity for the appellant but accepted that no notice of the application had been given to the court nor the respondent and he was not prepared to make submissions by reference to any authorities. Mr Sherrard had no objection to the application observing however that in criminal cases cogent evidence such as medical evidence is normally required to ground such an application.

[5] In order not to delay further the commencement of the hearing which had been listed as an urgent application given the circumstances of the appellant, I was content to make an interim order for the duration of the hearing to anonymise the appellant in any court lists for the following principal reasons.

[6] As a victim of domestic violence I considered that the appellant's human rights were engaged and that anonymity in the court list for the duration of the hearing was a proportionate interference with open justice and articles 6 and 10 of the ECHR.

[7] I made clear to the parties however that this was a temporary order and that any application for any more extensive order or for permanent anonymity of the decision for example would have to be made by reference to the authorities.

[8] Following delivery of the judgment on 23 December 2024, the appellant's solicitor by email of that date stated that no application for anonymity would be made by the appellant.

The evidence

[9] It was agreed by the parties that no oral evidence would be called. The court therefore had before it the affidavits of the appellant and the -decision-maker together with a bundle of documentation and an agreed bundle of authorities.

[10] Skeleton arguments were provided by both counsel shortly before the hearing and this was supplemented by oral submissions. The court is grateful to both counsel for their detailed submissions in this complex area.

[11] It is important to note that this judgment does not record all of the evidence to which the court was referred, nor does it refer in detail to all the authorities. All of the relevant evidence and relevant authorities have however been considered by the court in reaching its conclusions.

The appeal

[12] By a decision of 30 August 2024 the appellant was refused housing assistance on two bases:

(i) That she was ineligible for housing assistance due to her immigration status;

(ii) That she did not meet the test for homelessness because there was a home in Algeria that it would not be unreasonable for her to use and there was insufficient evidence of the appellant's husband's immigration status for the respondent to conclude that she was eligible for consideration for housing assistance.

[13] The appeal to this court is under the Housing (NI) Order 1988 ("the 1988 Order") and is in the nature of a judicial review. It was agreed by the parties that the court does not conduct its own assessment but reviews the decision made by the respondent on the information available to it at that point. (A11D (4) of the 1988 Order; *Ranza v NIHE* [2015] NIQB 3).

[14] The remedies available to the court are to affirm the decision, to quash the decision or to vary it. (A11D (4) of the 1988 Order). In this case the remedy sought was that the decision be quashed.

The grounds of appeal

[15] This appeal rests on two primary grounds:

(i) <u>Ground 1:</u> That the wrong legislation was used to determine whether the appellant was eligible for consideration for housing assistance, the respondent thus misdirected itself in deciding whether the appellant was a person subject to immigration control ("PSIC") and the decision should therefore be quashed on grounds of illegality due to an error of law. The respondent should instead have considered whether she was not ineligible

under other legislative provisions only one of which required consideration of her husband's immigration status.

(ii) Ground 2: That in reaching the decision that the appellant did not meet the homelessness test in the 1988 Order, the respondent took account of irrelevant considerations; did not take account of relevant considerations; and did not make appropriate enquiries to the extent that the respondent's actions were unreasonable in the *Wednesbury* sense, and this also amounted to a failure to make enquiries under the 1988 Order.

The factual background

[16] The agreed factual background is as follows:

(a) The appellant is Algerian, and her husband has dual Irish/Algerian citizenship, and he is thus an EEA citizen.

(b) The appellant married her husband on 9 March 2019 and lived in the family home in Algeria until 2 August 2023.

(c) The appellant's husband has lived in Northern Ireland for 35 years but regularly visited the family home in Algeria.

(d) In 2023 the appellant applied to the Home Office to join her husband and obtained Pre-Settled Status ("PSS").

(e) The appellant arrived in Northern Ireland in August 2023. She was subjected by her husband to violent, controlling, and coercive behaviour.

(f) Following a violent incident on 26 April 2024 the appellant left her husband and the PSNI were involved. It was accepted by the respondent that the appellant was a victim of domestic violence.

(g) On 29 April 2024 the appellant was interviewed by the respondent having presented as homeless and the interview was conducted with the help of an interpreter due to the appellant's lack of proficiency in English. At that point the appellant informed the respondent that her husband was a taxi driver.

(h) On 30 May 2024 the appellant informed the respondent that she was in receipt of Universal Credit. On 28 June 2024 an email to the respondent from Housing Rights on behalf of the appellant stated that she was in receipt of Universal Credit.

(i) By a decision issued on 31 May 2024 the respondent informed the appellant that she was not eligible for housing assistance and also that she had failed the homelessness test. The appellant requested a review of that decision.

(j) On 30 August 2024 a review decision informed the appellant that the decision of 31 May 2024 was confirmed. The decision of 30 August 2024 is the impugned decision and the subject of this appeal.

[17] The impugned decision stated in summary as follows:

(i) On eligibility for housing assistance, it was accepted that the appellant has PSS but as a PSIC she did not fall within the relevant classes under the Persons Subject to Immigration Control (Housing Authority Accommodation and Homelessness) Order 2000 ("the 2000 Order") to enable her to be eligible.

(ii) The respondent did not dispute the appellant's immigration status nor her status as a family member of her husband. The respondent had satisfied itself through the Home Office of the appellant's status.

(iii) The respondent also accepted that the appellant was entitled to be in the UK, was permitted to reside in the UK and to have access to public funds but stated that this was not the same as being within a class of persons eligible for homelessness assistance.

(iv) On the homelessness test the respondent's conclusion was that it was not unreasonable for the appellant to go back to the home in Algeria stating that there was no indication from the appellant that it was unreasonable for her to return there.

(v) It also stated that the husband's status was unclear as regards whether he was exercising EU Treaty rights and thus was a Qualified Person. (It was uncontested that if the husband was a Qualified Person that would have meant that the appellant would not have been ineligible for housing assistance by virtue of article 7A(1)(b) of the 1988 Order and Regulation 4 of the Allocation of Housing and Homelessness (Eligibility) Regulations (Northern Ireland) 2006 ("the 2006 Regulations").

The relevant legal framework

Homelessness

[18] The respondent's obligations in relation to the provision of housing assistance are outlined in the Housing (Northern Ireland) Order 1988 ("1988 Order).

[19] Article 3(1) provides:

> "a person is homeless if he has no accommodation available for his occupation in the UK or elsewhere."

[20] Article 5(1) provides that certain classes of persons have a priority need for accommodation including:

> "(b) a person with whom dependent children reside or might reasonably be expected to reside
>
> …
>
> (e) a person without dependent children who satisfies the Executive that he has been subject to violence and is at risk of violent pursuit or, if he returns home, is at risk of further violence."

Eligibility for housing assistance

[21] The provisions on eligibility for housing assistance are set out in the 1988 Order at Article 7A which states where relevant as follows:

> **"7A. Persons not eligible for housing assistance**
>
> (1) A person is not eligible for assistance under this Part –
>
> (a) If he is a person from abroad who is subject to immigration control and is ineligible for such assistance by virtue of section 119 of the Immigration and Asylum Act 1999;
>
> (b) If he is any other person from abroad who is ineligible for such assistance by virtue of regulations made under paragraph (2);
>
> …
>
> (2) The Secretary of State may, for the purposes of paragraph (1)(b), make provision by regulations as to

other descriptions of persons who are to be treated as persons from abroad who are ineligible for assistance under this Part.

…

(4A) A person falls within this paragraph if the person –

(a) Falls within a class specified in an order under section 119(1) of the Immigration and Asylum Act 1999; but

(b) Is not a person who, immediately before IP completion day, was –

(i) A national of an EEA State or Switzerland, and

(ii) Within a class specified in an order under section 119(1) of the Immigration and Asylum Act 1999 which had effect at that time."

[22] The Immigration and Asylum Act 1999 provides where relevant as follows:

"118. Housing authority accommodation

(1) Each housing authority must secure that, so far as practicable, a tenancy of, or licence to occupy, housing accommodation provided under the accommodation provisions is not granted to a person subject to immigration control unless –

(a) he is of a class specified in an order made by the Secretary of State; …

119. Homelessness: Scotland and Northern Ireland

(1) A person subject to immigration control –

(a) is not eligible for accommodation or assistance under the homelessness provisions, and

(b) is to be disregarded in determining for the purposes of those provisions, whether a person falling within subsection (1A) –

(i) is homeless or threatened with homelessness,
(ii) has a priority need for accommodation,

unless he is of a class specified in an order made by the Secretary of State.

(1A) A person falls within this paragraph if the person –

(a) falls within a class specified in an order under section 119(1) of the Immigration and Asylum Act 1999; but

(b) is not a person who, immediately before IP completion day, was –

(i) a national of an EEA State or Switzerland, and

(ii) within a class specified in an order under section 119(1) of the Immigration and Asylum Act 1999 which had effect at that time.

(2) An order under subsection (1) may not be made so as to include in a specified class any person to whom section 115 applies.

(3) 'The homelessness provisions' means –

(a) in relation to Scotland, Part II of the Housing (Scotland) Act 1987; and

(b) in relation to Northern Ireland, Part II of the Housing (Northern Ireland) order 1988.

> **(4)** 'Persons subject to immigration control' has the same meaning as in section 118."

[23] The Immigration and Social Security Co-Ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) Regulations 2020 ("the 2020 Regulations") bear on the question of whether the appellant is a PSIC. The relevant provisions are in Schedule 4.

[24] Schedule 4 of the 2020 Regulations is titled:

> 'Saving provision in relation to benefits and services.'

[25] The exception relied upon in this appeal is in paragraph 5 of Schedule 4 when read with paragraph 7. Paragraph 5 states:

> "a member of the post-transition period group is not to be treated as "a person subject to immigration control" within -…. (b) the meaning of section 118 of the Immigration and Asylum Act 1999 (housing authority accommodation) for the purposes of the exercise of the functions specified in paragraph 7."

[26] The definition of a "member of the post-transition period group" is at paragraph 1(b) of Schedule 4 which states that such a person is:

> "a person who has limited leave to enter, or remain in, the United Kingdom granted by virtue of residence scheme immigration rules within the meaning given by section 17 of the European Union (Withdrawal Agreement) Act 2020."

[27] Section 17(1)(a) of the European Union (Withdrawal Agreement) Act 2020 ("the EUWAA 2020") states that:

> "Residence scheme immigrations rules" means "Appendix EU to the Immigration Rules."

[28] Paragraph 5 of Schedule 4 to the 2020 Regulations applies as the functions specified include:

> "Determining whether a person is ineligible for assistance under Part 2 of the Housing

(Northern Ireland) Order 1988 (persons not eligible for housing assistance," (paragraph 7(b)).

[29] Whether the appellant fell within paragraph 5 when read with paragraph 7(b) of Schedule 4 of the 2020 Regulations is an issue for determination in this appeal. As set out below the court finds that the appellant fell within this exception and was thus not ineligible for consideration for housing assistance on that basis.

[30] If the appellant was not a PSIC then the Allocation of Housing and Homelessness (Eligibility) Regulations (Northern Ireland) 2006 ("the 2006 Regulations") are relevant.

[31] Regulation 4 of the 2006 Regulations sets out:

> "(i) The categories of ineligibility including a person from abroad who is not a PSIC and who is not habitually resident in the Common Travel Area. (Regulation 4(1)(a)). The appellant's submission was that the respondent should have considered the appellant under this and no assessment of the husband's immigration status and whether he was a Qualified Person was necessary as this is a matter of domestic law.
>
> (ii) That a person from abroad is not to be treated as ineligible for housing assistance if she is the family member of an EEA national who is a worker/self-employed person (Regulation 4(2)(a) and (b)). This is an EU derived rights requiring consideration of whether the husband was a Qualified Person and economically active."

I find that Regulation 4(1) (1A) referred to by the respondent does not apply to the appellant as it is limited to those who fall within Regulation 4(1)(b) and (c) neither of which categories applies to the appellant.

[32] In the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") the following are defined:

> "(i) Who qualifies as a family member (Regulation 7); and,

(ii) Who is a Qualified Person. (Regulation 6). In summary, a Qualified Person is someone exercising EU Treaty rights as a worker for the prescribed length of time who is economically active which includes temporary incapacity. Someone who is unemployed is not a Qualified Person because member states are entitled to refuse Social Security benefits to economically inactive people."

[33] It was not in dispute in this appeal that the appellant had Pre-Settled Status ("PSS"). The issue is whether the appellant was properly considered to be a PSIC and if not whether, because of her PSS status, the respondent should have gone on to consider the issue of habitual residence under domestic law without the need to look at the husband's immigration status under the EU-derived exception.

The Charter of Fundamental Rights of the European Union ("the Charter")

[34] The UK left the EU on 31 January 2020 thereafter entering the transition period which continued until 31 December 2020. After the transition period the status of EU citizens in the UK is governed by terms of the Withdrawal Agreement which are incorporated into domestic law. EU law is defined in the Withdrawal Agreement to include the Charter of Fundamental Rights. (Withdrawal Agreement Article 2 (a)(i)).

[35] In this appeal the respondent agreed that the Charter applied to the appellant and that consideration had to be given to the appellant's rights under the Charter. The appellant's submission was that she could rely on her PSS status on its own to access Charter rights. The respondent's submission was that this depended on the status of her husband as a Qualified Person because if he was not a Qualified Person it closed off that route to the Charter as this is an EU Treaty-derived right.

[36] The relevant instruments of EU Law are: The right to residence in another member state derived from Article 21 of the Treaty on the Functioning of the European Union (TFEU); Article 10 1(e)(ii) of the Withdrawal Agreement was relied upon by the appellant as the appellant conceded that she did not fall within Article 13(3) due to her date of entry into the UK. The question, therefore, is whether the appellant was within the personal scope of Article 10 without having to rely on her husband's status as a worker under EU law.

[37] The Charter states at Article I that: "human dignity is inviolable. It must be respected and protected." Section 7A of the EUWAA 2018 enshrines the Withdrawal Agreement in domestic law giving it primacy even over primary UK legislation. (section 7A (3) and section 20(1)).

[38] Under Article 4(3) of the Withdrawal Agreement the respondent must comply with the Charter when making decisions in relation to the eligibility of individuals for housing based upon a right of residence provided such an individual falls within the personal scope of the Withdrawal Agreement. Thereafter, an individualised assessment is required in the social security context where benefits are being refused to someone with Pre-Settled Status/Limited Leave to Remain in order to ensure rights under Article 1 of the Charter are respected.

[39] The appellant relied on the case of *Secretary of State for Work and Pensions v AT* [2023] EWCA Civ 1307 where the English Court of Appeal endorsed the approach of the Court of Justice of the European Union ("CJEU") in the case of *CG v Department for Communities in NI* [2021] 1 WLR 5919 and confirmed that rights under the Charter in relation to access to benefits are continuing rights for those in scope under Article 13, as they relate to the fundamental right of freedom of movement which is a continuing right and thus continues after the Withdrawal Agreement into the post-transition period.

[40] The *AT* case concerned a woman who had Pre-Settled Status/Limited Leave to Remain under Appendix EU and had to leave her family home due to domestic violence. *AT's* claim for Universal Credit was refused as a person with Limited Leave to Remain under Appendix EU was not regarded as being "in Great Britain" by relevant regulations. The First-tier Tribunal allowed *AT's* appeal by referring to judgments of the CJEU. That decision was appealed to the Court of Appeal which endorsed the approach that once an individual is within the personal scope of the Charter then an individualised assessment must be conducted before the decision to refuse eligibility is made.

[41] The import of the *AT* and *CG* decisions is that once an individual is within the personal scope of the Charter then there is a positive duty on the public authority to conduct an individualised assessment and also that specific consideration of the appellant's Charter rights (where she falls within a vulnerable group) is required before any decision is made.

Relevant case law

[42] The principal points relevant to this case, drawn from the relevant authorities referred to by the parties, are as follows.

[43] In *Poshteh v Kensington and Chelsea Royal LBC* [2017] UKSC 36, the Supreme Court outlined the proper approach of a court of supervisory jurisdiction to decisions of housing officers citing with approval the following comments of the House of Lords in 2009 in *Holmes-Moorhouse*:

> "In my view, the appeal on this issue well illustrates the relevance of Lord Neuberger's warning in *Holmes Moorhouse* … against overzealous linguistic analysis. This is not to diminish the importance of the responsibility given to housing authorities and their officers … The length and detail of the decision letter shows that the writer was fully aware of this responsibility. Viewed as a whole it reads as a conscientious attempt by a hard-pressed housing officer to cover every conceivable issue raised in the case. He was doing so, as he said, against the background of serious shortage of housing and overwhelming demand from other applicants, many no doubt equally deserving." (para 39).

[44] The *Wednesbury* test for unreasonableness as applied to this case, is whether the impugned decision is a decision that no reasonable housing authority officer acting reasonably would have come to in the circumstances. The *Wednesbury* test for unreasonableness applies also to the issue of whether further enquiries should have been made by the decision-maker. *(Plantagenet Alliance Ltd* [2014] EWHC 1662*)* .

[45] The case of *R v Woodspring DC ex p Walters* [1984] 16 HLR 73 (QB) is a High Court decision dealing with where the burden lies in conducting enquiries. The court underlined the positive obligation on the respondent to make enquiries. This is a common law obligation aside from the duty to make enquiries under the 1988 Order. The burden of satisfying itself as to ineligibility is on the respondent. I conclude that if a positive assertion is made by the appellant then the respondent has an obligation to take steps which in this case could have included obtaining a form of authority from the appellant to approach the Universal Credit authorities for information.

[46] The respondent submitted that the Court of Appeal decision of *Barnet LBC v Ismail and Abdi* [2006] EWCA Civ 383 is authority for the proposition that an EEA national can be a PSIC. As this predated the Withdrawal Agreement it is of little assistance to the court.

[47] The respondent relied on the reasoning in the decision of *Fertre v Vale of White Horse* [2024] EWHC 1754 (KB) which is a decision of the High Court in England whereby an appellant who had PSS status failed in her bid to access housing assistance.

[48] In the instant case the respondent urged the court to follow that as persuasive authority on the issue of the effect of the appellant's PSS status on her eligibility for consideration for homelessness assistance via EU-derived non-discrimination rights under the Withdrawal Agreement.

[49] The *Fertre* case concerned an EEA national who was economically inactive and wanted to avail of the non-discrimination provisions in the Withdrawal Agreement (deriving from EU Treaty rights) to have the same access to benefits as UK citizens. That application was refused by Mr Justice Lane following an analysis of the Withdrawal Agreement and its application to her circumstances. The key finding was that, as an economically inactive EEA citizen, the appellant could not draw on EU treaty rights which specifically allowed for member states to exclude economically inactive citizens from Social Security benefits.

[50] Reference was then made at para 30 of the judgment to Ms Fertre's PSS status as this came up in the context of an amendment application that was made on the morning of the hearing and was refused. Mr Justice Lane nevertheless gave his view on the point which was that PSS status was no more than a gateway to benefits after which more information would be required to determine eligibility. Crucially, however, there was no reference whatsoever in that paragraph in *Fertre* to the specific exception relied upon in the instant case namely paragraph 5 of Schedule 4 to the 2020 Regulations.

[51] The comments in *Fertre* in this regard are therefore obiter dicta and are of no authority persuasive otherwise in this court as regards the effect of the appellant's status as a person with PSS in relation to availing of the exception in paragraph 5 of Schedule 4 to the 2020 Regulations.

[52] However, I do adopt the reasoning in *Fertre* in the instant case in relation to the issue of whether the appellant's PSS status alone means that she can rely on Charter rights. I, therefore, conclude that she must bring herself within the personal scope of Article 10 as PSS status is no more than a gateway to EU rights and therefore consideration of her husband's immigration status and whether he was a Qualified Person was required.

Consideration

Ground 1 The decision on whether the appellant was a PSIC

[53] It was common case that the appellant fell within the post transition group which in essence comprised those individuals covered by the Withdrawal Agreement. As regards the appellant, the effect of the Withdrawal Agreement was that she had to apply for either permanent status or for pre-settled status (PSS), she did so and was given PSS by the Home Office in 2023.

[54] The Withdrawal Agreement therefore required someone in the appellant's position and indeed her husband to apply for either settled status which would be permanent, or pre-settled status which would last for five years.

[55] The appellant referred the court to the explanatory memoranda and explanatory notes accompanying the interlinked legislation. It was common case that those notes reveal the intention of Parliament which was to preserve the status quo so that those in the post-transition group were no worse off nor any better off than they would have been before the Withdrawal Agreement.

[56] Explanatory memoranda and explanatory notes are no more than an aid to interpretation of the legislative provisions if there is a lack of clarity whereas in this case in my judgement paragraph 5 of Schedule 4 to the 2020 Regulations is clear. The appellant falls within that specific exception the effect of which is that she is not to be regarded as a PSIC for the purposes of housing assistance. Whether that is more generous than Parliament intended is not for this court to assess.

[57] I conclude that the appellant fell within the exception in the 2020 Regulations at paragraph 5 of Schedule 4 when read with paragraph 7. The respondent's decision that she was a PSIC under Article 7A of the 1988 Order was therefore tainted with illegality and is quashed on that basis.

The habitual residence issue

[58] I accept the appellant's submission that the wrong legislation was applied to reach a decision that the appellant was a PSIC. The appellant submitted that she should have been considered under the alternative provision which requires an assessment of whether the appellant was a PSIC because she was not habitually resident in the CTA. The appellant's submission was that this was not considered at all and thus the respondent's decision was flawed. I agree with that submission.

The husband's immigration status.

[59] The respondent considered whether the appellant was not ineligible because she was the family member of her husband, an EEA national, who was a

Qualified Person which required him to be a worker or self-employed i.e. economically active.

[60] The appellant's submission was that the respondent's decision on eligibility and the homelessness test was flawed on the following five bases which are considered in detail below:

(i) On the information before it in light of the appellant being a victim of domestic violence;

(ii) No account was taken of her status as a victim of domestic violence;

(iii) The lack of enquiries as regards Universal Credit;

(iii) Placing the burden on the appellant amounted to a procedural irregularity as it reversed the burden of proof which was on the respondent; and

(v) Eligibility for Charter rights was not considered appropriately.

(i) The evidence before the respondent

[61] The following information was before the respondent in relation to consideration of the appellant's status as the family member of an EEA national and whether he was a Qualified Person. This information relates, inter alia, to whether the appellant was within the personal scope of the Charter.

[62] The appellant was in receipt of Universal Credit having been accepted as eligible for that benefit. It was uncontested that the test for habitual residence for Universal Credit is largely the same as that for housing assistance. No enquiries were made by the respondent to the Universal Credit authorities as instead the burden was put on the appellant to provide evidence. It was open to the respondent to seek details about Universal Credit, firstly, by asking the appellant for more detail; secondly, by way of a form of consent from the appellant; or thirdly, via her solicitor who had notified the respondent about the appellant's receipt of Universal Credit.

[63] The fact that the appellant was a victim of domestic violence was not considered at all in reaching the decision nor was it considered when deciding what enquiries were appropriate and necessary in the circumstances. The fact that the appellant was a victim of domestic violence also should have informed the respondent's consideration of the weight to be given to the evidence before it.

[64] I conclude that the respondent's action in not making further enquiries about Universal Credit was irrational and unreasonable to the *Wednesbury* standard and was also in breach of its statutory obligation to make enquiries. Effectively, the respondent put the full burden on the appellant to produce evidence as to her husband's status even though it accepted she was a victim of domestic violence.

[65] The respondent submitted that, as the appellant receives Universal Credit, even though she is ineligible for housing assistance from the respondent, she can access their advice and obtain her own accommodation. That submission does not however address the question for this court which is did the appellant's Charter rights form part of the decision-making process in the form of appropriate enquiries to establish whether the appellant was within the personal scope of the Charter and indeed whether appropriate enquiries were made at all.

[66] The court looks at the decision (affording the latitude referred to in the *Poshteh* case) to see if there is any evidence of the appellant's Charter rights having been taken into account. The lack of consideration given to her status as a victim of domestic violence (as evidenced in particular by the assumption that she could return to the family home in Algeria) leads the court to the conclusion that an appropriate level of enquiry to establish whether her husband was a Qualified Person did not take place.

[67] The fact that it was not considered and assessed in this way before the decision was made rendered the decision flawed. Failure to enquire appropriately into issues connected to the appellant's Charter rights therefore amounted to a failure to take account of a relevant consideration.

(ii) The appellant's status as a victim of domestic violence

[68] From the documents before the court and from the content of the impugned decision, it is clear that the fact that the appellant was a victim of domestic violence was not weighed in the balance at all in the decision-making process. Rather the focus was on requiring the appellant to provide evidence of her husband's status to establish whether he was economically active and thus a Qualified Person.

[69] In this regard the respondent asked the appellant to provide the husband's payslips which was a very surprising request to make of a victim of domestic violence and underlines how that status, whilst accepted by the respondent, was not considered appropriately or indeed at all.

(iii) and (iv) The duty to make enquiries and the burden of providing evidence

[70] The appellant relied on her husband's status namely an EEA national who had lived and worked in Northern Ireland for 35 years. The appellant's argument is that she was therefore a family member of someone who had habitual residence and permanent status post EU Exit because of the Withdrawal Agreement and the EU Settled Status Scheme.

[71] The provisions in the 2006 Regulations set out the categories of people who are to be regarded as ineligible. The categories relevant to this appeal are:

(i) That a person is regarded as ineligible if not habitually resident in the CTA (Regulation 4 (1) (a)); and

(ii) If not habitually resident, by virtue of Regulation 4(2)(d) the appellant as a family member of a worker or self-employed person could rely on her husband's status as he was an EEA national to bring herself within an exception meaning that she would not be ineligible.

[72] The respondent accepted that the appellant has PSS, married to an EEA national and was therefore a family member of that person. She would be eligible for housing assistance if her EEA family member was currently a Qualified Person or had a permanent right to remain. However, the respondent submitted that whilst the appellant suggested that her husband might be a Qualified Person, she could not provide any evidence to support what she said.

[73] The appellant's submission was that the burden is on the respondent to satisfy itself as to the appellant's status and putting the burden on the appellant to provide evidence of her husband's status in particular, amounted to a procedural impropriety especially against the background of domestic violence.

[74] I find that there was some burden on the appellant to put certain matters in issue in that it would not have been enough for her to simply remain silent and leave it to the respondent to try to find evidence relating to eligibility. However, once the appellant gave information on certain matters, and in particular Universal Credit, then the obligation was on the respondent to assess the evidence before it and to elicit further evidence, as appropriate, particularly given the fact that the appellant was a victim of domestic violence. That status should have informed the respondent's approach as to satisfying itself as to her eligibility.

[75] Under the 1988 Order there is a statutory duty placed on the respondent to make such enquiries as are necessary to satisfy itself as to whether a person is homeless. (Article 7 of the 1988 Order).

[76] This shows the positive obligation on the respondent to make enquiries and by analogy to make such enquiries as are necessary in relation to the issue of eligibility particularly when read with Article 7B referred to below.

[77] Article 7A outlines the categories of persons not eligible for housing assistance. Reading Article 7A as a whole it is clear that it is for the respondent to satisfy itself that the appellant was not eligible for housing assistance. It was not the case that the respondent had to satisfy itself that the appellant was eligible for housing assistance.

[78] The distinction is important in this case and is where the respondent fell into error in my judgment as the respondent proceeded to put the burden on the appellant to produce evidence of her eligibility for housing assistance despite the respondent's acceptance of her status as a victim of domestic violence. That approach also infected the process of weighing up the available evidence before the respondent in reaching its decision on whether the appellant was ineligible to be considered for housing assistance.

[79] Article 7B places a positive obligation on the Secretary of State for the Home Department, if requested by the respondent, to provide it with such information as the respondent may require to enable it to determine whether a person is eligible for assistance. In this case the respondent enquired of the Home Office about the appellant's status. No enquiry was made, however, in relation to the husband's status despite the fact that his status was relevant to the assessment of the appellant's status.

[80] The respondent regarded the appellant's entitlement to Universal Credit as key evidence. Documents were produced to the court which post-date the impugned decision. These were not helpful to the court's review of that decision except as an indicator of the information that might have been elicited if proper enquiries had been made.

[81] It was common case that assessment of immigration status for Universal Credit purposes is largely the same as for the assessment for eligibility for housing assistance. This was thus a key piece of evidence which did not rely on the appellant obtaining, for example, her husband's payslips.

[82] In May 2024, before the impugned decision was made, the appellant told the respondent through an interpreter that she was in receipt of Universal Credit. This was followed up by an email in June 2024 from her solicitor Ms Creighton of Housing Rights which informed the respondent that the appellant was in receipt of Universal Credit.

[83] It was common case that the Universal Credit application involved the details of the appellant and her husband, and that the information gleaned by the Universal Credit authorities would relate both to the appellant and her husband.

[84] The appellant raised the fact that she had been found eligible for Universal Credit and this was repeated by her solicitor. She therefore put the matter in issue with the respondent and, in my judgement, that triggered an obligation on the respondent to make some sort of enquiry to elicit more detail if they were not prepared to accept the award of Universal Credit as an indicator of the husband's eligibility for access to benefits as a Qualified Person.

[85] The appellant submitted that enquiries could have been made for example by asking the appellant's solicitor for more information. Alternatively, bearing in mind the appellant's vulnerability as a victim of domestic violence, the respondent could have obtained the appellant's consent to enable the respondent to approach the Department for Communities to elicit Universal Credit information which would likely have shed light on the husband's status.

[86] I conclude that once the appellant and her solicitor put in issue the fact that she was in receipt of Universal Credit, and given that this was regarded as a key source of evidence for the respondent in relation to whether the husband was a Qualified Person, then the respondent was under an obligation to make some enquiries even if it was only from the appellant and her solicitor for them to get further information.

[87] In the event no enquiry whatsoever was made as the approach was to require the appellant to provide proof of the husband's status. Indeed, the initial decision to refuse her on grounds of eligibility and homelessness test followed the day after the respondent had been informed of her award of Universal Credit.

[88] The appellant's Subject Access Request made for the purposes of this appeal, elicited details of the appellant's Universal Credit information which included information relating to her husband (albeit with his name redacted) as his status was relevant to her given that she relied upon it as a family member. This information strengthens the point (which was conceded by the respondent) that Universal Credit information was key evidence albeit that it was not conclusive evidence.

[89] The appellant further submitted that the respondent could have enquired of the husband's employer as the Home Office does. I am not persuaded on this point as it was uncontested that the powers of the Home Office in relation to immigration are more extensive than those of the respondent which is an independent body albeit under the aegis of the Department for Communities.

[90] Given that the appellant was a vulnerable person as a victim of domestic violence lacking proficiency in English the lack of enquiry in relation to Universal Credit tipped the respondent's decision-making into *Wednesbury* unreasonableness as regards reasonable enquiries and amounted also to a failure to comply with its statutory duty to make necessary enquiries.

(v) Charter rights

[91] As regards the Charter, Article 13 of the Withdrawal Agreement essentially reproduces the pre-withdrawal freedom of movement that applied to EU citizens and family members. In the case of *CG* the CJEU recognised that the rules created by the EU Settlement Scheme in the UK are more favourable than those envisaged in Article 13 but they nevertheless gave effect to the rights conferred by Article 21(1) of the TFEU.

[92] It was accepted by the appellant that she was not within the personal scope of Article 13 of the Withdrawal Agreement and that for the Charter rights to apply to her an anchoring EU right must be identified. The appellant relied on Article 10 of the Withdrawal Agreement which I find relies on consideration of her husband's status and whether he was a Qualified Person

[93] I conclude that, as regards access to housing assistance, what was required by the Withdrawal Agreement for the appellant as a vulnerable person, was firstly, consideration of whether she came within the personal scope of the Withdrawal Agreement by assessing whether her husband was a Qualified Person. Only then was there an obligation for an individualised assessment to be conducted as to the risk that refusal of access to housing assistance might expose the appellant to a position whereby she might not be able to live in dignified conditions. This would also have involved consideration of the recourse the appellant had in practice to support or housing, before the decision was made by the respondent to refuse her application under Article 7A of the 1988 Order.

[94] As set out above, the requisite consideration of the applicability of the Charter amounted to a failure to take account of a relevant consideration.

Ground 2 The Homelessness test

[95] The second ground of appeal was in relation to the homelessness test under the 1988 Order. In this regard the conclusions set out in the paragraphs above are relevant in relation to the evidence before the respondent, the lack of appropriate enquiries into Universal Credit and the house in Algeria and the lack of regard in

the decision-making given to the appellant's status as a victim of domestic violence and whether she was within the personal scope of the Charter.

[96] The key issues as regards the homelessness test in this appeal are:

(i) Whether or not it was unreasonable for the appellant to return to the family home in Algeria.

(iv) Whether the burden was impermissibly placed on the appellant to provide evidence of her husband's status and in particular detail of the appellant's and her husband's eligibility for Universal Credit which had been granted by the Department for Communities.

(v) Whether account was taken of the fact that the appellant was a victim of domestic violence in deciding how to deal with the evidence before it and also in relation to enquiries which might be appropriate in the circumstances.

The house in Algeria

[97] The appellant's submission was that the assumption was made that she could go back to that home with no consideration being given to the fact that she was a victim of domestic violence nor to the fact that this was the family home in which she had resided before she came to Northern Ireland and which the husband had visited regularly.

[98] Information was provided to the court which was not before the decision-makers namely, firstly, that the house belongs to the husband's mother, and secondly, to support the appellant's contention that the adopted children in it were not relevant to the respondent's consideration. These would clearly be relevant points if the appellant reapplies to the respondent for housing assistance.

[99] The appellant was never asked why she could not return to the house in Algeria as an assumption was made that she could return. Asking the question of the appellant likely would have elicited some more information as to the unsuitability of that option for the appellant in her circumstances. If the question had been asked it may well also have elicited the information which has been given since the impugned decision.

[100] Even on the evidence before the respondent, the decision that it was not unreasonable to return was irrational. That evidence was that it was accepted this was the family home, that the husband had visited regularly before the appellant came to Northern Ireland and that the appellant was a victim of domestic violence.

[101] As set out above, the respondent also failed to make appropriate enquiries; wrongly placed the burden on the appellant to provide evidence; no account was taken of her status as a victim of domestic violence; and the applicability of the Charter was not considered.

The parties' remaining submissions

Comparison with other benefits regimes

[102] During oral submissions a further point was put forward by the appellant which in essence sought to rely on a comparison with both the Universal Credit and the Housing Benefit regimes. It was regrettable that this was not referred to in skeleton argument nor was the respondent on notice of this aspect of the submissions. In the event the court does not need to consider this further given its conclusions on the primary submissions.

The hard-pressed housing officer issue

[103] The principle in *Holmes-Moorhouse* cautions the court against an -over-analysis of a housing officer's reasoning where various matters have to be weighed in the balance in reaching a decision.

[104] That does not avail the respondent in the case where the wrong legislation was applied to decide that the appellant was not eligible to be considered at all. It is however applicable to the issue of applying the homelessness test and reasonable enquiries. In this case, however, as simple steps could have been taken to make enquiries; as unwarranted assumptions were made; and as relevant matters were excluded from consideration, then the decision-making tipped into *Wednesbury* unreasonableness in my judgement.

Appropriateness of review by the court

[105] The respondent submitted that review by this court was unnecessary given that there is a suitable alternative remedy open to the appellant.

[106] The respondent submitted that the appellant could always reapply with the further information she had gathered, and on that basis, it was not apt for judicial review on judicial review principles.

[107] As this route was open to the appellant, the respondent submission was that she had not exhausted her appeal rights, and the court should be slow to

permit the appellant to proceed with this appeal. In this regard, the respondent relied on the judicial review decision in *Re Kirkpatrick's Application* [2004] NIJB 15.

[108] I reject that argument as the scenario in this appeal is entirely different to that in *Kirkpatrick*. In that case there was an alternative remedy to go to the Fair Employment Tribunal (an independent judicial forum) and for that reason the judicial review was dismissed because there was a suitable alternative remedy available to the applicant.

[109] In the instant case if the appellant is right that the wrong legislation was applied to her then going back to the decision-makers instead of this court dealing with her statutory appeal would result in the same flawed decision being made and for this reason returning to the respondent was not a suitable alternative remedy.

[110] The respondent submitted that the decision was not apt to be quashed because the result would have been the same even if the husband's status had been considered on the evidence before the respondent. Given the court's conclusions on the flaws in the decision-making and enquiry processes then that submission is rejected.

[111] The respondent submitted that it is open to the appellant to apply to the Home Office as a victim of domestic violence to obtain enhanced status on top of her PSS status. That does not avail the respondent where a key issue was whether the wrong legislative provision was applied to the appellant, nor does it absolve the respondent of its obligation to make appropriate enquiries. Whilst the court understood that that application had been made and was yet to be determined by the Home Office, at the conclusion of the delivery of judgment on 23 December 2024, Mr Heyward stated that no application has been made to the Home Office.

Duty of candour

[112] The respondent referred to the appellant having breached her duty of candour by failing to provide full Universal Credit details and other information which has been provided since the impugned decision was made. I reject the respondent's argument on this point as the duty of candour is not applicable in this scenario, particularly as this relates to an analysis of documents which were not before the decision-maker. The appellant may well have a good reason for not having had access to, nor the ability to produce, those documents at the time. All that was required of the appellant was that she give such information as she could in the circumstances and that she be truthful when dealing with the respondent.

[113] The respondent submitted that the appellant refused to give permission to the respondent to make enquiries as regards her husband thus hampering the respondent. Again, the court does not know why the appellant did this; it may well have been because she is a victim of domestic violence. The appellant's stance did not, however, close off the other options open to the respondent for making appropriate enquiries.

[114] The respondent submitted that as the appellant is in receipt of Universal Credit, she is not destitute and can still access advice and assistance to obtain her own accommodation. This would relate to any individualised assessment to be carried out if the appellant is shown to be within scope of the relevant Charter rights.

Summary

[115] The appellant succeeds on the domestic legislation and common law as regards irrationality and *Wednesbury* reasonableness. In summary the court's conclusion on irrationality/unreasonableness relates to:

(i) The fact that there was no consideration of her status as a victim of domestic violence when determining eligibility and the homelessness test;

(ii) The burden was put squarely on the appellant to provide evidence of the husband's status in particular;

(iii) No questions were asked of the appellant in relation to the home in Algeria; rather, the respondent relied on assumptions despite describing the house as the family home and knowing the background of domestic violence;

(iv) The appellant's consent was not sought for further information to be elicited by the respondent from the Universal Credit authorities nor was her solicitor asked for more detail;

(v) Nevertheless, enough information was before the respondent for it to conclude that the appellant might not fall within the ineligible group set out in the legislation.

[116] The wrong legislative test was applied in deciding whether the appellant was a PSIC, and this amounted to an error of law.

[114] The respondent wrongly put a burden on the appellant to provide evidence relating to her husband and to prove eligibility when a proper application of the

law would have focused on whether she fell within ineligible groups, whether she could rely on an exception, and whether her husband might be a Qualified Person.

[117] As regards the homelessness test a relevant consideration was excluded namely that she was a victim of domestic violence, and this fed into a conclusion in relation to the house in Algeria. There was insufficient evidence to support the decision that it was not unreasonable for her to return to that home.

Disposal

[118] The impugned decision is hereby quashed and remitted to the respondent.

(a) On the first ground of illegality because the wrong legislative test was applied and thus amounted to an error of law.

(b) On the second ground because in applying the homelessness test the respondent:

(i) Took account of irrelevant considerations by making assumptions about the family home without making any enquiry;

(ii) Did not take appropriate account of relevant considerations namely the fact that the appellant was a victim of domestic violence and that she had been found eligible for Universal Credit;

(iii) Failed in its duty to make appropriate enquiries in relation to Universal Credit and the house in Algeria; and

(iv) The failure to make further enquiries was in the circumstances unreasonable in the *Wednesbury* sense at common law and also under the 1988 Order.

[119] Costs in favour of the appellant are hereby awarded on the Equity scale in the County Court Rules as set out in Appendix 2 Part VIII in Table 1 at part (vii). I also certify for skeleton arguments at the maximum fee of £101 as set out in Appendix 2 at Part IX in Table 1 at part (iv).