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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY LOUISE McCARRON FOR JUDICIAL REVIEW

Roman Lavery KC and Sinead Kyle (instructed by the Law Centre NI) for the Applicant
Tony McGleenan KC and Philip McAteer (instructed by the Crown Solicitor's Office) for the Respondent

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Introduction

[1] The applicant is a recipient of Universal Credit which includes a claim for housing costs. When she became homeless in 2021, she was accommodated in temporary accommodation provided by the Northern Ireland Housing Executive (NIHE) ("the Executive") until she was able to resolve her living situation in May 2023. The central issue in this application relates to the applicant's ineligibility to receive Cost of Living Payments (COLPs) when she was homeless, by virtue of belonging to a particular category of Housing Benefit claimants at that time. The applicant challenges the statutory provisions which give rise to this situation, namely sections 1 and 2(1) of the Social Security (Additional Payments) Act 2022 ("the 2022 Act") and sections 1 and 2 of the Social Security (Additional Payments) Act 2023 ("the 2023 Act") ("the impugned provisions"), which governed her eligibility to receive COLPs. She does so on the basis that this was in violation of her rights under article 14 ECHR, in conjunction with article 8 ECHR and/or article 1 of the First Protocol to the ECHR (A1P1).

[2] Mr Lavery KC and Ms Kyle appeared for the applicant; and Mr McGleenan KC and Mr McAteer appeared for the respondent, the Secretary of State for Work and Pensions (SSWP). The court is grateful to all counsel for their helpful written and oral submissions.

Factual background

[3] Housing Benefit (HB) is a means-tested benefit to assist with the housing costs of low-income claimants. Universal Credit (UC) is a comparatively new single welfare payment which combines means-tested benefits for working age claimants. UC consists of a standard allowance and other relevant applicable amounts or elements, for instance (and of relevance to the applicant's circumstances) for the payment of housing costs.

[4] At the time of the application, the applicant was 39 years old. Due to some heath issues, the applicant was medically retired from Northern Ireland Civil Service (NICS) in or around 2010/2011.

[5] Previously, the applicant received income-related Employment Support Allowance (IRESA) and HB which was paid directly to her landlord. The applicant was assessed for UC in February 2021 and her benefits moved from the payment of IRESA to the payment of UC with a housing element. This is in line with the general intention that UC should replace 'legacy' benefits. Under this new arrangement, the applicant's housing allowance continued to be paid directly to the landlord. However, due to some neighbour issues, the applicant decided to move from the property where she was then living.

[6] As a result, the applicant began to live in a different property from May 2021. The landlord at this property asked for rent payments to be made differently, that is, to be paid to him by the applicant. The applicant had difficulties managing her finances when her housing costs were paid to her, rather than directly to the landlord, and this led to her accruing 3-4 months' arrears in rent. She was therefore asked to leave that property in July 2021, making her homeless.

[7] Unfortunately, the applicant did not then have a permanent place to live for several months. She has averred to a number of difficulties she experienced at that time, which need not be set out for present purposes. However, she then moved to temporary hostel accommodation where she struggled to adapt. During this time the applicant also experienced some deterioration in her mental health. After a period in hospital, the applicant moved to temporary homeless accommodation in January 2022 provided by the NIHE.

[8] The applicant is entitled to receive contribution-based Employment Support Allowance (CESA), owing to her previous employment with the NICS. This is a benefit provided to claimants who are unfit for work and who have made sufficient National Insurance contributions during their previous employment. Consequently, the applicant is in receipt of £117.60 CESA each week, which amounts to £509.60 per month. The applicant also receives a private NICS pension payment of £319.72 each month. Moreover, the applicant receives £627.60 per month by way of Personal

Independence Payment (PIP), which is a non-means tested disability benefit, due to a variety of health conditions.

[9] As noted above, the applicant received an award of UC in February 2021. The UC statements show that the applicant received the standard allowance, a housing element, a Limited Capability for Work or Work-related Activity (LCWRA) element and a transitional protection element. The assessment deducted amounts in respect of the applicant's other income, including her private pension and CESA payment. A further deduction was made as repayment of a crisis loan and of advances in UC, which had been paid to the applicant during a 5-week waiting period before she received her first payment of UC. Generally, however, the applicant remained entitled to a modest payment of UC.

[10] The applicant's UC assessment included housing costs prior to the assessment period of 27 July 2021 to 26 August 2021. When the applicant became homeless in July 2021, her housing costs could only be made by way of HB. This is as a result of regulation 6 of the Universal Credit (Persons Required to Provide Information, Miscellaneous Amendments and Saving and Transitional Provision) Regulations (Northern Ireland) 2018 (SR 2018/92) ("the 2018 Regulations"). The applicant claimed that it is the government's intention that, in due course, *all* housing costs will be paid by way of UC. The respondent has said that there are currently no plans to change the existing arrangements for how claimants in temporary accommodation receive support with housing costs, although it will continue to explore longer term solutions. For the moment, however, there are issues with housing costs being paid through UC where a claimant is homeless or at risk of being homeless, particularly since the payment usually goes direct to the claimant rather than direct to the landlord. The court was told that part of the rationale for this is also to address the delay in housing payments being made through UC in such circumstances. The respondent's evidence also suggests that it is to prevent NIHE (or local authorities in England and Wales) experiencing a funding shortage in certain circumstances; and because of difficulties with short-term temporary accommodation not aligning with UC assessment periods. This is addressed in the Explanatory Notes to the equivalent regulations in England, the Universal Credit (Miscellaneous Amendments, Saving and Transitional Provision) Regulations 2018 (SI 2018/65), at paras 7.24 to 7.29. A number of these issues are also helpfully discussed in a House of Commons Library briefing paper which was exhibited in evidence, 'Housing costs in Universal Credit' (August 2021).

[11] Being housed in temporary accommodation thus barred the applicant from claiming housing costs through a UC calculation under the existing statutory scheme. She reverted to these being paid by way of HB. The difficulty for her is that HB is not a qualifying benefit for the purpose of COLPs under the 2022 or 2023 Acts, while UC is. Thus, the applicant was ineligible to receive COLPs through the gateway benefit of UC because she moved to temporary accommodation and had her housing costs met by HB rather than (as previously) through UC with a housing

element, reducing her UC entitlement to nil when her other income was taken into account.

[12] On 5 August 2022 the applicant made enquiries with the Department for Communities (DfC) ("the Department") requesting the low-income COLP. She raised her exclusion from a UC award because she had had to stay in temporary accommodation. On 9 August 2022, the applicant received an online response to the effect that she was ineligible to receive the low-income COLP because her UC benefit had been calculated at nil applying the relevant statutory provisions.

[13] In September 2022, the applicant received a Disability Cost of Living Payment, which was a one-off payment of £150.00 payable to claimants in receipt of non-means tested disability benefits, to which she was entitled because she was in receipt of PIP. This is a different type of COLP from those which are at the centre of this challenge.

[14] On 22 September 2022, pre-action correspondence was issued on behalf of the applicant by the Law Centre NI to the Department. In response, the Departmental Solicitor's Office (DSO) communicated on 31 October 2022 to the effect that DfC was not the appropriate respondent and that the matter was more properly directed to the Department of Work and Pensions (DWP). On 5 October 2022, two separate but similar pre-action letters were issued on behalf of the applicant to the Secretary of State of Northern Ireland (SSNI) and the SSWP. In response, the Crown Solicitor's Office (CSO) indicated that the SSNI was not an appropriate respondent but accepted that SSWP was the relevant respondent, since DWP had been responsible for the 2022 and 2023 Acts which are under challenge.

[15] Since the applicant moved to permanent accommodation on 18 May 2023, she is no longer homeless. Accordingly, her previous status as a person who could claim housing costs under UC was reinstated. As a result, the applicant was eligible to receive £300.00 by way of COLP in October 2023 and, later, to receive a further COLP in Spring 2024. The issue in the case therefore relates only to the previous period where the applicant was ineligible for COLPs as a result of receiving housing support by means of HB rather than the housing element of UC. In turn, that arose from that support going towards temporary accommodation as a result of the applicant's period of homelessness.

[16] The relevant dates, when the applicant claims she *ought* to have been eligible to receive COLP payments, that is to say the periods remaining at issue in this application, are as follows:

UC qualifying period	**Payment date range**	**Amount**
26/04/22 – 25/05/22	20/07/22 – 30/07/22	£326
26/08/22 – 25/09/22	08/11/22 – 23/11/22	£324

26/01/23 – 25/02/23	25/04/23 – 17/05/23	£301

[17] As appears from the above table, the applicant contends that she unlawfully lost out on COLPs in the total sum of £951.00 because of the operation of the impugned provisions.

Relevant statutory provisions

[18] Para 4A of Schedule 1 to the Universal Credit Regulations (Northern Ireland) 2016 (SR 2016/216) ("the UC Regulations") defines 'temporary accommodation' for present purposes as follows:

> **"4A. Temporary Accommodation**
>
> (1) The accommodation referred to in paragraph (3)(ea) is accommodation which falls within Case 1 or Case 2.
>
> (2) Case 1 is where—
>
> (a) rent payments are payable to the Housing Executive;
>
> (b) the Housing Executive makes the accommodation available to the renter—
>
> (i) to discharge any of the Housing Executive's functions under Part II of the Housing (Northern Ireland) Order 1988, or
> (ii) to prevent the person being or becoming homeless within the meaning of Part II of the Housing (Northern Ireland) Order 1988, and
>
> (c) the accommodation is not exempt accommodation.
>
> (3) Case 2 is where—
>
> (a) rent payments are payable to a provider of social housing other than the Housing Executive;
>
> (b) that provider makes the accommodation available to the renter in pursuance of

arrangements made with it by the Housing Executive—

(i) to discharge any of the Housing Executive's functions under Part II of the Housing (Northern Ireland) Order 1988, or

(ii) to prevent the person being or becoming homeless within the meaning of Part II of the Housing (Northern Ireland) Order 1988, and

(c) the accommodation is not exempt accommodation."

[19] There is no dispute that, during the relevant period, the applicant was in temporary accommodation meeting this description. Generally speaking, a UC claimant is not entitled to HB (and a number of other legacy benefits). However, entitlement to UC does not prevent a claimant from entitlement to HB in respect of temporary accommodation or in respect of 'specified accommodation' (see regulation 3 of the Universal Credit (Transitional Provisions) Regulations (Northern Ireland) 2016 (SR 2016/226).) A variety of payments are excluded from being rent payments for the purposes of UC housing costs: see paras 2 and 3 of Schedule 1 to the Universal Credit Regulations (Northern Ireland) 2016 (SR 2016/216) ("the UC Regulations"). This includes payments in respect of ground rent, approved premises, care homes, specified accommodation, owner-occupier payments and service charge payments. For present purposes, it also excludes payments in respect of temporary accommodation specified in para 4A: see para 3(ea) of Schedule 1 to the UC Regulations, as amended by regulation 6 of the 2018 Regulations.

[20] The 2022 and 2023 Acts are applicable throughout the UK. The impugned provisions of the 2022 Act are sections 1 and 2(1). Section 1 makes provision for means-tested additional payments; while section 2 deals with qualifying entitlements. Section 1(3)(a) specifies that individuals in receipt of UC were one of the categories which came within the scope of the 2022 Act for the purpose of payment of the COLPs for which it provided. Section 1, insofar as material, is in the following terms:

"**1. Means-tested additional payments: main payments**

(1) The Secretary of State must secure that—

(a) a single payment of £326 is made to any person who has a qualifying entitlement to a

social security benefit in respect of 25 May 2022 (the first "qualifying day"), and

(b) a single payment of £324 is made to any person who has a qualifying entitlement to a social security benefit in respect of the second qualifying day.

…

(3) The social security benefits are—

(a) universal credit under the Welfare Reform Act 2012 or the Welfare Reform (Northern Ireland) Order 2015 (S.I. 2015/2006 (N.I. 1));

(b) state pension credit under the State Pension Credit Act 2002 or the State Pension Credit Act (Northern Ireland) 2002;

(c) an income-based jobseeker's allowance under the Jobseekers Act 1995 or the Jobseekers (Northern Ireland) Order 1995 (S.I. 1995/2705 (N.I. 15));

(d) an income-related employment and support allowance under Part 1 of the Welfare Reform Act 2007 or Part 1 of the Welfare Reform Act (Northern Ireland) 2007;

(e) income support under section 124 of the Social Security Contributions and Benefits Act 1992 or section 123 of the Social Security Contributions and Benefits (Northern Ireland) Act 1992.

(4) The second qualifying day is such day, not later than 31 October 2022, as may be specified by the Secretary of State in regulations.

(5) Regulations under subsection (4) may specify a day before the regulations come into force."

[21] What amounts to a "qualifying entitlement" to a relevant social security benefit is further defined in section 2(1), for present purposes, in the following terms:

> "(1) A person has a qualifying entitlement to a social security benefit in respect of a qualifying day if—
>
> (a) in respect of universal credit, the person is entitled to a payment of at least 1p in respect of an assessment period ending during the period of one month ending with the qualifying day;
>
> (b) in respect of state pension credit, an income-based jobseeker's allowance, an income-related employment and support allowance or income support, the person is entitled to a payment of at least 1p in respect of any day during the period of one month ending with the qualifying day."

[22] The second qualifying date was set out in the Social Security Additional Payments (Second Qualifying Day) Regulations 2022, pursuant to which the second qualifying date under the 2022 Act was 25 September 2022. Accordingly, these provisions required COLPs to be made of £326.00 and £324.00 for those with a qualifying entitlement on 25 May 2022 and 25 September 2022 respectively.

[23] The 2023 Act was enacted on 23 March 2023 and makes very similar provision as the 2022 Act, except that the 2023 Act provided for payment of low-income COLPs of up to £900.00 in three instalments. Sections 1 and 2 are in materially similar terms to the equivalent sections (cited above) in the 2022 Act. They provided for a single payment of £301.00 to be made for those qualifying on the first qualifying day; of £300.00 to be made for those qualifying on the second qualifying day; and of £299.00 to be made for those qualifying on the third qualifying day. Again, the precise dates of the qualifying days were to be set by regulations made by the SSWP but within limits prescribed by section 1(4)-(7). In due course, the qualifying dates for the purpose of the 2023 Act were set out in two further sets of regulations: the first qualifying date was 25 February 2023; the second was 17 September 2023; and the third was 12 December 2023.

[24] In all, therefore, the 2022 and 2023 Acts provided for five one-off payments to an individual who qualified across the range of qualifying days, amounting to a total potential payment of £1,550.00. (As appears from the table at para [16] above, the applicant's ineligibility which is under challenge in these proceedings relates to the first and second qualifying days under the 2022 Act and the first qualifying day under the 2023 Act.)

Summary of the parties' submissions

[25] The applicant contends that her situation as a homeless person living in temporary accommodation, resulting in her falling within the scope of the broader category of claimants only in receipt of HB, has had a detrimental impact on her eligibility for COLPs in 2022 and 2023. She contends that these circumstances fall within the ambit of article 8 ECHR and A1P1 for the purpose of claiming a violation of article 14 ECHR. She argues that her status as a homeless person living in temporary accommodation has been overlooked by the policy officials when the relevant categories were decided upon; and that the policy-makers could and should have resorted to other options which would not have penalised her in this way but which could still have catered for legitimate concerns in relation to expedited delivery of COLPs and avoiding duplicative payments. At the very least, the applicant contends that her case is (what was referred to as) a 'hard edge case' whereby she should have benefitted from mitigating payments on the basis of her circumstances, along the lines of the assistance available from the Household Support Fund (HSF) in England and Wales. She contends that the Discretionary Support (DS) available in Northern Ireland was inadequate in this regard.

[26] The respondent contends that the treatment of HB-only claimants, including those in the applicant's position, was a deliberate choice and not an oversight or anomaly, having regard to the discussions and communications which informed the drafting of the impugned statutory provisions. The reasons for the exclusion of some categories of claimant from the COLP regime were to enable quick and simple delivery of the scheme, while also avoiding potential duplications of payments for those claiming HB and some other qualifying benefit; and having proper regard to the other sources of income individuals, such as the applicant receive. Moreover, the respondent observes that the applicant could have applied for DS, and indeed did so, to receive some assistance which mitigated the severity of her situation.

[27] On the basis of the above analyses, the applicant contends that there is no objective justification for the difference in treatment between her and others who were eligible for COLPs; and the respondent contends that there is reasonable justification for any such difference (if and insofar as that difference in treatment calls for justification in Convention terms.)

The policy and policy-making behind the statutory provisions

[28] It is necessary to examine briefly the policy development leading to the passage of the 2022 and 2023 Acts. The evidence in relation to this is set out in some detail in the affidavits of Ms Elizabeth Wenzerul (Team Leader within the UC Policy Team responsible for the policy relating to means-tested COLPs at DWP in 2022) and Ms Charlotte Clancy (Team Leader within the equivalent team at DWP in 2023). The analysis below is drawn largely from their evidence and the documents exhibited to their affidavits.

[29] The backdrop is the cost-of-living crisis across the UK in 2021 and 2022 arising in the period of recovery from the Covid-19 pandemic and contributed to by the

effects of the war in Ukraine. Consideration was being given by government to the provision of assistance to households across the UK to help with energy bills and local rates, amongst other things. At a number of cost-of-living meetings in April 2022, the SSWP wished to examine potential solutions which could be delivered during 2022 to assist means-tested benefit claimants who were unable to improve their income through employment. There was discussion about the provision of one-off payments to people on IRESA and in the Limited Capability for Work (LCW) and LCWRA groups on UC; and a higher Winter Fuel Payment (WFP) for people over state pension age claiming a means-tested benefit.

[30] Apart from the above categories, some other cohorts were also considered in submissions later made to the SSWP. In particular, in a submission dated 10 May 2022, some significant delivery risks were raised in relation to the options under consideration and the risks of limiting payments to specific cohorts of claimants were considered. For instance, it was noted that a reason for the proposed exclusion of HB-only claimants was because it would be difficult to cover them within reasonable time frames and to avoid duplicate payments:

> "…We have also excluded Housing Benefits and Tax Credits as we believe that covering these benefits would not be possible in reasonable timeframes. The key issue is avoiding duplicated payments where families receive more than one income-related benefit. We expect ~1.4m working age benefit units receive more than one income-related-benefit (~21% of the entire working-age income-related benefit caseload). If we included Housing Benefit and Tax Credits there would be a high risk of some benefit units receiving multiple payments."

[31] At a meeting on 16 May 2022 the SSWP wanted policies developed before October 2022, stressing the need for something that could be delivered urgently, as it was judged that those on the lowest incomes needed support imminently. In response, the officials advised that simplicity was key to delivering quickly. A note was prepared on the lead assumptions for cost-of-living support on 22 May 2022, reflecting the discussions that were taking place at the time. At that stage, it was not evident whether DWP would make COLPs in Northern Ireland. The assumption in respect of claimants in receipt of HB only was as follows:

> "Possible discretionary Local Authority pot to help address hard cases, particularly focused at those that only receive housing benefits (~400,000 GB-wide) and potentially – depending on options above – to pensioners requiring additional support."

[32] Following exchanges with Her Majesty's Treasury (HMT), some suggestions were presented to DWP officials at a meeting on 23 May 2022. One of the

suggestions was the need to have two payments for those receiving means-tested benefits, the first being in July and the second in November. In relation to Northern Ireland, it was highlighted that legal cover to make payments directly may be required.

[33] By the end of May 2022, plans were becoming more detailed and, on 25 May 2022, DWP confirmed that it had agreed to deliver the required legislation on a UK-wide basis to the agreed timetable. DWP considered there to be three priority groups, namely those on low-income on DWP means-tested benefits; disabled people; and pensioners.

[34] At the same time as policy officials acknowledged that the prioritisation of some groups was paramount for expeditious delivery and to help those in need, they also noted that this may mean that there were some excluded groups. One of the excluded groups considered, amongst others, was "people claiming HB but no other means-tested benefits." The SSWP gave her formal agreement to a submission in late May 2022 including the indication that DWP "should try to deliver this from HMG for NI and Scotland." An exchange of correspondence followed, including with the Minister for Communities in Northern Ireland, who welcomed the COLPs but felt that more should be done to provide support. In this regard, she indicated in a statement to the Northern Ireland Assembly that she would explore other options to support people in need through the Voluntary and Community Sector Emergencies Leadership Group on the Cost of Living.

[35] Meanwhile, there was an Equalities Impact Assessment (EIA) undertaken in May 2022 for the COLP package, which included an assessment of means-tested benefit payments and extending the HSF. The EIA noted as follows:

> "Providing payments for recipients of means tested benefits is designed to have a positive impact on households on lower incomes. Overall, households sharing protected characteristics are expected to benefit and it is not expected to have a negative impact on any group with protected characteristics. Means-tested benefits are designed precisely to support the most vulnerable in society and therefore offers the best match we can find within the government systems at short notice for identifying this group.
>
> … There are possible gaps in pursuing this option on its own... However, this measure is purposely designed to support those on the lowest incomes, who will be most vulnerable to cost-of-living issues... As a part of this package, the extension to the HSF is

> intended to support households in need who are ineligible for the one-off payment."

[36] DWP worked closely with HMT following the EIA, and confirmation of agreement to the cost-of-living package was confirmed late in May 2022. The package was announced by the then Chancellor on 26 May 2022, including a £650.00 COLP payable in two payments to claimants in receipt of a qualifying means-tested benefit, tax credit or pension credit. There was also to be additional funding to extend HSF in England, with equivalent funding through Barnett consequentials for the devolved administrations (to which I return below). Specially regarding HB-only claimants, the Chancellor stated as follows:

> "Of course, we recognise the risk that, with any policy there may be small numbers of people who fall between the cracks. For example, it is not possible right now for the DWP or HMRC to identify people on housing benefit who are not also claiming other benefits. To support them and others, we will extend the HSF delivered by local authorities by £0.5 billion from October."

[37] Since, in general, one-off payments are not facets of the benefit system, DWP urgently prepared the Social Security (Additional Payments) Bill which was introduced into Parliament on 15 June 2022. Parliament was asked to expedite this Bill so that payments could be delivered promptly beginning in July 2022. As a result, the second reading in the House of Commons, consideration by the Public Bill Committee, the report and third reading stages were all conducted on 22 June 2022. The second and third readings in the House of Lords were both conducted on 27 June 2022. Royal Assent was granted on 28 June 2022.

[38] Before the passage of the 2023 Act, DWP was instructed by HMT to undertake delivery of a further one-off COLP on 20 October 2022. On the same day the policy officials discussed including the previously excluded groups in the second COLP scheme (including HB-only recipients). However, they stated that adding new benefits to the eligibility criteria for COLPs could again result in jeopardising its quick delivery.

[39] Consequently, on 26 October 2022 the eligibility criteria for the 2023 COLP scheme was set, remaining essentially the same as those for the 2022 scheme (except for the removal of the requirement for some benefits for the payment to be at least 10p). The intention behind the 2023 scheme was the same as the 2022 scheme. As such, it was to be simple to deliver, capable of being delivered quickly and minimising the risk of error. Although the eligibility for the 2022 and 2023 schemes remained the same, amounts payable to means-tested benefit claimants were expected to be higher. Ultimately, £900.00 was paid in three instalments. Those groups 'excluded' remained the same as under the 2022 scheme due to the delivery

constraints mentioned above. The officials highlighted that previous mitigation for such groups had been provided by the HSF.

[40] In an urgent submission on 9 November 2022, officials set out the timeframe and order of the COLP prior to the Chancellor's announcement on 17 November 2022.

[41] In the 2023 scheme, the officials were again concerned about hard cases, referred to in some exchanges as 'hard edge' cases. The possibility of including in the upcoming payment cycle individuals on UC who had received sanctions and had their award reduced to nil was taken into account during the drafting of the relevant Bill. In a ministerial submission on 14 December 2022, the SSWP was advised to conduct feasibility tests to determine the viability of this plan. The ensuing feasibility test indicated that DWP was unable to identify the relevant cohort accurately and that subsequent 'mop up' payments would be required to be made which could significantly increase clerical work. As a result, in a follow-up submission it was recommended to the SSWP that this group be excluded from the COLP scheme. The SSWP agreed with this recommendation. Another group of 'hard' cases was identified as arising from those with fluctuating earnings in UC (such that entitlement to payments would also fluctuate). It was also difficult for DWP to distinguish this category.

[42] During a meeting on 1 November 2022, the SSWP returned to the issue of hard cases, such as the exclusion of HB-only applicants, and enquired of officials whether there was any way to reduce the number of such cases. The advice received was to the effect that these needed to remain the same to facilitate quick delivery of the scheme. HB-only claimants had been considered along with other excluded groups for inclusion in the 2023/24 round of COLP payments; but this idea was rejected due to the pressurised timetable to legislate and deliver the next round of payments and also to keep the mechanism simple.

[43] As to the position in Northern Ireland, at the time of the introduction of the scheme for the 2022/23 payments, there had been a 'caretaker minister' in place in DfC. (Although the First Minister had resigned in February 2022 bringing down the Executive Committee of the Assembly, a number of other ministers in Northern Ireland Departments were able to remain in post until October 2022.) When the scheme for the 2023/24 payments was introduced, the previous caretaker minister in DfC was no longer in position. In those circumstances, a letter dated 6 January 2023 was sent from the DWP Permanent Secretary to the Permanent Secretary in DfC, seeking agreement to bring forward COLP legislation for Northern Ireland making provision equivalent to that in Great Britain. In this correspondence it was stated that, although social security policy is a matter for Northern Ireland, in the absence of a functioning Executive, for the COLPs made under 2022 Act DWP had legislated for and made payments in respect of Northern Ireland. DWP suggested the same approach in relation to the 2023 Bill.

[44] On 20 January 2023, the SSWP wrote to the Chancellor requesting clearance from the Home Affairs Committee for the Social Security (Additional Payments) Bill 2023 to proceed without a legislative consent motion in the absence of a functioning Northern Ireland Assembly.

The article 14 issues

[45] Having set out the background to the two Acts containing the impugned provisions, the court turns to consider the applicant's case. It is now well known that challenges under article 14 ECHR follow a structured analysis (with formulations – such as that set out by Lady Hale in *Re McLaughlin's Application* [2018] UKSC 48, at para [15] – differing slightly in their terms) addressing the following four questions:

(i) Do the circumstances "fall within the ambit" of another Convention right?

(ii) Is the difference in treatment on the grounds of the applicant's status which is recognised under article 14?

(iii) Is there a difference in treatment between the applicant and another person whose situation is, in relevant respects, analogous?

(iv) Is the difference in treatment reasonably and objectively justified?

Ambit

[46] The issue of 'ambit' is frequently the most straightforward element of the article 14 analysis. *Re McLaughlin's Application* (supra) was an appeal considering the compatibility of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 with article 14, read either with article 8 or with A1P1. At para [16] of her judgment, Lady Hale explained that:

> "Article 14 does not presuppose that there has been a breach of one of the substantive Convention rights, for otherwise it would add nothing to their protection, but it is necessary that the facts fall "within the ambit" of one or more of those: see eg *Inze v Austria* (1987) 10 EHRR 394, para 36."

[47] She went on, at para [20], to explain (as is now trite) that there is no need for the substantive Convention article to be "infringed" in order for article 14 to be engaged within its ambit. However, the closer the facts come to the protection of the core values of the substantive article, the more likely it is that they fall within its ambit.

[48] The present case concerns non-eligibility for welfare benefits in the form of COLPs. Although welfare and social security benefits are frequently not distinguished from each other, and the terms are often used interchangeably in common parlance, for clarity of argument a distinction may be made between them. In simplistic terms, social security benefits are based on some form of contribution by the individual whereas welfare benefits are non-contributory. On the issue of whether non-contributory benefits fall within the ambit of A1P1, the case of *R (DA and Others) v Secretary of State for Work and Pensions* [2019] UKSC 21 is of assistance. In that case, at para [137], Lady Hale stated that:

> "There is nowadays no doubt that entitlement to state benefits, even non-contributory means-tested benefits, is property for the purpose of article 1 of the First Protocol (A1P1), which protects property rights…"

[49] I consider that the applicant's claim – that she has unlawfully been denied the benefit of COLPs to which she should be entitled (but for unjustified discrimination in breach of the Convention) – falls sufficiently within the ambit of A1P1 to engage article 14 ECHR. Indeed, the respondent did not dispute the fact that the claim arose within the ambit of A1P1.

[50] The applicant further argued that this dispute arose within the ambit of her article 8 rights. In doing so she relies upon authorities such as *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368 (see para [9], *per* Lord Bingham) and *R (Bernard) v Enfield LBC* [2002] EWHC 2282 Admin (see para [31], *per* Sullivan J, considering *Botta v Italy* [1998] 26 EHRR 241) emphasising the breadth of the notion of 'private life' within article 8 as including features integral to a person's ability to function socially. This too is addressed in para [137] of Lady Hale's judgment in *Re McLaughlin* where, referring to Lord Wilson's judgment (at paras [35]-[37]), she considered that benefits which represent one of the ways in which the state manifests its respect for family life (those which are designed to meet basic needs) also fall within the ambit of article 8 (and see further Lord Carnwath, with whom Lords Reed and Hughes agreed, at para [102]).

[51] The applicant relies upon the consequences of her being ineligible to receive the COLPs, such that her living conditions deteriorated to the extent that she was unable to cover even basic needs while staying in temporary accommodation. She contends that the nature of her situation and purpose of the COLPs in this case (to support the costs of *living*) combined such that the alleged discrimination did affect her ability to lead her life in society with dignity. I proceed on the basis, without having to decide the matter, that, in the particular circumstances of this case, the alleged discrimination also arose with in the ambit of the applicant's article 8 rights (even though, as Mr McGleenan pointed out, this particular case does not involve children). Nonetheless, when one turns to the ultimate question of justification of the alleged differential treatment, I also accept the respondent's argument that being

within the ambit of article 8 (as opposed to merely within the ambit of A1P1) does not make a material, if any, difference to the analysis, at least in this case.

The protected status or statuses

[52] As to the status on the basis of which the applicant contends she has been discriminated against, the applicant frames her claim under an "other status" protected by article 14, due to her being a homeless person living in temporary accommodation. Mr McGleenan for the respondent argued that, when the status upon which the applicant relies is properly understood (being in temporary accommodation, such that her housing costs fell to be met by HB and she was no longer eligible to receive UC payments), the status upon which she relies is simply defined by the differential treatment of which she complains. He further took issue with the contention that the applicant can rely upon any status protected by article 14 under the "other status" rubric.

[53] I accept that the applicant can rely upon a status which is capable of being protected under article 14 in light of being homeless and living in temporary accommodation. The position is of course somewhat more complicated than that, since the key feature is that her housing costs in those circumstances were met through HB rather than a housing component of UC; *and* her non-eligibility for COLPs arose because her additional income reduced her UC entitlement to nil when the housing component was removed. (On this basis, the respondent asserts that a key element of the applicant's relevant status was her additional income which exceeded the threshold for her receipt of an income-replacement benefit). Nonetheless, on the facts of this particular case, the applicant's predicament arose essentially because of her housing situation at the relevant time (as evidenced by her putative eligibility for COLPs before, and her actual eligibility for COLPs after, her period in temporary accommodation).

[54] A status capable of being protected under article 14 need not be permanent and the concept of 'other status' is now often given a broad meaning (see, for example, *Re RK's Application* [2022] NIQB 29, at para [37], and the cases there cited). An individual's housing situation, including being a homeless rough sleeper, can be a relevant status for this purpose (see, for instance, *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63; [2009] AC 311, at para [41]).

[55] I proceed on the basis, therefore, that the applicant can avail of a status which (provided her circumstances are sufficiently analogous to those of a comparator given more favourable treatment) calls for a justification of the differential treatment at issue. I also, however, accept the respondent's argument that the applicant's status for this purpose is not a 'suspect' personal characteristic but, rather, falls more towards the outer orbit of Lord Walker's analysis of concentric circles explained at para [5] of the *RJM* case. (This is, of course, not to take away from the fact that the applicant found herself in housing difficulties not through any deliberate choice of her own.)

[56] As I did in my judgment in the *RK* case (see para [38]), and for similar reasons, I again reject the respondent's contention that the relevant status relied upon is entirely defined by the differential treatment complained of. As is often the case, the less favourable treatment is related to the applicant's status (since she contends, as she must, that the less favourable treatment arises by reason of her protected status). However, her status for this purpose can be formulated otherwise than by simply repeating the fact that she is ineligible for the COLPs.

Analogous situation

[57] A more complicated question is whether the applicant's chosen comparators are in a relevantly analogous situation to her. The applicant compares herself to a person who has not lost their eligibility for COLPs by becoming homeless and being housed in temporary accommodation. Hence, the applicant's comparator group is the broad cohort of people who received COLPs. On this basis, the applicant states that she was subjected to direct discrimination on the grounds of her status. To substantiate her position as to the comparator group, the applicant draws attention to her change in circumstances on 18 May 2023, at which point she was no longer deemed homeless and thus was eligible to receive COLPs.

[58] From the perspective of the policy-making at issue, the important point is that the applicant was part of a wider group which was excluded from eligibility for COLPs, namely those only in receipt of HB and no other qualifying benefit. However, the court considers that it may be appropriate to view the applicant as belonging to a sub-category within that cohort, *viz* a more limited category of persons within the cohort of HB-only claimants who fell into that group because of the way in which their housing costs were dealt with. This particular circumstance is quite specific and (the evidence suggests) may not have been given any detailed consideration separately from those who, for more generic reasons, were only in receipt of HB.

[59] The respondent contends that the applicant has not identified a comparator group properly, on the basis that the applicant's comparator group is everyone entitled to COLPs who is not in her precise circumstance. Nevertheless, the two situations do not have to be identical, merely relevantly similar (see para [59] of *O'Donnell* and para [59] of *R (SC and Others) v Secretary of State for Work and Pensions and others (Respondents)* [2021] UKSC 26*)*. When viewed from a practical point of view, I consider the applicant's position to be sufficiently similar to that of a person in receipt of COLPs to be analogous for the purpose of article 14. If the applicant's housing costs had continued to be met through UC, she would have been eligible for COLPs. Moreover, the fact of her homelessness and accommodation on a temporary basis are matters which, in broad terms, might be thought to increase her vulnerability (both financially and generally) and her need for assistance by way of COLPs, rather than the opposite.

[60] For the above reasons, I consider the applicant's position is not so dissimilar to those in her chosen comparator group for her claim to fail on that account. I have also taken into account that, in the Strasbourg and domestic jurisprudence in relation to article 14 ECHR, this issue is often not treated as determinative: see, for instance, para [24] of *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42, in which Lady Hale referred to Lord Walker's judgment in *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173, at para [65], where he observed that "in most instances of the Strasbourg case law…the comparability test is glossed over, and the emphasis is (almost) completely on the justification test." The court therefore now turns to that issue.

Justification

[61] As is so frequently the case, the meat of this dispute relates to the justification for the difference in treatment of which the applicant complains. In turn, much of the analysis depends upon how the applicant's situation should be categorised and what one takes as the starting point for the justification advanced. On the respondent's case, the applicant should simply be viewed as part of the cohort of HB-only claimants, which was specifically considered and ruled out of eligibility at the time of policy development for reasons discussed and weighed at the relevant time. On the applicant's case, that categorisation is far too simplistic. Albeit the applicant was excluded from eligibility for COLPs because she was in receipt of HB only, this arose for a particular reason (*viz* the manner in which her housing costs were met by reason of her being homeless and housed in temporary accommodation). She contends that individuals in that specific position were not identified and considered when the policy was developed, such that the respondent cannot claim to have expressly addressed the matter in a rational and informed manner. On her case, it was and is anomalous that she fell out of scope of the schemes merely by reason of the change in her housing status (which increased her vulnerability).

[62] The question of how much difference it makes whether the decision-makers considered the issue in advance is an interesting one. A strong argument can be made that where, as here, the actual decision-maker is Parliament – since the alleged discrimination complained of is a result of provision made in Acts of Parliament – there is little scope for assessing in detail the nature and adequacy of the reasoning behind the provisions (save as expressed in the text of the relevant statutory provisions). In the *SC* case (supra), at para [176], Lord Reed referred to Lord Nicholls' discussion of Parliamentary reasoning and Parliamentary privilege in *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40. At para [67] of Lord Nicholls' judgment in that case he had identified the following as a relevant principle:

> "The proportionality of a statutory measure is not to be judged by the quality of the reasons advanced in support of it in the course of parliamentary debate, or by the subjective state of mind of individual ministers or other

> members…Lack of cogent justification in the course of parliamentary debate is not a matter which "counts against" the legislation on issues of proportionality. The court is called upon to evaluate the proportionality of the legislation, not the adequacy of the minister's exploration of the policy options or of his explanations to Parliament. The latter would contravene article 9 of the Bill of Rights. The court would then be presuming to evaluate the sufficiency of the legislative process leading up to the enactment of the statute."

[63] Lord Reed endorsed this in his own reasoning in *SC* at paras [171]-[172] and [184]; albeit observing (at para [182]) that the absence of Parliamentary consideration may deprive the respondent of a factor in favour of upholding the legislation.

[64] Applying the principles underlying these authorities, I do not consider that the absence of specific consideration of cases such as the applicant's should be given any significant weight. It is the approach set out in the impugned provisions, representing Parliament's expressed will, which fall for consideration. As to that, the respondent (developing again a familiar theme in this context) relies upon the use of 'bright line' rules.

[65] The propriety of adopting broad categories in the field of social security benefits, which indeed may often be necessary in this context, was emphasised in the *Carson* case when it reached the European Court of Human Rights (ECtHR): see *Carson v United Kingdom* (2010) 51 EHRR 13, at para [62]. This has since been recognised and applied in domestic case law: see, for instance, *R (Z) v Hackney London Borough Council* [2020] UKSC 40; [2020] 1 WLR 4327, at para [85]. When challenges are made to the use of broad categories, the courts are obviously unable to assess each and every individual case and must examine the rationale behind the categorisations which have been adopted. On this basis, Mr McGleenan's submissions focused on the justification for excluding from the COLP scheme those who were in receipt of HB only.

[66] The affidavits of Ms Wenzerul and Ms Clancy set out the rationale behind the use of broad categorisations in state benefits schemes and in relation to COLPs in particular. As mentioned above, in terms of excluding individuals in receipt of HB only from eligibility for COLPs, a number of reasons were advanced in the course of policy development, largely relating to delivery constraints. The following factors were particularly emphasised:

(a) DWP holds limited information on HB-only claimants in England, since HB is administered by local authorities. In addition, HB is often paid to landlords rather than claimants themselves (in relation to all local authority housing stock and 95% of the social rented sector). This means that account information which is required to make payments may not be held or may be

inaccurate for many claimants in receipt of HB only. Claimants would need to be contacted for their details or required to apply for a payment, which would add significant complexity to the process.

(b) The majority of HB claimants are also in receipt of other qualifying benefits, which means that they would receive a COLP through that other benefit. To use HB alone as a qualifying benefit may create a risk of some individuals receiving multiple COLP payments.

(c) HB is not an income-replacement benefit but is intended to cover only housing costs. Those with the lowest incomes would be able to claim a qualifying means-tested income-replacement benefit alongside HB to cover their other living costs. In summary, those in receipt of HB only (and no other means-tested benefit) would not be those in the most financial need.

(d) Nil awards of other means-tested benefits cannot be easily seen by local authorities. The provision of data by local authorities would be costly (due to the resources need to carry out searches, which may include manual searches) and time-consuming.

[67] The approach the SSWP adopted therefore made the scheme much simpler to deliver and to roll out at speed. In addition, it assisted significantly in avoiding duplication of payments (since many recipients of HB would have qualified for COLPs through receipt of another benefit). The respondent's evidence emphasised the need for expedition in terms of the government's intended intervention and that HB was not included as a qualifying benefit primarily due to the complexities which would likely have prevented delivery of the payments in the time available.

[68] Ms Wenzerul's evidence also made the point that being housed in temporary accommodation does not preclude a person from being entitled to UC. The issue in relation to temporary accommodation is that, when calculating the maximum amount of UC (from which any income is deducted) no amount is added for housing costs. Depending on their personal circumstances, such as whether they have children, a disability or a caring responsibility, and their income and capital, a person can be paid HB and still qualify for UC, albeit that did not assist the applicant in her particular circumstances. Nonetheless, it is not the case that all those in temporary accommodation who have their housing costs met through HB would find themselves ineligible for UC (and, therefore, ineligible for COLPs). The applicant's nil award of UC arose just as much from her additional income (see para [8] above) which was deducted from her UC entitlement as it did from the non-payment of her housing costs through the UC housing component.

[69] The applicant raised three main arguments against the rationale relied upon by the respondent. First, she contended that the desire to minimise error and avoid duplicate payments did not stack up because there is no information relating to the specific burden or risk of over-payment by way of duplicate payments. Second, the

applicant argued that the need to legislate quickly did not stack up because there was a considerable time lag between the relevant Acts coming into force and the later assessment periods and payment dates for which they provided. In short, she contends that there was sufficient time between policy development and the COLP payments being made to craft a more carefully calibrated scheme. Third, and relatedly, the applicant draws attention to the fact that Northern Ireland has only one housing authority (NIHE), rather than various local authorities responsible for the provision of social housing, so that the sharing of data which would have been required to minimise the risk of abuse or error and to facilitate the smooth running of the scheme in cases such as hers would have been easier to achieve in this jurisdiction. I consider each of these in turn.

[70] First, it may be the case that there is no particular evidence base relied upon as to the risk of error or abuse of the scheme had the eligibility requirements been more complicated and had they allowed for eligibility on the basis of those whose housing costs were met through HB. However, this is perhaps unsurprising given that this was the development of a new, bespoke scheme to meet the challenges of the cost-of-living crisis. More prosaically, however, this is the type of issue on which the court ought to afford considerable respect to the judgment and expertise of the respondent. It is unsurprising that errors can and do occur in the administration of complex benefits arrangements applying to millions of citizens, particularly where there is a financial incentive for the unscrupulous to game the system. That risk is likely to be increased as the eligibility requirements are liberalised, particularly where this is also dependent upon the timely sharing of accurate data between central and local government. DWP recognised that some hardship may flow from excluding certain groups from COLPs but made an informed judgment that the hardship that may result was outweighed by the risks to which their inclusion may give rise (in conjunction with the other policy objectives facilitated by adhering to a simplified scheme). Although the applicant is right to refer to section 3 of the 2002 Act (which touches upon issues of 'double eligibility') this does not, of itself, guarantee that over-payments would not occur in practice where COLP claimants were in receipt of a number of qualifying benefits; nor does it reduce the practical burden of assessing and correcting the matter where such a situation arose.

[71] Similarly in relation to the second objection, it is primarily for the respondent (and Parliament) to assess the speed with which the measures had to be introduced. It is right that, by way of example, the 2022 Act received Royal Assent on 28 June 2022 but the first assessment period ended on 25 September 2022, some three months later. The applicant complains that such a delay was greater than the six-week time lag identified by the respondent as being required for a HB data share. However, it was rational for Parliament to wish to introduce the statutory underpinning for the scheme as soon as possible in the circumstances, leaving further details to be dealt with by way of delegated legislation. It cannot be assumed that the legislation would have passed as smoothly or in the same way if additional complications had been introduced into it. The structure of the scheme (including those who were to benefit) was determined at an early stage, with the 'delays' upon which the

applicant relies occurring only at a later stage in the course of the implementation of the scheme. Parliamentary time is frequently at a premium; and there were policy reasons, in the face of the cost-of-living crisis, why the government wished to legislate quickly in respect of a range of prospective payments. The respondent also pointed out that there were reasons for determining qualifying periods retrospectively, rather than in advance, in order to prevent attempts to abuse or game the scheme, which was also a rational consideration. In all, there is no clear basis upon which the court could second-guess the judgment of the respondent that the simplicity of the scheme adopted was necessary or appropriate in order to meet the exigencies of the crisis the government was seeking to address in a timely fashion.

[72] The argument that the complications of including those in the applicant's situation were over-estimated (because of the small size of this jurisdiction and the administrative ease therefore of obtaining the relevant information to administer the scheme effectively and efficiently) is also questionable in my view. First, the applicant's premise is unevidenced and speculative. Even assuming that it is correct, the mere fact that an administrative difficulty may be easier to overcome in one jurisdiction than another does not necessarily mean that Parliament is required to differentiate between the jurisdictions when introducing a UK-wide scheme. It was entitled to conclude, particularly in a scheme of this type, that there is benefit in providing a UK-wide scheme in a manner which applies consistently throughout each jurisdiction, albeit the implementation of the scheme may (for a variety of reasons) be relatively more straightforward or difficult as between the constituent legal jurisdictions of the United Kingdom. In the present case in particular, where Parliament decided in the public interest to legislate for Northern Ireland in a devolved area in the context of the non-functioning of the local administration, it should not be unduly criticised for failing to tailor arrangements to the specific circumstances in Northern Ireland in a way which the local Executive or Assembly might have done (had devolution been functioning at that time) and in a way which would have been *more* generous than what was proposed in the other jurisdictions being provided for in the 2022 and 2023 Acts. It was entirely rational for it to legislate with consistent eligibility criteria across the board.

[73] Returning to the theme of using broad and imperfect categorisations in an area such as this, which may give rise to hard cases on the margins, it is helpful to recall what Lord Sales said in the *R (Z) v Hackney LBC* case, giving the judgment of the court, at para [85]:

> "In the context of state provision of social welfare benefits, it is well established that it is generally a legitimate approach and in accordance with the principle of proportionality for the state to use bright line criteria to govern their availability: see eg *R (RJM) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2008] UKHL 63; [2009] 1 AC 311;

> *Carson v United Kingdom* (2010) 51 EHRR 13, para 62; and *R (Tigere) v Secretary of State for Business, Innovation and Skills (Just for Kids Law intervening)* [2015] UKSC 57; [2015] 1 WLR 3820. That is to say, the state is entitled to focus provision of social welfare benefits on a particular group, and hence exclude other groups, even though there may be little or no difference at the margins in terms of need between some particular individual in the first group and another particular individual in the excluded groups. Use of bright line criteria in this way is justified because it minimises the costs of administration of a social welfare scheme; it may be the best way of ensuring that resources are efficiently directed to the group which, overall, needs them most; it can reduce delay in the provision of benefits; and it provides clear and transparent rules which can be applied accurately and consistently, thereby eliminating the need for invidious comparisons of individual cases in all their variety, with the risk of arbitrariness in outcomes which that may involve. Lord Sumption and Lord Reed explained these points in *Tigere*…"

[74] Of particular significance is the observation that the state is entitled to exclude groups of potential claimants "even though there may be little or no difference at the margins in terms of need between some particular individual in the first group and another particular individual in the excluded groups." That is not to say, of course, that the state can maintain discriminatory distinctions on suspect grounds; but simply reflects the low intensity of review – consistent with the analysis set out by Lord Reed in the *SC* case, particularly at paras [115], [142] and [158]-[161], and endorsed and applied by the Court of Appeal in this jurisdiction in *Re Cox's Application* [2021] NICA 46 – where the state rationally adopts the use of broad categorisations in this field for some or all of the reasons given by Lord Sales. It is generally insufficient for a challenger to point to alternative means by which, in their estimation, the state could theoretically better cater for problems or concerns. In this case, the applicant pointed to a number of other ways in which (in her submission) the government *could* have dealt with concerns relating to over-payment, duplication, data sharing and so on; but for the court to adopt these as the touchstone of proportionality would come close to it legislating itself for an entirely different scheme.

[75] In the present case, the government was aware of the potential for a number of individuals with significant needs to 'fall through the cracks.' Although there are no statistics in relation to the potential extent of this concern, in the EIA which was conducted there was some consideration of the issue (see the passage cited at para [35] above). The matter was revisited in the discussions leading to the 2023 Act, when a suggestion that eligibility be widened was again considered but rejected on similar, rational grounds.

[76] Notwithstanding the sympathy the court has for the applicant in her particular circumstances, this is a case where there was a rational foundation for the respondent (and, more importantly, Parliament) proceeding as it did and excluding those potential COLP claimants who were in receipt of HB only; and where the difference in treatment is justified generally notwithstanding hardship on the facts of certain individual cases (such as in *Re Lancaster and Others' Application* [2023] NICA 63, at para [70], albeit in a very different context). In particular, I accept the respondent's argument that the justification comes down to more than one of simple administrative convenience but was about ensuring that the available funding was best targeted, excluding those in receipt of HB only and no other income-replacement benefits partly as a means of targeting the assistance to those in the most need. Importantly, another aim was that the scheme was able to be introduced, rolled out and administered at speed. Compromising that objective would have been to undermine a primary aim of the scheme which was, in view of the cost-of-living crisis, to make funds available to households swiftly. Simplicity was key to the expeditious introduction and roll-out of the scheme and to minimising the cost of its administration so as to focus the available funds on meeting need. In truth, all of the objectives mentioned by Lord Sales in the passage cited at para [73] above were in play, to a greater or lesser degree, in this case.

[77] It is also relevant to note that, as I observed at para [53] above, the applicant's non-eligibility for COLPs did not arise simply or exclusively because of her being homeless and housed in temporary accommodation. That is one aspect of a variety of factors which resulted in her being ineligible for the payments (albeit, on the particular facts of her case, the decisive factor during the period she was ineligible). However, this arose not merely because her housing costs were then met through HB rather than UC but also in conjunction with the other income she received (including her civil service pension) which resulted in deductions from her UC entitlement.

[78] The applicant further raised, albeit somewhat more faintly than her primary submissions, an argument that the discrimination in this case was *Thlimmenos*-type discrimination (wrongly treating her similarly to other individuals from whom she was relevantly different). The nub of this argument was that it was wrong to treat her the same as other HB-only claimants because her reliance on HB was for a different reason (her homelessness and need for temporary accommodation) than others who were eligible for, and still in receipt of, HB on a more normal basis. In this regard, she argued that those who *would* have been in receipt of housing costs through UC but for those costs relating to specified or temporary accommodation (and so being met by way of HB) should have been carved out and treated differently from other applicants in receipt of HB. They should have been treated as if they were still in receipt of a relevant award of UC, as is the case in the context of the Discretionary Financial Assistance Regulations (Northern Ireland) 2001 (SR 2001/216) ("the 2001 Regulations"): see the definition of "relevant award of

universal credit" in those regulations, which was also amended by the 2018 Regulations, read with Schedule 4 to the UC Regulations.

[79] I do not consider that this argument can avail the applicant for a number of reasons. First, it entirely undermines the approach set out in authority, discussed above, that the state is entitled to use broad categorisations and bright line rules. On the applicant's analysis, the obvious bright line rule in this case (relating to claimants who receive HB only) would have to be modified with recognition of at least one sophisticated sub-category. This may also require other HB-only claimants to be distinguished because they were ineligible for housing payments through UC on the basis of additional exclusions contained in para 3 of Schedule 1 to the UC Regulations. Second, albeit the applicant may be in receipt of HB only for a different reason from (at least some) others whose only entitlement is to HB, it is difficult to see how this is a relevant difference in the present context. The same difficulties would arise in respect of the assessment of eligibility for, and the processing and payment of, COLPs whatever the precise reason for the claimant being in receipt of HB. I therefore doubt that the applicant is, in the present context, in a materially different situation from other HB-only claimants. Third, the difficulties to which the applicant's suggested approach would give rise are discussed above and are likely to be materially different to those arising in relation to the payment of discretionary financial assistance in Northern Ireland by the NIHE under the 2001 Regulations. In short, the same practical difficulties as would arise in relation to the UK-wide payment, at speed, of COLPs by DWP do not appear to arise in this different context. Viewed through the *Thlimmenos* lens – even assuming the applicant is in a relevantly different position from other HB claimants because she did not receive UC as a result of being in temporary accommodation – Parliament was objectively justified in treating her in the same manner as other HB-only claimants in the context of eligibility for COLPs.

[80] It remains to say something about the 'mitigations' which were considered as catering for hardship in what were termed 'hard-edge' cases where a claimant was ineligible for COLPs but where it was recognised that some additional support would be beneficial. The applicant relied upon the fact that this was primarily delivered through the HSF in England and Wales, which is not available in Northern Ireland. In response, the respondent points to the availability of DS in Northern Ireland which it says serves a similar purpose, but which the applicant says is less in amount than HSF and was an inadequate mitigation in her circumstances.

[81] There is an issue as to whether the applicant's case was, or was not, properly to be viewed as a 'hard edge' case for which such mitigations were designed to cater. This is addressed to some degree in Ms Clancy's evidence. DWP recognised that there would be some cases where potential claimants just missed out on COLP eligibility, for instance because their receipt of qualifying benefits fell just outside the scope of the relevant qualifying dates or their incomes were just above the eligibility threshold for means-tested benefits. It treated HB-only claimants as a separate,

excluded group. However, whether or not the applicant's case fell within the cases which DWP expressly considered in this regard, it is nonetheless relevant to take into consideration the other payments to which those who were ineligible may have been able to have recourse.

[82] The HSF in England is aimed at helping people in need by providing some additional support particularly in relation to the costs of energy, food and essentials. There is guidance provided for county councils and unitary authorities in England ("the HSF Guidance") to which the court was referred. At para 3 of this guidance, it is stated that those eligible may include, but are not limited to, people who are entitled to but are not claiming qualifying benefits and people who are claiming HB only. It is the responsibility of the relevant local authorities to decide how to spend their HSF funds and they have flexibility to identify which vulnerable households are most in need of support and to apply their own discretion when identifying eligibility. The respondent indicated that an additional £500m was provided to help households with the cost of essentials from October 2022, with £421m being used in England to further extend HSF.

[83] HSF is not available in Northern Ireland but the allocation of funds for this purpose in Great Britain was reflected in the provision of additional funding (of some £28m) to Northern Ireland under the Barnett Formula. In this jurisdiction, crisis support for households was available in certain circumstances through DS, which is a Northern Ireland-specific scheme which replaced Social Fund Community Care Grants and Crisis Loans for living expenses following their abolition as part of the package of welfare reforms. In the respondent's submission, DS is broadly similar to HSF in that its purpose is to support people on a low income in crisis situations, including where they are (or would otherwise be) struggling to meet essential costs. The applicant accepted that DS was the "nearest relative" to the HSF in this jurisdiction, although contended it was not as effective as the HSF in the context of mitigating ineligibility for COLPs. There is no upper limit on the amount that a claimant can receive as a DS grant (although the amount of loans, which are also available, will take into account the claimant's ability to repay). The respondent has also relied upon the fact that energy support payments were made available, such that eligible households in Northern Ireland would receive a £400.00 non-repayable discount to help with electricity bills over winter 2022/23; and there was an energy price guarantee for heating, or additional extra payments available to help with fuel price increases where the consumer would not benefit from the guarantee.

[84] In the applicant's case, her eligibility for and recourse to such funding is addressed in an affidavit of her solicitor, Mr Owen McCloskey. Out of 10 applications submitted by the applicant for DS from 2021-2023, four applications were successful, comprising two grants totalling £189.83 and loans totalling £288.47. In terms of the claims made by the applicant from the date when she was housed in temporary accommodation as a homeless person (January 2022), out of the five claims made only two were successful, with three of the applicant's claims being refused. During this period, the applicant received DS loans totalling £275.54. The

eligibility criteria for DS awards, contained within the Discretionary Support Regulations (Northern Ireland) 2016, are strict and the applicant was refused on a number of occasions on the basis that she was unable to show that she was in "an extreme, exceptional or crisis situation which places you and your immediate family's health, safety or well-being at significant risk and that you meet all of the other basic eligibility criteria."

[85] It seems likely that HSF was easier to access in England and Wales for those in an analogous position to the applicant than DS was in Northern Ireland and that the assistance available through HSF may have been more generous (although these are, to a large degree, assumptions which may not be entirely or universally correct). The evidence also suggests that, due to budget pressures, there was pressure to scale back DS awards due to deficits in the DfC resource budget. HSF was also designed to fill the gaps in the COLP schemes in a way in which the pre-existing DS scheme was not, since the HSF Guidance expressly pointed applicants and authorities to the fact that those ineligible for COLPs as a result of being in receipt of HB only may be appropriate recipients of HSF grants. The applicant is likely correct, therefore, in her case that this aspect of the mitigation provided was less effective in Northern Ireland than in Great Britain. Nonetheless, both schemes provided some additional assistance to those in the most vulnerable position; and the applicant was able to avail of assistance through the DS scheme in at least some instances, including during the period of her non-eligibility for COLPs.

[86] Perhaps more importantly, the government provided additional funds to the Northern Ireland administration by way of mitigation, through the Barnett Formula, which was available for similar purposes. The state of the evidence is that it is unclear precisely how the additional £28m funding was used by Northern Ireland Departments, since this would have been allocated to the Northern Ireland Block Grant, rather than directly to DfC, and the Northern Ireland Budget for 2023/24 was set by the SSNI (and approved by Parliament) in the absence of a functioning Executive and Assembly. It may well be the case that not much, if any of it, was directed to the DS budget. Again, however, in the circumstances pertaining in this case, it is difficult to criticise Parliament or the respondent for any failures on the part of the Northern Ireland administration (particularly in the absence of a functioning Executive) to effectively target or distribute this additional assistance. The relevant policy decisions were made by the respondent in this case recognising that the distribution of COLPs would not be perfect but providing additional funding to mitigate that by way of discretionary assistance where possible and appropriate. This, again, appears to me to have been a rational and proportionate approach in light of the delivery constraints discussed above.

Conclusion

[87] For the reasons set out at para [53] above, I am concerned that the differential treatment in this case did not arise because of the applicant's relevant status (as she defines it). It arose in part because of those circumstances but also, importantly,

because of her other income which also materially reduced her entitlement to UC, reducing this to zero.

[88] Assuming in her favour that the applicant's status was a cause – or a material part of the cause – for her non-eligibility for COLPs, I nonetheless find that a very low intensity of review, or a wide margin of judgment, is appropriate in this case. The ground upon which the discrimination is based is not a 'suspect' ground; the measure in question is one of general economic and social strategy; and the state was applying broad categorisations in an area where this is both common and frequently necessary. I consider that the differential treatment is reasonably and objectively justified on the basis advanced by the respondent. The early advice to the Minister recognised that, having reviewed the available options, all of the available choices involved trade-offs or risks. The respondent decided upon, and Parliament endorsed, an approach which prioritised simplicity and speed in order to meet the crisis which households were facing; recognising that this was not a perfect scheme but that other discretionary funding was available to mitigate hardship where claimants fell outside the eligibility criteria. It was rational and proportionate for government and the legislature to proceed on this basis and it is not for the court to seek to dictate or rewrite the terms of the intervention.

[89] I, accordingly, do not find the applicant's article 14 challenge made out and dismiss the application for judicial review.