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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY RYAN TAYLOR FOR JUDICIAL REVIEW

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Mr Hugh Southey QC and Mr Steven McQuitty (instructed by Kristina Murray Solicitors) for the Applicant
Mr Tony McGleenan QC and Mr Aidan Sands (instructed by the Departmental Solicitor's Office) for the First Respondent, the Department of Communities
Mr Tony McGleenan QC and Mr Aidan Sands (instructed by Crown Solicitor's Office) for the Second Respondent, the Department for Work and Pensions

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FRIEDMAN J

Introduction

[1] This case concerns the continuing payment of housing benefit while a person is temporarily absent from their home by virtue of being in prison. The Applicant, Mr Ryan Taylor, has brought a human rights challenge against the applicable legislative framework and policy considerations which differentiate between a prisoner who is remanded in custody pending his trial (hereafter a 'remand

prisoner'), and a prisoner who has been sentenced to a term of imprisonment after pleading guilty, or otherwise convicted of an offence (hereafter a 'sentenced prisoner'). Under the applicable statutory regime the sentenced prisoner can receive housing benefits for up to 13 weeks of absence from their home and a remand prisoner can receive benefits for up to 52 weeks. The various time scales referred to below must be read with the knowledge that a person who is sentenced to a term of imprisonment will be automatically eligible for release after he has served half of that period. Also any period of remand in custody prior to a sentence will count as time served in calculating the date of release.

[2] No benefit system could likely afford, or justify, paying housing benefits to subsidise indefinite or prolonged periods of absence from a home occasioned by imprisonment. However, it has been a feature of social security law for several decades to secure the permission of temporary absence for both remand and sentenced prisoners for short periods, although the statutory regime under challenge in these proceedings has afforded greater temporal latitude to remand prisoners. Prior to 1995 both types of prisoners were treated the same with entitlement to temporary absence for 52 weeks. Since the staged introduction of Universal Credit in 2013 across England & Wales, and since 2015 in Northern Ireland, they are again being treated as the same with entitlement to temporary absence for six months.

[3] The Applicant has been a prisoner in various forms and timescales that are important to the challenge. He was first a remand prisoner (September-December 2019), then for a brief period a dual remand and sentenced prisoner (December 2019-April 2020), but until his grant of bail in August 2020 when he was released into the community to live in his pre-existing home address, he had reverted to being a remand prisoner only. His overall period in custody did not exceed 52 weeks, of which his period as a sentenced prisoner within that timescale was 16 weeks. Had he been in receipt of Universal Credit, as opposed to Housing Benefit, then the Applicant would have been able to keep his benefit payments for 26 weeks. Instead, the payments were immediately cancelled as soon as it was known he was sentenced to be imprisoned for more than 13 weeks.

[4] The operative legislative scheme is the Housing Benefits Regulations (Northern Ireland) 2006 ('the Regulations') as amended by The Social Security (Miscellaneous Amendments) Regulations (Northern Ireland) 2013. They provide that persons in receipt of benefits, including a sentenced prisoner, can be away from their home for up to 13 weeks and still continue to receive payments (Reg. 7(13)). The Regulations recognise certain exceptions to the rule, of which a remand prisoner is such an exception, who is allowed to be away from their home for up to 52 weeks and still receive benefits (Reg. 7(16)(c)(i)). However, since an amendment to the Regulations in 2013 a remand prisoner in this context cannot also be a prisoner who has been detained in custody following a sentence upon conviction that is longer than 13 weeks, even by a short period (Reg. 16A). The agreed combined effect of these regulations is that on the date that the Applicant received a sentence of longer than 13 weeks, which in his case was 32 weeks for which he would serve half, then

the Northern Ireland Housing Executive ('the NIHE') was immediately required to cancel his housing benefit as he would definitely exceed the period of permitted temporary absence.

[5] In his Amended Order 53 Statement the Applicant claims that the statutory regime exposed him disproportionately to an "*imminent*" risk of losing his home while he completed the short period of imprisonment. That was because there was no discretion to maintain the housing benefits as a result of the sentence, or to reinstate the benefit once he returned to the status of a remand prisoner. In his complaint about the undue risk of losing his home as a consequence of the landlord being entitled to bring possession proceedings if he could not pay the rent, the Applicant submits that his circumstances brought about by the ordinary operation of the legislation that cancelled his rental contributions were such as to violate Article 8 (right to respect for private life and his home) and/or Article 1 Protocol 1 ('A1P1') (right to protection of property) of the European Convention of Human Rights (hereafter 'ECHR').

[6] In addition, the Applicant argues that the difference of treatment between short term sentenced prisoners and remand prisoners as regards the length of time for which they are entitled to the payment of benefits while absent from the home, gives rise to a breach of Article 14 ECHR (prohibition on discrimination) as it applies to the enjoyment of his rights under Article 8 and/or A1P1. He characterises the relevant protected status as the short term dual remand and sentenced prisoner who is in a sufficiently analogous position with a short term remand prisoner, such that the difference in treatment could not be justified.

[7] The First Respondent is the Northern Ireland Department for Communities ('DfC'). As a result of the issuing of Notices pursuant to Order 121, Rule 3(1) of the Rules of the Court of Judicature (Northern Ireland), the Department for Work and Pensions ('DWP') entered an appearance as a Second Respondent. Both Government departments were represented by the same counsel team, and for reasons foreshadowed in the ruling on interim relief, these proceedings were indebted to the work done by the officials of both departments to research the various changes that have taken place in this area of benefits provision since the 1990s and the reasons for those changes: [2020] NIQB 52 §§9-12. The NIHE was also a Notice Party. Unless otherwise necessary, I refer below to the 'Respondents' to denote the arguments that were made jointly on behalf of the Minister and the Secretary of State.

[8] As regards the challenges under Article 8 and A1P1, the Respondents submit that the relationship between the payment of benefits and the risk of possession proceedings that would end in the loss of the home is too remote to engage either of the substantive Convention rights, but in any event there is no human right to benefits, such that the choice to provide continuing benefits for up to 13 weeks and no more, could not be impugned as disproportionate.

[9] As regards the challenge under Article 14 the Respondent maintains that the legislative choice to treat remand and sentenced prisoners differently is justified by the categorical and essential difference in their status. The former is presumed innocent and the latter is not. This lack of analogous positions is compounded by the fact that the express difference of treatment is not on the basis of any status or characteristic protected by Article 14. Finally, the differentiation falls within the latitude permitted to government in the highly contested and finite field of social welfare. The same latitude must be afforded to the Respondent's decision to evolve the benefits system to treat the two categories as the same under Universal Credit.

[10] The judgment is split into the following Parts:

Part I: Relevant Facts - deals with (a) the value of his home to the Applicant, (b) his changing custodial status and (c) the value of a home to prison leavers.

Part II: Legal and Policy Framework – deals with (a) General Matters, (b) Housing Benefit, (c) the 2006 Regulations, (d) the 2013 Amendment, (e) the Policy History of the Temporary Absence Rule and (f) the Paradigm Shift in Policy Rationale Occasioned by Universal Credit.

Part III: Article 8 and A1P1 Challenges – deals with both claims together as the court was invited to do so given the overlap between the two rights in the social security field.

Part IV: Article 14 Challenge – deals with the key questions for a court to answer when it is alleged that the ambit of a person's enjoyment of his ECHR rights as part of a sufficiently distinct status group is unjustifiably discriminated against as compared to another group in an analogous position.

PART I: RELEVANT FACTS

[A] The value of his home to the Applicant

[11] Since the end of May 2019, the Applicant began living at an address in Belfast. It is a rented private property. The rent was £425 per month. The Applicant received Housing Benefit at £410.19 per month, the balance being paid by the Applicant himself. By Regulation 89(3) of the 2006 Regulations the NIHE paid the rent allowance directly into the letting agency's account at intervals of four weeks in arrears.

[12] There was debate – suggested by the Respondent to be relevant to the engagement of Article 8 ECHR – as to how attached the Applicant could have been to this home given that he was detained within three months of moving into it. The property was newly decorated, with a garden in good order. I was told that after moving in the Applicant had himself carried out some basic refurbishment works,

internally and externally. The property was just around the corner from the home of the Applicant's mother and brothers.

[13] It was apparent from the affidavit evidence of the Applicant and his mother that the home was seen as a source of future stability for him and especially so in the light of his remand into custody, followed by his sentence of imprisonment. The Applicant experienced great disquiet at the prospect of losing his home. He correctly concluded that as a single man it would be extremely difficult to obtain social housing through the NIHE as he did not qualify for many points in the points system. He knew that private rental near his mother's home was hard to come by and he feared he would also have difficulties renting due to his criminal record.

[14] These proceedings in themselves, including the affidavits that were served in support of the interim relief applications, underscore the commitment that the Applicant has to keeping this particular home. The Applicant's mother, despite her own low income employment, continued to pay the rent after the cancellation of the Housing Benefit. During the life of these judicial review proceedings, she paid the rent in March, and April. Due to the indeterminate and complex challenges of COVID-19, including as regards to social isolation and limited household contact, the attachment to living nearby to the mother's home was likely to be a greater stabilising factor once the Applicant was released from prison than it was considered to be at the outset of these proceedings.

[15] Whatever its consequences in law, I therefore do not find that the significance of this home to this Applicant was tenuous, even though it was recent. As can be seen from the policy related evidence summarised below, having a 'fixed abode' acquires a particular value to any short term prisoner as regards resettlement and rehabilitation.

[B] The Applicant's Changing Custodial Status

[16] In September 2016 the Applicant committed an offence of actual bodily harm to which he received a suspended sentence of 8 months imprisonment in March 2018. In April 2019, the Applicant made threats to commit criminal damage and threats to kill towards his ex-partner while in possession of a bladed article. It was after those underlying events that the Applicant moved into the home that forms the subject matter of the claim. According to the Applicant he had briefly reconciled with his partner, but matters did not settle. On 1 September 2019 a further argument took place that led to the Applicant's arrest, bail and then remand into custody on 9 September 2019 for breaching his police bail conditions not to enter the boundary near the complainant's home. Those September allegations concern threats to kill, assault and criminal damage.

[17] On 9 December 2019 the Applicant pleaded guilty to summons matters relating to his conduct in April 2019. He was sentenced to 4 months imprisonment for each offence, with the sentences to run concurrently. At the same time the

Magistrates' Court activated the 8 month suspended sentence for the assault occasioning actual bodily harm that was imposed in March 2018. This 8 month sentence also ran concurrently with the 4 month sentences for the summons matters.

[18] The Applicant's continuing remand status arose from the fact that he was separately charged with offences relating to the altercation in September 2019, which he pleaded not guilty to before the Magistrates' Court. Due to the backlog caused by COVID-19, the Applicant was not arraigned in the Crown Court until March 2020. He was admitted to bail in August 2020. By the time of the hearing in these proceedings at the end of September 2020 he had not yet been tried.

[19] Based on the above events the activation of the suspended sentence alone therefore meant that the Applicant was destined to be away from his home as a sentenced prisoner for more than 13 weeks as of 9 December 2019; even if only by a further 3 weeks. That event compelled the cessation of his Housing Benefit and the NIHE had no discretion to act otherwise.

[20] To those core facts I would add that they bear features that are not uncommon in the carriage of criminal justice, and which bring home that the distinctions between a remand and sentenced prisoner can produce inconsistencies. Charges relating to events in April and then September 2019, came to the court through various routes, some by summons and some by charge sheet. Had the Applicant delayed pleading to any matters, including the summons charges, which by his plea then activated the suspended sentence, he could have continued to remain on remand for 52 weeks starting from 9 September 2019. On that date he could have pleaded guilty to all matters, and enjoyed automatic release based on remission, if his combined sentence was up to 104 weeks. This is not a sentencing court and the evidence of the other charges are unknown, save that they were not so serious as to prevent the Applicant being admitted to bail once by the police and then by a court. There was a significant domestic violence repetitive aspect to the Applicant's offending, but (based on the facts as known from above) he could not be described as a prolific offender from a sentencing point of view.

[21] In his complaint about the statutory regime the Applicant was therefore able to point to two feasible different outcomes. His own outcome was temporary absences of 16 weeks as a sentenced prisoner, which led to automatic cessation of housing benefit, despite his continuing remand thereafter. Another outcome – lawfully open to him – could have been to wait well into a 52 week remand period to plead to all matters without any implications for his continuing rental payments. On behalf of the Applicant, Mr Southey QC described this as a peculiarly unfair aspect of the difference of treatment; especially so when it can be no part of any punishment to condemn a prisoner to losing their home.

[C] The importance of a home to prison leavers

[22] There is an emerging consensus in criminal justice, criminology and prison reform circles that recognises a link between lack of access to secure accommodation and re-offending, especially amongst people detained for short periods.

[23] An important landmark in UK government understanding of the issue is the Ministry of Justice ('MOJ') Green Paper, '*Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*'. It was published in December 2010 during the period of Coalition Government and was in due course cited in the DWP led '*Social Justice Strategy*' in 2012 that advocated a new social security approach to groups whose wellbeing and life chances have become particularly marginalised in contemporary society (see further at paragraphs 80-81 below). In *Breaking the Cycle* the MOJ focussed on the fact that reoffending rates for those released from short term custodial sentences, which it defined as less than 12 months, are the highest amongst all those discharged from custody (page 3). The courts sentenced approximately 100,000 offenders each year (100,190 in 2009). Of those sentenced to immediate custody around two-thirds (64,539 offenders in 2009), were given short sentences of less than 12 months; which was around five per cent of all those sentenced by all courts each year (§§1.16, 3.8 and 3.12). Sixty-one percent of those released from a short sentence were reconvicted within a year, compared with 49 percent of the total discharged from custody (§1.29).

[24] Against those statistics the MOJ claimed a strong case for investing in rehabilitation, especially with regard to the short term imprisoned (§1.39):

> "The economic and social costs of crime are far greater than those costs which offenders place on public services. Focusing on rehabilitation could therefore generate significant benefits to society through having fewer victims of crime, less damage and destruction of property and more offenders becoming productive members of society. In addition, there could be cost savings to government through reduction in demand for services, such as the criminal justice system, and increases in taxable earnings."

[25] While the MOJ advocated a "*multi-modal*" system of intervention, it recognised the need for strategies to target specific issues, including accommodation, which was known to be a significant problem for those released prisoners, but required more developed research on the links between accommodation and reducing reoffending (§§5.37, 5.43). It cited the HMG Cabinet Office Social Exclusion Unit report from 2002 that established that a third of all prisoners lose their home while in prison.

[26] The Applicant referred to the report by the Howard League for Penal Reform, '*No Fixed Abode: The implications for homeless people in the criminal justice system*'. That source conveniently collates the Government and NGO work that was duly carried out to generate a national statistical overview. Of the cited materials, it is of note that fifteen per cent of prisoners sampled by an MOJ survey in 2012 reported having no accommodation prior to imprisonment (MOJ (2012) '*Accommodation, homelessness and reoffending of prisoners: Results from the Surveying Prisoner Crime Reduction Survey*'). The same survey found that prisoners who reported being homeless before custody were more likely to be reconvicted upon release than prisoners who did not report being homeless (79 per cent compared with 47 per cent in the first year).

[27] To those Government statistics, the Howard League Report added that a third of people leaving prison say they have nowhere to go (pages 6-7). This amounts to roughly 50,000 each year. Over 75 per cent of homelessness services in England support clients who are prison leavers. Forty-eight per cent of homeless projects claim that "*more than half of their clients have links with probation*". The Howard League was particularly critical of the 'back-door' sentencing of bail or probation hostels for homeless prison leavers who were then subject to a range of rules and regulations that set them up for failure and then made it far more likely that they would breach their bail conditions or be recalled to prison.

[28] The above matters were similarly commented upon by the All-Party Parliamentary Group ('ALPG') for Ending Homelessness that in 2017 produced its own report on "*Homelessness prevention for care leavers, prison leavers and survivors of domestic violence*". The ALPG noted the parallel different operative timescales for permitted temporary absence as between remand and sentenced prisoners in receipt of Housing Benefit and the parity of treatment with regard to the housing payment element of Universal Credit. The increasing reliance on private sector housing for those in receipt of either benefit was described as problematic, both because of the reluctance of landlords to rent to those with a criminal record and because of the difficulties of raising the funds for deposits.

[29] I did not take the evidence of the Respondents to query the various cited materials. The affidavit of Anne McCleary, who is the Director of Social Security Policy and Legislation Division at the DfC, recognised the "*significant challenges in finding suitable settled accommodation for some vulnerable prisoners leaving custody*". She emphasised the need for effective partnership between agencies as well as preparatory work with prisoners before they leave custody. Janice Hawkins is the senior policy lead with responsibility for Housing Benefit policy, within the Housing Policy Division of the DWP. On behalf of the Secretary of State, she supported the McCleary affidavit and added that all ex-offenders are able to claim help with their housing costs on their release from prison, with no additional financial implications for other organisations, such as the Probation Service.

[30] Both affidavits in reply did, however, point to a broader policy landscape in which the availability of social housing for those on waiting lists is very limited. In

the Belfast area there are 8,143 people in Housing Stress, requiring allocation, of which 6,509 has been designated as having Full Duty Applicant status. The entire NIHE housing stock of the city area is 25,507 and 84,610 for the whole of Northern Ireland. These figures inevitably create greater dependency on the private rental sector, with the attendant dilemma of whether it is better to subsidise the rent of empty properties by those serving prison sentences, even for substantial periods, as opposed to prioritising those who are homeless or imminently so; as well as those otherwise inappropriately housed.

[31] I return to the legal implications of this evidence in dealing with the Article 14 challenge in Part IV, but for present purposes I find that these materials at least indicate that the difficulties of prisoners being able to transition, resettle and rehabilitate, would appear to benefit from a fixed abode; and are conversely harder without one. At the same time those difficulties are complex and subject to multi-agency strategies. It would not be straightforward for NIHE to exercise discretion to decide which sentenced prisoners should keep their benefits; and who should not. It is also a basic feature of the system under review that there is an automatic entitlement to benefits upon release, although prison leavers are noted to encounter administrative difficulties in securing the benefit rights that are due to them. They also encounter difficulties in access to limited social housing stock and alternative private rental accommodation. Finally, the issues raised by this claim do not exist in a vacuum, but are part of the general social welfare funding dilemmas in relation to housing, homelessness and those at-risk of homelessness.

PART II: THE LEGAL AND POLICY FRAMEWORK

[A] General Matters

[32] The Social Security system in Northern Ireland generally follows a policy of parity with benefit entitlements in the rest of the United Kingdom. This facilitates free movement and ensures that individuals have access to the same benefits, regardless of where they live. Section 87 of the Northern Ireland Act 1998 requires the Secretary of State with responsibility for social security and the Northern Ireland Minister for Communities to consult each other with a view to securing single systems of social security. Much of what follows is informed by the operation of parity.

[33] Although this is a case that focuses on a particular predicament that the Applicant faced as a result of his being charged with different matters at different times, it has to be understood as arising within a complex social security system, which has evolved over time, by reference to polymorphous policy criteria concerning competing factors. For the uninitiated it is challenging to get to grips with the legal chapter and verse, as well as the full arc of the policy making, that has produced given differences of treatment in social security law. Even then, the Respondents cautioned that such concerns as apply here to the unsecured accommodation of prison leavers, do not readily make it unreasonable for

government to prioritise other categories of homeless and at-risk of homelessness: see *R (Ahmad) v Newham LBC* ([2009] UKHL 14 [2009]) 3 All ER 755 §§15, 22, 46-47, 59-62 as recently affirmed in *R (Z) v Hackney LBC* ([2020] UKSC 40) [2020] 1 WLR 4327 §§83-84.

[B] Housing Benefit

[34] Housing Benefit is a social security benefit which is paid by the NIHE, on behalf the DfC to help tenants on low incomes with payment of their rent.

[35] Pursuant to section 129(1) of the Social Security Contributions and Benefits (Northern Ireland) Act 1992, Housing Benefit is only payable to those who are liable to make payments of rent on a dwelling that they occupy as their home. Occupation of a dwelling is therefore a primary criterion for eligibility for this benefit. However, under section 133(2)(h) regulations may make provision "*as to circumstances in which a person is or is not to be treated as occupying a dwelling as his home*". It is that rule making power that has given rise to the so-called temporary absence rule, which deems a person to be in continuing occupation of their dwelling for set periods of time, even when they are not.

[36] These features of Northern Ireland 1992 Act are duplicated in the Social Security Contribution and Benefits Act 1992 that operates in England & Wales. Both statutes are consolidated legislation. There is a history to how the temporary absence rule has previously operated from 1983 through to the present that is returned to later in the judgment, because it is essential to understanding the justification that is put forward for the extant regime under review.

[C] The 2006 Regulations

[37] Regulation 7(13) of the 2006 Regulations, provides that, subject to regulation 7(17), a person shall be treated as occupying a dwelling house as his home while he is temporarily absent within Northern Ireland if (a) he intends to return to occupy the dwelling as his home; (b) the part of the dwelling normally occupied by him has not been let or sublet; and (c) the period of absence is unlikely to exceed 13 weeks. This is the period of deemed occupation for all people to whom it applies, irrespective of the reason for their absence from their home.

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

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

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

[41] In order to be entitled to temporary absence beyond 13 weeks, Regulation 7(16)(d) also requires that "*the period of… absence*" for the person that falls within one of the ten exceptions contained in Regulation 7(16)(c), "*is unlikely to exceed 52 weeks or, in exceptional circumstances, is unlikely substantially to exceed that period*". By Regulation 7(17) the maximum period for those in deemed occupation in respect of a vacant property is 52 weeks in all the exceptions contained in Regulation 7(16)(c). There is no discretion to extend that time once 52 weeks have passed.

[42] On behalf of the Applicant, Mr Southey QC points to Regulation 7(16)(d) to indicate that there is at least hypothetical capacity in the scheme to allow for the flexible application of time limits to account for "*exceptional circumstances*". A similar provision has appeared in earlier statutory incarnations of the temporary absence rule. Its function concerns situations where the absentee "*in exceptional circumstance*s" is known at the outset to have no control over the date of return and that date is unlikely to exceed the relevant authorised period by much. Mr Southey's point (and it could be no more than a hypothetical one) is that *if* a similar provision as contained in Regulation 7(16)(d) was included in Regulation 7(13), then it could have at least allowed the Applicant to retain benefits for 13 weeks and then make arrangements to cover the remaining 3 weeks of the 16 week sentence.

[43] The Respondent did not accept that regulation 7(16)(d) read with regulation 7(17) was open-endedly flexible. Mr McGleenan QC emphasized that the 52 weeks was a bright line under Regulation 7(17), just as 13 weeks was a bright line under Regulation 7(13). Neither provision contains flexibility as regards the period for which benefits may be paid. He submitted that the marginal discretion in Regulation 7(16)(d) relates to the prospective assessment at the outset of how long a temporary absence is likely to last in order to exceptionally qualify for deemed occupation beyond the 52 week period.

[44] In *Obrey v Secretary of State for Work and Pensions* ([2013] EWCA Civ 1584) [2014] HLR 12, the Upper Tribunal (quoted at §12 of the Court of Appeal Judgment) referred to Regulation 7(16)(d) as requiring from the housing benefit authority some

"*predictive judgement*" (and therefore discretion) about timescales in order to allow the payments to continue at the outset of an absence, but not in the sense requiring in depth and periodic monitoring of the condition of mentally ill patients both before and after the expiry of the 52 weeks period. *Obrey* was a case about mentally ill patients discovering at the end of a 52 period that they needed more time in hospital, or other residential care.

[45] I bear in mind that the Applicant examined this aspect of the scheme to query the proportionality of denying any element of discretion for the NIHE to elect to pay 13 weeks of his rent and therefore to optimise his capacity to avoid possession proceedings. My main concern about the argument is what is to be meant by "*exceptional circumstances*"? If it simply means involuntary absence then it could apply to all prisoners whose date of release was unlikely to substantially exceed a relevant date. However, if some other judgement was required, then more difficulties arise, especially for the NIHE who would have to apply the test. Whatever value this Applicant placed on his home it is difficult to see how his "*circumstances*" could have been regarded an "*exceptional"* given that it must be common for people to be sentenced to some few weeks more than 26 weeks imprisonment. While there is some marginal predicative discretion at the outset of a period of absence for exceptional reasons in the special category 52 week context. I therefore agree with the Respondent that the whole system is essentially based on bright line rules. That is certainly the case with the general temporary absence rule under Regulation 7(13) with its standard inflexible 13 week duration. I return to the issue of the compatibility of 'bright lines' with human rights law in Part IV below.

[D] The 2013 Amendment

[46] The original terms of Regulation 16(c)(i), which provided that prisoners on remand and awaiting sentence fell within the special category 52 weeks rule, was amended by Regulation 6(2)(a) of the Social Security (Miscellaneous Amendment) Regulations (Northern Ireland) 2013. The exception category for remand prisoners, now contained its own exception, that for dual remand and sentenced prisoners [i.e. this Applicant's situation], the clock would automatically stop at the point when it was known that they would be absent as a sentenced prisoner for more than 13 weeks, even if it was clear that they would revert to being a remand prisoner immediately thereafter. The amendment is now reflected in the 2006 Regulations at Regulation 16A, which reads as follows (with emphasis added):

> "This paragraph applies to a person ("P") who is detained in custody on remand pending trial, detained pending sentence upon conviction, or as a condition of bail, required to reside in a dwelling, other than a dwelling P occupies as P's home, *and who is not also detained in custody following sentence upon conviction*."

[47] Both parties accept that the amendment was made to reverse the effect of the decision of the Upper Tribunal in England in *MR v Bournemouth Borough Council* [2011] UKUT 284 (AAC) which decided that "*detained in custody on remand pending trial*" and "*detained pending sentence on conviction*" must "*apply to a person who has been remanded in custody or detained pending sentence whether or not he is simultaneously serving another sentence*" (my emphasis) (§20). While it is correct that the Applicant would have continued to enjoy an entitlement to Housing Benefit had the 2013 Regulations not been enacted, it is equally apparent that the Upper Tribunal's reasoning foresaw that its strict construction of the statute was contrary to its underlying policy. Sitting then as the Upper Tribunal Judge, and now a Law Commissioner of England & Wales, Nicholas Paines QC observed the following in the light of submissions by the local authority and the Secretary of State:

> "I can see that the policy behind including remand prisoners in paragraph 16 may be to make the more generous 52-week rule available to, in particular, those of them that are subsequently acquitted; if so, the reason why remand prisoners who are subsequently convicted and sentenced to immediate imprisonment nevertheless benefit from the 52-week rule during the period of their remand may be simply that it is not possible or appropriate to remove their HB entitlement retrospectively following conviction. I can understand an argument that there is not the same policy imperative for giving the benefit of the 52-week rule to remand prisoners who are simultaneously serving another sentence and will not be released from prison even if acquitted; but my task is simply to decide what the Regulations mean."

[48] Prior to the substantive hearing in this case, the Applicant had access to Explanatory Memorandum that accompanied the amending legislation which outlined an aim to preclude against more generous treatment for "*more prolific offenders*", who "*are therefore more likely to be sentenced and remanded for different offences*" (See §3.15 in the Northern Ireland version and §7.29 in the England & Wales version). Taken as a core basis for the amendment the Applicant queried the soundness of its reasoning. It assumed that being on remand (while also serving a sentence) is prima facie evidence that a prisoner must therefore be a "*more prolific offender*"; whereas a remand prisoner (even if they are also serving a sentence) may be innocent of the other charges. It did no justice to the myriad specific circumstances wherein a remand prisoner might also find themselves also serving a prison sentence. Some might indeed be prolific offenders (like many sentenced prisoners) but some may also not be. The timing of when charges are laid and pleas are entered is a particularly aleatory feature of this short term custodial/minor offending terrain of the criminal justice system. Finally – and as the Applicant put it paradoxically – the reason gave no consideration to the emerging body of evidence

that one of the reasons why short term prison leavers re-offend is that they do not have access to secure accommodation.

[49] While these criticisms were understandable, the text of the Explanatory Memorandum turned out, after post-permission disclosures by the Respondent, not to reflect the full reasoning behind the amendment. Explanatory Notes are admissible and potentially important aides to construction. However, their text is intended to be neutral in political tone and their publication aims to explain the effect of the text and not to justify it. The purpose is to help the reader to get his bearings and to ease the task of assimilating the law: see *R (Westminster City Council) v NASS* ([2002] UKHL 38) [2002] 1 WLR 2956 per Lord Steyn §§4-6. In this case, the Ministerial Submission relied on a deeper hinterland of policy and politics, which the Memorandum did not convey.

[50] The Ministerial Submission to Lord Freud, the Minister for Welfare Reform, dated 9 January 2012 referred him (at §§1 and 7) to the recent decision of the Upper Tribunal (attaching it in an Annex). As quoted above, the UT decision included the recognition by the Judge that the policy imperative to protect the presumed innocent was not the same after the imposition of a sentence on the convicted that would last beyond 13 weeks. That same UT decision further reflected the bright line reasoning that it was unworkable to retrospectively claim back benefits from remand prisoners who turned out to be guilty.

[51] The Minister was primarily advised that the outcome of the UT decision was "*contrary to well-established policy that benefit may continue to be paid to sentenced prisoners for a maximum of 13 weeks*" (§1). Despite there being "*no available statistics to identify the cohort*", but "*belief that the numbers would be small*", the correcting amendment was commended (§2). This was because the "*policy intention in such cases was that the claimant should only receive HB for a maximum of 13 weeks*" (§8). Leaving the text of the regulations unchanged "*would be inconsistent with the policy aim, and add complexity*" (§9). Having referred to the risk of adverse reaction to the judgement in the media, the Minister was asked for approval to amend the regulations, so that the DWP could "*respond to any negative coverage by saying that we are taking action to restore the policy aim and prevent extended payment for HB in these circumstances*" (§12).

[52] I accept that the Explanatory Memorandum read on its own is scant justification for the treatment of people in the Applicant's category of short-term custody. However, I agree with the Respondent that in the aftermath of the post-permission disclosure of evidence, the Applicant has continued to isolate the one portion of the Submission that found its way into the Memorandum**,** namely the reference to "*prolific offenders*", as representing the entire justification for the amendment, whilst overlooking the primary issue identified in the same Submission, namely that the *MR* decision (as its Judge surmised) was "*contrary to the well-established policy that benefit may continue to be paid to sentenced prisoners for a maximum of 13 weeks*". In order to assess the full justification for the difference of

treatment it is necessary to look to the earlier policy developments that underpinned the original 2006 Regulations and more specifically their forerunner provisions dating back to 1995. It was prior to the latter date that the Department of Social Security ('DSS') made fundamental changes that are reflected in the present distinction between sentenced and remand prisoners.

[E] The Policy History of the Temporary Absence Rule

[53] The relevant features of the overall history of the temporary absence rule as it relates to prisoners is as follows. Prior to 1987, the regulations did not deal with temporary absence in terms of any time limits, but focused on very limited circumstances when claimants could be entitled to separate housing benefits to secure other temporary accommodation (e.g. those seeking temporary shelter from domestic violence for up to 4 weeks, or granted temporary board and lodging elsewhere for up to 14 days): see Housing Benefit (General) Regulations (Northern Ireland) 1983, as promulgated under an earlier version of the 1992 Act, the Housing Benefits (Northern) Ireland Order 1983. I did not hear any submissions on the operation of these provisions.

[54] Regulation 5(8) of the Housing Benefit (General) Regulations (Northern Ireland) 1987 was also promulgated under the 1983 Order. That Regulation introduced the first general temporary absence rule. It allowed for any person to be absent from their home for up to 52 weeks, or in exceptional circumstances longer, but not substantially so, provided that that they intended to return and did not sub-let their property. No reasons were required. No special categories of involuntary absence were given express more generous protection.

[55] With regard to the discretion to extend beyond the general date, the requirement for "*exceptional circumstances*" was to apply "*for example, where the person is in hospital or otherwise has no control over the length of his absence*". As regards Mr Southey's critique (at paragraphs 42-45 above) about the absence of discretion where it was possible to construct one, this is the forerunner provision he was pointing to, which begs the question whether involuntary, but necessary custodial sentences could ever be regarded as "*exceptional*", without further factors (e.g. implications for a third party, or some aspect of vulnerability).

[56] In 1994 the DSS took steps to fundamentally amend what it regarded as an over-generous system, because it allowed for unoccupied properties to be subsidised in a manner that was not in the interest of the tax payer and failed to protect special categories of need. The DSS produced a memorandum in support of draft new regulations that was sent to the Social Security Advisory Committee ('SSAC'). The SSAC is an independent statutory body created under Part XIII of the Social Security Administration Act 1992. Its function is to provide impartial advice on social security matters and to scrutinise secondary legislation. This single body advises both the DWP and relevant authorities in Northern Ireland, and has done so prior to and since the Northern Ireland Act 1998.

[57] The departmental memorandum to the SSAC of December 1994 cited "*considerable public and media criticism*" of the current 52 rule, which allowed convicted prisoners serving "*lengthy*" sentences to continue to receive benefits on empty homes. Other concerns related to extended holidays, and those who remained in informal trial periods in alternative accommodation before relinquishing their main homes.

[58] The draft regulations revised the general temporary absence rule down to 13 weeks. The proposed amendments continued to provide what the DSS called "*greater protection*" for vulnerable groups who have no control over the length of their absence. Those affected would be single people, because a remaining part of a couple would be treated as entitled to the benefits. Most others affected would be able to tailor their absences to fall within the 13 week rule. It was acknowledged that convicted prisoners would not.

[59] As regards convicted prisoners, the DSS explained that the new rules would be able to protect those serving what it called "*short sentences*" of 13 weeks (subject to 50% remission). This would cover "*relatively minor offences and offer longer protection for up to 52 weeks to people held on remand*". To this description of what was meant by "*relatively minor*", the affidavit of Ms Hawkins has added that a 13 weeks rule aligns with the maximum sentence for a single offence that can be imposed by a Magistrates' Court in England & Wales, which is 6 months (less 50% remission). From this I infer that by choosing 13 weeks the DSS was therefore retaining protection for the most minor category of sentenced prisoners; but not, for instance, those who receive an aggregate sentence of 12 months for more than one "*either-way offence*" in accordance with the overall sentencing powers of a Magistrates' Court.

[60] The draft regulations were then the subject of a detailed report by the SSAC under section 174(1) of the Social Security Administration Act 1992. Such reports are made available to the Secretary of State if the SSAC regards it as appropriate. By section 174(2), where new regulations are laid before Parliament, a copy of the SSAC report must be attached together with a statement from the Secretary of State showing—(a) the extent (if any) to which he has, in framing the regulations, given effect to the Committee's recommendations; and (b) in so far as effect has not been given to them, his reasons why not. That is what happened here.

[61] The report of the SSAC was published in a Command Paper 2783 in March 1995. It annexed the DSS memorandum. The SSAC had consulted with sixty-six stakeholder organisations, including national and local probation services, prisoner welfare groups and homelessness charities and experts. Its opposition to the proposed changes, most notably with regard to their adverse impact on single person tenants imprisoned for just a few weeks beyond the 13 weeks, is powerful; especially so when read with the above summarised evidence on the subject supplied by the MOJ, Howard League and others some 25 years later.

[62] The proposal on prisoners was the subject of strong reservations from consultees. The SSAC agreed with them. It was probable that convicted prisoners would be the largest single group affected by the changes, because anyone else could transiently return to their homes after 13 weeks and immediately leave them again for another 13 weeks. However, there was dispute as to the actual numbers involved; and especially with regard to a figure of 10,000 homes that had appeared in the media. The SSAC pressed for proper research on the actual figures on prisoner absence temporary payments, which was not done at the time and – as far as can determined from the disclosure in these proceedings – has never been done. There is one letter between the DWP and the Home Office in December 1994 that indicates discord between the two Departments' rough estimated figures being as low as 2,145 and revised up to 6,500, in one calculus, and 7,150 in another. A Written Home Office Ministerial answer during the course of the debate had said that there was no plans to collect national statistics on the numbers and ratio of prisoners released to temporary, permanent or no fixed accommodation, because the figures "*could only be obtained at disproportionate cost*".

[63] The major concerns by the SSAC was that the proposed changes would inevitably result in an increase of the likelihood of homelessness among ex-prisoners. Those with tenancies who live alone and who serve 14-52 weeks, after remission, would have to make a choice on conviction between giving up the tenancy or allowing a considerable debt in rent arrears to accumulate. In the latter case they might lose the tenancy through repossession by the landlord. For some there would be additional difficulty of arranging for clothing and personal possessions to be removed and storage, and without any funding for storage their possessions could be lost (§25).

[64] It was said that the problem would be exacerbated by the loss of the discretionary power to pay up to the limit where the expected absence would not be substantially longer. Echoing – very much the hypothetical that Mr Southey put to the Court – the SSAC itself referred to the ability to meet 13 weeks' housing costs for people serving sentences of, "*for example, 16 weeks*" could mean the difference between their being able to keep their homes and make arrangements to pay off a relatively small amount of rent arrears for the remaining three weeks, or having to give up the tenancy, because the debt was too great for them to manage (§26).

[65] As with the more recent evidence from the MOJ and the Howard League, the specialist organisations highlighted the serious problem of homelessness among ex-offenders. Suitable accommodation was difficult to acquire and in short supply (NACRO estimated 100,000 prison leavers having nowhere to live each year). A body of studies now linked homelessness to re-offending (Home Office research had found it was more than twice as likely amongst mentally stable ex-offenders). People with criminal records were disadvantaged in the housing market. Single men were not a priority for social housing. No account was given to single parents; or young people recently in care who had no secure family support. Also no account was given to those with mental health problems, whose loss of a home increased the

chances that their condition would deteriorate and many ended up living on the street (§§27-30).

[66] The consultees – without exception – were concerned that any public perception that the current rules were too generous was not objectively justified. Inevitably media coverage over-simplified issues. The salient problem here would be to overlook the unintended costs of emergency accommodation, social fund grants, further re-offending, further court times, and further imprisonment (§32). The costs, both financial and social could therefore be significant to weigh against any possible benefits savings (§80).

[67] It was on that basis that the SSAC recommended that a limitation on the payment of housing costs for convicted prisoners was acceptable, but that the current period of 52 weeks was long standing and struck a reasonable balance (§33). In the event that the Government disagreed, the SSAC recommended "*a minimum safeguard*" for prisoners with "*special needs*", which it said should apply to those with mental and physical disabilities, those with drug or alcohol dependency problems, young people aged under 21 previously in care and lone parents. It was said that they should all have protection for up to 52 weeks (§34). For all other convicted prisoners, it was recommended that they should generally be allowed to receive payments for 13 weeks where the absence will not be substantially in excess of that period, in line with the approach to periods in excess of 52 weeks (§35). (This was Mr Southey's submitted workable discretion on the facts of the Applicant's case).

[68] The DSS disagreed with these recommendations and was therefore required by section 174(2)(b) of the Social Security Administration Act to say why. The Government (at §6 of its statutory statement) explained that it decided not to accept the recommendation to maintain the status quo, because the present rule results in the housing costs on empty properties without any regard being had to the reasons for the absence. That approach was considered to be "*wrong in principle*". The new scheme addressed the situation "*by tailoring the available help according to the circumstances of each absence while continuing to protect those persons who need it most, such as hospital patients*". As the new rules were expected to only affect single persons, the Government added "*in so far as these changes free up accommodation, this will assist needy homeless families*". The underlined emphasis is mine, because the vacating of single person accommodation, and only after successful possession proceedings, was unlikely to free up much space at all for such families. Neither before, nor after, these changes did Government departments acquire statistical evidence to establish the correlation between removal of housing benefits from prisoners excluded from the 13-52 week exception and the freeing up of homes for other homeless individuals, or families.

[69] Although the rest of the statement accepted recommendations by SSAC in relation to other vulnerable categories, it refused to follow its recommendations regarding sentenced prisoners. The Government (at §9a) expressed itself as having given "*very careful consideration*" to the recommendation to make an exemption for

the identified special needs of prisoners (i.e. mental and physical disabilities, those with drug or alcohol dependency problems, young people aged under 21 previously in care and lone parents). However, it was not considered appropriate "*to treat them either better than other prisoners serving comparable sentences who have similarly pressing problems, or as favourable as, for example, those in hospitals*". Its reasons were that the 13 weeks aligned with the sentencing for a single minor offence by a Magistrates' Court. Ex-offenders would be allowed to claim housing costs upon release. The changes did not affect the responsibilities of local authorities under homelessness legislation or the Children Act 1989.

[70] As to the recommended general protection to be given to prisoners whose sentenced absence would not be substantially longer than 13 weeks, the Secretary of State rejected the argument on the basis that 13 weeks was being introduced as a predictable bright line that paid no regard to the reasons for peoples' absence, including a minor sentence of imprisonment. The 52 week period was designed as it was to deal with matters outside a person's control, where it could turn out to be a waste of public funds if the period away marginally exceeded 52 weeks. The detailed prisoner-related points made by the SSAC were not explicitly dealt with. However, the Government was clearly rejecting any discretion in relation to periods of time that would minimally exceed a minor term for single offence sentenced prisoners. Those persons too were absent through no choice of their own, but they were regarded as responsible for their absence in a way that the hospitalised, in care, or abused, were not.

[71] The DSS duly sponsored the amendment to the regulations in England & Wales as the Housing Benefits, Council Tax Benefit and Income Support (Amendments) Regulations 1995. The same amendments were introduced for Northern Ireland by the Housing Benefit and Income Support (General) (Amendment) Regulations (Northern Ireland) 1995. Although the underlying policy change had arisen during a period of Conservative Government, the same regulations were enacted by a Labour Government in 2006.

[72] It was a Labour Secretary of State that also defended the human rights compatibility of the 1995 amendment to the regulations in *R(Waite) v Hammersmith & Fulham LBC and the Secretary of State for Social Security* ([2002] EWCA Civ 482) [2003] HLR 3. The case concerned a person sentenced to life imprisonment and recalled to prison having been released on licence. He sought to maintain his benefits while awaiting for his parole board review. Although therefore a different situation and now subject to evolved Supreme Court guidance on Article 14 ECHR over the last ten years, this is necessarily a persuasive authority. Having reviewed the above detailed debate, mandated as it was by a special statutory consultation process, Lord Justice Laws came to the following conclusion (at §37):

> "Here, in my judgement, the distribution of state benefit lies particularly within the constitutional responsibility of elected Government. [Counsel] submitted that the loss of

> property which a person deprived of housing benefit may suffer is something which itself can be relevant to the judicial determination of the question whether his continued detention is justified. Thus, says [Counsel] this is not merely a matter of the distribution of public money for the purposes of benefit, it is a question also of the interests, and indeed ultimately the rehabilitation of prisoners such as HMP detainees. In my judgement, however, there is nothing whatever to suggest that the Secretary of State in considering his response to the recommendations that had been made and in framing the new Regulations in 1995 did not have well in mind the social implications of the distribution which he was to make. It is plain that he considered, and advisedly considered, the position in which different categories of potential beneficiaries found themselves. The categories included prisoners and young persons."

[73] When the Ministerial Submission dated 9 January 2012, which led to the 2013 Amendment, referred Lord Freud to "*well established policy*" that benefit should not be paid to convicted prisoners beyond 13 weeks, I find that the outline of the materials contained in this section of the judgment are all relevant to support the advice that was given.

[F] Universal Credit

[74] There is, however, a significant coda. It concerns a fundamentally different approach to the very same issue in introducing Universal Credit, which occurred near enough simultaneously with the 2013 Amendment to the Housing Benefit Regulations.

[75] First the essential legislative context. Part I Chapter 1 of the Welfare Reform Act 2012, creates a new, means-tested, welfare benefit (Universal Credit). The benefit comprises a "*standard allowance*", to which may be added, amongst other things, an "*amount for housing*" (s.1(3)(c)) in respect of any liability to make payments concerning accommodation occupied by a claimant as his home (s.11(1)), with a power to make regulations for "*temporary absence to be disregarded*" (s. 11(3)(c)). This is intended to replace housing benefit: s.33(1)(d). The equivalent legislative framework is contained in the Welfare Reform (Northern Ireland) Order 2015, Arts. 6(3)(c), 16(1), 16(3)(c) and 39(d), which is secondary Westminster legislation made under the Northern Ireland (Welfare Reform) Act 2015. As to the background of the delayed entry of the legislation into Northern Ireland, see *In Re Lorraine Cox's Application* [2020] NIQB 53 §§25-28.

[76] Transitional provisions govern the migration of claimants from existing benefits to the new Universal Credit. In Northern Ireland these are contained in

Schedule 6 of the 2015 Order; and there have been a complex set of Transitional Regulations. For present purposes it suffices to note that Housing Benefit is regarded as a 'legacy benefit' that will be phased out. However, there are some claimants whose migration to the new system is delayed because their overall package of benefits does not yet fit with the Universal Credit system.

[77] After some necessary research by Respondent **counsel** and their clients, it was established that as of January 2019 regulations had prevented the Applicant from passing through a gateway into Universal Credit for the reason that he is in receipt of income-related support that specifically contains a Severe Disability Premium component: see Regulation 2B Universal Credit (Transitional Provisions) Regulations (NI) 2016 as amended by Regulation 3 of Universal Credit (Transitional Provisions) (SDP Gateway) (Amendment) Regulations (NI) 2019. Regulation 4A of The Universal Credit (Transitional Provisions) Regulations 2014 is the parallel provision in England & Wales. It was inserted by Regulation 2 of The Universal Credit (Transitional Provisions) (SDP Gateway) Amendment Regulations 2019.

[78] The dizzying technical idiosyncrasies of social security transitional provisions have come to matter in this case. That is because having received the Ministerial Submission from the Housing Policy Division of the DWP in support of the 2013 Amendment on 9 January 2012, Lord Freud – in the same post – received a further Ministerial Submission on 16 April 2012 from the Universal Credit Policy Division of the DWP. That Submission advised on creating "*a more coherent and deliverable solution*" temporary absence under Universal Credit, which would "*provide suitable protection for a wider number of people*". Although data in the area was "*virtually non-existent*", the combined proposed changes were believed to be "*cost neutral compared to now*" (§1). To that end the Submission argued for the introduction of a six month temporary absence rule in all housing cases, including sentenced and remand imprisonment, with no requirement for reasons.

[79] The document thereafter contains paradigmatically different reasoning to the January Ministerial Submission and the then orthodox citation of "*well established policy*". The April Submission begins by proposing re-appraisal of the approach that absence was generally to be regarded as "*incompatible with being able to claim Universal credit (e.g. being abroad, being in prison)*" (§2). The Submission recognised the "*risks*" of returning to a single timescale "*not least of which is around the treatment of people in prison*". Contemplated policy change therefore had to be viewed in the light of the DWP *Social Justice Strategy: Transforming Lives* CM 8314 (March 2012) on supporting rehabilitation pre and post-release (§4).

[80] I interpose that the parties did not address the court on the detail of *Social Justice Strategy*, but it is a flagship DWP initiative, which heralded a new approach to social justice based on the fundamental principles of "*prevention throughout a person's life, with carefully designed interventions to stop people falling off track and into difficult circumstances*" and "*a vision for a 'second chance society'*" in which "*anybody who needs a second chance should be able to access the support and tools they need to transform their*

lives" (page 1.): foreword by Iain Duncan Smith, Chair of the Social Justice Cabinet Committee and (as then) Secretary of State for Work and Pensions. In its aims to support the most disadvantaged adults, I have noted the DWP took cognisance of the MOJ Green Paper, '*Breaking the Cycle'* (see paragraph 23 to 25 above) and itself declared, "*We need to ensure that people are able to break the cycle of offending at the earliest opportunity by accessing support services that tackle their problems and help them reintegrate into families, jobs and communities*" (§193). Of the measures that the DWP committed to taking they included "*Working to increase the range of housing that offenders are able to access on release from prison…to reduce the number of ex-offenders who become homeless following release…*" (§194).

[81] It was with that Policy in mind that the Ministerial Submission recommended a new approach to those in prison that would allow "*a short period of easement to avoid the costly-short term re-assessments and disruption to household stability – but only where a UC claim is already up and running*" (§11).

[82] As regards temporary absence due to imprisonment of any type, Lord Freud was *now* advised (3 months since his previous advice on housing benefits) that "*it is particularly important to protect that individual's current house/room where the sentence is not a lengthy one*". Reference was made to the MOJ report, '*Breaking the Cycle'* and its highlighting "*that having somewhere stable to live upon release from custody can be a critical factor in rehabilitating offenders*". It was said that SJCC (which I take to be the Social Justice Cabinet Committee) had recently directed MOJ Ministers "*to look further at improving homelessness for released prisoners (particularly short-term prisoners).*" (§13).

[83] In searching for a "*single duration*" for "*simplification purposes*", the Minister was offered 3 months, but told that this would leave sentences of 6-12 months "*unprotected*" and "*significantly shortens*" the 52 period for remand prisoners. It was estimated – again without clear statistical research - that "c.*6-8000 benefit recipients p.a. serve a custody period of 13 weeks or more, of who roughly 1,500 might end up being acquitted*". On that basis the Minister was invited to "*actively*" consider whether it was preferable to allow a period of 6 months in such cases (§14).

[84] Save for the discrete circumstances of domestic violence, the Minister was invited to apply a six-month rule to all other cases, it being thought "*that 6 months continuously away from the household without one single return is an acceptable point* (emphasis in the original)" (§15). This could lead to a very small number of cases compared to the current rules (for example, hospitalisation without a single break for more than six months). If the Minister was concerned about "*the trade-off between simplicity and bureaucratic intervention*" in such cases, he was offered "*more complex*" multi-layered approaches (§16).

[85] In due course, Paragraph 9(1) of Schedule 3 of the Universal Credit Regulations 2013 provided for a bright line 6 month temporary absence rule for the housing element of Universal Credit "*where the absence exceeds, or is expected to exceed,*

6 months". There is no allowance for hardship cases, such as more than six months in hospital, or access to back payments for those who are acquitted after more than six months on remand. There is no predictive discretion to maintain benefits if it known they will surpass that date (as in Reg. 7(16)(d) of the 2006 Regulations). The only remaining exceptional category is 12 months, where the absence is caused by domestic violence. The equivalent provision in this jurisdiction is contained in Paragraph 8 of Schedule 3 to the Universal Credit Regulations (Northern Ireland) 2016.

Conclusion on legal and policy framework

[86] Having reviewed the overall history of the temporary absence rule, with two Government Departments, the NIHE and both counsel teams to assist in its navigation, the difference between the Ministerial Submissions of January 2012 and April 2012 are striking: something like two ships passing in broad daylight (save that the lack of synchronicity between the two policy orientations has perhaps come more into the light as a result of this litigation). What occurred was a paradigm shift in the policy rationale on temporary absence, which now recognised offender rehabilitation as intrinsic to the smart targeting of benefits. I return in Part IV to the legal consequences in the change to the policy rationale. At this stage I make the following conclusions on the evidence.

[87] Firstly, the change in policy can properly be described as paradigm shifting because the disapproval of funding vacant premises for any one serving the most minor of sentences was no longer to prevail for the new benefit, although it would continue for the old one. The SSAC critique of the 1995/2006 Regulations now aligned with the MOJ intervention of 2010 and the Social Justice Strategy of 2012. The Howard League Report shows that this has never stopped being conventional wisdom amongst criminal justice, prison reform and homelessness experts. The change is that it has now gone mainstream, adopted by government committed to breaking offending cycles through prevention strategies in service of the creation of a 'second chance' society. The talisman of the policy is the short term prisoner, now defined in line with sentencing law and MOJ nomenclature, as someone sentenced to an aggregate term of up to twelve months imprisonment, subject to 50% remission. Their situation is now treated as equal to the remand prisoner, who is in the analogous position of being a short-term prisoner at risk of insecure accommodation and/or homelessness. Far from being a prolific offender, this Applicant is at worst a repeat course of conduct offender; he very much fits the profile of the revised policy position, including the evidence that he values his home as an opportunity to resettle into his family and community.

[88] Secondly, the 1995 policy was never substantially about freeing up vacant properties to assist other homeless people. I emphasise the point because the affidavits of the Respondents touch upon that rivalling imperative. However, I find any reference to the prioritising of the needs of other homeless to be largely tangential. The policy applied only to single people, who disproportionately rent

private accommodation, rather than residing in social housing. Private landlords could not be prevailed upon to accommodate local authority homeless populations. Even if they could, or even if the accommodation in question was state owned, these were homes occupied by single tenants that were not going to re-accommodate high priority families. Hence the caveated way in which the matter was mentioned in the DSS response to the SSAC in 1995. There were never any statistics to correlate the removal of benefits to individual householder and the freeing up of space for the needy homeless. While I could contemplate a local authority raising the competing needs of other homeless people in possession proceedings, this case had not got to that. Overall the objective justification of the policy was never about encouraging evictions to suit the greater homelessness needs of others.

[89] Thirdly, there was also never anything remotely fiscal scientific about the costs and numbers involved in reforming the 13-52 week period. The figures were disputed by the Home Office, the DSS and the SSAC in 1995. The Ministerial Submissions of both January 2012 and April 2012 did not have precise figures. The former had no available statistics but said the numbers would be small. The latter said that data was virtually non-existent, and that the changes would be cost neutral compared to costly short term re-assessments and disruption to household stability.

[90] Fourthly, when the Secretary of State ultimately struck the balance in his response to the SSAC report he applied a value judgement that it was wrong to treat the involuntary absent due to sentenced imprisonment as favourably as, for example, persons in hospital. In not opposing the promulgation of the Regulations, Parliament did the same. This was a political decision, which subject to any reasons to intervene on human rights grounds, was one entirely open to elected politicians to make. The *Waite* case (cited at paragraph 72 above) looked at the core features of the 1995 policy, without access to the coda of the policy change for the Universal Credit that has been disclosed in this case. The Court of Appeal in England found that as between the concern about the public funding of unoccupied residential property and the rehabilitative advantages of preserving for a licence recalled detainee the unquantifiable prospect that his further detention will soon come to an end, the balance struck in the 1995 policy was not one with which a court should interfere.

[91] Fifthly, the harsh facts of the long term mentally ill patients in the *Obrey* case aside (cited at paragraph 44 above), it is also difficult to contemplate any category of persons, other than those imprisoned, who would not find it generally feasible to make brief returns to their homes within a set period, and therefore sufficiently comply with the rule. It was for that reason that the Universal Credit Regulations adopted a flat six-month time-scale. Its only exception relates to twelve months afforded to those living in other accommodation because of reasonable fear of violence.

[92] Sixthly, all versions of the temporary absence rule have combined principle (contested, or otherwise) and pragmatism. Both the 52 weeks general allowance prior to 1995 and the 6 months allowance under Universal Credit bears the

advantages of bright line simplicity over the complexity of bureaucratic intervention. Whenever complex legislation in fields such as welfare benefits or taxation is based on a particular policy, there are almost always hard cases which fall the other side of the line. Both the Respondents and the Applicant well-understood that Universal Credit had produced a less favourable situation for remand prisoners; and Mr Southey added that this was especially so in Northern Ireland where there are no custody time limits.

PART III: THE ARTICLE 8/ARTICLE 1 PROTOCOL 1 CHALLENGES

[A] Article 8 ECHR – the Right to Respect for Private Life and the Home

[93] Article 8 of the ECHR provides:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[B] The Parties' Arguments

[94] The Applicant's case was that his exposure to a risk of repossession through the cessation of his benefit payments – and therefore his capacity to otherwise pay the rent – interfered with Article 8 rights to respect for his private life and his home. The autonomous Convention concept of a 'home' referred to property established by a person as his home, lived in as a residence, and retained with a purpose of returning to it when absent: *Buckley v UK* (1996) 23 EHRR 101 §54. The concept of 'private life' was additionally relevant to the case, as the risk of not being able to return to the home had plagued the Applicant as he served a short sentence, after which he would be only on a remand. It was submitted that the cumulative evidence of both his attachment to his own residence and the importance of accommodation to prison leavers meant that his links to his home – permanent before custody and proximate to family to aid resettlement on release - were of a sufficient quality to engage Article 8 protection.

[95] Based on the Applicant having acquired a 'home' that was of evident value to him, Mr Southey pointed to the repeated line of Strasbourg authority that the loss of one's home is "*a most extreme form of interference*" with the right of respect for a home, such that any person "*at risk of an interference of this magnitude should in principle be*

able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end": *McCann v UK* (2008) 47 EHRR 40 §50; and *Kay v UK* (2012) EHRR 30 §68. The emphasis on the risk of losing the home was necessary for **counsel** to make, because eviction did not occur in this case, and at no time did the landlord begin possession proceedings in the County Court.

[96] The argument that there had nevertheless been a breach of Article 8 rights was based upon what Mr Southey described as a direct causal link between the operation of the impugned regulations, the loss of the Applicant's Housing Benefit and the consequential *risk* that the Applicant would be evicted from his home. Mr Southey submitted that there was an ab initio "*unacceptable risk*" to his Article 8 rights, by reference to the general public law principles on systemic unfairness. The relevant test is those cases is whether a system "*considered in the round*" is "*inherently unfair*", and whether "*the risk inheres in the policy itself, as opposed to the ever present risk of aberrant decisions*": *R (Refugee Legal Centre v Secretary of State for the Home Department* ([2004] EWCA Civ 1481) [2005] WLR 2219 §§6-7 and the cases cited in *R (Howard League) v Land Chancellor* ([2017] EWCA Civ 244) [2017] 4 WLR 92 at §§48-50. I understood the Applicant to argue that this case law could be read across into this particular Article 8(2) context, because the requirement to determine whether the interference with respect for the home is proportionate to the aim pursued raises a question of procedure as well as substance; and therefore requires a court to consider the sufficiency of the safeguards and guarantees to protect a person who is at risk of eviction: *Kay v UK* §67, *McCann* §49 (both citing *Connors v UK* (2005) 40 EHRR §§81-83 and 92). As the Court put it in *Kay v UK*:

> "It is clear from the case-law of the Court that the requirement under Article 8 § 2 that the interference be "necessary in a democratic society" raises a question of procedure as well as one of substance. The procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, the Court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8".

[97] The Applicant maintained that there was an unacceptable risk of losing his home (or as he elsewhere put it, "*a sufficient degree of likelihood*" of the same), because no possession proceedings, if brought, could properly protect against the consequence that had arisen because of the disproportionate and inflexible application of the temporary absence rule. He based that systemic forecast upon the different approaches in the Article 8 case law to possession proceedings, as between

private and social housing landlords. When possession proceedings are brought by local authorities, a court must consider whether it would be proportionate to allow the eviction: *McCann v UK* §54, *Kay v UK* §73 and *Manchester City Council v Pinnock (Ns 1 and 2)* ([2011] UKSC 6) [2011] 2 AC 103 §45. Conversely when the proceedings are brought by a private individual or enterprise there is no requirement to consider the proportionality, as the balance between the competing interests of the landlord and the occupier are generally struck by the legislation – governing contract and its enforcement - that has the purpose of protecting the Convention rights of both non-state individuals.

[98] The Applicant's case rested on a situation that was submitted to be overall incompatible with Article 8. Regulation 7 bore no grounds for discretion. The possession proceedings, when or if they were brought, but (as counsel put it) "*with the shadow that they were coming*", bore no quarter to defend its consequences. As due regard to the proportionality of an eviction could not be guaranteed, the interference in the right to private life and respect for the home could not be proportionate in accordance with Article 8(2). It was for this court to now reach its own judgement on proportionality: *Miss Behavin' Ltd v Belfast City Council* ([2007] UKHL 19) [2007] NI 89 §31. It should do so on the basis that reasons provided for the Regulations (in 2013 and 1995) were flawed, unfair and led to arbitrary outcomes.

[99] The Respondents first queried whether Article 8 was engaged at all. The Applicant had only lived in rented accommodation for three months prior to his detention, having lived at a previous rental address presumed to link to the allegations of domestic violence made against him. There was no evidence of any particular connection to the new property other than the fact that it was near his mother's house. The evidence that the Applicant had decorated himself, or done anything meaningful to settle into the address prior to his imprisonment was said to be laconic. Whether he had "*sufficient and continuous links*", as described on the facts of *Buckley v UK*, was therefore doubted.

[100] Even if the threshold for engagement for Article 8 was passed, its limited level of engagement was said by the Respondents to bear relevance on the extent of the individual rights in this case. They recalled that there is no Article 8 right to be provided with a home, even if homeless, and nor is there a right to the benefits to pay for it: *Chapman v UK* (2001) 33 EHRR 18 §99. Rather Article 8 in this context is concerned with respect for a person's home and "*regulates interference by public bodies with that right*": *R (ZH and CN) v London Borough of Newham and others* ([2014] UKSC 62) [2015] AC 1259 §61.

[101] Domestic and Strasbourg case-law had now aligned to confirm that it is only in "*very exceptional cases*" that there will be an arguable lack of proportionality where a public authority landlord seeks to evict an applicant who has no right to possession in domestic law: *ZH* §65 (citing the acknowledgment of the same in *McCann v UK* and *Kay v UK*). It was submitted that the cessation of a means tested benefit designed to assist with the payment of rent is in a different category to the

already exceptional threshold for intervention that Article 8 requires in the field of social welfare policy. It certainly did not constitute a decision to terminate the Applicant's property rights.

[102] As regards the *McCann* line of authorities concerning procedural safeguards for a person at risk of losing their home, it was submitted that they required a far greater nexus to the actual loss of a home before the risk per se could arguably establish a disproportionate interference with Article 8 rights. In *McCann* itself the Applicant had been evicted from his home, in circumstances where his wife as a joint tenant had signed a notice to quit thereby denying him any effective access to court (§54). As to other cases referred to by the parties, in *Kay v UK* the Applicant and others had been evicted, in circumstances where the County Court excluded all consideration of their defences based on personal circumstances. In *Buckley*, *Connors*, *Chapman* and *FLM*, the Applicants had either been evicted or served with notices requiring them to leave.

[103] The Respondent further opposed the Applicant's reliance on the absence of a right to raise a proportionality defence in possession proceedings for four reasons. Firstly, the Applicant continued to enjoy the safeguards and protection of the law. These mandated the landlord to give one month's notice prior to issuing possession proceedings (in fact, it was temporarily three months as a result of Covid emergency laws): Art. 14 of the Private Tenancies (Northern Ireland) Order 2014. Even if possession proceedings were issued, the County Court in Northern Ireland could delay either the enforcement of a decree of ejectment, including the requirement to pay rent arrears if that were part of a decree, "*as he considers reasonable in the circumstances*": Art. 45 of the County Court (Northern Ireland) Order 1980; and Order 33 r. 9-10 of the Country Court Rules. This alone went someway to meeting the Applicant's case that there was an unacceptable risk/sufficient likelihood of an actual eviction.

[104] Secondly, even if the landlord had been a public authority, "*as a general rule*" a proportionality defence would not have availed to this Applicant on these facts, as it would have been open to the local authority to seek eviction in order to house homeless or other priority need persons especially, if (as disclosed by Ms McCleary's evidence) there are 8000 individuals in housing stress in Belfast alone: *ZH v London Borough of Newham,* §67. On that basis the distinction between the public and private law landlords would not have mattered as much Mr Southey suggested.

[105] Thirdly, as the landlord was a private individual, there was now a sufficiently clear line of domestic and Strasbourg jurisprudence that it was not open to a court to intervene to alter the contractual rights and obligations that the parties had freely entered into. The domestic and Strasbourg case law had established that there was no room for a super-added requirement of proportionality in that private law context: *Vrzić v Croatia* (2018) 66 EHRR 30 §66-67; *FJM v UK* (2019) 68 EHRR SE5 §§37-46 affirming the Supreme Court in *MacDonald v Macdonald (Secretary of State for*

Communities and Local Government intervening) ([2016] UKSC 28) [2017] AC 273 §40-47.

[106] As to hard cases, this case could not compare with the actual eviction in *FJM v UK*, where the child of the Applicants had been unable to sustain a place in social housing due to her mental illness, and they had acquired a private property for her as a last resort. On those facts, the Court would not intervene to prevent a repossession by a finance company, even when it meant forcing an acutely vulnerable person out of her home.

[107] The Respondents' fourth point was that if the Applicant became subject to a final possession order, it was open to the County Court to suspend the requirement to give up the property for a specified time. In England & Wales that period is up to six weeks. In Northern Ireland it is not time limited; and thus conceivably could bridge the period of the Applicant being released from prison and making arrangements to relocate. As the Applicant had moved into rented accommodation 3 months before being in prison, and had previously lived in another address not too distant from his present one, there was no evidence that he would become homeless, or have considerable difficulty finding other accommodation, even if less convenient or not as nice.

[108] The Respondents rested their case on the fact that the risk of eviction was remote, "*never on a cliff edge*", but in any event it was entirely proportionate to implement a benefit system which seeks to ensure that public monies are not spent on properties that are vacant for extended periods. Overall, the 2006 Regulations set a fair balance between the provision of an adequate cushion for individuals who may have reason to be temporarily absent and the public interest in not subsidising such properties when so many are in need of them.

[109] Although Mr McGleenan accepted that this court should judge the issues by deciding itself whether the flat rate of 13 weeks in Regulation 7 was proportionate, he referred to the principle – first articulated in the case law concerning A1P1 – that a court should only intervene in socio-economic subject matter such as this where satisfied that the reasons for the interference in the Applicant's Article 8 rights were "*manifestly without reasonable foundation*" (for which see, citations below).

[C] Article 1 Protocol 1 ECHR – Peaceful Enjoyment of Possessions

[110] Article 1 Protocol 1 ('A1P1') of the ECHR provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his possessions except in the public interest and subject to the conditions provided by the law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State

> to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[D] The Parties Arguments

[111] I take this part of the claim more swiftly, because the Applicant's skeleton argument emphasised the significant overlap between the claim under A1P1 and Article 8. During the hearing I took Mr Southey to accept that A1P1 did not substantially add anything to his analysis under Article 8. However, it is important to appreciate the purported freestanding relevance of the A1P1 to this challenge, not least to establish how the Convention operates in tandem across Art. 8, A1P1 and Art. 14 in this context of private housing dependent as it is on state housing benefit.

[112] In summary, the Applicant argued as follows:

(i) It was no longer in dispute that A1P1 protected both the Applicant's right to the peaceful enjoyment of his tenancy *and* the housing benefit provided in order to pay for it, both of which are 'possessions' within the meaning of the provision. For an approach to rented accommodation (far away from the extant context, but recognising that that which is rented can be a 'possession'), see *Stretch v UK* (2004) 38 EHRR 12 at §§32 – 35. For the recognition that housing benefits are also a 'possession', see *R (RJM) v Secretary of State for Work and Pensions* ([2008] UKHL 63) [2009] 1 AC 311 at §34 relying as it does on the foundation Strasbourg case of *Stec v UK* (2006) 46 EHRR 47 §§47-54, which is cited at *RJM* at §§28-33.

(ii) The complaint was focussed not on entitlement to benefits simpliciter, but rather the regulations that have operated to stop the Applicant's Housing Benefit, without recourse to an individualised proportionality analysis, and thereby to put his tenancy in jeopardy.

(iii) As regards the jeopardy of the tenancy, the Applicant further relied on his Article 8 arguments that the possession proceedings could not guarantee him an opportunity to catch up on his rental arrears once shortly released from prison. In so far as there was an established interrelationship between the state reliance on the private housing market to accommodate lower income people, there was no reasonable justification to create such inflexibility in this area.

[113] Again in summary, the Respondents countered as follows:

(i) The Applicant has not been deprived of his tenancy by the operation of the 2006 Regulations and his reliance on A1P1 in this regard was misconceived; and indeed without recourse to any authority to show that the risk of

possession proceedings in this context would constitute an interference with the right. The cited case of *Strech v UK* related to the actual cessation of a renewal option on a 21 year lease, where the complainant had carried out extensive work on the site, and was denied any effective recourse to challenge the reneging on the renewal clause by virtue of it being ultra vires of the powers of the public authority to provide the clause in the first place.

(ii) It was accepted that a non-contributory social welfare benefit was a possession within the meaning of A1P1 although the cited cases had all been decided on the inter-relationship between A1P1 and Article 14 and not under A1P1 alone.

(iii) A1P1 was therefore only engaged because the state had made a choice to create a benefits scheme; as opposed to their being a right to benefits at all under A1P1 or, indeed, any other part of the Convention.

(iv) There was a long line of Strasbourg and domestic case law that established that the basis for judicial intervention under A1P1 in areas relating to social-economic policy was limited to interferences in the right that were manifestly without reasonable foundation (see below).

(v) It was further submitted that intervention in this field was even less likely outside of the context of Article 14. That was because the lack of justification could only be found in the setting of the bright line rules per se as regards the consequences of those rules for the temporary absence of sentenced prisoners.

[E] Findings on Article 8/Article 1 Protocol 1

[114] The ECHR – unlike the Universal Declaration of Human Rights (1948) (Art 22), the UN Covenant on Economic and Social Rights (1966) (Art. 9) and the European Social Charter (1961) (Art 12) - does not create rights to social security (including, in this context, such security as would both entitle a person to a home and protect them from its loss). What it does do is create a potential ground of legal challenge to the interference with/deprivation of a financial benefit that the State has chosen to grant in circumstances where the interference/deprivation of the entitlement is carried out in a disproptionate and unjustifiable fashion in its own right, *or* because the State has decided to create a benefits scheme in a manner that is incompatible with Article 14. Although the substantive and discrimination claims in this judicial review are alleged in tandem, the court is here asked to determine a complaint of a violation of the substantive rights under Article 8 and A1P1.

[115] The standard of judicial review in this context is governed by important caveats about the competency of judges and/or the legitimacy of judging matters relating to the distribution of resources outside the elected, expert and accountable field of government. There is a line of case law that begun in the field of A1P1 that has migrated into other parts of the Convention, including Article 8, and as we shall

see Article 14, which recognises that there are areas of law that "*commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely*". To that end, while the European Court of Human Rights will enquire into the contested measures and the reasoning on which they are based, it would generally respect a democratically-elected and democratically-accountable legislature's judgement on the implementation of socio-economic policies, unless it determines that its judgement is "*manifestly without reasonable foundation*": *James v UK* (1986) EHRR 123 §46 and adopted by the Grand Chamber in *Stec v UK* §52.

[116] *In Chapman v UK* (2001) 33 EHRR 18 §99 the Court made the following observations that were relied upon by the Respondents and not disputed by the Applicant:

> "It is important to recall that Article 8 does not in terms recognise a right to be provided with a home. Nor does any of the jurisprudence of the Court acknowledge such a right. While it is clearly desirable that every human being have a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the Contracting States many persons who have no home. Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision."

[117] In *Blečić v Croatia* (2004) 41 EHRR 185 (a case concerning a penalty for 10 months temporary absence on a secure tenancy), the First Section of the Court held that:

> "State intervention in socio-economic matters such as housing is often necessary in securing social justice and public benefit. In this area, the margin of appreciation available to the State in implementing social and economic policies is necessarily a wide one. The domestic authorities' judgement as to what is necessary to achieve the objectives of those policies should be respected unless that judgement is manifestly without reasonable foundation. Although this principle was originally set forth in the context of complaints under Article 1 of Protocol No 1 … the State enjoys an equally wide margin of appreciation as regards respect for the home in circumstances such as those prevailing in the present case, in the context of Article 8. Thus, the Court will accept the judgement of the domestic authorities as to what is necessary in a democratic society unless that judgement is manifestly without reasonable foundation, that is, unless

> the measure employed is manifestly disproportionate to the legitimate aim pursued."

I note the statement in *Blečić* was cited without criticism in the nine judge Supreme Court decision in *Manchester City Council v Pinnock* at §34.

[118] The Article 8 Strasbourg authorities on housing often recite the section of the judgement in *Connors v UK* (2005) 40 EHRR 189, where it emphasises that in spheres such as housing, which play a central role in the welfare and economic policies of modern societies, the Court will respect the legislature's judgement as to what is in the general interest unless that judgement is "*manifestly without reasonable foundation*" (§82). Having observed that the phrase emerged in the Article 1 Protocol 1 case law, but has migrated elsewhere within the Convention framework, the Court in *Connors* said of the Article 8 context, that there could be an added aspect of the right to a private life to take into account, which "*concerns rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community*." Overall it advised that:

> "Where general social and economic policy considerations have arisen in the context of Article 8 itself, the scope of the margin of appreciation depends on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant."

[119] Thus far I have quoted the Convention case law, and its articulation of why a margin of appreciation is afforded by **an international court** operating under the Convention to the socio-economic decision making in signatory States, which have myriad different approaches to social welfare issues. As it was expressed by the Grand Chamber in *Stec v UK* at §52:

> "Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation"."

[120] There is a clear and important difference between the role of a domestic court investigating the facts and the reasons upon which Government has acted in the socio-economic field, and a supervisory international court doing the same, especially so when it relies considerably on how the domestic courts have approached an issue. However, our own courts have recognised that certain matters involving controversial issues of social and economic policy are by their nature more suitable for the determination of the democratically-elected Parliament, or the

democratically-accountable executive, than by the courts: *R (SG) v Secretary of Secretary of State for Work and Pensions* ([2015] UKSC 16) [2015] 1 WLR 1449 §§92-93; R *(SC) v Secretary of State for Work and Pensions* ([2019] EWCA Civ 615) [2019] 1 WLR 5687 §§85-87; and *Secretary of State for the Home Department v JCWI* [2020] EWCA Civ 542 §128. In *R (SC) v Secretary of State for Work and Pensions* §87, Leggatt LJ (as then) explained in an Article 14 case why there were compelling reasons for according the full area of judgement allowed to the UK under the Convention in matters of social and economic policy to the legislature and the executive:

> "Within the UK's constitutional arrangements, the democratically elected branches of government are in principle better placed than the courts to decide what is in the public interest in such matters. Those branches of government are in a position to rank and decide among competing claims to public money, which a court adjudicating on a particular claim has neither the information nor the authority to do. In making such decisions, the legislature and the executive are also able and institutionally designed to take account of and respond to the views, interests and experiences of all citizens and sections of society in a way that courts are not. Above all, precisely because decisions made by Parliament and the executive on what is in the public interest on social or economic grounds are the product of a political process in which all are able to participate, those decisions carry a democratic legitimacy which the judgment of a court on such an issue does not have. For such reasons, in judging whether a difference in treatment is justified, it is now firmly established that the courts of this country will likewise respect a choice made by the legislature or executive in a matter of social or economic policy unless it is "manifestly without reasonable foundation."

[121] I therefore approach this part of the case on the basis that the ultimate question is whether the 13 week temporary absence rule for a short term sentenced prisoner is manifestly without reasonable foundation. In deciding that question, I use the fourfold technique or tool of the *Bank Mellat* approach to justification (*Bank Mellat* [2014] AC 700, 771 §20 and §73). In doing so I bear in mind that the issue under review in the Article 8 and the A1P1 claims is the existence of the temporary absence rule for a short term dual sentenced and remand prisoner, as opposed to the difference in treatment between this Applicant's situation and remand prisoners in an allegedly analogous position, which I take to be the focus required by Article 14 challenge. On the Article 8 ground I additionally bear in mind the well-established requirement as expressed in *Connors v UK* that understanding the legal and political context remains essential as does equally the need to appreciate the extent of the

interference in to the personal sphere of this Applicant. With both of these substantive ECHR complaints, although the burden is ultimately on the Applicant to establish his case, I have still regarded it as particularly important for the Respondents to serve evidence that sufficiently explains both the reasons and the justification for the State's conduct.

[122] Firstly, Article 8 expressly grants an individual the 'right to respect for… *his* home' (emphasis added), such that a requirement for a person to move out of a particular dwelling that is his home will interfere with the Article 8 rights. As indicated in paragraph 15 I do not accept that Applicant's attachment to the property was tenuous, even if it was recent. I conclude that this was a "*home*" to the Applicant within the autonomous meaning of Article 8. The Respondent's submission to the contrary might only succeed if there has never been any, or hardly any, occupation by the Applicant or where there has been no occupation for some very considerable time: *Demopoulos v Turkey* (2010) 50 EHRR SE14 §136. My conclusion follows from the judgment of the Supreme Court in *Hounslow London Borough Council v Powell* ([2011] UKSC 8) [2011] 2 AC 186, §33. Having accepted that it is well established that in the jurisprudence of the Strasbourg court that an individual has to show sufficient and continuing links with a place to establish that it is his home for the purposes of Article 8 (citing amongst other authorities *Buckley v UK* §54), Lord Hope added:

> "This issue is likely to be of concern only in cases where an order for possession is sought against a defendant who has only recently moved into accommodation on *a temporary or precarious basis*. The Leeds appeal in *Kay v Lambeth London Borough Council* [2006] 2 AC 465, where the defendants had been on the recreation ground in their caravan for only two days without any authority to be there, provides another example of a situation where it was not seriously arguable that Article 8 was engaged: see para 48. In most cases it can be taken for granted that a claim by a person who is in lawful occupation to remain in possession will attract the protection of Article 8." (My emphasis).

[123] Secondly, I agree that the Applicant's continuing enjoyment of his home at this time was also an important aspect of his private life, particularly in terms of the value it represented to him for his rehabilitation and reintegration back into his community. The efforts that the Applicant and his mother went to in order to keep his home point to matters relating to "*the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community*": *Connors v UK* §82. In so far as Article 8 secures to the individual "*a sphere in which he can freely pursue the development and fulfilment of his personality*" (*A-MV v Finland*, *Application no. 53251/13, 23 June 2017* §76), there is

good reason to see the security of a prisoner's pre-existing fixed abode as a concrete manifestation of such a sphere. Contemporary Government policy, as expressed through the MOJ '*Breaking the Cycle*' and the DWP '*Social Justice Strategy*' are more appreciative of such matters than the 1995 approach of the Government to the same concerns. To the extent that the Applicant lived under the shadow of losing his home, I therefore find that Article 8(1) was engaged.

[124] Thirdly, and crucially to the Applicant's argument, I do not accept that a potential eviction by virtue of the possession proceedings specifically not being permitted to consider the proportionality of the operation of Regulation 7(13) and/or the 2013 Amendment creating Regulation 16A, was such as to create an inherently unacceptable risk of a breach of Article 8 across all cases of its kind and/or a sufficiently likely risk of a breach of Article 8 on these facts. On both ways that Mr Southey framed this aspect of his case, I do not find it to succeed:

(i) Whatever the fears of possession proceedings beginning at the outset of the litigation, the fear did not transpire, interim relief intervened, and the Applicant was admitted to bail and his housing benefit renewed.

(ii) I agree with the Respondent that the *McCann* line of authorities requiring attention to procedural safeguards do not extend to rendering the Applicant a victim of a breach of Article 8, because he lived under "*the shadow*" of *potential* possession proceedings, where it would not be open to him to argue that Regulation 7 made it disproportionate to evict him. Whatever risk of eviction in those circumstances there was, I agree that it was too remote to engage the housing related procedural rights duties under Article 8.

(iv) In any event the aligned Strasbourg and domestic case law concerning public authority landlords confirms that proportionality will only make a difference in very exceptional circumstances. With either type of landlord, the relevant law would have needed one month's notice of pending proceedings, with common law discretion on the court to set its own timetable. I could foresee circumstances where a judge would decide to adjourn proceedings brought by a hypothetical public authority landlord pending payment of a small amount of outstanding rent and/or suspend the order for possession on the happening of payment of rent arrears: *Doherty v Birmingham City Council* ([2008] UKHL 57) [2009] 1 AC 367 §§52-53 and 133-136 (eschewing the unduly formalistic requirements of mere Wednesbury review). A private landlord might have legitimately overridden that adjournment request, for the reasons identified in *MacDonald v MacDonald* and confirmed in *FJM*. As the proceedings never arose, and it is unknown what the Applicant's landlord would say, no finding can be made.

(v) Given his actual situation – at risk of possession proceedings, but not yet at risk of eviction – the Applicant was not without procedural safeguards. He was free to challenge the broader legal framework on Article 8 grounds, as the

Supreme Court in *MacDonald v MacDonald* (at §45) has maintained that he must be able to do where there is an argument that the legislature had not carried out its obligations under the Convention. In order to protect his position he was able to bring judicial review proceedings to challenge the proportionality of Regulation 7, seek an expedited hearing (as was granted), and (in the exceptional circumstances caused by the Covid 19 pandemic) obtain interim relief due to the Respondent not **initially** being able to serve the core evidence that has been relied on in this case.

(vi) Even if the possession proceedings were brought and an eviction order was promptly made there is discretion in the County Court judge to postpone execution of the order to deal with hardship and other such circumstances: *FJM v UK* §44 (citing the maximum 6 weeks in England & Wales, whereas there is no time limit in Northern Ireland). Provided that the landlord did not lose out financially (and there were no other reasons necessitating expedition) there was a case to be made here that there should be some time for the Applicant to relocate out of prison and find some other property to live in. The only evidence before the court is that a home as nice as this one would be hard to come by in the relevant area, but it was not submitted to me that that there was no prospect of finding other homes in the city through the private rental market, or that this Applicant would face street homelessness on release. Even then, temporary housing duties on the local authority would have been available to him as of right.

[125] Finally, if there had been a completed eviction in the Applicant's case I do not accept that it would have been disproptionate by operation of the 13 week temporary absence rule including the cession of the benefits immediately when it was known it would be surpassed. On this complaint the court is concerned only with a policy decision to create a bright line entitlement for absentee serving prisoners. The Strasbourg requirement for sufficient procedural safeguards in possession proceedings does not require consideration of whether the social security of rent subsidies is proportionately applied on a case by case basis. I bear in mind that I am not here considering the difference of treatment between sentenced and remand prisoners. Neither, do I intend at this stage to consider the consequences that the Government has changed its mind on the same issue as regards the parallel system under Universal Credit. I return to that matter in Part IV.

[126] Applying the four-fold approach to proportionality (*Bank Mellat* §20 and §73), and doing it myself, as opposed to deferring to the Respondents' judgement (*Miss Behavin' Ltd*, §31), but still bearing in mind that there was full and mandated statutory consultation with the SSAC in 1994-1995, I find as follows:

(i) The policy foundation to the temporary absence rule in Regulation 7(13) and 7(16A), cannot be regarded as unnecessary in a democratic society for failing to be sufficiently important to justify the limitation on how long the State will subsidise absence from the home when it is occasioned by sentenced criminal

conduct. As to the proper historical context and explanation for the "*well-established*" policy, see paragraphs 53 to 73, which requires a combined reading of the Ministerial Submission in January 2012 and the 1994/1995 exchange of views between the DSS and the SSAC.

(ii) The aim of the policy was to recalibrate a previous situation of all absences being permissible for up to 52 weeks regardless of reasons, which was deemed by Government to be overgenerous and unfair to the taxpayer, with special attention paid to public and media objection to subsiding the empty accommodation of serving prisoners. The DSS memorandum to the SSAC explained the aim. The SSAC consulted with the stakeholders. When he sought Parliamentary consent for bringing the Regulations into force, the Secretary of State was required by law to attach a statement declaring any reasons for disagreeing with the advice of the SSAC. This he did. Parliament did not object.

(iii) The policy has not excluded sentenced prisoners from the temporary absence rule altogether, but treated them by way of a bright line rule as the same as all other people, save those with special cases of assessed more deserving involuntary absence that they bear no responsibility for. Looked at this way it can be said that the policy combines aspects of enlightenment, pragmatism and political value judgement.

(iv) The drawing of lines around a sentenced prisoner (identified by reference to a minor sentence for a single offence imposed by reference to maximum powers of the Magistrates' Court) bears a rational connection to the policy aim. Equally, no rational disconnect arises from favouring the position of the presumed innocent, but not retrospectively saddling them with an obligation to reimburse the social security funds if they are found guilty. The 1995 decision was principally about drawing a line between guilt and innocence, with the convicted awaiting sentence kept to one side on the assumption that they could be released for reasons of time served. If not immediately released, the operation of the bright lines constitutes an accepted administrative price to pay in the interests of simplicity and overall favouring of the presumed innocent: see *MR v Bournemouth* §20 and *Waite* §41.

(v) I am sceptical about the rational connection between stopping private rental subsidies for minor term prisoners and an aim to consequentially free up space in that aspect of the housing market for other needy homeless to fill. However, I do not see it to be a salient part of DSS decision making in 1995; or its defence of the policy in 2003 in the *Waite* case; or in the January 2012 Submission to Lord Freud advising on the amendment concerning dual sentenced and remand prisoners. Housing shortages were referred to in the Respondents' evidence and focussed upon in the skeleton argument, including by reference to the case law about hard choices concerning other more needy homeless. Given the short time limits involved, I simply cannot

see how that reason for the policy would make a particular difference either way; and still less so, when we are here concerned with the private rental market.

(vi) At the behest of the SSAC and those it consulted, the Government considered options on less intrusive methods, particularly as to whether to operate a discretion to continue cases for vulnerable prisoners with special needs, but determined that identifying those needs would be overly complex and particularly difficult to justify favouring one claimant over another given the difficulties faced by much of the prison population. The administrative resistance towards introducing individuated discretionary judgements in equally complicated area of mental health was accepted as valid by the Court of Appeal in England in *Obrey*. The Universal Credit system with its flat six month rate is even less willing to countenance a trade-off between simplicity and bureaucratic intervention, so much so that it has increased the temporary absence rule to six months for all people (save victims of domestic violence) for the sake of a coherent and deliverable solution. The Government directly applied its mind to the issue of whether to insert prisoner related discretionary exceptions in 1995. It would be wrong for this court to disagree with that decision simply because there are a range of alternative approaches to the matter. However, I also find that a more individuated scheme would be difficult to apply in a way that did not lead to uncertainty and arbitrariness in outcome.

(vii) Even if the severity of the consequences was actual, as opposed to potential, eviction, prison leavers retain immediate renewed entitlement to benefits and/or interim emergency rehousing. For that reason, although the balance struck between the rights of the individual and the interests of the community might be controversial and open to criticism, it cannot be condemned as manifestly without reasonable foundation. I accept that there is evidence that the changes could adversely affect rehabilitation, resettlement and (paradoxically) impact on the likelihood of re-offending, but it would be wrong to conclude that the generated risk of re-offending was solely caused by access to housing benefit; or that the role of the state in assisting prison leavers not to offend lies exclusively in housing benefit policy. These are complex issues with polymorphic causes and effects whatever policy choices are made; and so are inherently more amenable to politically accountable decisions than judicial ones.

[127] For all of the above reasons, I find that there was no breach of Article 8 in this case. I also find that there was no breach of A1P1. The Applicant accepted that he could not prevail on A1P1 if his claim did not succeed under Article 8. Although he suggested that his Article 8 submissions could be read across to the A1P1 claim, there are differences between the two protections. A1P1 does not contain the private life features identified in *Connors*; and it also does not contain the same procedural guarantees in the state benefits field as the *McCann* line of authorities has required in

the housing field. Still, there is a statutory right of appeal against an NIHE decision to cease or refuse benefits and judicial review of the ECHR compatibility of the legislative scheme was available to the Applicant in this case.

[128] The Respondents pressed what they described as the orthodox position, identified in *Stec v UK* at §53:

> "Art 1 of Protocol No 1 does not include a right to acquire property. It places no restriction on the Contracting State's freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme. If, however, a State does decide to create a benefits or pension scheme, it must do so in a manner which is compatible with Art 14 of the Convention."

[129] The scope for an A1P1 claim taken alone does therefore appear to be particularly narrow in this situation; a point indicated in part by the judgment in *Carson v UK* (2008) 51 EHRR 13 §53 that reflects that the freestanding complaint under A1P1 was held to be inadmissible. I agree at least in this instance that there was no basis for the Applicant's claim of a substantive breach of A1P1. I respectfully adopt the approach to the issue by McAlinden J *In re Lorraine Cox* [2020] NIQB 53 at §107. The only right to receive such a payment arises where the terms of the social security scheme as fixed by the State are met. In this instance the rules set by the State were properly applied and the Applicant received that which the rules dictated he should have received. That is the end of the matter subject only to the discrimination issues addressed below.

PART IV: THE ARTICLE 14 CHALLENGE

[A] Article 14 Challenge – Prohibition of Discrimination

[130] Article 14 which is headed "Prohibition of discrimination", states:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[B] The Article 14 Questions

[131] Four key questions have been identified in a number of landmark cases in the Supreme Court and in the Court of Appeal that provide a pathway for analysing an Article 14 challenge. It is is generally accepted that the questions are interrelated

and cannot be rigidly compartmentalised: *In re McLaughlin* ([2018] UKSC 48) [2018] 1 WLR 4250 §15; and *In re Lennon* [2020] NICA 15 §42. I was invited to approach the questions in this case essentially in the terms used by Baroness Hale in *McLaughlin at* §15, but in the order suggested by her judgment in *R (DA and DS) v Secretary of State for Work and Pensions* ([2019] UKSC 21) [2019] 1 WLR 3289 §136 and the judgment of Baroness Black in *R (Stott) v Secretary of State for Justice* ([2018] UKSC 59) [2018] 3 WLR 1831 §8. In short form heading that is 'ambit', 'status', 'analogous situation' and 'justification'. Thus:

(1) Do the circumstances "fall within the ambit" of one or more of the Convention rights?

(2) Has there been a difference of treatment on the ground of one of the characteristics listed or "other status"?

(3) Is that difference of treatment between two persons who are in an "analogous situation"?

(4) Is there an objective "justification" for the difference in treatment?

As regards question (4) and in order to understand this aspect of the claim, I recall that it is the difference of treatment that must be justified and not (as in the substantive claims) the treatment itself: *DA and DS* §§53-54 effectively following Lord Bingham in *A v Secretary of State for the Home Department* ([2004] UKHL 54) [2005] 2 AC 68 §68.

[C] Ambit

[132] The Respondent did not contest that the Applicant's circumstances fell within the ambit of Article 8 and A1P1. This inevitably follows from the above findings that there was an interference in Article 8(1) both with regard to respect for "*his home*" and "*the personal sphere*" pertaining to his private life. Equally, as is now well accepted, the choice by a State to provide benefits of itself is capable of falling within the ambit of A1P1. Although this claim related to the "*home life*" of an individual, rather than a family, the approach in *DA and DS* at §§35 (per Lord Wilson) and 137 (per Baroness Hale) underscores the extent to which Article 14 will play its role in protecting the non-discriminatory enjoyment of "*a home life underpinned by a degree of stability, practical as well as emotional, and thus by financial resources adequate to meet basic needs of accommodation…*".

[D] Status

[133] There was a more significant dispute between the parties as to whether the Applicant's personal characteristics as a short term dual sentenced and remand prisoner were sufficiently specific to fall within the concept of "*other status*" as

referred to in Article 14. The Applicant relied on the "*generous meaning*" afforded to "*other status*" in *Stott* (at §81), although I note Baroness Black's judgment equally accepted that it could not be "*open ended*". In oral submissions Mr Southey submitted that this was not a matter that should be neatly compartmentalised, for instance by ignoring the grounds for differentiating the Applicant's class of prisoners from others. There had been a significant interference in the Applicant's Article 8 rights, arising from his situation as a short term prisoner, and thereby risking his existing home life and future rehabilitation. Decisions such as *Shelley v UK* (2008) 46 EHRR SE16, relating as it does to needle exchange schemes for prisoners suffering from heroin addiction, exemplified the extent to which personal characteristics need not be innate, involuntary or permanent.

[134] The Respondents referred to the *obiter* observations by certain judgments in *DA and DS* that the concept of 'other status' still awaited further clarity (§126 per Lord Hodge) and that there was room to doubt that the concept could tolerate the proliferation of narrow status subgroups especially in the field of social security where entitlement has to be expressed in broad terms (§108 per Lord Carnwath). Mr McGleenan adopted the simile of Lord Walker in *RJM* (at §5) that 'personal characteristics' in Article 14 should be treated as a series of concentric circles moving out from the core list of protected status characteristics. It was submitted that the description of a dual remand and sentenced prisoner described something in too distant an orbit to warrant protection. It was also maintained that the description of the dual remand and sentenced prisoner was a construct, given that the sentenced prisoner was actually deemed to be in occupation for 13 weeks like anyone else, after which he did not qualify for special treatment, such as the non-sentenced remand prisoner, or the hospitalised.

[135] I acknowledge that this area is still in a state of some flux, although the overall review of the case law (especially from Strasbourg) in *Stott* has pointed to the capacity of "other status" to act as a broad portal for consequential consideration of the justification for any difference of treatment based upon an identified status. There is a tension here between the desire for legal certainty and the need for generous interpretation in the field of human rights protection. The common law has an answer that favours generosity when the instrument in issue is human rights based and constitutional in status: *Minister of Home Affairs v. Fisher* [1980] AC 319, 328-29 (Lord Wilberforce)*; Attorney-General of The Gambia v. Momodou Jobe* [1984] AC 689, 700 (Lord Diplock). The same approach applies when issues are raised under the Human Rights Act 1998 about the compatibility of domestic legislation with the fundamental rights and freedoms which are enshrined in the ECHR: *R v Director of Public Prosecution ex parte Kebilene* [2000] 2 AC 326, 375 (Lord Hope).

[136] In my view the situation of the short term sentenced prisoner (whether read with his dual remand status or not) should be recognised for discrimination protected status purposes. I appreciate the critique of open ended proliferation, but I would not shy away from adding for the purpose of the judicial exercise other descriptive features, such as 'short term prisoner in receipt of housing benefit', or

'short term dual remand and sentenced prisoner in receipt of housing benefit'. I note that in *Clift v UK* the description was 'a person sentenced to a term of at least 15 years imprisonment' and in *DA and DS* the statuses were lone parents (which no Supreme Court Justice saw as a problem) and lone parents with children under two, or children under five, which only two Justices queried for being overly narrow. My further reasons for recognising that short term prisoners constitutes "*other status*" are as follows:

(i) The starting point is the language used in the Treaty. It deliberately includes a 'living instrument' openness to other and evolving grounds on which discrimination can and will occur as society itself evolves. The equivalent protection under Article 2 of the International Covenant of Civil and Political Rights uses the same phrase. The list of statuses in Article 14 reflects lessons learned about discrimination in modern history – where certain core identified characteristics have caused people to be discriminated against because of their perceived otherness – but it needs to remain an open list. There are always other forms of otherness, and the function of 'other status' is designed to meet that problem.

(ii) The French translation of the relevant part of Article 14 refers to "*toute autre situation*". That is a construct that is wide in itself, but also broader than the concept of "personal characteristics" that was used by the European Court of Human Rights in *Kjeldsen v Denmark* (1976) 1 EHRR 711 §56 and adopted in initial UK case law: *RJM* §39. It explains why the Strasbourg Court has so readily come to recognise that a person's circumstantial situation is relevant to the construction of 'other status'. The judgment in *Clift v UK* (at §58) cites the various case law examples: e.g. large and small landowners (*Chassagnou v France* (1999) 29 EHRR 615 §90 and 95); commissioned and non-commissioned officers (*Engel v the Netherlands* (1976) 1 EHRR 647 §72); different types of planning permission (*Pine Valley Developments Ltd v Ireland* (1991) 14 EHRR 319 §64); public and private housing tenants (*Larkos v Cyprus* App No 29515/95, 18 February 1999 §25); and prisoners directly at risk of the use of infected needles (*Shelley v UK*).

(iii) The common law principle of interpretation, *ejudem generis*, is really not applicable here. The characteristics themselves are clearly not of the same kind and neither are they linkable as innate, voluntary, or permanent. Sex, race and colour do not connect in that way to religion, political opinions and property: see *DA and DS* §38 and *RJM* §47.

(iv) The few examples of when an "other status" has not be regarded as Convention protected underscore the breadth of the concept. They include different penal consequences due to the commencement date of a new sentencing regime (*Minter v UK* (2017) 65 EHRR SE6) and the decision to impose higher sentences for specified crimes, which essentially differentiates certain types of crime, rather than certain types of people (*Gerger v Turkey*

App. No 24919/94 8 July 1999). These exceptions to the principle of generous interpretation concern statutory choices where personal characteristics and circumstances are entirely irrelevant.

(v) The distinct legal situation of a prisoner per se has been acknowledged by the Strasbourg authorities on a number of occasions to constitute "other status". Mr McGleenan submitted (by reference to the emphasis placed on the point by Baroness Black in *Stott* at §81) that cases such as *Clift* and *Stott* were concerned with ensuring against discrimination within the ambit of Article 5 ECHR and a particular concern to prevent arbitrary grounds for continuing detention. The approach of the European Court of Human Rights in the admissibility decision in *Shelley v UK* suggests that this is too narrow a construction:

> "Insofar as the Government argued that the applicant could not claim that being a prisoner was a status for the purposes of attracting the prohibition against discriminatory treatment, the Court would observe that being a convicted prisoner may be regarded as placing the individual in a distinct legal situation, which even though it may be imposed involuntarily and generally for a temporary period, is inextricably bound up with the individual's personal circumstances and existence, as may be said, variously, of those born out of wedlock or married. Prisoners' complaints do not therefore fall outside the scope of Article 14 on this ground. The legal status of a prisoner is, however, very relevant to the assessment of compliance with the other requirements of Article 14."

(vi) Subsequently, the Court has treated disqualification from state benefits on account of a person's position as a prisoner, as "other status". In *Stummer v Austria*, App no 37452/02, 7 July 2011 (concerning access to state pensions for work done in prison), the Grand Chamber explained (at §90) that the list set out in Article 14 was not exhaustive and includes "any other status" (or "*toute autre situation*" in the French text) by which persons or groups of persons are distinguishable from each other. It had not been disputed by the parties in that case that being a prisoner is an aspect of personal status for the purposes of Article 14. The same point was also not disputed by the United Kingdom in *SS v UK and FA v UK*, App nos 40356/10 and 54466/10, 21 May 2015 (concerning the entitlement to welfare benefits of convicted prisoners detained or otherwise transferred to hospital). The Court's admissibility decision (at §38) records that the parties did not disagree "*that, in view of the relevant case-law, the status of prisoner is covered by the term "other status" in Article 14*" (citing *Shelley, Clift* and *Stummer*).

(vii) An added reason for recognising the Article 14 protected "status" of a prisoner is because those who are deprived of their liberty in conformity with Article 5 do not generally forfeit the protection of the other fundamental rights and freedoms guaranteed under the Convention, although the manner and extent to which they may enjoy those other rights will inevitably be influenced by the context: *Hirst v UK (no. 2)* (2005) EHRR 1169 § 69; *Dickson v. United Kingdom* [GC], App No. 44362/04, 4 December 2007 §§67-68. In my view that is a category-specific reason to examine decisions about the different treatment of a short term prisoner with particular care.

[137] Both the domestic and Strasbourg case law have recognised that there is analytical overlap between 'status', 'analogous position' and 'justification'. At this juncture I see the generous approach to the interpretation of "other status" especially as regards the legal situation of a prisoner as a practical and effective means of not closing the door on the Article 14 analysis. The generous approach to "other status" ensures that judicial scrutiny will not be short-circuited at a premature stage. The fact that the person is a prisoner may well have implications for later parts of the analysis. Lord Walker's simile of concentric circles remains particularly valid when analysing justification, as less weighty reasons may be needed to justify difference of treatment based on status situations that are not predicated upon core inherent characteristics. Also the decisions that a State makes about the access of prisoners to benefits are more likely to fall within the ambit of permissible political decision making in a way that other decisions about prisoners (for instance their release on parole when the prisoner is no longer judged to be a risk) should not.

[E] Analogous Situation

[138] The parties disputed whether a remand prisoner could be properly regarded as an analogous comparator to a sentenced prisoner. The Respondents focused on the inescapable binary difference. The Applicant's comparator cohort had not been convicted of any offence. In the eyes of the law, they are innocent, whereas the Applicant had been found guilty. He was in prison by order of the sentencing court, those remanded in custody remain entitled to the presumption of innocence. There was in the words of Lord Nicholls in *R (Carson) v Secretary of State for Work and Pensions* ([2005] UKHL 37) [2006] 1 AC 17 §3:

> "…[A]n obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous."

[139] The Applicant deployed the case law that required an attention to the substance as opposed to the form of the analogy; especially as regards the nature of complaint and whether the same issues were at stake for both the comparator groups: *Stott* §138 and *Clift v UK* §66-67. To that end Mr Southey emphasised what was relevantly similar between the two types of short term prisoners. Both types have the same interests in retaining their home following release. Both prisoners also

have rights to retain Housing Benefit while imprisoned. The only difference is the period of permitted temporary absence. However, the fact that sentenced prisoners had not been excluded from entitlement altogether and remand prisoners were not entitled beyond 52 weeks, meant that the State itself had recognised that both prisoners have an interest in retaining housing benefit, but only in the short term. The real substance of the analogy therefore concerned different types of short term prisoners. Again at this stage of the analysis that was a sufficient basis to go on to consider the justification of the distinction based on guilt or innocence. The Applicant therefore relied on the other part of Lord Nicholls' guidance in the *Carson* case at §3:

> "Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."

[140] At the heart of this argument is both a relevant difference and a relevant similarity. The sentenced and the remanded are not the same, but the measure under review concerns the same recognition that they should both continue to receive housing benefits as short term prisoners; but for slightly different time periods. The 2013 Amendment is also relevant here. The DWP decided that reversion of the dual sentence and remand prisoner to remand only status would not, of itself, re-entitle the prisoner to housing benefit. After 16 weeks of dual status the Applicant became more relevantly similar to the remand prisoner, subject only to the short intervening period of a sentence.

[141] It is not disputed that the engagement of Article 14 requires a difference of treatment between groups that are relatively analogous, as opposed to identical. It is important to recall that the Article 14 protection is different from domestic anti-discrimination laws. The latter focus on less favourable, rather than a difference of treatment, and therefore more attention is required to be paid as to whether comparators, real or hypothetical are truly such. Article 14 does not require an exact comparator; and where the difference between the groups is not obvious it is better to move to analysing the justification for the difference of treatment. That was the approach of Baroness Hale in *AL (Serbia) v Home Secretary* ([2008] UKHL 42) [2008] 1 WLR 1434 §§24–25. Having cited Lord Nicholls' in the *Carson,* she emphasised (at §26) that:

> "….unless there are very obvious relevant differences between the two situations, it is better to concentrate on the reasons for the difference in treatment and whether they amount to an objective and reasonable justification."

[142] The way the contest over analogies is often framed can itself require justification. In *In re McLaughlin* (with all other Supreme Court Justices in agreement) Baroness Hale repeated her reasoning in *AL (Serbia)* and added that:

> "…there are few Strasbourg cases which have been decided on the basis that situations are not analogous, rather than on the basis the difference was justifiable. Often the two cannot be disentangled".

In this case that is so. The form/substance debate conducted before me itself begs the question of whether it is proportionate to favour the bright lines between guilt and innocence. While the difference between the two types of prisoners are relevant to that decision, I find that their formal differences should not prevent the analysis going forward.

[143] In doing so I distinguish this case from other decisions in England & Wales where the comparator groups were in more pronounced different positions. In *R (Waite) v London Borough of Hammersmith* ([2002] EWCA Civ 482) [2003] HLR 24 the convicted life sentence prisoner released on licence and then returned to prison on suspicion of having breached his parole conditions was not treated as in an analogous situation with a remand prisoner awaiting his trial. In *R (DM) v Department of Work and Pensions* ([2010] EWCA Civ 18) [2010] 1 WLR 1782 (considered in *SS v UK and FA v UK*) it was held that those who were admitted or transferred to hospitals after criminal convictions for serious offences were sufficiently different to those detained under the civil law purely for treatment purposes.

[F] Justification

[144] *DA and DS* confirmed (at §50) that once the Applicant had shown a difference in treatment of persons in relevantly similar situations, the burden of proof lay on the state to establish that it was justified. The judgment of Lord Wilson (with whom Lords Carnwath and Hodge agreed; and Lords Reed and Hughes agreed with Lord Carnwath) held (at §§59 and 65) that challenges to benefit schemes based on Article 14 needed to demonstrate that the difference in treatment is "manifestly without reasonable foundation." He then added the following (at §66) as to how the principle should be applied in practice:

> "How does the criterion of whether the adverse treatment was manifestly without reasonable foundation fit together with the burden on the state to establish justification, explained in para 50 above? For the phraseology of the criterion demonstrates that it is something for the complainant, rather than for the state, to establish. The rationalisation has to be that, when the state puts forward its reasons for having countenanced the adverse

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

[145] In *Stach v Department of Communities and the Department of Work and Pensions* [2020] NICA 4 §92, the Court of Appeal interpreted this guidance in the following way:

> "The impugned statutory provision being, *par excellence*, a measure of economic and social policy, the question for this court (per *DA*) is whether the Applicant's challenge establishes that the impugned statutory provision is "*manifestly without reasonable foundation*". For present purposes we do not distil from the judgment of Lord Wilson in *DA* that the Appellant has any burden of proof in this respect. This is an issue which may require further consideration in a suitable future case. We approach this issue on the simple basis that the burden of demonstrating justification - in other words a legitimate aim and a measure proportionate thereto - rests on the respondent Departments. We consider that the determination of this issue entails an evaluative judgement on the part of the reviewing court…"

[146] The Applicant focussed his criticism primarily on the arbitrary nature of the distinction between the two types of prisoners. The presumed innocent remand prisoner could plead guilty or be convicted just on 52 weeks, receive 104 weeks of sentence and be immediately released without prejudice to his housing benefits. The convicted prisoner could also retain his housing benefit pending his sentence.

[147] Secondly, the distinction in issue has been removed from the regulations governing Universal Credit for both the anomalies that it caused and in recognition of the need for a more far-sighted attitude towards the short term sentenced prisoners. Both the fact and the reasons for changing the scheme were relevant to reasonableness, because the Government had clearly changed its mind. Indeed it had conceded that the underlying criticism of the 1995 policy were valid. The reasoning behind the original policy had become obsolete and it added to the arbitrariness of the

Applicant's situation that but for his particular overall benefit package, he would have been allowed a temporary absence of six months and thereby retained his benefits on the very facts of this case. Mr Southey pointed to the approach in one of the Bedroom tax cases that acknowledged that subsequent legislative change can make it harder for a state to demonstrate the proportionality of the un-amended provision: *Burnip v Birmingham City Council* ([2012] EWCA Civ 629) [2013] PTSR 117 §64. When other similar cases were heard by the Supreme Court, none of the Justices disagreed with the approach in *Burnip* on that issue: *R (MA) v Secretary of State for Work and Pensions* ([2016] UKSC 58) [2016] 1 WLR 4550 §§19-20 and 42.

[148] Thirdly, in so far as the essence of the decision underpinning the 1995 policy concerned a political perception that the public were unwilling to tolerate the subsidising of vacant properties by sentenced prisoners, Mr Southey argued that this was an impermissible justification for the reasons identified in *Clift v UK* §74 (itself following cases like *Hirst No 2*) that public opinion should not be unduly allowed to influence to the treatment of prisoners.

[149] Although the Respondents' evidence and skeleton argument focussed on the need to free up vacant housing, the oral arguments on behalf of the two Departments before the court focussed more on the history of the policy making, including its 1995 statutory consultation process, and the extent to which a Government was relatively free to make a political decision about favouring remand prisoners over sentenced ones in this context. Firstly, the difference of treatment was not on the basis of any core status such as gender or disability or any immutable personal characteristic. The Applicant's Article 14 "status" had been acquired by the commission of an offence sufficiently serious to justify a sentence beyond the minor sentencing powers of a Magistrates' Court. On Lord Walker's analysis in *RJM* at §5, the more peripheral the status, the lesser the weight of the reasons required to justify the decision.

[150] Secondly, what the Applicant was denigrating as arbitrary was better understood as the need for bright lines in the operation of social security law; and in any event the resort to a bright line between the claimants who are remanded and sentenced was a justifiable line to deploy.

[151] Thirdly, the changes introduced by Universal Credit and their underlying reasoning, did not affect the reasonable justification of the operative scheme. Mr McGleenan made a number of points.

(i) It was a non-sequitur to conclude that justification for the older scheme was manifestly unreasonable, even if on one view the new scheme could be regarded as more reasonable.

(ii) It was contrary to public policy to stigmatise a decision of a Government to expand benefits entitlement as proof of previous discrimination under Article 14. It would build in an incentive against reform and cause any more inclusive approaches to be subject this type of challenge.

(iii) The policy of parity was intrinsic to what had turned out to be a staged introduction of Universal Credit in Northern Ireland. The Universal Credit Regulations and its transitional Gateway Regulations had come into force in Northern Ireland after England & Wales. This Applicant's position was part of the ordinary mechanics of devolved government. There was also fiscal planning associated with the staged migration of claimants from housing benefits to Universal Credit.

(iv) In support of the right of the Government to introduce new bright lines, as well as operate two systems side by side during a phasing out period, the jurisprudence strongly favoured the operation of clear and workable general categories of entitlement, as opposed to administrative layers of discretion. Particular emphasis was placed on the majority and dissenting judgments in *R (Tigere) v Business, Innovation and Skills Secretary* ([2015] UKSC 57) [2015] 1 WLR 3820, §§36, 86-93 and 98; and (in the temporary absence rule context) *Obrey v Secretary of State for Work and Pensions* ([2013] EWCA Civ 1584) [2014] HLR 12 §23 endorsing the first instance decision.

[G] Findings on Article 14

[152] Having reviewed the overall history of the temporary absence rule in Part III above, I endeavoured to carry out the proactive examination and evaluative process that the authorities have commended: see *DA and DS* §66 and *Stach* §92. The intensity of the investigation in this context, including requiring the Respondents to justify a prima facie difference of treatment even in the socio-economic sphere, is mandated by the extent to which equal treatment is a core value for a human rights orientated society. The complexity of its potential qualification ought to be monitored by the courts with great care. The Article 14 jurisprudence requires particularly weighty reasons to be shown in the field of discrimination based on immutable characteristics, not least because of the historical and continuing lessons of the damage that can do. The enhanced standard is not applicable here. However, the treatment of prisoners ought to press a different note of judicial anxiety, even if in a more minor key. It is easier to overlook the human rights implications of a decision relating to sentenced prisoners, precisely because of their penalised situation. Although a socio-economic decision is under review in this challenge, it has also evidently been informed by a social value judgment about the entitlement of sentenced prisoners to housing benefits, even if their exclusion could jeopardise the prospects of their rehabilitation.

[153] As detailed in paragraphs 85 to 91 I have concluded that there had been a paradigm shift in the policy rationale on the temporary absence rule, which now recognises offender rehabilitation as intrinsic to the smart targeting of benefits. I do regard that change as striking, because the disapproval of funding vacant premises for any one serving more than the most minor of sentences has been replaced by a far more nuanced recognition that the stop starting of housing benefits may be administratively cumbersome and expensive, as well as socially counter-productive. I was not addressed in any detail on the Social Justice Policy, but it is apparent that the DWP has now very much aligned itself with the MOJ argument that it is essential to support short term prisoners, regardless of whether they are sentenced or on remand. The housing crisis – although no doubt a crisis – looms very little in the actual rationale for the original policy or the revised one, not least because no version of the policy would have a significant deterministic effect in freeing up private properties for needy homeless families. There has never been a detailed fiscal analysis of potential savings. There is no evidence about the implications that the policy could have for the private housing market. The issue has been governed much more by social views, albeit with additional emphasis on the administrative virtue of bright lines.

[154] Ultimately, therefore, the Applicant is right to submit that the 1995 policy was about the purported public and media disquiet about the over-generosity of funding empty homes for the sake of (undeserving) sentenced prisoners, for anything other than a minor period. It led to a legislatively endorsed value judgment, which acted as the source of the 2013 Amendment. However, the Amendment was built on the last moments of a policy rationale that was about to end, save for the legacy continuance of some Housing Benefit claimants (only when in discrete receipt of certain other benefits) pending an appropriate moment for migration into Universal Credit. The question I have found most pertinent in this challenge is whether the Applicant's pending migrant situation, awaiting a gateway into a parallel benefit system, bears any, and if so what, relevance to the issue of whether his difference of treatment by virtue of the 2013 Amendment was manifestly without reasonable foundation. The context may not be the same, but in the words of Lord Wilson in *DA and DS* (at §91) the arguments raised in this case have for this reason required "*careful and sympathetic consideration*".

[155] My first conclusion – as prefaced in the Article 8 and A1 P1 claims - is that this is an area that particularly requires bright lines in order to be both just and workable, even if that inescapably means producing hard cases. In *RJM* at §54, Lord Neuberger acknowledged that "*policy concerned with social welfare payments must inevitably be something of a blunt instrument*" and to that effect endorsed Lord Bingham in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* ([2008] UKHL 15) [2008] AC 1312 §33, agreeing that "*A general rule means that a line must be drawn, and it is for Parliament to decide where*", and this "*inevitably means that hard cases will arise falling on the wrong side of it, but that should*

not be held to invalidate the rule if, judged in the round, it is beneficial". In *RJM* at §57 Lord Neuberger added in the Article 14 context the following:

> "The fact that there are grounds for criticising, or disagreeing with, these views does not mean that they must be rejected. Equally, the fact that the line may have been drawn imperfectly does not mean that the policy cannot be justified. Of course, there will come a point where the justification for a policy is so weak, or the line has been drawn in such an arbitrary position, that, even with the broad margin of appreciation accorded to the state, the court will conclude that the policy is unjustifiable."

[156] While I could not agree that the line has been drawn so imperfectly in the operative scheme, I am also bound to recognise that the application of general rules in the welfare benefit context is not necessarily inimical to the concern that human rights law has about provisions that are general, or 'blanket', in their application. Baroness Hale confronted this issue in her judgment in *Tigere* at §36 when she recognised that the Strasbourg considers bright line rules differently depending on context:

> "On the one hand, it tends to disapprove of a "blanket" exclusionary rule, such as that on prisoners' voting (*Hirst v United Kingdom (No 2)* (2005) 42 EHRR 41), or a "blanket" inclusionary rule, such as that governing the retention of DNA profiles (*S and Marper v UK* (2009) 48 EHRR 50). On the other hand, it recognises that sometimes lines have to be drawn, even though there may be hard cases which sit just on the wrong side of it (see, for example, *Animal Defenders International v UK* (2013) 57 EHRR 21). The need for bright line rules in administering social security schemes has been recognised domestically, for example in *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] 1 AC 311."

[157] Although they disagreed on the outcome in *Tigere* §§89-91, Lord Sumption and Lord Reed provided a general review of the function of bright line rules in the context of an Article 14 challenge:

> "88. Those who criticise rules of general application commonly refer to them as 'blanket rules' as if that were self-evidently bad. However, all rules of general application to some prescribed category are 'blanket rules' as applied to that category. The question is whether the categorisation is justifiable….In a case

involving the distribution of state benefits, there are generally two main reasons for this.

89. One is a purely practical one. In some contexts, including this one, the circumstances in which people may have a claim on the resources of the state are too varied to be accommodated by a set of rules. There is therefore no realistic half-way house between selecting on the basis of general rules and categories, and doing so on the basis of a case-by-case discretion. The case law of the Strasbourg court [the European Court of Human Rights] is sensitive to considerations of practicality, especially in a case where the Convention [the ECHR] confers no right to financial support and the question turns simply on the justification for discrimination. In *Carson v United Kingdom* (2010) 51 EHRR 13 [51 EHRR 13], which concerned discrimination in the provision of pensions according to the pensioner's country of residence, the Grand Chamber observed, at para 62:

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

This important statement of principle has since been applied by the European Court of Human Rights to an allegation of discrimination in the distribution of other welfare benefits such as social housing: *Bah v United*

Kingdom [54 EHRR 21] at para 49. And by this court to an allegation of discrimination in the formulation of rules governing the benefit cap: *R (SG) v Secretary of State for Work and Pensions (Child Poverty Action Group intervening)* [2015] 1 WLR 1449, para 15 (Lord Reed JSC).

90. The second reason for proceeding by way of general rules is the principle of legality. There is no single principle for determining when the principle of legality justifies resort to rules of general application and when discretionary exceptions are required. But the case law of the Strasbourg court has always recognised that the certainty associated with rules of general application is in many cases an advantage and may be a decisive one. It serves 'to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case by case basis': *Evans v United Kingdom* (2007) 46 EHRR 728, at para 89. The Court of Justice of the European Union has for many years adopted the same approach to discrimination cases, and has more than once held that where a residence test is appropriate as a test of eligibility for state financial benefits, it must be clear and its application must be capable of being predicted by those affected: *Collins v Secretary of State for Work and Pensions* (Case C-138/02) [2005] QB 145, para 72, *Förster v Hoofddirectie van de Informatie Beheer Groep* (Case C-158/07) [2009] All ER (EC) 399, para 56. As Advocate General Geelhoed acknowledged in considering these very Regulations in *Bidar* [*R (Bidar) v Ealing London Borough Council* (Case C-209/03) [2005] QB 812], para 61:

> 'Obviously a member state must for reasons of legal certainty and transparency lay down formal criteria for determining eligibility for maintenance assistance and to ensure that such assistance is provided to persons proving to have a genuine connection with the national educational system and national society. In that respect, and as the court recognised in *Collins*, a residence requirement must, in principle, be accepted as being an appropriate way to establish that connection.'

91. The advantages of a clear rule in a case like this are significant. It can be applied accurately and consistently,

> and without the element of arbitrariness inherent in the discretionary decision of individual cases. By simplifying administration it enables speedy decisions to be made and a larger proportion of the available resources to be applied to supporting students. …"

[158] Most recently in *R(Z) v Hackney London Borough Council* ([2020] UKSC 40) [2020] 1 WLR 4327 §85, Lord Sales (with Lords Kerr, Kitchen and Reed in agreement) cited the analysis of Lord Sumption and Lord Reed in *Tigere* with approval and made the following observation:

> "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."

[159] On the basis of the above principles, and having examined the operation of the system in the prisoner context, I find that the inclusionary bright line rule of three months, or now six months, is open for the Respondents to impose. Ultimately, the sentenced prisoner has always been included in the general temporary absence rule, just like anyone else. He has simply not been included in the limited list of exceptions, but it cannot be regarded as manifestly unreasonable to choose not to include him in a special hardship list; especially so when he continues

to be entitled to housing benefit and other emergency housing and rehabilitation services upon release. In so far as the Applicant relies on the introduction of the Universal Credit system, it is noteworthy that the list of special categories has now been discarded, save for those who are absent from their homes due to domestic violence.

[160] Overall, the Government in 1995 had squarely confronted the various options and chosen an outcome which rejected the exercise of discretion to deal with hard cases. This was not a situation, as in *Tigere*, where the majority concluded that the Government had simply failed to take into account a core matter (in that case the taxpaying value of university educated UK settled residents with ILR); or as in *Hirst (No 2)* where a general rule without exceptions had been adopted without any proper political consideration of the possibility of exceptions (in that case automatic disenfranchisement of convicted prisoners). An imposition of a bright line rule that condemned a short term prisoner to destitution, or a drastic change of social protection upon release might require intervention, but that has not happened here.

[161] On a structured proportionality approach, I therefore find that general rules in this field do not constitute a rational disconnect from the legitimate aim. Neither is it feasible for a court to dictate some less onerous measure (i.e. deciding on a more generous rule or inserting discretions). It also cannot be said that the distinction in the 1995 policy between a sentenced and remand prisoner is arbitrary. The use of the bright lines in this context strikes a proper balance between the interests of society and the protection of individual rights.

[162] My second conclusion concerns Universal Credit. The Applicant's case was that the Government has changed its mind in relation to the relevant reasons for treating short term sentenced prisoners differently to remand prisoners. The Respondents' case is that the evolution of policy is itself a core feature of social justice politics over time; and that a reviewing court must limit its focus to the operative policy and the operative provision. I am not persuaded that this is a situation where the fact of the change in underlying policy suffices of itself, or in combination with other matters, to render the previous policy manifestly without reasonable foundation. I accept that the change in the rules in this case is relevant to take into account, but it is important to analyse both the nature of the change and the extent to which it is appropriate for the Respondents to introduce a new benefit systems in a staged and bright line fashion.

[163] Although the Universal Credit policy has dropped DWP opposition to differentiating between sentenced and remanded prisoner statuses, both parties acknowledged that there would be potential losers from new bright line on the basis that it failed to respect differences between the guilty and the presumed innocent. The new policy is essentially a return to the status quo ante prior to the 1995 change, which disregards the reasons for all absences, save that it has limited the period to 6 months, not 12 months. In Northern Ireland the change could bring about more

significant consequences, because there are no statutory custody time limits to safeguard diligent and duly expeditious preparation of trial for those on remand.

[164] The precise approach to transitional provisions does not give way to a single principle. On the facts of *Burnip* (a case concerning the inflexible 'bedroom tax' position relating to severely disabled people in need of a separate room for an overnight carer) the Court of Appeal, as a final feature of its reasoning, cited the fact that Parliament had now seen fit to legislate to deal with the very issue that had caused the claims to be brought. There is a difference in this case because the state has certainly changed its mind about the differentiation between the two types of prisoners, but it has done so by including every one, save domestic violence victims, into a single category. While the amendment to the temporal bright line has benefitted this Applicant, there has been a reframing of the temporary absence rule to level the general population up, and level all but one of the special case categories down.

[165] As a precedent *Burnip* confirms that a change in the law can be relevant, but it is not decisive. Context is important. In *Burnip* itself Parliament had acknowledged the error of its ways. It did so in relation to extreme cases of hardship based on persons suffering from severe congenital disabilities where long term housing security was particularly important (per Henderson J at §47). The potential value of reassurances provided to short term prison leavers in the course of resettlement back into their home life and communities is not of the same quality.

[166] As the system has been reframed to be arguably more reasonable, without making the operative system manifestly without reasonable foundation, I accept that it must be open to the legislature to regulate the migration of claimants from the legacy benefit into the successor system. Universal Credit is not without its own administrative complexities and controversies. The housing element of the new system is one part of a multifaceted whole. There is reasonable room for bright line fiscal and administrative planning in this area, even if it can produce unfairness. I say that before one factors in the time lag that it has taken for Northern Ireland to catch up with other parts of the nation-wide changes in the welfare system.

[167] My focus in this judgment about what the Government itself regards as the sounder reasonableness of the new policy is not caught by the dicta of Lord Wilson in §66 of *DA and DS*, where he said that it would be "*fanciful*" to contemplate that after proactive examination a court could both conclude that the the state had failed to persuade it that its decision was reasonable, and still the claim should fail because the complainant had failed to persuade that the reasons were manifestly unreasonable. I have taken this part of the reasoning in *DA* to underscore the essential requirement for the Government to justify its decision-making. It reflects an important alignment between public law and human rights law that prima facie evidence of discrimination requires accountability and explanation. This judicial review was delayed because the Respondents needed time to collect the available evidence that explained the policy. It was not open to this court to dispose of this

challenge without that accounting exercise. In the end the Respondents did produce the evidence. Their reasons are open to rational criticism as the evidence from government and non-government sources underscores. Again, using the words of Lord Wilson in *DA*, the underlying rationale of the 1995 policy no longer enjoys the "*surest*" of foundations. However, if it is right that there has been some genuine evolution in social justice policy thinking on society's interest in short term prisoners, it is not for the court to interfere with the staged administrative introduction of the initiative. The chosen process for the change is not manifestly without reasonable foundation.

[168] My final conclusion concerns the dominant political quality of the 1995 policy. There are instances where political considerations based on perceived public opinion cannot be a basis for proportionate interference with Convention rights. In the prisoner context the issue has arisen with regard to voting (*Hirst v UK No.2* §70) and parole (*Clift v UK* §74). I do not find that the same invalidation of what is perceived to be public opinion must operate in a judicial review of the politics of benefit distribution. The function of that type of politics certainly encourages careful scrutiny from the courts and candour and co-operation from the executive to justify the position. The case law especially on Article 14 compels that approach. The courts also have a **particularly** important supervisory role to play in relation to discriminatory choices made against prisoners and other unpopular categories of people, who may be without broader constituencies of support in civil society. This litigation has therefore rightfully necessitated proactive legal analysis. But the end result is that the evolving value judgements of government as to the extent of any rent subsidy for the fixed abodes of prisoners must here prevail; as must the programmed transition from one benefits system to another.

CONCLUSION

[169] For all of the above reasons I refuse the Applicant's claims. I am grateful to the legal teams, and those who have assisted them, for the careful preparation of their respective cases.