Neutral Citation No: [2020] NIQB 52 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **FRI11274** *Delivered:* **22/06/2020**

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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FRIEDMAN J

Introduction

[1] Due to the unusual and sometimes procedurally testing circumstances of the Covid-19 situation this is a further ruling in relation to interim relief based on delays in determining a claim for judicial review, which on 11 March was ordered to be heard on an expedited basis on 22 April. It then had to be adjourned to 12 June. It has now been adjourned to 18 September. For reasons outlined below the delay has arisen through no fault of the parties. The consequence of the delay is that the Court has had to determine where justice lies on a range of interlocutory issues without service of the Respondent's affidavit in reply.

[2] On 1 May 2020 I handed down electronically a judgment allowing the Applicant's then renewed application for interim relief for the Respondent, the Department for Communities to make the payment of a sum equivalent to the previous housing benefit to fund the rent on his privately leased home for a two month period, pending the determination of the expedited substantive judicial review proceedings that will test the ECHR compatibility of the underlying housing benefit regulations as they apply to remand and short-term sentenced prisoners. In total the payments so far amount to £850: see [2020] NIQB 46.

[3] This first ruling (hereafter 'Ruling 1') dealt with the procedural challenges posed by Covid-19 (at §§3-4), the facts and issues arising in the substantive claim (at §§2 and 15-17), and the relevant legal principles in relation to interim relief in public law cases (at §§18-20). Those principles were then applied to the special circumstances of this litigation in which its expedited case management had become caught up in the midst of the public health emergency (at §§21-32). Were it not for

those factors the Order would not have been made; and until those factors arose, the Order was not actively sought. The reasoning below must be read with Ruling 1.

[4] To appreciate what follows I do set out paragraph 2 of Ruling 1, which summarises the substantive issue:

> "[2] The Applicant is a remand prisoner in HMP Magilligan. He has until April of this year also been a short term sentenced prisoner serving a sentence of 8 months on a separate charge, which caused him to lose his housing benefit under a legislative scheme that is the subject of the claim. The Housing Benefits Regulations (Northern Ireland) 2006 (the Regulations) as amended by The Social Security (Miscellaneous Amendments) Regulations (Northern Ireland) 2013, provide that persons in receipt of benefits, including a sentenced prisoner, can be away from their home for 13 weeks and still continue to receive benefits (Reg. 7(13). As this Applicant received a sentence of 32 weeks, of which he was required to serve at least 16 weeks, the housing benefit was cancelled. By contrast the Regulations recognise certain exceptions to the 13 week 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)). During an overall period of less than 52 weeks, this Applicant has altered in his detainee status from being a remand prisoner, to a serving and remand prisoner, in relation to a set of allegations that are separate, but said to be connected, to now being a remand prisoner only. The question that falls to be determined at the substantive hearing is whether his non-entitlement to receive housing benefits for the longer time frame of 52 weeks is compatible with Article 8 and/or Article 1 Protocol 1, read with Article 14, of the European Convention of Human Rights ('ECHR')."

[5] As a result of that ruling, it was agreed that the Notice Party, the Northern Ireland Housing Executive, would make the payment, and that has been done at the beginning of May and June.

[6] During that time the Respondent has been unable to serve its affidavit in reply, which ordinarily it both could and should have been able to do. Due to a successful application by the Respondent to vacate an expedited listed fixture that would otherwise have proceeded remotely, facilitated as such by the Court Service, on 12 June 2020, the Applicant has now made a further application for interim relief

on the same terms for a further two months. The hearing has been re-listed for 18 September 2020.

[7] By agreement the application has been dealt with on the papers, although I was properly invited by the Applicant to keep open the possibility of convening an oral hearing if I thought it necessary. In the end I did not think so, in the light of written submissions that were served, including the previous submissions served prior to Ruling 1, and the correspondence throughout the proceedings. I nevertheless have borne in mind the essential need to protect the fairness of all aspects of the proceedings, including its interlocutory features, which includes their appearance of fairness and that my reasoning in relation to this application should be public and transparent. I thank Counsel and those who instruct them for the assistance they have provided in the exchange of correspondence, followed by written submissions.

[8] It is not in dispute that the sums involved are modest from the point of view of government, but they are significant to the Applicant and his mother who has endeavoured to support him financially. They would also be significant to others in need. The issues arising from the application draw attention to competing individual and public interests, especially in the procedural state of exception that has been necessitated by a public health emergency. The law as reviewed in my previous judgement is not novel, but its application is.

Adjournment Application

[9] Before turning to the application itself, it is important to record the exigent matters that gave rise to the Respondent's application for the vacation of the second hearing date of the 12 June and the reasons for granting it, despite opposition from the Applicant.

[10] The background predates the handing down of Ruling 1. On 1 April the original hearing date of 22 April was vacated. The decision was prompted by an email to the Court on 31 March, in which the Respondent indicated that the Covid-19 crisis, then in its first throes, had prevented it from serving its evidence that was due on 1 April, with an application to extend time for service beyond the then trial date. However, irrespective of that application it is almost inevitable that the Court would have had to adjourn the hearing date of 22 April. At that stage all non-urgent court business was suspended due to the unavoidable adjustments in response to the pandemic. While this claim had previously justified an Order for expedition, it was not "urgent" in the sense that it concerned immediate liberty, health, safety or wellbeing of individuals. In due course the parties therefore supplied an agreed joint timetable that was designed to enable the hearing to be tried on 12 June. This was confirmed in an Order of 16 April. It included a direction that the Respondent serve its affidavit in reply and supporting evidence by 29 April. Both parties had agreed in principle to a remote hearing disposal. The Court also agreed that the case could be heard remotely, albeit subject to any further views of

the parties, and consultation with the Court Service. In due course it emerged through administrative enquiries that the Court was in a position to enable the hearing to take place remotely on that date.

[11] On 29 April the Departmental Solicitor's Office wrote on behalf of the Respondent to inform the Court that it was unable to comply with the agreed direction to serve its affidavit in reply, which was due that day. A request was made for an extension to be granted until 22 May. At that stage, the Respondent indicated that working conditions relating to Covid-19, of which I outline more below, had delayed an exercise of retracing the history and justification of the amendments to the relevant statutory framework. In seeking the extension, the letter further warned that there was a "*significant probability that not all relevant evidence will be available by [the] amended date and, if that is the case, then it may be necessary to bring a further application to file a supplementary affidavit thereafter if further relevant evidence is obtained from Whitehall Departments*". My view at the time was that the delay in serving the bulk of the evidence need not affect the June listing, subject to the parties agreeing a timetable that did not prejudice the Applicant. At that stage I also did not consider that the prospect of the Respondent serving a discrete supplementary affidavit of additional matters arising from enquiries in England would be something that would preclude fair case management, if the need arose.

[12] However, on 11 May 2020, the Departmental Solicitor's Office wrote again to explain this time that notwithstanding the best efforts of the Respondent, it had come to realise that there was no realistic prospect of it being able to serve its evidence at all before the summer vacation. The Respondent therefore sought permission to serve the evidence on 31 July, to vacate the fixture for 12 June, and to seek a new hearing date in the autumn term. The explanation of the issue by the Solicitor bears repeating, not only because I accepted it as the basis for the vacating of the fixture, but also because it had implications for any further application for interim relief that I am now called upon to decide:

> "One of the principal issues in the case is whether there was an evidential basis for the change that was made to the Housing Benefit Regulations (Northern Ireland) 2013 which meant that sentenced prisoners who were also on remand would now fall within the standard temporary absence rule rather than the 52 week rule, which applied to the limited category of persons who fell within Regulation 7(16) of the Rules.
>
> The Applicant also makes the case that the application of the standard 13 week rule in the case of sentenced prisoners generally, on a *bright line* basis without any individualized assessment, is a breach of Article 8 ECHR as well as constituting unlawful discrimination contrary to Article 14 ECHR, read with Article 8. The Department

would also wish to put before the Court relevant evidence relating to the original policy intent of treating sentenced prisoners as being subject to the standard rule on temporary absence, whilst prisoners on remand and awaiting sentence would be subject to the 52 week rule.

Paragraph 8 of Schedule 3 to the Universal Credit Regulations (Northern Ireland) 2016 provides for a 6 month temporary absence rule for the housing element [of] Universal Credit. There may be relevant material relating to the policy basis for this decision which may also be relevant to the matter before the Court.

An extensive search of materials has been conducted in the offices of the Department for Communities but little relevant material has been found to date. 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 are in the United Kingdom. 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.

As a result, if there are relevant policy documents and evidence as described, it is likely that they would be in the possession of the Department for Work & Pensions in London, rather than here in Northern Ireland. Efforts have been made to conduct a search to see what documents exist, but because of the ongoing Covid-19 situation is has not been possible to obtain them. As is the case in Northern Ireland, many officials are working from home with little or no access to papers, and with other urgent business taking priority. It has not been possible to find someone to conduct a search of files nor is it likely that this will be possible within the next few weeks.

Whilst it would be possible to provide *some* evidence at this stage by way of Affidavit, the Respondent is unable to confirm the evidence is complete. In the circumstances, we consider that there is no alternative but to apply for an adjournment to allow the Respondent to collate all of the

> relevant evidence and put it before the Court in a coherent and complete form."

[13] The letter went on to pre-emptively indicate that the Respondent would oppose any further application for interim relief for reasons dealt with below. It also asked that in the event that a fresh application was made by the Applicant to extend the relief that the Respondent should be given leave to file a response.

[14] The Applicant opposed the application to vacate in terms that were understandable from the point of view of a party whose expedited case had been adjourned already, and at the request of a public authority Respondent who by that time had made two successful applications to adjourn the service of its evidence. In a letter dated 18 May 2020, his solicitor emphasised that the issue of parity of the position between benefits in Northern Ireland and in England ought to have been immediately apparent to the Respondent. She queried when the work had been started such as to leave so much of it outstanding once lockdown began. She sought an explanation as to why work on the service of this case had not been a necessary departmental priority given that outstanding work outlined in the 11 May letter was accepted to be essential to the presentation of the Respondent's case. There and in subsequent submissions it has been pressed by the Applicant that the work of government must go on, just as the scrutiny of the issue by the courts must not be unreasonably delayed. Not surprisingly, again from his perspective, the Applicant was dismayed that the Respondent had applied to vacate, but at the same time registered a pre-emptive opposition to any further application for limited interim relief. The Court was asked to rule on the application to adjourn; and if so allowed, withhold any view on interim relief pending the exchange of further submissions.

[15] The Respondent replied to the matters raised by the Applicant in a letter dated 20 May. It was urged that "*These are unprecedented times*" and the Respondent has endeavoured to progress matters as quickly as possible, mindful of its obligations to the Court. It was confirmed that an initial email request had been sent to the Department for Work & Pensions ('DWP') on 11 March 2020, being the afternoon of the leave hearing, seeking all relevant material. It was described that nowadays, papers such as these are held in secure remote storage and these must be retrieved. One such file was obtained from storage on 24 March but by that stage the staff member in London dealing with the request was required to work from home, having been placed in the vulnerable group for coronavirus purposes. Shortly after, all staff were working from home. For those reasons it had not therefore been possible to review the relevant file, notwithstanding the best efforts of the Department. In the circumstances, it was averred that the criticisms made of the Respondent in this regard are misplaced. It was added that in the meantime, the Respondent and DWP have been dealing with an additional and urgent workload due to the ongoing crisis. Searches had been conducted in the premises of the Respondent in Northern Ireland but it remained the case that the evidence cannot be finalised until all necessary searches are conducted. The letter concluded:

> "Thus, whilst it is recognised that there is a need to progress this case, it is respectfully submitted that it is not in the interests of the parties, or in the interests of justice, to proceed where not all relevant evidence is before the Court."

[16] Prior to my determination of the application, the Applicant suggested an alternative approach where by the Respondent could be given until 29 May to serve its affidavit, and all further dates could be expedited to maintain the 12 June fixture. There was some suggestion that in the alternative, if I granted the application, I should immediately grant an extension of the interim relief. In all the circumstances, I continued to keep the two issues uncoupled; and to be dealt with by way of further exchange of submissions.

Decision on Adjournment Application

[17] From all of the above, two things particularly stood out: first, the nature of the task that the Respondent regarded as essential to the case; and second, the pressures that public sector employees acting on behalf of the Respondent would have faced in their current working conditions to comply with a direction to serve the evidence in the time left available.

[18] As to the first point, it was explicit in the reasons for the delay that this Respondent was unable, for archiving difficulties and through no fault of the people working on the case, to yet present what it considers to be a complete defence combined with its discharge of the duty of candour and cooperation. This unprecedented situation has left the Respondent after several months still seeking to do justice to a case in a sensitive human rights related area, but which also may require restraint from a reviewing court before determining that it is disproportionate to use bright line rules (in this case 13 weeks absence from the home) as opposed to discretion based on individual circumstances. On the Respondent's own analysis that requires the service of relevant policy documents and evidence explaining the background to the legislative choices that are subject to review. That evidence might serve to defeat the claim, or it might serve to show that the Applicant should succeed. However, I agree with the Departmental Solicitor's characterisation of the problem that until such time as service can be achieved the matter cannot progress in a fashion that would serve the interest of the parties, or the interests of justice.

[19] As to the second point, it is often right to insist that public authorities, especially at government departmental level, should act expeditiously, and all the more so in the context of a human rights challenge. Equally, in public law cases of this nature, a court should be cautious before assuming some sort of logistical equality of arms between a publicly funded applicant and a Department of State. Be all that as it may, this was an application that was mindful of the people who were going to access the files and were otherwise tasked with dealing with the

unprecedented and myriad system wide demands that are currently placed on the benefits regime for a limited albeit indeterminate period. They are also – many of them – working at home, with a range of consequential implications for their personal lives. On that basis a Court working in accordance with the Overriding Objective in Order 1, Rule 1A of the Rules of the Court of Judicature should be resistant to insisting on "*business as usual*", as much as accepting that this is a "*new normal*". The Guidance for Courts issued by the Office of the Lord Chief Justice most recently on 12 May 2020 characterises the present as a time for "*gradual and incremental recovery of court business*", which requires "*progressively phased*" identification of next steps to conclude cases. Matters just have to be advanced carefully on a case by case basis.

[20] The Court duly granted the application by way of an email, sent out on 22 May 2020. It is best that I simply set out the text which contained the reasons, as it was conveyed to the parties:

> "In order to conduct this hearing fairly and properly, both for these parties and in the wider public interest, the information described in the letter of 11 May correctly needs to be searched for. In particular, the Court will be assisted in understanding the background as to why legislative choices were made and the history of those emerging distinctions between remand, short term prisoners, and other categories of persons who are permitted to be temporarily away from the home without jeopardising their entitlement to state benefit to rent it.
>
> However, for logistical reasons outside its control, the Respondent cannot complete the work in time; nor should it sensibly now be required to do so by the proposed new date of 29 May. Present circumstances do not justify, in this instance, putting employees under undue pressure in a way that might be justified outside the Covid-19 crisis. The question of why this material is not automatically to hand can be revisited in later applications or submissions, if relevant, but it does not justify forcing the hearing to go ahead with the above consequences. The Respondent has also made it plain that it was not at fault in any lack of effort on its part to begin preparation after the leave hearing, but prior to the fundamental changes caused by remote working arrangements.
>
> Although neither of the parties suggested I should do so, I initially considered whether to begin the hearing on 12 June and give leave for further evidence to be served on an iterative basis, with potential further hearing time.

> That neither party has made this suggestion is understandable. It will be both fairer and more effective for everyone in a case of this nature for the law and facts to be dealt with in one go."

Application for interim relief

[21] There was not agreement that I should deal with interim relief immediately. In any event, the novelty of the situation required studied submissions. Ruling 1 had left open the possibility that there could be a change of circumstances further delaying the hearing, or additional evidence, or argument relevant to the issue, all with liberty to apply. The parties exchanged written submissions, including a brief reply by the Applicant, which expanded upon issues first introduced in the above referred to correspondence.

[22] Before addressing the submissions I should recall two further features of my approach to the law in Ruling 1 that are important to what follows. First, in accordance with the case law on interim relief – which must be maintained as a flexible discretionary mechanism without strict rules – I regarded it as premature to investigate the Applicant's prospects of success, beyond the necessary threshold that there was a "*serious issue to be tried*," which was not in dispute. In analysing the "*balance of convenience*", although it was open to me to analyse the relative strength and weakness of the case, I did not do so, not least because the Respondent was yet to serve an affidavit in reply and any supporting evidence. The case is also not without factual and legal complexity. In adopting this approach I relied on the general guidance in *HM Treasury ex p British Telecom* [1994] 1 CMLR 621, 643 §§40-41 (and cited in *R (Medical Justice) v Secretary of State for the Home Department* [2010] EWHC 1425 (Admin) at §13). The Court of Appeal in England there urged against adopting "*any rule of thumb in a mechanistic way or to treat any consideration as capable of being decisive in every case*", adding that "*this is a field in which there are no absolutes, only variables*" (§40).

[23] Secondly, my first ruling specifically left open that the Respondent might wish to address me further on my decision (at §31) that it was not right to rely on the fact that the Northern Ireland Assembly was due to introduce emergency legislation that would prevent landlords from initiating eviction proceedings for eviction for 3 months from the date of arears. My concern was not simply that the law was not yet in force, but that once in force it should not be relied on as an answer to where the balance of convenience lay between the parties in these proceedings thereafter. For ease of reference, the relevant paragraph of Ruling 1 reads as follows:

> "[31] On further reflection I have also shied away from relying on The Private Tenancies (Coronavirus Modifications) Bill 2020 once it comes into force. The Section 75 Screening Form sets out the aims of this legislation, that the emergency measures, including

> mortgage holidays for landlords will go some way to alleviate the concerns of landlords, who might be worried about meeting mortgage payments, and should therefore mean no unnecessary pressure is put on their tenants. On that basis the Notice to Quit time limits are extended from 1 month to 3 months, and for that reason it is said that the Applicant could not be evicted, even if no one paid the rent. I accept that eviction may not be immediately possible because of this change in the law, but I know nothing else about the landlord's position. It may be that the effect of immediate arrears would be covered by a mortgage holiday, but there is no evidence before the Court that this would be the case. The Screening Form recognises that landlords may in cases of rental arrears be deprived of an income stream for the period, and will be delayed in gaining possession of the property to sell or put to alternative use. The emergency legislation is said to be aimed at being a proportionate response to the difficulties that both landlord and tenants face in these exceptional times. While that may absolutely be the case, I do not think it is right to pass the additional difficulties and variables raised by this application on to a landlord, who is not a Notice party, by automatically piggy backing on the new Act, which is not in force, and without any submissions on its final form. The broader public interest also requires particular constraint before relying on any form of emergency provisions; especially so for a purpose that was arguably outside of their originating purpose."

[24] On behalf of the Applicant, Mr Hugh Southey QC and Mr Steven McQuitty submitted that there was no material change in circumstances. They relied on a third affidavit from the Applicant's mother, which established that her financial and personal situation had not changed since the description provided in Ruling 1 (at §6), save that she was not doing overtime work at the moment, such that her income was now more limited than before. She remained concerned about her son's wellbeing. As previously indicated the listed arraignment in the outstanding criminal proceedings had been cancelled on 24 March 2020 due to Covid-19 cessation of hearings generally. The matter had not been listed since for review, arraignment, or otherwise. She was advised, as judges and practitioners know, that listing will begin again in the coming weeks on a limited basis. I would, however, observe that throughout the Covid-19 crisis the courts have continued to conduct bail applications, including by a paper process, and not surprisingly the latest Guidance for Courts issued by the Office of the Lord Chief Justice on 12 May 2020 reiterates, as per the previous Guidance, that bail applications must be regarded as falling within the category of an "urgent case".

[25] The Applicant's submissions pre-emptively dealt with two matters foreshadowed in the correspondence. Firstly, it was not new to the Court that the custodial time line in this case involved the Applicant being sentenced to a term of 8 months' imprisonment. In paragraph 2 of Ruling 1 as quoted in the introductory section above, the Court had assumed that this meant that he was a serving prisoner for at least 16 weeks, which exceeded the bright line of 13 weeks, before returning to the more generous 52 week period afforded to those who are detained on an exclusively remand basis. On this the Applicant is correct about what I assumed based on the Order 53 papers, and I equally took that fact to be one of the matters to be engaged with in the full hearing.

[26] Secondly, the Applicant submits that the fact that the Private Tenancies (Coronavirus Modifications) Act (Northern Ireland) 2020 has now received Royal Assent (on 4 May 2020), does not represent any material change in circumstances that would now lead the Court to a different conclusion. In particular, it was emphasised that the amendment to the law does not change the obligation of the Applicant to pay rent. It merely means that it takes longer to evict the Applicant.

[27] Overall the Applicant relies on my initial reasons, particularly at §§25 and 28-34, to argue that the extension of this Order would not impact on the operation of the impugned provisions and would operate, pragmatically, to keep these proceedings "*on track*", in "*a context in which all can admit is difficult and hard to manage*". The adverse impact on the Respondent and Notice Party is submitted, in that same context, to be "*almost negligible*". In his Reply the Applicant added that any decision on interim relief ought not to pretend or purport to produce the "*perfect*" outcome. Rather, a decision is urged which would most equitably balance the competing interests, applying the 'balance of convenience' test to ask: "*how does the court secure the least worst outcome considered without the benefit of the hindsight always available at the end of any litigation?*".

[28] On behalf of the Respondent, Dr Tony McGleenan QC and Mr Aidan Sands make clear that the delay was not culpable, which I accept, for the reasons I have explained above. They concede that the sums involved are modest, but urge that the issues at stake are important. I agree. The Respondent opposes the extension of the Order on the basis of two grounds. Firstly, it is submitted that the grant of additional interim relief would not be just and equitable or in the public interest. Secondly, by reference to the recent change in the law on eviction proceedings, it is said that further relief is not necessary in any event to protect the Applicant's interests.

[29] On the first ground, further framed as "*Fairness and the Public Interest*", the Respondent argues that "*an issue of equity*" arises as regards the distribution of limited resources. Once the Applicant received the 8 month sentence he inevitably stood to exceed the 3 month bright line. All other Housing Benefit claimants who received a sentence of this length would have lost their entitlement to Housing Benefit immediately, as their absence would not be "*unlikely to exceed 13 weeks*" and

they would not therefore satisfy the standard temporary absence rule in Regulation 7(13) of the Housing Benefit Regulations (Northern Ireland) 2006.

[30] By granting further relief it is submitted that this particular Applicant would end up doing much better than someone in a similar position. It would lead to him being funded by the state to be absent from his residence for close on 52 weeks. The Respondent submits that such an outcome, whilst desirable for the Applicant, would be unduly favourable to him, and would not do justice when set against the larger canvas of all other housing benefit claimants who may have been temporarily absent from their homes. I appreciate the point, although I would add that for several months of that period, it was his mother, and not the Housing Executive, who paid his rent.

[31] The prospect of awarding undue benefit to a party that turns out to be ultimately unsuccessful is an inescapable risk of granting the relief sought. In *Philomena McKay's Application* [2014] NIQB 128 Treacy J (as then) cited with approval the authors of Auburn, Moffatt & Sharland on Judicial Review that

> "the fundamental principle applied by the courts in deciding whether to grant interim remedies is that they should take whichever course carries the lower risk of injustice if it transpires that, in light of the eventual outcome of the claim, the interim remedy was wrongfully refused or granted."

[32] In applying that principle to the facts of the present application I am faced with the absence of affidavit evidence. For the reasons described by the Departmental Solicitor's Office that evidence may go some way to identifying the competing strengths of the respective cases. It has been accepted since *American Cyanamid* that it is open to the court to consider the strength of the case in determining an application for interim relief. While it is not required to do so by the operation of an inflexible rule, it should at least be a norm for a court to consider whether that exercise is possible. In *Series 5 Software v Clarke* [1996] 1 All ER 853, Laddie J extensively reviewed the jurisprudence, albeit decided predominantly in the commercial law field, to hold at p. 865C-E that it was legitimate to look at the relative strength of the disclosed affidavits. His reasoning rather underscores what cannot be accomplished in the present instance:

> "It appears to me that the court should not attempt to resolve difficult issues of fact or law on an application for interim relief. If, on the other hand, the court is able to come to a view as to the strength of the parties' cases on the credible evidence, then it can do so. In fact, as any lawyer who has experience of interlocutory proceedings will know, it is frequently the case that it is easy to determine who is most likely to win the trial on the basis

> of the affidavit evidence and any exhibited contemporaneous documents. If it is apparent from that material that one party's case is much stronger than the other's then that is a matter the court should not ignore. To suggest otherwise would be to exclude from consideration an important factor and such exclusion would fly in the face of the flexibility advocated earlier in *American Cyanamid*."

[33] In *McLaughlin & Harvey Limited v Department of Finance and Personnel* [2008] NIQB 25 Deeny J at §6 cited *Series 5 Software v Clarke* [1996] 1 All ER 853, and appears to have encapsulated the approach in his proposition that "*If the relative strength of one party's case is significantly greater than the other that may legitimately be taken into account*". He added by way of emphasis on the flexibility of the remedy that the Court has an "*overall discretion to do what is just and convenient in the circumstances.*"

[34] In Ruling 1 (at §§22-24) I considered the case law that would have allowed me to determine some greater part of the strength of the action beyond deciding that there was a serious issue to be tried. Had the affidavit, the underlying evidence, and fuller legal argument been served at the time I might well have been able to do so. However, as things stand, I am presently no better acquainted with the substantive issues in the case either evidentially or legally than I was at the time of Ruling 1. The one difference is that I am now on notice by virtue of the application to vacate that there is work to be done to explain the very policy decisions at the heart of the claim. Neither of the parties can rely on that explanation pending its delayed disclosure. While the Respondent is not at fault for the delay, the fact of and reason for the delay makes me more reluctant to interrogate the strength of what I have previously established was an arguable case for the purposes of bringing a judicial review as opposed to a case with a strong prospects of success. The Respondent has not asked me to review merits in that way at this juncture. Instead, counsel draw attention to potential for this Applicant to realise his remedy of 52 weeks in substance, even if his claim is refused.

[35] On this first ground of opposition, I accept that the risk of unfairness in terms of undue payment of state benefit, if the claim is refused, should not be discounted in weighing up the balance of convenience, although I do not consider it to have great weight. In seeking "*whichever course carries the lower risk of injustice*" (as per *Philomena McKay's Application)*, I cannot presently make any progress on assessing the likely outcome. The inescapable difficulty here is that the affidavit is not served and the latest description of what it will deal with makes it all the more desirable for the Court to consider it and any response before it could be possible, if at all, to say that the strength of the Respondent's case is significantly greater than the case of the Applicant. As I indicated in Ruling 1, the proposed Order may be "treading in the territory" of the policy, but it is not re-writing anything yet, if at all, and has been compelled only because of the exigencies of the public health situation. I have also deliberately not considered the future of the Applicant's criminal proceedings and

whether that would cause him to be detained for beyond 52 weeks. I do not know whether this will be the case and cannot see why it is relevant to take into account at this juncture.

[36] What should understandably concern this Respondent in particular is the prospect of every claimant to judicial review arising from the state benefits arena simultaneously enjoying an entitlement to financial interim relief. Were that the case then real issues of unfairness could arise. For the courts to routinely exercise discretion to make such awards might also be said to displace the ordinary presumption at the interim stage of judicial review that a public authority should not be restrained from exercising its statutory power or doing its duty to the public. However, no Order was actively pursued by this Applicant, nor would it have been necessary, when the full hearing was initially directed and case managed to proceed in April. The extant relief is based on an unprecedented set of variables. The principal public interest now lies in bringing an expedited case to a fair conclusion, which (similarly to how the Departmental Solicitor's Office presented its application to vacate) is not just in the interest of the parties, but in the interest of the public.

[37] The Respondent's second ground for opposing the application is that it is simply not necessary, because the change of the law on evictions means that this Applicant will not lose his home before the conclusion of this hearing. The following points are made, which are correct as a matter of fact, and which initially struck me as a reason not to grant relief once the legislation came into force, although in my final reasons in Ruling 1 (at §31) I concluded otherwise. As a result of the modifications to the length of Notices to Quit introduced by the Private Tenancies (Coronavirus Modifications) Act (Northern Ireland) 2020, a minimum of 12 weeks' notice must now been given by a Landlord. Even if the Landlord were to serve notice immediately on 1 July 2020 then the Applicant would not be required to quit before the end of September, by which stage proceedings are likely to be at an end.

[38] As regards the relevant part of the previous judgment, the Respondent takes issue with my view that it may not be appropriate to pass on the difficulties created by this case to the landlord, by refusing interim relief. It is submitted that Housing Benefit is a state benefit like any other in favour of the individual claimant, rather than a state subsidy to landlords. The contractual obligation to pay rent lies with the Applicant as tenant, not the Department or the Housing Executive, and the cessation of interim relief would be no different to the case of any other housing benefit claimant who received a prison sentence of more than 3 months, lost his entitlement to Housing Benefit, and was unable to pay rent. The point is pressed that whether, and to what extent, the landlord would show some degree of forbearance is a private law matter between the landlord and the tenant.

[39] Both parties say that a case about benefits granted to pay rent has nothing to do with eviction for non-payment of rent, but they disagree as to whether I am right to discount that fact from a decision to make an order for interim relief in these proceedings. The crux of the problem was well summarised in the letter from the

Departmental Solicitor's Office of 11 May 2020. By reference to the change in the law she emphasised that "*there was therefore no immediate risk of the Applicant losing his home*" although she "*acknowledged that he would however be responsible for the rent to the landlord in the meantime*".

[40] However flexible the discretion, I am nevertheless called upon to exercise a power, so contained in Section 91 of the Judicature (Northern Ireland) Act 1978, to grant relief "*in any case where it appears to the court to be just and convenient to do so for the purpose of any proceedings before it ....*". Based on the evidence available to me, it should not be overlooked that the Court would now make a decision that would expose the Applicant to falling into arrears, which could therefore affect the rights of a third party who has nothing to do with these proceedings. The Respondent's answer that this is a purely private law matter between a landlord and tenant, ignores the context for my considering the matter in the first place. It would have me discount that the reasons that this is under discussion at all is because of the difficulties that have arisen in these public law proceedings. Whether or not the delay was unintended, in the end it is the Court that agrees to adjournments and vacates fixtures, because the fairness of the process so requires. As a matter of fairness and in the broader public interest the Court should not thereafter be indifferent to the consequences that its decisions could have for others; or to treat the operation of private law as hermetically sealed from those consequences. The historic origins of interim remedies in the law of equity favoured the justice of substance over form and for that reason I would not for present purposes apply the public/private law distinction that the Respondent has suggested that I should.

[41] In the language of *American Cyanamid*, it is sufficient to characterise my reluctance to rely on passing on the problem to the landlord in terms of the 'special factors' pertaining to each case, which a court is required to consider in the exercise of its discretion. Others in prison might benefit from the emergency provisions, but they will not do so because of the unintended delays in this case, which is rightly before the Court but not ready to be tried. I would reject the Respondent's submission on that basis.

[42] However, I remain concerned (as indicated in §31 of Ruling 1) that "*the broader public interest also requires particular constraint before relying on any form of emergency provisions; especially so for a purpose that was arguably outside of their originating purpose*." I am further reluctant to exercise my discretion to refuse the interim relief in these proceedings with the above consequences, if it means being asked to take account of emergency legislation that has abrogated fundamental and basic common law rights to property and access to court. That was not the purpose of bringing the emergency legislation into force. This Court is not interpreting the legislation, or exercising a power under it, but in the exercise of its discretion, it should be cautious to look to those provisions with collateral purpose, indifference as to consequence, or with an attitude that normalises or extends their exceptional and limited intent.

Conclusion

[43] Interim relief in judicial review of benefits disputes is unusual. Expedition ought normally to be the answer, and the Applicant accepted it to be the answer at the time of the leave hearing. Ruling 1, which was only sought in an extreme situation, made clear that relief was granted "… *because of special considerations pertaining to this test case litigation and only after its case management has become caught up in the midst of a public health emergency. I very much exercise my discretion based on an overall conclusion of what is 'just and convenient in the circumstances'*" (§32).

[44] For the above reasons I conclude that the same circumstances that justified the previous ruling remain, save that for causes beyond its control the Respondent could not comply with the case management timetable to enable the newly ordered expedited hearing in June. The situation continues to preclude the court from assessing the relative strength of the case. The 'balance of convenience' remains as described in paragraph 25 of the original ruling, such as to justify two additional months payment to be made on the same terms as before. The 'special factors' are now only to do with the exceptional case management issues that have arisen in these proceedings alone. They are the fault of neither party, but it does not follow that the Applicant and his mother should therefore bear the brunt. As a matter of equity, and in the exercise of my broader discretion in the field of interim relief, I will continue to not rely on emergency housing legislation concerning a private law right, even if now in force, for a tangential purpose arising out of the conduct of public law proceedings, especially at the foreseeable expense of a third party.

[45] I will therefore make the Order sought for July and August, with three further features. Firstly, the Order should contain an express additional requirement for the Applicant to update the Respondent, Notice Party and the Court, as soon as reasonably possible if his custodial situation changes at any time. Secondly, unlike my previous Order, the two payments should be made at the end of each calendar month and not the beginning. As the Respondent pointed out prior to my making the original Order, Regulation 89(3) of the 2006 Regulations provides that housing benefits payments to landlords will be made one month in arears. Although I did not think it necessary then given all of the unusual circumstances to attempt to replicate the scheme, and there were a range of uncertainties at play at the time, I now find the balance of convenience to favour that option. Thirdly, in order to provide an assurance to the landlord that this will be done, the Order should provide for a letter to be sent to him explaining the position and referring to Regulation 89(3) and the previous basis on which payments were made prior to December 2019.

[46] In their submissions the Respondent suggested that if I was minded to make the Order for interim relief I should only do so on the basis of a cross-undertaking that requires the Applicant to repay the sum of £850.00 within 3 months of a final Order, in the event that he is not successful in his application for Judicial Review. Undertakings of that nature could be sought in a public law case. I have decided

that in all the circumstances it is not right to do so in a case of this nature faced with all its procedural challenges. The sums are modest to the Respondent, but not to the Applicant and his mother. Unlike commercial litigation, including business litigants who bring a public law challenge, these people are not trying to pay the rent pending judgment based on entrepreneurial risk analysis of what the outcome will be. Due to the delay in serving the affidavit in reply they are also prevented from being advised themselves on the prospects of success. Ideally the Court could have articulated a provisional view about prospects in its treatment of this application, but it cannot do so.

[47] The Applicant submitted that if I did make the Order, I should also award costs as the Respondent had been expressly invited to concede the required Order but refused to do so. It was contended that it was unreasonable to dispute an extension. I do not accept it was unreasonable for the Respondent to contest the matter; just as it was not unreasonable for the Applicant to contest the application to adjourn. Given the importance of the issues raised, and in Applicant Counsels' own words, "*a context that all can admit is difficult and hard to manage*", I refuse that application and reserve costs to trial.