IN THE COUNTY COURT AT CENTRAL LONDON

Claim K40CL206
Thomas More Building
Royal Courts of Justice
Strand
London WC2A 2LL

Date: 24 May 2024

Before:

HIS HONOUR JUDGE SAUNDERS

Between:

JURAJ HYNEK **Appellant**

- and -

LONDON BOROUGH OF ISLINGTON **Respondent**

-and-

(1) THE AIRE CENTRE (First Intervenors)
(2) THE 3MILLION LTD (Second Intervenors)

Mr Toby Vanhegan of Counsel (instructed by Lawstop,Solicitors**) for the Appellant**
Mr Andrew Lane and Mr Jeremy Ogilvie-Harris of Counsel (instructed by the Respondent's Legal Services) **for the Respondent**
Mr Jamie Burton KC and Mr Yasser Vanderman of Counsel (instructed by the First Intervenor**) for the First Intervenor**
Mt Tim Royston and Mr Charles Bishop of Counsel (instructed by the Second Intervenor**) for the Second Intervenor (**by written submission**)**

Hearing date: 23 April 2024

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

HHJ SAUNDERS:

1. This is my judgment in relation to the appellant's appeal under section 204 of the Housing Act 1996 ("the Act") in relation to the respondent local housing authority's review decision dated 5 September 2023.

2. This appeal is significant in that, rather than dealing with issues such as suitability or priority need, as would normally be the case in such appeals, it deals with some important questions about the effect of legislation governing the UK's departure from the EU, contained in The Agreement of the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union, otherwise known as the Withdrawal Agreement, (referred to in this judgment as "WA") and the application of the Charter of Fundamental Rights of the European Union ("the Charter") with specific focus upon housing homeless applicants, in particular former EU nationals who have remained in the UK following the UK's departure. In this particular case, the appellant is a Slovakian national, and is as such an EU national.

3. As a result, there is considerable interest in this case. Permission was granted to allow two intervenors, The Aire Group, a charity and pro bono law centre providing specialist advice in areas of EU and European human rights law ('the First Intervenor') and The 3Million Limited ('the Second Intervenor'), a grassroots organisation for EU citizens in the UK, to intervene and make representations in such cases.

4. At the hearing before me, the appellant was represented by Mr Toby Vanhegan of counsel with the respondent being represented by Mr Andrew Lane of counsel, along with his junior, Mr Jeremy Ogilvie-Harris of counsel. Upon behalf of the First

Intervenor, I heard from Mr Jamie Burton KC, leading counsel, together with his junior, Mr Yaaser Vanderman of counsel. The Second Intervenor did not appear but relied upon written submissions prepared by Mr Tom Royson and Mr Charles Bishop, both of counsel.

5. By reference to the review decision letter dated 5 September 2023, the respondent determined that the appellant was ineligible for housing homeless support. This was based upon the application of section 185(1) and (2) of the Act which provide that a person from abroad is ineligible for housing assistance unless they fall within a prescribed class of persons defined by regulations.

6. The Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006/1294 (the Eligibility Regulations 2006") set out cases where classes of people subject to immigration control are eligible for assistance (Regulation 5) and classes of people who are not subject to immigration control but are nevertheless ineligible for assistance (Regulation 6).

7. Paragraph 7.9 of the Homelessness Code of Guidance for Local Authorities 2021 provides that the provisions of section 7 (1) of the Immigration Act 1988 and the Asylum and Immigration Act 1996, which regulates support, have been saved for the purposes of housing legislation, so as to protect the rights of EU citizens, and their family members, who have citizen's rights pursuant to the WA.

8. As a consequence, in this case, the respondent has assessed the appellant's application, with these provisions in mind, on the basis that, as a person with settled status (and not subject to immigration control), he should demonstrate that he falls within one of the categories set out in Regulation 6 (2) of the Eligibility Regulations

2006, either being (a) a worker, (b) a self -employed person, (c) an accession state national who has acquired worker authorisation or (d) a family member of (a), (b), and (c).

9. In this case, the respondent has determined that the appellant is not a worker, nor had he had retained worker status (which would be possible if someone had worked previously). Moreover, his claim to be self-employed was rejected as not being genuine or effective. Also, of considerable relevance to this appeal, it was further determined that there had been no breach of his rights as to dignity or non – discrimination enshrined in the WA and the Charter. This was based upon an assessment of his circumstances, and with particular emphasis that he was in receipt of Universal Credit. As such, it is said by the respondent, he did not lack means and so to refuse assistance would not be in breach.

10. That is why, in this case, the background to this appeal is important. The basic facts are largely agreed but they set the scene and I set them out below.

Background

11. The appellant was born on 14 September 1984. He is a national of Slovakia. He arrived in the UK on 31 October 2019.

12. On the 11 December 2019, he was granted pre-settled status until the 12 December 2024, at which point he would be entitled to apply for settled status in the UK.

13. His work record is that he was employed as a software engineer between 18 November 2019 and 11 February 2020. From 9 March 2020 to 7 May 2020, he was employed by "My Community Finance" – a part of the Amplifi Group.

14. He then went out of work and signed on at his local Jobcentre (but was unable to find any - possibly hampered by the covid restrictions in place at that time). He was signed off work by his GP between 1 June 2021 and 1 September 2021 – due to a combination of SADHD and anxiety. He applied for, and was granted, Universal Credit, at about this time.

15. He continues to receive Universal Credit to this day.

16. On 24 May 2021, the appellant applied to the respondents for homelessness assistance. On 26 May 2021, he sent the respondents documents including a bank statement. On 18 June 2021, he completed a Housing Triage Form. I understand that, at that time, the appellant was sleeping rough on a bench in Regents Park.

17. No doubt taking those circumstances into account, on the same day, the respondent provided him with temporary accommodation at Flat 23, 33 Anson Road, London N7 0RB.

18. Having considered the matter, the respondents wrote to the appellant on the 9 July 2021, and notified him, under section 184 of the Act, that they considered he was ineligible for housing assistance.

19. By a letter dated 15 July 2021, the appellant's solicitors requested a review with which the respondents agreed but, nevertheless it seems, on the 26 July 2021, he was evicted and, since that date, a period of nearly three years, he has been sofa surfing at a variety of addresses. I am told that sometimes he has had to sleep outside.

20. The respondent first reviewed their decision on the 2 November 2021. It was decided that the appellant was ineligible for housing assistance.

21. That was made subject to an appeal to this court. The matter came before HHJ Backhouse on 13 July 2022, and that appeal was allowed.

22. In the meantime, in February 2022, the appellant had registered as self – employed. He is said to have started his business on the 5 April 2022 in the field of web designing. It is said, in terms of that registration, that he was building a website for a restaurant business in Camden.

23. Triggered by the appellant’s change of work status, on 5 September 2022, his solicitors wrote to the respondents to argue that the appellant was eligible because of his employment.

24. This was followed by a sequence of letters – the respondents sent a “minded–to” letter on the 19 May 2023, and the appellant’s solicitors made further representations on the 15 August 2023.

25. The respondents issued a second review decision on the 5 September 2023. It found that the appellant was ineligible. It is against that decision that the appellant now

appeals. The two intervenors were granted permission to intervene on the 5 April 2024. The appeal hearing came before this court on the 23 April 2024.

The Grounds of Appeal

26. In this appeal, the appellant seeks a variation of the review decision, such that he should be found to be eligible for housing assistance, or, in the alternative, that the review decision should be quashed. There are three grounds of appeal.

(a) Ground One – that the review decision was directly, alternatively indirectly, discriminatory.

(b) Ground Two – that the review decision was in breach of the Charter.

(c) Ground Three – that the review decision was wrong in deciding that Mr Hynek was not self-employed.

27. I will deal with each of these in turn. I have attached as an annex, to this judgment, copies of the WA and the Charter, such as are relevant to this appeal. It is, in my view, important to set out, before I consider the grounds, the framework of the WA, particularly in view of its relevant to Ground 1, and, to a certain extent, Ground 2.

The Framework of the Legislation

28. The UK left the EU at midnight on 31 January 2020, at which time the WA was fully ratified. As a result, on 1 February 2020, it entered the transition period, which continued until 31 December 2020. During this time, the Directive remained in effect. After the transition period, the terms of the WA govern the status of EU citizens remaining in the UK.

29. The WA establishes the terms of the UK's withdrawal from the EU. Its intention is to protect EU citizens and their families who in the UK, and, equally, to protect British nationals in the EU, a matter which is particularly set out in the sixth recital to the WA.

30. It is of particular importance to note (regarding Ground 2 in particular) that Article 2(a)(i), of the WA defines "Union law" as including the Charter.

31. The WA is given direct effect in the UK by operation of article 4(1). This provision has been given domestic effect by the European Union (Withdrawal) Act 2018, section 7A. The effect of sections 7A (3) and 20(1) is that any rights flowing from the WA supersedes any incompatible provisions of domestic law whenever passed or made. That is highly relevant to this appeal.

32. Under articles 4(2) to (5), the UK must interpret the WA in accordance with Union law and disapply inconsistent or incompatible domestic provisions. This is, again, highly relevant.

Ground 1

33. It is Mr Hynek's case that he is eligible for housing assistance under Part 7 of the 1996 Act because he has pre-settled status ("PSS") and can rely upon the WA and its non-discrimination provisions which are found at Article 12 (which deals with non-discrimination) and Article 23 (dealing with equal treatment).

34. Mr Vanhegan submits, upon behalf of the appellant, that the review decision gave rise to unlawful discrimination, This, he says, was direct (in that it treated a Slovakian national in a different way to a British national) or, alternatively, that this becomes indirect. This assertion is said to be in breach of articles 12, 23 and 24 of the WA.

35. That, it is claimed, being contrary to the WA, is said to render the review decision unlawful.

36. The respondent's case, as submitted by Mr Lane, is that this assertion is misconceived.

37. They rely upon four reasons and its conclusion:

(a) The appellant's legal arguments reformulate and alter the actual text of the WA.

(b) To obtain the non-discrimination protection afforded by Article 18 TFEU and Article 24 of the Directive 2004/38/EC ("the Directive") you must be a worker, self-employed and so on (applying *CG v Department for Communities in Northern*

Irelans [2021] 1 WLR 5919; and *Dano v Jobcenter Leipzig (C-333/13)* [2015] 1 W.L.R. 2519 at paragraphs 67-84).

(c) These articles continue to operate in UK law in the form of Articles 12 and 23 of the Agreement respectively (as provided for in *SSWP v AT* at paragraphs 93-95 relating to Article 13 of the Agreement and Article 21 of TFEU).

(d) It is said that it "must naturally follow", to use Mr Lane's expression, that, from this analysis that the case law relating to those provisions apply in this case (e.g., *CG* and *Dano*).

(e) It must equally follow that the Appellant cannot benefit from Articles 12 and 23 of the Agreement unless (as is relevant to these facts) he is self-employed.

38. Looking at this conclusion in slightly more detail, and referencing sub-paragraph (c) immediately above, the respondent argues that Article 23 of the Agreement textually replicates Article 24 of the Directive and is expressly qualified insofar as it is "In accordance with Article 24 of Directive 2004/38/EC". The logical consequence, it is said, of this is that Article 23 is only applicable where a person has a right to reside in accordance with the Directive, or, in this case, if the Appellant is, at the time of the alleged discrimination, self-employed.

39. In support of this contention, the respondent has compared the wording of the Directive and the WA. I have replicated the table in Mr Lane's skeleton argument for this purpose:

WA	Directive
Article 23 Equal treatment	**Article 24 Equal treatment**
1. In accordance with Article 24 of Directive 2004/38/EC, subject to the specific provisions provided for in this Title and Titles I and IV of this Part, all Union citizens or United Kingdom nationals residing on the basis of this Agreement in the territory of the host State shall enjoy equal treatment with the nationals of that State within the scope of this Part. The benefit of this right shall be extended to those family members of Union citizens or United Kingdom nationals who have the right of residence or permanent residence.	1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.
2. By way of derogation from paragraph 1, the host State shall not be obliged to confer entitlement to social assistance during periods of residence on the basis of Article 6 or point (b) of Article 14(4) of Directive 2004/38/EC, nor shall it be obliged, prior to a person's acquisition of	2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent

the right of permanent residence in accordance with Article 15 of this Agreement, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status or to members of their families.	residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

40. It is also claimed that notice must be taken of Article 12 of the WA which is qualified in that "any discrimination on grounds of nationality within the meaning of the first subparagraph of Article 18 TFEU shall be prohibited". It is, therefore, argued that, as with the analysis of Article 23 set out above, it can only therefore provide protection in line with the Article 18 and the CJEU case law. Accordingly, the reasoning in *CG* should be followed (that is that Article 18 TFEU does not provide protection against discrimination greater than that provided for by the Directive).

41. This means, it is said, that both the authorities in *CG* and *Dano* can be applied to the facts in in this particular case.

42. In *Dano*, it was held that, notwithstanding the prohibition on discrimination in Article 18 TFEU, Member States were permitted to enact legislation giving effect to the Directive which excludes economically inactive nationals of other member states

from entitlement to state benefits if they do not comply with the conditions for residence set down in the Directive.

43. The respondent also relies upon *Mirga v Secretary of State for Work and Pensions* [2016] UKSC 1; where the Supreme Court held that where a national of another Member State is not a worker and has no, or very limited, means of support, it would severely undermine the purpose of the Directive if he could invoke proportionality to obtain a right of residence and social assistance in another member state, and that it would place a substantial burden on a host Member State if it had to carry out a proportionality exercise in every case.

44. In *CG*, the CEJU held that alleged discrimination under Article 18 TFEU must be considered through the lens of Article 24 of the Directive because the latter gave specific expression to the principle of non-discrimination on the grounds of nationality enshrined in Article 18. This reasoning had previously been applied in the context of Part 7 of the 1996 Act in *Samin v Westminster City Council* [2016] UKSC 1 at paragraphs 41-57.

45. The respondent submits that, crucially, Article 24 of the Directive can only apply to those who are exercising their rights under it (as in *Dano,* where they are economically active or self-sufficient).

46. The respondent says that, in terms of both Articles 24 and 25 of the WA similarly can only apply through their express wording to workers and/or self-employed persons. If a person falls within either of those Articles, it is argued that they are likely

(although not certain) to be entitled to social security and homelessness assistance under Part 7 of the Act.

47. The provisions of this legislation, the respondent submits, provide that the appellant may well enjoy PSS but he must be a worker or self-employed (or satisfy any of the other requirements) under regulation 6 (2) of the Eligibility Regulations in order to qualify. That status was rejected be the local authority in the review decision and is correct in law.

48. In summary, the respondent's position is as follows:

    (a) Articles 12, 23 and 25 of the WA do not apply if a Union citizen does not have worker status or self-employed status or is not otherwise self-sufficient (applying *Dano, Samin, CG*).
    (b) Accordingly, the WA is only relevant if the appellant has self -employed status on the facts of this case. He does not, and so Ground 1 should be rejected.

49. That, on the face of it, and consideration of the authorities, is a compelling argument.

50. However, much of the respondent's argument relies upon the effect and application of the authorities in *CG* and *Dano*. Do they still apply? That question is, in my view, crucial.

51. In my view they can be distinguished for several reasons. First, there is an overarching point that the WA was introduced to govern the relationship between the EU and the UK after the latter left the EU, and to govern the relationship of EU

citizens in the UK (and UK citizens in the EU) after "Brexit". That seems to me, on the face of it, for the WA, as a general point, supersede any previous articles under the Directive (and consequently any authorities which flow from interpretation of the Directive (rather than the WA) such as *Dano, Samin* and *CG*.

52. The legislation under the Directive no longer applies and has not done so since the WA came into effect. *CG* and *Dano*, it is true, held that it is not discriminatory for persons with PSS to be ineligible for social assistance – but they were decided in the context, in my view, of a declaratory scheme of law relating to free movement under Article 18 of the TFEU.

53. That is now governed by the EU Settlement Scheme which has created a constitutive residence status (which obviously did not apply previously under the Directive). That, it would appear, confers non -discrimination rights which are not conditional.

54. It is important, in order to understand that rationale, to examine how this situation now works in practice.

55. Part Two of the WA applies to the appellant, because he is an EU citizen who has exercised his right to reside in the UK before the end of the transition period, and he has continued to reside here, which is within the scope of the WA, as set out by Article 10 (3) of the WA. That he has applied before the end of the transition period is enough, as is set out in *Batool & Others v Entry Clearance Officer [2022] UKUT* 00219 (IAC).

56. It is the case that, having been granted PSS, the appellant was conferred with rights under Title II of Part Two of the WA (including the right of residence under Article 13).

57. He is, therefore, residing upon the basis of the WA and, therefore, enjoys the right of "equal treatment" with UK nationals in the provision of housing assistance under Article 23.

58. I need to expand on this further.

59. Article 10 of the WA is set out in the Part Two of the WA. It sets out the 'personal scope' of those rights. It applies to *'(a) Union citizens who exercised their right to reside in the United Kingdom in accordance with the Union law before the end of the transition period and to continue to reside thereafter'.* The transition period ended on the 31 December 2020.

60. Article 23 – this provides that those who meet the definitions in Part Two (Title II) are eligible to benefit from its provisions.

61. In this case, the appellant must meet this definition. First, he is entitled to rely on Article 21 (1) of the WA as he entered the UK before 31 December 2020 and exercised a 3- month period of residence under Article 6 of the 2004 Directive 38/EC. Secondly, as a Union citizen, he exercised a right to reside in accordance with Union law. Thirdly, and irrespective of this, the respondent has accepted that he exercised his Treaty rights between September 2019 and February 2020, and then between March 2020 to May 2020. Fourthly, he does not appear to have left the UK and maintained continuity of residence.

62. So, what is the ordinary textual meaning of Article 10? In my view, that can only mean that it requires that the EU citizen resides in accordance with EU law at some point prior to the end of the transition period – as in the appellant's case - and continue to do so - again, as in the appellant's case.

63. If the opposite were to have effect, it would mean that there is a possibility that unfortunate situations could exist, which is contrary to the UK Government's intention to give clarity to citizen's rights. An example of this could include potential difficulties such as those experienced by the Windrush generation, albeit I accept that is an extreme example. What surely was intended was to avoid complex arguments about whether an individual was in the WA at any time, or whether they were in the UK residing in accordance with Union law at any relevant date.

64. Other difficulties include the fact that there is no mechanism in place for an individual returning into the scope of the provisions (which supports the contention that this interpretation is correct), or it being a fertile ground for misunderstandings as to whether an individual had WA rights or not.

65. Mr Vanhegan, rightly, in my mind, submitted that it is supportive of this construction that the UK chose a constitutive scheme, and not a declaratory scheme, in setting out its desired level of immigration control.

66. This is implemented by Article 18 of the WA. There has been judicial commentary on this in the case of *R(IMA) v. Secretary of State for the Home Department* [2022] EWHC 3274 (Admin), where Lane J, at paragraph 45 said:

> *"I have mentioned that Article 18 of the WA confers a power on the host state to require Union citizens and UK nationals and their family members to apply*

for a new residence status conferring the rights under Title II of Part Two . This power enables the UK and Member States to give effect to the citizens' rights contained in Part Two by means of a 'constitutive scheme', whereby the rights in question must be conferred by the grant of residence status. This contrasts with a 'declaratory scheme', under which rights under Tile II arise automatically upon the fulfilment of the conditions necessary for their existence…'

67. That choice is crucial, in my view. Unusually (as opposed to many systems in Europe), I understand that a Union citizen could stay in the UK without their right to reside having been verified by government. If they intended to obtain some kind of benefits, such as housing or social security, if the right was dependent upon establishing an EU law right of residence, then that right was only verified at the point of application for that benefit.

68. That approach could have continued under the WA. I am told (and it appears to be unchallenged) that 14 (fourteen) EU countries have adopted the opposite declaratory scheme under the WA.

69. I presume, for policy reasons, the UK adopted the constitutive approach. The provisions require an individual to 'apply for new residence status'. A Union national is required to have leave to enter or remain, and if they do not apply, then it follows that they have no right to be in the UK.

70. The effects of that are that they are present unlawfully, liable to prosecution and have a complete bar on working. The position before 'Brexit' was totally different –

it was the case that EU citizens did not need permission to enter the UK under section 7 of the Immigration Act 1988.

71. I, therefore, consider that there are several important consequences:

(a) The status of PSS confers rights under the Title (Article 18 (1) of the WA).

(b) That prevents individuals from not being prosecuted or removed, as illegal immigrants.

(c) *R(IMA)* (as set out above) provides, at paragraph 150, per Lane J, that *'whilst the WA permits the use of a constitutive scheme, that scheme must deliver the rights of residence in Title II of Part Two. Neither the UK nor a member state can employ a constitutive scheme which fails to do this'.*

(d) That means that those states (including the UK) under the WA are prohibited from using domestic law to grant PSS to those who could be refused residence. I accept that there would be considerable ambiguity if PSS were granted to those with WA rights, and those without. That would prevent the grant of PSS from being a conferral of rights (which is the only interpretation of Article 18).

(e) It must follow that an individual with PSS 'is residing' based on the WA. That is in accordance with Article 23 (1) since the 'new' status derives from it. Interestingly, the Secretary of State's position in R (IMA) was that PSS conferred rights under the WA – that is consistent with letters sent out to EU citizens granted PSS which made a legal assertion that the status conferred , for EU citizens, was in accordance with the WA.

(f) It is important to note that conferral is what it says it is. 'Residence rights' are not the same as 'freedom of movement' rights. Interestingly, as a counter to the respondent's argument, in *R(IMA)*, Lane J indicated that these rights applied

'notwithstanding that the rights described in article 13 contain limitations and conditions set out in the Directive'.

(g) The rights contained include *'equal treatment'* under Article 23 of the WA. It is apparent that, post – Brexit, the intention of the government was to exercise a greater degree of immigration control. A declaratory scheme would simply have enabled individuals who are EU citizens to remain in the UK even though they lacked EU law rights, that having been the case prior to UK's withdrawal from the EU.

72. Article 24 of the Directive does not replicate Article 23 of the WA, albeit that, I accept, there are similarities. If so, then that would mean that the appellant would have to show that he is self -employed.

73. I agree with Mr Vanhegan and, indeed, the second intervenor that the opening words of Article 23 of the WA are not restrictive. They say: *'In accordance with Article 24 of Directive 2004/38/EC.',* I accept, but this is not determinative at all. Its purpose was to ensure that the basis of equal treatment was the same as between the Directive and the WA, no more.

74. For example, they do not govern who has equal treatment rights, (as that is a matter dealt with under Article 10) and we have, of course Lane J's conclusions in R(IMA) which I must follow as it is binding upon me.

75. It further follows, as I have remarked earlier, that the case law that the local authority relies upon under the Directive simply cannot apply. For the avoidance of

doubt, I accept that the WA was referred to in *Dano* but Part Two was not in force at that time. The legislation that applied in that case was the Directive (not the WA) and for these reasons, it is my view that it is of no effect.

76. The principal point is that the UK having accepted a constitutive scheme, must acknowledge the EU citizens' rights under Article 18 of the WA, as it did not adopt a declaratory scheme, which it could have.

77. If I were in any doubt about this, it is important to consider the interpretative sections of the European Union (Withdrawal Agreement) Act 2020 (which is of assistance) and which provides that , at section 17, the '*residence scheme immigration rules'* provide that rules identified in the immigration rules are not to have effect in connection with ' the residence scheme that operates in connection with the withdrawal or *"any other immigration rules which are identified in the immigration rules as having effect in connection with the withdrawal of the United Kingdom from the EU".* The Explanatory Notes are also helpful. They state:*' The UK is giving effect to its commitments in the Agreements regarding residence status for EU citizens, EEA EFTA and Swiss nationals and their family members through the EU Settlement Scheme, which was established under Immigration Rules made under section 3(2) of the Immigration Act 1971."*

78. This underpins the conclusions that I have set out above.

79. Ground 1 is, therefore, successful for the reasons set out above.

<u>Ground 2</u>

80. Even if I am wrong about this, I have gone on to consider whether the respondent was in breach of the Charter, which is Ground 2.

81. Here, the respondent says, and maintains, that this is not the case. Their reasoning is that the threshold for violation of the appellant's rights has not been met, such that the review officer was entitled to reach the conclusions at paragraphs 35 – 37 of the review decision in which it was claimed that the appellant's rights were not breached.

82. The fundamental basis upon which the respondent states that this is the case is four – fold. They rely upon the following:

    (a) There cannot have been a breach of Article 1 because the appellant is not particularly vulnerable or precluded from obtaining private accommodation which is state funded (in the appellant's case by Universal Credit to which he is entitled).

    (b) The appellant's circumstances do not meet the minimum level of security required for a breach of Article 4.

    (c) Article 7 is not relevant as the appellant does not have children and so has no general right to housing.

    (d) The appellant has adequate and sufficient resources, and so his rights were not violated.

83. The question here is what is the right approach?

84. There is no dispute between all the parties that, under Article 4 (3) of the WA, the local authority must comply (and is obliged to comply) with the Charter when making

decisions in relation to the eligibility of individuals concerning the application, interpretation, and scope of his eligibility for housing, based upon a right of residence.

85. In short, that means that the respondent must consider whether a finding that the appellant was ineligible for housing would result in a breach of his rights under the Charter.

86. Did they do that here, and did they apply the law correctly?

87. At paragraphs 35 -37 of the review decision, the respondent sets out the appellant's solicitors' complaints that the local housing authority has failed to make any assessment of his right to live in dignified conditions, and consequently failed to apply the Charter. (paragraph 35). This is said to be pursuant to the rationale in *CG.*

88. The assertion that is made is that his dignity would be threatened as he will (a) lose his accommodation, and (b) it would threaten his attempts to build up human capital including his skills in web design. That loss of accommodation is said to render him homeless, and that would amount to breach of his rights under Article 1, with the resultant failure to provide assistance amounting to a breach of Article 26 of the WA. (paragraph 36)

89. The respondent's response (presumably based on a reading of the letter as a whole) is simply that it is not accepted that there has been any breach of his rights to dignity and non – discrimination, and that an adverse finding would not amount to a breach. The respondent says that having considered the application, and that, in view of the

fact that the appellant receives Universal Credit, there cannot be a breach of the Charter *"in circumstances in which (he)(is) lacking means".*

90. In relation to Article 1, Mr Lane relies upon the judgment of Green LJ in CG, who, at paragraph 112, says as follows:

"*112. Ultimately, the approach to determining the benchmark for the standard of review under Article 1 must now be found in the judgment of the CJEU in CG which addresses the provisions of law in issue in this case and concerned closely analogous facts. The CJEU did not frame its analysis in terms of degradation or inhumanity. The CJEU applied Article 1 on its own to CG and Article 1 in conjunction with Articles 7 and 24 to the position of mother and children: see paragraphs [89] and [90]. In paragraph [92] the CJEU confirmed that the support relevant to Articles 1, 7 and 24 had to come through "national law". The CJEU in paragraphs [92] and [93] identified the following facts as relevant to the analysis: (i) CG was a mother of two young children; (ii) she had no resources to provide for her own or her children's needs; and (iii) she was isolated because she had been forced to flee a violent partner. There is no reference there to accommodation though from facts set out elsewhere in the judgment it is apparent that she was in temporary accommodation in a women's refuge (paragraphs [37] and [44]) a state of affairs the Court seems to have treated as relevant to whether she was "destitute" (paragraph [44]). It seems that access to accommodation was viewed as a component of access to means. On the basis of CG the facts relevant to a Charter violation are within a relatively narrow compass and focus upon: the availability of means and resources to meet needs (which would include accommodation); the degree of isolation; and, the degree of dependency of children. The provision of accommodation, such as access to a refuge, will not be treated as sufficient if it is merely temporary. It is right, finally, to note that the factors taken into account were those the CJEU considered relevant "in the present case" (paragraph [91]) i.e. the conclusion whether there was indignity was fact and context specific. It would therefore be wrong to treat paragraphs [92] and [93] as laying down hard and fast rules. They are nonetheless strongly indicative as to how the standard should be applied.*"

91. At paragraph 171 of the judgment, it is said that there is an overlap between Articles 1 and 4 and that the test was whether an individual's right of dignity would be breached in so far as there would be a failure by the state *"in the sense of meeting a minimum level of viability"*.

92. In this case, it is argued that the appellant is not particularly vulnerable (such as in the case of domestic violence or complete destitution), that he does not have any children who would be destitute, and that he has means in the form of Universal Credit to sustain him. This is asserted because his housing costs could be met by UC and there is evidence that he has existing connections by virtue of his website design activities.

93. In terms of Article 4, the respondent maintains a similar argument.

94. The test for Article 4 of the Charter is analogous to that in Article 3 of the European Convention on Human Rights ("ECHR").

95. I am directed towards the test that the House of Lords applied in the context of Article 3 ECHR in the context of destitution for asylum seekers in *R. (Adam, Limbuela and Tesema) v. Secretary of State for the Home Department* [2005] UKHL 66 where Lord Bingham held, in the circumstances of that case:

> "*As in all article 3 cases, the treatment, to be proscribed, must achieve a minimum standard of severity, and I would accept that in a context such as this, not involving the deliberate infliction of pain or suffering, the threshold is a high one. A general public duty to house the homeless or provide for the destitute cannot be spelled out of article 3. But I have no doubt that the threshold may be crossed if a late applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state,*

denied shelter, food or the most basic necessities of life. It is not necessary that treatment, to engage article 3, should merit the description used, in an immigration context, by Shakespeare and others in Sir Thomas More when they referred to "your mountainish inhumanity".

96. I am also directed, by Mr Lane, to the case of *Jawo v Germany* (C-163/17), a case concerning Articles 1 and 4 of the Charter in relation to asylum seekers, the CJEU held (applying the same threshold for Article 1 as Article 4 / Article 3 ECHR):

"92. That particularly high level of severity is attained where the indifference of the authorities of a member state would result in a person wholly dependent on state support finding himself, irrespective of his wishes and personal choices, in a situation of extreme material poverty that does not allow him to meet his most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity: see MSS v Belgium and Greece , paras 252–263.

93. That threshold cannot therefore cover situations characterised even by a high degree of insecurity or a significant degradation of the living conditions of the person concerned, where they do not entail extreme material poverty placing that person in a situation of such gravity that it may be equated with inhuman or degrading treatment."

97. This, I accept if it is appropriate, imposes a high test.

98. The respondent submits that the appellant's circumstances are not therefore capable of constituting a breach of article 4 as a matter of fact or law because he is in receipt of UC, is not prohibited from working, and has, therefore, alternative support.

99. In terms of Article 7, it is argued that it does not create a general right to housing, that, even if there was a positive obligation, it could likely be met with an interim provision of

housing, and that the appellant's circumstances do not meet a level of poverty which would be sufficient to meet a breach.

100. The respondent relies upon the judgment of Chamberlain J in *AT v SSWP [2024] 4 CMLR 10* (where it was said that very little turns on Article 7 in the context of Social Security challenges or matters of welfare provision) and *O'Rourke v UK (Application number 39022/97)* which is authority for saying that the Charter obligations could potentially be discharged when an applicant is provided with temporary hostel accommodation.

101. Within this context, the respondent argues that this is enough. The reliance upon the appellant's current circumstances and his receipt of Universal Credit (which will meet housing costs) is sufficient and must amount to adequate reasons, taking the content of the review decision letter which should be read as a whole. That, it is said, is sufficiently contained in paragraph 37. It is proper, adequate, and intelligible (*South Bucks District Council v Porter (No2) [2004] UKHL 33*).

102. Is that right?

103. It must be the case that that a respondent local housing authority must consider, as a matter of right, whether a finding that an applicant is ineligible for housing in accordance with section 185 (2) of the Act would result in a breach of his rights under the Charter. That appears to be confirmed by *AT*.

104. I disagree that the appellant must meet the high test set out in Article 3 of the ECHR, and *Limbuela* overall. My reading of "*loss of dignity*" is that it does not equate to the Article 3 test, and, in any event, in the context of welfare provision, that high threshold, which can be applied to Article 4, does not, in my view, apply to Article 1, which is a different test. This is supported by *AT* in paragraph 117 of the judgment in that case.

105. I accept the proposition that the correct approach (endorsed by *AT*) is that taken by the CJEU in *CG* – and, in particular paragraphs 92 -93 of the judgment. It is worth setting them out in full.

"92. In such a situation, the competent national authorities may refuse an application for social assistance, such as Universal Credit, only after ascertaining that the refusal does not expose the citizen concerned and the children for which he or she is responsible to an actual and current risk of violation of their fundamental rights, as enshrined in Articles 1, 7 and 24 of the Charter. In the context of that examination, those authorities may take into account all means of assistance provided for by national law, from which the citizen concerned and his or her children may actually and currently benefit. In the dispute in the main proceedings, it will be for the referring court, in particular, to ascertain whether CG and her children may benefit actually and currently from the assistance, other than Universal Credit, referred to by the representatives of the United Kingdom Government and the Department for Communities in Northern Ireland in their observations submitted to the Court.

93…However, provided that a Union citizen resides legally, on the basis of national law, in the territory of a Member State other than that of which he or she is a national, the national authorities empowered to grant social assistance are required to check that a refusal to grant such benefits based on that legislation does not expose that citizen, and the children for which he or she responsible, to an actual and current risk of violation of their fundamental rights, as enshrined in arts 1, 7 and 24 of the Charter. Where that citizen does not have any resources to provide for his or her own needs and those of his or her children and is isolated, those authorities must ensure that, in the event of a refusal to grant social assistance, that citizen may nevertheless live with his or her children in dignified conditions. In the context of that examination, those authorities may take into account all means of assistance provided for by national law, from which the citizen concerned, and her children are actually entitled to benefit."

106. The principles that I gain from this section of the judgment are as follows:

(a) That the local authority is required to check whether there is a breach of Articles 1,4, and 7 of the Charter.

(b) That this is a positive obligation.

(c) That there is a requirement that an applicant, and their family, live in "dignified conditions" – here, of course, the appellant was sleeping in a park and is now "sofa – surfing".

(d) That the assessment should take place before the circumstances arise where there might be a loss of dignity. In other words, it is the local authority's responsibility to assess the risk.

107. My reading of AT also leads me to several other conclusions.

108. First, there must be an individualised assessment.

109. Secondly, there is a duty to provide an individualised outcome.

110. Thirdly, that the facts of *CG* provide a benchmark against which Article 1 is to be applied. In that case, *CG* was an EU national who arrived in Northern Ireland with her partner and their two children. She moved into a women's refuge after her partner became violent. She had never been economically active and had no resources to support herself. She was granted PSS and her application for UC was refused.

111. Mr Lane submits, and I understand this submission, that the appellant's circumstances here are not as extreme. However, it is this third principle that is important. In AT, the Court of Appeal observed that, at paragraph 112: "…

> *"On the basis of CG the facts relevant to a Charter violation are within a relatively narrow compass and focus upon: the availability of means and resources to meet needs (which would include accommodation); the degree of isolation; and, the degree of dependency of children. The provision of accommodation, such as access to a refuge, will not be treated as sufficient if it is merely temporary*."

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112. Fourthly, the duty of protection is triggered by "risk". To this end, the Court of Appeal said:

> *"154…The duty arises when it can be predicted that the applicant for relief is at risk of having to exercise their right of residence in an undignified manner. This makes the duty prophylactic in the sense that it is designed to prevent the*

applicant falling into a position of indignity; it does not only arise once that personal predicament has materialised."

113. I must accept that the court went onto say that unpredictable risks would be too remote, but it is clear that, based on an individualised assessment, the local housing authority is bound, under the Charter, to assess what those risks are in the context of the applicant's circumstances, and to the degree set out in paragraph 154 of *AT* above.

114. It follows, therefore, that the local authority must bear the relevant burden in interpreting and applying domestic legislation, which they must apply lawfully to homelessness assistance.

115. Mr Burton KC, for the first intervenor, makes some interesting general points about the application of the Charter. They can be summarised as follows:

(a) The Court of Appeal in *AT* had doubts that the broad-brush power set out in the Localism Act 2011 can be sufficient "in principle" to address the central issue of accommodation where there is a clear-cut decision by Government that housing and accommodation should not be made available. It referenced "at the very least" the lack of any evidence of this Act being used for this purpose, or any funding being made available to allow local authorities to do so.

(b) It is said that the case law demonstrates unequivocally that because of the application of s.3(1), the general power in s.2 of the Localism Act 2011 is not available to provide accommodation to persons who are ineligible under Part VII of the Act. (*R(Khan) v Oxfordshire County Council [2004] EWCA Civ 309.*)

(c) In terms of the Care Act 2014, that cannot be of assistance where an individual does not have needs arising from physical or mental impairments, and not destitution alone.

(d) That this means that, due to the primacy of the Act, only those with PSS who have eligible health – related care and support needs under 2014 Act are likely to be able to avail themselves of its protection. That could extend to the Children Act 1989. This is said to reinforce the point that the only way to avoid a breach of the Charter for many people with PSS and no resources of their own will be to deem them eligible for homelessness assistance.

(e) Finally, the Court too must act compatibly with the WA and the Charter. Therefore, if the Court finds an error of law in the review decision it is compelled to make a decision that is compatible with the appellant's Charter rights and may have regard to the evidence as it stands as at the date of the hearing.

116. In my view, Mr Burton's submissions demonstrate that those individuals who have been granted PSS, such as in the appellant's case on its own specific facts, have very little recourse should their application for homelessness be refused and that is something which has to be taken into account.

117. That is a useful backdrop to the situation here, and I remind myself that each case will turn on its own individual facts, and that, by my analysis of the law, it is one to which an individualised assessment must be carried out.

118. So, the question that arises is as to whether this exercise was carried out lawfully, on the particular facts of this case?

119. I accept that letters must be read as a whole, that that establishes context, and such letters written by housing officers who are not legally trained should be regarded with some benevolence – a principle that is well – established following *Holmes-Moorhouse v London Borough of Richmond upon Thames [2009] UKHL 7*.

120. However, it must be said that the review decision in this case only contains one paragraph which deals, in pretty scant terms, with the reasons why the WA and Charter do not apply (paragraph 37).

121. To my reading, this paragraph appears to say that there can be no breach of the Charter because the appellant was in receipt of Universal Credit. That is a bold statement but the respondent considers that sufficient.

122. In my view, that approach is wrong for several reasons. First, it goes against what is explained in *AT,* that being that an individualised assessment is required. The review decision does not, for example, consider the question of "*risk*" and what the potential outcome could be for the appellant if he were not to be provided with assistance.

123. The provision of Universal Credit is not a universal panacea although, obviously, it can be of considerable assistance. In my view, the grant, of UC itself, cannot mean (as the decision appears to suggest) that the appellant can almost inevitably avail himself of an ability to provide housing for himself. That must be wrong. As just one example to the contrary, it does not resolve the difficulty of obtaining a deposit in private sector accommodation, and the likely cost – particularly if accommodation is sought in London or in one of the other major cities of the UK. Interestingly, it is of note that the respondent has set up its own scheme to help individuals with this problem and that is perhaps indicative of the weakness of the respondent's argument.

124. Secondly, this was a formal assessment, with no consideration of the outcome, which we are told by *AT* must be considered. The crucial question: "Does the grant of Universal Credit relieve the appellant of his ability to obtain housing?" was simply not posed or answered.

125. Thirdly, it simply lacks detail. I would not expect exhaustive detail but would expect at least some indication that the points surrounding the implications of the grant of Universal Credit on the specific facts of this case were properly discussed and considered.

126. Fourthly, it must follow that, the local authority's almost sole reliance on the grant of Universal Credit in the review decision, fails to address the appellant's actual and current risk of his fundamental rights being breached.

127. In these circumstances, I find (also) that Ground 2 must succeed.

Ground 3

128. I need not go into considerable detail regarding this Ground, as it is a more traditionally – based ground of appeal, and largely now of little consequence in view of my having allowed this appeal on Grounds 1 and 2. I deal with it for completeness.

129. I accept that the appropriate test in relation to a finding that an individual is (or is not) in self – employment is set out in the judgment of Upper Tribunal Judge Kate Markus KC in *DV v HMRC* [2017] UKUT 155 (AAC) in a case relating to social security law where "self – employment" was defined:

"3…Self-employment for these purposes has a community law meaning. It exists where economic activities are carried out by a person outside any relationship of subordination with regard to the conditions of work or remuneration and under his own personal responsibility: Jany v Staatssecretaris van Justitie Case C-268/99, [2001] ECR I-8615 at paragraph 37. Economic activities include the provision of services in return for some form of remuneration provided that the work performed is genuine and effective rather than marginal and ancillary: Jany at paragraph 33.

5…The level of remuneration and the hours worked may be relevant factors in the overall assessment: Genc v Land Berlin Case C-14/09 [2010] ICR 1108. The motives which prompted a person to seek employment in another Member State are of no account provided that she or he pursues or wishes to pursue a genuine and effective activity (Levin at paragraph 23)."

130. I agree that another review officer may have reached a different decision. However, this is a decision akin to a judicial review and so this is not the test.

131. In my view, the test in *DV* was properly applied. It must be considered through the lens that the appellant failed to provide information which was requested of him. That, it seems to me, included requested evidence of contracts, accounts, and a history of his work pattern. These are the kind of inquiries that would be expected in, say, an application for social security benefits, or those from HMRC.

132. The review officer came to a reasonable conclusion. The evidence provided showed that the appellant received an income of £ 1128.70 between April 2022 and April 2023, and, so, based upon that, an assessment that any form of self – employment was "marginal and ancillary" is a decision that the review officer was entitled to conclude. It is not perverse – it is possible that, with further information, the position may have become clearer (or changed) but, in any event, it was a decision that could not be described as irrational, particularly in circumstances where the appellant was in receipt of Universal Credit and the requested information had not been provided.

133. I agree with Mr Lane that the review decision, largely at paragraph 16:

(a) fairly sets out the information before her.

(b) explains what information she (reasonably) sought; and

(c) addressed the correct test, namely whether the services that the appellant was performing in web design were of some economic value such that they can be seen as real and genuine as opposed to marginal and ancillary.

(d) That the fact that the income was low was a matter that could be considered in reaching such an assessment based upon the correct test.

133. This Ground fails, for these brief reasons, although it does not affect the outcome of the appeal.

Disposal

134. Having reached these conclusions, it follows that the appeal succeeds.

135 The question then arises as to whether the review decision should be quashed, or varied so as to find the appellant is eligible.

136. As the decision to allow the appeal, is largely decided upon points of law, I see no practical benefit for either party in simply quashing the decision, which would simply put the onus back on the local authority to re -make the decision appealed against.

137. The conclusions that I have reached find that the appellant is eligible – this being an eligibility case. It is appropriate, in these circumstances, for the review decision to be varied so as to reflect the appellant's eligibility, under the powers provided to me by section 204(3) of the Act.

138. I would invite the parties to agree an order. If there are any issues arising out of the appeal, for example, in relation to costs, then the matter can be listed for a disposal hearing before me by contacting my clerk, on monica.kane@judiciary.gov.uk providing corrections as instructed, in the usual way.

HHJ Saunders
24 May 2024