THE HIGH COURT

JUDICIAL REVIEW

[2024] IEHC 493

[2023 No. 1496 JR]

BETWEEN

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

APPLICANT

-AND-

THE MINISTER FOR CHILDREN, EQUALITY, DISABILITY, INTEGRATION AND YOUTH, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Barry O'Donnell delivered on the 1st day of August, 2024.

INTRODUCTION

1. This case arises from the difficulties encountered by the State between late 2023 and May 2024 in providing accommodation to certain applicants for international protection. For ease of reference, those persons will be referred to in this judgment as *unaccommodated IP applicants*.

2. When an individual applies for international protection in Ireland, their first main point of contact is the International Protection Office ("*IPO*"). The State is legally obliged to take a number of steps, including providing material reception conditions for those applicants. The concept of material reception conditions derives from EU law and generally it is an obligation that applies to all Member States in all circumstances, with limited exceptions. As defined in the European Communities (Reception Conditions)

Regulations 2018 (SI No. 230 of 2018) ("*the Regulations*") transposing Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96 ("*the Directive*") into Irish law, material reception conditions comprise housing, food and associated benefits provided in kind, together with a weekly allowance to meet incidental personal expenses, and a clothing allowance.

3. Ordinarily, accommodation and ancillary hygiene and food services are provided directly to IP applicants through the International Protection Accommodation Service ("*IPAS*"), and that provision is supplemented by the daily expenses allowance payment ("*DEA*") for incidental expenses. There is also the potential to access occasional discretionary additional needs payments ("*ANP*"), operated by the Department of Social Welfare.

4. Arising from the inability of the State to provide direct accommodation and associated services to some IP applicants, the central issues in this case relate to the manner in which the State has sought to provide for those services indirectly and whether that provision is adequate to vindicate the human rights of unaccommodated IP applicants.

5. There are additional issues in these proceedings because of the novelty of the form of action before the court. The proceedings have been brought by the Irish Human Rights and Equality Commission ("*the Commission*") using a power provided for in section 41 of the Irish Human Rights and Equality Act, 2014 ("*the 2014 Act*"). That power is being exercised for the first time in these proceedings, and a number of questions regarding the scope and meaning of that provision will have to be addressed.

6. Put briefly, the backdrop to the action is that since late 2023 – but not for the first time – the number of persons applying for international protection has exceeded the available accommodation capacity. In order to manage that under capacity, and while endeavouring to increase capacity, the State has adopted a policy of prioritising access to accommodation to certain categories of IP applicant. The effect of that policy is that many single male IP applicants were not provided with accommodation by the State. Instead, the State has sought to provide for the needs of those applicants by providing increased daily expenses allowance payments and making provision for further ancillary services such as vouchers, information services, and increased assistance for day services.

7. Very recently, the issue of the obligations of the State to unaccommodated IP applicants under the relevant Regulations and EU Directive transposed by those Regulations was addressed by the High Court in cases brought by individuals within that category of IP applicant. The cases in question arose from circumstances in early 2023 when the accommodation system was unable to provide for all IP applicants. As a result, the State found itself having to introduce a system whereby more vulnerable persons, such as families with children, were prioritised for accommodation ahead of single male IP applicants. The High Court made clear that, on the facts then presenting, the State was in breach of its obligations because the approach adopted did not meet the basic needs of the particular applicants in those cases. In a further case, the High Court referred questions to the CJEU directed to the issue of whether a force majeure defence was available in an action for *Francovich* damages based on an assertion that the State was not complying with its EU law obligations. That immediate crisis seemed to have

abated temporarily, but by late November/early December 2023 it was apparent that the same difficulty was recurring.

8. This case differs from the earlier cases in some respects. First, the court is faced with an application by the Commission pursuant to section 41 of the 2014 Act, in which declaratory and other relief is sought in respect of a class of persons, being the unaccommodated IP applicants who arrived in the State since December 2023. Hence, there is a question around the meaning and scope of section 41 of the 2014 Act. The State asserts that the Commission is not entitled to rely on section 41 in the manner that it has sought to in this case. Second, and without prejudice to the section 41 argument, the State argues that in the period since the other cases were determined by the High Court in 2023, the factual context has altered because the State has implemented changes to the way that it deals with unaccommodated IP applicants. It is argued that these changes mean that the basic needs of unaccommodated IP applicants are now being met by the more recent State interventions. Third, the State argues that because it is already committed to addressing the accommodation issues and because of the decision of the High Court in *S.Y.* (*A Minor Suing by his Next Friend Aoife Dare) v. The Minister for Children & Ors* [2023] IEHC 187 ("*S.Y.*") there is no practical utility in the proceedings and/or that the court should exercise its discretion to refuse relief.

9. While there are many disputes between the parties, what does not appear to be disputed is that there is a growing number of IP applicants who cannot be accommodated, or who cannot be accommodated without a period of some delay, within the State. The Commission acknowledges that this situation presents very significant demands on the State and that the State is making efforts to resolve the difficulties, albeit that the

Commission considers that more can be done. Fundamentally, the Commission argues that, legally, the State cannot be absolved from the obligation to observe the human rights of unaccommodated IP applicants. In essence, the obligations reflect fundamental human rights law obligations that are mandatory and unqualified.

10. From the perspective of the State, the argument being made is that it is faced with an unprecedented and unforeseeable surge in the number of IP applicants, and that the situation is compounded by the obligations undertaken by the State to provide for the large numbers of persons from Ukraine seeking protection in this State on foot of the Russian invasion. In addition, the efforts of the State to ameliorate the situation have been hampered by the emergence of hostility in some areas of the country to the accommodation of IP applicants, particularly single male IP applicants; and evidence was available of incidents, including serious criminal acts, that have interfered with the ability of the State to provide additional accommodation facilities.

11. For the purposes of this judgment, the first matter to be addressed concerns the arguments that were made in respect of the power of the Commission to bring these proceedings. In that regard, the Commission adopted the position that section 41 is clear in its scope and application. The provision empowers the Commission to bring proceedings seeking declaratory relief in relation to the human rights of any person or class of persons. It argues that the class of persons concerned in this case is made up of the unaccommodated IP applicants who sought protection in the State from 4 December 2023. In oral argument it was asserted that this class comprised the 2,807 persons who, between 4 December 2023 and 10 May 2024, were entitled to be made an offer of accommodation but who were neither offered accommodation nor provided with

sufficient resources to do so. It was said that, as of 10 May 2024, there were 1,715 IP applicants still awaiting an offer of accommodation.

12. As such, the class of persons on whose behalf declarations are sought is defined by the following characteristics:

a. First, they are IP applicants who presented between 4 December 2023 and 10 May 2024;

b. Second, they are persons who were entitled to an offer of accommodation but who did not receive such an offer;

c. Third, the overall size of the class is 2,807 persons, of whom, on 10 May 2024, 1,715 persons were still awaiting an offer of accommodation.

13. In summary, the State arguments in respect of the interpretation of section 41 of the 2014 Act were as follows:

14. First, the State argues that the Commission cannot make its case by reference to the provisions of the EU Directive and Regulations. This, according to the State, is because the reference to "*human rights*" in section 41 is restricted to rights flowing from the specific instruments or classes of instrument identified in the specific definition of "*human rights*" utilised in Part 3 of the 2014 Act, and that the definition does not encompass rights in secondary legislation. That argument was not necessarily fatal to the claims sought to be made, but, it was said, significantly restricts the scope of the arguments that can be made.

15. Second, the State argues that when the Commission seeks to bring proceedings on behalf of a class the individual members of the class must be identified.

16. Third, and this is related to the contention that the individual members of the class must be identified, the State argues that where the Commission brings proceedings on behalf of a class of persons, the Commission must obtain the consent of all members of the class to the bringing of the action.

17. Fourth, as a general proposition the State argues that the Commission has misinterpreted section 41, when it is seen in the context of Part 3 of the 2014 Act. On this argument, the State contends that section 41 provides for a particular form of representative action but cannot be utilised to bring about a form of roving or general inquiry into a particular issue. It is argued that the 2014 Act makes separate provision for the Commission to carry out inquiries into systemic human rights issues, and that this provides an important context to inform the interpretation of the powers set out in section 41.

18. For the reasons set out in this judgment I have concluded that the State is incorrect in its approach to the interpretation of section 41 of the 2014 Act, save to the extent that the narrower approach to the definition of "*human rights*" is correct. As a result, the court is satisfied that the Commission was entitled to bring this action. For the purposes of section 41 of the 2014 Act, there was no need to identify each individual member of the class of persons concerned in the action, or to obtain consent from each member. In addition, the State is incorrect in asserting that the general scheme of Part 3 of the 2014 Act precludes the Commission from bringing an action that arises from an asserted

systemic failure to comply with human rights obligations. However, the court is equally satisfied that while the section 41 power permits the Commission to bring an action concerning the rights of third parties, and thus alters the usual rules on standing, the Commission like any other litigant must satisfy the court that there is a live dispute and prove their case in the ordinary way. The section 41 power is not a vehicle to seek advisory opinions from the court or to have hypothetical cases resolved.

19. Having found that the proceedings are properly formulated, I then address the substantive arguments. In that regard, as explained below, the court finds that the approach adopted by the State breached the human rights of the relevant unaccommodated IP applicants. By failing to meet their basic needs and leaving unaccommodated IP applicants without accommodation or the means to access accommodation, the State has breached the rights of those persons as provided for in Article 1 of the Charter of Fundamental Rights of the European Union ("*the Charter*").

20. While the court is satisfied that declarations to that effect are warranted, the court will not grant the mandatory orders sought by the Commission. Very briefly, the court is not satisfied that there is a basis for concluding that the State will ignore its obligations. The State has made clear, and the court accepts, that it is making strenuous efforts to redress the situation. Moreover, in response to the decisions of the High Court in 2023, the State in fact altered its approach by taking steps to improve the provision for unaccommodated IP applicants. While those steps were not sufficient to avoid a breach of the rights of those applicants, it demonstrated that the State did not intend to ignore the court orders. In the premises, it is not appropriate for the court to take the very

serious additional step of making mandatory orders to support the declaratory relief sought by the Commission.

THE PROCEEDINGS

21. I will address the substantive evidence and issues later in this judgment; however it is worth noting at this point the basic structure of the proceedings.

22. On 21 December 2023, the High Court (Hyland J.) granted the applicant leave to apply by way of an application for judicial review for the reliefs set forth at paragraph 4(1)-(9) in the Statement of Grounds, on the grounds set forth at paragraph 5 therein. In the Statement of Grounds, the Commission seeks the following relief:-

(1) A declaration that the respondents' failure to provide for the basic needs of newly arrived international protection applicants since in or around 4 December 2023, whether by way of the provision of accommodation, shelter, food and basic hygiene facilities or otherwise, is in breach of the Charter of Fundamental Rights of the European Union, and in particular Articles 1 and/or 3 and/or 4 and/or 7 thereof, the State's obligations under the European Convention of Human Rights and in particular Article 3 and/or 8 thereof (as given further effect through the European Convention on Human Rights Act 2003) and/or the Constitution of Ireland, in particular Article 40.3 thereof;

(2) A declaration that the respondents' failure to provide accommodation to newly arrived international protection applicants since in or around 4 December 2023 is in breach of the Charter of Fundamental Rights of the European Union, and in particular Articles 1 and/or 3 and/or 4 and/or 7 thereof, the State's obligations under the European Convention of Human Rights and in particular Article 3

and/or 8 thereof (as given further effect through the European Convention on Human Rights Act 2003) and/or the Constitution of Ireland, in particular Article 40.3 thereof;

(3) Further, or in the alternative, a declaration that the respondents' failure to provide accommodation to newly arrived international protection applicants since in or around 4 December 2023 is in breach of the European Communities (Reception Conditions) Regulations 2018 (SI No. 230 of 2018) and/or the Reception Conditions Directive (Recast) (Directive 2013/33/EU);

(4) A declaration that the respondents' failure to provide financial assistance to newly arrived international protection applicants who are unaccommodated since in or around 4 December 2023 that is sufficient to ensure a standard of living adequate for the health and dignity of those applicants and capable of ensuring their subsistence and/or otherwise to meet their basic needs is in breach of the Charter of Fundamental Rights of the European Union, and in particular Articles 1 and/or 3 and/or 4 and/or 7 thereof, the State's obligations under the European Convention of Human Rights and in particular Article 3 and/or 8 thereof and (as given further effect through the European Convention on Human Rights Act 2003) and/or Article 40.3 of the Constitution of Ireland;

(5) Further, or in the alternative, a declaration that the respondents' failure to provide financial assistance to newly arrived international protection applicants who are unaccommodated since in or around December 2023 that is sufficient to ensure a standard of living adequate for the health and dignity of those applicants and capable of ensuring their subsistence, and/or otherwise to meet their basic needs, is in breach of the European Communities (Reception Conditions) Regulations 2018 and/or Directive 2013/33/EU.

23. In addition to the declaratory relief sought by the applicant, various formulations of orders of *mandamus* are sought, effectively directed towards requiring the respondents to meet the basic needs of newly arrived international protection applicants who are unaccommodated.

24. The State respondents delivered opposition papers on 26 March 2024, in which the State raised a number of preliminary issues as well as opposing the relief on substantive grounds.. As mentioned, the State contended that the statutory entitlement provided for in section 41 of the 2014 Act has not been properly invoked in this case by the Commission. With regard to the substantive issues, the State accepts that the cohort of IP applicants who could not be offered accommodation in late 2023 was confined to single male adults. The respondents contend that, in addition to the increase of €75 per week in the daily expenses allowance payment for international protection applicants who were not offered accommodation immediately, further additional provision was made for individuals. That provision included a supermarket voucher in the amount of €100; arrangements with charities and NGOs to ensure that drop-in day services were available to all IP applicants who have not been offered accommodation; and the provision of information and an automated response to any email to the IPAS email address which sets out contact details along with other details for various support services.

25. With regard to the increase to the DEA payment of €75, it was stated that the level of weekly payment is greater than equivalent payments to international protection applicants who are not immediately offered State accommodation in other European

Union Member States. The respondents contend that they are seeking to respond to a growing number of people seeking international protection in the context of a very diminished supply of available accommodation across the State. They claim they are affected by unforeseen and extraordinary circumstances and that active steps are being taken to free up accommodation and to bring additional properties into use. For those substantive reasons, and without prejudice to the procedural arguments, the State say that there has been no breach of human rights and that the court should not grant declaratory or other relief.

26. Each party adduced a very large volume of evidence in the form of affidavits and multiple exhibits. I will address the evidence in more detail below. Before doing so, it is necessary to address the preliminary issues raised by the State.

THE PRELIMINARY ISSUES REGARDING THE 2014 ACT

27. In *Heather Hill Management Company CLG & McGoldrick v. An Bord Pleanála & Ors* [2022] IESC 43, the Supreme Court provided a detailed account of the proper approach to statutory interpretation. That approach was summarised by Murray J. in *A, B and C (A Minor Suing by his Next Friend, A) v. The Minister for Foreign Affairs and Trade* [2023] IESC 10, at para. 73 as follows:

> "*In answering these questions, it is to be remembered that the cases – considered most recently in the decision of this court in Heather Hill Management Company CLG and anor v. An Bord Pleanála [2022] IESC 43, [2022] 2 ILRM 313 – have put beyond doubt that language, context and purpose are potentially in play in every exercise in statutory interpretation, none ever operating to the exclusion of the other. The starting point in the construction of*

a statute is the language used in the provision under consideration, but the words used in that section must still be construed having regard to the relationship of the provision in question to the statute as a whole, the location of the statute in the legal context in which it was enacted, and the connection between those words, the whole Act, that context, and the discernible objective of the statute. The court must thus ascertain the meaning of the section by reference to its language, place, function and context, the plain and ordinary meaning of the language being the predominant factor in identifying the effect of the provision but the others always being potentially relevant to elucidating, expanding, contracting or contextualising the apparent meaning of those words."

28. Hence, in seeking to understand the proper meaning and scope of section 41, the plain and ordinary meaning is central, but it must be considered in its proper context within the Act of 2014.

29. Each side drew attention to provisions within the 2014 Act, and I consider that the following matters are of assistance in understanding the meaning and effect of section 41.

30. Section 2 provides a number of definitions that are common to all parts of the Act of 2014. In that regard, as observed by the State, "*enactment*" means a statute, or an instrument made under a power conferred by statute. Clearly, the Regulations fall within this definition. It can be noted, the words "*person*" or "*class of persons*" are not defined in the Act. The Act also provides two different definitions of "*human rights*",

with a narrower definition applicable to matters addressed in Part 3 of the Act, which is where section 41 is found.

31. The Commission was established by section 9 of the 2014 Act, and, subject to the provisions of the Act, is to be independent in the performance of its functions. In performing those functions, the Commission shall have regard to and be guided by best international practice applicable to national human rights institutions and to equality bodies.

32. The Commission is empowered with a significant range of functions, and these functions are set out in section 10 of the 2014 Act. The range of functions provides important context for the interpretation of section 41. The first function identified by the Oireachtas is "*to protect and promote human rights and equality*" (section 10(1)(a)). The range of functions extends from what could be described as advocacy and public information elements to specific extensive powers. The more particular powers – all of which are to be exercised independently – include reviewing the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality; carrying out examinations of legislative proposals and reporting its views on any implications for human rights or equality; and, making recommendations to the Government in relation to measures which the Commission considers could be taken to strengthen, protect and uphold human rights and equality in the State.

33. The Commission is empowered by section 10(2)(e) to apply to the Superior Courts as *amicus curiae* in proceedings before those courts that involve or are concerned with human rights or equality. In addition, section 10(2)(g) identifies one of the functions

as: "*where it sees fit, to institute proceedings under section 41 …*". It can be noted that while the Commission has the power to apply to the Superior Courts to appear as an *amicus curiae* in proceedings that are concerned with human rights or equality rights, the courts concerned have an absolute discretion to grant such an application. No such qualification applies in relation to applications pursuant to section 41.

34. The State contended that section 10(2)(g) of the 2014 Act simply reiterates the power provided for in section 41, and that the decision to be taken is one for the Commission. This seems correct so far as it goes, but I am not persuaded that the provision merely reiterates the section 41 power. I consider that section 10(2)(g) of the 2014 Act also emphasises that the decision to institute the proceedings is solely for the Commission, which somewhat militates against the proposition that the Commission may only institute proceedings with the consent of the members of the class under consideration.

35. Before considering some of the specific powers given to the Commission by Part 3 of the 2014 Act, I am satisfied that the extensive range of functions set out in section 10 of the 2014 Act serve to emphasise that the Commission is tasked to discharge what could be described euphemistically as the functions of a watchdog.

36. At the risk of stating the obvious, the promotion and protection of human rights generally involves a tension between the State and individuals. In a modern State committed to the rule of law, blatant or deliberate violations of individual human rights are thankfully rare. However, often, as has occurred in this case, there is scope for dispute where there are tensions between the vindication of individual rights and the practical exigencies faced by the State, with the result that allegations of breaches will

arise. Those disputes often will involve a significant disparity in power and resources. Particularly in the case of persons seeking international protection, their experiences may lead to a concern that speaking out individually may lead to official repercussions, even when that does not reflect the approach of the authorities in this State to persons seeking to vindicate their rights. Ensuring that an independent statutory body is empowered to carry out oversight functions emphasises a commitment on the part of the State to the rule of law and respect for human rights.

37. Accordingly, I consider that the description of the general functions of the Commission certainly cannot be treated as giving rise to the implication that the specific power in section 41 requires to be interpreted in a narrow or restricted way. The power conferred on the Commission fundamentally is a power to address and ameliorate perceived breaches of human rights concerning an often extremely vulnerable class of person. As such, it calls for a reasonably broad interpretation.

38. In considering the precise scope and meaning of the Part 3 powers, it is necessary to consider the very clear differences between the general definition of "*human rights*" and the specific definition that applies in Part 3. The primary definition, which applies other than in connection with Part 3 of the 2014 Act, defines "*human rights*" as meaning-

> "*(a) the rights, liberties and freedoms conferred on, or guaranteed to, persons by the Constitution,*
>
> *(b) the rights, liberties or freedoms conferred on, or guaranteed to, persons by any agreement, treaty or convention to which the State is a party, and*

(c) without prejudice to the generality of paragraphs (a) and (b), the rights liberties and freedoms that may reasonably be inferred as being-

(a) inherent in persons as human beings, and

(b) necessary to enable each person to live with dignity and participate in the economic, social or cultural life in the State;"

39. Part 3 of the 2014 Act concerns "*Enforcement and Compliance*". For the purposes of Part 3, a more restricted definition of "*human rights*" applies. I have underlined the points where the definition is more narrow or focused than in the general definition:

" "*human rights" means-*

(a) the rights, liberties and freedoms conferred on or guaranteed to, persons by the Constitution,

(b) the rights, liberties or freedoms conferred on, or guaranteed to, persons by any agreement, treaty or convention to which the State is a party and which has been given the force of law in the State or by a provision of any such agreement, treaty or convention which has been given such force, and,

(c) the rights, liberties and freedoms conferred on, or guaranteed to, persons by the Convention provisions within the meaning of the European Convention on Human Rights Act 2003."

40. Hence, in a very general way, it can be seen that for the purposes of Part 3, the definition of human rights narrows to encompass rights that in a broad sense are seen as clearly identifiable and justiciable, and which are set out in what were described by the State as "*foundational*" instruments.

41. In the initial provisions of Part 3, the Commission is provided with relatively broad powers to review the effectiveness of enactments relating to human rights and equality. Such reviews can give rise to recommendations on the working or effect of such enactments. In addition, the Commission is empowered to prepare codes of practice in furtherance, *inter alia*, of the protection of human rights, which in turn can be adopted by the Minister and, if so, the codes will become admissible in proceedings.

42. As part of its arguments regarding the proper interpretation of section 41 of the 2014 Act, the State placed particular emphasis on the powers provided for in section 35. Section 35 is concerned with inquiries, and as highlighted by the State, appears to be concerned, *inter alia*, with systemic difficulties. Hence by section 35(1), the Commission may, either of its own volition or if requested by the Minister, conduct an inquiry if it is considered by the Commission that:

> "*(a) there is, in any body (whether public or otherwise) institution, sector of society, or geographical area, evidence of—*
>
> *(a) a serious violation of human rights or equality of treatment obligations in respect of a person or a class of persons, or*
>
> *(b) a systemic failure to comply with human rights or equality of treatment obligations,*
>
> *and*
>
> *(b) the matter is of grave public concern, and*
>
> *(c) it is in the circumstances necessary and appropriate to do so*."

43. Schedule 2 to the 2014 Act sets out the basic guidelines for the carrying out of inquiries pursuant to section 35, and sets out to ensure in broad terms that any inquiry is conducted in accordance with fair procedures. Schedule 2 in many respects reflects the type of procedures associated with commissions of inquiry or other statutory inquiries, and it would be fair to observe that what is contemplated is likely to be lengthy and time consuming. That apprehension is reinforced by a consideration of what is to occur following the carrying out of an inquiry.

44. Where such an inquiry has been conducted and the Commission is satisfied, *inter alia*, that any person has violated or is violating human rights, the Commission may serve a compliance notice on the person (section 36(1)). Before a compliance notice is served, the 2014 Act provides for an advance notice of a proposal to serve a compliance notice to be given to the person concerned and sets the periods within which parties can make representations to the Commission in respect of the advance notice. Once finalised, a compliance notice can be appealed within specified periods to the District Court, and, if the District Court confirms a compliance notice, the affected party has a further 42 days to appeal such a confirmation to the Circuit Court. Finally, there is a further provision for an appeal to the High Court on a point of law.

45. It would be fair to say, that there is every likelihood that a relatively extensive period of time will elapse between the commencement of an inquiry by the Commission and the final confirmation of a compliance notice.

46. The State is correct to observe that both section 35 and section 41 can involve a consideration of human rights violations in respect of a person or class of person. It is

also true that section 35 refers to inquiries into "*systemic failures to comply with human rights ... obligations*". However, I am not persuaded that section 35 is intended to provide the *only* mechanism for the Commission to address systemic failures to comply with human rights obligations as they affect persons or a class of person. There is nothing in the language of either section that supports the contention that section 41 may not be utilised by the Commission where the matter concerning the human rights of the person or class concerned could be framed as deriving from a systemic failure to comply with human rights. As observed, the section 35 inquiry process inevitably will be time consuming. On the other hand, the availability of recourse to the courts often can give rise to a speedier process and a definitive legal resolution. Moreover, the language used by the Oireachtas in both sections makes clear that in each situation the Commission has a discretion to institute proceedings or commence an inquiry.

47. The fact that the Commission is provided with a series of mechanisms to bring about compliance by a public body with human rights obligations, each of which may be exercised at its discretion, strongly suggests an intention that it is a matter for the Commission to choose the mechanism that best suits the situation in question. If anything, the commencement of an inquiry is subject to more strictures and a more exacting standard.

48. Section 40 of the 2014 Act permits a person (but not, or at least not expressly, a class of persons) to apply to the Commission for assistance in relation to proceedings, including legal proceedings involving law or practice relating to the protection of human rights, which that person wishes to institute. The Commission has a broad discretion whether or not to accede to such an application, and assistance can be

provided in a variety of ways including the provision of legal advice or the provision of legal representation. In the past, the Commission has provided assistance to IP applicants who have sought to bring proceedings in relation to material reception conditions. It is important to observe that where the Commission provides assistance under section 40, this does not result in the Commission taking over the proceedings or replacing the person as applicant or plaintiff. In many respects the provision can be seen as conferring the power on the Commission to utilise its funding for that purpose, and avoiding any legal argument that may arise in principle regarding third party funding of litigation.

49. Again, save for the potential difference that the legal proceedings concerned in a section 40 application for assistance do not appear to encompass proceedings by a class of persons, the court is not persuaded that the provision assists the broader State arguments about the meaning and scope of the section 41 power. The Oireachtas has provided the Commission with a range of mechanisms to ensure compliance with human rights obligations and discretion as to which mechanism is appropriate; and section 40 is one such mechanism to achieve its objectives.

50. Section 41 of the 2014 act provides as follows:-

> "*41. (1) The Commission may institute proceedings in any court of competent jurisdiction for the purpose of obtaining relief of a declaratory or other nature in respect of any matter concerning the human rights of any person or class of persons.*
>
> *(2) The declaratory relief the Commission may seek to obtain in such proceedings includes relief by way of a declaration that an enactment or a*

provision thereof is invalid having regard to the provisions of the Constitution or was not continued in force by Article 50 of the Constitution."

51. As noted above, the term "*class of person*" is not defined in the 2014 Act, although it is also used in section 35(1)(a) of the Act. The Commission argues that the meaning and effect of section 41 is apparent from the plain meaning of the language used. The Commission argued that the provision is clear and straightforward. The State contends that the provision must be read in connection with the overall Act and in particular Part 3. As I have set out above, I do not consider that the State is correct in its general argument, which was that the provision did not envisage proceedings being brought in respect of matters which could be described as systemic, and which on that argument were more appropriate as the subject matter of an inquiry under section 35.

52. The ordinary meaning of the words used in section 41 certainly supports the approach adopted by the Commission. The Oireachtas has provided the Commission with a discretion to institute proceedings in respect of any matter concerning the human rights of any person or class of persons, and the proceedings can be brought for the purpose of obtaining relief of *a declaratory or other nature*.

53. I should note that there was no argument about the precise meaning of the term "*relief of a declaratory or other nature*", and specifically whether that term includes relief in the form of *mandamus*. I will proceed on the basis that the provision permits the Commission to seek *mandamus*, while noting that the court did not hear argument on that issue and that therefore the determination of that particular issue will have to be resolved, if necessary, in another action.

54. Here, the Commission argues that it instituted proceedings, the relief sought is in the form of declaratory and mandatory orders, and that the relief is in respect of a matter concerning the human rights of a class of persons.

55. By way of brief repetition, the State made three additional specific arguments. I will address the arguments on the implications of the Part 3 definition of "*human rights*" below. The remaining two State arguments were that if the Commission commenced proceedings in respect of matters concerning the human rights of the class of persons it was necessary (a) to identify all the individuals that fell within the class, and (b) to obtain the prior consent of all such individuals before the proceedings were commenced. It was argued that these matters amounted to a fatal difficulty with the Commission's case.

56. The following initial matters can be observed:

a. First, there is no express provision in section 41 of the 2014 Act or elsewhere in the statute that imposes the requirements pressed for by the State.

b. Second, the provision refers to proceedings brought in a matter concerning the human rights of "*any*" person. The use of the word "*any*" is significant, in my view. It does not suggest that the power may only be exercised where a specific person has consented to the relief being sought in a matter that concerns them; albeit that there will be practical issues of proof in seeking to agitate proceedings concerning a person who is not agreeable to that course of action.

c. Third, section 41 is not framed as a form of representative action: the proceedings are instituted to seek relief in respect of any matter *concerning* the

human rights of any person or class of person. The proceedings are brought by the Commission, and, if granted, the declaration is obtained by the Commission. As drafted, a section 41 action is not brought *on behalf of* the person or class of person. As such, the phrasing of the provision is not the same as one providing for a class action, as that concept is ordinarily understood. In such an action, proceedings are brought by a member of a class of persons on behalf of himself or herself and the members of the class. Here, the provision seems to contemplate an action *about* a class of persons but not *on behalf* of the class of persons.

d. Fourth, it is necessary to consider what the word "*class*" actually describes. In some legal scenarios the word "*class*" can describe a number of persons who have the same interest in one cause or matter; for instance, as provided for in Order 15, rule 9 of the Rules of the Superior Courts ("*RSC*"). In other scenarios, the word refers to persons who share a common characteristic. In this case, it seems to me that for a person to fall within the class of persons contemplated by section 41, they must share sufficient characteristics so that a declaration in respect of the matter concerning their human rights will apply with equal force and coherence to their particular circumstances. Put another way, it would seem that their circumstances vis-à-vis the matter concerning their human rights should be considered as capable of being treated largely interchangeably. Prima facie, and subject to satisfactory proof of the factual issues, in a general sense individual unaccommodated IP applicants within a specified timeframe would seem capable of meeting that definition.

57. Against that backdrop, the questions are, first, whether the State is correct that each individual member of the class should be identified, and second, that there should be evidence that they consented to the bringing of the proceedings.

58. In terms of the need to identify the specific members of any class of persons, the State argues that the provision must be understood in the context of a number of existing well established legal principles.

59. The State highlighted that at the level of principle the courts generally do not provide advisory opinions. That principle is exemplified by the approach adopted by the Supreme Court to mootness, in well known cases such as *Lofinmakin & ors v. Minister for Justice & ors* [2013] IESC 49; [2013] 4 IR 274, where it has been made clear that the courts will not give advisory opinions or opinions that are purely hypothetical or abstract. That principle derives from the adversarial nature of the system of justice in the State, and means that legal disputes are resolved within a framework of the evidence in a live dispute. At a higher level of principle, the concept also reflects the separation of powers and the need to ensure that the judicial branch maintains the functioning of the justice system within proper checks: in effect, for very good reasons, the judicial branch is not charged with providing advisory opinions or deciding on issues of policy, which are matters within the remit of other branches.

60. I agree that the matters identified by the State are weighty and important. If the Oireachtas intended that the courts were to provide advisory opinion or address issues of policy untethered from a properly grounded live legal dispute this would be so unusual that one would expect that intention to be expressed in very clear terms.

However, I am not persuaded that, properly interpreted, section 41 of the 2014 Act sets out to effect any such radical change to the law, or that a failure to identify each member of a class converts a section 41 action into a form of hypothetical action.

61. It can be noted that, in *Lofinmakin,* the Supreme Court, when addressing the policy reasons why decisions generally should not be made in cases that were moot, noted at paragraph 28:-

> "*This policy stems from and is directly related to the system of law within which our courts discharge their essential function of administering justice. Apart from any special jurisdiction conferred by statute, by the Constitution, or resulting from our membership of the European Union, the system in question is fully adversarial*."

62. Accordingly, there may be cases where the ordinary adversarial approach will not apply, including cases provided for by a special jurisdiction conferred by statute. Moreover, the courts have a discretion, even in moot cases, to answer the questions in a case. Often this is where the legal issues remain live and where there are systemic issues of importance; see, for instance, *CFA v. PMcD & Others* [2024] IESC 6.

63. However, I do not understand or interpret section 41 of the 2014 Act as providing a jurisdiction to give advisory opinions, and that is not what has been sought by the Commission in this case. The provision, as I read it, does not permit proceedings to be brought in the abstract. The provision clearly provides for proceedings seeking relief in respect of *any matter* concerning the human rights of a person or class of person. The

word "*matter*" should be understood as referring to a proper legal controversy that can be resolved according to the ordinary rules and procedures in adversarial proceedings.

64. The difficulty with the State's argument on this point can be illustrated by noting that the State accepted that the Commission could have brought proceedings under section 41 of the 2014 Act if the class of persons was restricted to the individual IP applicants who swore affidavits in these proceedings. Likewise, it can be noted that proceedings can also be brought by the Commission in relation to *any person*. There is nothing in the statute to suggest that the Commission could bring proceedings about an identified individual where the proceedings did not seek to resolve a properly grounded legal dispute, but instead sought to agitate a purely abstract legal issue.

65. The question then is whether, and, if so how, a failure to identify each member of the class individually can operate as a bar to the Commission seeking declaratory or other relief from the point of view of the interpretation of the statute. It seems to me that the State is eliding the issue of the identification of members of a class with the issue of the need for a case to have a proper foundation, both legally and evidentially. Independently and quite separately from any question of statutory interpretation, a case seeking a declaration concerning the human rights of a class of persons will face a fundamental difficulty if it does not seek to have the court adjudicate on a legal question that is not grounded in a live dispute and where it is not anchored to proper evidence. That would certainly give rise to a real risk of the court engaging in a process of stepping outside its proper boundaries. That difficulty would not be a function of a failure to identify every individual member of the class, so long as the class of persons is capable of precise description: it would be a function of the court being asked to

provide a purely advisory opinion. That difficulty is resolved where, as in this case, the court is satisfied that the matters in issue are ongoing and not resolved, and where there is sufficient evidence of the factual situation, including direct affidavit evidence from an appropriate representative sample of the affected members of the class.

66. Finally in this regard, and this is a point returned to below in the context of the evidence in the case, it must be observed that the argument made by the State is somewhat artificial. In this case the State is, or certainly ought to be, aware of the identity of each member of the class of persons involved in this case. The Commission has argued that the definition of the class is clear: those IP applicants who presented to the State seeking protection between 4 December 2023 and 10 May 2024 and who were not provided with accommodation by the State. The Commission has stated that the number of persons falling within this class can be set with precision – an overall total of 2,807 persons who were not offered accommodation within that period, and 1,715 persons who had not been offered accommodation by 10 May 2024.

67. These are judicial review proceedings seeking relief against the State. While the State is not obliged to prove the applicant's case, it is expected to assist the court in the resolution of the issues by, as the phrase goes, *playing its cards face up on the table*.

68. In this case, it is indisputable that once a person presents to the State seeking international protection they are registered, and the State is aware of their presence in the State and their identity. Likewise, the State is aware of the identity of those persons within that category who have been accommodated and therefore the persons who have yet to be accommodated. Accordingly, while the court cannot rule out that a perfectly

legitimate objection may be made in other cases that the "*class of persons*" is so ill defined or amorphous that a court either should not entertain an action or as a matter of discretion refuse relief, that is not an argument that can be available in this case.

69. The second point made by the State is that the case is not properly brought under section 41 because consent has not been obtained from every member of the class. In that regard, the State draws on the existing law relating to the bringing of representative actions and submits that the Oireachtas could not have intended to introduce a form of representative action that permitted proceedings to be brought without the consent of those on whose behalf relief is sought.

70. The short answer to that argument is that section 41 does *not* provide for a form of representative action as that concept ordinarily is understood. Instead, as I have described above, the proceedings are brought by the Commission *about* but not *on behalf of* the class of unaccommodated IP applicants who presented to the State between 4 December 2023 and 10 May 2024.

71. The State makes its argument by analogy with the caselaw concerning O.15, r.9 of the RSC, and contends that the Oireachtas could not be understood as intending to introduce a variation to the ordinary rules regarding representative actions without making the position fully clear. That rule provides that:

> *"9. Where there are numerous persons having the same interest in one cause or matter, one or more such persons may sue or be sued, or may be authorised by the Court to defend, in such cause or matter, on behalf, or for the benefit, of all persons so interested."*

72. Hyland J. recently considered O.15, r.9 RSC in *Grace v. Hendrick and Garvey* [2021] IEHC 320. That was a case in which the plaintiff sought damages for personal injuries caused by alleged assaults between 1979 to 1984 perpetrated by the first defendant, a member of the Congregation of Christian Brothers. It was alleged that the second defendant, the European Province leader of the Congregation of Christian Brothers was negligent and in breach of duty. An issue had arisen by what was stated to be a failure of the second defendant to disclose the names of the members of the Congregation who were currently alive and who were members of the Congregation at the time when the alleged assaults occurred. A motion was brought seeking to compel the second defendant to provide that information or alternatively to direct the second defendant to defend the proceedings on behalf of all members of the Congregation that fell within the specified category. The second defendant refused to provide the names that had been requested and he did not consent to act as a representative defendant for the Congregation.

73. Hyland J. considered the terms of O.15, r.9 of the RSC and was satisfied that the rule was permissive rather than mandatory. The Court found that the rule could not be interpreted as meaning that the court could order an unwilling defendant to act in a representative capacity on behalf of other unnamed or unidentified defendants.

74. However, it is important to note the differences between O.15, r.9 of the RSC and section 41 of the 2014 Act. In the first instance the rule seems clearly directed to a situation in which there are numerous persons having the same interest in a cause or matter, and it permits one or more of that class to be authorised to sue or be sued on

behalf of all persons so interested. Second, certainly in *Grace*, there was a difficulty that what was being sought was an order directing the second defendant to defend the proceedings on behalf of persons who were not identified or who were not consenting to that course of action. The effect of such an order would be to bind those unidentified and non-consenting parties to any result in an action for damages. In this case, if the orders sought are granted, they will be granted to an identified party and against an identified party; there is no requirement for the court to authorise any party to represent any other party in the proceedings.

75. I am not persuaded that the case law on O.15, r.9 of the RSC advances an understanding of the meaning of section 41 of the 2014 Act or suggests that a requirement for identification or consent should be read into section 41. As noted above, the fundamental difference is that the action brought under section 41 is not a form of representative action. Section 41 provides for a novel and unusual form of action in which the Commission – an independent body with express functions to promote and seek to bring about compliance with human rights obligations in the State – has an express statutory entitlement to commence proceedings as applicant or plaintiff in which the relief sought relates to the rights of third parties. In that regard I interpret section 41 of the 2014 Act as being predominantly directed to a question of standing rather than towards representation.

76. In addition, neither of the principal provisions that refer to actions taken concerning the human rights of a class of persons - inquiries under section 35 or actions under section 41 - have an express requirement for such identification or consent. The practical

challenge for the Commission is to ensure that the relief is sought in the context of a live dispute and properly grounded in evidence.

77. There is no obvious absurdity or particular incongruity in the Oireachtas giving the Commission a standing to bring proceedings seeking declaratory relief about the human rights of a class of person, even if the individual members are not identified so long as the class is capable of precise description.

78. Consent does not seem to be a prerequisite because the orders sought will not bind or lead to any potential adverse consequences (such as costs) for the members of the class. The members of the class are not parties to the action, they are the subject of the action.

79. The class of person whose rights may be in issue in an action of that type often, but not always, will be a vulnerable category of person who may not have the resources to bring proceedings individually. Further, even if such a fear was not founded objectively, it is perfectly understandable that members of a vulnerable class of person whose human rights are considered to be adversely affected by the actions of public bodies may well have a subjective apprehension that taking personal proceedings could lead to adverse consequences for them individually. Viewed in that way, the power afforded to the Commission is a valuable mechanism to ensure that live issues concerning human rights can be litigated.

The effect of the definition of "human rights" in Part 3

80. In this regard, I agree with the basic argument of the State. There is an unequivocal basis for concluding that the Oireachtas intended the scope of an action under section

41 to concern itself with the narrow definition of "*human rights*" specific to Part 3 of the 2014 Act. Further, that definition must be understood not only by reference to its own language but also to the language of the more general definition.

81. Accordingly, I am satisfied that where the Commission brings an action under section 41 of the 2014 Act in respect of a matter concerning the human rights of a person or class of person, the human rights in question must be those in the Part 3 definition.

82. As discussed above, the difference between the two definitions can be found in the second and third section of each definition. In each case, the definition includes rights derived from the Constitution. The second element in the definition, put generally, refers to rights derived from treaties and international instruments to which the State is a party. In the third part of the general definition found in section 2 of the 2014 Act, "*human rights*" is deemed to mean: -

> "*(c) without prejudice to the generality of paragraphs (a) and (b), the rights liberties and freedoms that may reasonably be inferred as being—*
>
> *(a) inherent in persons as human beings, and*
>
> *(b) necessary to enable each person to live with dignity and participate in the economic, social or cultural life in the state;"*

83. In Part 3, the rights derived from international agreements and treaties is narrowed by including those treaties which have *been given the force of law in the state or by a provision of any such agreement, treaty or convention which has been given such force*. Therefore, the provisions that can be the subject of actions by the Commission in effect are those that ordinarily can be the subject of actions brought by persons in the State,

given the general proposition that individuals are not entitled to litigate provisions in international agreements which have not been given the force of law in the State. Thus, the definition in effect reflects the orthodox and well established propositions that, for instance, prevented litigants from relying directly on provisions in the European Convention on Human Rights, or other international conventions or treaties to which the State was a party but which had not been given the force of law in the State.

84. The third element in the Part 3 definition of "*human rights*" refers to:

> "*(c) the rights, liberties and freedoms conferred on, or guaranteed to, persons by the Convention provisions within the meaning of the European Convention on Human Rights Act 2003."*

85. That definition can be contrasted with the very broad and somewhat open-ended third element in the general definition, and adds to the understanding that what can be litigated in a section 41 action are only rights that are derived from foundational instruments that have the force of law in the State. A section 41 action could not be grounded therefore on claims based on provisions in instruments to which the State is a party but which have not been incorporated into the law of the State, and certainly could not be grounded on rights of the type described in subsection (c) of the general definition.

86. As noted above, the State argued that the effect of the narrower definition in Part 3 was to rule out any direct reliance on rights that are found in an enactment. On that argument, the Commission had to go further than simply contend, as the applicants in previous cases on material reception conditions had done, that the State was not

complying with the mandatory requirements in the Directive and the Regulations. Aside from any question of proof of the necessary facts, the Commission was required to show that the Part 3 defined "human rights" of the class of persons had been breached. I agree. It is very clear that the Oireachtas intended that actions brought using the section 41 power cannot succeed merely by proving that the respondent in a case failed to comply with statutory provisions.

87. The Commission takes the view that their case is rooted firmly in an assertion that their allegation that the State has failed to provide material reception conditions is an assertion that the State has breached the rights of the class of unaccommodated IP applicants conferred by Article 1 of the Charter of Fundamental Rights of the European Union, and with slightly less emphasis the rights under Articles 3, 4 and 7. That argument was made without resiling from the arguments about breaches of Constitutional or Convention rights. The Commission argues that the minimum mandatory standards set out in the Directive and transposed by the Regulations are expressly intended, as set out in recital 35 of the Directive, "*to ensure full respect for human dignity and to promote the application of Articles 1, 4, 6, 7, 18, 21, 24 and 47 of the Charter and has to be implemented accordingly.*" In that way, there is a form of symbiotic relationship between the Directive provisions and the rights provided for under the Charter.

88. I am satisfied that the Commission cannot obtain a declaration that the State has breached the terms of the Regulations *simpliciter* in an action under section 41 of the 2014 Act. However, that does not make the Regulations or Directive irrelevant. I am satisfied that, at the level of principle, the Commission is entitled to adduce evidence

of such a breach as part of an action seeking to prove that the State breached the human rights – described in the foundational documents set out in the Part 3 definition – of unaccommodated IP applicants. Proof that the State is breaching statutory provisions that are intended to give effect to basic or foundational human rights will go some distance to proving a breach of those basic or foundational human rights, but in and of itself is not necessarily proof of a breach of Article 1 of the Charter. Specifically, if the evidence that establishes a breach of statutory rights can be shown to have the further effect of establishing a breach of human rights described in the foundational instruments, this will meet the test.

89. Hence, for the purposes of this part of the judgment, I am satisfied as to the following:

a. That the Commission is entitled to bring an action using section 41 of the 2014 Act seeking to prove that the State breached the human rights of unaccommodated IP applicants.

b. That the failure to identify each member of the class of persons concerning whom the action is brought is not necessary so long as the class is capable of precise definition.

c. Likewise, there is no obligation on the Commission to obtain the consent of the members of the class of persons who are the subject of the section 41 action. The action is not a form of representative action or class action. The action, if successful, can only lead to a judgment and orders that operate as between the Commission and the respondent in question.

d. The Commission cannot obtain relief to the effect simply that the respondent has breached a provision in an enactment. The relief must relate to an alleged

breach of a provision in one or more of the foundational instruments referred to in the definition of "*human rights*" in Part 3 of the 2014 Act.

e. However, that is not to say that breach of an enactment cannot be relied upon as part of the proof of an alleged breach of human rights.

f. The role of the court is not to provide an advisory judgment or to answer hypothetical questions. An action brought pursuant to section 41 of the 2014 Act is subject to the same requirements as any other proceedings (with necessary modifications for issues such as standing). There must be a live dispute and the case must be proved in the ordinary way.

90. I will now address the substantive arguments that are made by the parties. In this regard, it is necessary to consider the broader framework and background to the obligations on the State to IP applicants.

THE SUBSTANTIVE ISSUES – THE LEGAL BACKDROP

The Directive and domestic Regulations

91. The concept of material reception conditions is sourced in EU law. Both the Directive and Regulations have been the subject of recent scrutiny by the High Court, and I will consider those cases after highlighting the key provisions of each instrument.

92. The Directive makes clear that the provision of material reception conditions for applicants for international protection is a requirement derived from fundamental principles of human rights law. Recital 10 provides that with respect to the treatment of persons falling within the scope of the Directive, "*Member States are bound by*

obligations under instruments of international law to which they are party." This principle is expressed in recital 35 as follows:

> *"(35) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1, 4, 6, 7, 18, 21, 24 and 47 of the Charter and has to be implemented accordingly."*

93. Further recitals emphasise the need for applicants to be treated equally throughout the EU at all stages concerning applications for international protection (recital 8); and that the standard for the reception of all applicants is one "*that will suffice to ensure them a dignified standard of living and comparable living conditions in all Member States*" (recital 11).

94. Article 2 of the Directive defines "*reception conditions*" as meaning "*the full set of measures that Member States grant to applicants in accordance with this Directive*"; and "*material reception conditions*" are defined as meaning "*the reception conditions that include housing, food and clothing provided in kind, or as financial allowances or in vouchers, or a combination of the three, and a daily expenses allowance.*" Significantly, the concept of DEA, for the purposes of the Directive, is treated as a separate matter to the provision of housing, food and clothing.

95. Article 17 sets out general rules on material reception conditions and healthcare. Article 17(1) provides that Member States shall ensure that material reception conditions are available to applicants when they make their application for international protection.

Article 17(2) provides that Member States shall ensure that material reception conditions provide "*an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health*."

96. Article 18 deals with "*modalities*" for material reception conditions. The article provides that where housing is provided it should take one or a combination of the following forms:

> *"(a) premises used for the purpose of housing applicants during the examination of an application for international protection made at the border or in transit zones;*
>
> *(b) accommodation centres which guarantee an adequate standard of living;*
>
> *(c) private houses, flats, hotels or other premises adapted for housing applicants."*

97. Article 18(9) is critically important to this case. It addresses exceptional cases where housing capacity is temporarily exhausted:

> *"9. In duly justified cases, Member States may exceptionally set modalities for material reception conditions different from those provided for in this Article, for a reasonable period which shall be as short as possible, when:*
>
> *(a) ...*
>
> *(b) housing capacities normally available are temporarily exhausted.*
>
> *Such different conditions shall in any event cover basic needs."*

98. Hence, even in exceptional cases where housing capacity is temporarily exhausted, different conditions may be provided, but in that scenario the exceptional modalities shall be for as short a period as possible and must still *cover basic needs*. The Directive does not permit Member States not to provide for basic needs. It should be noted that the term "*basic needs*" is not defined in the Directive, but as set out below the essential elements that go to make up basic needs have been described by the CJEU in caselaw.

99. To further reinforce the emphasis on the need for the provision for IP applicants to achieve an adequate minimum standard, it is telling that even when material reception conditions are reduced or withdrawn due to specified conduct on the part of an applicant, Article 20(5) makes clear that Member States "*shall under all circumstances ensure access to health care in accordance with Article 19 and shall ensure a dignified standard of living for all applicants.*"

100. The primary domestic legal instrument to give effect to the Directive is the Regulations. The Regulations have been amended from time to time since 2018, but it does not appear that those amendments are material to the issues under consideration in this case.

101. "*Material reception conditions*" is defined as meaning "*the following provided to recipient for the purposes of compliance with the Directive-*

> *(a) the housing, food and associated benefits provided in kind,*
>
> *(b) the daily expenses allowance, and*
>
> *(c) clothing provided by way of financial allowance under section 201 of the Social Welfare Consolidation Act 2005*."

102. In the Regulations, "*daily expenses allowance*" is defined as meaning "*that part of the material reception conditions that constitutes a weekly payment made, under a scheme administered by the Minister for Employment Affairs and Social Protection, to a recipient in order for the recipient to meet incidental, personal expenses*" [emphasis added]

103. Again, in a similar way to the Directive, the Regulations treat DEA as separate to the provision of housing, and treats that payment as intended to be used for incidental, personal expenses.

104. Regulation 4 deals with the provision of material reception conditions. The basic principle articulated in Regulation 4(1) is that, subject to the Regulations, a recipient *shall be entitled* to receive the material reception conditions where he or she does not have sufficient means to have an adequate standard of living. The material reception conditions are predicated on the notion that they are to be made available at accommodation centres, or in certain situations at a reception centre.

105. Regulation 4(5) of the Regulations reflects Article 18(9) of the Directive and provides that:

> "*(5) The Minister may, exceptionally and subject to paragraph (6), provide the material reception conditions in a manner that is different to that provided for in these Regulations where—*
>
> *(a) an assessment of the recipient's specific needs is required to be carried out, or*

(b) the accommodation capacity normally available is temporarily exhausted.

(6) The provision of material reception conditions authorised by paragraph (5) shall—

(a) be for as short a period as possible, and

(b) meet the recipient's basic needs."

Relevant case law

106. In 2014, the CJEU gave judgment in a case from Belgium, Case C-79/13 *Federaal agentschap voor de opvang van asielzoekers v. Saciri and Others* ECLI:EU:C:2014:103 ("*Saciri*"). The case concerned the interpretation of the precursor to the 2013 Directive. In that case the Saciri family applied for asylum in Belgium in October 2010, and were informed by the relevant Belgian agency, Fedasil, that it was unable to provide accommodation. The family could not afford to find accommodation privately. The Labour Court ordered Fedasil to offer reception facilities and to pay for financial aid. Eventually the family was placed in a reception centre in January 2011.

107. On a preliminary reference the Court was entirely unequivocal in its determination on the nature and extent of the obligations on Member States. Significantly for this case, the Court drew a direct connection between the Directive requirements and the requirements under the Charter, and it observed:

"*35. In addition, the general scheme and purpose of Directive 2003/9 and the observance of fundamental rights, in particular the requirements under Article 1 of the Charter of Fundamental Rights of the European Union, under which*

human dignity must be respected and protected, preclude the asylum seeker from being deprived – even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State – of the protection of the minimum standards laid down by that directive (see Cimade and GISTI, paragraph 56)"

108. The Court also made clear at para. 37 that when financial aid is being granted it must be sufficient to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence. At para. 42 the Court framed the basic requirement where financial aid was provided as a level of provision "*sufficient to ensure a dignified standard of living and adequate for the health of the applicants and capable of ensuring their subsistence by enabling them to obtain housing, if necessary, on the private rental market."*

109. In response to an argument in that case that the accommodation network for asylum seekers was overloaded, the Court was clear that the basic need of applicants must be met, and those needs included what was necessary for a dignified standard of living. The Court found that:

"*50. … it must be pointed out that it is for the Member States to ensure that those bodies meet the minimum standards for the reception of asylum seekers, saturation of the reception networks not being a justification for any derogation from meeting those standards."* [emphasis added]

110. Case C-233/18 *Haqbin v. Federaal Agentschap voor de opvang van asielzoekers* ECLI:EU:C:2019:956 ("*Haqbin*") was a preliminary ruling decision in a case where

the applicant unaccompanied minor was placed in a reception centre but was suspended for fifteen days due to his participation in a brawl. During the suspension the applicant spent his nights between a park and ad hoc stays with friends and acquaintances. In addressing the questions, the Court noted that material reception conditions may be reduced or withdrawn under the provisions of Article 20 of the Directive. However, the Court again drew a clear connection between the Directive's requirements and the obligations under the Charter:

> "*46. With regard specifically to the requirement to ensure a dignified standard of living, it is apparent from recital 35 of Directive 2013/33 that the directive seeks to ensure full respect for human dignity and to promote the application, inter alia, of Article 1 of the Charter on Fundamental Rights and has to be implemented accordingly. In that regard, respect for human dignity within the meaning of that article requires the person concerned not finding himself or herself in a position of extreme material poverty that does not allow that person to meet his or her most basic needs such as a place to live, food, clothing and personal hygiene, and that undermines his or her physical or mental health or puts that person in a state of degradation incompatible with human dignity (see, to that effect, judgment of 19 March 2019, Jawo, C-163/17, EU:C:2019:218, paragraph 92 and the case-law cited).*"

111. In the premises, the Court found that the Directive provisions, read in the light of the Charter, must be interpreted as meaning that a Member State cannot withdraw or reduce material reception conditions even temporarily where that would have the effect of depriving the applicant of the possibility of meeting his most basic needs. It should be borne in mind that *Haqbin* was a case where the applicant's behaviour had

warranted a sanction, but that even in that case the Member State remained under an obligation to meet his basic needs.

112. Both *Saciri* and *Haqbin* were relied upon by the High Court in cases concerning material reception conditions.

113. *S.Y. (A Minor) v. Minister for Children* [2023] IEHC 187, was a case brought by a young person concerning an entitlement to material reception conditions under the provisions of the Regulations. In that case, accommodation had been provided to the applicant since the proceedings were commenced. However, the applicant continued to seek certain declarations. The applicant arrived in the State on 7 February 2023 and made an application for international protection on 8 February 2023. The applicant was informed that there was no accommodation available to him and he was provided with a voucher of approximately €28 for Dunnes Stores to buy bedding and he was provided with the address of the Capuchin Day Centre, a private charity. Between 7 February and 28 February 2023, the applicant had to sleep rough in a variety of locations. The applicant applied for leave to apply for a judicial review on 24 February 2023.

114. In his judgment, Meenan J. addressed the legal framework. The court noted recitals 10, 14 and 35 to the 2013 Directive. The court then considered Article 17 of the Directive which, it is to be recalled, sets out general rules on material reception conditions and healthcare in mandatory form. The court noted that *"material reception conditions*" are defined in the 2018 Regulations as being *"provided to a recipient for the purposes of compliance with the Directive".*

115. The court considered Regulation 4(5) of the Regulations, which provided for different material reception conditions where the accommodation capacity was temporarily exhausted, and that even in that situation the basic needs of the applicant must be met.

116. In that case, the Minister had admitted that prior to 28 February 2023 (the date when accommodation was provided to the applicant) the Minister did not afford to the applicant the *"material reception conditions"* which included *"accommodation/housing, to which he was entitled under the [Regulations]"*.

117. The court also noted the Minister's evidence regarding the challenges in providing accommodation for persons such as the applicant in that case. In a similar way to this case, the situation was exacerbated by the increase in the number of persons seeking international protection and separately the number of Ukrainian nationals who have arrived in the State since late February 2022. The evidence before the court set out steps being taken by the Minister for the procurement of other accommodation for those seeking international protection. Having considered the affidavit evidence, Meenan J. summarised the factual situation as follows:

> *"(i) The Minister accepts that he has failed to provide "material reception conditions" to the applicant as is required by the Regulations.*
>
> *(ii) The Minister explains his failure to provide "material reception conditions" because of a chronic shortage of available accommodation. This shortage has been caused and/or exacerbated by the numbers of people seeking international protection and those fleeing the war in Ukraine.*

(iii) The Minister is making considerable efforts to source suitable accommodation. Meanwhile, persons such as the applicant, a young single male, are being denied the accommodation to which they are entitled.

(iv) "Material reception conditions" not only include accommodation but also the provision of food and basic hygiene facilities. In purported compliance with the Minister's legal obligations the applicant was given one voucher to the value of €28 for Dunnes Stores and directed towards private charities such as the Capuchin Day Centre. Clearly this does not come remotely close to what is required by law. Directing persons such as the applicant to private charities to receive supports which the Minister is obliged to give cannot be seen as anything other than completely unacceptable.

(v) By reason of the failure of the Minister the applicant has been forced to live and sleep rough, beg for food and has been deprived of basic hygiene conditions. In addition the applicant has been exposed to personal attack and danger and also subjected to humiliation."

118. By reference to the authorities on mootness, the court was satisfied that the application had not been rendered moot simply by the fact that the applicant had been provided with accommodation. The court went on to consider the case law concerning the general principles for the granting of declarations. In particular the court noted the observations of Charleton J. in *PMcD v. Governor of X Prison* [2021] IESC 65 (which is discussed below).

119. At para. 40, Meenan J. made clear his view that there was nothing academic or theoretical about the rights which the applicant was seeking to enforce in that case. As explained by the court, being denied material reception conditions had a direct impact on the applicant's quality of life to the extent that it deprived him of the most basic standards of living. As such the court was satisfied that the four factors identified by Clarke J. in *Omega Leisure Ltd v. Superintendent Barry* [2012] IEHC 23 which were referred to by the Supreme Court in *PMcD* were all present: There was a good reason for the declaration, the issue was real and substantial, the applicant had sufficient interest to raise the issue and there had been a *"proper contradictor"*.

120. Significantly, the court then went on to consider the interaction between the Regulations and the Charter of Fundamental Rights of the European Union. Meenan J. considered *Haqbin* and *Saciri*, and he attached significance to the response of the CJEU to the third question in *Saciri* which, in summary, was that where accommodation facilities were overloaded it was possible for provision to be provided in kind. However, that provision was subject to the qualification that the system must continue to ensure that the minimum standards laid down in the Directive as regards to asylum seekers were met.

121. In the circumstances in *S.Y.*, Meenan J. found that even though the Minister was making efforts to secure accommodation this did not absolve him of his obligations under the Regulations and that giving the applicant a €28 voucher for Dunnes Stores and the addresses of private charities did not come close to what was required.

122. Significantly, the court granted a declaration that the failure by the Minister to provide the applicant the material reception conditions pursuant to the Regulations was a breach of the applicant's rights under Article 1 of the Charter of Fundamental Rights.

123. It is relevant and noteworthy that the judgment of the High Court in *S.Y.* was not appealed, and that, at the hearing of this case, although the State sought to distinguish *S.Y.*, it did not seek to argue that it was wrongly decided. Respectfully, I am in full agreement with the analysis of Meenan J., and for my part I cannot see any reason why that decision should not be followed. The points of distinction highlighted by the State relate to the changes in the approach adopted by the Minister, and I will consider that factual situation below. I will also address briefly a further argument that was not made by the State in *S.Y.* concerning the question of *force majeure*. However, at the level of principle, I consider that the decision clearly and correctly – having regard to the unequivocal rulings of the CJEU – establishes that a failure to provide for the basic needs of an IP applicant amounts to a breach of that person's rights under Article 1 of the Charter of Fundamental Rights of the European Union.

124. I should also note that in December 2023 the High Court delivered a further judgment of Ferriter J. in the cases of *S.A. v. The Minister for Children & Ors and R.J. v. The Minister for Children & Ors* [2023] IEHC 717 ("*S.A.*").

125. The judgment in *S.A.* concerned two international protection applicants. Each of the applicants were provided with the initial Dunnes Stores vouchers and spent considerable periods of time sleeping rough until they were granted accommodation. Mr A. received a single Dunnes Stores voucher for €25 on 15 February 2023 and did

not receive his daily expenses allowance (which at that point amounted to €5.54 per day) until 5 April 2023, when he received a backdated payment. He was finally accommodated on 27 April 2023 after 71 days. During the period where he did not have accommodation he was not provided with any additional needs payments. Mr A.'s situation was complicated by the fact that he had sustained injuries in a car accident while en route to Ireland and was considered by the Irish Refugee Council as a person with a particularly high level of vulnerability. He was unable to pay for accommodation in hostels and B&Bs and claimed that he did not receive information about food or hygiene sanitation facilities or his entitlement to apply for allowances. For the most part Mr A. resided on the streets, although there were occasions where he was provided with temporary accommodation by fellow nationals.

126. Mr J. arrived in the State on 16 March 2023 and he received a €25 voucher for Dunnes Stores on his initial presentation to the IPO on 20 March 2023. He spent 64 nights sleeping rough until he was granted accommodation in May 2023. During that period he was street homeless, he received a tent, food and clothes from a charity and he stated that sometimes he got food from day centres. He did not find out about his entitlement to the DEA until 17 April 2023, and he received a payment on 21 April 2023. He made three applications for additional needs payments which resulted in cumulative payments of €220 between March and May 2023, the last of which was received after he was accommodated. In common with Mr A., and, in common with the defendants in this case, Mr J. found the overall situation frightening and very stressful.

127. In *S.A.* the court again considered the legislative framework providing for material reception conditions, and again contextualised the requirements as intimately connected to the Charter obligations to respect and protect the inviolable value of human dignity. The court considered the 2013 Directive and the 2018 Regulations, and was satisfied that the terms of Article 17 which provide for material reception conditions are mandatory and immediate on application for international protection. The court went on to consider the meaning and effect of Article 18(9) of the Directive and Regulation 4(5) of the Regulations.

128. Having done so, Ferriter J. noted, at paragraph 20:

> *"It will be noted that the Regulations, in regulation 4(5), anticipate the temporary exhaustion of normal accommodation capacity for those entitled to material reception conditions. The Regulations are clear (as is the Directive), however, that in such circumstances the provisional material reception conditions (including accommodation) must "meet the recipient's basic needs" (Regulation 4(6)).."*

129. It should be noted that in the *S.A.* case, the court was primarily addressing an argument made by the State seeking to avail of a *force majeure* defence in a claim for *Francovich*-type damages by the applicants. In support of that argument the State relied on the unprecedented numbers of people requiring accommodation and the effect that had on its ability to provide accommodation, the numbers of persons seeking assistance in the State as a result of the war in Ukraine, and in common with the situation in this case, updated figures were provided by the State to demonstrate the pressure that the system found itself under. Evidence was also given by the State

of the efforts being made by the State to secure accommodation and the arrangements being made with charitable organisations to assist in meeting the needs of IP applicants. The State also referred to the similar difficulties that had been encountered in other EU Member States, particularly Belgium, the Netherlands and France.

130. The court considered the application of the concept of *force majeure* in EU law. The court noted that the CJEU has emphasised that since the concept of *force majeure* does not have the same scope in the various spheres of application of EU law its meaning must be determined by reference to the legal context in which it is to operate. Ferriter J. noted that there appeared to be differing formulations of the parameters of the test, which perhaps reflects its sensitivity to context. The court concluded that whatever about the precise parameters of the defence in any given context, it is clear that a strict approach has been taken to the availability of the defence more generally.

131. In considering the application, the court was clear that the Directive and the Regulations did not expressly provide for a defence of *force majeure* in answer to a claim for breach of an obligation to provide material reception conditions. In that regard the court found it was clear that the obligation to provide such conditions including accommodation was mandatory. While both instruments provide for a situation where there is a temporary exhaustion of housing and accommodation capacity and in those circumstances material reception conditions can be provided in a different manner (*i.e.*, different from reception and accommodation centres), those different conditions are required in a mandatory language to cover the recipient's *"basic needs"* and the situation must only obtain for as short a period as possible.

132. The court considered that the case law of the CJEU underscored the mandatory nature of the obligations which themselves were rooted in an objective in the Directive to ensure full respect for human dignity. The court noted that in *Saciri,* the CJEU made clear that if material reception conditions are to be provided in the form of financial allowances *"those allowances must be sufficient to ensure a dignified standard of living and adequate for the health of the applicants and capable of ensuring their subsistence by enabling them to obtain housing, if necessary, on the private rental market"*.

133. Similarly, in *Haqbin* the Court found that it was not sufficient for a Member State simply to provide a person excluded by way of sanction from an accommodation centre in Belgium with the list of private centres for the homeless likely to host that person. The obligation to ensure a dignified standard of living provided for in the Directive required the Member State *"to guarantee such a standard of living continuously and without interruption."*

134. Ultimately, in response to the specific questions posed in the *S.A.* case, the High Court decided to refer certain questions to the CJEU, in particular the following:

> *"(1) Where "force majeure" is not found as a defence in the Directive or implementing Regulations in issue, is such a defence nonetheless available as a defence to a Francovich damages claim for a breach of an EU law obligation that confers rights on individuals which derive from the fundamental right to human dignity contained in Article 1 of the Charter (whether as a defence within the second limb of the Brasserie du Pêcheur/Factortame test or otherwise)?*

(2) If the answer to question (1) is "yes", what are the parameters and proper scope of that force majeure defence?"

135. In framing those questions, the court made the following clear: -

"125. It is important to emphasize that the need for guidance as a matter of EU law relates solely to the parameters of liability for Francovich damages in circumstances where there have been breaches of the Directive and Regulations by reason of the State's failure to provide mandatory material reception conditions including accommodation to the international protection applicants in these (and related) cases. As the review of the relevant law contained in this judgment makes clear, as a matter of EU law (as transposed into Irish law) the State remains under a continuing, mandatory obligation to provide international protection applicants with basic needs including accommodation on an uninterrupted basis from the point at which qualifying persons apply for international protection. This judgment should not be taken as raising any question mark over the State's continuing obligations in this regard."

136. In its oral arguments in the present case, the State highlighted an argument grounded in the concept of *force majeure*. Aside from the fact that the same legal issue – albeit in the context of a claim for *Francovich* damages – has been referred by the High Court to the CJEU, this does not appear as a clear pleading in the extensive Statement of Opposition. As such, I am not satisfied that this was a proper issue before the court. Moreover, while there was a real question about the availability of the defence in a

Francovich damages claim, I do not consider that the question of the extent of the underlying obligations has been left unclear by the existing CJEU jurisprudence. It must be recalled that even though *Saciri* predates the war in Ukraine, the Temporary Protection Directive and the more recent post COVID-19 increase in the number of persons seeking international protection in the State, it was a case where the Belgian authority was seeking to rely on what was described as the saturation of its accommodation networks. That, in effect, is what the State is arguing in this case. Despite that saturation, the CJEU was clear that providing for the basic needs of applicants was mandatory, and a failure to provide for those basic needs breached their rights under Article 1 of the Charter of Fundamental Rights of the European Union, even if *force majeure* was not raised in terms as a defence

137. For similar reasons – because the terms of the Directive and Regulations are clear and because of the unequivocal approach of the CJEU – I am not persuaded that there is a need, as submitted by the State, to refer questions to the CJEU for the purpose of resolving this action.

THE SUBSTANTIVE CASE BEING MADE

138. In the Statement of Grounds, the Commission sets out the grounds upon which relief is sought. After addressing the preliminary question about its entitlement to bring the proceedings, the Commission sets out that it has been actively engaged on the issue of the lack of accommodation and material reception conditions for newly arrived international protection applicants in the State.

139. In explaining the factual basis for the application, the Commission notes that in January of 2023, the State announced that it would no longer be in a position to provide accommodation to all newly arrived IP applicants. As a result, in the early part of 2023, there were significant numbers of IP applicants who were homeless or without adequate or stable accommodation. The Statement of Grounds then goes on to set out the Commission's interactions in 2023 with the Minister regarding its concern about the need to meet the basic needs of IP applicants. The Commission granted legal assistance to IP applicants under section 40 of the 2014 Act, which led to the *S.Y.* proceedings.

140. Later that year, on 4 December 2023, the Department announced that, despite intensive efforts to source emergency accommodation and due to the severe shortage in such accommodation, it was again no longer in a position to provide accommodation to all IP applicants who arrived in the State. In order to mitigate those difficulties, it was announced that IP applicants who were not provided with accommodation would receive a temporary increase of €75 to their weekly DEA, increasing the allowance from the rate of €38.80 per week to €113.80 per week for all eligible applicants.

141. The Commission asserts that, as of 12 December 2023, 147 IP applicants were awaiting an offer of accommodation. As of 19 December 2023, that number had increased to 259. The proceedings were commenced on 21 December 2023.

142. The Commission argues that the increased DEA which has now been provided does not permit applicants to meet their basic needs. In essence, the argument was made

that an increase of €75 in the weekly DEA payment is insufficient to enable IP applicants to secure even the most modest forms of temporary accommodation on the private market. The increased payment will not permit IP applicants to access hostel accommodation for more than a small number of nights before running out of funds. Even where the financial supports in principle may assist IP applicants, there are practical delays in accessing supports. Non-governmental organisations are not in a position to meet all the basic needs of all homeless IP applicants who presented to their services. IP applicants' difficulties are compounded by a growing number of incidents and threats, and the very difficult weather conditions that affect homeless persons and rough sleepers. The situation contended for by the Commission is summarised at para. 30 of the Statement of Grounds, as follows:-

> *"30. Overall, on the basis of the information and evidence available to the Commission, in the circumstances that prevail in the State at present, newly arrived international protection applicants who are not offered accommodation find themselves in an extremely vulnerable and distressing position, unable to access accommodation and meet their basic needs, with acute and heightened risks to their dignity, physical and mental health and integrity, and indeed their physical safety."*

143. The legal grounds upon which the application for judicial review is based are set out from paras. 34 through to 49 of the Statement of Grounds. In summary, it is asserted that applicants for international protection in the State have a fundamental right to have their human dignity respected and protected, including by being provided with an adequate standard of living which guarantees their subsistence and protects their physical and mental health where they do not have sufficient means to provide for

themselves. The source of that right is identified as deriving from Article 1 of the Charter of Fundamental Rights of the European Union, Article 40.3 of the Constitution and various provisions in the European Convention on Human Rights.

144. In addition, the applicant relies on Directive 2013/33/EU and the European Communities (Reception Conditions) Regulations 2018 (SI No. 230 of 2018). The Commission relied on the judgment of the CJEU in *Saciri*, and the decisions of the High Court in *S.Y.* and *S.A.* I have addressed those legal issues above, and found that while direct reliance cannot be placed on the Directive or the Regulations it is clear that the State's obligations thereunder are clear and unequivocal and that compliance or non-compliance with those obligations is directly relevant to the question of whether the State has breached, *inter alia*, the rights of unaccommodated IP applicants under Article 1 of the Charter.

Affidavit of Ms Sinead Gibney

145. The primary affidavit grounding and verifying the Statement of Grounds was made by Ms Sinead Gibney, who was then Chief Commissioner of the applicant. Her affidavit was sworn on 21 December 2023. At para. 11, the Commission acknowledges, *"the very significant practical challenges in securing appropriate accommodation and the good faith efforts of the First Named Respondent (the "**Minister**") to address this issue"*. Nevertheless, the gravity of the situation from the perspective of the applicant required the proceedings to be commenced. Having set out the background to the application which, to a large extent, rehearses the factual matters set out in the Statement of Grounds, Ms Gibney addresses what she describes as *"the inadequacy of the response of the State to the crisis in accommodation for IP*

applicants" from para. 28 of her affidavit onwards. Based on government statistics, which were exhibited by Ms Gibney, she notes that, in late 2021, the State was accommodating about 7,000 people in its international protection system. As of December 2023, the State was now providing accommodation for 26,000 people in the international protection system, of whom 5,563 are children, as well as a high number of temporary protection applicants from Ukraine.

146. Having noted the increase in DEA implemented by the State for unaccommodated IP applicants, Ms Gibney explains why those persons nevertheless are unable to meet their basic needs in a manner consistent with their human dignity and their physical and mental health integrity. The following points are made:

a. First, where the State itself is unable to source emergency accommodation, the challenge for individual IP applicants is obvious. The increase of €75 in the weekly DEA payment is insufficient to enable IP applicants to secure even modest temporary accommodation on the private market.

b. Second, a payment of €113.80 does not provide homeless IP applicants with sufficient means to secure accommodation in the private sector or otherwise. Hence, while those persons may be able to access hostel accommodation for short periods, they cannot be accommodated for any lengthier period because they run out of funds. In seeking to explain that IP applicants are unable to meet their basic needs, Ms Gibney draws attention to statistical and other evidence which suggests that the amount of €113.80 means that IP applicants are unable to meet their basic needs.

c. Third, Ms Gibney notes that many IP applicants newly arrived in the State may not have access to the DEA or other payments for some time after making their

application for international protection including by reason of delays in the provision of PPS numbers and that even though the discretionary additional needs payment can, in principle, be available to eligible applicants, access to this payment in practice appears to be very limited.

d. Fourth, insofar as reliance is placed on non-governmental organisations working with IP applicants, those organisations are not in a position to meet all the basic needs of all homeless IP applicants who present to their services.

e. Fifth, Ms Gibney highlights the risks facing IP applicants from a combination of a growing number of incidents and attacks, a sample of which she addresses in her affidavit.

147. Ms Gibney, in the initial formulation of her affidavit, sought to describe the circumstances of certain individual applicants. Following objections to that material in the affidavit, her affidavit was redacted and further affidavits were sworn directly by individual applicants, and I will address that below.

148. In addition, the Commission sought to adduce evidence in respect of the basic underlying factual foundation for the case, to the effect that the provision currently being made in respect of unaccommodated IP applicants was inadequate or insufficient.

Affidavit of Ms Samantha Mann

149. On 21 December 2023, Ms Samantha Mann, a legal executive for the Commission, swore an affidavit setting out the results of research she carried out in respect of

accommodation costs. She carried out research in relation to the availability and cost of hostel accommodation in Dublin, both for weekend and midweek places. Her survey of hostels in the Dublin area demonstrated accommodation rates from €19.55 up to just under €47 per night. Her research also confirmed that the accommodation providers she contacted required some form of photo identification and a credit card, with the credit card being required even in circumstances where cash payments could be made. Ms Mann also conducted inquiries in relation to hotel accommodation and other forms of privately available accommodation, which, unsurprisingly, showed that those rates exceeded the rates for hostel accommodation.

Affidavit of Mr Przemyslaw Kluczenko

150. Mr Przemyslaw Kluczenko, who is the Deputy Head of Operations for Merchants Quay Ireland ("*MQI*"), swore an affidavit on 20 December 2023. MQI provides an 'open access service' on Merchants Quay in Dublin 8 which is a day service providing showers, hot meals, changes of clothes, primary health care advice and advocacy in terms of accessing services. The service is available during the daytime only. The deponent averred that most unaccommodated IP applicants who attended the service were in fact seeking accommodation which could not be provided, but they were provided with meals, showers and a change of clothes. He expressed the view that, in general, unaccommodated IP applicants presented as vulnerable and reported fear of violence and threats of violence, robbery and intimidation on a regular basis. The number of unaccommodated IP applicants attending the service placed a strain on the services and that, generally, once they were accommodated by IPAS, the individuals disengaged with the open access service. Since December 2023, the service received

approximately four to eleven new unaccommodated IP applicants who previously had not availed of an MQI service on a daily basis. By the date of swearing, approximately 94 unaccommodated international protection applicants had attended the service. Mr Kluczenko averred that MQI did not provide tents or sleeping bags, which are available through other services. He noted that the majority of unaccommodated IP applicants present as being street homeless while others present as having temporary ad hoc sleeping arrangements. He noted that they have an open line of communication to IPAS, whose staff appear to be accessible and supportive. Mr Kluczenko noted that, even with extra funding to provide services, MQI would have difficulties due to staffing issues.

Affidavit of Ms Hannah Dwyer

151. Ms Hannah Dwyer is an information and casework advocacy manager with the Irish Refugee Council ("*IRC*"), and she swore an affidavit on 21 December 2023. Again, the affidavit was sworn to provide general information to assist the applicant in presenting the evidence in the case. Ms Dwyer provided evidence that, between January 2023 through to May 2023, over 450 unaccommodated international protection applicants attended or contacted the IRC seeking advice and support. The main issue related to the provision of accommodation, which the IRC could not provide. The number of applicants presenting with the service during that period placed a strain on already stretched services. She noted that many of the applicants were particularly vulnerable and, similarly to the experience of MQI, applicants reported fear of violence and threats of violence, robbery and intimidation on a regular basis. In addition, Ms Dwyer noted that the experience of the IRC engaging with

applicants during the January to May 2023 period was that many were reluctant to bring legal proceedings due to fears that issuing such proceedings could impact negatively on their applications for international protection. That fear existed aside from the serious practical challenges involved in pursuing proceedings when a person is homeless.

152. In the period since the start of December 2023, 42 individuals had attended the service. Ms Dwyer noted that the vulnerabilities that these persons presented with included a sense of being scared and feeling threatened on the street, varying levels of competency with English, and difficulties protecting possessions while homeless. She reported that many applicants, in turn, reported that they had difficulty understanding or digesting information provided by IPAS. She also reported that difficulties were encountered in accessing hostels due to a shortage of funds and/or issues around the availability of identification. She reports that the Department of Children had warned the IRC between October and November 2023 that the pressures on accommodation had reached a point where accommodation might run out shortly.

Affidavits from individual identified IP applicants

153. In addition to the evidence from MQI and the IRC, over the course of the proceedings, the Commission also adduced evidence in the form of affidavits from individual identified IP applicants, most of whom arrived in the State during the period following 4 December 2023. I have considered all of the affidavits that were sworn which eventually amounted to evidence from 13 IP applicants. I hope that it does no disservice to the individuals concerned if I focus on a small number of individual

affidavits. Those individual experiences provided a valuable insight into the difficulties encountered, and it would be fair to note that there was a number of common threads throughout that aspect of the evidence.

154. Pursuant to section 26 of the International Protection Act 2015, the identity of international protection applicants should be kept confidential, and matters cannot be published or broadcast that would lead members of the public to identify a person as such an applicant. It was agreed at the hearing of this action by all parties that the identity of the individual applicants who swore affidavits should not be disclosed. Accordingly, I will refer to the applicants by their initials for the purposes of this judgment.

155. RK swore an affidavit on 29 January 2024. RK is a Pakistani national who arrived in the State on 7 January 2024 and submitted an application for international protection on 8 January 2024. He arrived in the State with €250 and spent €50 on a hostel for his first three nights. Since then, up to the date of swearing, he slept rough in Dublin and Limerick and spent three nights in temporary accommodation which he was directed to by IPAS. In essence, up to the date of swearing in the three weeks that he was in the State, with the exception of his initial stay in a hostel and three nights in temporary accommodation provided by IPAS, he slept rough, or was accommodated on an ad hoc basis by an acquaintance.

156. He noted that there was a large demand for day services and difficulty accessing halal food. He relied on day services and cafés for access to sanitary services and, at night, he did not have access to any sanitary services. He had health difficulties and found

being homeless very difficult. In terms of financial support, he received Dunnes Stores gift cards from IPAS in the sum of €140 total and started receiving DEA on 16 January 2024 in the amount of €113.50 per week. The money he received was not enough for him to meet his food, accommodation and other needs. He received an additional needs payment of €50 on 11 January 2024, which he used to buy food from halal takeaways.

157. AAK swore an affidavit on 29 January 2024. He is a Pakistani national who had arrived in the State on 10 January 2024 and who had applied for international protection the following day. He was informed that he could not be provided with accommodation and was given a voucher for Dunnes Stores in the sum of €100 and some information regarding supports. He suffered from depression and anxiety and had been prescribed medication. He had no money but had borrowed €350 from someone he knew and used this money to pay to sleep in two hostels. When the weather was very poor, he had been offered night-by-night temporary shelter by IPAS and stated that the accommodation provided involved 35 people sleeping in one room and he was given a sleeping bag. There were toilets but no showers at the accommodation. He had emailed IPAS, setting out his situation on a number of occasions but had only received automated responses. Again, because of a difficulty accessing halal food, he could not avail of the food service from some of the day services and instead spent the money he had buying food. Since he arrived in the State, he had received approximately €445 in total in DEA. He was unaware that he was able to apply for additional needs payment. His overall circumstances made it difficult for him to adhere to the medication regime for his mental health difficulties, and he found the overall situation very difficult.

158. VOB swore an affidavit on 30 January 2024. He is a Nigerian national who arrived in the State on 4 January 2024 and had submitted an application for international protection on the same day. He was informed by IPAS that they could not provide him with any accommodation and that he would be put on a waiting list. He was provided with an information note regarding available supports. On 5 January 2024, he was provided with a voucher for Dunnes Stores in the sum of €100. He received a tent from a civil society organisation with a sleeping bag on 8 January 2024. However, around 14 or 15 January 2024, he was informed that his tent had been ripped and tampered with and he was afraid to go back. He was eventually informed that he would be provided with accommodation at the old Central Mental Hospital campus in tented accommodation. He did not spend any time sleeping in hostels as he could not afford to pay for them. In addition to the Dunnes Stores vouchers, he applied for DEA shortly after arriving and received his first payment on 16 January 2024. He did not apply for additional needs payment as he did not know that payment was available to him. In terms of access to services, he attended a number of the day services to obtain food, take showers and to charge his phone. He also used toilet facilities and spent time trying to stay warm in fast food restaurants. He had a medical condition and was given a vulnerability assessment triage when he first arrived at the International Protection Office. He was provided medication for his condition but required further treatment, and being homeless negatively affected his condition. He averred that, as of 30 January 2024, he was being accommodated in tented accommodation which was cold and not weather proofed. He shared the accommodation with seven other people and had no privacy.

159. A number of further international protection applicants swore affidavits on behalf of the Commission. Each of the deponents were the persons who arrived in the State in January of 2024 and applied for international protection. A common thread in the affidavits was that, in the absence of accommodation being provided through IPAS, the deponents found themselves in a position where they variously slept on the streets, were provided with short-term accommodation on an ad hoc basis through the intervention of others, or attempted to access temporary accommodation in places such as churches or mosques. All of the deponents experienced enormous difficulties surviving on the financial support that was given, and there appears to be widespread confusion around the accessibility and availability of additional needs payments. While day services are available, they appear to be oversubscribed and the unavailability of halal food is a real difficulty for Muslim applicants. One of the deponents, DAK, a Nigerian national, had difficulty accessing medication and treatment for his epilepsy condition. It is clear that none of the deponents was able to access private sector hostel accommodation for anything more than a short number of nights as the costs exceeded their available resources.

The Statement of Opposition

160. The opposition paper on behalf of the respondents was delivered on 26 March 2024. It raises a number of preliminary issues, which I have addressed above.

161. With regard to the factual matters, the State agreed that the cohort of IP protection applicants who could not be offered accommodation in late 2023 was confined to single male adults. The respondents contended that, in addition to the increase of €75

in the DEA payment for IP applicants who were not offered accommodation immediately, further provision was made including a once-off supermarket voucher in the amount of €100. Arrangements were made with charities so that drop-in day services are made available to all IP applicants who have not been offered accommodation, and that unaccommodated IP applicants are provided with information. Any email to the IPAS email address results in an unaccommodated helpdesk auto response which sets out contact and other details for various support services.

162. With regard to the increase to the DEA payment of €75 per week for IP applicants who cannot be offered accommodation, it was stated that the level of weekly payment is greater than equivalent payments to international protection applicants who are not immediately offered State accommodation in other European Union Member States. In that regard, the Statement of Opposition notes, at paragraph 10:-

> *"The decision was made to provide for an amount in line with EU Member States with similar economic indicators as Ireland, which ensures a reasonable equivalence of benefit in line with Recital 12 of the 2013 Directive which provides that harmonisation of conditions for reception of applicants should help to limit the secondary movement of applicants influenced by the variety of conditions for their reception."*

163. The respondents explained that they are seeking to respond to a growing number of people seeking international protection in the context of a very diminished supply of available accommodation across the State. They claim they are affected by unforeseen

and extraordinary circumstances and that active steps are being taken to free up accommodation and to bring additional properties into use.

164. The respondents note that the information leaflet provided to all IP applicants sets out information on how to access the DEA payment, the initial shopping voucher, how to make applications for PPS numbers and applications for additional needs payments. It sets out contact details for IPAS and INTREO (the Public Employment Service) as well as information on the IPAS vulnerability assessment triage and a potential HSE health assessment which can be held at the IPO at the time of the protection application. In addition, contact details are provided for day services and the IP applicants' entitlement to legal support.

165. The Statement of Opposition notes that the respondents are particularly concerned about the risks of street homelessness. In that regard, the Minister is applying an accommodation allocation system for single male applicants on a *"needs"* basis. This effectively is operated on a triage system *"with the aim of reducing street homelessness to the greatest degree possible"*. Effectively, the triage system is operated first by IPAS at the IPO during the initial interview. Secondly, it is informed by referrals of applicants who are considered vulnerable and likely to be street sleeping from bodies such as An Garda Síochána, health services and charities or NGOs. Because some applicants are in a position to secure alternative accommodation, the Minister now prioritises those who are actually found to be street homeless following a referral to it by those agencies.

166. The respondents explained that, once the Minister became aware of the imminent possibility of a shortage of accommodation, certain preparations were made involving the Dublin Regional Homeless Executive, An Garda Síochána and NGOs including the Dublin Simon Community. A referral system was introduced so that those with direct contact with IP applicants could report instances to IPAS *"where an immediate intervention is warranted"*. Those interventions appear to be arranged on the basis of indicators including apparent vulnerability and/or personal presentation. Where people are referred directly to IPAS by An Garda Síochána, they are triaged and accommodated immediately. IP applicants identified through other routes such as NGOs are referred to IPAS *"and these notifications are prioritised for accommodation"*.

167. Emergency and temporary accommodation was made available as part of the Department's *"Cold weather response"*.

168. Critically, the respondents plead that individual IP applicants' basic needs are being met, having regard to the additional measures and supports put in place in late 2023 for IP applicants by way of increased payments in the DEA, outreach measures to identify IP applicants who may be street homeless, the vulnerability and triage assessments, and the other measures identified by the respondents.

169. With, it appears, particular reference to the mandatory reliefs that are being sought by the applicant, the respondents plead that the use of State resources is a matter properly within the domain of the first respondent and the Government and is not a matter that

is appropriate for mandatory relief. As stated, at para. 28 of the Statement of Opposition:-

> *"The present situation has not arisen due to a lack of financial resources on the part of the State but due to a confluence of regrettable circumstances as described herein and accordingly the said reliefs would interfere with the separation of powers between the Executive and this Honourable Court."*

170. The State pleads that, as a matter of European Union law, Member States have a certain margin of discretion as to how material reception conditions, as defined by the 2013 Directive, are to be provided. In that regard, the State contends it has provided different material reception conditions covering the basic needs of IP applicants who have not yet been offered accommodation, both through direct financial payments and through intermediary bodies.

171. At a general level, the respondents claim that the Commission has failed to show the utility of the present proceedings in circumstances where the Minister is entirely aware of the obligations in law towards all IP applicants and has acknowledged same in both the public arena and in the proceedings previously taken against the Minister, including in *S.Y. v. Minister for Children* [2023] IEHC 187 and is taking all reasonable steps to address such obligations.

172. From para. 33 of the Statement of Opposition, the State identifies five ways in which the Minister's response to the lack of available accommodation for IP applicants has evolved since December 2023 from the earlier response – which was the subject of the decision in *S.Y. v. Minister for Children*.

a. First, there is reference to the process put in place to prioritise the most vulnerable for accommodation instead of an allocation based solely on a *first come first serve* basis.

b. Second, the initial vulnerability assessment at the IPO when an applicant first makes an application has been put on a formal, or more formal basis, with the adoption of vulnerability triage procedures and using the IPAS vulnerability assessment triage form.

c. Third, in response to the shortage of accommodation, the DEA payment for IP applicants who are not offered accommodation has been increased by €75 per week, and applicants are also provided with a €100 shopping voucher to cover the initial period before their DEA is first received.

d. Fourth, the Minister's department has entered into formal agreements with three separate day services and an arrangement with one further day service to provide a range of services to those who are unaccommodated. It is stated that those agreements are more formal than the arrangements that had been put in place in early 2023. It is stated that this ensures that food, hygiene and health supports are put in place for all those who need them.

e. Fifth, based on the experience from 2023, the Minister's department has improved the information provision on processes at the IPO relating to the emailing of vouchers and tracking individuals.

173. All of the above is framed in a context involving what is described as *"an unforeseeable inflow of nationals of third countries on a sudden basis in that, since February 2022, 105,282 Ukrainian nationals have arrived in the State and have status under the EU's Temporary Protection Directive issued by the Department of Justice"*.

It is pleaded that, since that date, approximately 75,000 Ukrainian nationals have been accommodated by the Minister, creating acute pressures on accommodation that were unpredictable and could not be resolved in the period concerned. Added to that, the respondents noted that, since the COVID-19 pandemic, there has been a rapid increase in the number of IP applicants arriving in the State. As of 17 March 2024, 28,181 such applicants were being accommodated by the Minister through IPAS. Since 14 March 2024, a temporal limitation on the entitlement to IPAS-provided accommodation has been adopted in respect of new Ukrainian arrivals who are recognised as having status as beneficiaries under the Temporary Protection Directive. Such persons are now allocated a place in a designated accommodation centre for a maximum of 90 days.

174. The respondents note that the situation continues to remain challenging in circumstances where 3,071 people requested accommodation from IPAS in the first two months of 2024 compared to 1,928 in the same period in 2023, an increase of 59%.

175. The respondents also note that the Minister's endeavours are significantly hampered by hostility at local level to the Minister securing suitable accommodation. In those premises, the State respondents deny that there has been any breach of rights as alleged.

First affidavit of Mr David Delaney

176. The State's opposition was verified by an affidavit of Mr David Delaney, Assistant Secretary for International Protection and Integration Division of the Department of

Children, Equality, Disability, Integration and Youth. That affidavit was sworn on 27 March 2024.

177. In the first instance, Mr Delaney notes the increase in applications for international protection in recent years. For instance, in 2021, there were 2,649 applicants for international protection, whereas, in 2023, there was 13,277. Mr Delaney states that the number of applications received in 2022 and 2023 was sudden, unprecedented and entirely unforeseeable.

178. Mr Delaney avers that notwithstanding the efforts of the State and the scale of arrivals through the international protection process combined with those arriving from Ukraine has continued to outpace the Department's ability to find suitable accommodation.

179. Significantly, at para. 11 of his affidavit Mr Delaney states that since 4 December 2023, *"the Department is again unable to offer accommodation to all newly arrived applicants and to date 1,465 individuals have not received offers of accommodation."* Mr Delaney explains the various efforts made by the State to address the situation which includes a dedicated team of Civil Servants supporting people with status to leave centres, thus freeing up accommodation for others. Mr Delaney set out in his affidavit the revised approach to accommodating Ukraine refugees and intensive efforts being undertaken by staff in the Department to source emergency accommodation. Mr Delaney notes that the accommodation that can be opened at this point was primarily being utilised for families in order to avoid women and children becoming homeless.

180. Mr Delaney notes that the situation is more challenging as a result of significant community pushback to the opening of new centres. That pushback is particularly acute where the accommodation is being provided for single male applicants.

181. The results of the current situation are described by Mr Delaney at para. 19 in the following terms: -

> *"Given the current acute accommodation shortage, the First Respondent is temporarily providing different material reception conditions covering the basic needs of international protection ("IP") applicants who have not yet been offered accommodation, both through direct financial payments and through intermediary bodies. This is on an exceptional and temporary basis and the First Respondent is taking all reasonable steps to bring this situation to an end as soon as possible."*

182. As explained in the Statement of Opposition, Mr Delaney sets out the various steps and changes that have been made to policy and procedures since similar issues arose in early 2023.

183. In the context of the triage system that is operated when referrals are made to IPAS by An Garda Síochána Mr Delaney states that *"the numbers of such referrals have been relatively low which would suggest that – with the notable exception of the Mount Street area in and around the IPO offices – that the number of IP applicants who are street homeless is not significant."*

184. However, in the next paragraph Mr Delaney refers to referrals from NGOs such as the Dublin Simon Community, where NGOs have been asked to email the IPAS help desk with the subject line "*Unaccommodated IPA Rough Sleeping*" where the referrals are added to the NGO referral priority list from which accommodation offers are directed. In that regard, Mr Delaney notes, as this priority list has grown, IPAS has continued to offer accommodation within this cohort to include those with vulnerabilities that have emerged and who are not captured by the initial IPO triage process.

185. According to Mr Delaney, since 4 December 2023, 213 IP applicants falling into the cohort governed by the present proceedings have been offered accommodation following an application to them of the vulnerability assessment triage process by IPAS at the time of their protection application being made. A further 404 such persons have been offered accommodation following a referral and prioritisation process. Tellingly, at para. 32, Mr Delaney states that as of 25 March 2024, IPAS received 541 referrals from NGOs for potential rough sleepers. Of those, 404 received an offer of accommodation. Mr Delaney noted that during particular conditions of cold weather, between 16 and 19 January 2024 and 1 to 4 March 2024, as exceptional measures, a number of IP applicants were temporarily accommodated. Those beds were on a night-time basis only and the accommodation provided was only for the purpose of providing accommodation during those specific cold weather response periods.

186. It can be noted therefore that the State position is that it is accepted that an appreciable number of IP applicants were not accommodated and of that cohort a large number presented as street homeless. At various stages in his initial and subsequent affidavits,

Mr Delaney suggested that the number of IP applicants who are street homeless was not significant, while at the same time he referred to a growing priority list on foot of referrals from NGOs. It must be remarked that an unfortunate feature of the State's evidence in this case was that at no point was the court provided with an accurate number of or even an informed estimate from the State of the number of unaccommodated IP applicants who are "*street homeless*". On one level the descriptor "*street homeless*" is apt to mislead. This is because it may not capture those unaccommodated IP applicants who in fact are either availing of *ad hoc* arrangements with charitable third parties or who have managed to find overnight accommodation in places such as churches. Even so, it appears to the court that the State is best placed to provide evidence of the full extent and circumstances of the IP applicants who have not been accommodated, and it was unsatisfactory that more precise figures were not provided.

187. At para. 39 of his first affidavit, Mr Delaney addresses the level of the weekly payment of €113.80. He repeats what is stated in the Statement of Grounds to the effect that the Government provided for an amount in line with the equivalent payment made in EU Member States with similar economic indicators as Ireland. However, he notes that this step *"ensures calibration of offering and does not incentivise Ireland as a location in which to apply for international protection taking account of the reality that most IP applicants travel through other EU Member States before coming to Ireland.*

188. At para. 43 of his affidavit Mr Delaney responds to the evidence in the affidavits filed on behalf of the Commission concerning the difficulties accessing additional needs payments. Mr Delaney stated that there was insufficient information in the

Commission's affidavits to allow him to understand the particular difficulties that were being described. He states that he was informed by the Department of Social Protection that there had been approximately 4,985 ANPs paid to IP applicants since 4 December 2023 to the date when instructions were taken for the affidavit in March 2024. However, that figure was not broken down so that the court can understand how many of those ANP payments were made to unaccommodated IP applicants. With regard to the evidence from the MQI and IRC, Mr Delaney states that their affidavits indicate that some of the bodies are experiencing level of demands which are unexpectedly high, and he does not doubt this, but the general feedback from the charities operating the services is that the services are working and provided the supports as intended.

189. Mr Delaney highlights the increased and improved information provisions for IP applicants and also states that the Minister is not aware of any systemic issues with the provision of PPS numbers or with the payment of the increased DEA. In essence, he argues that there is a need for some level of minimum verification to ensure that emergency payments are not abused and a need for minimal administration which he accepts might frustrate or deter some claimants. However, he does not see how that can be avoided. The court accepts that the State must be able to conduct a minimum level of verification and that there must be some allowance for the proper administration of the system.

190. To some extent Mr Delaney queries the affidavit evidence of Ms Samantha Mann on the basis that she was inquiring about availability and prices of accommodation in Dublin during the week before Christmas which may have had a bearing on

availability and prices. In any event, Mr Delaney suggests that from the perspective of the State the only way to secure reliable short and medium term accommodation is by contracting for the whole or significant portions of existing or previously underused accommodations, and that is the focus of the Department's efforts.

191. I consider it fair to say that while Mr Delaney raised certain queries about the evidence adduced by the Commission, he essentially accepts the central thrust of what is being contended for. He accepts that procuring sufficient bed space to keep pace with demand created by incoming arrivals *"remains extremely challenging, leading to significant shortages."* He states, at para. 59 of his affidavit, *"that the Department has faced a real difficulty securing accommodation for IP applicants and there has been genuine and well-documented pressure if not coercion at times, whether on social media or through protests or otherwise on accommodation providers not to accommodate IP applicants especially single male applicants. This has created a significant and ongoing difficulty for the State in terms of meeting its obligations under the 2018 Regulations."*

192. Mr Delaney notes that other EU Member States have experienced similar difficulties by reference to relatively recent EU data. He also notes there is also some imbalance of experience between different EU Member States.

193. With regard to the individual IP applicants who swore affidavits on behalf of the Commission, Mr Delaney is clear that he does not doubt the general experiences that are described. He then provides updated information in relation to each of those deponents, stating that with one exception (MN) the deponents all have been offered

accommodation. Mr Delaney also suggests that where some of the deponents refer to medical difficulties some confusion may have arisen because the deponents stated that they had no medical conditions when they initially presented to the IPO. Nevertheless, Mr Delaney very fairly takes no issue with the general proposition that each of the deponents found their experiences difficult and stressful.

194. Following on from Mr Delaney's initial replying affidavit there was a further exchange of affidavits. Many of the issues raised related to the entitlement of the Commission to commence the proceedings and the efficacy of the court granting relief. There was also considerable dispute relating to the encampment of unaccommodated IP applicants outside the IPO.

First affidavit of Mr Jim Clarken

195. On 12 April 2024 Mr Jim Clarken, a commissioner with the Commission, swore an affidavit in reply to Mr Delaney's affidavit. Mr Clarken began by identifying that when the application was brought in December 2023 there was a total of 259 IP applicants who had yet to be offered accommodation. According to published figures, which he exhibited, as of 9 April 2024, the number of unaccommodated IP applicants since 4 December 2023 stood at 1,700.

196. Mr Clarken draws attention to the absence of detailed information and supporting documentation to substantiate many of the assertions in the respondents' affidavit. He notes that the Commission has made efforts to obtain that information pursuant to FOI requests, but the records have not been provided to date.

197. In terms of the increased efforts by the State, and the new elements in their approach to the problem identified since issues were addressed in the period of January to July 2023, Mr Clarken makes the point that the revised approach has not been effective in addressing the difficulties. Specifically, he highlights that the State respondents have not identified any meaningful alternative accommodation options for IP applicants who were not offered accommodation by the State. In effect, the result of that approach is that many individuals are left without any or any adequate accommodation and are rendered street homeless. In terms of the specifics of the response of the State, Mr Clarken questions the utility of the vulnerability triage system on the basis that the Commission does not believe it is possible to minimise the risks associated with the sleeping out on the street to an appropriate level by way of vulnerability assessments or triage.

198. On the Commission's analysis of the figures and by reference to statistics published by the respondents, it was asserted that of the 2,360 individuals who presented without accommodation since 4 December 2023, only 248 have been accommodated *via* the application of triage. This means that there is a large cohort of IP applicants who are not offered accommodation at this initial assessment stage. Mr Clarken highlights that the triage system is reactive and depends on the IP applicants in question being drawn to the attention of the authorities or certain civil society organisations, with the result that there may well be IP applicants who are simply not identified as part of this process. By reference to the deponents who are individual IP applicants and who swore affidavits earlier in the proceedings, Mr Clarken notes that many unaccommodated IP applicants may sleep in places where they would not ordinarily come into contact with either the authorities or the relevant NGOs.

199. With regard to the cold weather measures implemented by the State, while they are welcomed by the Commission, Mr Clarken observed that those accommodation facilities are emergency and temporary in nature, and the measures themselves highlight the underlying failure on the part of the State to offer IP applicants with either accommodation, or adequate supports to enable them to obtain accommodation.

200. With regard to the increased DEA payment and the additional needs payment issues, Mr Clarken makes the point that the respondent's evidence regarding the extent of the availability of additional needs payments remained unclear, and that on the Commission's analysis of the figures it remained the case that a large number of unaccommodated IP applicants did not receive ANP. Secondly, with regard to the increased payments, the Commission questioned whether the comparisons with other EU Member State payments was accurate, and also queries one of the purposes of the choice of payment level, the need to limit secondary movement, where the underlying purpose, as the Commission asserts, of the Directive and Regulations is to ensure that the human dignity of applicants is respected.

201. Moreover, as put by Mr Clarken at para. 54 of his affidavit, even with the increased level of payment it is simply not possible for very many members of the newly arrived unaccommodated IP applicants cohort to source and secure accommodation on a regular or ongoing basis or at all.

202. To reinforce the argument regarding the availability of hostel accommodation – which does not in fact appear to be a significantly contested issue in the proceedings, Mr

Clarken outlines details of searches carried out by the Commission's legal team to check the availability and cost of accommodation in Dublin on a selection of dates between 14 March 2024 and 14 April 2024. The prices returned suggested that the lowest available one-night stay in a dorm room was in the region of €20 while the most expensive was in the region of €149.

203. With regard to the day services that are being provided, the Commission acknowledged the very important work being done by the organisations that provide support and services to unaccommodated IP applicants and who have formal agreements in place with the Minister. Mr Clarken notes that the charities are experiencing very significant levels of demand and refers to evidence adduced by representatives of some of those organisations in the form of affidavits and letters. The point is made that even though those services endeavour to provide a high level of support and care, they are not in a position to provide night services or accommodation.

204. In addition to the principal replying affidavit of Mr Clarken a number of ancillary affidavits were filed to support Mr Clarken's averments.

Further affidavits of individual identified IP applicants

205. In the first instance, RK, swore a further affidavit on 8 April 2024. He states that since his previous affidavit of 29 January 2024 until 7 March 2024, he found that the capacity at day services were so busy that he had to reduce the amount of time he attended. He states that he frequently had to wait up to two hours for a shower. He

found that his DEA was not enough to meet his basic needs. He spent the money on food that he needed when he could not access the day services and also on data for his mobile phone, which he stated was essential because it was the only way of receiving emails and hearing about offers of accommodation from IPAS, as well as spending money on toiletries, clothes, medication and other essential items. He states that he made further applications for additional needs payments on dates in February and received in total €290 in February when the applications were determined favourably. After receiving that payment, he was still not successful in securing hostel accommodation. It appears the difficulty in this regard was that he was informed by the hostels that he needed some form of identification and a credit card in order to make a booking. He states that from the date of his previous affidavit in January 2024 until 8 March 2024, he slept in a tent outside the IPO with the exception of three nights when he was accommodated during bad weather in tents in the former Central Mental Hospital in Dundrum. Despite being informed on 8 February 2024 that he was on a priority list for accommodation, he was not accommodated until 7 March 2024, two months after he made his application for international protection and six weeks after the deponent used the dedicated email address to alert IPAS as to his urgent needs for accommodation because he was rough sleeping. He noted that during the period he was admitted to St Vincent's Hospital with a kidney stone issue and spent three nights there.

206. KD swore an affidavit on 12 April 2024. He was a Ghanian national who arrived in the State on 19 December 2023 and submitted his application for international protection on 20 December 2023. Between 20 December 2023 and the date of swearing of his affidavit he had been sleeping rough, save for approximately fifteen

nights. On the nights when he was not rough sleeping it involved him being accommodated through the intervention of charitable individuals that KD met. He is in receipt of the DEA having received his first payment in late December 2023. He also received a voucher for €100. He states that he mostly spent the money to buy food for himself although he bought some clothes. He applied for ANP for the first time on 8 March 2024 with the assistance of the Irish Refugee Council. On 3 April 2024 he was informed that €154 would be available for collection on 8 April 2024. When he attempted to book himself into a hostel, he was informed that they would not accept a Public Services Card as a valid form of identity and that they required a passport. He states that having contacted approximately ten other hostels he has been unable to find a hostel that will accept a public services card as a form of identification. He attends MQI for food and for access to showers. He states that there are usually very long queues for a shower and he has to limit having a shower to twice a week. He uses sanitary facilities at a public house near Phoenix Park, as well as in certain fast food restaurants. When those places are closed, he does not have access to sanitary facilities. He explains that he found the entire situation extremely stressful.

Affidavit of Mr Geoffrey Corcoran

207. Mr Geoffrey Corcoran, the Head of Services and Operations for Merchants Quay Ireland swore an affidavit on 11 April 2024. He notes that MQI has experienced a striking increase in new international protection applicants presenting in the first three months of 2024. On his estimate there are approximately 145 new presenters per month attending the open access service. Between January 2024 to March 2024 the number of meals served has doubled compared to the previous year. The increase in numbers presents a difficulty having regard to the space available to the open access

service at its premises. He states that the showering facilities at MQI are completely overwhelmed with the number of individuals who attend the service and want to take a shower. They are not in a position to provide a shower to every individual who wants one. He states that MQI have verbally reported the numbers of new presenters to IPAS in regular meetings.

Affidavit of Mr Nick Henderson

208. The Chief Executive Officer of the Irish Refugee Council, Mr Nick Henderson, swore an affidavit on 12 April 2024. In addition to addressing a complaint that the IRC lodged with the European Commission, which does not seem entirely relevant to these proceedings, Mr Henderson says that since the swearing of Ms Hannah Dwyer's affidavit in December 2023 the IRC has continued to engage with newly arrived unaccommodated IP applicants. There has been engagement with approximately 320 such applicants between 6 December 2023 and 10 April 2024. Further to the above engagement 320 referral emails were sent to IPAS and the IRC estimates that approximately 80 such applicants who were referred received an offer of accommodation from IPAS. He notes that the Irish Refugee Council has had positive engagement with Crosscare, Tiglin and Merchants Quay Ireland who provide day services. The IRC observes that all day services are very busy and demand for showers appears to be very high and that often men seeking necessities such as blankets, sleeping bags, jackets or shoes had to leave without those necessities on occasion. Mr Henderson, at the point when the affidavit was sworn, noted the IRC's concern regarding the conditions and lack of facilities for those residing in tents near the International Protection Office. Ultimately, he notes that the number of newly arrived

applicants for international protection who have not been provided with accommodation is increasing and this will place even more significant strain on the availability of services.

Second affidavit of Mr David Delaney

209. Mr Delaney swore a further affidavit on 8 May 2024. Mr Delaney provides an update on the numbers involved. In the first twelve weeks of 2024 over 5,100 people claimed international protection in the State. This is compared with 2,900 people for the same period in 2023, a more than 75% increase in arrival numbers. He describes this as a "*further unprecedented rise in a trajectory of ever increasing numbers since in or about January 2023. The associated cumulative pressure on the accommodation system was unforeseeable and the State is therefore managing an unprecedented emergency situation*."

210. Mr Delaney outlines changes to policy and procedures since December 2023. He notes that the comprehensive strategy, which is set out in a revised white paper, will take some time to implement to address the needs of IP applicants in the medium and long term.

211. Mr Delaney asserts, and this was the subject of significant debate, that while there were 100 people camped outside the IPO offices at the date of swearing, another 1,500 persons appeared to have found an alternative solution by making use of the increased DEA payment. He provides as a basis for this contention that NGOs have reported to IPAS that they have not noted an increase in the amount of rough sleeping in Dublin

other than in the vicinity of the IPO office in Mount Street. He states it is therefore "*reasonable to assume that the increased DEA payment and the first Respondent's current multi-faceted approach is adequate to meet the daily needs of recipients and that the majority of such recipients have found alternative accommodation, given that no alternative position is in fact advanced or substantiated by Mr. Clarken in his affidavit*".

212. At para. 32 of his affidavit Mr Delaney states that IPAS maintains two lists of IP applicants. First the full unaccommodated list which at the date of swearing comprised 1,710 persons and, second, a priority list comprising those persons who IPAS have been advised are potentially "*rough sleeping*" and which now contains 319 persons. He notes that IPAS is prioritising those who it has been advised may be rough sleeping. He states that it is unlikely that a person will be sleeping rough without coming to the attention of an NGO or An Garda Síochána and infers from this that those who are on the unaccommodated list, and not on the priority list, are very likely to have had some financial means or access to alternative accommodation and are not currently rough sleeping. However, he also acknowledges that IPAS does not have a record of the total number of referrals from An Garda Síochána.

213. Again returning to the core issue in the proceedings, at para. 35 Mr Delaney states: -

> *"35. It is accepted that as matters stand not all priority referrals can be offered an immediate offer of suitable accommodation. As of today's date there are 319 persons who have been prioritised for accommodation but to whom an offer of accommodation has not yet been made. Of the 30 priority referrals which are recorded as having been made by [the applicant], 14 persons have not been*

accommodated. It is the first-Respondent's intention to address these outstanding cases with the greatest possible expedition using the resources of accommodation which are currently available to IPAS or which become available through the ongoing effects [sic] to develop new capacity."

214. With regard to additional needs payments, Mr Delaney acknowledges that there is a difficulty in obtaining precise figures from the Department of Social Protection but contends that: -

"43. The first-Respondent has estimated based on a consideration on the number of ANP applicants processed at the North Cumberland Street Asylum Seekers Unit carried out by an officer of the DSP that about 1,400 ANP's have been paid to unaccommodated IP applicants since the beginning of December 2023, albeit it is acknowledged that this is a best estimate and is not a comprehensive figure, as unaccommodated IP applicant may apply for ANPs online or at locations other than the Asylum Seekers Unit and any such applications and any resulting awards are not therefore reflected in this estimate."

215. Mr Delaney reiterates his view that the level of DEA payment is not inadequate. It is in line with the equivalent level in similar EU Member States, and he also notes that one of the purposes of the fixing of the level was not to incentivise Ireland as a location in which to apply for international protection. He reiterates the first respondent's belief and understanding that only a minority of IP applicants who have not been offered accommodation are in fact rough sleeping.

216. Insofar as there may be occasional capacity within the system to provide additional accommodation, Mr Delaney highlighted that if every available space was provided to unaccommodated IP applicants it would prevent the respondents from being able to maximise bed units by having configurations available for a range of family situations. This would have knock on consequences for other IP applicants including families that the respondent considers should be prioritised for accommodation. He notes again that there is significant volatility in the procurement of international protection properties and real difficulties are occurring on the ground.

Second affidavit of Mr Jim Clarken

217. Mr Clarken swore a further affidavit on 13 May 2024. In that affidavit he again criticises the absence of detailed information and supporting documentation to substantiate the statements made by Mr Delaney. He notes that at that point the FOI requests made by the applicant still have not been replied to and were the subject of three separate reviews before the Office of the Information Commissioner. He asserts that as of 13 May 2024, the number of newly arrived unaccommodated IP applicants since 4 December 2023 now stands at 1,715, a figure sourced from the publicly available "*Statistics on International Protection Applicants Not Offered Accommodation*" published by the first named respondent on 10 May 2024.

DISCUSSION

218. It is important to return to the question of what has been determined by the relevant case law. In that regard, the High Court, drawing on clear authority from the CJEU has established that the State will breach the rights of unaccommodated IP applicants under Article 1 of the Charter on Fundamental Rights of the European Union if their

basic needs are not met on an uninterrupted basis from the point at which they apply for international protection.

219. What amounts to basic needs has been noted by the CJEU in *Haqbin* as including a place to live, food, clothing and personal hygiene. The ultimate purpose of ensuring that basic needs are met is not merely to ensure compliance with the provisions of the Directive or Regulations, as important as that is, but to ensure that IP applicants are not treated in a manner incompatible with their human dignity.

220. The initial question is how the court can be satisfied on the evidence, not that an individual person's basic needs are being met or not met, but that the basic needs of a class of persons are being met or not being met. Can the court be satisfied that, as a class, the unaccommodated IP applicants are provided with sufficient means to have an adequate standard of living?

221. Here, the parties have set out a large amount of evidence, comprising affidavits to which voluminous materials were exhibited. The evidence sought to address, from the perspective of the Commission, that the basic needs of unaccommodated IP applicants were not being met by the State. This was done by setting out a series of general factual propositions on the availability of housing and services and a set of general factual propositions on the adequacy of the State response, both in respect of the individual measures and their combined effects. Those general propositions were corroborated by the specific evidence of individual IP applicants who had interacted with the system and who relayed their experiences in their sworn affidavits.

222. I am satisfied that the combined effect of the evidence of the Commission was to establish their case on a strong prima facie basis. It is important to note, as discussed further below, that the State response was nuanced and relatively fair. The individual experiences were not seriously challenged by the State. There was also a general acceptance that a large number of IP applicants from early December 2023 to May 2024 were not provided with accommodation. In addition, it was clear that, even where there was debate about the extent of 'street homelessness' among that cohort, the State was not able to provide accommodation to every person who was reported as street homeless.

223. Insofar as the State contested the proposition that the basic needs of unaccommodated IP applicants were not being met, this was based on a generalised contention that the State response was adequate, and that it was possible to infer that many unaccommodated IP applicants were able to access accommodation. Ultimately, I am not satisfied that the State has rebutted the case made by the Commission.

224. There were some disputes about the quality and proper interpretation of the evidence and some disputes about facts that, properly considered, lie at the margins of the key factual issues. Much of the factual material related to the effort of the State to explain the position in which it finds itself and the efforts that have been made to improve that position. Mr Delaney swore a further affidavit on 20 May 2024, which takes issue in the main with general observations by the applicant that the State ought to have been in a better state of preparedness to deal with the issues that arose. This was important evidence, and of real relevance to understanding the underlying problems. The court does not doubt that the State is faced with an extraordinary and unprecedented

situation and that the accommodation resources available have been saturated for the reasons given. Likewise, the court is satisfied that real efforts are being made to address those problems, and the already difficult task of sourcing accommodation has been rendered even more difficult by hostility in certain areas of the country.

225. Nevertheless, the primary focus must be on the question of the circumstances in which IP applicants find themselves when accommodation is not available. In reality there was very little, if any, dispute about the core factual contentions.

226. The starting point for the Commission's case is that, between 4 December 2023 and 10 May 2024, within the overall cohort of persons who presented to the State seeking international protection, 2,807 persons were not provided with accommodation. From that group of 2,807 persons, there was a subgroup of 1,715 persons who were still awaiting an offer of accommodation by 10 May 2024.

227. It was accepted by the State that since 4 December 2023 the available accommodation capacity in the State for IP applicants was not sufficient to ensure that all such applicants were accommodated. The result was that the State implemented a policy of prioritising families and children ahead of single male applicants.

228. In terms of the number of persons concerned, the affidavits sworn by Mr Delaney provide some insight. In his 27 March 2024 affidavit, Mr Delaney states that since 4 December 2023 1,465 individuals have not received offers of accommodation. In his 8 May 2024 affidavit, Mr Delaney states that IPAS recorded that the full unaccommodated list that it maintained comprised 1,710 persons.

229. Hence, while there is a minor difference in the numbers presented to the court, which may be attributable to the dates for which figures were given, at the very least it was clear that as of 8 May 2024, on the State's own analysis, there were 1,710 IP applicants who were not being accommodated, and that the number has grown over time.

230. In the premises, the starting point of the Commission's case must be treated as proved: there is a group or class of IP applicants numbering 2,807 who between 4 December 2023 and 10 May 2024 were not provided with an offer of accommodation. Of that number, 1,715 persons were still awaiting an offer of accommodation as of 10 May 2024.

231. The next stage in the Commission's argument was that there was seriously inadequate provisions for the unaccommodated IP applicants. The Commission's premise was that unaccommodated IP applicants were not able to provide for their basic needs from their own resources and were reliant on State assistance. There was no evidence before the court to the effect that any substantial number of those IP applicants had sufficient resources to provide for their basic needs, being housing, food, clothing, and hygiene. Certainly, the State did not seek to present any evidence to support such a contention. In the premises, I am satisfied that as a matter of fact it is more likely than not that this class of unaccommodated IP applicants are reliant on the State to provide for their basic needs.

232. Hence the question is what provision was made by the State and whether that was adequate by itself to provide for those basic needs.

233. The provision being made by the State was described as being provided on an exceptional and temporary basis (first affidavit of Mr Delaney at paragraph 19). The State identifies the ways in which the response to the lack of available accommodation for IP applicants has evolved since December 2023:

a. There is a process in place to prioritise the most vulnerable for accommodation instead of an allocation based solely on a *first come first serve* basis. There is also a vulnerability triage procedure which uses the IPAS vulnerability assessment triage form.

b. The DEA payment for unaccommodated IP applicants has been increased by €75 per week to €113.80. Applicants are also provided with a €100 shopping voucher to cover the initial period before their DEA is first received.

c. There are formal agreements with day services to provide a range of services to those who are unaccommodated. In this way food, hygiene and health supports are put in place for all those who need them.

d. There is an improved process for information processing at the IPO, so that applicants are provided with relevant information and contacts, and the IPO/IPAS can be informed of particularly vulnerable applicants.

e. Temporary accommodation was made available on an emergency basis as part of the Department's *"Cold weather response"*.

234. Against that, the Commission asserts that the new efforts by the State are not effective in addressing the core difficulties facing unaccommodated IP applicants. This can be broken down to a series of further contentions. First, there is an argument that the payments being made are not sufficient to permit such applicants to access

accommodation, with the result being that many individuals are left without any or any adequate accommodation and are rendered street homeless.

235. Here, the court is satisfied that the payments being made by way of DEA do not amount to an adequate financial allowance to permit the applicants to access basic housing. In both the Directive and the Regulations, the daily expense allowance is a sum to provide for incidental personal expenditure. Hence the additional sum of €75 can really only be taken into account as representing the allocation to assist in the provision of basic needs. Otherwise, there would be no allowance provided for incidental expenditure.

236. Even if it was accepted for the sake of argument that the DEA also was not intended to be used for food – and this is contrary to the evidence in this case – there is no real dispute from the State that unaccommodated IP applicants face very real difficulties in accessing even basic hostel accommodation.

237. A feature of the State's case was that in seeking to stand over the increased DEA figure as representing an adequate sum to provide for basic needs the State did not provide any analysis of the real-world purchasing power of that sum or how in fact an unaccommodated IP applicant was expected to access the basic need of housing. Instead, the contention was that the sums provided reflected a norm from equivalent EU Member States.

238. In his first affidavit, Mr Delaney repeats what is set out in the Statement of Opposition to the effect that the Government provided for an amount in line with the equivalent

payment made in EU Member States with similar economic indicators as Ireland. He notes at para. 39 of his affidavit that that step *"ensures calibration of offering and does not incentivise Ireland as a location in which to apply for international protection".*

239. Whether or not avoiding the incentivisation of Ireland as a location in which to apply for international protection is a legitimate factor to take into account, that incentivisation will not be achieved if the result is a situation where the basic needs of applicants are not being met.

240. I accept that the figures presented in the course of the proceedings make it clear that €75 will not permit an unaccommodated IP applicant to access housing from the private sector. The State gave no indication as to how the unaccommodated IP applicants could otherwise access housing. Therefore, I am satisfied that the financial assistance provided is not adequate to ensure that these IP applicants can access housing where it is not being provided directly by the State.

241. The next matter to be addressed is whether the Commission satisfied the court that, in those premises, the reality was that many if not all of the unaccommodated IP applicants are likely to have been homeless if they could not access housing.

242. It was a feature of the evidence from the individual deponents who were IP applicants, that on occasion they were able to access overnight accommodation in a variety of ways. The evidence showed certain individuals being permitted or managing to find a way to spend overnights in churches or mosques. Others occasionally were able to

stay overnight with acquaintances or charitable strangers. However, all of the deponents experienced periods on the street. While the evidence in that regard was from a small sample of applicants, the State did not realistically challenge their evidence. Moreover, the question would have to be asked: if an applicant does not have the means to buy accommodation, where can they be expected to house themselves? The State provided no coherent or satisfactory answer to that question, and I am satisfied that a finding can be made that the preponderance of unaccommodated IP applicants simply remained without any form of basic housing.

243. There was considerable debate in the proceedings about the issue of street homelessness. I consider that this is something of a red herring. Clearly, many IP applicants lived on the streets in tents for some time. However, that cohort represents the most visible manifestation of the problem of the absence of adequate housing, and I do not accept the proposition that if a person is not identified as street homeless it can be inferred that they have resolved their housing problems. That proposition, which was a feature of the State's evidence, seems to run entirely contrary to the overall evidence. Most obviously, it is not at all clear how one can deduce that a person who does not have the means to access housing has in fact accessed housing. In addition, it was evident from the affidavits that many of the applicants resorted to ad hoc arrangements such as spending overnights in churches or otherwise finding somewhere inconspicuous to spend their nights. Others simply walked around the city during the night.

244. However, even in the case of persons who were 'street homeless' the court is not satisfied that the response of the State was adequate having regard to Article 1 of the

Charter of Fundamental Rights of the European Union. Here there was some dispute on the proper interpretation of what was very limited evidence.

245. In their papers, the State position was that the respondents are particularly concerned about the risks of street homelessness. I accept that this is true, but the real issue is whether what is being done is adequate. The State operates what is described as a triage system. Effectively, the triage system is operated first by IPAS at the IPO at the initial interview. Secondly, it is informed by referrals of applicants who are considered vulnerable and likely to be street sleeping from bodies such as An Garda Síochána, health services and charities or NGOs. Because of a belief that some applicants are in a position to secure alternative accommodation, the Minister prioritises those who are actually found to be street homeless following a referral to it by those agencies.

246. Mr Delaney's evidence from his March 2024 affidavit was that IPAS is prioritising those who it has been advised may be rough sleeping. He avers that since 4 December 2023, 213 IP applicants were offered accommodation through the vulnerability assessment triage process by IPAS at the time of their protection application being made. However, he states that as of 25 March 2024, IPAS received 541 referrals from NGOs from potential rough sleepers. Of those, 404 received an offer of accommodation, which suggests that even on the State's analysis there was an appreciable number of unaccommodated IP applicants, even when drawn to the attention of IPAS through the various elements of the triage system.

247. The Commission in its evidence, particularly in the affidavits of Mr Clarken, questioned the effectiveness of the vulnerability triage system – as it applied to

persons who were street homeless – operated by IPAS. On the Commission's analysis, and by reference to statistics published by the State, it was asserted that of the 2,360 individuals who presented without accommodation since 4 December 2023, only 248 were accommodated *via* the application of triage by early April 2024. This means that there is a large cohort of IP applicants who are not offered accommodation at this initial assessment stage. Mr Clarken highlighted that the triage system was reactive and depended on the IP applicants in question being drawn to the attention of the authorities or certain civil society organisations, with the result that there may well be IP applicants who are simply not identified as street homeless as part of this process.

248. In his 8 May 2024 affidavit, Mr Delaney updates the figures. He explained that the priority list comprising those persons who IPAS have been advised are potentially "*rough sleeping*" at that point included 319 persons.

249. He asserted that it was unlikely that a person will be sleeping rough without coming to the attention of an NGO or An Garda Síochána, and infers from that that those who are on the unaccommodated list and not on the priority list are very likely to have had some financial means or access to alternative accommodation and are not currently rough sleeping. However, he also acknowledges that IPAS does not have a record of the total number of referrals from An Garda Síochána.

250. As noted above, Mr Delaney asserted that while there were 100 people camped outside the IPO offices in early May 2024, another 1,500 persons appeared to have found an alternative solution by making use of the increased DEA payment. He provides as a basis for this contention that NGOs have reported to IPAS that they have not noted an

increase in the amount of rough sleeping in Dublin other than in the vicinity of the IPO office in Mount Street. He states it is therefore, "*reasonable to assume that the increased DEA payment and the first-Respondent's current multi-faceted approach is adequate to meet the daily needs of recipients and that the majority of such recipients have found alternative accommodation, given that no alternative position is in fact advanced or substantiated by Mr Clarken in his affidavit*".

251. As noted above, the court does not accept that it is reasonable to infer that the majority of unaccommodated IP applicants have sourced accommodation through private means or by using the DEA.

252. Basic needs go beyond housing, and includes food, clothing, and personal hygiene. I accept that, in that regard, the day services funded by the State are endeavouring to provide an adequate level of services. However, the evidence shows that those services are under considerable strain and not all needs can be accommodated. It was clear from the MQI evidence, for instance, which reflected the experience of the individual IP applicant deponents, that it was not possible to provide showers for all applicants.

253. In the premises, the court is satisfied that the Commission has proved that the current range of services made available for this class of unaccommodated IP applicants is not adequate to provide properly for their basic needs of housing, food, clothing and hygiene. While it may be that by combining the various State payments and accessing day services it may be possible to for an IP applicant to access some basic needs, that necessarily involves the person having to make an unacceptable choice between food,

clothing or hygiene. In respect of hygiene facilities, it is clear from the evidence that day services are overwhelmed, or close to becoming overwhelmed. The result is that this class of unaccommodated IP applicants cannot access regular hygiene services in a manner consistent with their dignity.

254. The court further accepts that the evidence from the sample of unaccommodated IP applicants, taken with the general evidence from the Commission and NGO witnesses, establishes that the consequences of an inability to access basic needs, particularly housing and hygiene services, is that those persons are left in a deeply vulnerable and frightening position that undermines their human dignity.

THE ISSUE OF RELIEF

255. The State argued that even if the court was satisfied that the Commission had made out its basic case, there was no need for the court to grant declaratory relief because the State already was endeavouring to address the situation and the general legal position regarding unaccommodated IP applicants had been clarified in the *S.Y.* judgment. In that regard the State relied particularly on the Supreme Court's observations in *PMcD v. Governor of X Prison* [2021] IESC 65, which had been considered by Meenan J in *S.Y.*

256. In *PMcD v. Governor of X Prison*, Charleton J. stated at paragraph 20:-

> *"20. ...More generally, the discretion to refuse is not fettered when it comes to granting a declaration but, as Lord Bingham stated at [1991] PL 64, courts are guided as to conduct and efficacy:*

'The court has exercised its discretion to refuse declarations which will serve no useful purpose, [AG v. Scott [1905] 2 K.B. 160, 169; Eastham v. Newcastle United Football Club Ltd. [1964] Ch. 413, 449] or to refuse relief where the applicant has achieved the substantial result which he seeks without any order, [R. v. Commissioner of Police of the Metropolis, ex p. Blackburn [1968] 2 Q.B. 118] or where a public body has shown that it is doing all it honestly can to comply with its statutory duty, [R. v. Bristol Corporation, ex p. Hendy [1974] 1 W.L.R. 498] or where an error has been substantially cured. [R. v. Secretary of State for Social Services, ex p. Association of Metropolitan Authorities [1986] 1 W.L.R. 1]. This seems to me a beneficial rule. If the court is satisfied that a public body will readily perform its duty once the court tells it what its duty is, I see no reason why it should be the subject of a coercive order. The rules that the court will not compel a party to do the impossible and will not make futile or unnecessary orders seem hard to challenge.'

22. As Walsh J acknowledged in Transport Salaried Staff Association v. CIÉ [1965] IR 1, while the circumstances in which a court of equity may grant a declaration have become less strict, over the century up to the date of that judgment, such a jurisdiction is exercised with "circumspection". MacMenamin J in his separate judgment rightly cites Omega v. Barry [2012] IEHC 23, where Clarke J identified four essential factors: that there be a good reason for a declaration; that there must be a more than theoretical, rather real and substantial, issue; that the contending party for such relief must have sufficient

interest to raise that question; and finally, that there must be a proper contradictor. It must be born in mind that what is before the court is a matter which touches on the immediate rights and liabilities of parties and that in consequence of a declaration, the parties are considered bound by what has been declared and, in many if not all instances, are expected to act according to the legal position which the court has not only clarified but taken the step of publicly setting out in solemn form. Such has to relate to an issue touching them both and has to be one within the scope of the judicial exercise of power…"

257. I am satisfied that the court should grant declaratory relief in this case by reference to the four factors identified by Clarke J. in *Omega v. Barry* [2012] IEHC 23, which were endorsed by the Supreme Court in *PMcD*:

a. First, there is a good reason for the declaration. The State position in this case was that the measures implemented by the State since the *S.Y.* judgment were adequate to meet the basic needs of unaccommodated IP applicants. In that sense there was a real legal dispute grounded on facts that required to be resolved.
b. Second, in those premises there was a real and substantial issue to be resolved.
c. Third, for the reasons explained above, the court was satisfied that by virtue of section 41 of the 2014 Act, the Commission has sufficient standing and interest to raise the issues in the case.
d. Fourth, there was a proper contradictor in the form of the respondents.

258. In terms of the application for mandatory relief, this also was opposed by the State by reference to well established principles. The Commission, on the other hand, argued

that this was an appropriate case for the court to grant mandatory relief. It should be noted that the specific mandatory relief sought was as follows:

> "*An order of mandamus requiring the Respondents to meet the basic needs of newly arrived international protection applicants who are unaccommodated to ensure a standard of living adequate for the health and dignity of those applicants and capable of ensuring their subsistence, and/or otherwise meet their basic needs.*
>
> *In the alternative, an order of mandamus requiring the Respondents to ensure/arrange the provision to newly arrived international protection applicants who are unaccommodated of accommodation and/or financial assistance that is sufficient to ensure a standard of living adequate for the health and dignity of those applicants and capable of ensuring their subsistence, and/or otherwise meet their basic needs.*
>
> *In the alternative, an order of mandamus requiring the Respondents to ensure that material reception conditions are available for newly arrived international protection applicants who are unaccommodated sufficient to provide an adequate standard of living which guarantees their subsistence and protects their physical and mental health*."

259. It is to be borne in mind that the mandatory relief here must first bear a relationship to the context of the proceedings. This is not a case about a failure to comply with a statutory duty, although that is an important context. Rather this is a case in which pursuant to section 41 of the 2014 Act the Commission is seeking declaratory or other relief in relation to a matter concerning the human rights of a class of persons.

260. It seems to the court that this is a case in which taking the step of granting the mandatory relief as formulated or a version of the mandatory relief is not appropriate or necessary.

261. The relief as formulated is in very general terms – in effect the State would be compelled to give effect to the human rights of unaccommodated IP applicants. The State has made clear, and the court accepts, that the State is actively endeavouring to achieve that objective. Moreover, while this is now a further case in which the High Court has found that the State has not properly vindicated the rights of unaccommodated IP applicants, the court is satisfied that the State made efforts to improve the nature and extent of its provision since the judgment in *S.Y.*

262. Even though the court has found that those efforts were not adequate, it demonstrates that the State sought to respond to earlier declarations made by the High Court, and there is no suggestion that the State will not respond to this judgment if only declaratory relief is granted.

263. Underlying the above, is the inescapable practical fact that policing a mandatory remedy framed in such general terms would present real difficulties and give rise to scope for serious disputes about what amounted to compliance. The court is satisfied that the justice of this case is satisfied by the grant of declaratory relief, and will exercise its discretion not to grant mandatory relief.

SUMMARY

264. Applicants for international protection in the State have a well-established fundamental right to have their human dignity respected and protected, including by being provided with an adequate standard of living which guarantees their subsistence and protects their physical and mental health where they do not have sufficient means to provide for themselves.

265. The court is satisfied that the current State response to the needs of IP applicants who are acknowledged to be without accommodation is inadequate to the point that the rights of the class of person concerned in these proceedings under Article 1 of the Charter of Fundamental Rights of the European Union have been breached by the State. As noted by the CJEU in clear and unequivocal terms in *Saciri* and *Haqbin*, a failure to provide for the basic needs of applicants amounts to a breach of their right to human dignity.

266. In the premises the court will grant a declaration in the following terms:

"A declaration that the respondents' failure to provide for the basic needs of newly arrived international protection applicants between 4 December 2023 and 10 May 2024, whether by way of the provision of accommodation, shelter, food and basic hygiene facilities or otherwise, is in breach of that class of persons rights pursuant to Article 1 of the Charter of Fundamental Rights of the European Union."

267. As this judgment is being delivered electronically, I will list the matter for final argument in respect of costs or the final formulation of orders before me at 11am on 11 October 2024. I will express the provisional view, in aid of the parties, that the

respondents should be responsible for the costs of the applicant, to be adjudicated in default of agreement. However, the parties are welcome to propose a different resolution. The parties are invited to seek to come to agreement on the form of final orders. If there is no agreement, particularly in relation to costs, the parties should file short written legal submissions for the court on or before 4 October 2024.