THE HIGH COURT

JUDICIAL REVIEW **[2023] IEHC 717**

Record No: 2023/209 JR

IN THE MATTER OF DIRECTIVE 2013/33/EU AND

THE EU (RECEPTION CONDITIONS) REGULATIONS 2018

Between:

S.A.

Applicant

-and-

THE MINISTER FOR CHILDREN, EQUALITY, DISABILITY,

INTEGRATION AND YOUTH,

IRELAND AND THE ATTORNEY GENERAL

Respondents

THE HIGH COURT

JUDICIAL REVIEW

Record No: 2023/541 JR

BETWEEN**:**

R.J.

Applicant

-and-

MINISTER FOR CHILDREN, EQUALITY, DISABILITY,

INTEGRATION & YOUTH,

IRELAND AND THE ATTORNEY GENERAL

Respondents

Judgment of Mr Justice Cian Ferriter delivered this 14th day of December 2023

Introduction

1. The applicants in these proceedings arrived in Ireland in mid-February (in the case of A.) and mid-March (in the case of J.) of this year, and sought international protection. Both applicants qualified for "material reception conditions" under the relevant EU and Irish legislation for international protection applicants, being the Reception Conditions Directive 2013/33/EU (*"the Directive"*) which is transposed into Irish law by the European Communities (Reception Conditions) Regulations 2018 (S.I. 230/2018) (*"the Regulations"*). Such conditions include the basic needs of accommodation, food, clothing and access to personal hygiene facilities. The State failed to provide the applicants with accommodation. As a result, A. spent 71 days homeless on the streets. J. was street homeless for 63 days. The respondents (for ease, the *"State"*) accept that the applicants were denied their entitlements to accommodation under the relevant legislation and consents to declarations of breach of the applicants' rights. The applicants also claim damages arising the failure of the State to provide for their basic needs. The State opposes the claims for damages on the basis that the failure to provide the applicants with accommodation, in particular, arose from the *force majeure* circumstances of saturation of available international protection accommodation capacity stemming from the huge influx of Ukrainian refugees arising from the war in Ukraine and an unexpectedly large increase in the numbers of other international protection applicants arriving in Ireland in the same period.

2. While the two applicants properly brought their claims in separate proceedings, I am giving a joint judgment on the two claims in circumstances where the two cases represent *"test"* cases from a pool of some 50 or so such cases that have been brought arising out of the same broad circumstances i.e. single male adult international protection applicants being left street homeless for periods following their arrival in Ireland to claim protection. The problem of such applicants being left street homeless ran from 24 January 2023 (when the International Protection *"Transit Hub"* located in Citywest, Dublin reached capacity) until 9 June 2023 (when the State was in a position to provide accommodation to all remaining international protection applicants who had not been provided accommodation to that point).

3. The cases raise potentially significant questions of EU law as to the availability and scope of a *force majeure* defence to claims for damages for breach of State liability for inviolable fundamental rights under the Charter of Fundamental Rights of the European Union

("the Charter"). As explained in this judgment, I have concluded that a reference to the CJEU on such questions is necessary to enable me determine the claims in these proceedings.

Procedural background

4. Hyland J. granted leave to apply for relief by way of judicial review in the A. case. The J. case came before me as a telescoped hearing. For the sake of good order, I should say that I am satisfied to grant leave to apply for judicial review in the J. case. Accordingly this judgment proceeds on the basis that I am dealing with the substantive claims for which leave has been granted in both cases.

Prior relevant litigation

5. A number of cases concerning international protection applicants who were left homeless came before the courts earlier this year when the problem first started to manifest itself. Many of these applicants sought urgent injunctive relief to ensure that they were provided with accommodation. One of those cases was *S.Y. v Minister for Children, Equality, Disability, Integration and Youth* [2023] IEHC 187 ("*S.Y.*"). In that case, Meenan J. held that the State was in breach of its obligations under the Regulations and Article 1 of the Charter in failing to provide an international protection applicant with accommodation and granted the following declarations, despite opposition from the State:

(i) A Declaration that the Minister's failure to provide to the applicant the "material reception conditions" pursuant to the European Union (Reception Conditions) Regulations 2018 is unlawful;

(ii) A Declaration that the failure by the Minister to provide to the applicant the "material reception conditions" pursuant to European Union (Reception Conditions) Regulations 2018 is in breach of the applicant's rights under Article 1 of the Charter of Fundamental Rights of the European Union.

6. The State accepts that similar declarations are appropriate in each of the applicants' cases here.

7. The State maintains that it accepted in the *S.Y.* proceedings that there was a breach of the Regulations but argued that a declaration was not necessary or appropriate in the circumstances. The State contended that *force majeure* was not run as an argument in that case, which was a hearing on an application for declaratory relief in the context of an admitted breach of the Regulations. The Minister denied a breach of Article 1 of the Charter but lost on that issue. The applicant there also maintained a case for breach of Articles 3, 4 and 7 of the Charter, in addition to Article 1 but Meenan J. confined his findings to a breach of Article 1. As I shall come to later in this judgment, the applicants contend that the State cannot run a *force majeure* case in answer to the claim for damages where it ran a form of "impossibility" defence in the *S.Y.* case and lost that argument there i.e. where *force majeure* was not available as a defence to liability it could not now be available as a defence to a claim for damages.

Scope of the applicants' claims

8. While the applicants' pleaded cases sought damages for, *inter alia,* breach of statutory duty, it was common case at the time of the hearing before me that the cases were claims for "*Francovich* damages" governed by the principles found in the jurisprudence arising from the seminal case of *Francovich* (Joined Cases C-6/90 and C-9/90) ("*Francovich")*.

Applicable legislative framework

9. It is necessary to briefly sketch the applicable legislative framework.

10. Article 1 of the Charter is titled "Human dignity and provides:

> *"Human dignity is inviolable. It must be respected and protected."*

11. The Reception Conditions Directive (Directive 2013/33/EU) ("the Directive") determines the minimum standards for the reception of applicants for international protection, such as the applicants in this case. In particular, as acknowledged in the recitals:

> *"(10) With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party.*

...

(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."

12. Article 17 of the Directive sets out the general rules on material reception conditions as follows:

"*1. Member States shall ensure that material reception conditions are available to applicants when they make their application for international protection.*

2. 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." (emphasis added)

13. As can be seen, the terms of article 17 are mandatory and immediate on application for international protection.

14. Article 18 of the Directive sets out the modalities for material reception conditions and provides in particular at para. 9:

"*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) an assessment of the specific needs of the applicant is required, in accordance with Article 22;

(b) housing capacities normally available are temporarily exhausted.

Such different conditions shall in any event cover basic needs." (emphasis added)

15. In Case C-79/13 *Saciri* ("*Saciri*") (with reference to the original Reception Conditions Directive (2003/9/EC)), the Court of Justice (at paras 34-35) explained the nature and origin of the obligation to provide material reception conditions to applicants, emphasising the need to protect the right to human dignity as a result of which Member States may not deprive asylum seekers, "even for a temporary period of time" of the protection of the minimum standards laid down in the Directive. This approach has been consistently re-iterated: see *Haqbin* (Case C-223/18 ECLI:EU:C:2019:956) ("*Haqbin")* (a case in which a recipient of material reception conditions was expelled from reception accommodation due to violent behaviour) and *T.O.* (Case C-422/21, ECLI:EU:C:2022:616) ("*T.O.*") (another reception accommodation withdrawal case).

16. It is common case that the Regulations faithfully transpose the Directive for the purposes of the issues arising in this case.

17. The Regulations define "Material Reception Conditions" as being "provided to a recipient for the purposes of compliance with the Directive" and that they constitute the following:

> *"(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."*

18. At regulation 4, the 2018 Regulations further define "provision of material reception conditions" as follows:

> *"(1) A recipient shall, subject to these Regulations, be entitled to receive the material reception conditions where he or she does not have sufficient means to have an adequate standard of living.*
> *...*
> *(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 a recipient's specific needs is required to be carried out, or

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

(6) The provision of the 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." (Emphasis added)

19. As can be seen, the Regulations are mandatory in their terms as regards provision of material reception conditions including accommodation.

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)).

21. Both the Directive and the Regulations also make specific provision for vulnerable applicants.

The applicants' personal circumstances

Mr. A.

22. Mr. A. is a 25-year-old man from Afghanistan. He was forced to flee Afghanistan following events which involved the Taliban killing an older sibling, an incident which led to him being pursued by the Taliban (and a younger sibling being imprisoned and, ultimately, dying in prison). Mr. A. was injured in a very serious car accident in Hungary in January 2023 in which a number of people died. Mr. A. arrived in Ireland on 14 February 2023 and applied for international protection on 15 February 2023. As he did not have sufficient means to provide any adequate standard of living for himself in Ireland, it is accepted that he was entitled to material reception conditions under the Regulations, in particular accommodation, food, clothing and access to basic hygiene facilities.

23. In summary, Mr. A. was not provided with accommodation for 71 days. He was reduced to sleeping rough on the streets of Dublin in often wet and freezing weather. He was suffering physical pain from injuries sustained in his car accident and complex PTSD. He had suicidal ideation. His application to be treated as a vulnerable person pursuant to the Regulations was refused. He received a single Dunnes Stores voucher for €25 on 15 February. He did not receive his daily expenses allowance ("DEA"), which amounts to €5.54 per day, until 5 April 2023 (when he was given a payment backdated to 15 February) which meant that he went some 50 days with only a €25 voucher. He was finally accommodated on 27 April 2023 after 71 days on the streets. He received an "additional needs payment" ("ANP") of €100 on 20 June 2023 some time after he was accommodated.

24. On presentation to the IPO on 15 February 2023, Mr. A was told there was no accommodation available. He explained that he did not have any friends or family in Ireland to stay with and was advised to email the IPAS (International Protection Accommodation Services) section in the first respondent's Department ("the Department") which deals with accommodation for international protection applicants. He emailed the IPO and IPAS on the following day, 16 February 2023, stating *"I'm sick, I don't have a place to stay, I can't sleep on the streets, my body is in a lot of pain, I am going to die"*. He received an email reply from the IPAS helpdesk stating that:- *"Due to the nationwide shortage of available accommodation for IP applicants, particularly single males, the Transit Hub has been providing emergency shelter while applicants wait to be assigned to accommodation. It is no longer possible to provide emergency shelter to IP adults as the Transit Hub has now reached capacity."* He was then told that he would be contacted as soon as accommodation became available.

25. Mr. A slept rough on the streets outside the IPO for a number of nights until he was moved on by the Gardaí after which he continued to sleep rough in various locations around Dublin city centre. He attended the office of the Irish Refugee Council ("IRC") and a solicitor with the IRC arranged for an email to be sent to IPAS on 24 February 2023 with an urgent request to provide accommodation to Mr. A. This email pointed out that Mr. A. was experiencing pain due to a hip injury, headaches and suicidal thoughts and that he had not received any payment as he was outside direct provision and so was in a situation of destitution. The email requested that Mr. A. be issued with an offer of accommodation urgently and that if

an offer of accommodation in line with Regulation 7 of the Regulations could not be provided, Regulation 4(5) should be applied i.e. alternative accommodation.

26. This email was replied to by IPAS who explained that IPAS was currently in the midst of an acute accommodation shortage for international protection applicants, that they were working to accommodate such applicants as quickly as possible and that they were managing the situation on a *"date of application basis"*. The email stated that the only exceptions to this is where there is *"a particularly high level of vulnerability, such as a severe physical disability"* with those cases being triaged on a case-by-case basis. The IRC replied by email on the same date informing IPAT of Mr. A.'s *"particularly high level of vulnerability"*, with Mr. A. suffering severe pain in his head, chest, ribs and back as a result of the serious car accident he had been in while *en route* to Ireland (i.e. the accident in Hungary). The email stated the pain was sometimes at such a level that Mr. A. felt he could no longer cope and wanted to end his life. The IRC stated it had referred Mr. A. to health services which had provided him with pain medication and scheduled him a further assessment. It was pointed out that sleeping outside in cold weather conditions was aggravating his condition and, further, that Mr. A. was fearful that he would be attacked.

27. The IRC provided Mr. A. with a list of charities in Dublin which provided meals and access to bathroom facilities and Mr. A. sought to avail of them while he was sleeping rough in Dublin city centre.

28. Mr. A. put evidence before the court, by an affidavit of 6 March 2023, which demonstrated that accommodation continued to be available on an individual and temporary basis in hostels and B&Bs in Dublin and other locations around Ireland and exhibited a printout from Booking.com which contained details of some 40 establishments in Ireland offering accommodation on that date for €50 or under per night and over 460 establishments offering accommodation for €100 or under that night.

29. Mr. A. sent further emails to IPAS on 23 February 2023 and 27 February 2023. He received a standard response from IPAS on 2 March 2023. The IRC sent medical reports relating to Mr. A. to IPAS on 1 March 2023. These medical reports recorded the injuries he had sustained in the accident in Hungary and the severe headaches he had had since then, in

addition to physical pain. Concussion was diagnosed. He was advised to attend a GP to have his symptoms monitored and to get a reference to neurology services.

30. Mr. A. says that he did not receive any information about food or hygiene/sanitation facilities from IPO or IPAS. He did not speak or understand English well. He says he was not informed of any entitlement to apply for the daily expense allowance for international protection applicants or the additional needs payment.

31. The weather at that time was very cold with a lot of wind and rain. On 23 February 2023, the temperature dropped to -1 degrees Celsius and to -2.7 degrees Celsius on 7 March. The temperature was as low as -4.3 degrees Celsius on 27 March. Mr. A. averred that sometimes he felt like he wanted to end his life. Living on the streets made him feel very stressed. On two different occasions, he called an ambulance given how bad he was feeling. He said that he was given a medical form to complete which required a GP signature, but he did not have access to a GP. He was concerned his belongings would be stolen and witnessed violence on the streets while sleeping rough.

32. After a number of weeks sleeping rough in Dublin city centre, Mr A. met some Afghan men who helped find him a multi-story carpark in north Dublin which he began to sleep in. He did have a number of nights where he was able to stay with these Afghan friends, but mostly he was sleeping in the carpark. He did feel safer there, but sleeping there did mean that he could not access the homeless supports in Dublin city centre. Sometimes he went two days without proper food because he could not afford to travel into the city centre or to buy food. He would buy some biscuits because they were cheap and sometimes his Afghan friends would bring him food. His food difficulties were exacerbated by the fact that he was fasting during the day during the period of Ramadan. He often went five or six days without showering or washing because it was very difficult to access facilities.

33. Mr A avers that:-

> *"The experience of sleeping rough in Dublin and Skerries was one of the worst times of my life. I was hungry, tired, cold, filthy and scared almost all the time. I found the whole experience humiliating. I find it very distressing to think back on the experience now after talking about it."*

34. He applied for the DEA on 31 March 2023 (before then, the DEA could not be paid to people who were not in IPAS accommodation). He received a DEA payment of €315.90 on 5 April 2023, which included payments backdated to 15 February. This is a rate of €5.54 per day. The DEA was designed to be provided to international protection applicants living in direct provision i.e. to cover incidental personal expenses where their accommodation and food was already provided.

35. Mr. A. made an application for an additional needs payment on 15 June 2023 for assistance with purchasing clothes and was awarded €100 on 20 June 2023. Mr. A. averred that he made an application for ANP also on 5 April which he says was not dealt with. It appears that no record of this could be located by the Department of Social Protection (DSP) but that Mr A.'s case worker was told on 12 May that Mr A. could re-apply immediately at that point.

36. Mr. A. received accommodation in Citywest Centre on 27 April 2023 after 71 days of street homelessness.

Mr. J.

37. Mr. J. is a 22-year-old Christian man from India. He entered the State on 16 March 2023. He slept rough for a number of nights before presenting at the IPO office on 20 March 2023 when he claimed international protection. He claims international protection on the basis that he was persecuted in India arising from his involvement in an inter-faith relationship. The persecution included threats to kill him and his family, emanating from his partner's family, who are Muslim. He says he was forced to flee India and went to London where he lived for seventeen months. He came to Ireland to claim asylum, travelling from London to Dublin via Belfast.

38. As with Mr. A., Mr. J. was given a Dunnes Stores voucher for €25 on his initial presentation to the IPO on 20 March. He spent some 64 nights sleeping rough until he was granted accommodation on 22 May 2023.

39. He spent his nights sleeping on the streets of Dublin near the IPO offices in a tent provided to him by the Capuchin Centre. He averred that it was cold, wet and frightening. He

feared each night that his tent would be set on fire by people who had targeted other international protection applicants. He was often hungry.

40. He submitted a vulnerability assessment form, with the help of his solicitors, on 16 May 2023. It appears that his application to be assessed as vulnerable was not accepted.

41. Mr. J. received a tent, food and clothes over the period he was street homeless from a charity. He says that he sometimes got food from the Capuchin Day Centre and the Merchant Quay Centre. There were some nights where both centres were closed and he had to use what little food he had on hand until one of the centres opened the next morning. He averred that:-

> *"While I was thankful to have these centres to go to while I was homeless, there were many other people using the facilities and I often waited hours just to take a shower or charge my phone. I felt very unclean most of the time and like I could never keep up with my hygiene due to my situation. This made me feel miserable most days."*

42. Mr. J. says that he did not find out about the entitlement to DEA until 17 April 2023, which he then applied for. Mr J. received his DEA payment (of €5.54 per day/€38.80 per week) on 21 April 2023 which included payments backdated to 20 March 2023. This meant that he went a month with only a Dunnes Stores voucher of €25 and was entirely dependent on charity in this period. He said that:

> *"The €38.80 would not last me very long and I often had to make sacrifices as to what I could buy that week. While I needed clothes or toiletries, most of the time I would spend my money on food in case I could not get food from the centres."*

43. Mr. J. made three applications for additional needs payments. The first was applied for and granted on 28 March, in the sum of €100. A second ANP application on 7 April was refused. A third application was made on 6 April and granted some 7 weeks later on 28 May, in the sum of €120, after he was accommodated.

44. Mr. J. averred that he became desperate and was scared for his future and his wellbeing. He felt alone and afraid. He averred that he had some very dark moments when he thought he

could not go on. He felt worthless and did not think that it would ever change or get better. He averred that he could not sleep well in his tent because of the cold and wet weather. He developed serious digestive problems when living on the streets (he thinks through stress, worry and poor diet) and lost a lot of weight. He averred:-

> *"We were not offered any protection when we were living on the streets. On many nights racist individuals would come to the IPO building where we were living and threatened to burn down our tents. This was terrifying and I witnessed and heard them parading around the tents making rude and racist comments and threats."*

45. Mr J. said that his backpack and belongings were stolen, leaving him with nothing. He said that the weekly payment of €38.80 was not enough to help him replace his belongings and that he was left wearing the same clothes for a month.

46. He averred that:

> *"My experience living on the streets was worse than anything I have ever experienced. It changed me forever. I do not feel like myself anymore. I feel like I lost my health, mental clarity and character."*

47. Mr J. was provided with accommodation on 22 May 2023, after 64 days of street homelessness.

The State's position

48. Before addressing the parties' legal arguments, it is necessary to set out in a little detail the factual basis for the State's *force majeure* case.

The unprecedented numbers of people requiring accommodation

49. Counsel for the Minister said at the outset of the State's submissions that the accommodation crisis had occurred as a result of unprecedented and unforeseeable events and that the Minister had acknowledged from the outset, both to the court in various proceedings and to the media, the State's legal obligations under the Regulations and Directive. Counsel for

the Minister said it was a matter of regret on the part of the Minister that the applicants were not afforded material reception conditions.

50. The period in question was from 24 January 2023 (when the Citywest Transit Hub was closed to further recipients) until 9 June 2023 (by which point all remaining homeless international protection applicants were provided with accommodation). The only people who were not provided with accommodation in the period were single male adults. Families, children, elderly people and people with disabilities were all accommodated. The high point of this crisis was reached on 5 May 2023 when there were 583 international protection applicants without accommodation.

51. The State built its case on the basis that it exercised all due care in its efforts to provide material reception conditions, and to satisfy the applicants' basic needs, in the face of the abnormal and unforeseeable circumstances presented by the massive and unexpected influx of Ukrainian refugees to the country from late February 2022 to end of May 2023 and in the face of a parallel and unexpectedly large increase in the number of other international protection applicants in the same period.

52. To set the State's arguments in context, it is necessary to set out some relevant figures.

2020 projections as to IP accommodation capacity

53. In the *"Report of the Advisory Group on the Provision of Support including Accommodation to Persons in the International Protection Process"*, published by the Government in September 2020 (more commonly known as the *"Day Report"*, after its chairperson, Ms. Catherine Day), it was concluded that *"Based on past experience and taking account of the average number of applications for international protection between 2015 and 2019, the Advisory Group concluded that in future Ireland should equip itself with the permanent capacity to handle around 3,500 new applications every year"* (report, p. 19). The advisory group also considered that the State would need, in addition, to have contingency plans ready so that it could respond rapidly if unforeseen surges in applicants beyond those numbers occurred. The group analysed data for international protection applications in the period 2009 to 2019 and noted that the average number of applications for the period of three to five years prior to 2020 was between 3,200 and 3,500 (the advisory group's terms of reference included, *inter alia*, *"To advise on the development of a long-term approach to the*

provision of supports including accommodation to persons in the international protection process"). The group had a membership from across the spectrum of the State and NGO actors in the sector. The group consulted widely and received submissions from a wide variety of bodies, including the Movement of Asylum Seekers of Ireland, UNHCR and the Immigrant Council of Ireland.

The numbers involved from start of Ukraine war to May 2023

54. Over 83,000 Ukrainian nationals arrived in the State between late February 2022 and end May 2023. Ukrainian refugees were not dealt with through the normal international protection system but rather were addressed separately under the terms of the Temporary Protection Directive (2001/55/EC)**.** Pursuant to the terms of this directive, refugees from the war in Ukraine are entitled, on a temporary basis, to access to accommodation, education, medical care and employment such that their legal entitlements are different to international protection applicants governed by the Reception Conditions Directive and the 2018 Regulations. The State (through the Department) provided almost 64,000 of these refugees with accommodation (the remainder being housed with relatives or friends or otherwise in private accommodation). It does not appear that any Ukrainian refugees were left homeless.

55. In the same period, there was a surge in "conventional" international protection applicants. The evidence before the court was that, in 2022, there were 13,651 new applications for international protection. Some 15,015 international protection applicants sought IPAS accommodation in 2022. As of 22 May 2023, 20,485 people were being accommodated in the IPAS system, compared with 8,555 people at the end of January 2022. These figures were in addition to the Ukrainian refugees being accommodated by the Department.

56. The Department's evidence was that some 4,556 international protection applicants arrived in Ireland from January to May 2023 who were entitled to accommodation through the provision of material reception conditions. This resulted in an acute shortfall of available accommodation for single males in particular.

57. To illustrate the huge increase of pressures on the system, the State said that the numbers of people accommodated in emergency centres in the first week of January 2022 was

1,037. By the end of April 20223, this figure was 12,911. Between January 2022 and May 2023, there was an increase in the number of emergency centres from 24 to 153.

58. In short, the State went from a position at the end of 2020 where the considered view was that it should plan to accommodate some 3,500 international protection applicants per year to a position where (between Ukrainian refugees and international protection applicants) some 100,000 people came into the State between the end of February 2022 and end May 2023 of whom over 80,000 had to be accommodated.

59. In response to inquiries from the court, the department confirmed on affidavit that the height of the temporary accommodation emergency was reached on 5 May 2023 at which point there were 583 international protection applicants who had sought accommodation from IPAS but were still awaiting an offer of accommodation. (The Department did say that this figure is not necessarily to be taken as the number of persons who had no accommodation at all at that date, as it is not known or recorded how many could avail of an alternative source of accommodation at this time.) All of these people were subsequently accommodated or given an offer of accommodation by 9 June 2023. The relevant figure for 15 February 2023 (the date of Mr. A's protection application) was 203 persons and for 20 March 2023 (the protection application date for Mr. J's application) was 313 persons.

State efforts to secure accommodation

60. David Delaney, Assistant General Secretary of the Department, deposed (in an affidavit in the A. case of 22 September 2023) that *"As requests for tender procurement processes did not deliver the required capacity, the Department engaged in emergency accommodation sourcing through networks with other State accommodation providers such as local authorities, through newspaper advertisements, through cold calling accommodation providers and the use of online booking engines"*. The Department had already accommodated over 15,000 international protection applicants in 2022. Since the beginning of 2023, the Department's International Protection Procurement Services brought over 5,880 bedspaces into use with almost half of those spaces being used to reaccommodate existing applicants entitled to accommodation and the remaining spaces being used to accommodate new arrivals. However, new demand continued to outstrip new supply, leading to a net accommodation

shortfall resulting in IPAS not being in a position to offer accommodation to all newly arrived single male international protection applicants in the period 24 January 2023 to 9 June 2023.

61. The Department utilised offers which came through from the Association of Missionaries and Religions of Ireland for religious buildings such as assemblies and convents, and contacted other Departments in relation to school and third-level facilities; unused barracks and buildings; sporting and arts facilities. Mr. Delaney deposed that the repurposing of such buildings takes time and needed to comply with fire safety regulations and some of these projects would not be completed until later in 2023 or 2024. Emergency accommodation was established for a short term period using camp beds, such as in the National Indoor Arena in Abbotstown. Tent accommodation was utilised at certain times. Mr. Delaney deposed that despite all the Department's best efforts, additional capacity did not become available sufficiently quickly to meet the spike in demand and the expiration of accommodation contracts in many hotels throughout the first quarter of 2023 placed the Department in an extremely challenging position. Legislative amendments were introduced to permit a planning exemption for a change of use of office buildings and other warehouse-type facilities to assist in addressing the shortfall of accommodation for international protection applicants (S.I. 605/2022 with effect from 29 November 2022). Mr. Delaney deposed that the Department found it increasingly difficult to source new accommodation for single males *"often due to protests and the ensuing impact on contractual engagement"*.

62. The State made arrangements with third party charitable organisations to assist in meeting applicants' needs. Mr. Delaney averred that in October 2022 the Department entered into arrangements with the Capuchin Day Centre and Merchants Quay Ireland to provide day-services to applicants who had not yet been accommodated, including three meals a day, showers, WiFi and the provision of tents and sleeping bags where required. The Department also gave these bodies information notices for onward distribution to applicants in respect of medical, legal or other support services. It also appears that showers, WiFi and shelter were available to such applicants during the day at Mendicity. These services were available six days a week in the case of Mendicity (which was closed on Saturdays) and six days a week in the case of the Capuchin Day Centre (which was closed on Sundays). The Capuchin Day Centre opened every day from Monday to Saturday between 7.30 am and 11.30am, and again between 12.30pm to 3.00pm. Food parcels were also available on Wednesday mornings. The Merchant's Quay Ireland Centre was also open during the relevant period on Sundays and

served food, although the extent of the meal provision was not clear from the evidence before me.

63. The Department said that in circumstances where these bodies had established experience and services in place, such indirect provision was considered to be the most effective way to deal with the emergency situation. The Department says that it gave an assurance to these bodies that their state funding would reflect the increase demands on them as a result of these arrangements and that it is expected that these ad hoc arrangements will be reduced to formal contracts. As regards healthcare, applicants in need of medical support were directed to State-funded services at various "SafetyNet" primary care centres (indeed, Mr. A. availed of one of these when he attended a doctor in relation to his injuries). Homeless international protection applicants could also avail of a generic medical card.

Private sector accommodation capacity

64. In response to the contention that there was demonstrable capacity in the private accommodation sector, in particular (as noted at paragraph 28 above) hotels and B&Bs with accommodation available at nightly rates of less than €100 (over 460 establishments) or less than €50 (over 40 such establishments) in early March (this generally being the off season for such accommodation), Mr. Delaney averred that it was the Department's experience that such vacancies as were available would not necessarily be available once the Department queried such availability. He said that many accommodation providers would not accept a booking without identity documents and personal credit cards to meet security requirements. He says that he believes that some such establishments were wary of becoming the focus of protests or other publicity which may have had an adverse effect on their businesses. He said that, in general, these *ad ho*c vacancies were not readily available to the Department *"and experience led those involved to the firm conclusion that the only way to secure reliable, short and medium-term accommodation was contracting for the whole or significant portions of existing or previously underused accommodations"*. In those circumstances, he said *"the greater part"* of the available resources – both human and financial – were directed towards solutions which offered a significant number of beds for a definite contract period, procurements which required a measure of groundwork and planning.

DEA and ANP

65. Prior to March 2023, the DEA was only payable in the international protection context where a person resided in accommodation provided by IPAS i.e. in direct provision. The Minister requested the Minister for Social Protection on 9 March 2023 to make arrangements to issue the DEA to international protection applicants who had not been provided with accommodation by IPAS. The DEA is payable at a standard rate of €38.80 per week pursuant to the Regulations. It appears that the Department of Social Protection then introduced DEA entitlements for homeless international protection applicants from 28 March 2023. New applicants for international protection were issued with a letter at the IPO on making their protection application setting out their entitlement to the DEA from 28 March 2023. Such letters were not given to existing homeless international protection applicants, although the Department says that the information as to the availability of the DEA was made available on the *"gov.ie"* website.

66. As we have seen, DEA payments were backdated from 28 March 2023 to the date of a homeless applicant's application for protection. This is what happened in the case of both Mr. A. and Mr. J. An issue was raised at the hearing as to an apparent deduction from Mr. A's DEA of about €200 per week, based on the contents of a receipt for his DEA which he was furnished with by the Department of Social Protection. However, this was explained on affidavit by the State as a notional deduction to facilitate its computer systems and it is accepted that it was not the case that Mr. A did not receive DEA payments to which he was otherwise entitled.

67. The additional needs payment is provided under s. 201 of the Social Welfare (Consolidation) Act 2005 as amended. While the international protection DEA information note issued by the Department of Social Protection on 28 March 2023 also included information on ANP, the State's evidence is that such payments were available to international protection applicants prior to that date.

EU developments

68. The State also relied on the fact that a number of other EU Member States experienced difficulties in accommodating international protection applicants in the same period, including Belgium, the Netherlands and France. Material was before the court in relation to the widely

reported situation in Belgium, where the federal authority tasked with dealing with material reception conditions, Fedasil, reached a point where it was no longer able to provide any accommodation to single male applicants.

69. Institutional steps are underway at EU level to seek to address these problems, including through the EU's proposed "Pact on migration and asylum". The Department says that developments at EU level which seek to ensure a greater distribution of the burden of handling international protection applicants demonstrates an acceptance at EU level that the measures in place to date have proven insufficient to ensure that individual Member States do not find themselves dealing with a disproportionate number of international protection applicants.

The *Francovich* test and jurisprudence on that test

70. In order to frame the legal issues between the parties, it is useful at this point to summarise the *Francovich* test and the jurisprudence on that test.

71. The requirements for an award of damages against a Member State for State liability for breach of an EU law were first set out in *Francovich* (in the context of a failure to implement a directive) as follows (at para. 40):

> *"The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties."*

72. These requirements were refined in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur S.A. v. Germany and the Queen v Secretary of State for Transport, ex parte Factortame Ltd* ("*Brasserie/Factortame"*), at para. 51:

> " *...Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties."*

73. The Court of Justice elaborated on the second limb (that the breach must be sufficiently serious) as follows (in paras 55 and 56):

> "*55. As to the second condition, as regards both Community liability under Article 215 and Member State liability for breaches of Community law, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion.*
>
> *56. The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law."*

74. While most of the *Francovich* damages case law relates to failures of transposition, as noted in *Brasserie/Factortame* (at paras 32 to 34), State liability applies to breaches of the EU law no matter which organ of the Member State was responsible for the breach.

75. The *Francovich* line of case law has been applied in Ireland in cases including *Emerald Meats Ltd v. Minister for Agriculture (No 2)* [1997] 1 IR 1; *P v. Chief Superintendent of GNIB* [2015] 2 ILRM 1; *Ogieriakhi v. Minister for Justice* [2018] 2 IR 504 ("*Ogieriakhi*"); and *Glegola v. Minister for Social Protection* [2019] 1 IR 539 ("*Glegola*").

76. In *Glegola*, O'Donnell J. (as he then was) said as follows in relation to the three conditions for establishing a *Francovich* damages claim (at para 23) :

> *"The starting point for considering the award of damages is that it is decidedly the case that the establishment of a breach of European Union law does not, as it might have done, give rise per se to an award of damages to a party who has suffered loss, or might have obtained a benefit under the relevant provision. The jurisprudence is strict, in*

requiring, first, that the rule infringed must have been intended to confer rights on individuals, second that the breach of the rule was sufficiently serious, and third, that there is a direct causal link between the breach of the obligation imposed on the State and the damage sustained by the injured party."

77. In *Ogieriakhi* the Supreme Court held that "*good faith and honest misapprehension cannot be sufficient to excuse the State from liability in an appropriate case"* (at p.537).

Force majeure in EU law

78. Advocate General Jacobs, in his Opinion in Case C-236/99 *Commission v. Belgium* (Opinion, 16 March 2000), noted (at para. 16) that while the court had *"never ruled explicitly that force majeure is a general principle of Community law, and it is doubtful whether one can deduce such a principle, applicable to all areas of Community law, from the existing case-law"* that this did not mean that *force majeure* had no role in Community law. He noted that *"Force majeure is by its very nature a flexible doctrine, which is more concerned with equitable outcomes than with precisely defined conditions"* (at para. 17); that while the court had (in the case of *Commission v. Italy* Case C-101/84 [1985] ECR 2629) appeared willing to accept that *force majeure* might be a valid excuse for failure to implement a Directive within the prescribed time limit, the court did not define precisely what constituted *force majeure* and went on to note that it was nonetheless clear that the notion of *force majeure* in that context was *"very narrowly circumscribed"* (para. 22). In his discussion, he articulated the concept of *force* majeure as involving *"unforeseeable circumstances"*, which were *"extraneous to and beyond the control of the Member State"* which led that State to be faced with *"insurmountable difficulties preventing it from implementing the Directive"* (at para. 25). The court in that case rejected the *force majeure* argument on its facts.

79. In its jurisprudence since then, the CJEU has emphasized 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: see Case C-640/15 *Vilkas* ("*Vilkas"*) at para 54; Case C-407/21 *Union federale des consommateurs* (ECLI:EU:C:2023:449) ("*UFC*") at para 53. There also appear to be differing formulations of the parameters of the test which is perhaps a reflection of its sensitivity to context. While the case law is consistent in the requirement that *force majeure* can only arise in relation to

abnormal/unusual and unforeseeable circumstances outside the control of the party relying on the defence, there appear to be some differences of expression of the precise limits of the defence. Thus, in Case 11/70 *Internationale Hanedlsgesellschaft*, the Court (at para. 23) defined the applicable concept of *force majeure* (in the context of agricultural Regulations) as being not limited to absolute impossibility but to *"unusual circumstances, outside the control of the importer or exporter, the consequences of which, in spite of the exercise of all due care, could not have been avoided except at the cost of excessive sacrifice"* (at para. 23). In *Vilkas,* in the context of a European arrest warrant framework decision, the test was put in terms of the consequences of unforeseen and unforeseeable actions not being avoided *"in spite of the exercise of all due care"* by the authorities (para. 53), such concept to be *"interpreted strictly"* (at para. 56). This formulation was adopted most recently in *UFC* (at para 53), considered further below.

80. An arguably more arduous standard was applied in *Billerud* Case C-203/12 EU:C:2013:664 ("*Billerud*"), in the context of a directive relating to greenhouse gas emissions, where the Court (relying on the judgment in *Valsabbia v. Commmission* Case C-154/78 EU:C:1980:81 para. 140) referred to external causes *"which are inexorable and inevitable to the point of it making 'objectively impossible' for the person concerned to comply with their obligations"* (at para. 31.)

81. The Court has also emphasised that the defence will invariably be confined in its temporal scope: *Vilkas* para 57.

82. 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. Accordingly, the CJEU has made clear that difficulties in its domestic legal order cannot justify a failure to observe obligations arising under EU law (at para. 72). Furthermore, *force majeure* cannot refer to difficulties of a domestic nature deriving from a Member State's political or administrative organisation or because of a lack of powers, knowledge, means or resources: Case C-424/97 *Haim* at para. 28.

The parties' arguments - Liability

83. Given that the availability of the *force majeure* defence to the State's admitted breaches (whether in principle or on the facts) is the key issue in these cases it is perhaps more helpful first to set out a summary of the State's arguments before addressing the applicants' case including their response to the State's case.

Summary of State's arguments

84. The State has not pleaded a lack of financial resources in providing the material reception conditions. Rather, its case is that unprecedented numbers of Ukrainian refugees and international protection applicants overwhelmed the accommodation capacity for international protection applicants such that for a temporary period of four and a half months, single male non-vulnerable adults were left without accommodation but that the State made every reasonable effort to secure such accommodation and to satisfy the provision of other reception needs including food, hygiene facilities and clothing. The State pleaded, in both cases, that when faced with these difficulties, it *"took all reasonable steps as expeditiously as possible to ensure that all material reception conditions were provided to all international protection applicants as soon as possible"*. The State says it took all "reasonable steps/due care" (per *Vilkas* and *UFC*) for a limited period of time (per temporal limit concept in *Vilkas* para 57).

85. The State submitted that it was open to it, in light of the *Francovich* damages jurisprudence, to run a *force majeure* defence to the *Francovich* damages claim notwithstanding that such a defence was not maintained in the *S.Y.* case in respect of the breach of Regulations case as the pre-requisites for obtaining *Francovich* damages were such as to permit a defence of *force majeure* notwithstanding that a breach of the relevant EU law by the State was not otherwise excusable.

86. The State advanced a number of contentions as to the legal basis for the availability of a *force majeure* defence, as follows. It contended that *force majeure* circumstances came within the test on the application of the "second limb" of the test set out in *Brasserie/Factortame* at para 56 (as reproduced in para 73 of this judgment above) such that the requirement of a "sufficiently serious breach" could not be made out. It contended that this was so in three respects:

(i) That force majeure was contemplated by that part of the second limb which asks whether "*the infringement and the damage caused was intentional or involuntary*." The State says that the *force majeure* circumstances which led to the breaches here were unintentional or involuntary in the legal sense.

(ii) that the reference to *"error of law"* in para 56 of *Brasserie/Factortame* included a breach of a mandatory legal obligation. No authority was advanced for this proposition.

(iii) that the failure by the EU to adopt the new Pact agreement which would involve more equitable distribution of international protection applications around the Member States of the EU constituted an *"omission"* within the meaning of para. 56 of *Brasserie/Factortame* i.e. this represented a "*position taken by a Community institution* [which] *contributed towards the omission*"

87. In my view, points (ii) and (iii) above can be immediately discounted. There is no error of law excuse available here; the State accepts that the applicants were not afforded the basic needs to which they were entitled as a matter of law. Furthermore, the reliance on potential policy and legislative developments in furtherance of the new Pact agreement is far removed from the context of that aspect of *Brasserie/Factortame* which relates to a situation where a Community institution (such as the Commission) may itself have promulgated a view of the implementation of an EU law which later transpires to be incorrect. I will return to point (i) in my discussion later in the judgment.

88. The State also argued that *force majeure* was in any event available as a "free standing" defence as a matter of EU law. While it could not find any CJEU authority applying *force majeure* as a defence to a claim for *Francovich* damages for breach of a directive, it pointed to a series of authorities which addressed the availability of *force majeure* in EU law as a matter of principle. It also pointed to a decision of the Liège Labour court – *TZ v FEDASIL*, Tribunal du Travail de Liège ,30 March 2023 ("*TZ*") – where *force majeure* was raised and considered by a Member State court in the context of the failure to provide accommodation to recipients under the Directive. I will consider these authorities in more detail below.

Summary of applicants' arguments

89. The applicants submitted that they clearly satisfied the three limbs of the test for *Francovich* damages: the Directive and Regulations conferred rights on the applicants (this was not disputed by the State); the breaches of those obligations were, on any view, serious; and there was a clear causal connection between the breach of the State's obligations and the loss suffered by the applicants in the form of the suffering and loss of dignity involved in forced street homelessness for lengthy periods.

90. As regards the State's *force majeure* case, the applicants argued as follows.

91. First, the State cannot invoke *force majeure* where it in essence sought to invoke that defence in the *S.Y.* case on liability, lost that case and accepts that the breaches found in *S.Y.* also arise here.

92. Second, the applicants' case was that the *"sufficiently serious"* limb of the *Brasserie/Factortame* test effectively entailed a strict liability where there was no element of discretion vested to the Member States as to how the relevant EU law measure would be implemented (see e.g. Case C-5/94 *Hedley Lomass* para 28, and *Glegola* in an Irish context)**.** It was submitted that that was undoubtedly the case here; the Directive (and the Regulations implementing the Directive) were clearly expressed in mandatory terms and entailed mandatory obligations. The Directive and Regulations did not provide for a derogation in the event of accommodation saturation; indeed, the opposite is the case. It was contended that *Haqbin* and *Saciri* (discussed further below) support this position.

93. Third, it was submitted that it was highly doubtful whether *force majeure* could arise in the specific context of admitted breached of inviolable fundamental rights.

94. Fourth, if *force majeure* applied, it failed on facts. The evidence did not bear out the State's contention that it took all reasonable steps to ensure provision of the basic needs set out in the Regulations. The applicants submitted that the respondents made a policy choice to focus on global sourcing of accommodation at the expense of individual accommodation requirements and that the State's overall response involved too little too late. The State could and should have provided (even on a trial basis) accommodation vouchers for private sector accommodation as there was demonstrable capacity in that sector. The State could have

combined such an approach with its "macro" approach of sourcing collective accommodation solutions. While the influx of refugees from the war in Ukraine may not have been foreseeable, the consequences once that happened were not unforeseeable and the State effectively through its policy choices on sourcing accommodation sought to relegate the basic needs of individual applicants in favour of longer term solutions, contrary to the clear requirements of the Directive and Regulations.

95. Issue was taken on behalf of the applicants with the contention that the *"arrangements"* entered into between the Department and various charities in October 2022 were a sufficient response. It was submitted that the outsourcing of the State's basic needs obligations to third parties was inappropriate in principle and inadequate in practice. Counsel pointed to the fact that the Department received a view from an external agency in October 2023 that an allowance in the order of €62 per week for a single adult male would be required. She said there was no illumination in the State's papers as to how that was taken off the table entirely and became a once-off €25 voucher. Likewise, no explanation is given as to how €38.80 per week for a homeless international protection applicant was regarded as meeting basic needs, when this was the sum given to international protection applicants in accommodation who have their food and board fully provided.

Discussion

The mandatory obligations under the Directive and Regulations

96. It is clear that the Directive (and the Regulations in faithfully transposing the Directive) do not expressly provide for a defence of *force majeure* in answer to a claim for breach of the obligation to provide material reception conditions. The obligation to provide such conditions (including accommodation) is mandatory. Indeed, both the Directive (in Article 9) and the Regulations (in Regulation 4(5) and (6)) expressly provide for a situation where the housing/accommodation capacity normally available is temporarily exhausted and provide, in that situation, that material reception conditions (including accommodation) can be provided in a different manner (i.e. different from reception and accommodation centres), once such different conditions (including accommodation) *shall* cover the recipient's *"basic needs".* In the case of the Regulations, at Regulation 4(6), such alternative conditions (including accommodation) must be for *"as short a period as possible"*.

97. Recital (35) of the Directive states that the Directive observes the principles recognised, in particular by the Charter, and that *"this Directive seeks to ensure full respect for human dignity"* and to promote the application of, *inter alia*, Article 1 of the Charter.

98. As noted earlier, the case law of the CJEU underscores the mandatory nature of these obligations. The CJEU in *Saciri* stated (at para 35) that the general scheme and purpose of the Directive and the observance of fundamental rights *"in particular the requirements of Article 1 of the Charter of CFREU 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 the Directive (citing, in this regard, Case C-179/11 *Simade and GISTI* [2012] ECR, para. 56).

99. 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 applicants and capable of ensuring their subsistence by enabling them to obtain, if necessary, on the private rental market"* (*Saciri*, para. 42).

100. In *Saciri*, the CJEU pointed out that, while *"intermediaries"* may be used by the State to assist in the provision of material reception conditions, such bodies must also meet the minimum standards for reception and *"saturation of the reception networks"* is not a justification for any derogation from meeting those standards (para. 50).

101. In *Haqbin,* (a case, as already noted, in which a recipient of material reception conditions was expelled from reception accommodation due to violent behaviour), the CJEU reiterated the Directive's requirement that recipients are ensured of a dignified standard of living (noting, again, Article 1 of the Charter). The withdrawal, even on a temporary basis, of the full set of material reception conditions (i.e. those relating to housing, food or clothing) would be irreconcilable with the requirement (paras. 46 and 47). Again, the CJEU expressed the position in emphatic and non-derogable terms. Accordingly, in that case, it was not sufficient for a Member State to simply provide a person excluded by way of sanction from an accommodation centre in Belgium with a list of private centres for the homeless likely to host that person. The court emphasised that 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"*. The court noted that it was for the authorities of the Member States to ensure the provision of material reception conditions guaranteeing such a standard of living *"including when they have recourse, where appropriate, to private, natural or legal persons in order to carry out, under their authority, that application"* (para. 50).

102. In *T.O.*, the CJEU again considered the application of the obligations imposed in the Directive in the context of recipients who had material reception conditions withdrawn for violent behaviour. That case concerned the withdrawal of reception measures for recipients who engaged in seriously violent behaviour outside the accommodation centre. The CJEU reiterated the analysis contained in *Haqbin* as to the impermissibility of an applicant being deprived of his or her most basic needs, such as a place to live, food, clothing and access to personal hygiene facilities (paras. 39-45).

Availability of Force Majeure as a defence to a claim for Francovich damages?

State's entitlement to plead force majeure at all?

103. The applicants point to the incongruity between a position where the State sought to unsuccessfully deploy the lack of accommodation resources as a defence, in the *S.Y.* case, to a claim for declaratory relief, and the State now seeking to rely on the same matters to mount a *force majeure* defence in answer to a claim for damages for the very same breaches. Leaving aside the fact that *force majeure* was not pleaded in terms, or the subject of legal submission or analysis in the judgment in the *S.Y.* case, I do not see that a *res judicata* necessarily arises in principle where *force majeure* has not been raised in respect of the infringement question as to whether an EU law has been breached, but where it is sought to be raised in answer to a claim for *Francovich* damages for such an infringement. This is so because *Francovich* damages, as a distinct and discrete remedy, has its own criteria which must be satisfied and those criteria address themselves, in broad terms, to the circumstances in which the infringement has occurred. If the circumstances in which the infringement occurred are said to arise in *force majeure* circumstances, I do not see that such could be excluded at least in principle from a consideration as to whether *Francovich* damages are available for that infringement. Accordingly, I do not see that the State is shut out from raising a *force majeure* defence in

principle to the applicants' claim for *Francovich* damages simply because it raised similar factual matters in its defence to earlier claims for declaratory relief in a separate case.

Principles governing the availability of a force majeure defence in EU law generally

104. Counsel for the State relied on a series of authorities in which the CJEU/ECJ had considered the concept of *force majeure*. These authorities included *Internationale Handelsgesellschaft*, *Vilkas* and *UFC*. All of these cases involved situations where the EU law measure in issue contained a *force majeure*-type exemption from the legal obligation in issue.

105. A useful illustration is provided by *UFC*. That case concerned the question of the obligation of a provision in the Package Travel Directive (Directive (EU) 2015/23o2) concerning the right of a traveller to terminate a package travel contract with a full refund without paying any termination fee *"in the event of unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity and significantly affecting the performance of the package, or which significantly affect the carriage of passengers to the destination"*. Article 12(3) of that Directive also allowed an organiser terminate a package travel contract and provide the traveller with a full refund but without any additional compensation if *"the organiser was prevented from performing the contract because of unavoidable and extraordinary circumstances…"*. In France, legislation was introduced which sought to cater for the cancellation of package travel contracts as a result of the COVID-19 pandemic. The French legislation allowed for the provision of vouchers by package travel outfits cancelling such contracts, in lieu of reimbursement of money, as would otherwise be required by the Directive. In answer to a claim for infringement of its obligations under the directive, France pleaded the *force majeure* of the covid pandemic.

106. The CJEU reiterated that the concept of *force majeure* does not have the same scope in the various spheres of application of EU law and its meaning must be determined by reference to the legal context in which it is to operate (para. 53, citing *Vilkas* at para. 54). The CJEU held that despite the absence of any references to *"force majeure"* in terms in that Directive, the concept of *"unavoidable and extraordinary circumstances"* gave concrete expression to the concept of *"force majeure"* in the context of that Directive (para. 54). In the circumstances, the concept of "unavoidable and extraordinary circumstances" constituted an exhaustive implementation of the concept of *force majeure* for the purposes of that Directive (para. 56).

Accordingly, the reimbursement obligation in the relevant parts of Article 12 of the package travel directive could not necessitate Member States to release package travel organisers from those obligations on the grounds of *force majeure*, even if only temporarily (para. 57).

107. The CJEU went on to consider whether, notwithstanding the express provisions of that directive, Member States could nonetheless rely on *force majeure* for the purposes of adopting legislation which released package travel organisers from their reimbursement obligations where the financial consequences for the tourism sector arising from the covid pandemic could amount to *force majeure*. The CJEU stated as follows (at paras 66 and 67):

> *"66. Admittedly, it is clear from the Court's case-law in infringement proceedings under Article 258 TFEU that, where a Member State has not complied with its obligations under EU law, the possibility remains for that Member State to plead force majeure in respect of such non-compliance.*
>
> *67. In that regard, in accordance with settled case-law, although the concept of 'force majeure' is not predicated on absolute impossibility, it nevertheless requires the non-conformity in question to be attributable to circumstances beyond the control of the party claiming force majeure, which are abnormal and unforeseeable and the consequences of which could not have been avoided despite the exercise of all due diligence, and a situation of force majeure may be pleaded only for the period necessary in order to resolve those difficulties (see, to that effect, judgments of 13 December 2001, Commission v France, C-1/00, EU:C:2001:687, paragraph 131 and the case-law cited, and of 4 March 2020, Commission v Italy, C-297/08, EU:C:2020:115, paragraph 85 and the case-law cited)."*

108. The CJEU went on to hold that "*even if that case-law could be interpreted as allowing Member States to argue effectively, before their national courts, that the non-conformity of national legislation with the provisions of a directive is justified on the grounds of force majeure so as to ensure that that legislation may continue to apply during the necessary period*" (para 68), that, while the health crisis of the scale of the covid pandemic was *"beyond the control of the Member State concerned and is abnormal and unforeseeable"* (para. 69), the French legislation in issue was too generalised and effectively went beyond what might be justified in response to the *force majeure* circumstances.

Force majeure within second limb of Factortame test?

109. On the face of it, the matters set out at para. 56 of *Brasserie/Factortame,* discussed earlier, as being relevant to whether a breach of EU law is sufficiently serious to entitle an applicant to *Francovich* damages against a member state, are intended to be considered in circumstances where there is a measure of discretion in a member state as regards how it implements an EU law measure (see *Brasserie/Factortame* para 55*)*. Such a position is consistent with the Supreme Court's analysis of the application of the second limb in *Glegola* and also reflects the *dictum* of O'Malley J. in *Ogieriakhi* to the effect that a mere breach may suffice to satisfy the second limb (see also *Hedley Lomass* at para. 28). No such discretion arises in the Directive or Regulations here as regards provision of a recipient with basic needs including accommodation and therefore, the argument runs, there is no scope for the invocation of a *force majeure*-type defence when considering the second limb.

110. That said, one could see how in principle an argument might be made that the concept of involuntary or unintentional non-compliance as referenced in para 56. of *Brasserie/Factortame* could embrace *force majeure* circumstances of non-compliance, and how that concept might apply as equally to mandatory EU law obligations as it does to EU law measures which leave a margin of discretion to member states as to their implementation: in both cases, the member state is prevented from fulfilling its obligations due to unforeseeable circumstances beyond its control and the failure to perform the obligations does not arise from a flawed view of the scope of any discretion.

Force majeure available in fundamental, inviolable rights cases?

111. Accepting that *force majeure* could be available in principle in answer to a case of breach by a Member State of an EU directive, notwithstanding that no such defence is expressly provided for in the directive in issue, the question nonetheless arises as to whether *force majeure* could in principle be available in the context of EU law obligations which derive from inviolable Charter rights (here, Article 1), and which are expressed in mandatory, non-derogable terms in the relevant EU directive, and which relate to the most basic needs required for a minimum standard of human dignity (i.e. housing, clothing, food and personal hygiene facilities).

112. As pointed out by counsel for the State, within the EU legal framework, the Charter has the same legal status as the Treaties themselves (Article 6(1) TEU). Commentators have noted that, in respect of damages liability, *"Charter rights have the same status as any other source of EU law. Claims for compensation for breach of Charter rights therefore proceed similarly to claims for compensation in respect of other rules of EU."* (see *Peers, Hervey, Kenner and Ward "EU Charter of Fundamental Rights: A Commentary"* (2nd Ed., Bloomsbury, 2021) at para. 47.256).

113. The State was unable to point to any case in which *force majeure* had been allowed (whether in principle, or on the facts) as a defence to State liability (or, indeed, an infringement action under article 258 TFEU) in the context of infringement of fundamental human rights such as the right to human dignity.

114. The State points out that a *force majeure* defence was not considered in *Saciri, Haqbin* or *T.O.* and therefore has not been ruled out in principle by the CJEU in such contexts. The applicants, for their part, point to the clear terms in which the CJEU in those cases emphasised the non-derogable nature of the material reception condition basic needs requirements and the grounding of those requirements in, *inter alia*¸ article 1 of the Charter.

115. My attention was directed to *TZ,* a decision of the Belgian *Tribunal du Travail de Liege* of 30 March 2023 in which claims were made against the Belgian State and the Belgian Federal Agency for the Reception of Asylum Seekers (FEDASIL) arising from a failure to afford the applicant material reception conditions. In that case, the Belgian State pleaded *force majeure* in answer to the claims. The court there appears to have accepted that *force majeure* might be available in principle, although it roundly rejected the defence on the facts. I do not see that this decision is of immediate assistance in terms of resolving the EU law question of whether a *force majeure* defence can be availed of an answer to a claim for *Francovich* damages for admitted failure to comply with the mandatory reception condition requirements of the Directive, as it contains no analysis of that issue from an EU law perspective.

Parameters of such a defence, if available?

116. Apart from the important questions of principle discussed in the preceding sections of this judgment, there is also the question of the appropriate parameters of a defence of *force majeure* if such a defence is available, including the degree of *force majeure* required to successfully avail of such a defence in the context presenting here. Should the approach be one which does not require "excessive sacrifice" to avoid the consequences of unforeseeable events, or one which requires rather the taking of all due or reasonable steps in the face of such consequences, or one that requires all steps to be taken which are not "objectively impossible"? Or are these apparently different formulations found in the CJEU case law all variations on the same fact- and context-sensitive approach to an assessment of whether *force majeure* is available as a defence in any given set of circumstances?

117. If such a defence is available in principle, the particular context of the failure to provide for basic needs such as accommodation and food going to human dignity must surely require a very exacting scrutiny of whether such failure can truly be excused as arising from *force majeure.* One would have thought a test of, or close to, insuperable difficulties/objective impossibility would be appropriate in such a context, as opposed to an approach predicated on taking all due care. While it is, of course, the case that Russia's invasion of Ukraine, and the resulting exodus of Ukrainian refugees to the rest of Europe (including Ireland) was unforeseeable, it might be said that the consequences of the need for ongoing extra accommodation capacity in the international protection system resulting from that invasion were not unforeseeable after a certain point in time. Accordingly, while it might be said to have been reasonable, in broad terms, for the State to focus on finding collective accommodation contract solutions to the capacity crisis it faced from January to June 2023, it might equally be considered that a more exacting appraisal of what was required from the State would have required the State (which had at its disposal sufficient financial resources) in addition to sourcing medium term collective solutions to also look at simultaneously maintaining its efforts to source private accommodation for individual applicants who were in fact or would otherwise be street homeless, whether by looking at accommodation vouchers, significantly enhanced financial assistance (above the DEA), the erection of secure emergency shelter (including possibly secure tented shelter) for short periods and the like.

Need for reference to CJEU

118. The questions that I have identified in the discussion above seem to be significant questions to which there are no clear and obvious answers under EU law as matters stand. As a result, I cannot say with confidence that the answers to these questions are *acte claire*. They are questions on which I need guidance in order to properly determine the cases before me (and by extension, the 50 or so cases before the Irish Courts at present in which the same issues arise). The court considers in the circumstances that it is necessary to refer a number of questions to the CJEU pursuant the provisions of article 267 TFEU.

Questions to be referred to CJEU

119. Subject to hearing further from the parties, the Court considers that the following questions require to be answered in order to be able to resolve the EU law questions which arise in these cases:

(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?

120. I will confer further with the parties before finalising the proposed questions for reference to the CJEU.

Quantum

121. If I do reach the question of quantum, it is common case that the principle of national procedural autonomy dictates that principles under equivalent national law proceedings should apply to the quantum of damages to be awarded as *Francovich* damages. These principles were

set out in *Simpson v Governor of Mountjoy* [2020] 3 IR 133 ("*Simpson*") by McMenamin J. at para. 139 as follows:

> *"In considering the question of damages, it seems to me that a court may apply the following basic principles. First, there must be a restitutionary element, seeking to put a claimant in the same position as if his or her constitutional rights had not been infringed. Second, it is necessary to ask whether what arose in a particular case was not simply some procedural error. Third, a court's approach should be an equitable one, having regard to the particular facts of an individual case and the seriousness of the violation. Fourth, if and where necessary, a court awards damages under the various headings of the common law, such as non-pecuniary loss including pain, suffering, psychological harm, distress, frustration, inconvenience, humiliation, anxiety and loss of reputation. Fifth, punitive damages will not generally be awarded save in very grave cases, such as where there was a direct intent or purpose in bringing about a significant consequence or detriment."*

122. There have not been many Irish decisions relating to the award of *Francovich* damages. The parties referred me to the decision of O'Malley J in *P v Chief Superintendent of the GNIB* [2015] 2 ILRM 1 and of Barrett J in *X v Y v Minister for Justice* [2019] IEHC 133 (the latter being a case where damages were awarded for breach of material reception condition obligations). The parties addressed me on the question of quantum in each case in reliance on these Irish authorities and other Irish authorities relating to breaches of constitutional rights (including *Simpson)*; an authority relating to claims for damages under the European Court of Human Rights Act 2003 (*Pullen v Dublin City Council* [2010] 2 ILRM 61) and decisions of the European Court of Human Rights relating to breaches of the rights of asylum seekers including the right to accommodation (including *NH v France* (Case 2880/13), *VM v Belgium* (Case 60125/11) and *MK v France* (cases 34347 – 34349/18)).

123. As the question of quantum will not arise unless and until the question of liability (and in particular the question of the availability of a *force majeure* defence to the State) has been determined, which for the reason I have explained, requires a reference to the CJEU, I will not

determine the quantum issue at this point but will rather address that in a separate judgment as necessary, following determination of the liability question.

Conclusion

124. For the reasons outlined above, I will refer questions to the CJEU to enable me determine the question of whether the State is liable for *Francovich* damages in these cases.

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.