THE HIGH COURT

JUDICIAL REVIEW

Record No: 2023/209 JR

Between:

S.A.

Applicant

-and-

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

Respondents

THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Notice Party

And

Record No: 2023/541 JR

Between:

R.J.

Applicant

-and-

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

Respondents

REQUEST FOR A PRELIMINARY RULING

INTRODUCTION

1. This request for a preliminary ruling concerns the test for entitlement to damages for breach of rights conferred by European Union law.

THE QUESTIONS TO BE REFERRED

2. 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:

i) Where "force majeure" is not found as a defence in a 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)?

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

BACKGROUND

3) The request is made in proceedings between Mr A and Mr J ('the Applicants') and the Minister for Children, Equality, Disability, Integration and Youth, Ireland and the Attorney General ('the Respondents') (with UNHCR as a notice party) concerning their entitlement to damages for failure to provide them with accommodation, food, water and other material reception conditions to meet their basic needs.

4) The Respondents do not dispute that they failed to provide accommodation to the Applicants as required under the national rules implementing the Reception Conditions Directive (recast) (Directive 2013/33/EU) (**"the Directive")** for extended periods, 11 weeks in the case of Mr A, between February and April, 2023 and 9 weeks in the case of Mr J, between March and May 2023. On this basis, the Respondents did not dispute that the Applicants should be granted two of the declarations sought in the proceedings concerning a breach of the national rules implementing the Directive and Article 1 of the Charter of Fundamental

Rights. However, they deny that the Applicants have any entitlement to damages because the breaches, they contend, were caused by circumstances which amount to *force majeure* and were not therefore 'sufficiently serious' to fulfil the criteria for entitlement to damages established 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'*).

LEGAL CONTEXT

5) Article 1 of the Charter provides that "*Human dignity is inviolable. It must be respected and protected."* The Directive determines the minimum standards for the reception of applicants for international protection, such as the applicants in this case. Article 17 of the Directive imposes an obligation on Member States to "*ensure that material reception conditions are available to applicants when they make their application for international protection….material reception conditions* [must] *provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health."*

6) Article 18 of the Directive sets out the modalities for material reception conditions. It allows (in article 18(9)) for different material reception conditions in exceptional cases including where "*housing capacities normally available are temporarily exhausted"* subject to the requirement that *"such different conditions shall in any event cover basic needs."*

7) The case law of the CJEU makes clear that the obligation to provide material reception conditions is mandatory, but Member States have some discretion on how this is achieved: Case C-179/11 *Cimade and GISTI;* Case C-79/13 *Saciri;* Case C-233/18 *Haqbin;* Case C-422/21 *TO.*

Damages for breach of EU law

8) 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* 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."

9) These requirements were refined in *Brasserie/Factortame*, in which the CJEU added, at para 51, that "the breach must be sufficiently serious". The CJEU elaborated on this condition as follows:

"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."

Force majeure

10) The Respondents have pleaded the concept of *force majeure* in defence to these proceedings and argue that the prevailing circumstances in Ireland as detailed below are such that the breach of EU law involved in these cases is not sufficiently serious such as to meet with the criterion of sufficient seriousness identified by the CJEU in *Brasserie du Pecheur*.

11) The concept of *force majeure* does not have the same scope in the various spheres of application of EU law, so its meaning must be determined by reference to the

legal context in which it is to operate: Case C-640/15 *Vilkas* ('*Vilkas*') at para 54; Case C-407/21 *Union federale des consommateurs* ('*UFC*') at para 53.

12) There are 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 its 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 Handelsgesellschaft*, 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 (at para. 53), such concept to be interpreted strictly (at para. 56). This formulation was adopted most recently in *UFC* (at para. 53).

13) An arguably more arduous standard was applied in Case C-203/12 *Billerud*, in the context of a Directive relating to greenhouse gas emissions, where the Court (relying on the judgment in Case C-154/78 *Valsabbia v. Commission* 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.).

14) The Court has also emphasised that a defence based on *force majeure* will invariably be confined in its temporal scope: *Vilkas* para. 57.

15) It is also well established that difficulties in the domestic legal order cannot justify a failure to observe obligations arising under EU law (*UFC*, 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*, para. 28.

Irish law

16) The Reception Conditions Directive (recast) is transposed into Irish law by the European Communities (Reception Conditions) Regulations 2018, SI 230/2018 ('the Regulations').

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) The Daily Expenses Allowance ('DEA') is defined as '*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*.'

19) Regulation 4 of the Regulations provides for the form of exception found in article 18(9) of the Directive where the normally available accommodation capacity is temporarily exhausted, but makes clear that such exceptional provision must nonetheless meet "*the recipient's basic needs."*

20) A number of cases concerning international protection applicants who were not initially provided with accommodation by the International Protection Accommodation Service (IPAS) acting on behalf of the Minister came before the Irish courts in early 2023. One of those cases was *SY v. Minister for Children, Equality, Disability, Integration and Youth* [2023] IEHC 187 ("*SY*"). In its judgment, the High Court (Meenan J) held that the Minister was in breach of his

obligations under the Regulations and Article 1 of the Charter in failing to provide an international protection applicant with accommodation, food or sanitary facilities, and granted the following declarations:

(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.

21) There was no appeal by the Minister against the judgment in *SY* and the Minister has not disputed in the present proceedings that the Applicants are entitled to the same declarations as in *SY*. SY did not however claim damages.

THE DISPUTE IN THE MAIN PROCEEDINGS

The facts of Mr A's case

22) Mr A, an Afghan national, applied for international protection in Ireland on 15 February 2023 and became entitled to material reception conditions under the Regulations. However, he was not provided with accommodation because the reception centres for asylum seekers operated by the Minister were full. In lieu of a place in a reception centre, Mr A received a single voucher for €25. He was not eligible for daily expenses allowance (DEA) for asylum seekers at the time of his application because eligibility was dependent on residence in a reception centre. Mr A states that he was not given any information about other additional needs payments. Mr A was assisted by an NGO, the Irish Refugee Council (IRC), which provided him with a list of charities in Dublin which provided meals and access to bathroom facilities to homeless people. Mr A sometimes availed of them while he was sleeping rough in Dublin city centre.

23) Mr A received emergency medical care for injuries he sustained in a road accident in Hungary on his way to Ireland. He obtained medical reports detailing the concussion and pain he suffered and sent them to the Minister seeking priority in accommodation on the grounds of vulnerability. No such priority was granted.

24) Mr A slept rough on the streets of Dublin in often wet and freezing weather (in February and March 2023). He witnessed and experienced violence on the streets while sleeping rough and he was fearful of being attacked and concerned his belongings would be stolen. After some weeks sleeping rough in Dublin city centre, Mr A moved to a multi-story carpark in the village of Skerries near Dublin in which he began to sleep. On occasion he was invited to sleep in the homes of fellow Afghans but he generally slept in the car park. Sometimes he went two days without proper meals because he could not afford to travel into the city centre to access food from charities, or to buy food. He often went five or six days without showering or washing because it was very difficult to access facilities. In his evidence he described feeling cold, hungry, humiliated and afraid.

25) At the time Mr A was on the streets, accommodation continued to be available on an individual and temporary basis in hostels and B&Bs in Dublin and other locations around Ireland. The Minister submitted that such vacancies as were available would not necessarily be available once the Department queried such availability and that some accommodation providers would not accept a booking without identity documents and personal credit cards. The Minister decided to direct the available resources towards solutions which offered a significant number of beds for a definite contract period, procurements which required a measure of groundwork and planning.

26) The eligibility conditions were changed at the end of March 2023 and Mr A applied for DEA on 31 March 2023. His DEA payment of €38.80 per week was backdated to the date of application for International Protection on 15 February 2023 and was paid on 5 April 2023. He applied for an additional needs payment for clothing on 15 June 2023. His application was processed and the payment was made on 20 June 2023.

27) Mr A was accommodated on 27 April 2023 after 71 days of street homelessness.

The facts of Mr J's case

28) 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. 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. He spent his nights sleeping on the streets of Dublin near the IPO offices in a tent provided to him by a charitable organisation. 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.

29) Mr J submitted a vulnerability assessment form, with the help of his solicitors, on 16 May 2023 but his application to be assessed as vulnerable was not accepted.

30) 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 charitable organisations. He was unable to keep up with his hygiene needs and felt very unclean most of the time which made him miserable.

31) Mr J 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 €38.80 per week) on 20 April 2023 which included payments backdated to 20 March 2023. Mr J needed but could not afford clothes and toiletries and would spend the money he received on food for when he could not get food from the homeless centres.

32) Mr J made three applications for additional needs payments (ANP). 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.

33) 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 that there was no protection when living on the streets and that on many nights racist individuals would come to the IPO building where he was living with other applicants and threatened to burn down their tents. Mr J averred to being terrified.

34) Mr J said that his backpack and belongings were stolen from his tent, leaving him with nothing. He averred 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. Mr J averred that this period was the worst of his life and that it changed him forever.

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

The Respondents' circumstances

36) The Respondents have submitted that all reasonable care was exercised in the effort to provide material reception conditions as required by the national Regulations and to satisfy the applicants' basic needs, in the face of entirely abnormal and unforeseeable circumstances presented by the massive influx into Ireland of persons in need of temporary protection between late February 2022 and the end of May 2023 due to the invasion of Ukraine, and in the context of a parallel and unexpectedly large increase in the number of persons arriving in Ireland and seeking international protection during the same period. An official report published in 2020 (the Day Report) had advised Ireland to plan on the basis of around 3,500 new international protection applications per year. The Day Report 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.

37) Over 83,000 Ukrainian nationals arrived in the State between late February 2022 and end May 2023, almost 64,000 of whom were provided with accommodation by the Minister having been granted temporary protection.

38) In 2022, there were 13,651 new applications for international protection in Ireland. There were 4,556 new applications from January to May 2023. As of 22 May 2023, 20,485 people were being accommodated in the international protection reception system, compared with 8,555 people at the end of January 2022 (there was a significant decrease in international protection applications during the COVID pandemic).

39) In short, the Respondents went from a position at the end of 2020 where the expert view in the Day Report was that the Government should plan to accommodate some 3,500 international protection applicants per year to a position where (between persons granted temporary protection from the Ukrainian conflict and international protection applicants) some 100,000 people came into Ireland between the end of February 2022 and end of May 2023, of whom over 80,000 had to be accommodated by the Irish Government through the offices of the Minister.

40) The Respondents say that they engaged in sourcing emergency accommodation from a wide variety of sources as well as using tent accommodation at certain times. IPAS made arrangements with third party charitable organisations to assist meeting applicants' needs. These organisations were located in Dublin and provided day-services to applicants who had not yet been accommodation, including meals and showers, Wifi and the provision of tents and sleeping bags where required.

41) Prior to March 2023, the DEA was only payable in the international protection context where a person resided in accommodation provided by the Minister. 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. These arrangements took effect from 28 March 2023. The DEA is payable at a standard rate of €38.80 per week.

42) Pending the outcome of this reference, the referring court has not made any findings in fact or in law as to the adequacy of State's response to the international protection accommodation crisis.

The parties' arguments

43) The Respondents rely on *force majeure* as a defence to the Applicants' claim for Francovich damages. As stated they contend that *force majeure* circumstances come within the test on the application of the "second limb" of the test set out in *Brasserie / Factortame* such that the requirement of a "sufficiently serious breach" cannot be made out. It is contended that this is so in three respects. First, *force majeure* was contemplated by that part of the second limb which asks whether "*the infringement and the damage cause was intentional or involuntary*". The Respondents submit that the *force majeure* circumstances outlined above which led to the breaches here were unintentional or involuntary in the legal sense. Second, the reference to "error of law" in para. 56 of *Brasserie/Factortame* included a breach of a mandatory legal obligation. Third, the Respondents say that steps taken at EU level to establish the new Pact on Migration and Asylum which would involve more equitable distribution of international protection applications around the Member States equated to a "position taken by a community institution" (within the meaning of para. 56 of *Brasserie/Factortame*), which demonstrated an awareness on the part of the institutions of the EU of a need for a more equitable distribution of asylum application across the territory of the EU which is not met by the current legislative framework.

44) The Respondents have not pleaded a lack of financial resources in providing the material reception conditions required by the national Regulations and the Directive. Their case is that unprecedented numbers of persons arriving in Ireland and seeking temporary or international protection during the material times overwhelmed the established 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 offers of accommodation from IPAS for varying periods but that the Respondents made every reasonable effort to secure

such accommodation and to satisfy the provision of other reception needs including food, hygiene facilities and clothing.

45) The Respondents also argue that *force majeure* is in any event available as a free-standing defence as a matter of EU law.

46) The Applicants submit that they have satisfied the three limbs of the test for *Francovich* damages: the Directive and national Regulations confer 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.

47) As regards the State's *force majeure* case, the Applicants argue that the 'sufficiently serious' limb of the *Brasserie/Factortame* test entails a strict liability where the obligations in the Directive are clearly expressed in mandatory terms and do not provide for a derogation in the event of accommodation saturation; indeed, the opposite is the case. It is contended that the CJEU's case law — *Cimade and GISTI, Saciri, Haqbin* and *TO* — supports this position.

48) The Applicants also submitted that *force majeure* could not arise in the specific context of admitted breaches of inviolable fundamental rights.

49) The Applicants argue that even if *force majeure* could in principle apply, it is not made out on the facts. The evidence does not bear out the State's contention that it took all reasonable steps to ensure provision of the basic needs, including food and water, 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 their overall response involved too little, too late.

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

50) One could see in principle how an argument might be made that the concept of involuntary or unintentional non-compliance as referenced in para 56 of the

Brasserie/Factortame judgment 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 concerned does not arise from a flawed view of the scope of any discretion.

51) If *force majeure* could be available in principle in answer to a claim for damages for breach by a Member State of an EU Directive (notwithstanding that no such defence is expressly provided for in the Directive) the question 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 Directive, and which relate to the most basic needs required for a minimum standard of human dignity.

The parameters of such a defence (if available)

52) 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?

53) 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.

The need for reference to the Court of Justice of the EU

54) These are significant questions to which there are no clear and obvious answers under EU law as matters stand. As a result, the Court cannot say with confidence that the answers to these questions are *acte claire*. They are questions on which the Court needs guidance in order to properly determine the cases before it (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 the identified questions to the CJEU pursuant the provisions of article 267 TFEU.

55) The matter is pressing from an Irish court perspective as there are a large number of cases before the Irish courts in which damages are sought for breach of the State's obligations pursuant to the Directive and international protection accommodation-provision cases continue to come before the Irish courts.

Mr Justice Cian Ferriter

High Court of Ireland