[2017] AACR 1

(IC v Glasgow City Council and Secretary of State for Work and Pensions (HB) [2016] UKUT 321 (AAC))

Judge Gamble **CSH/110/2015**
Judge Knowles QC
Judge Carmichael QC
28 June 2016

Housing benefit – Housing Benefit (Habitual Residence) Amendment Regulations 2014 – F-tT had jurisdiction to consider *vires*

The claimant, an unemployed Slovakian national, had been receiving housing benefit on the basis that he was an EEA jobseeker until his entitlement ceased following the introduction of the Housing Benefit (Habitual Residence) Amendment Regulations 2014, which decoupled the link between housing benefit and jobseeker's allowance (JSA) for EEA jobseekers. The claimant challenged the *vires* of the 2014 Regulations, arguing that they were invalid because the Secretary of State had failed in his statutory responsibility under section 172 of the Social Security Administration Act 1992 to refer them to the Social Security Advisory Committee (SSAC) before their introduction, and that the statutory exception, that it was inexpedient to do so by reason of urgency, did not apply because any urgency arose from the Secretary of State's own delay. The First-tier Tribunal (F-tT) refused the appeal, holding that it lacked jurisdiction to consider the *vires* of the 2014 Regulations and the claimant appealed to the Upper Tribunal. It was argued on the Secretary of State's behalf that there had been insufficient time to consult given the perceived urgency of introducing the changes with effect from 1 April 2014, when Bulgarian and Romanian nationals became entitled to claim JSA.

Held, setting aside the decision of the F-tT only to re-make it to the same effect, that:

1. the F-tT had jurisdiction to determine whether the 2014 Regulations were validly made and if satisfied that they were not to have treated them as if they had not been made in deciding the appellant's appeal: *Chief Adjudication Officer v Foster* [1993] AC 754, reported as R(IS) 22/93; *Howker v Secretary of State for Work and Pensions* [2002] EWCA Civ 1623; [2003] ICR 405, also reported as R(IB) 3/03, and *EN (Serbia) v Secretary of State for the Home Department* [2009] EWCA Civ 630 (paragraph 5);

2. the point in time when an obligation to refer to the SSAC under the 1992 Act would have arisen, absent any urgency, was when the Secretary of State proposed to make regulations under any of the relevant enactments. It was the proposals, whether in the form of draft regulations or otherwise, that were to be referred. The 2014 Regulations were lawfully made and the circumstances were consistent with the relevant policy decision having been taken late in the day (paragraphs 34 to 35);

3. the panel expressed doubts about whether *R v Secretary of State for Social Security, ex p Association of Metropolitan Authorities* [1992] HLR 131 remained good authority on the Secretary of State's failure to consult in the circumstances of a purported urgency (paragraphs 45, 47, 49 and 50);

4. the panel was unable to conclude that the policy decision to prevent EEA nationals becoming entitled to housing benefit was outwith the range of reasonable decisions open to the Secretary of State to make at the point in time he did so, and it followed from that that the challenge to his decision as to the appearance of urgency also failed (paragraphs 52 to 53).

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Mr J Bryce, Advocate, instructed by McClure Collins, Solicitors and accompanied by Mr D Kelly, Welfare Rights Officer, Govanhill Housing Association appeared for the Appellant:

The First Respondent did not appear.

Mr A Webster, Advocate instructed by Ms A Stewart, Solicitor, of the Office of the Solicitor to the Advocate General for Scotland appeared for the Second Respondent.

DECISION

The appeal is allowed.

The decision of the tribunal given at Glasgow on 9 January 2015 is set aside.

The three-judge panel of the Upper Tribunal re-makes the decision that the First-tier Tribunal ought to have given. It is as follows:

The decision of the First Respondent dated 8 August 2014 is confirmed.

REASONS FOR DECISION

1. Until 1 April 2014, under regulation 10 of the Housing Benefit Regulations 2006 (SI 2006/213), a claimant for housing benefit ("HB") who was not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland was a person from abroad, and was treated as not having a liability to make payments in respect of the dwelling he occupied as his home. He was, therefore, not entitled to HB. A person in receipt of income-based jobseeker's allowance ("JSA") was, however, not a person from abroad, by virtue of regulation 10(3B) of the 2006 regulations. If he received income-based JSA, the claimant was "passported" into entitlement to HB.

2. The Housing Benefit (Habitual Residence) Amendment Regulations 2014 (SI 2014/539) ("the 2014 regulations") came into force on 1 April 2014. They amended regulation 10(3B) of the 2006 regulations. It was no longer sufficient that a claimant be in receipt of income-based JSA. The claimant must also have a right to reside other than a right to reside falling within paragraph (3A) of the same regulation. The appellant's right to reside was as an EEA jobseeker; a right to reside falling within paragraph (3A)(b). It is common ground that, but for this amendment, the appellant would have been entitled to HB. As it was, he made a claim for HB on 1 July 2014, which was refused by a decision of the first respondent, the local authority, on 8 August 2014.

3. The appellant's contention is that the 2014 regulations were not validly made. He made that argument before the First-tier Tribunal ("F-tT") which refused his appeal. In doing so, the tribunal judge who constituted the F-tT held that she lacked jurisdiction to consider the *vires* of the above regulations and considered that the appellant should proceed by judicial review.

4. The first respondent has taken no part in the Upper Tribunal proceedings and was not represented at the hearing before us. On that occasion, Mr Bryce represented the appellant and Mr Webster represented the second respondent, the Secretary of State.

5. Counsel were in agreement that the Tribunal Judge had misdirected herself on her jurisdiction and thus erred in law. The Social Security Commissioners, our statutory predecessors, had jurisdiction to determine any challenge to the *vires* of subordinate legislation: *Chief Adjudication Officer v Foster* [1993] AC 754, reported as R(IS) 22/93; *Howker v Secretary of State for Work and Pensions* [2002] EWCA Civ 1623; [2003] ICR 405, also reported as R(IB) 3/03. That jurisdiction is now possessed by the tribunals operating under the Tribunals, Courts and Enforcement Act 2007: *EN (Serbia) v Secretary of State for the Home Department* [2009] EWCA Civ 630, paragraphs 84, 86 and 87. Thus the F-tT did have jurisdiction to determine

whether the 2014 regulations were validly made and if satisfied that they were not to treat them as if they had not been made in deciding the appellant's appeal. Thus we agree with counsel's joint submission. We hold that the F-tT's decision was affected by a material error of law. We set it aside. However as we are not ourselves satisfied, for the reasons given in detail below, that the 2014 regulations were *ultra vires* we re-make it under section 12(2)(b)(ii) and (4) of the 2007 Act by substituting for it a decision confirming the first respondent's decision of 8 August 2014.

6. If we had accepted the appellant's main contention we would have allowed the appeal by holding that the 2014 regulation had not been validly made.

7. The appellant's argument, in summary, is this. The Secretary of State did not refer proposals to make the 2014 regulations to the Social Security Advisory Committee ("SSAC"). He was obliged by statute to do so, subject to an exception if it appeared to him that by reason of urgency it was inexpedient to do so. Any urgency in this case was urgency which had been produced by the inaction of the Secretary of State himself, and he was not therefore entitled to invoke it as a basis for having failed to make the reference.

8. We had before us an affidavit from Lindsay Fullarton, the Deputy Head of the EU and International Affairs Division of the Labour Market Strategy Directorate of the Department for Work and Pensions, with a number of appendices. The appellant posed a series of written questions in the light of the affidavit, which were answered in writing. Mr Bryce confirmed that he did not require to cross-examine the author of the affidavit. It therefore stands as her unchallenged evidence. We also had before us Minutes of Meetings of the SSAC; its report on the regulations; the government's response thereto; and correspondence between the Chair of the SSAC and the Secretary of State.

The duty to refer

9. The provisions regarding the Social Security Advisory Committee, the duty to refer, and the exception to that duty appear in sections 170, 172, 173 and 174 of the Social Security Administration Act 1992.

"**The Social Security Advisory Committee**

170. – (1) The Social Security Advisory Committee (in this Act referred to as 'the Committee') constituted under section 9 of the Social Security Act 1980 shall continue in being by that name –

(a) to give (whether in pursuance of a reference under this Act or otherwise) advice and assistance to the Secretary of State in connection with the discharge of his functions under the relevant enactments;

(b) to give (whether in pursuance of a reference under this Act or otherwise) advice and assistance to the Northern Ireland Department in connection with the discharge of its functions under the relevant Northern Ireland enactments; and

(c) to perform such other duties as may be assigned to the Committee under any enactment.

…

(3) The Secretary of State may from time to time refer to the Committee for consideration and advice such questions relating to the operation of any of the relevant enactments as he thinks fit (including questions as to the advisability of amending any of them).

(4) The Secretary of State shall furnish the Committee with such information as the Committee may reasonably require for the proper discharge of its functions.
…

Functions of Committee and Council in relation to regulations

172. – (1) Subject –

(a) to subsection (3) below; and

(b) to section 173 below,

where the Secretary of State proposes to make regulations under any of the relevant enactments, he shall refer the proposals, in the form of draft regulations or otherwise, to the Committee.
…

Cases in which consultation is not required

173. – (1) Nothing in any enactment shall require any proposals in respect of regulations to be referred to the Committee or the Council if –

(a) it appears to the Secretary of State that by reason of the urgency of the matter it is inexpedient so to refer them; or

(b) the relevant advisory body have agreed that they shall not be referred.

(2) Where by virtue only of subsection (1)(a) above the Secretary of State makes regulations without proposals in respect of them having been referred, then, unless the relevant advisory body agrees that this subsection shall not apply, he shall refer the regulations to that body as soon as practicable after making them.
…

Committee's report on regulations and Secretary of State's duties

174. – (1) The Committee shall consider any proposals referred to it by the Secretary of State under section 172 above and shall make to the Secretary of State a report containing such recommendations with regard to the subject-matter of the proposals as the Committee thinks appropriate.

(2) If after receiving a report of the Committee the Secretary of State lays before Parliament any regulations or draft regulations which comprise the whole or any part of the subject-matter of the proposals referred to the Committee, he shall lay with the

regulations or draft regulations a copy of the Committee's report and a statement showing –

(a) the extent (if any) to which he has, in framing the regulations, given effect to the Committee's recommendations; and

(b) in so far as effect has not been given to them, his reasons why not."

Background/chronology

10. Under provisions agreed when Bulgaria and Romania joined the EU in 2007, Member States were allowed to derogate for a limited time from the requirements of EU law regarding free movement of workers. The accession period was seven years, but employment restrictions during the final two years could be applied only if a Member State informed the European Commission that the restrictions were necessary to avert a threat of serious disruption to its labour market. The United Kingdom did make provision for restrictions during that final two year period, by the Accession (Immigration and Worker Authorisation) (Amendment) Regulations 2011 (SI 2011/2816), made on 23 November 2011. The accession period expired on 31 December 2013.

11. On 29 January 2013 the then Home Office Minister, Lord Taylor of Holbeach, made the following statement in the House of Lords:

"The Home Office regularly monitors and analyses overall migration data to help inform policy decisions. However, we have not prepared forecasts of likely inflows from Romania and Bulgaria once restrictions are lifted. Such forecasts are unlikely to be reliable because they are dependent on too many variable factors.

In November 2011 when considering the impacts of ending transitional controls on Romanians and Bulgarians, the independent Migration Advisory Committee concluded that it would not be sensible, or helpful to policymakers, for us to attempt to put a precise range around this likely impact.

So rather than produce speculative projections we are focusing on our work to cut out the abuse of free movement and address the pull factors that drive EU migrants to Britain."

12. The then Immigration Minister, Mark Harper, responded to a Parliamentary Question on 7 March 2013, by confirming that: "the Inter-Ministerial Group on Migrants' Access to Benefits and Public Services had been established to consider whether existing rules preventing illegal non-EEA migrant access to benefits, employment and public services could be administered more effectively and to determine whether existing rules on both EEA and non-EEA migrant access are overgenerous and should be tightened."

13. The Prime Minister made a speech on 25 March 2013 which included the following passage:

"So, by the end of this year, and before the controls on Bulgarians and Romanians are lifted, we are going to strengthen the test that determines which migrants can access benefits. And we're going to give migrants from the EEA – from the European Economic Area – a very clear message. Just like British citizens, there is no absolute right to

unemployment benefit. The clue is in the title: Jobseeker's Allowance is only available to those who are genuinely seeking a job.

You will be subject to full conditionality and work search requirements and you'll have to show you're genuinely seeking employment. And if you fail that test, you will lose your benefit. And, as a migrant, we're only going to give you six months to be a jobseeker. After that, benefits will be cut off unless you really can prove not just that you are genuinely seeking employment but also that you have a genuine chance of getting a job. We are going to make that assessment a real and robust one and, yes, it also will include whether your ability to speak English is a barrier to work.

And to migrants who are in work but then lose their jobs, the same rules will apply. Six months and then, if you can't show you have a genuine chance of getting a job, benefits will be cut off. That means that EEA migrants who don't have a genuine chance of getting work after six months will lose their right to access certain benefits. So, yes, of course they can still come and stay here if they want to, but the British taxpayer will not go endlessly paying for them anymore."

14. On 26 November 2013, an article by the Prime Minister was published in the Financial Times, which included this statement:

"We are changing the rules so that no one can come to this country and expect to get out of work benefits immediately; we will not pay them for the first three months. If after three months an EU national needs benefits – we will no longer pay these indefinitely. They will only be able to claim for a maximum of six months unless they can prove they have a genuine prospect of employment.
We are also toughening up the test which migrants who want to claim benefits must undergo. This will include a new minimum earnings threshold. If they don't pass that test, we will cut off access to benefits such as income support. Newly arrived EU jobseekers will not be able to claim housing benefit."

15. On 18 December 2013 the Prime Minister announced that the three months residence requirement would come into force from 1 January 2014. The Jobseeker's Allowance (Habitual Residence) (Amendment) Regulations 2013 (SI 2013/3196) which implemented that requirement were laid on 18 December 2013 and came into force on 1 January 2014. The Secretary of State relied on the provisions of section 173(1)(a) and did not refer the proposal to make the regulations to the SSAC.

16. Had no further action been taken, those who became eligible for income-based JSA after the three month period would also have become eligible for HB. A decision was taken to decouple entitlement to HB from entitlement to JSA in the way described above.

17. It was announced on 19 January 2014 that the changes to HB would take effect from 1 April 2014.

18. The SSAC met on 30 January 2014. Under agenda item 7, it considered, amongst other things, proposed amendments to HB legislation. The minutes recorded that although the SSAC had been advised by the Department that the proposals were due to come into force in April 2014, regulations had yet to be drafted. The team of officials attending the meeting did not include anyone specialising in HB. The officials who did attend were not able to explain to the

SSAC why it was not possible for the SSAC to see an early draft of the proposals. The SSAC was due to meet on 5 March, but offered to reconvene earlier if that would be helpful to the Department. In a letter dated 3 February 2014 to the Secretary of State from the Chair of the SSAC, the latter wrote, in relation to the proposals regarding HB:

> "Finally, we are of course aware of the Government's announced plans to remove access to Housing Benefit for EEA jobseekers if they get income-based JSA. The Committee understands that the intention is to have those regulations in place by the beginning of April and that, given the challenging timescales involved, you have again been considering the possibility of invoking the urgency provisions permitted by section 173(1)(a) of the Social Security Administration Act 1992.
>
> While we understand that the Department is operating at some pace on this issue, the Committee is keen to see the emerging draft proposals at the earliest opportunity – even if they are not in a final or polished state – which could obviate any perceived need to invoke the exceptional urgency provisions again so soon.
>
> Our current understanding is that draft regulations will be presented to the Committee at our next meeting on 5 March but, given the time constraints to which you are working, we would consider scrutinising the draft regulations at an earlier date outside of that meeting if that would be helpful to you."

19. The Secretary of State responded by letter dated 14 February 2014:

> "As you are aware, my officials are working at pace to ensure delivery of [the housing benefit amendment regulations] in time for the announced implementation date of 1st April 2014. We shall formally refer the full and final regulations to the Committee as soon as possible after they are ready, which will be for the April meeting.
>
> My officials are currently developing the regulations, supporting documents and associated operational procedures. I am keen that we benefit from the advice and expertise of the Committee. So I am pleased to confirm that my officials will be attending the 5th March meeting of the Committee, where they will be able to provide an update on progress and take part in a discussion of the key issues.
>
> In order to help support the discussion, I have asked them to share with you the latest version of the draft regulations package shortly before the March meeting."

20. Ms Fullarton's affidavit at paragraphs 28–45 sets out legal and operational challenges facing the Department for Work and Pensions. In order to comply with the 21 day rule (the rule that an interval of at least 21 days is allowed between the laying and coming into force of regulations) a number of matters had to be achieved by 10 March 2014. The legislation had to be drafted and an Equality Analysis, Explanatory Memorandum and Impact Assessment had to be prepared. Any consultation with local authorities and SSAC would also have had to be completed in that timescale. Finally it was necessary to find operational solutions, including information technology changes that would allow local authorities to identify whether a claimant was an EEA jobseeker. Without such a change some local authorities would make payments of HB on receipt of notification of an award of JSA.

21. The next meeting of the SSAC was due to take place on 5 March 2014. The normal process would have been to provide papers to it 12 days before it met, including draft regulations and associated documentation. However the Department for Work and Pensions was not in a position to provide papers by 21 February 2014. The time constraints imposed by the meeting on 5 March 2014 meant that there would have been no time thereafter for the Secretary of State to consider any observations made and any revisions recommended before the regulations themselves needed to be made and laid.

22. The Equality Analysis for Removal of Access to Housing Benefit for EEA Jobseekers is dated 27 February 2014.

23. The regulations were made on 5 March and laid before Parliament on 11 March 2014.

24. Officials presented the regulations to the SSAC on 2 April 2014. Following a meeting on the same date the SSAC consulted on the regulations. The results of the consultation were published on 30 June 2014. The government response was published on 20 November 2014.

Appellant's submissions

25. Against that factual background, the appellant submitted that the Secretary of State had known by at latest 23 November 2011, when the United Kingdom took steps to continue restrictions on free movement for nationals of Bulgaria and Romania, that the accession period would end on 31 December 2013.

26. What we are required to review was whether it was lawful for the Secretary of State not to refer the proposal to the SSAC. Mr Bryce formulated the task for us in a number of different ways in the course of his submission. First, he submitted that the question for us was whether there was truly no urgency, suggesting that we should consider that matter for ourselves, essentially as primary decision-makers. Second, he described the test as a traditional *Wednesbury* assessment, on the basis that the Secretary of State could not rationally conclude that there was urgency. His submission came to be that the Secretary of State was not entitled to rely on purported urgency when that urgency had resulted from the Secretary of State's own inaction; self-generated urgency, he said, was no urgency at all. In this connection he relied on *R v Secretary of State for Social Security, ex p Association of Metropolitan Authorities* ("*AMA*") [1992] HLR 131 (Tucker J, particularly at 138) and *R v Brent LBC, ex p Gunning* ("*Gunning*") (1985) 84 LGR 168.

27. Mr Bryce emphasised the importance of expert input from the SSAC and the circumstance that provision for that input was made in primary legislation. It was essential that the procedures be properly observed, and failure to observe them should result in the regulations being held *ultra vires*: *East Kilbride District Council v Secretary of State for Scotland* 1995 SLT 1238, at 1245G–H, quoting Lord Jauncey in *City of Edinburgh District Council v Secretary of State for Scotland* 1985 SC 261; *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39; [2014] AC 700, Lord Sumption at paragraphs 40–44; *Howker v Secretary of State for Work and Pensions* [2003] ICR 405, Hale LJ at paragraphs 53–55.

28. Finally, the appellant sought to draw an analogy with the reluctance of courts to grant emergency relief by way of injunction or interdict when the urgency of the application had derived from the conduct of the applicant.

Second respondent's submissions

29. Mr Webster submitted that the review to be carried out by us was of the rationality of the Secretary of State's assessment that there was urgency such as to permit him not to refer the proposal to make regulations to the SSAC. The question of whether there was urgency for the purposes of section 173(1)(a) crystallised only when "a policy decision was made". He identified 19 January 2014 as the point when the policy decision had been made. Only then had the issue crystallised. At that time, if the government wanted to ensure that EEA nationals did not become entitled to HB at the end of the three month period, they would have to act soon to achieve that result. Until there was a resolution that that should be the result, there had not been a relevant policy decision.

30. The second respondent's submission was that we should be slow to find irrationality. We should be cautious about trespassing on what was essentially a political policy decision: *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696, Lord Donaldson MR (in the Court of Appeal) at page 723C–E; *Bank Mellat*, Lord Sumption at paragraph 44.

31. There was always scope for policies to change. It was a feature of constitutional government that policy could change at any time, as the government saw fit: *Hughes v Department of Health and Social Security* [1985] AC 776, Lord Diplock at page 788B–C.

32. While the government was aware that the accession period was due to come to an end, the impact of that had not been clear. Mr Webster referred to the statement by the Home Office Minister on 29 January 2013, quoted above. What the Prime Minister had sought to convey on 25 March 2013 was confidence that the government could deal with the "pull factors". The case law of the Luxembourg court had developed in the case of *Brey,* C-140/12, EU:C:2013:565. Legislation for limitation on entitlement to JSA from 1 January 2014 then created a problem in relation to 1 April 2014 regarding entitlement to HB. The issue about housing benefit and whether the government wanted to prevent EEA nationals from becoming entitled to HB therefore only arose in January 2014. Until that point policy was in development.

33. Mr Webster's fallback position was that, if it was relevant at all to look at the period before January 2014, the government had not "sat on its hands". Policy had been developing over time. The crystallisation process had begun with the article by the Prime Minister in the Financial Times, but even then there had been no determination as to when the policy regarding out of work benefits would be given effect.

Discussion

34. The correct focus, as a matter of statutory construction, is on the point when an obligation would arise to refer to the SSAC, absent any urgency. The obligation under section 172 arises where the Secretary of State "proposes to make regulations under any of the relevant enactments". It is the proposals, whether in the form of draft regulations or otherwise, that are to be referred. The language falls to be contrasted with that used in section 176, which provides for consultation with representative organisations in respect of regulations related to housing benefit "before making regulations". It is not necessary that there be draft regulations available, but there must be a policy proposal, which the government will seek to achieve by making regulations under the relevant enactments. The policy proposal must be sufficiently clear and detailed to admit of effective consultation.

35. The first question for us is, therefore, when the relevant policy decision was made.

36. While the end date of the accession period was known in November 2011, there is nothing in the information presented to us that indicates that there was before 29 January 2013 a clear policy proposal such as to trigger the duty to refer.

37. The statement in the House of Lords on 29 January 2013 is a statement of intention to address the "pull factors" that "drive" EU migrants to Britain. The Written Answer on 7 March 2013 refers specifically to benefits, but contains no specification as to any particular means by which EEA migrant access to benefits might be tightened. Neither of these can properly be regarded as reflecting a proposal which would have given rise to a duty to refer to the SSAC.

38. The Prime Minister's speech of 25 March 2013 contains statements of policy. The language used indicates a settled intention to legislate. Ms Fullarton's affidavit, at paragraph 11, confirms that the Prime Minister, in speaking about strengthening the test that determines which migrants can access benefits, is referring to a test of habitual residence. She explains that the habitual residence test is a two stage test under which claimants must be factually habitually resident in the UK, Channel Islands, Isle of Man or Republic of Ireland, and have a legal right to reside in any of those places. There is no specification in this part of his speech as to which benefits the Prime Minister has in mind, or whether any decision has been taken as which benefits are to be affected. There is no statement of the extent to which the test is to be "strengthened". There is, however, a statement that the intention is to strengthen the test of habitual residence "by the end of [2013] and before the controls on Bulgarians and Romanians are lifted".

39. The same speech contains a specific proposal in relation to jobseeker's allowance and "certain [other unspecified] benefits". The specific proposal in question, however, is that of limiting entitlement to those benefits to a period of six months and does not relate to the content of the 2014 regulations.

40. On 26 November 2013, in the article in the Financial Times, the means by which eligibility for jobseeker's allowance was to be managed was made clear – out-of-work benefits would not be payable until three months after EU nationals had arrived in the United Kingdom. Housing benefit would not be available to newly arrived EU jobseekers. There is, however, still no statement of a policy proposal to prevent EU jobseekers, after three months, from accessing housing benefit.

41. Ms Fullarton's affidavit, at paragraphs 25–27 contains the following:

> "25. During December 2013, the Department was focused on implementing the proposed changes to income-based JSA and the HRT as these needed to be in place for 1st January 2014.
>
> 26. The Department initially anticipated that changes to HB, which would affect all EEA jobseekers, would be implemented later in 2014, in part due to the need to develop operational and IT solutions to manage the new policy. However, the changes to income-based JSA and the HRT from 1st January 2014 would result in those applying for JSA on 1st January being entitled to HB on 1st April 2014. In the initial weeks of January 2014 consideration was given to when the HB measure could be implemented, which involved

consideration of when an operational solution could be delivered, having regard to the 380 Local Authorities involved, and when the policy could be finalised.

27. It was announced on 19th January 2014 that the changes to HB would take effect from 1st April 2014. … Ministers had determined that for jobseekers of all EEA nationalities the proposed HB measure and the three months residence requirement would 'dovetail' so that the first EEA jobseekers making an initial claim for JSA on 1st January 2014, having served their 3 months residence requirement for JSA, could not then access HB only for that benefit to be removed again shortly afterwards. This would have happened had the new measure to remove entitlement to HB taken effect after 1st April 2014."

42. It is surprising that consideration of the "knock-on" effect of the three month deferral of entitlement to JSA on entitlement to HB came so late in the day. Given the passporting provision then in effect it should have been readily apparent that, absent some amendment to the regulations, claimants receiving JSA after the three month period would then access HB as well. That is, however, rather different from saying that the government either had concluded, or was bound to conclude at a particular point in time that it should, take the action that it eventually did. Indeed, Ms Fullarton's affidavit, the factual accuracy of which is not challenged by the appellant, makes it clear that as late as early January 2014 ministers had not yet determined that the provisions would or could come into effect on 1 April 2014. It does seem, looking in particular at paragraph 26 of the affidavit, that until a very late stage it genuinely remained a live possibility that the government would not attempt to prevent entitlement to HB precisely in alignment with preventing entitlement to JSA.

43. That impression is reinforced to some extent by the content of the Minutes of the SSAC meeting of 30 January 2014. No draft was available for the SSAC to consider. The relevant officials were not available. Those circumstances are consistent with a policy decision having been taken late in the day.

44. *Howker* does not assist us as to the approach that we should take where the Secretary of State has not referred a proposal on grounds of urgency. We accept the analyses by Peter Gibson LJ at paragraph 35, as to the importance of references to the SSAC in the legislative scheme. The facts in *Howker* are, however, materially different from those in the present case. In *Howker* information provided to the SSAC by officials, which would have permitted it to take an informed decision as to whether to require a reference, was seriously inaccurate. The committee decided, on the basis of a misrepresentation, not to require that a reference be made. It is not difficult to see why the Court of Appeal decided that that was a procedural irregularity which must result in invalidity.

45. In *AMA* Tucker J was concerned with a failure to consult under similar predecessor legislation, the Social Security Act 1986, section 61(7). The applicant's submission was that consultation had been left until the Secretary of State had decided what to do. That had created urgency. Urgency was self-induced, and could not be relied upon as a reason for the failure to consult. Tucker J agreed. He regarded the duty to consult as a mandatory requirement and found that the Secretary of State could not, by ignoring the requirement, and leaving matters to the last moment, invoke the exemption given for situations of urgency. Against that background, Tucker J rejected a submission that the question as to whether or not it appeared inexpedient to consult by reason of urgency was one for the Secretary of State, and not for the court.

46. In *Gunning* the context was a provision of the Education Act 1944 requiring a local authority to consider a report from an education committee before exercising certain functions. It was open to the authority to dispense with such a report if, in its opinion, the matter was urgent. There was no indication that the local authority had applied its mind to the decision whether or not to dispense with such a report. It put certain proposals regarding the restructuring of local schools to consultation without the proposals having been considered by the education committee. Hodgson J held that in consulting without considering a report from an education committee the local authority was in breach of a mandatory requirement and "guilty of a grave procedural impropriety". He found that all that followed thereafter was *ultra vires* and should be quashed.

47. A number of points arise from *AMA* and *Gunning*. Both use the language of mandatory requirements. As is now well established the central question where Parliament has imposed a requirement in apparently mandatory language is what Parliament intended should be the consequence where the requirement was not complied with, and in particular whether the consequence should be the invalidity of the exercise of a power: *R v Soneji* [2005] UKHL 49; [2006] 1 AC 340. That approach is perhaps prefigured in the decision of Tucker J regarding remedy in *AMA*. Although he declared that the Secretary of State had failed to comply with the duty to consult, he declined to quash the regulations. Although the point was not explored in discussion before us, there must be some doubt as to whether the argument in *Gunning* would have followed precisely the same lines today as it did in 1985.

48. The point in *Gunning* was in any event rather different from that in the present case. The court proceeded on the basis that there had simply been no engagement with the question as to whether the local authority should dispense with a report. It therefore provides no assistance as to the approach that ought to be taken when the relevant authority has decided to invoke an exception based on urgency.

49. More important, however, is the absence of discussion in *AMA* of authorities such as *Brind* and *Hughes*, both of which pre-date it. The relevant passages are these:

> "A decision whether or not to [exercise certain powers under the Broadcasting Act 1981 and the licence and agreement with the BBC] and if so, in what terms, involves the Secretary of State in making a delicate and difficult political judgment. In the nature of things it is likely that there will be more than one tenable decision. But it is a judgment to be made by the Secretary of State and not the courts, whose right and duty to intervene only arises in the event that the Secretary of State reaches an untenable decision in the sense that he can be shown to have taken account of matters which are irrelevant or failed to take account of matters which were relevant or in which the decision is manifestly wrong as falling outside the wide spectrum of rational conclusions." (*Brind*, Lord Donaldson MR at 723C–E).
>
> "Administrative polices may change with changing circumstances, including changes in the political complexion of governments. The liberty to make such changes is something that is inherent in our constitutional form of government." (*Hughes,* Lord Diplock at 788B).

50. The reasoning in these passages casts doubt on whether Tucker J was correct to decide the substantive point before him in the way that he did. The point in time that a policy decision is made is itself a question of political judgment, and pre-eminently one for the executive, not the

courts. It is intimately connected with the policy decision itself. Moreover, government will at any given time be dealing with a number of matters to which it may be considering giving attention, and the way in which it affords priority to those matters and the order in which it deals with them is again one pre-eminently for it. Consultation is required only when the government **has** decided what to do. It follows that it is reviewable on *Wednesbury* grounds. It would be curious if a decision as to the appearance of urgency, which is inextricably related to the point in time at which the decision is reached, were to be reviewable on another, more stringent, basis, as Tucker J appears to suggest.

51. In the present case we are not being asked to interfere directly with the policy decision to prevent EEA nationals becoming entitled to housing benefit. We are being asked to find that it was unlawful for the Secretary of State to conclude that it appeared to him that it was inexpedient by reason of the urgency of the matter to refer the proposals to the SSAC. We are being asked to hold the regulations invalid in consequence of that.

52. There are two approaches implicitly interwoven in the submissions for the appellant. The first is that that there had in fact been a policy decision at a point earlier than that contended for by the second respondent, thus making urgency on the basis of a purported later decision illusory and reliance on such urgency improper. For the reasons more fully explained above, we do not accept that the policy decision in question was taken earlier than 19 January 2014.

53. The second is to ask us to hold that the Secretary of State ought to have made a policy decision earlier so as to allow for consultation, (or, the logic must be, to have referred for consultation once the decision was made, notwithstanding that the resulting delay would mean that claimants would be awarded benefit which would shortly afterwards be withdrawn). If either were correct, the decision on appearance of urgency would be unreasonable. For the reasons set out above, that line of argument is without merit. We are unable to hold that it was outwith the range of reasonable decisions open to the Secretary of State for him to make the policy decision he did at the point when he did, and it follows from that that the challenge to his decision as to the appearance of urgency must also fail.

54. Thus we reject the appellant's contention that the 2014 regulations were not validly made.