



**Neutral Citation Number: [2026] UKUT 272 (AAC)
Appeal No. UA-2023-000852-HB**

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Between:

Michaela Kuželová

Appellant

- v -

**(1) The London Borough of Barnet
(2) The Secretary of State for Work & Pensions**

Respondents

Before: Deputy Upper Tribunal Judge Gullick KC

Hearing dates: 23-24 June and 24 September 2025

Representation

Appellant: Simon Cox and Daniel Hallström
(Counsel, instructed by Osbornes Solicitors LLP)

1st Respondent: Jemma Taverner
(Appeals Officer)

2nd Respondent: Naomi Ling
(Counsel, instructed by the Government Legal Department)

On appeal from:

Tribunal: First-tier Tribunal (Social Entitlement Chamber)
Judge: Tribunal Judge SJ Walker
Tribunal Case No: SC242/21/01447
Tribunal Venue: Fox Court
Decision Date: 19 October 2022

SUMMARY OF DECISION

Housing benefit – temporary absence (16.5)

Housing benefit – recovery of overpayments (16.7)

Supersession – general (30.9)

This appeal concerns the Appellant's entitlement to Housing Benefit between 25 May 2020 and 7 August 2020. The Appellant is a citizen of the Czech Republic and was lawfully present in the United Kingdom as an EU migrant worker. She lived in North London with her son, then aged eight. Their home was rented from a private landlord. The Appellant received Housing Benefit, administered by the London Borough of Barnet, to assist with payment of the rent.

In May 2020, the Appellant's father became seriously ill. The Appellant and her son travelled to the Czech Republic to visit him. Shortly after they arrived, the Appellant's father's condition improved – but the Appellant's son then became seriously ill, requiring in-patient hospital treatment and a lengthy period of convalescence. The Appellant initially remained in the Czech Republic with her son. She returned to her home in Great Britain in July 2020. Her son stayed with his grandparents and returned much later on.

On 7 August 2020, the London Borough of Barnet made a decision that the Appellant's entitlement to Housing Benefit had ended when she travelled to the Czech Republic in May 2020, because the length of her absence from Great Britain was likely to exceed the permitted maximum period of four weeks in the Housing Benefit Regulations. It also decided that there had been a recoverable overpayment of Housing Benefit during this period of more than £1,000.

As a result of the local authority's decision that her entitlement to Housing Benefit had ended when she left to travel to the Czech Republic in May 2020, it was necessary for the Appellant to make a claim for Universal Credit, which had replaced Housing Benefit. She was awarded Universal Credit in September 2020.

The Appellant challenged the lawfulness of the local authority's decisions of 7 August 2020 in an appeal to the First-tier Tribunal. That appeal failed. The Appellant was granted permission to appeal by the Upper Tribunal. The Secretary of State for Work and Pensions was joined as a Respondent to the appeal to the Upper Tribunal.

The Upper Tribunal finds that the decision of the First-tier Tribunal was made in material error of law. The First-tier Tribunal failed to consider whether the Appellant was entitled to Housing Benefit on 7 August 2020 and so the local authority's decisions should have been made by way of "closed period supersession" – that is, by the local authority finding that even if there had been a point at which the Appellant's entitlement to Housing Benefit had ended, it had since been re-established by the date of its decision.

The Upper Tribunal re-makes the decision by allowing the appeal against those parts of the local authority's decisions of 7 August 2020 which are challenged. The Upper Tribunal finds that:

1. Applying the Housing Benefit Regulations, but without regard to any provisions of EU Law, the Appellant's entitlement to Housing Benefit ceased on 25 May 2020 but resumed on 8 June 2020, as a result of the reason for her absence abroad from this point onwards being her son's illness. Her entitlement to Housing Benefit did not thereafter cease again prior to the date of the decisions under appeal on 7 August 2020.
2. In respect of the Appellant's entitlement to Housing Benefit for the period between 25 May 2020 and 7 June 2020, the Appellant as an EU migrant worker can rely on her rights under EU Law to equality of treatment with British workers. The Respondents accept that the relevant provisions of the Housing Benefit Regulations have a discriminatory effect on EU migrant workers because, since changes made in 2016, they have provided for different basic maximum permitted periods of absence within Great Britain (13 weeks) and outside Great Britain (4 weeks). The Respondents are therefore required to demonstrate that this accepted discriminatory effect is objectively justified. They have failed to do so. As the period in question falls entirely before the date on which the position under EU Law materially changed following the United Kingdom's departure from the European Union, then the relevant provisions of the Housing Benefit Regulations must be disapplied in the Appellant's case in favour of the more generous entitlement that otherwise arises only in respect of permitted periods of absence in Great Britain. Applying those provisions, the Appellant's entitlement to Housing Benefit did not cease during the relevant period.

The result is that the local authority's decisions of 7 August 2020 finding no entitlement to Housing Benefit for the period 25 May to 7 August 2020, and finding that there was a recoverable overpayment, are set aside. There was such an entitlement throughout the relevant period, and accordingly no recoverable overpayment in respect of that period.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the Judge follow.

DECISION

The decision of the Upper Tribunal is that:

- 1. The Appellant's withdrawal of Ground 1, for which permission to appeal was granted on 2 May 2024, is confirmed pursuant to Rule 17 of the Upper Tribunal Rules of Procedure.**
- 2. The Appellant's application for permission to amend the grounds of appeal is granted.**
- 3. The appeal to the Upper Tribunal is allowed. The decision of the First-tier Tribunal (Social Entitlement Chamber) dated 19 October 2022 was made in error of law.**
- 4. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007, that decision is set aside and is remade as follows:**
 - a. The appeal in respect of the First Respondent's decision of 7 August 2020 that the Appellant was not entitled to Housing Benefit from 25 May 2020 until the date of decision is allowed. That decision is set aside.**
 - b. The appeal in respect of the First Respondent's decision of 7 August 2020 that there had been a recoverable overpayment of Housing Benefit for the period 25 May 2020 to 28 June 2020 in the sum of £1,010.30 is allowed. That decision is set aside.**
 - c. The appeal in respect of the First Respondent's decision that there had been a recoverable overpayment of Housing Benefit for the period 6 January 2020 to 5 April 2020 in the sum of £179.40 is dismissed upon it having been withdrawn by the Appellant.**

REASONS FOR DECISION

Introduction

- 1. This is an appeal against the decision of the First-tier Tribunal (Social Entitlement Chamber) about the Appellant's entitlement to Housing Benefit between 25 May 2020 and 7 August 2020. As its name suggests, Housing Benefit is assistance with the payment of housing costs (in the Appellant's case, with the payment of rent to her landlord) that is provided by the state to those on low incomes or who are unemployed.**
- 2. At the hearing of the appeal to the Upper Tribunal, the Appellant was represented by Simon Cox of Counsel, leading Daniel Hallström of Counsel. Mr Cox and Mr Hallström were instructed by William Ford of Osbornes Solicitors LLP. None of the Appellant's legal representatives appeared before the First-tier Tribunal.**

3. There are two other parties to the appeal. The First Respondent is the London Borough of Barnet. It is a Borough Council which, in common with other local authorities throughout the country, administers the award and payment of Housing Benefit in relation to residents in its area. It was responsible for taking decisions on the Appellant's entitlement to Housing Benefit. I shall refer to the London Borough of Barnet as "the Local Authority".
4. The Local Authority was represented by its Appeal Officer, Jemma Taverner. Ms Taverner appeared for the local authority before the First-tier Tribunal.
5. The Second Respondent is the Secretary of State for Work and Pensions. He is the United Kingdom Government Minister with responsibility for the administration of the system of state benefits. I will refer to him as "the SSWP". The SSWP was not a party to the proceedings before the First-tier Tribunal.
6. The SSWP was represented by Naomi Ling of Counsel, instructed by the Government Legal Department.
7. Before the Upper Tribunal was a hearing bundle of 744 pages, an authorities bundle of 1,424 pages and the parties' skeleton arguments, running to a combined total of 50 pages. In addition, I was provided with a short addendum authorities bundle, and a brief but detailed note drafted by the Appellant's representatives on the Upper Tribunal's residual power to disapply national legislation after the United Kingdom's withdrawal from the European Union. Ms Ling also produced brief but very helpful written submissions in advance of the third day of the hearing, which narrowed the issues between the parties considerably.
8. I am grateful to all the parties' representatives for the assistance provided to the Upper Tribunal in connection with this appeal. I hope that I do not do any of the others involved an injustice by expressing my particular thanks to Mr Cox and to Ms Ling for their assistance during oral argument on the questions of European law that arise on this appeal. I also commend the industry of Mr Hallström: but for the assistance provided by him to the Appellant in his previous role at the Free Representation Unit ("FRU"), this appeal might have taken a very different course.
9. Following the change in the practice of the Administrative Appeals Chamber with regard to the anonymisation of parties to social entitlement appeals with effect from the end of March 2026, the Appellant's full name has been included in the published version of this decision. In April 2026, following directions which I gave with regard to the making of any application for anonymity under Rule 14 of the Upper Tribunal Rules of Procedure, the Appellant's Solicitors informed the Upper Tribunal that the Appellant did not wish to make such an application.
10. As will be apparent from the terms of the decision, set out above, I have decided to allow the appeal to the Upper Tribunal, and to substitute my own decision in favour of the Appellant for that of the First-tier Tribunal, for the reasons which follow.

Background to the Appeal to the Upper Tribunal

11. Before setting out the factual background, it is convenient to summarise very briefly some of the relevant provisions of the Housing Benefit Regulations 2006 (SI 2006/213). I will set these out in greater detail later; for present purposes, it is sufficient to note the following:
 - a. Regulation 7(13) provides for entitlement to Housing Benefit to continue for up to 13 weeks when the recipient is temporarily absent within Great Britain from their home, provided that (i) they intend to return to occupy it as their home, (ii) it has not been let or (as the case may be) sub-let, (iii) the period of absence within Great Britain is unlikely to extend beyond 13 weeks.
 - b. Regulation 7(13D) contains similar provision in relation to temporary absences outside Great Britain from the home – but the maximum period of absence abroad for the purpose of entitlement to Housing Benefit continuing under that paragraph is four weeks.
 - c. These provisions insofar as they differentiate between permitted periods of temporary absence from the home within and outside Great Britain were inserted with effect from 28 July 2016 by the Housing Benefit and State Pension Credit (Temporary Absence) (Amendment) Regulations 2016 (SI 2016/624). Prior to this change, there was a single rule governing continued entitlement to Housing Benefit in relation to all temporary absences from the home irrespective of the location of the recipient whilst absent.
 - d. Both Regulation 7(13) and Regulation 7(13D) are, however, subject to a number of exceptions including those that are set out in Regulation 7(16) and Regulation 7(17), which modify the maximum permitted periods of absence from the home in certain cases – these include where the reason for the absence is that a recipient's dependent child is undergoing medical treatment or medically approved convalescence, where the relevant maximum period of absence is increased to 26 weeks.
12. The Appellant, who was born in 1979, is a citizen of the Czech Republic. She came to the United Kingdom in 2009 and has been resident here ever since. The Appellant entered the United Kingdom lawfully, and thereafter has remained resident in this country lawfully, by virtue of her status as a citizen of a European Union ("EU") Member State.
13. Whilst in the United Kingdom, the Appellant has worked on both an employed and on a self-employed basis, although prior to the events with which this appeal is concerned she also had periods of unemployment during which she was in receipt of Job-Seeker's Allowance.
14. The Appellant's son was born in the United Kingdom in January 2012. He resided with her at the times material to this appeal.

15. The United Kingdom was an EU Member State when the Appellant arrived here. It remained an EU Member State until 31 January 2020 when it withdrew from the EU, consequent upon the result of the 2016 referendum on EU membership and the subsequent decisions taken to give effect to that outcome by the United Kingdom Government and the United Kingdom Parliament.
16. The United Kingdom's withdrawal from the EU was subject to an initial transition period, ending on 31 December 2020. The withdrawal is also the subject of international agreements made between the United Kingdom and the EU, and consequent United Kingdom primary and secondary legislation. I will deal with that legislation in greater detail later on.
17. Immediately prior to the events with which this appeal is concerned, the Appellant had been in receipt of Housing Benefit in respect of a property in the Local Authority's area of North London. This was her home, at which she resided with her son – who at this point was eight years of age. The most recent decision of the Local Authority confirming her award of Housing Benefit had been issued on 26 April 2020. At this time, the Appellant was receiving £189.94 per week in Housing Benefit.
18. Earlier in April 2020, the Appellant had declared to the Local Authority that she had ceased a period of employment and that she would be working on a self-employed basis; the Local Authority had then suspended the Appellant's award of Housing Benefit because it needed further information about the Appellant's new circumstances. However, on 25 April 2020 the Local Authority decided to reinstate the Appellant's Housing Benefit because she had begun to receive Job-Seeker's Allowance on 16 April 2020. That decision was issued to the Appellant on 26 April and was extant until the Local Authority's decisions of 7 August 2020 with which this appeal is concerned.
19. On 29 June 2020, the Local Authority again requested information from the Appellant about her income from self-employment. Payment of Housing Benefit was again suspended.
20. On 22 July 2020, the Appellant sent an email to the Local Authority stating that she had been unable to provide the requested documents as she had been abroad.
21. The Local Authority then asked the Appellant to provide it with information about her absence abroad, which she did via an email on 30 July 2020 with accompanying supporting documents. The Appellant informed the Local Authority that:
 - a. She had travelled to the Czech Republic on 21 May 2020, via Eurotunnel, due to *"the unprecedented serious health conditions of a family member"* (this reference was in fact to the Appellant's father, who had suffered a stroke).
 - b. She had planned to return to the United Kingdom on 15 July 2020, again via Eurotunnel, and had made a booking for that purpose.

- c. However, in the meantime, the Appellant's son (who had accompanied the Appellant to the Czech Republic) had developed a serious health problem which required hospitalisation and surgery.
 - d. The Appellant's son had been admitted to hospital on 5 June 2020 and had surgery on 8 July 2020. He was, as at the end of July, recovering from surgery and still not able to travel. It might take as long as seven more weeks for him to recover sufficiently to be able to return to the United Kingdom.
- 22. On 7 August 2020, the Local Authority made several decisions as a result of the information that had been provided to it by the Appellant:
 - a. The first decision was that the Appellant was not entitled to Housing Benefit from 25 May 2020 onwards, because of her absence abroad. The effective date for this change of entitlement was 25 May 2020 because this was the first day of the weekly benefit period immediately following the change in the Appellant's circumstances. I shall refer to this decision as "the Entitlement Decision".
 - b. The second decision was that the Appellant had been overpaid Housing Benefit for the period from 25 May 2020 onwards – that is, for the period between what the Local Authority had found was the date of her change of entitlement and the Local Authority's decision of 7 August. This overpayment was assessed as being in the sum of £1,010.30. I shall refer to this decision as "the Overpayment Decision".
 - c. The third decision was that the Appellant had been overpaid Housing Benefit for the period between 6 January 2020 to 5 April 2020 because account had not been taken of her earnings from self-employment. This overpayment was assessed as being in the sum of £179.40.
 - d. The Local Authority decided that both the overpayments of Housing Benefit were recoverable from the Appellant.
- 23. On 21 September 2020, the Appellant appealed to the First-tier Tribunal against each of the decisions that had been made by the Local Authority.
- 24. The appeal hearing in the First-tier Tribunal (Social Entitlement Chamber) took place on 19 October 2022. The Appellant attended in person and gave oral evidence. The Respondent was represented by Ms Taverner. The Tribunal's decision, given at the hearing and in a Decision Notice bearing the same date, was to dismiss the appeal in its entirety.
- 25. The Appellant subsequently applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal; this was treated as a request for full written reasons for the Tribunal's decision to dismiss her appeal under Rule 41 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008.

26. The First-tier Tribunal's Statement of Reasons was issued on 18 April 2023. The Statement of Reasons records the following:
- a. At the hearing, the Appellant had withdrawn her appeal in respect of the decision that there had been an overpayment of £179.40 based on the calculation of her self-employed earnings.
 - b. The Tribunal accepted the entirety of the Appellant's evidence, which it described as "*clear and straightforward*".
 - c. The Tribunal found that when the Appellant left Great Britain, on 21 May 2020, she did not know how long she would be absent for, as it was dependent on her father's condition. Although her original plan was to stay for two weeks, she would have stayed in the Czech Republic for as long as her father needed her. At this time, she had been told that the prognosis was poor and that her father could die if the drugs he was taking did not work. She hoped, however, to be able to return "*sooner rather than later*" because of an improvement in her father's condition.
 - d. The Appellant's son was admitted to hospital on 5 June 2020, with an infected gall stone. He was discharged on 8 June and told not to travel until after he had surgery. That took place on 8 July 2020. He was discharged from hospital on 13 July and stayed with his grandparents to recuperate. The Appellant then returned to Great Britain on 15 July 2020.
27. The reasoning of the First-tier Tribunal on the points material to the outcome of the appeal to it was as follows:
- a. The Appellant was absent from Great Britain for more than four weeks, because she had left on 21 May 2020 and returned on 15 July.
 - b. When the Appellant left the country, she did not know how long she would be away. Her father was in hospital, and the prognosis was not good. She hoped, however, that he would recover quickly and that she would be away for no more than two weeks. Her actual intention was to remain with her father for as long as he needed her.
 - c. Against that factual background it could not be said that, at the point when the Appellant left the country, her absence was unlikely to exceed four weeks. Accordingly, the period of temporary absence could not be disregarded under Regulation 7(13D) of the Housing Benefit Regulations. The Local Authority had correctly concluded that the Appellant's entitlement to Housing Benefit had therefore come to an end from the beginning of the benefit week immediately following her departure on 21 May.
 - d. The change in the Appellant's circumstances resulting from her son's illness made no difference to the position. Whilst there were exceptions within Regulation 7(16) for those whose dependent children were undergoing medical treatment abroad, those could not assist the

Appellant. That was because when she left on 21 May there was no suggestion that her son would need medical treatment when they were away. The Appellant's entitlement to benefit had already come to an end before the possibility of relying on those provisions had arisen.

28. The First-tier Tribunal therefore concluded that the Local Authority had made correct decisions on 7 August 2020 as to the Appellant's entitlement to Housing Benefit and about the amount and recoverability of the overpayments.
29. Following receipt of the Statement of Reasons, the Appellant renewed her application for permission to appeal from the First-tier Tribunal to the Upper Tribunal. Permission to appeal was refused by the First-tier Tribunal, in a decision issued on 10 May 2023, on the basis that there was no arguable error of law in the decision that had been made.

The Appeal to the Upper Tribunal

30. The Appellant filed a notice of appeal in the Upper Tribunal on 14 June 2023. At this stage, she remained a litigant in person. The grounds of appeal were, in summary, that the First-tier Tribunal had made an incorrect decision both in terms of its conclusion that the Appellant's absence from Great Britain was unlikely to exceed four weeks at the point when she left, and also that the Housing Benefit Regulations did permit absence of up to 26 weeks where an applicant's child was in hospital. The Appellant requested an oral hearing of her application for permission to appeal.
31. On 7 August 2023, Upper Tribunal Judge Wikeley directed that there should be an oral hearing to determine whether to grant permission to appeal. When doing so, he suggested that the Appellant might wish to consider requesting representation under the Upper Tribunal's scheme for referring unrepresented parties to the FRU, a charity providing free legal assistance in tribunal cases for those who cannot otherwise obtain such support.
32. The oral hearing of the application for permission to appeal was listed before me on 10 January 2024. On the morning of the hearing, the Upper Tribunal and the Local Authority were provided with a skeleton argument dated 9 January that had been settled by Mr Hallström (then the FRU Legal Officer) and Mr Jamie Miller (then the FRU Assistant Legal Officer), acting as representatives for the Appellant. This skeleton argument advanced two new proposed grounds of appeal:
 - a. The first proposed new ground of appeal was that the phrase "*unlikely to exceed four weeks*" in Regulation 7(13D) of the Housing Benefit Regulations should, in its particular context, have been read by the First-tier Tribunal as meaning "*where there is a real possibility that the absence will not exceed four weeks*" – a lower standard for someone in the Appellant's position to have to reach than if the word "*unlikely*" was to be interpreted as "*less likely than not*".

- b. The second proposed new ground of appeal was that Regulation 7(13D) of the Housing Benefit Regulations was indirectly discriminatory in its application to migrant workers, such as the Appellant, who were nationals of EU (and European Economic Area) Member States. The basis for this argument was that Regulation 7(13D) was intrinsically more liable to affect migrant workers than workers who were UK citizens, and would place them at a particular disadvantage – so, for example, a worker who was a citizen of an EU Member State leaving home to visit their family abroad would face a four week absence limit under Regulation 7(13D), but a worker who was a British citizen visiting their family in Great Britain would face a 13 week absence limit under Regulation 7(13).

The Appellant's FRU representatives proposed that permission to advance these grounds of appeal should be given, and that the SSWP should be joined as a party to the appeal.

33. As will be apparent, the Local Authority had only a few minutes' notice of these new arguments. The SSWP was at this point unaware of them because he was not yet a party to the appeal and was not represented at the hearing. I therefore decided to give directions for written responses to the proposed new grounds of appeal, and to the application to join the SSWP, to be provided by both the Local Authority and the SSWP. The SSWP filed submissions on 21 February 2024, which were adopted in full by the Local Authority. The Appellant then filed a reply, settled by Mr Hallström on 22 March 2024.
34. I note that on the substance of the second proposed new ground of appeal, the entirety of the argument advanced by the SSWP in response to the application for permission to appeal was that the only appropriate route for the point about the alleged discrimination to be raised was by way of a claim for judicial review of the lawfulness of the Housing Benefit Regulations in the High Court. That argument was not, however, subsequently pursued in the SSWP's substantive written case in response to the appeal or by Ms Ling at the hearing.
35. Having considered all the written submissions, I decided that the grounds of appeal set out by the Appellant's FRU representatives had a realistic prospect of success. I decided to grant permission to appeal on both grounds without a further oral hearing and to join the SSWP as a party to the appeal. In my decision of 2 May 2024 granting permission to appeal, I directed the Respondents to provide full written responses to the appeal and for a reply to those responses to be filed by the Appellant. As a result of the timetable which I set out having been extended, the process was not completed until 14 January 2025, when the Appellant's reply – settled by Mr Cox and Mr Hallström, still acting under the auspices of FRU, was filed.
36. At this point, the Appellant withdrew her argument about the meaning of "*unlikely*" in Regulation 7(13D) of the Housing Benefit Regulations, for which I had given permission to appeal – on the basis that it was accepted by the Appellant that the SSWP's position in her written case that, in its context, this term meant "*less likely than not*" was correct. I should add that Mr Cox confirmed at the hearing that the

Appellant wished to withdraw that ground of appeal; there was no objection to this by any other party, and I therefore treat it as having been withdrawn pursuant to Rule 17 of the Upper Tribunal Rules of Procedure.

37. The Appellant however applied, when making her written submissions, to add a new ground of appeal – that the First-tier Tribunal had erred by failing to consider whether the Appellant had an underlying entitlement to Housing Benefit from 5 June 2020 as a result of her son having become seriously ill when they were in the Czech Republic, so engaging the relevant modification to the maximum period of absence which appears in Regulation 7(16) of the Housing Benefit Regulations. It was contended that the First-tier Tribunal should have considered whether the amount of any overpayment of Housing Benefit should accordingly have been reduced because Regulation 104(1) requires the amount of any recoverable overpayment to be calculated by reference to a claimant's correct circumstances including whether there is any underlying entitlement during the period in issue.
38. On 8 February 2025, Upper Tribunal Judge Jacobs ordered an oral hearing of the appeal and gave case management directions for the preparation of bundles and skeleton arguments. He directed that the application to amend the grounds of appeal should be dealt with at the hearing.
39. In March 2025, the Appellant applied for public funding and instructed Osbornes Solicitors LLP to represent her in connection with the appeal to the Upper Tribunal. They, in turn, instructed Mr Cox and Mr Hallström as Counsel. Proposed amended grounds of appeal were filed on 25 March 2025. The two grounds now sought to be pursued were the ground based on discrimination arising from the application of EU Law (for which I had already given permission to appeal), and the ground based on the argument about underlying entitlement which had first been raised in the Appellant's reply.
40. On 4 April 2025, the Upper Tribunal sent notice to the parties that the appeal would be heard over two days on 23-24 June 2025.
41. On 28 May 2025, the Appellant's Solicitors made an application to rely on a further witness statement from the Appellant dated 15 May 2025, with 265 pages of exhibited material.
42. On 30 May 2025, the Government Legal Department made an application on behalf of the SSWP to adjourn the appeal hearing. The basis for this request was that, firstly, the SSWP considered that the content of the Appellant's new witness statement might lead to a modification of the Local Authority's position in terms of the Appellant's entitlement to Housing Benefit at the relevant time. The application noted that the SSWP had asked the Local Authority to conduct such a review. Secondly, the SSWP applied to adjourn the hearing on the basis that the arguments on the EU Law aspect of the appeal made in the Appellant's written reply (which had been filed in January 2025) were such that the SSWP wished to apply to introduce further evidence in response.

43. The SSWP's application to adjourn the hearing was opposed by the Appellant's Solicitors, who filed a detailed response on 3 June 2025 setting out why the appeal should proceed on the listed dates.
44. On 9 June 2025, I directed that the Appellant's application to rely on the new witness statement and the SSWP's application to adjourn the appeal should both be dealt with at the commencement of the hearing on 23 June. I noted that the SSWP had not explained why, insofar as it might be necessary to file further evidence, this could not be done prior to the hearing.
45. On 13 June 2025, the Government Legal Department filed a witness statement made on behalf of the SSWP by George Beresford. Mr Beresford is a civil servant in the Department for Work and Pensions who has lead responsibility for policy on Housing Benefit and on housing costs within Universal Credit. The statement addressed some of the matters arising in relation to the EU Law element of the appeal and additionally set out in considerable detail (and by reference to published policy and to case law) arguments which had not been advanced by the Appellant but which, in Mr Beresford's opinion, might result in her having an entitlement to Housing Benefit throughout the period of her absence. This included, in particular, the issue of whether the true question arising in consequence of the Appellant's son having become ill on 5 June 2020 was whether the Local Authority's decision of 7 August 2020 should have been by way of closed period supersession – a concept which I discuss in more detail below. This argument was subsequently adopted by the Appellant at the appeal hearing, without objection from the Respondents.
46. The SSWP's application to adjourn was not pursued by Ms Ling at the beginning of the appeal hearing on 23 June 2025. I heard oral argument on the substance of the appeal on both 23 and 24 June. There was insufficient time for the argument to be completed, and a further day of oral argument took place on 24 September. I then reserved my decision to be given in writing.
47. At the hearing of the appeal, the SSWP's position on matters of EU Law was adopted in its entirety by the Local Authority. Insofar as I refer below to the SSWP's arguments in that regard, they should therefore be taken as being those advanced by the Local Authority as well. The recent witness statements of the Appellant and of Mr Beresford were also admitted by agreement between the parties. None of the representatives wished to cross-examine either of them on the content of the statements.

The Law

48. Before addressing the substance of the appeal, I will set out the applicable law in more detail.

Housing Benefit

49. By paragraph 2 of Schedule 7 to the Child Support, Pensions and Social Security Act 2000, a claim for Housing Benefit must be made. Once that claim is decided, then it is no longer subsisting and a further claim must be made if circumstances

not obtaining at the time of the original claim are relied upon. Paragraph 4 of Schedule 7 however makes provision for a decision to be superseded by the appropriate authority, either on application or on the authority's own initiative.

50. Regulation 7(2)(a)(i) of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001 (SI 2001/1002) permits an authority to make a supersession decision under paragraph 4 of Schedule 7 to the 2000 Act where there has been a change of circumstances since the decision had effect.
51. Entitlement to Housing Benefit arises under sections 130-130E of the Social Security (Contributions and Benefits) Act 1992 and the Housing Benefit Regulations 2006. Housing Benefit is means tested – that is, it is an income-related benefit payable where the recipient does not have enough income to adequately support themselves.
52. Section 130(3) of the 1992 Act and Regulations 70-75 of the Housing Benefit Regulations set out the formula by which the amount of Housing Benefit is determined, having regard to matters such as income and family circumstances. Although the full amount of the benefit payable is 100 per cent of the rent, the amount paid to particular claimants is tapered based on the amount of their income. Pursuant to section 130(3) of the 1992 Act, Housing Benefit is also not payable where an individual has savings of £16,000 or more.
53. Regulation 70 of the Housing Benefit Regulations provides that Housing Benefit is calculated and payable on a weekly basis. Regulation 2 provides that a “benefit week” is a period of seven consecutive days commencing on a Monday and ending on a Sunday. Regulation 79 provides that a change in circumstances which affects entitlement to Housing Benefit takes effect on the first day of the benefit week following the date on which the change in circumstances occurs.
54. An award of Housing Benefit is, for practical purposes, indefinite in duration – but a material change of circumstances will result in entitlement changing or ceasing at the end of the benefit week in which the change occurs.
55. Section 130(1)(a) of the 1992 Act provides that entitlement to Housing Benefit only arises if a person “*is liable to make payments in respect of a dwelling in Great Britain which he occupies as his home*”. For the entitlement to Housing Benefit to arise in the first place, therefore, a claimant such as the Appellant must be occupying a dwelling as their home.
56. Additionally, Regulation 10 of the Housing Benefit Regulations provides, subject to limited exceptions relating to refugees that are not material to this appeal, that someone who is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland shall not be treated as liable to make payments in respect of a dwelling. Thus there is also a requirement of habitual residence within the statutory scheme.
57. It is not in dispute that during the period with which this appeal is concerned, the dwelling normally occupied by the Appellant as her home was the property in the Local Authority's area in respect of which Housing Benefit had been paid to her.

Nor is it in dispute that she was habitually resident in the United Kingdom. The issue on this appeal is whether, for the purpose of section 130(1)(a) of the 1992 Act, she was to be treated as occupying her home during the time when she was not in fact in occupation of the property because she was absent abroad in the Czech Republic.

58. Regulation 7 of the Housing Benefit Regulations makes provision for the circumstances in which someone is to be treated as occupying a dwelling as their home – which is the criterion for eligibility set out in section 130(1)(a) of the 1992 Act. The SSWP’s skeleton argument for this appeal described Regulation 7 as setting out “*a complex scheme relating to a number of different factual scenarios in which a recipient of [Housing Benefit] may be away from the dwelling*”.
59. As I have already noted, the provisions which I set out below which differentiate between temporary absences within and outside Great Britain were inserted into the Housing Benefit Regulations 2006 by the Housing Benefit and State Pension Credit (Temporary Absence) (Amendment) Regulations 2016 (SI 2016/624). Prior to those amendments being made, there was no distinction in the 2006 Regulations between periods of temporary absence within Great Britain and abroad. The provisions which I set out below are those which apply following the amendments made in 2016, and which therefore applied to the Appellant in 2020.
60. Regulation 7(1) provides, materially:

“Subject to the following provisions of this regulation, a person shall be treated as occupying as his home the dwelling normally occupied as his home—

(a) by himself or, if he is a member of a family, by himself and his family...

and shall not be treated as occupying any other dwelling as his home.”
61. Regulation 7(2) provides that regard may be had to the occupation of any other dwelling anywhere in the world when deciding whether or not a dwelling is that normally occupied as a person’s home.
62. It is not in dispute that throughout the period with which this appeal is concerned, the Appellant continued to occupy as her home the property in respect of which Housing Benefit was paid by the Local Authority. It is not in dispute that her absence from that home was, on any view, temporary.
63. The provisions of Regulation 7 which concern the circumstances in which there are temporary periods of absence from the home are paragraphs (13) to (17D). I will only set out those provisions that are material to the decision on this appeal, starting with the provisions that govern the payment of Housing Benefit during temporary absences within Great Britain.
64. Regulation 7(13) is the primary provision concerning temporary absence within Great Britain. It provides:

“(13) Subject to paragraphs (13B) and (17), where a person is temporarily absent within Great Britain from his main dwelling, he shall be treated as occupying that dwelling as his home whilst he is so absent, subject to an overall limit of a period of 13 weeks beginning with the first day of the absence from the main dwelling, provided that—

(a) the person intends to return to occupy the main dwelling as his home;

(b) the part of the main dwelling normally occupied by the person has not been let or, as the case may be, sub-let; and

(c) the period of the absence within Great Britain is unlikely to extend beyond the overall limit.”

65. Accordingly, in relation to temporary absences within Great Britain, Housing Benefit continues to be payable for up to 13 weeks following the beginning of the period of absence, provided that each of the conditions in sub-paragraphs (a) to (c) is met. Paragraphs (13B) and (17) modify this position in certain circumstances. Paragraph (13B) is not material for present purposes. Paragraph (17) provides that:

“(17) Subject to paragraph (17B), a person to whom paragraph (16) applies who is absent within Great Britain, shall be treated as occupying the main dwelling as his home whilst he is so absent, subject to an overall limit of a period of 52 weeks beginning with the first day of the absence from the dwelling.”

66. It is therefore the case that where someone falls within the scope of the exceptions listed in paragraph (16) the provisions in paragraph (13) which govern the permitted period of absence within Great Britain are disapplied, and such a person is treated as occupying their home whilst they are absent from it, subject to an overall maximum period of 52 weeks. Paragraph (17B) is not material for present purposes.

67. Paragraph (16) provides:

“(16) This paragraph shall apply to a person who is temporarily absent from the main dwelling, if—

(a) he intends to return to occupy the main dwelling as his home; and

(b) while the part of the main dwelling which is normally occupied by him has not been let, or as the case may be, sublet; and

(c) he is—

(i) a person to whom paragraph (16A) applies;

(ii) resident in a hospital or similar institution as a patient; or

(iii) undergoing, or as the case may be, his partner or his dependant child is undergoing, medical treatment, or medically approved convalescence, in accommodation other than residential accommodation; or

(iv) following a training course; or

(v) undertaking medically approved care of a person; or

(vi) undertaking the care of a child whose parent or guardian is temporarily absent from the dwelling normally occupied by that parent or guardian for the purpose of receiving medically approved care or medical treatment; or

(vii) a person who is receiving medically approved care provided in accommodation other than residential accommodation; or

(viii) a student to whom paragraph (3) or (6)(b) does not apply; or

(ix) a person who is receiving care provided in residential accommodation other than a person to whom paragraph (11) applies; or

(x) a person who has left the dwelling he occupies as his home through fear of violence, in that dwelling, or by a person who was formerly a member of the family of the person first mentioned, and to whom paragraph (6)(a) does not apply; and

(d) in the case of—

- (i) absence within Great Britain, any period of absence from the dwelling is unlikely to extend beyond or, in exceptional circumstances is unlikely substantially to extend beyond, an overall limit of 52 weeks beginning with the first day of the absence from the dwelling;*
- (ii) absence from Great Britain by a person to whom any of sub-paragraphs (c)(ii), (iii), (vii) or (x) apply, any period of absence from Great Britain is unlikely to exceed or, in exceptional circumstances is unlikely substantially to exceed, 26 weeks beginning with the first day of the absence from Great Britain; or*
- (iii) absence from Great Britain by a person to whom paragraph (ii) of this sub-paragraph does not apply, any period of absence from Great Britain is unlikely to exceed or, in exceptional circumstances is unlikely substantially to exceed, 4 weeks beginning with the first day of absence from Great Britain."*

68. The operation of paragraphs (16) and (17), as containing exceptions to the general position provided for in paragraph (13), therefore results in a person who

is temporarily absent within Great Britain from their home because, for example, they are resident in a hospital as a patient being treated as occupying their home whilst absent from it for up to 52 weeks, if they (i) intend to return to occupy it as their home, (ii) have not let or sub-let it and (iii) their absence is unlikely to extend beyond 52 weeks (or, in exceptional circumstances, unlikely to extend substantially beyond 52 weeks). It is not necessary for present purposes to set out in detail the nature of any of the particular reasons for temporary absence covered in sub-paragraph (c) or the particular exceptions which apply to them – as will be apparent, they relate to such reasons for temporary absence from the home as study, training, caring responsibilities and fear of violence.

69. In short, therefore, the basic provision for a recipient of Housing Benefit who is temporarily absent within Great Britain is that there is a default maximum period of 13 weeks' absence during which they can continue to receive Housing Benefit – but this can be extended to as long as 52 weeks where the temporary absence from the home is for one of the particular reasons specified in paragraph (16). Both paragraph (13) and paragraph (16) require that the person who is temporarily absent from their home intends to return to occupy the dwelling in question as their home, and that it has not been let or sub-let, and that the period of temporary absence is unlikely to exceed the permitted maximum – the last of these points being pertinent because entitlement to Housing Benefit is calculated on a weekly basis.
70. I will now set out the relevant provisions of Regulation 7 which deal with absences outside Great Britain. As will have been apparent from what I have stated above, the scheme is similar but not identical. In particular, the basic maximum permitted period of temporary absence from the home is substantially lower where the absence is outside Great Britain – four weeks, rather than 13 weeks.
71. Regulation 7(13C) and (13D) provide:

“(13C) This paragraph applies to a person who is temporarily absent from Great Britain and who occupied the main dwelling as his home, or was treated as occupying that dwelling as his home, immediately before the period of absence from Great Britain.

(13D) Subject to paragraphs (13E), (13G), (17C), (17D) and (17E) a person to whom paragraph (13C) applies shall be treated as occupying the main dwelling as his home whilst he is absent from Great Britain, for a period not exceeding 4 weeks beginning with the first day of that absence from Great Britain, provided that—

- (a) the person intends to return to occupy the main dwelling as his home;*
- (b) the part of the main dwelling normally occupied by the person has not been let or, as the case may be, sub-let; and*
- (c) the period of absence outside Great Britain is unlikely to exceed 4 weeks.”*

72. Paragraph (13E) relates to a person's absences abroad in connection with the death of certain family members, and paragraph (13G) relates to absence abroad whilst serving in HM Forces or in certain other types of occupation including the crew members of ships. They provide for longer periods of permitted absence in certain circumstances. Paragraph (17E) contains special provision in relation to certain categories of person absent in territories where after their arrival, HM Government either advise British citizens to leave or conduct an evacuation. The exceptions referred to in Regulation 7(13D) are not material for present purposes.

73. Paragraphs (17C) and (17D) provide:

“(17C) A person to whom paragraph (16) applies who—

(a) is a person described in any of sub-paragraphs (c)(ii), (iii), (vii) or (x) of that paragraph;

(b) is temporarily absent from Great Britain; and

(c) immediately before that period of temporary absence, occupied the main dwelling as his home or was treated as so occupying that dwelling,

shall be treated as occupying that dwelling as his home whilst he is absent from Great Britain, for a period not exceeding 26 weeks beginning with the first day of the absence from Great Britain.

(17D) A person to whom paragraph (16) applies who—

(a) is a person described in any of sub-paragraphs (c)(i), (iv), (v), (vi), (viii) or (ix) of that paragraph;

(b) is temporarily absent from Great Britain; and

(c) immediately before that period of temporary absence, occupied the main dwelling as his home or was treated as so occupying that dwelling,

shall be treated as occupying that dwelling as his home whilst he is absent from Great Britain, for a period not exceeding 4 weeks beginning with the first day of the absence from Great Britain.”

74. These two paragraphs therefore replicate, in the scheme insofar as it applies to absences from Great Britain, the exceptions that apply to absences within Great Britain by reason of paragraphs (16) and (17). But they do so with important modifications. Pursuant to paragraph (17D), the basic four-week limit which applies to absences from Great Britain is retained in respect of certain of the categories appearing in paragraph (16) – including for training, study and care provided in residential accommodation. Pursuant to paragraph (17C), however, the basic period of four weeks' temporary absence from Great Britain is extended

to 26 weeks in other categories of case – including, in particular, cases falling under paragraph 16(c)(iii) where the reason for the temporary absence outside Great Britain is that the person in receipt of Housing Benefit (or, materially insofar as the Appellant's case is concerned, their dependent child) is undergoing medical treatment or medically approved convalescence.

75. Paragraph (18) of Regulation 7 contains definitions of a number of the terms which appear within that Regulation. It is not necessary to refer to those definitions other than to note that the term “*main dwelling*” is defined for the purposes of Regulation 7 as meaning “*the dwelling that a person normally occupies as his home*”.
76. Part 13 of the Housing Benefit Regulations concerns overpayments. An overpayment is defined in Regulation 99, insofar as material, as “*any amount which has been paid by way of housing benefit and to which there was no entitlement under these Regulations (whether on the initial decision or as subsequently revised or superseded or further revised or superseded) ...*” Regulation 100 provides that any overpayment of housing benefit, save in certain cases of errors made by officials, shall be recoverable. Regulation 104(1) however provides, materially, that:

“... in calculating the amount of a recoverable overpayment, the relevant authority shall deduct any amount of housing benefit which should have been determined to be payable to the person from whom the overpayment is recoverable or their partner in respect of the whole or part of the overpayment period—

(a) on the basis of the claim as presented to the authority;

(b) on the basis of the claim as it would have appeared had any misrepresentation or non-disclosure been remedied before the decision; or

(c) on the basis of the claim as it would have appeared if any change of circumstances, except a change of the dwelling which the claimant occupies as his home, had been notified at the time that change occurred.”

77. The effect of Regulation 104(1)(c) is that the amount of any recoverable overpayment shall be reduced by the amount of Housing Benefit which would have been payable if any change of circumstances had been notified when it occurred. This provision forms the basis of the Appellant's argument on “underlying entitlement”.
78. From 2013 onwards, a number of separate state benefits (including, for many categories of claimant, Housing Benefit) were replaced for new claimants by Universal Credit – a single benefit with a number of component elements, established under the Welfare Reform Act 2012. It is not necessary to go into detail here about the provisions of the system of Universal Credit, other than to note that:

- a. Regulation 6A of the Universal Credit (Transitional Provisions) Regulations 2014 (SI 2014/1230) provides that, subject to certain exceptions, an individual is not entitled to re-apply for Housing Benefit once it has been withdrawn. A new claim for Universal Credit must be made.
- b. One of the elements of Universal Credit is for assistance with housing costs. As with Housing Benefit, entitlement to the housing element of Universal Credit depends on a number of conditions being satisfied, including in relation to occupation of the property in respect of which assistance is being claimed.
- c. Entitlement to Universal Credit is calculated on a monthly basis – unlike Housing Benefit, which is calculated on a weekly basis.

EU Law

79. I take this analysis of the position in relation to EU Law as it applies to this appeal from the written submissions that were made on behalf of the Appellant and the SSWP. There was no dispute at the hearing of the appeal between any of the parties as to these matters.

80. When the United Kingdom was a Member State of the European Union, the European Communities Act 1972 governed the application by national courts and tribunals of the provisions of EU Law. Immediately prior to the United Kingdom's withdrawal from the European Union, section 2(1) of the 1972 Act provided, relevantly:

"All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly ; and the expression "enforceable EU right" and similar expressions shall be read as referring to one to which this subsection applies."

81. It was through this provision that EU Law was introduced into the national law of the United Kingdom as an independent and overriding source of law: *R (Miller & Another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 at paragraph 65. The 1972 Act gave the United Kingdom's courts and tribunals an obligation to construe national legislation consistently with EU Law, including power to disapply offending domestic legislation to the extent necessary to achieve compatibility with EU Law: *Vodafone 2 v HMRC* [2009] EWCA Civ 446, [2010] Ch 77 at paragraph 37. Such disapplication does not, however, result in the suspension of such provisions of national law in cases where rights under EU Law cannot be relied on: *Imperial Chemical Industries Plc v Colmer (Inspector of Taxes)* [1999] 1 WLR 108, CJEU, at paragraph 34.

82. Following the 2016 referendum on EU membership, the European Union (Withdrawal) Act 2018 was passed by the United Kingdom Parliament. By section

1 of the 2018 Act, the 1972 Act was repealed in its entirety on 31 January 2020 (which was “*exit day*” under this legislation).

83. The repeal of the 1972 Act effected by the 2018 Act was however made subject to a saving provision in section 1A of the 2018 Act which preserved the effect of the 1972 Act until “*IP completion day*”. This saving provision was inserted by the European Union (Withdrawal Agreement) Act 2020, which in section 39 defined “*IP completion day*” as meaning 11 pm on 31 December 2020.
84. Section 4(1) of the 2018 Act, as enacted and modified in respect of “*IP completion day*”, provided that any “*rights, powers, liabilities, obligations, restrictions, remedies and procedures*” which immediately before “*IP completion day*” had been recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, continued to be available, and enforceable, under domestic law after “*IP completion day*”. Section 5(2) of the 2018 Act provided that “*the principle of supremacy of EU law continues to apply on or after IP completion day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before IP completion day.*”
85. The effect of these provisions was to preserve accrued rights and remedies under EU Law, provided that the provision of national law in question was passed before 11 pm on 31 December 2020 – as the provisions of the Housing Benefit Regulations that are in issue on this appeal were.
86. Parliament subsequently enacted the Retained EU Law Act 2023. This amended section 5 of the 2018 Act to provide that, with effect from 1 January 2024, the principle of the supremacy of EU Law no longer forms part of national law. It also repealed section 4 of the 2018 Act in its entirety. However, both provisions were saved under section 22(5) of the 2023 Act for “*anything occurring before the end of 2023*”.
87. The result of this legislative scheme enacted by Parliament is that the power to disapply national legislation to the extent that it is not compatible with EU Law in the Appellant’s case remains, because the circumstances giving rise to this appeal, and the Appellant’s cause of action, all arose before the end of 2023. In substance, therefore, the position in that regard for the purposes of this appeal remains as it was when the United Kingdom was an EU Member State.
88. That is, however, subject to one important exception. It was agreed between the parties that I did not have the power to make a reference to the Court of Justice of the European Union (“CJEU”) on any question of EU Law that might arise in this appeal. That is because the terms upon which the United Kingdom left the EU ended the power of national courts and tribunals to refer a question of EU Law, save one arising under the Withdrawal Agreement – which is not the case in this appeal. See, in particular, section 6 of the European Union (Withdrawal) Act 2018. So, although EU Law applies to the events with which this appeal is concerned, it was agreed by the parties that it is now the United Kingdom’s courts and tribunals which determine any questions of EU Law that may arise.

89. I turn, then, to consider the specific provisions of EU Law upon which the Appellant relies. As a result of the SSWP having conceded that the provisions of the EU's Free Movement of Workers Regulation (Regulation 492/2011) are applicable to the circumstances of the Appellant's case, I did not hear argument on whether, and if so for what reasons, the EU's Citizens' Rights Directive was also applicable – Mr Cox being content to rely only on the former provision on the basis that nothing would be added by the latter.
90. Article 45 of the Treaty on the Functioning of the European Union (TFEU) provides for the free movement of workers within the European Union. Article 45(2) provides that this *"shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment."*
91. Article 46 of the TFEU requires the EU's legislative bodies to *"issue directives or make regulations setting out the measures required to bring about freedom of movement for workers"*.
92. The Free Movement of Workers Regulation was made on 5 April 2011. Recital (4) provides, materially, that freedom of movement *"constitutes a fundamental right of workers and their families"* and that mobility of labour both enables workers to improve their own living and working conditions, as well as *"helping to satisfy the requirements of the economies of the Member States"*. Recital (6) provides that the right of freedom of movement *"requires that equality of treatment be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing, and also that obstacles to the mobility of workers be eliminated, in particular as regards the conditions for the integration of the worker's family into the host country."*
93. Articles 7 and 9 of the Free Movement of Workers Regulation are in Section 2 of the Regulation, entitled *"Employment and equality of treatment"* and provide, relevantly:

"Article 7

1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers..."

"Article 9

1. A worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy all the rights and benefits accorded to national workers in matters of housing, including ownership of the housing he needs..."

94. The Appellant relies, in particular, on the objectives set out in recitals (4) and (6) of the Regulation, to which I have already referred, and on the right of migrant workers to enjoy “*the same social... advantages as national workers*” under Article 7(2) of the Regulation and the right of migrant workers to enjoy “*all the rights and benefits accorded to national workers in matters of housing...*” under Article 9(1) of the Regulation.
95. Having regard to these provisions of EU Law, workers who are nationals of other Member States must not be discriminated against under the United Kingdom’s national law, whether directly or indirectly. A provision may be indirectly discriminatory if it is liable to affect a substantially higher proportion of migrant workers than national workers and there is a consequent risk that it will place the former at a particular disadvantage, unless it is objectively justified and proportionate to its aim. It is not necessary to demonstrate that the provision in question does in practice affect a substantially higher proportion of migrant workers – it is sufficient that it is liable to have such an effect. See *O’Flynn v Adjudication Officer* [1996] 3 CMLR 103, ECJ, at paragraphs 17-21.
96. The SSWP has conceded, for the purposes of this appeal, that the lower four-week period of maximum permitted temporary absence from the home which applies to absence outside Great Britain under Regulation 7(13D) of the Housing Benefit Regulations is likely to affect a substantially higher proportion of migrant workers than national workers. Accordingly, the issue in dispute between the parties insofar as the Appellant’s EU Law rights are being relied on is whether Regulation 7(13D), as it is applicable to her and provides for a lower maximum period of absence than the 13 weeks permitted for temporary absence within Great Britain under Regulation 7(13), is “*objectively justified and proportionate to its aim*” (see *O’Flynn* at paragraph 20). I will return to that question later.

The Issues

97. By the conclusion of the hearing, there was a considerable measure of agreement between the parties which had not been apparent from the written cases originally filed.
 - a. It was accepted by the SSWP that Housing Benefit falls within the scope of the provisions of EU Law that are material to this appeal.
 - b. It was accepted by the SSWP that the Appellant was within the scope of the Free Movement of Workers Regulation. Accordingly, the Appellant was able to rely on her EU Law rights to non-discriminatory treatment consequent on the provisions of that Regulation.
 - c. It was agreed that as a result of this concession by the SSWP, there was no need to determine whether the Appellant could rely in this appeal on any EU Law rights arising under the EU’s Citizens’ Rights Directive (2004/38).

- d. It was agreed that the Upper Tribunal no longer has the power to make a reference to the Court of Justice of the European Union (CJEU) on any question of EU Law arising in this appeal.
- e. It was accepted by the SSWP that the lower four-week period of maximum permitted temporary absence from the home which applies to absence outside Great Britain under Regulation 7(13D) of the Housing Benefit Regulations was likely to affect a substantially higher proportion of migrant workers than national workers.

98. The central disputes on the appeal were therefore on the following issues:

- a. Did the Appellant have an underlying entitlement to Housing Benefit for any part of the period from 25 May 2020 onwards that was the subject of the Local Authority's decision of 7 August 2020?
- b. Insofar as the Appellant is not otherwise entitled to Housing Benefit for any part of that period, is the resulting indirect discrimination against her as the citizen of an EU Member State within the scope of the EU's Free Movement of Workers Regulation justified as a matter of EU Law?

Closed Period Supersession and Underlying Entitlement

99. This part of the appeal arises irrespective of the correctness of the EU Law arguments raised by the Appellant. It is convenient to determine it before considering those arguments, because in the event that the Appellant's arguments are correct then her entitlement to Housing Benefit for a significant part of the period in issue may be established under the relevant provisions of national law, without needing to consider the position under EU Law.
100. Although the grounds of appeal, drafted before Mr Beresford's witness statement was filed, refer solely to the question of underlying entitlement under Regulation 104 of the Housing Benefit Regulations in the context of the Overpayment Decision, the essential point being made by the Appellant in support of her argument based on the concept of closed period supersession is the same – namely, that the change in circumstances arising from her son's illness on 5 June 2020 resulted (contrary to the decisions made by the Local Authority) in her entitlement to Housing Benefit being established from that point onwards. It was not suggested by any of the representatives that re-amended grounds of appeal ought to be filed by the Appellant to plead the closed supersession argument raised by Mr Beresford in his witness statement, or that she should otherwise be prevented from raising that argument on this appeal.
101. It is convenient to start the analysis of this ground by considering the application of the concept of closed period supersession. This was helpfully set out in Mr Beresford's Witness Statement. It was also considered in detail by Upper Tribunal Judge Butler in *Secretary of State for Work & Pensions v SC* [2025] UKUT 299 (AAC). If I may respectfully say so, I cannot improve upon Judge Butler's magisterial analysis in *SC* of the purpose of, the history of and the legislative basis for this approach at paragraphs 113-199 of her reasons.

102. Rather than lengthen this decision by quoting extensively from SC, I will attempt to summarise the key points from Judge Butler’s analysis; I note that none of the parties to this appeal took any issue with it, despite having the opportunity to do so at the resumed hearing on 24 September 2025. Nothing that I say in this decision is, therefore, intended either to undermine or to put any gloss upon the very detailed discussion of these matters by Judge Butler in SC.
103. It is, however, useful to repeat here Judge Butler’s description of the way in which closed period supersession decisions operate, which appears at paragraph 114 of her reasons:

“The mechanism for making closed period supersession decisions has not previously been considered in detail. This is probably because they operate in a (mostly) benign way. They allow a benefit claimant whose entitlement has been interrupted by a temporary, fixed period of non-entitlement, to remain entitled overall to benefit without having to make a fresh claim. They prevent artificial inflation of overpayments of benefit. I use the word “artificial” to mean an overpayment that carries on increasing even when the person starts to satisfy the entitlement conditions again. A closed period supersession means the overpayment is restricted to the specific period during which the claimant did not meet the entitlement conditions. It provides both continuity and accuracy of benefit entitlement.”

104. The mechanism by which a closed period supersession decision is made in a Housing Benefit case is, applying the approach in SC, as follows:
- a. A decision awarding Housing Benefit creates an indefinite award (prior to 2004, Housing Benefit was awarded on a periodic basis). Such a decision is final and conclusive, unless changed by revision, supersession or appeal.
 - b. A supersession disallowing an award of benefit is not a decision of indefinite duration. It applies to the period covered by the earlier award decision leading up to and including the date of the disallowance decision.
 - c. A decision can be superseded where there has been a relevant change of circumstances. To be relevant to an existing award of benefit, the change must affect the award in some way (for example, by bringing it to an end).
 - d. A benefit award can only be changed to the extent that the relevant change of circumstances applies. A benefit award cannot be changed for periods of time when the change of circumstances is not present.
 - e. The decision-maker making the supersession decision in relation to a Housing Benefit award is therefore required to look at the whole period of time covered by the award which is the subject of the supersession decision.
 - f. The decision-maker must identify whether there are periods within that time where the claimant meets the entitlement conditions as well as periods where they do not. The award cannot be changed in respect of periods where the entitlement conditions are met. Doing so would alter

the award outside the scope of the ground upon which the supersession decision is made.

- g. The underlying rationale is that a claimant who has been paid benefit under a specific decision can only have their entitlement changed in the specific way permitted by the ground upon which the supersession decision is made and the circumstances in which that ground can properly be applied.
- h. If the supersession decision identifies past periods of non-entitlement, followed by the claimant meeting the entitlement conditions once more, it will change the benefit award by modifying past entitlement to reflect that. But the award of benefit will continue to apply into the future on an indefinite basis. The award cannot, as at the date of the supersession decision, be ended by the ground upon which the supersession decision is made. The award can, in these circumstances, be modified as a result of the ground for a fixed (i.e. historic) period of time.

105. Returning to the circumstances of the present case, the Appellant contends that the First-tier Tribunal erred in law when it concluded that her son's illness from 5 June 2020 onwards made no difference to the outcome of her appeal because it could not have affected her entitlement to Housing Benefit as at the date of the Local Authority's decisions under appeal (7 August 2020), that entitlement having come to an end as a result of her leaving Great Britain on 21 May 2020.

106. Mr Hallström, who argued this part of the appeal for the Appellant, submitted that the Local Authority and the First-tier Tribunal approached the question of the Appellant's entitlement erroneously because they did not consider whether the appropriate decision for the Local Authority to make on 7 August 2020 to have been by way of closed period supersession. Mr Hallström submitted that the concept of closed period supersession is available to deal with the problem that would otherwise arise where a claimant is awarded a benefit on an ongoing basis, there is a change of circumstances which removes that entitlement and then before a supersession decision is taken, there is a further change that re-establishes their entitlement.

107. Mr Hallström submitted that this was the case for the Appellant, because even if her entitlement had ceased when she left Great Britain to travel to the Czech Republic on 21 May 2020, prior to the Local Authority's decisions of 7 August 2020 being taken there were (on the findings of fact made by the First-tier Tribunal) two relevant changes of circumstance which had re-established her entitlement to Housing Benefit from 5 June 2020 onwards:

- a. Firstly, the Appellant's son had become seriously ill on 5 June – requiring immediate admission to hospital and, later on, surgery. This, Mr Hallström submitted, engaged the provisions of Regulation 7(16)(c)(iii) of the Housing Benefit Regulations because the reason for the Appellant's temporary absence from her home in Great Britain from that point onwards was her son's illness. On this basis, the maximum permitted period of temporary absence from Great Britain would not have been four weeks, but 26 weeks.

- b. Secondly, Mr Hallström submitted that the First-tier Tribunal had found that the Appellant had returned to Great Britain on 15 July, after her son's surgery. That was several weeks before the Local Authority had made its decisions on 7 August. Yet the Local Authority and the First-tier Tribunal had both failed to take into account the fact that, at the time of those decisions, the Appellant was present in Great Britain – and it was not suggested that she was not, at that point, living at the property in respect of which Housing Benefit had been paid. She was therefore, at the date of those decisions, entitled to Housing Benefit (where entitlement is assessed on a weekly basis) irrespective of whether she had, for any part of the period since 21 May, not been so entitled.
108. Mr Hallström therefore submitted that the First-tier Tribunal had materially erred in law by not approaching the correctness of the Local Authority's decisions on this basis and by treating the fact that the Appellant had left Great Britain on 21 May 2020 to visit her father on a trip likely to last four weeks or more as being determinative of the outcome, irrespective of anything that had followed.
109. Ms Ling advanced no positive case for the SSWP on this part of the appeal, although she drew my attention to the suggestions that had been made in Mr Beresford's witness statement. These were, in any event, very largely adopted by Mr Hallström for the Appellant.
110. For the Local Authority, Ms Taverner supported the decision made by the First-tier Tribunal. She submitted that the Appellant's entitlement to Housing Benefit had ended when she left Great Britain on 21 May, and that the Local Authority's decision of 7 August had not been made until several months later because it had not been made aware of the Appellant's change in circumstances. Ms Taverner submitted that the Appellant's entitlement to Housing Benefit had ended "there and then" when she had departed on 21 May, that she was no longer occupying the property as her home from that point and that she had no underlying entitlement to benefit.
111. In support of her arguments, Ms Taverner relied on the decision of Deputy Commissioner Sir Crispin Agnew of Lochnaw Bt QC in CH/1237/2004. That case also concerned the payment of Housing Benefit. The appellant had left her home due to fear of violence. She was absent from 23 October 2000 to 16 October 2002. She intended to return to live there. She made a claim for Housing Benefit in respect of the property in December 2021 and requested that it be backdated to October 2000. The issue being determined by the Deputy Commissioner in that case was, however, when the assessment of whether the appellant's period of absence was "likely to exceed 52 weeks" had to be made. He concluded at paragraph 12 of his reasons that this had to be made by reference to the date at which the appellant had left her home (not the date of application or the date of decision), and thereafter that continued entitlement needed to be judged on a week-by-week basis. That was the only issue that was required to be decided on that appeal. Insofar as the Deputy Commissioner subsequently stated at paragraph 17, and as he put it "for the avoidance of doubt", that once entitlement to Housing Benefit had ceased then the claim would be at an end and entitlement could not be re-established by a subsequent change of circumstances prior to the

date of the decision on the backdated claim, then I decline to follow that reasoning in deciding the Appellant's case. It is *obiter* and, insofar as not distinguishable on the basis that the Deputy Commissioner was addressing a backdated claim rather than a situation such as the Appellant's in which a further decision was being taken on the continuation of an entitlement that had already been established, is not consistent with the position as developed in the authorities on closed period supersession which are discussed in SC.

112. I accept Mr Hallström's submissions on this issue. In my judgment, the First-tier Tribunal materially erred in law when it held that the fact that the Appellant's son had become seriously ill whilst they were both in the Czech Republic could not make any difference to the outcome of the appeal even if the exception in Regulation 7(16)(c)(iii) applied. As Mr Hallström correctly submitted, on 5 June 2020 there was a change of circumstances which engaged the exception in Regulation 7(16)(c)(iii) of the Housing Benefit Regulations. Once the Appellant's son had become ill, had been admitted to hospital on 5 June and had been assessed as requiring surgery that prevented him from travelling back to Great Britain, the Appellant's absence was because she had a dependent child who was undergoing medical treatment, or medically approved convalescence. He was not doing so in "residential accommodation" as defined in Regulation 7(18).
113. The First-tier Tribunal also materially erred in law by failing to consider whether the Appellant was entitled to Housing Benefit at any point during the period following her return to Great Britain on 15 July 2020 up to 7 August 2020, the date of the supersession decision made by the Local Authority which was under appeal. The property continued to be the Appellant's home throughout this period. Her tenancy agreement was not terminated, and on any view her absence from the property had been temporary. The issue is whether that temporary absence was of a character that meant her entitlement to Housing Benefit was no longer established, applying the provisions governing entitlement to Housing Benefit during temporary absence from the home to which I have already referred.
114. Contrary to the position taken by the Local Authority and the First-tier Tribunal, the Appellant's entitlement to Housing Benefit had not been irrevocably terminated when she left Great Britain on 21 May 2020. Even if the Appellant had ceased to be entitled to Housing Benefit from that point there was nonetheless at the very least the possibility that – between that date and the Local Authority's decision on 7 August – she had become entitled to it once again. The First-tier Tribunal failed to consider that question at all. Even if the Local Authority was not in a position to make a decision on entitlement to Housing Benefit until 7 August, it should still have considered the up-to-date position as at that time.
115. I accept the Appellant's argument on this part of the appeal because the First-tier Tribunal was considering the correctness of the Local Authority's decision of 7 August 2020 which superseded the award that had been made on 26 April 2020 and which disallowed the claim for Housing Benefit in its entirety from when the Appellant left the United Kingdom on 21 May 2020, up to and including 7 August 2020. The material before the First-tier Tribunal however demonstrated not only that the basis for the Appellant's temporary absence from Great Britain had

changed on 5 June, but that the Appellant had returned to Great Britain on 15 July and that she was present in Great Britain on 7 August.

116. The correctness of the Appellant's case in this regard can be demonstrated by an example that was raised during oral argument. On the Local Authority's approach, a recipient of Housing Benefit who left their home with the intention of staying with a relative in Great Britain for a period of (say) 16 weeks would immediately lose their entitlement to Housing Benefit, even if the period of that stay was then cut short after two weeks, following which they returned to their home and reported the change of circumstances, resulting in the making of a supersession decision after their return. For the reasons which I have endeavoured to explain, that approach does not represent the law.
117. On any basis, therefore, the appeal against the First-tier Tribunal's decision must be allowed on the ground that the First-tier Tribunal materially erred in law by failing to consider whether the Local Authority had erred by not making a closed period supersession decision on 7 August 2020, and by failing to substitute a decision to that effect in the Appellant's favour on the facts which it had found to be established. It is, in my judgment, clear that once the reason for the Appellant's temporary absence from Great Britain became the requirement for her son to receive and recover from urgent medical treatment, her absence was unlikely to exceed the higher permitted maximum period of 26 weeks. This was positively accepted by the First-tier Tribunal at paragraph 27 of its statement of reasons – but, for the reasons which I have given, the Tribunal then erred in law in concluding that this could make no difference to the outcome of the appeal.
118. It is therefore strictly unnecessary to determine the Appellant's alternative argument regarding the correctness of the Overpayment Decision based on there being an underlying entitlement to Housing Benefit which should have been taken into account through the application of Regulation 104(1) of the Housing Benefit Regulations. But as I accept Mr Hallström's submissions that the First-tier Tribunal failed to apply the correct approach in this respect as well, I will address it briefly. I have set out the material provisions of Regulation 104(1) above. It is not concerned with the initial question of a claimant's entitlement to Housing Benefit – but with the issue of the amount of any recoverable overpayment.
119. The effect of Regulation 104(1) was considered by Upper Tribunal Judge Knowles QC in *JM v London Borough of Tower Hamlets* [2015] UKUT 460 (AAC). At paragraphs 21-22 and 33 of her reasons, the Judge held that Regulation 104(1) requires a two-stage process to be undertaken. Firstly, to look into the past to see what the true circumstances were, had the claimant submitted a valid claim for the benefit, and to calculate the benefit due to the claimant on that basis. Having done that, the local authority is required to deduct that amount from the overpayment that is recoverable from the claimant. It requires the local authority to determine the amount of benefit to which the claimant would hypothetically have been entitled, had they submitted a valid claim once their circumstances had changed. The purpose is to ensure that a recoverable overpayment is calculated with reference to the claimant's correct circumstances – and that any underlying entitlement to the benefit is deducted from the sum owed.

120. Mr Hallström submitted, and I accept, that on the findings made by the First-tier Tribunal the Appellant had an underlying entitlement to Housing Benefit which ought to have been taken into account in the Overpayment Decision, for the same reasons which I have set out above in relation to the closed period supersession argument.
121. If, therefore, I had not accepted the Appellant's argument that the First-tier Tribunal erred in law by failing to consider whether it should substitute a closed period supersession decision for that made by the Local Authority on 7 August 2020 then I would have allowed the appeal in respect of the decision on the amount of the recoverable overpayment, based on the Appellant's reliance on Regulation 104(1).
122. Having found that the First-tier Tribunal's decision was erroneous in law on a material issue, I set it aside. There was agreement between the parties that I should not remit the appeal to the First-tier Tribunal. I therefore proceed to re-make the decision. For this purpose, I have regard to the content of the Appellant's further witness statement which was admitted by agreement and upon which she was not cross-examined.
123. In my judgment, the position having regard to that statement and to the other evidence and submissions made to me is as follows:
 - a. The Appellant accepts that, when she left Great Britain to visit her seriously ill father on 21 May 2020, intending to be with him for as long as was needed and not then knowing when she would return, her absence from Great Britain was likely to exceed the four weeks permitted under Regulation 7(13D). This change of circumstances affected her entitlement to Housing Benefit from 25 May 2020, the first day of the following benefit week. Her entitlement to Housing Benefit ceased at this point.
 - b. From 5 June 2020, the reason for the Appellant's absence from Great Britain changed. That is because the Appellant's father's condition had by then improved to the point that she would have been content to return to Great Britain – but the Appellant's son then became seriously ill and required hospitalisation and surgery. He was advised by his doctors not to travel. As the Appellant put it in her witness statement, her son's illness changed her plans completely. She could no longer return home to Great Britain because she needed to stay with him. She remained with her son until after his operation on 8 July 2020. Following his discharge from hospital she then returned home to Great Britain on 15 July, leaving her son in the care of his grandparents.
 - c. Between 15 July and the date of the Local Authority's decision now under appeal on 7 August 2020, the Appellant went "*back and forth*" (as she put it in her witness statement) from Great Britain to the Czech Republic in order to visit her son whilst he recuperated from his operation. These visits were short in duration and it is not suggested that any of them were likely to exceed the four weeks permitted under Regulation 7(13D).

Transactions made on the Appellant's bank account show that on 7 August 2020, when the decisions now under appeal were taken, she must have been present in Great Britain.

- d. At all the material times between 21 May 2020 and 7 August 2020, the Appellant was living in the property as her home. She had not surrendered her tenancy and continued to pay the rent. Nor did she have any intention to leave Great Britain to live abroad, or indeed to live anywhere else than at the property. Insofar as she was absent from her home at any point then she was temporarily absent by reason of the matters set out above.

- 124. The position under national legislation and without consideration of the appeal insofar as it is based on EU Law is, in my judgment, that the Appellant's entitlement to Housing Benefit ceased on 25 May 2020 but was restored from 8 June – the beginning of the benefit week after the Appellant's son had become seriously ill. Having thus been restored, the entitlement did not thereafter cease prior to the Local Authority's decisions of 7 August. Absent consideration of the Appellant's arguments based on EU Law, I would therefore have substituted for the Entitlement Decision made by the Local Authority a closed period supersession decision to that effect and modified the terms of the Overpayment Decision accordingly.
- 125. It is, however, necessary to consider the correctness of the Appellant's arguments based on EU Law. That is because, even though a correct application of the Housing Benefit Regulations would otherwise result in her appeal being allowed with the consequences set out above, there is nonetheless a period of two weeks at the end of May 2020 and the beginning of June 2020, i.e. between the Appellant leaving Great Britain and her son becoming ill when, applying national law without regard to the provisions of EU Law, she had no entitlement to Housing Benefit. The Appellant contends that this result violates her rights under EU Law. I will address that argument in more detail below.
- 126. Although not relevant to the correctness in law of the Local Authority's decisions of 7 August 2020, it is pertinent to note the Appellant's evidence about what happened after those decisions were taken. Their effect was to stop her Housing Benefit. The Appellant was then advised that she had to make a claim for Universal Credit and did so on 21 September 2020. She was awarded Universal Credit, but her request for it to be backdated was refused. As a result, the Appellant was unable to pay her rent. The Appellant's landlord then gave notice terminating her tenancy, and she and her son (who had returned from the Czech Republic in October 2020) moved out of the property in December 2020. Thereafter, they stayed with a friend elsewhere in North London. In due course, the property became vacant again in September 2021 and the Appellant was able to move back in, with her son, under a new tenancy. The Appellant very understandably describes the consequences of the removal of her Housing Benefit as a result of the Local Authority's erroneous decisions of 7 August 2020 as having been incredibly stressful for her.

127. I also note, and with considerable concern given the consequences for the Appellant and her son to which I have just referred, that Ms Taverner very frankly accepted that the concept of closed period supersession was not something that would normally be considered by the Local Authority in these circumstances. For the reasons which I have endeavoured to set out, and which are more fully discussed by Judge Butler in *SC*, that was a flawed approach. The concept of taking a closed period supersession decision to address a fixed period of historic non-entitlement has been referred to in the Housing Benefit and Council Tax Guidance published by the SSWP since at least July 2009 – see paragraph 145 of *SC*.

The EU Law Ground of Appeal

128. Given that I have found that the First-tier Tribunal materially erred in law when it dismissed the Appellant's appeal to it for the reasons set out above in relation to the argument based on closed period supersession, it is unnecessary to lengthen this decision any further by conducting an analysis of whether it also materially erred in law by failing to disapply the relevant parts of the Housing Benefit Regulations in the Appellant's case by reason of the EU Law arguments which she now advances. That is because all the parties to this appeal accept that I should, in the event of finding a material error of law on the part of the First-tier Tribunal, re-make the decision on the Appellant's appeal against the Local Authority's decision that was made by the First-tier Tribunal. For the purpose of re-making that decision, I will have regard to the further evidence submitted and the arguments raised by the parties in respect of EU Law which were not before the First-tier Tribunal.
129. The Appellant's arguments that I have addressed above and accepted in relation to the making of a closed period supersession decision arise without reference to the position under EU Law. They do not, however, deal with the Appellant's entitlement to Housing Benefit over the entirety of the period in question. That is because the change of circumstances resulting from the Appellant's son's ill health only occurred on 5 June 2020. At that point, the Appellant had already been absent from Great Britain for two weeks. It therefore remains necessary to determine the EU Law ground of appeal. That ground alone resolves the question of the Appellant's entitlement to Housing Benefit between 25 May and 7 June 2020.
130. On this appeal, the Appellant accepts the correctness of the First-tier Tribunal's finding that when she left Great Britain her period of absence was not unlikely to exceed four weeks – and so she lost her entitlement to Housing Benefit by reason of Regulation 7(13D) at that point, even if for the reasons set out above her entitlement resumed as a result of the change in circumstances resulting from her son's ill health.
131. The Appellant's case, however, is that Regulation 7(13D) and the connected parts of Regulation 7 should be disapplied in their entirety or with appropriate modifications – with the result that the test which should have been applied in order to give effect to her rights under EU Law was, under a modified version of Regulation 7(13), whether her absence from her home was not unlikely to exceed

13 weeks. As I have already set out above, this argument turns on the question of whether Regulation 7(13D) is objectively justified for the purposes of EU Law.

132. Although initially there was some dispute about some of them, the SSWP accepts the correctness of the following propositions:

- a. the Appellant was, at the material time, a worker within the material scope of Article 45 of the TFEU and Articles 7(2) and 9(1) of the EU's Free Movement of Workers Regulation;
- b. that Housing Benefit is within the material scope of those provisions;
- c. that Regulation 7(13D) of the Housing Benefit Regulations is *prima facie* indirectly discriminatory against migrant workers in the position of the Appellant;
- d. that, accordingly, the difference in treatment caused by Regulation 7(13D) of the Housing Benefit Regulations must be objectively justified under EU Law;
- e. that purely economic considerations are not sufficient to amount to objective justification under EU law;
- f. if the difference in treatment is not objectively justified and so is contrary to EU Law, then the provisions of the Housing Benefit Regulations must be modified or disapplied to avoid the discriminatory effect on the Appellant.

133. The material difference between the Appellant and the SSWP is, therefore, whether the difference in treatment that results from the lower period of permitted absence from the home which appears in Regulation 7(13D) is objectively justified. The SSWP submits that it is so justified. The Appellant contends that it is not. It is to that question which I now turn.

The Decided Cases

134. I was referred to a number of decided cases on the issue of the correct approach to the question of objective justification under EU Law. I will now summarise the points underlying the approach of the European Court of Justice, as set out in the most important of those cases. Some of the cases concern measures in respect of "social advantage" (benefits granted to workers primarily because of their status as workers, or by virtue of the mere fact of residence) and others in respect of "social assistance" (benefits granted to those who lack sufficient resources for their basic needs). I note that none of the case law to which I was referred, whether at European or domestic level, concerns the provision of benefits during periods of temporary absence from the host Member State.

135. In *O'Flynn v Adjudication Officer* [1996] 3 CMLR 103, the European Court of Justice addressed the question of indirect discrimination in the context of payments in respect of funeral costs from the United Kingdom's social fund. Mr

O'Flynn was a migrant worker resident in the United Kingdom who was refused a means-tested funeral payment in relation to the death of his son because the burial was to take place outside the United Kingdom, in the Republic of Ireland. He contended that this territorial restriction constituted indirect discrimination, contrary to his rights as a migrant worker under EU Law.

136. At paragraph 17, the Court of Justice noted that under EU Law the equal treatment rule "*prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead in fact to the same result...*" At paragraph 18, it held that conditions imposed by national law "*must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers... where they are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers... or where there is a risk that they may operate to the particular detriment of migrant workers...*"
137. At paragraph 21, the Court stated that it is not necessary to find that the provision in question does in practice affect a substantially higher proportion of migrant workers: "*It is sufficient that it is liable to have such an effect.*" Nor are the reasons why a migrant worker chooses to make use of his right to freedom of movement to be taken into account when assessing whether the national provision has a discriminatory effect.
138. Conditions of national law which are thus indirectly discriminatory will only be lawful, said the Court of Justice in paragraph 19 of its judgment, if they are "*justified by objective considerations independent of the nationality of the workers concerned, and if they are proportionate to the legitimate aim pursued by the national law*".
139. On behalf of the SSWP, Ms Ling accepted that the test for establishing objective justification in the present case was that set out by the Court of Justice in *O'Flynn*.
140. On the facts of Mr O'Flynn's case, the Court of Justice held at paragraphs 22-30 of its judgment that the condition for a funeral payment from the social fund that burial or cremation should take place in the United Kingdom was indirectly discriminatory in respect of migrant workers, and that it was not objectively justified. In doing so, it rejected the United Kingdom's argument based on the cost and practicality of making such payments, noting that funeral expenses incurred in respect of burials or cremations in the United Kingdom would be no different to those incurred abroad – the cost of transporting the coffin not being covered in any event.
141. *European Commission v Netherlands* [2012] 3 CMLR 27 was decided under the predecessor regulations relating to the free movement of workers. The measure in question related to 'portable' funding for higher education courses outside the Netherlands. This required residence in the Netherlands for at least three of the six years preceding commencement of the course. At paragraph 54 of its judgment, the Court of Justice held that this residence requirement was indirectly discriminatory against migrant workers resident in the Netherlands or who were

“frontier workers” (i.e. resident in another Member State but working in the Netherlands). It therefore required objective justification.

142. Two reasons were advanced by the Netherlands to justify this discriminatory effect on migrant workers. The first was that the residence requirement was necessary in order to avoid an unreasonable financial burden which could have consequences for the very existence of the funding scheme in question. At paragraphs 57-58 of the judgment, the Court of Justice held in respect of this argument that:

“57. As regards the justification based on the additional burden which would result from non-application of the residence requirement, it should be borne in mind that, although budgetary considerations may underlie a Member State’s choice of social policy and influence the nature or scope of the social protection measures which it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination against migrant workers...”

58. To accept that budgetary concerns may justify a difference in treatment between migrant workers and national workers would imply that the application and the scope of a rule of EU law as fundamental as non-discrimination on the grounds of nationality might vary in time and place according to the state of the public finances of Member States...”

143. The Court of Justice went on in paragraphs 59-67 of its judgment to emphasise the important distinction between the position of migrant workers and economically inactive EU Citizens with regard to the provision of social assistance and the application of the principle of equal treatment. Mr Cox highlighted this as indicating that the approach in respect of the rights of migrant workers is stricter than in respect of those citizens who are not economically active, with a narrower range of options available to the Member States given the importance of the rights in issue. At paragraphs 65-66, the Court stated:

“65. As regards migrant workers and frontier workers, the fact that they have participated in the employment market of a Member State establishes, in principle, a sufficient link of integration with the society of that Member State, allowing them to benefit from the principle of equal treatment, as compared with national workers, as regards social advantages. That principle is applicable not only to all employment and working conditions, but also to all the advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory...”

66. The link of integration arises from, inter alia, the fact that, through the taxes which he pays in the host Member State by virtue of his employment, the migrant worker also contributes to the financing of the social policies of that State and should profit from them under the same conditions as national workers.”

144. I agree with Mr Cox that this case supports the proposition that cases which do not specifically deal with the position of migrant workers provide at best limited assistance as to the correct approach to justification. That is because, as the Court of Justice stated, the sufficient degree of integration is necessarily established in migrant worker cases.
145. At paragraph 69 of its judgment, the Court held that the objective of avoiding an unreasonable financial burden could not be regarded as an overriding reason relating to the public interest, capable of justifying the unequal treatment of workers from other Member States as opposed to workers from the Netherlands.
146. The second justification advanced by the Netherlands for the indirectly discriminatory residence requirement was the objective of increasing student mobility by encouraging students who would, in the absence of the scheme, have pursued their studies in the Netherlands to do so abroad. The Netherlands argued that this was not only advantageous for the students, but to national society and to the employment market in the Netherlands. The Court of Justice accepted at paragraphs 70-79 of its judgment that this was a public interest consideration capable of justifying the discriminatory effect which it had found, and that the residence requirement was appropriate for attaining the objective of promoting student mobility.
147. The Court stated at paragraph 80 of its judgment that it nonetheless remained to be determined whether the requirement did not go beyond what was necessary to achieve that objective. The Court went on to state, materially for present purposes:
- “81. According to settled case law, it is for the national authorities, where they adopt a measure derogating from a principle enshrined in EU law, to show in each individual case that that measure is appropriate for securing the attainment of the objective relied upon and does not go beyond what is necessary to attain it. The reasons which may be invoked by a Member State by way of justification must be accompanied by an analysis of the appropriateness and proportionality of the measure adopted by that State and specific evidence substantiating its arguments...”*
- 82. Accordingly, it falls to the Kingdom of the Netherlands not only to establish that the national measure at issue is proportionate to the objective pursued but also to indicate the evidence capable of substantiating that conclusion.”*
148. The Court of Justice held at paragraphs 83-89 of its judgment that the Netherlands had not discharged the burden on it to show that this discriminatory measure was justified. It was not sufficient for the Netherlands to point to the fact that other requirements that might have been imposed instead of the residence requirement (e.g. a requirement to speak the national language) would be even more discriminatory. At paragraphs 85-86, the Court stated:

“85. Admittedly, the Court has ruled that the standard of proof cannot be so high as to require the Member State to prove, positively, that no other conceivable measure could enable the objective pursued to be attained under the same conditions...”

86. Nevertheless... the Kingdom of the Netherlands would have needed at least to show why it opted for the “three out of six years” rule, to the exclusion of all other representative elements. It should be pointed out in that regard that the rule is too exclusive. By requiring specific periods of residence in the territory of the Member State concerned, the “three out of six years” rule prioritises an element which is not necessarily the sole element representative of the actual degree of attachment between the party concerned and that Member State.”

149. *Hendrix v Raad van Bestuur van het Uitvoeringsinstituut Werknemersverzekeringen* [2007] 3 CMLR 46 concerned a work-related incapacity benefit payable to disabled young people resident in the Netherlands. Mr Hendrix had received that benefit whilst living and working in the Netherlands, of which he was a citizen. In 1999, he moved to Belgium while continuing to work in the Netherlands. This resulted in the termination of the benefit for non-compliance with the residence requirement. The Court of Justice held that given the requirements of EU Law in relation to migrant workers, the condition of residence attached to receipt of the benefit could be relied on *“only if it is objectively justified and proportionate to the objective pursued.”* The Court held that because the benefit was closely linked to the socio-economic situation of the Netherlands, being based on the standard of living in that country, the condition of residence was objectively justified. It nonetheless was subject to the requirement of proportionality. In that regard, the Court noted that the national legislation permitted the residence requirement to be waived if it would lead to *“an unacceptable degree of unfairness”*. It considered that it was for the national courts to interpret this provision of national law *“taking into account the fact that Mr Hendrix has exercised his right of freedom of movement as a worker and that he has maintained economic and social links to the Netherlands”*. Insofar as the Court did not declare that the national legislation infringed the provisions of EU Law, this was because the Court considered that the requirement of proportionality under EU Law arising from Mr Hendrix’s status as a migrant worker was to be considered by the national court when operating the exceptionality provision.

150. I was also taken to the Opinion of Advocate-General Kokott in *Hendrix*, where at paragraphs 64-65 the Advocate-General stated that special non-contributory benefits *“constitute an expression of solidarity within a Member State”* and that only national residents need to be granted special benefits, whereas social security benefits arising from employment can be claimed independently of the place of residence. The Advocate-General went on to state in paragraph 72 that in the absence of harmonisation in the field of benefits, Member States enjoy *“a wide margin of appreciation”* in deciding which criteria are to be used when assessing the degree of connection to the society of a Member State, and that residence conditions in particular are permissible.

151. Turning to the approach to the proportionality assessment, Ms Ling relied on *R (on the application of Lumsdon) v Legal Services Board* [2015] UKSC 41, [2016] AC 697. In that case, the UK Supreme Court considered whether decisions taken by the Board in relation to authorisation schemes for providers of legal services were contrary to Regulations which had implemented an EU Directive. The Regulations provided that the need for an authorisation scheme had to be “*justified by an overriding reason relating to the public interest*” and that “*the objective pursued cannot be attained by means of a less restrictive measure*”. The UK Supreme Court, in the joint judgment of Lord Reed and Lord Toulson, made a number of general observations about the principle of proportionality in EU Law.
152. At paragraph 34 of *Lumsdon*, the UK Supreme Court stated that a “*critical aspect of the principle of proportionality is the intensity with which it is applied*” and that this must be considered by reference to how the principle has been applied by the Court of Justice “*in the particular context in question*”. The UK Supreme Court went on, in paragraph 37, to consider proportionality as a ground of review of national measures. The Court stated that the concern “*first and foremost*” was “*the question whether a member state can justify an interference with a freedom guaranteed in the interests of promoting the integration of the internal market, and the related social values, which lie at the heart of the EU project.*” In this context, the Court of Justice “*generally applies the principle more strictly*”. Where, however, the national measure “*does not threaten the integration of the internal market... a less strict approach is generally adopted.*”
153. At paragraph 56, the UK Supreme Court observed that justification “*tends to be examined in detail, although much may depend on the nature of the justification, and the extent to which it requires evidence to support it. For example, justifications based on moral or political considerations may not be capable of being established by evidence. The same may be true of justifications based on intuitive common sense. An economic or social justification, on the other hand, may well be expected to be supported by evidence.*” At paragraph 67, the Court stated in connection with justification that, “*The court will be heavily reliant on the submissions of the parties for an explanation of the factual and policy context.*”
154. Ms Ling submitted that paragraphs 56 and 67 from *Lumsdon* demonstrate that it is not always necessary to have evidence to establish objective justification in relation to a particular measure.
155. In support of the proposition that proportionality was not strictly applied in relation to national social security measures, Ms Ling relied on *Geven v Land Nordrhein-Westfalen* [2007] 3 CMLR 1232. This case concerned a worker who lived in the Netherlands but undertook part-time work in Germany for between 3 and 14 hours per week. Her application to the German authorities for a child-raising allowance was refused on the basis that she was not resident in Germany and that she did not work a sufficient number of hours to qualify as a non-resident. At paragraphs 19-20 of its judgment, the Court of Justice pointed out that a residence condition would need to be “*objectively justified and proportionate to the aim pursued*” because it was intrinsically liable to affect migrant workers more than national workers, with a consequent risk that migrant workers would be

placed at a particular disadvantage. The justification relied on by the German government was that the allowance was “*an instrument of national family policy intended to encourage the birth-rate*” in Germany and that it was therefore granted to persons who, by their residence had “*established a real link with German society*”. The Court noted that the residence condition in that case was not, however, applied strictly – there were exceptions under which frontier workers resident outside Germany could claim the allowance, based on the extent of their work in Germany. The claimant had not qualified given the limited extent of her part-time employment.

156. The Court held at paragraph 26 that “*the fact that a non-resident worker does not have a sufficiently substantial occupation in the Member State concerned is capable of constituting a legitimate justification for a refusal to grant the social advantage at issue*”. It went on to state in paragraph 27 that social policy is “*a matter for the Member States, who have a wide discretion in exercising their powers in that respect. However, that wide discretion cannot have the effect of undermining the rights granted to individuals by the provisions of the EC Treaty in which their fundamental freedoms are enshrined...*”
157. The Court went on to hold at paragraphs 28-29 that the measure was justified. The allowance was granted to persons “*who have a sufficiently close connection with German society, without reserving that allowance exclusively to persons who reside in Germany.*” The Court considered that excluding non-resident workers engaged in “*minor employment*” in Germany was appropriate and proportionate, having regard to that objective.
158. Ms Ling submitted that two points of significance emerge from the judgment in *Geven*. Firstly, the Court made no reference to there being a requirement of overriding public interest in order to establish objective justification and referred to the “*wide discretion*” of the Member States. Secondly, unlike in *Hendrix*, the exceptions under which an applicant might qualify notwithstanding the rule were not general in nature; there were, as in the case of Housing Benefit, a number of specific exceptions rather than a general dispensing power. The measure in question was nonetheless justified.
159. In *Prete v Office National de l’Emploi* [2013] 1 CMLR 40, the applicant was a French national who had completed her studies in France but had married a Belgian national and moved to Belgium. She registered as a job seeker with the Belgian authorities and applied for a “*tideover allowance*” which was payable to young people to facilitate their transition from education to the labour market. This was refused on the basis of a rule requiring applicants to have studied for six years at a Belgian institution. At paragraph 37 of his opinion, Advocate-General Villalón stated that “*... the Court has repeatedly referred to the requirement that a person who exercises freedom of movement in the European Union must be integrated in order to secure entitlement to social benefits, but it is important to differentiate between the various specific areas in which the Court has given its rulings. Thus, its case law relating to students... refers to the integration required of persons who exercise freedom of movement with a view to studying in another Member State. Logically, the criterion developed by the Court in those circumstances is not automatically extendable to jobseekers, whose intentions*

are strictly economic and connected with the objectives of a freedom of movement that is distinct from that applicable to students. Consequently, it is important to define the scope of the Court's case law and to identify the integration criteria specifically applicable to jobseekers applying for the tideover allowance."

160. Ms Ling relied on this passage of the Advocate-General's opinion as demonstrating that the concept of integration varies according to the nature of the benefit and the category of claimant concerned. She submitted that the requirement for a claimant to demonstrate a sufficient connection with the host State is a legitimate objective recognised throughout the case law. In the present context, she submitted that Housing Benefit is a means-tested benefit with features analogous to social assistance and special non-contributory benefits. The relevant question was therefore whether a prolonged temporary absence abroad weakened the connection between the claimant and the United Kingdom labour market, society and "*community of solidarity*" to a degree that justified the four-week limit. She submitted that *Prete* showed that different connection criteria may legitimately be adopted in different contexts and that the authorities do not require the same approach to integration in every category of case.
161. Mr Cox submitted that what the Advocate-General said at paragraph 37 of his opinion in *Prete* did not assist the SSWP. Mr Cox pointed out that in paragraph 39, the Advocate-General had then stated that "*... the case law allows a host State to require jobseekers from other Member States to demonstrate a degree of integration. This may be the integration that exists between the jobseeker and the labour market, but it may also be the connection between the jobseeker and the host society, whether through the existence of family or emotional ties with nationals of the host State or through a prolonged period of residence.*" Mr Cox submitted that *Prete* was a case about the degree of integration with the society of the host State – something which was not in doubt in the Appellant's case – and said nothing about using a criterion based on temporary absence from the host State, in which the applicant had been integrated, as the rationale for terminating benefits. I accept Mr Cox's submission about the significance of these passages from the Advocate-General's Opinion in *Prete*.
162. Ms Ling also relied on *Hockenjos v Secretary of State for Social Security* [2004] EWCA Civ 1749, [2005] IRLR 471. That case concerned the premium paid to recipients of Job-Seeker's Allowance who were responsible for children. The appellant, who shared the care of his two children on an equal basis with his wife (from whom he was separated) was refused the premium because he was not in receipt of child benefit. He contended that the requirement to be in receipt of child benefit was indirectly discriminatory on the ground of his sex, contrary to the EU Social Security Directive. It was accepted that this had an adverse impact upon men. The Court of Appeal held that the measure was not justified under EU Law. Ms Ling emphasised, in particular, what Scott Baker LJ stated at paragraph 35 of his judgment – the question being "*whether the measures under scrutiny reflect a legitimate social policy aim of the United Kingdom and are both appropriate and necessary to achieve that aim. In choosing the measures to achieve that aim the Member State, in this case the United Kingdom, has a broad margin of discretion.*"

163. *Stewart v SSWP* [2012] PTSR 1 concerned a claimant who was a British citizen. She had moved to Spain with her parents when aged 11 and resided there. She was in receipt of Disability Living Allowance, a United Kingdom state benefit. Her application to the SSWP for an award of short-term incapacity benefit was refused because of a rule that required her presence in Great Britain on the date of the claim in order to obtain that benefit.
164. As Mr Cox correctly pointed out, *Stewart* concerned incapacity benefit, a different type of benefit to Housing Benefit. The relevant EU Regulation provided that, “*invalidity, old-age or survivors’ cash benefits, pension[s] for accidents at work or occupational diseases and death grants*” should not be subject to restriction on the basis that a recipient resided in the territory of a Member State which was not that responsible for payment of the benefit. The Court of Justice was not therefore considering the question of whether the national law was indirectly discriminatory as it arises in the present context of the EU’s legislative scheme for migrant workers. Rather, it was considering whether the rule was an unreasonable restriction on freedom of movement – see paragraphs 85-87 of the judgment – and the issue of justification was not being raised in the context of the rights of migrant workers. What the Court said in paragraphs 89-90 of its judgment regarding the permissibility of the aims pursued by the United Kingdom in that context is therefore of no material assistance in the present case. I therefore agree with Mr Cox that it is unsurprising that the judgment in *European Commission v Netherlands* [2012] 3 CMLR 27, given a year after *Stewart* and by a chamber comprising several of the same judges of the Court of Justice, makes no reference back to the decision in *Stewart*.

The SSWP’s arguments on justification

165. I turn, then, to the arguments advanced by the SSWP in support of the proposition that the indirect discrimination against the Appellant as a migrant worker which the SSWP accepts arises in this case is nonetheless justified.
166. Ms Ling accepted that purely economic arguments could not amount to objective justification of a discriminatory measure such as that applied to the Appellant in this case – but Ms Ling submitted that this was, in any event, not the case being advanced by the SSWP.
167. The essence of the SSWP’s justification defence, as advanced by Ms Ling, was as follows:
- a. Differing needs, as between those temporarily absent from Great Britain and those absent within Great Britain. Ms Ling submitted that Housing Benefit is, by its very nature, a type of benefit closely linked to the socio-economic situation within the host country. The needs of a person who had travelled to a different country for a period in excess of four weeks (with a potentially significant difference in living standards) would be different to someone present and continuing to work in the host country and would no longer be referable to the socio-economic situation of the host country.

- b. Although not on the face of the legislation, the aim of the longer 13-week period of temporary absence permitted for those Housing Benefit recipients remaining in Great Britain was to encourage them to seek work – such as seasonal work – elsewhere than in their local area. Whilst Ms Ling accepted that absences of up to 13 weeks for other reasons, such as taking a holiday or visiting family members, were permitted, she submitted that these were incidental and were not the central purpose of the provision, and that it was not necessary for specific provision to be made limiting the 13-week period to recipients searching for work before the SSWP could rely on such an argument.
 - c. Contribution to society. Ms Ling submitted that a recipient of Housing Benefit who was temporarily absent abroad would not be contributing to society in the same way as someone temporarily absent within Great Britain. There is necessarily a difference in contribution to the system between those who pay more into it, versus those who pay less into it. A person absent abroad would necessarily make less contribution towards society, by reason of lower personal expenditure within Great Britain.
 - d. Financial considerations. These were not relied on in and of themselves but Ms Ling submitted that they could legitimately form the underlying basis for choices in social policy, in particular the broader aim of getting people off benefits and into work – see *European Commission v Netherlands* at paragraph 57.
 - e. Fairness, in terms of the nature of the ongoing link between the recipient of the benefit and the community that provides the benefit. Ms Ling submitted that absence abroad for a lengthy period, whether that be in order to work or to go on holiday, results in a much weaker link with the “community of solidarity” providing the benefit.
168. As to the limitation of four weeks on temporary absence outside Great Britain, Ms Ling submitted that this was a high-level policy decision that had been made in the context of the change to assessment of needs on a monthly basis under Universal Credit. Housing Benefit should not be anomalous. The introduction of the four-week limit brought Housing Benefit into line with the direction of travel of the benefits system as a whole. Further, absence abroad for more than four weeks meant that there could no longer be a reliable assessment of a recipient’s needs, given they would have been away for such a long period. The choice of a four-week period was informed by the need to ensure fairness as between those in work contributing to the benefits system, and those in receipt of Housing Benefit. She submitted that the former would be unlikely to be able to take more than four weeks off work to travel to a different country, and it would be unfair for the latter to be in a better position. Ms Ling submitted that there were also several exceptions to the four-week rule which mitigated its impact, consistently with way in which such exceptions had been treated by the Court of Justice in *Geven*. Ms Ling submitted that this was not *ex post facto* justification, but reasoning identified at the time the measure was introduced.

169. Ms Ling submitted that there was a broad margin of appreciation afforded to the State, and that differentiation at a high level of generality was permissible. Legislating involves making broad differentiations between different groups of people on different grounds – see *Sullivan v Isle of Wight Council* [2025] EWCA Civ 379, [2025] ICR 1299, at paragraph 81.
170. Ms Ling submitted that an important feature of the objective justification argument in relation to Housing Benefit was that it was a non-contributory benefit – payable in respect of the occupation of a dwelling and subject to an income requirement as a means-tested “*safety net*” benefit, claimable by an individual who did not have the resources to meet their own basic needs.
171. Ms Ling submitted that the SSWP’s argument on justification in the present case was based primarily on political considerations – and so there was not a requirement for the sort of detailed evidence as to the factual position that might have been needed if the nature of the justification advanced was based on empirical considerations (see the passages from *Lumsdon* referred to above). For example, insofar as the SSWP relied on the adoption of a monthly assessment period in respect of Universal Credit in support of his justification argument, then this was a political decision. Ms Ling submitted that the choice of four weeks as the permitted period of absence from Great Britain was a high-level policy decision made in the context of the introduction of assessment of needs for the purpose of Universal Credit on a monthly basis.
172. In addition to her submissions as to the political nature of the choice made to differentiate between the permitted periods of absence within and outside Great Britain, Ms Ling submitted that there was in any event evidence going to objective justification upon which the SSWP relied, including material from the time at which the changes in question were adopted, and that submitted to the European Commission in 2019.
173. Ms Ling submitted that the decision to change the rules on entitlement to Housing Benefit during periods of absence from Great Britain, which was made in 2016, followed a major re-design of the system of state benefits. That resulted in the introduction of Universal Credit and coincided with a recognition that spending on Housing Benefit, as with other benefits had increased significantly and needed to be addressed. In the United Kingdom’s observations to the European Commission in connection with the infringement process, it was stated that spending on Housing Benefit had increased by 46 per cent in real terms between 1999-2000 and 2010-11, and that this was the context for changes that were made to curb the cost of providing Housing Benefit.
174. Ms Ling drew my attention to the Explanatory Memorandum provided to the Social Security Advisory Committee in connection with the 2016 Regulations, where the Government explained the rationale for these changes. This stated:

“There are sound reasons for maintaining the 13 week absence rule for absences within [Great Britain], which allows flexibility for Housing Benefit claimants to leave home for work, or to look for work.

The rationale for the change from [Great Britain] is that the current rule to allow a means tested benefit, paid for out of general taxation, to continue where the claimant is abroad for a period of up to 13 weeks is too long and should be shorter.

The Secretary of State has considered what the period should be shortened to and considers that 4 weeks is appropriate because the change will broadly align with Universal Credit (UC) and other legacy benefits such as Income Support (IS) and Jobseeker's Allowance (JSA) for simplification and fairness."

175. Ms Ling submitted that the explanations given in the Explanatory Memorandum for the changes made in 2016 were the justifications now relied on by the SSWP; they were explained and developed by the content of the Government's January 2019 response to the European Commission. She submitted that this was not a situation of *ex post facto* justification – there had been an express decision in 2016 to introduce this measure for reasons which had been identified at the time, including consideration of the difference that would arise between the permitted periods of temporary absence within and outside Great Britain.
176. As to the impact on Housing Benefit claimants, the Explanatory Memorandum stated:

"Where there could be cases of real prejudice, e.g. on medical absence and, for [Housing Benefit] only, some occupations abroad from [Great Britain] we will allow absences of up to 26 weeks...

It is difficult to predict behavioural impacts with any certainty but it is possible that people who would previously have been temporarily absent for between four and 13 weeks will reduce the length of time they are absent from the country under the new rules...

Due to the nature of the change it is not possible to identify in advance those who may be materially affected by this change, however, claimants who wish to be abroad from [Great Britain] for longer periods should consider if they can afford to do so – just as working families do."

The Government estimated that the changes to the rules on temporary absence would affect around 100,000 Housing Benefit claimants.

177. I was also referred to a National Centre for Social Research report commissioned by the Department for Work and Pensions, published in December 2018 as part of the Local Authority Insight Survey. This report found that 60 per cent of local authorities responding to the survey said that they had not experienced an increase in denials of Housing Benefit since the four-week limit for periods of temporary absence abroad was introduced in 2016. 22 per cent of respondents had seen an increase, and 18 per cent were unsure.
178. One fifth of respondents said that the new limit was impacting specific demographic groups, including: Asian families visiting relatives in Bangladesh,

India and Pakistan; EU migrant workers returning home to visit family or to go on holiday; people going on pilgrimage; and pensioners who were able to take extended foreign holidays or family visits. Ms Ling submitted that, albeit at a high level of generality, this indicated that the reasons why recipients of Housing Benefit who were affected by the four-week limit were leaving the UK were predominantly for leisure activities. Ms Ling submitted that such persons were not in a comparable position to recipients of Housing Benefit travelling domestically for the purposes of seeking work, who unlike those absent abroad were maintaining their contribution to the United Kingdom's "community of solidarity". She accepted, however, that there was no corresponding research addressing the reasons why Housing Benefit recipients might spend long periods of time away from home within Great Britain.

179. On 8 November 2018, the European Commission gave formal notification to the SSWP of its view that the differential treatment in the Housing Benefit Regulations, as amended in 2016, of absences from Great Britain and absences within Great Britain, in terms of the permitted period of absence, was indirectly discriminatory against migrant workers under EU Law and that it was, having regard to the case law, not objectively justified – that is, it took the same position that the Appellant now advances on this appeal. The European Commission invited the United Kingdom Government to submit its observations in response, stating that in due course it "*may, if appropriate, issue a Reasoned Opinion*" under Article 258 of the TFEU. This would have resulted in the United Kingdom being required to remedy any breach of EU Law identified by the Commission, or else be referred to the Court of Justice.
180. The United Kingdom Government submitted a response to the European Commission on 7 January 2019, asserting that there was no breach of EU Law. It was contended that the provisions in question were not indirectly discriminatory – a position that is not now maintained by the SSWP on this appeal – and that, in any event, they were objectively justified. No enforcement proceedings were taken by the European Commission, prior to the United Kingdom's withdrawal from the European Union. The response sought to justify the differential period on two essential bases. One was to "*protect limited public funds*" (which I note is a financial argument not capable of amounting independently to justification for indirect discrimination). Ms Ling did however rely on other elements of the justification arguments advanced to the European Commission. She submitted that although there was no administrative imperative to bring the permitted period of temporary absence abroad into line with the permitted period of one month's absence for Universal Credit, Housing Benefit had become an anomaly because of the "*direction of travel*" of the rest of the benefits system. The choice of one month's permitted temporary absence abroad for Universal Credit had been made in order to align with the monthly assessment period cycle; it was then reasonable to limit the period of permitted temporary absence outside Great Britain to four weeks, in line with the month permitted for Universal Credit. The UK Government relied on the proposition that means-tested benefits were necessary to prevent or alleviate financial hardship entailed from the costs of living in Great Britain, and that temporary absences of more than four weeks "*break the continuity of... residence necessary for the continued receipt of means-tested benefits for existing claimants*". A claimant who wishes to continue

their benefit claim whilst planning to take a longer absence abroad “*places themselves in a situation where they are requesting further financial assistance from taxpayers in order to meet the cost of daily living expenses incurred whilst living outside [Great Britain]*”. Ms Ling relied on the justification advanced by the UK Government that an absence of more than four weeks “*breaks the continuity link with the [Great Britain] labour market*” and that it would be difficult for someone working and not in receipt of Housing Benefit to spend a continuous period of more than four weeks abroad.

181. Ms Ling also submitted that the admitted discriminatory effect of the provision in issue on those in the Appellant’s position would be substantially mitigated by the possibility of returning from abroad for a short period of time prior to the end of the permitted four-week period, before going back abroad to continue their visit. Ms Ling also suggested that this would demonstrate such an individual’s commitment to the United Kingdom.
182. Ms Ling also submitted that when considering whether a measure was objectively justified the reason why the particular measure was introduced is not the sole consideration. The difference in treatment is also part of the inquiry in looking at whether the measure is justified, although the difference in treatment does not itself have to be justified.
183. Ms Ling submitted that the State had given specific consideration, in this statutory scheme, to what exceptions should be made to the rigour of the four-week rule. The Social Security Advisory Committee had conducted a consultation process and published reports, which had been considered and responded to by the SSWP. She also noted that where a recipient of Housing Benefit had travelled abroad for a reason that did not fall within the exceptions, but then the reason for their absence changed to one falling within the particular exceptions, the application of the concept of closed period supersession would (as in the Appellant’s case) mitigate the situation that would otherwise apply.

The Appellant’s argument on justification

184. Mr Cox submitted that the Appellant was seeking a “*levelling up*” of the position so that her temporary absence from her home in London when she was in the Czech Republic was treated in the same way as if she had been absent within Great Britain, as it would have been prior to the amendments to the Housing Benefit Regulations that were made in 2016. He submitted that a significant feature in relation to the justification argument is the purpose of Housing Benefit. Under section 130(1) of the Contributions and Benefits Act and Regulation 10 of the Housing Benefit Regulations 2006, it is only paid for costs in respect of a dwelling in Great Britain which a migrant worker such as the Appellant occupies their home. They must be legally and habitually resident in the United Kingdom for the benefit to be payable at all. If the migrant worker no longer occupies the dwelling as their home, then Housing Benefit will not be paid. It was not being asserted in the Appellant’s case that the property was no longer her home – it was accepted that her absence abroad in the Czech Republic which had resulted in the loss of her entitlement to Housing Benefit was, on any view, a temporary one.

185. Mr Cox submitted that this point was a complete answer to the SSWP's argument to the European Commission that the change in the temporary absence rules was necessary to address the continuing payment of Housing Benefit to those no longer habitually resident in the United Kingdom. As the need for residence was a precondition for the payment of Housing Benefit in the first place, it could not be used to justify the *prima facie* discriminatory changes to the temporary absence provisions which were effected in 2016.
186. Mr Cox submitted that the decided cases demonstrated the need both for a legitimate objective to be established and for the requirement of proportionality to be satisfied. Mr Cox noted that in *O'Flynn*, it was not suggested by the United Kingdom or by the Court of Justice that paying for funeral services that took place abroad would result in any material breaking of the connection with the United Kingdom's economy. Mr Cox noted that in *Hendrix*, the rule in question resulted in the cessation of benefit when the claimant was no longer resident in the Member State, but that as a result of the "*unacceptable degree of unfairness*" flexibility provision in national law there was a considerable degree of latitude as to how it might be operated in practice. In the Appellant's case, however, the rule in question denied Housing Benefit to migrant workers during periods of continued residence in the United Kingdom, when they were only temporarily absent abroad, and had no similar degree of flexibility in its operation which might, as with the "*unacceptable degree of unfairness*" test in *Hendrix*, result in the impugned measure being applied in a proportionate manner.
187. Mr Cox accepted that witness evidence going to the justification of the impugned provision was not a requirement, and that it could be justified on the basis of matters not considered at the time it was introduced. However, he submitted that the SSWP's submissions on justification could not be given the same weight as if they had been supported by evidence.
188. Mr Cox submitted that each of the SSWP's justification arguments had a financial element – and that, on the authorities, financial considerations were not sufficient to justify discrimination here. He pointed out that in March 2016, the Social Security Advisory Committee had written to the SSWP recording that the Government had predicted savings of £25 million in the first year of operation, thereafter reducing gradually to £10 million in the fourth and fifth years, but that the SSWP was "*not able to provide any meaningful data relating to those who were likely to be adversely affected by the proposals*" and criticising "*the absence of a detailed impact analysis*". The Committee identified on the differing figures put forward to it by the SSWP there was a gap "*in the region of 20,000*" affected claimants "*for which an explanation is needed*" in terms of whether they would suffer a reduction in benefit or modify their behaviour to avoid the effect of the impugned measure. It also noted that any loss of benefit "*will be immediate and in full. It will mean that some people will be returning to [Great Britain] to face a significant debt problem which, at its worst, could lead to homelessness.*"
189. In its July 2016 response to the Committee's report, which requested sight of the evidence which had informed the decision, the Government stated: "*The Committee has identified that there is no firm evidence in terms of the potential*

impact of the changes to temporary absence rules on specific groups. Therefore, the Department will monitor the effect of this policy through its normal communication routes with both DWP operations and local authorities, including the LA wave survey and any further available information such as customer correspondence.” Mr Cox pointed out that the Government’s response therefore appeared to accept the absence of “*firm evidence*” to support the Government’s view at the time; the response did not address the issue of data or provide an explanation for the identified gap of around 20,000 affected claimants in the figures used.

190. Mr Cox submitted that the continuing absence of evidence about these matters on this appeal was particularly striking, given what had been raised in 2016. He submitted that the December 2018 survey did not evaluate the claimed savings (indeed, the SSWP had not provided any evidence about what savings had been achieved or how many Housing Benefit claimants had actually been affected). He noted that in the UK Government’s response to the European Commission, in January 2019, the Government had stated that at the point, systems had not been put in place to record data on periods of absence abroad, and there was no “*centrally collated data which records [Housing Benefit] claimant by their nationality, reasons for leaving [Great Britain] and the durations for each absence*”, and that the impact of the measure had been assessed by reference to estimates and surveys only. Mr Cox further noted that if any post-implementation empirical analysis had been undertaken since 2016, then the SSWP would have provided it in connection with this appeal. Mr Beresford’s witness statement did not provide any further detail on the point.
191. Mr Cox also submitted that regard should be had to the purpose of continuing the payment of Housing Benefit during periods of temporary absence – which is to prevent homelessness on a claimant’s return to the home (which is what actually occurred in the Appellant’s case) or the accrual of debt.
192. Turning to the SSWP’s argument based on ensuring the continuity of a link with the labour market in Great Britain, Mr Cox submitted that the Appellant continued to have a link with the labour market. Mr Cox submitted that as it was accepted that the Appellant was a migrant worker exercising her right to free movement under EU Law, especially strong justification for the discriminatory measure needed to be shown. He emphasised that the starting point for consideration must, in the present context, be that a migrant worker recipient of Housing Benefit in the Appellant’s position remained legally and habitually resident in Great Britain, and liable to make rental payments for their home. Mr Cox emphasised that the payment of Housing Benefit was not to cover the Appellant’s living expenses when temporarily away from home but was to support the payment of rent for the dwelling which she and her son occupied as their home.
193. The issue, he submitted, was whether it was then justified to deny Housing Benefit to such a person during a period of more than four weeks’ temporary absence from their home abroad, when they would continue to receive it if temporarily absent from their home within Great Britain for up to 13 weeks. The argument was not about whether the Appellant retained the necessary link to society within Great Britain, because that was already fulfilled in the provisions of

the legislation requiring legal and habitual residence for the benefit to be payable at all. The issue was about the payment of Housing Benefit during periods of temporary absence that, on this premise, did not affect her status under domestic or European law, or the quality of her link to this country. Mr Cox submitted that this case was therefore one step removed from the cases cited where there was an issue about whether the recipient of the benefit did have a link to the society of the Member State where the benefit was paid.

194. Mr Cox submitted that the essential basis of the SSWP's justification defence was purely economic – about spending less money on Housing Benefit. This could not be a legitimate justification under EU Law. He submitted that the SSWP had advanced no proper analysis of the appropriateness and proportionality of the measures adopted, and no evidence to support the justification argument. As to the four elements of the justification defence advanced:

- a. As to needs, the argument that the needs of a person in the Appellant's situation were no longer referable to the situation in Great Britain was wrong. The SSWP had advanced no evidential basis for concluding that the needs of any Housing Benefit claimant temporarily absent from Great Britain would change during the period of absence falling between the four-week cut off for permissible temporary absence when abroad and the 13 weeks permitted in Great Britain. In any event, the Appellant when temporarily absent abroad remained legally and habitually resident in the dwelling in Great Britain in respect of which Housing Benefit was paid. There was no evidence that, as a general rule, the needs of a Housing Benefit recipient when temporarily absent abroad would be different. Mr Cox submitted that the Appellant's need for housing in the United Kingdom had not disappeared. She remained habitually resident in the property and was only temporarily absent. Nor was there any evidence of the Government being unable to assess the level of an applicant's need during periods of temporary absence from the United Kingdom - and whether they might be greater, lesser or the same. Mr Cox submitted that this would be readily quantifiable.
- b. Mr Cox submitted that there was no evidence that the 13-week period of permitted temporary absence within Great Britain encouraged Housing Benefit recipients to find work elsewhere in Great Britain. Even if that had been the SSWP's intention, however, Mr Cox submitted that the question was whether the discriminatory consequences of the impugned measure could be justified. There was no prohibition on Housing Benefit claimants continuing to receive the benefit whilst taking a 13-week holiday within Great Britain – yet migrant workers in the position of the Appellant would lose the benefit after four weeks visiting family in their countries of origin.
- c. As to the SSWP's argument based on the claimed contribution of Housing Benefit recipients to society when temporarily absent within Great Britain as opposed to when temporarily absent abroad, Mr Cox submitted that this was not a high-level political criterion, but one that was readily capable of being demonstrated by evidence – for example, as to the respective levels of tax paid. It could not be assumed that the

degree of contribution would be materially different during such periods of temporary absence.

- d. Mr Cox submitted that it was not inherently fairer to have a rule for Housing Benefit that penalised temporary absence abroad when compared to temporary absence within Great Britain – as opposed to a single rule for all temporary absences.
- e. Mr Cox submitted that the SSWP's arguments on justification, as made to the European Commission in 2019, related largely to the structure of Universal Credit - a benefit with different criteria – and that the need for alignment as claimed by the SSWP had not been established. Mr Cox submitted that it was inapt to link the four-week period of permitted temporary absence abroad under the Housing Benefit Regulations to the assessment procedure for Universal Credit. An award of Universal Credit is indefinite, but the amount payable is calculated by reference to monthly periods. Housing Benefit is similarly an indefinite award, but payable on a weekly basis. Importantly, the four-week permitted period of temporary absence abroad was not aligned with any particular assessment period – it started as and when absence begins.

195. I have already referred to Mr Cox's submissions about the significance of the decision in *Hendrix* – he submitted that the crucial point of distinction was that, unlike the claimant in *Hendrix*, the Appellant was always habitually resident in the United Kingdom and that the government's justification argument had been accepted in *Hendrix* because of the generally applicable exception to correct unacceptable unfairness, which was not present in the Housing Benefit Regulations.

Discussion

196. Logically, the first question which arises for decision is whether the Appellant's absence from Great Britain during the period in question was unlikely to exceed 13 weeks. If the Appellant's entitlement would have ceased even if a provision equivalent to that applying to temporary absence within Great Britain had been applied to her, then the EU Law arguments which she raises make no difference.

197. Having regard to the evidence in the Appellant's further witness statement, in particular – which neither of the Respondents wished to challenge – I accept that the Appellant's absence was never likely to exceed 13 weeks. Whilst the Appellant did say that ultimately she would have stayed in the Czech Republic for as long as she needed to, the context was that her father had become very seriously ill and there was concern that he might not survive. Her intention was to stay in the Czech Republic for two weeks, initially, and to see what the situation was after that – with the hope that her father's condition would improve sufficiently to enable her to return. In those circumstances, I accept Mr Cox's submission that the period of the Appellant's temporary absence from the United Kingdom was never likely to exceed 13 weeks. It is therefore necessary to determine the merits of the SSWP's argument on justification.

198. I agree with Mr Cox that the fact that the European Commission did not take enforcement action against the United Kingdom prior to it leaving the European Union is not indicative of the Commission having taken the view that there was no breach; and, in any event, the Court of Justice and not the Commission would have been the final arbiter of the matter. I do not therefore treat the Commission's failure to pursue enforcement proceedings as of any material relevance to my decision.
199. There are some important features of the factual matrix in which the proportionality assessment is to be conducted which must be borne in mind.
200. Firstly, this is not a case in which the Appellant had ceased to occupy the property as her home because she had gone to live elsewhere. She remained liable for the payment of the rent. She intended to return to live at the property with her son. Her absence from the property whilst in the Czech Republic was never on anything other than a temporary basis. Regulation 7(2) of the Housing Benefit Regulations provides that regard may be had to the occupation of any other dwelling anywhere in the world when deciding whether or not a dwelling is that normally occupied as a person's home and so provides a mechanism for the state to filter out Housing Benefit claimants who are occupying property abroad. That is not the situation in the Appellant's case.
201. Secondly, the Appellant was at all material times a migrant worker resident in the United Kingdom and exercising her EU Law rights in that regard. The discriminatory effect of the impugned provision, which is accepted by the SSWP, arises because of the difference in the maximum permitted periods of temporary absence from the home which apply, depending on whether that temporary absence is within Great Britain or not.
202. Thirdly, the justification argument necessarily proceeds on the premise that this admittedly discriminatory measure only applies in circumstances where the recipient of Housing Benefit continues to be habitually resident in the United Kingdom and is only temporarily absent from their home – see Regulation 10 of the Housing Benefit Regulations. If the period of absence, or predicted period of absence, results in the cessation of habitual residence then Housing Benefit will no longer be payable. In this respect, I accept Mr Cox's argument that the SSWP has not sufficiently explained why the habitual residence requirement alone is not sufficient to achieve the aims relied on as justifying the discriminatory approach to permissible periods of temporary absence.
203. I agree with Mr Cox that it is a fundamental right under EU Law for a migrant worker such as the Appellant to pursue her own advancement, and that of her family, in another Member State. I further accept that the equality guarantees provided for migrant workers under the legislative provisions to which I have made reference, including in relation to eligibility for housing, are an important means of achieving the objective of integration of migrant workers into the economy and society of the host country.
204. As to the correct approach to the proportionality assessment in the present context, I accept Mr Cox's argument that the test is to be strictly applied –

although I make clear that I do not consider that the standard applied in this regard makes a difference to the outcome in this case. It must be remembered that the Appellant, at the material time, was a migrant worker residing in the United Kingdom in rented accommodation. The provision of Housing Benefit enabled her to pay the rent to her landlord – that is, to keep a roof over her own head and that of her son. As Mr Cox pointed out, the recitals to the Regulation make clear that freedom of movement is a fundamental right under EU Law, and specifically refer to eligibility for housing as being a matter in respect of which there is equality of treatment:

- a. The fourth recital to the Regulation states, “*Freedom of movement constitutes a fundamental right of workers and their families...*”
- b. The sixth recital to the Regulation states, “*The right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that equality of treatment be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing, and also that obstacles to the mobility of workers be eliminated, in particular as regards the conditions for the integration of the worker’s family into the host country.*” (emphasis added)

205. I accept Mr Cox’s submission that provision for migrant workers such as the Appellant in relation to housing is a central element of the Regulation and a key part of ensuring the ability of such workers to exercise their rights of free movement under EU Law. In *European Commission v Netherlands*, the Court contrasted the position of migrant workers in this regard with that of those who are economically inactive. I accept Mr Cox’s argument that there is an important distinction made, for the purposes of an objective justification argument, in that respect.
206. In any event, even if I had accepted Ms Ling’s argument that the scope of the discretion afforded to Member States in designing systems of state benefits meaning that the proportionality review should involve a greater degree of deference to the choices made by the UK Government in this regard, I would nonetheless have rejected the SSWP’s justification argument on the material presented.
207. I accept that the elements of the justification defence now advanced by the SSWP are capable of being legitimate aims which could, in principle, justify the *prima facie* discrimination which the SSWP has accepted arises from the operation of the scheme as amended from 2016 onwards. They are not considerations which are purely financial.
208. Nonetheless, to be objectively justified under EU Law the impugned measure must be proportionate – namely, it must be appropriate to achieve the legitimate aim and go no further than necessary to achieve the aim. I accept that legislation commonly operates by means of bright-line rules. However, the existence of such a rule does not relieve the State of its burden of establishing, in circumstances

where there is an admitted discriminatory effect for the purposes of EU Law, that the rule in question is objectively justified and proportionate.

209. I agree with Mr Cox that the SSWP has failed – and, in my judgment, by a considerable margin – to demonstrate that the discriminatory effect which it is accepted arises in the Appellant’s case by reason of the difference in the permitted period of absence abroad versus that within Great Britain is objectively justified under EU Law.
210. I agree with Mr Cox that the authorities relied on by the SSWP do not, on analysis, support the position that has been taken on objective justification. With regard to what the UK Supreme Court said at paragraph 37 of *Lumsdon*, in my judgment the matter presently in issue does present a barrier to market integration, notwithstanding that Housing Benefit is a matter of national competence. As Mr Cox pointed out, “*eligibility for housing*” is expressly referred to in the Regulation as a matter requiring equality of treatment in order to promote integration.
211. None of the authorities, including *Prete* and *Geven*, recognise temporary absence from the State of residence as a sufficient reason for terminating benefits. *Geven* was a case about the whether the migrant workers in question had a sufficient connection to the society of the host State. I accept Mr Cox’s submission that the Appellant’s situation is different because she does not challenge a rule which reduces her entitlement due to a lack of a sufficiently close connection to society – the concept of temporary absence abroad under the Housing Benefit Regulations proceeding on the basis that a person such as the Appellant remains legally and habitually resident in Great Britain, and that the absence from their home is necessarily a temporary one.
212. I reject the SSWP’s argument that the Appellant is, in substance, seeking an entitlement broader than those recognised in the decided cases relating to situations such as those of “*frontier workers*”, students or those who are residing but not working in another Member State. Rather, in my judgment, those cases concern situations in which the degree of integration between the recipient of the benefit in question and the host State is considerably less than in the context of the Appellant’s case – where the Appellant had been resident in the United Kingdom for more than a decade, at the material time was exercising her EU Law rights as a migrant worker, and where her entitlement ceased as a result of temporary absence abroad in order to visit a seriously ill close relative.
213. I further agree with Mr Cox that it is not sufficient for the SSWP to justify the impugned measure by relying on the relevant decisions having been made at a political level. The bare fact that decisions may have been taken by Ministers, rather than officials, does not elevate the arguments relied on into the dimension of “*moral or political*” justification.
214. The key issue, in my judgment, is that it is for the SSWP to justify the discriminatory effect of the impugned measure. Whilst I accept that it is open, in principle, to a State to justify a measure such as this without making reference to evidence addressing the arguments on objective justification (see *Lumsdon*), in the particular circumstances of the present case I consider that the lack of

evidence is fatal to several of the reasons relied on by the SSWP as justifying the measure, both in relation to the connection between the impugned measure and the legitimate aim, and the proportionality of limiting the permitted maximum period of temporary absence abroad to four weeks.

215. I do not accept that the arguments relied on by the SSWP are matters of such high policy that they are not capable of being evidenced through the production of research or the provision of data. The position however in my judgment remains as described by the Social Security Advisory Committee in 2016: there is “*no firm evidence*” regarding the impact of the changes made.
216. I do not accept that, with regard to the question of the measure being justified as a result of migrant workers losing a sufficient connection to the host state by reason of the length of the period of temporary absence going beyond four weeks, that can be achieved either by submission alone or on the limited evidence presented. In substance, the SSWP’s arguments on this point amount to an assertion that is the case – but the SSWP has not apparently undertaken any research (still less provided any evidence) that absence abroad going beyond four weeks results in recipients of Housing Benefit, who remain legally and habitually resident in Great Britain, losing a sufficient connection to society within Great Britain by reason of their temporary absence from home.
217. I do not accept that the difference in treatment is justified by reason of those migrant workers who are temporarily absent abroad for more than four weeks in some way losing a sufficient connection to the community in Great Britain or no longer contributing to the society of the host State so that they are no longer to be regarded as part of the “*community of solidarity*”. As Mr Cox pointed out, such a person continues to be liable to pay the rent on their accommodation (with the result that their landlord will be liable to pay tax on the rent received) and will be liable to make payments for council tax and utilities (at least in respect of fixed costs, i.e. standing charges) whilst they are temporarily absent. Such a person is also likely to continue to pay recurring costs of living in Great Britain during the period of absence which are not directly referable to their accommodation, such as under a mobile phone contract and in respect of subscriptions (such as gym memberships). Such costs will continue to be paid during a period of temporary absence.
218. Moreover, it is not necessarily the case that a worker who is temporarily absent abroad for a period of more than four weeks will lose their connection to the host state in terms of the performance of work. Such a worker may still be receiving a salary from their employer in the United Kingdom (and paying tax in the United Kingdom on it) even if not actually performing work whilst abroad, or they may be working for their employer remotely.
219. Mr Cox submitted that, in any event, that a sufficient link for EU Law purposes was already present on the facts of the Appellant’s case – being between the Appellant as a migrant worker living in the United Kingdom and the host Member State: see *European Commission v Netherlands* at paragraphs 66-67. Mr Cox submitted that such a link was already in place by reason of the provisions of the legislation limiting payment of Housing Benefit, including in circumstances of

temporary absence, to those with a home in the host state who were habitually and legally resident there. Moreover, as noted by the Court of Justice at paragraph 66 of its judgment, a migrant worker retains a sufficient degree of integration with the host state, in terms of the financing of social policies, by reason of the payment of taxes in that state by virtue of his employment. I accept Mr Cox's submissions in this regard. In my judgment, these passages of the Court of Justice's judgment undermine the SSWP's justification submissions.

220. By contrast, the SSWP has not, in my judgment, adduced sufficient evidence to demonstrate that those who are temporarily absent from Great Britain for more than four weeks lose their link to the society of the host state, or why the period of four weeks' temporary absence abroad permitted under the Housing Benefit Regulations (with the resulting nine-week differential in terms of permitted temporary absence within Great Britain) is the minimum necessary to ensure the retention of such a link.
221. With regard to the SSWP's argument as to need, I agree with Mr Cox that in order to justify the impugned measure it would be necessary to show an evidential basis for recipients of Housing Benefit no longer having the same housing needs. I do not accept the proposition that an individual in the Appellant's position is no longer in need, during the period of temporary absence, of Housing Benefit to meet her basic needs. This ignores the fact that such a person remains resident in Great Britain and liable to pay rent in respect of their home there – which they may well lose (as the Appellant indeed did) in the event that Housing Benefit is withdrawn. By definition, their absence from that home is a temporary one. Whilst their immediate need for housing (namely, a roof over their head for the night) is being met in a different way, that is the case whether the temporary absence is one of four weeks or of 13 weeks. The argument that a migrant worker in the Appellant's position is no longer "in need" of Housing Benefit ignores these crucial elements of the factual context.
222. Turning to the arguments raised by the SSWP with regard to the alignment of the benefits system, again I do not accept that the SSWP has adduced sufficient evidence to demonstrate that the measure is objectively justified on the basis of this legitimate aim. The essential point being made by the SSWP here, as I understand it, is that the period of four weeks' permitted absence was chosen in order to align Housing Benefit with Universal Credit, in particular.
223. There are a number of difficulties with this argument. Firstly, the periods chosen in respect of Universal Credit and permitted absence abroad are slightly different – one month, as opposed to four weeks. Secondly, the nature of the periods is different. The period of four weeks is not an assessment period in the same way as that which applies to Universal Credit – rather, it is a permitted maximum period of absence from Great Britain which, once exceeded, results in the cessation of entitlement to Housing Benefit – an award of which will otherwise endure indefinitely until a material change of circumstances arises. Universal Credit is, in any event, a different benefit addressing a range of factors (not just housing needs), and is administered by central Government rather than local authorities. Thirdly, the maximum period of permitted temporary absence within Great Britain has not been aligned as between Universal Credit (where six

months is permitted) and Housing Benefit. Whilst it might be anomalous to have different permitted periods of temporary absence abroad as between the two benefits, there is nonetheless an apparently discriminatory effect within both of them because the permitted periods of absence within Great Britain and outside it are not equal. It is therefore no answer, for the purposes of justifying the admittedly discriminatory effect on EU migrant workers of the differential treatment of permitted periods of temporary absence for Housing Benefit, for the SSWP to rely upon the need to align Housing Benefit with the apparently similar effect achieved by Universal Credit. The underlying rationale for having such a difference in the first place therefore becomes crucial.

224. As to the aim of administrative simplification, I note that in 2016 the Social Security Advisory Committee stated that, *“Shortening the period of allowed absence has the potential for creating more administrative work for local authorities which the Department has acknowledged... The rules will also mean that the numbers of cases where awards of [Housing Benefit] ... are terminated as the claimant leaves [Great Britain] will increase. Upon the claimant’s return, [local authorities] ... will face the added administration costs associated with handling repeat claims for benefit...”* The SSWP has not, however, adduced evidence about there being any positive impact on the administration of Housing Benefit as a result of the change having been made. Indeed, the introduction of multiple exceptions to the four-week maximum may have increased the complexity of the system; and, to the extent relevant to the justification argument, I do not consider that those limited exceptions for particular circumstances mitigate the discriminatory effect of the general rule, in the context of EU migrant workers, to any material extent.
225. The SSWP might have sought to support his argument with evidence as to the administrative benefits of providing for different periods of permitted temporary absence within and outside Great Britain, and the administrative benefits of providing for a period of four weeks’ permitted temporary absence in particular. But, beyond assertion, there is no such evidence. I am therefore unable to say what, if any, administrative benefits are derived from the introduction of this measure. Indeed, it remains unclear precisely what financial benefits have been derived from the introduction of the lower permitted period of temporary absence (whether from administrative savings or a reduction in the sums payable by the state); although of course such an argument is not, in and of itself, capable of justifying the discriminatory measure.
226. Insofar as financial considerations are relied upon, the SSWP has not established that this admittedly discriminatory measure avoids an unreasonable financial burden being imposed on the United Kingdom. I have already referred to the lack of any evidence about how much money has actually been saved since 2016. In any event, as the SSWP was constrained to accept in his skeleton argument, the savings achieved by the measure *“may be small”*. I note that the position in respect of permitted periods of temporary absence abroad and within Great Britain was equalised for over 30 years prior to the changes made in 2016 without there apparently being any suggestion that an unreasonable financial burden was thereby being imposed on taxpayers.

227. In my judgment, the SSWP's case that the discriminatory effect of the measure complained of on the Appellant and other migrant workers is justified either by a need to promote the integrity of the benefits system, or by improvements in its administration (or, to the extent it may be relevant, by financial considerations), is not established.
228. The SSWP's argument based on the higher permitted period of absence within Great Britain being necessary in order to enable recipients of housing benefit to search for, or to perform, work away from their home area is, similarly, not sufficiently evidenced. There is no requirement under the Housing Benefit Regulations for a Housing Benefit recipient to either search for or undertake work when temporarily absent from their home within Great Britain. A Housing Benefit recipient is, for example, permitted to take up six or eight (or even 13) weeks' holiday in Great Britain but still to receive the benefit. There is no evidence about the proportion of those Housing Benefit recipients who are temporarily absent from their homes who are looking for or undertaking work, as opposed to being on holiday, or explaining (with regard to this issue) the significant differential in the permitted periods of absence introduced in 2016. The SSWP might, for example, have adduced evidence about the United Kingdom's labour market, and in particular the number of Housing Benefit recipients leaving home to seek or undertake work (such as seasonal work) within Great Britain – and the periods of time spent away from home for this purpose. Such evidence might, had it been adduced, have demonstrated the need for a much higher permitted period of temporary absence within Great Britain. But, as I have said, there was no such evidence.
229. Insofar as Ms Ling relied on the December 2018 survey in support of the proposition that Housing Benefit recipients absent from their homes for extended periods within Great Britain would necessarily be looking for or performing work, in contrast to the purposes stated in the report for absences abroad, then I do not accept that proposition is made out. As Ms Ling was constrained to accept, in respect of the purposes of temporary absence abroad for those directly affected by the change in permitted period, the survey is based largely on anecdotal evidence; and the SSWP has no corresponding evidence about the purposes of lengthy temporary absences within Great Britain.
230. In my judgment, the alleged close link of the higher permitted period of 13 weeks' absence within Great Britain to the socio-economic situation of the host state is not made out. As Mr Cox pointed out, if the purpose of permitting as long as 13 weeks' temporary absence from the home within Great Britain was indeed to facilitate seeking and undertaking work then it might be expected that this would be referred to expressly on the face of the scheme. It is not. Insofar as the SSWP's justification argument is based on either the purpose or effect of the discriminatory measure with regard to this question, it therefore fails.
231. Mr Cox also made what in my judgment was a telling point in this regard based on the SSWP's argument that the four-week temporary absence period was the same as the statutory minimum annual leave entitlement of a full-time worker of 28 days, so putting recipients of Housing Benefit in the same position as workers not in receipt of the benefit when deciding whether to go abroad. As Mr Cox put

it in his skeleton argument: *“Forcing claimants to replicate the decisions made by people who support themselves solely through work about whether to take annual leave does not explain the GB / non-GB distinction. If making [Housing Benefit] claimants act as if they were dependent on a full-time job with 4 weeks annual leave were the aim, then the rule would not distinguish between 13 weeks on a beach in Brighton and 13 weeks on a beach in Barcelona...”*

232. Insofar as the SSWP’s justification argument relies on the proposition that those who leave Great Britain in order to seek work abroad (something which on any view the Appellant herself was not doing) should no longer receive taxpayer-funded accommodation here in the interests of fairness to the “*community of solidarity*”, there is no evidence about how many recipients of Housing Benefit who continue to reside here (and so are not disqualified from continuing to receive Housing Benefit at all) but are temporarily absent for periods of more than four weeks are in fact seeking work outside Great Britain. Nor does the argument deal with why such a person would, on the SSWP’s case, continue to be entitled to receive Housing Benefit on the basis of residence within Great Britain in the first place, when working abroad for an extended period. In effect, it disregards the premise upon which the justification argument has to be advanced – which is that the absence in question must be temporary in nature.
233. I do not accept Ms Ling’s argument that the possibility of a recipient of Housing Benefit making a return trip, prior to the expiry of the permitted maximum period of temporary absence abroad, in order to re-establish their entitlement before then going abroad again, mitigates the discriminatory effect of the provision for the purposes of the argument on objective justification. Such an individual, by definition, remains resident here (otherwise Housing Benefit would not be payable at all) and is only temporarily absent from home. The costs of travel from EU member states to the United Kingdom are not insignificant, and such journeys might themselves take several days by road or rail. Nor do I accept that an EU migrant worker in the Appellant’s position who is (for example) visiting a seriously ill relative should be expected to make a round trip of potentially 3,000 miles for this purpose. The possibility of doing so does not, in my judgment, mitigate to any material extent the discriminatory effect of this provision on migrant workers. Indeed, it emphasises that effect.
234. Nor, in my judgment, does the possibility of a closed period supersession decision being made upon an applicant’s return to the United Kingdom (where the period of absence is more than the permitted maximum) materially mitigate the discriminatory effect of this provision. Whether it did so would depend upon the particular periods of time recipients of Housing Benefit spend abroad between the respective different maximum periods of four and 13 weeks, and the degree to which they were impacted (both in financial terms and the potential for loss of their home both whilst abroad and on return, with the consequent impact upon their EU Law rights as migrant workers) as a result of the removal of Housing Benefit. There is, as I have indicated, no evidence about this and in any event the possibility of such a decision being made does not directly address the discriminatory nature of the provision in question.

235. Further, insofar as Ms Ling submitted that it would not be desirable to apply a four-week limit in the same way to temporary absences within the United Kingdom, because it would have a detrimental effect on economic activity, then (even if correct) that does not address the question that is posed in the present context – which is not whether the permitted periods of temporary absence ought to be equalised at the lower level of four weeks, but whether the discriminatory effect of imposing the four-week period on EU migrant workers such as the Appellant, in the context of permitting 13 weeks’ temporary absence within Great Britain, can be justified.
236. When looked at overall, the SSWP’s justification arguments amount, in substance, to a series of assumptions and assertions which are not supported by evidence in circumstances where that might be expected. They do not, in my judgment, come close to justifying the discriminatory effect of this measure on EU migrant workers such as the Appellant or demonstrating that the maximum period of four weeks’ temporary absence abroad is no more than necessary to achieve the aims relied on – rather than, for example, the eight-week period that was proposed as an alternative by the Social Security Advisory Committee in 2016 to “*capture the hardest cases that are likely to be impacted by these proposals*”. Such material as the SSWP has deployed in these proceedings amounts in substance to argument, rather than evidence, and is insufficient to demonstrate that the measure is objectively justified.
237. Accordingly, I find that the SSWP has failed to justify, as a matter of EU Law, the indirectly discriminatory effect of the measure complained of. In my judgment, the Government has not provided a sufficient analysis, whether by way of submission or evidence, of the appropriateness and proportionality of the measure complained of, insofar as it admittedly discriminates against the Appellant and other EU migrant workers.
238. It was common ground that if I were to conclude that the SSWP’s argument on objective justification has not been made out, then under the approach to EU Law which I have set out above I would need to disapply the offending provisions of the Housing Benefit Regulations insofar as, and only to the minimum extent, necessary to achieve compliance with the Appellant’s rights under EU Law. This can be done by determining the Appellant’s entitlement to Housing Benefit during her period of temporary absence on the basis of omitting the words “within Great Britain” where they appear in Regulation 7(13), and by omitting Regulation 7(13C), 7(13D) and 7(13E). The result is that, in the Appellant’s case, the permitted maximum period of temporary absence from the home, at the point when she left for the Czech Republic, was 13 weeks rather than 4 weeks. For the reasons which I have already given, her entitlement during the relevant period is established on this basis.

Conclusion

239. The appeal to the Upper Tribunal is allowed. I set aside the decision of the First-tier Tribunal and re-make it by setting aside all the elements of the Local Authority’s decisions of 7 August 2020, save for the finding that there had been a recoverable overpayment of Housing Benefit in the sum of £179.40 which was

conceded by the Appellant before the First-tier Tribunal. It will now be for the Local Authority to recalculate the precise amount of Housing Benefit that ought to have been paid to the Appellant in respect of the period in question.

240. It is important to point out what the decision on this appeal does not determine. The application of EU Law to the national legislation considered in this appeal is governed by primary legislation passed by the United Kingdom Parliament which has preserved, in particular respects, the legal landscape as it stood prior to the United Kingdom's withdrawal from the EU. The United Kingdom Parliament has therefore preserved the Appellant's ability to rely on her rights under EU Law in this appeal. Whether, and if so by what route, a similar result to the outcome of this appeal, insofar as it turns on arguments based on EU Law, should be reached in relation to the application of the Housing Benefit Regulations 2006 to events which took place at any point after 7 August 2020 does not arise for decision in the present appeal and is not a matter upon which I heard any argument or express any opinion. Nor does my decision in relation to the disapplication of these provisions in the Appellant's case mean that such provisions are necessarily of no effect in other cases where, for whatever reason, an individual is unable to rely on rights derived from EU Law to achieve such a result.

**Mathew Gullick KC
Judge of the Upper Tribunal**

Authorised by the Judge for issue on 16 July 2026