[2014] AACR 9

(R (Reilly & Wilson) v Secretary of State for Work and Pensions [2013] UKSC 68)

SC **Lord Neuberger, President**
Lord Mance
Lord Clarke
Lord Sumption
Lord Toulson

30 October 2013

Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 – required information – need for a published policy – whether the regulations were *ultra vires* or contrary to Article 4 ECHR

The two respondents had been placed upon separate work for benefit schemes: the sector-based work academy (sbwa) and the Community Action Programme (CAP) as established under the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011. The respondents applied for judicial review in the High Court on the grounds that (i) the 2011 Regulations were *ultra vires* (as they did not prescribe either a description of the schemes, or the circumstances in which a person can be required to participate in the schemes, or the required period of participation, contrary to section 17A of the Jobseeker's Act 1995), (ii) the required notice provisions had not been complied with, (iii) it was unlawful to enforce the 2011 Regulations in the absence of a published policy as to the nature and requirements of either scheme and (iv) the first respondent had been subjected to forced or compulsory labour contrary to Article 4 of the European Convention on Human Rights. The High Court upheld the second ground of the appeal: the Secretary of State accepted that the first respondent's notice had not satisfied the regulations and the Court held that the second respondent's notice had not done so either. The Court of Appeal upheld this aspect of the High Court's decision and also allowed the first ground of the appeal, thereby quashing the 2011 Regulations. The Secretary of State appealed to the Supreme Court against the Court of Appeal's decision on grounds (i) and (ii) and the respondents cross-appealed against its decision on grounds (iii) and (iv). Immediately following the Court of Appeal's decision the Jobseeker's Allowance (Schemes for Assisting Persons to Obtain Employment) Regulations 2013 repealed and replaced the 2011 Regulations and set out fuller details of seven schemes, including the sector-based work academy and the successors of the Community Action Programme schemes, pursuant to section 17A of the 1995 Act. The Jobseekers (Back to Work Schemes) Act 2013 also came into force, and its effect was agreed before the Supreme Court to be to validate the 2011 Regulations retrospectively.

Held, allowing the Secretary of State's appeal on the *vires* of the 2011 Regulations but only on the basis that the 2013 Act had come into force and dismissing the rest of his appeal, and dismissing the respondents' cross-appeal, that:

1. both the sbwa and CAP schemes fell within the 2011 Regulations. However, regulation 2 contained no prescribed description of the sbwa and CAP schemes or the Employment, Skills and Enterprise Scheme. Even taking into account the need for flexibility in the detail of the schemes, regulation 2 failed to satisfy the requirements of section 17A(1). The courts had no more important function than to ensure that the executive complied with the requirements of Parliament as expressed in a statute. Moreover, the need for legal certainty was of crucial importance where a statute allowed the making of regulations with a significant impact on people's lives. To be meaningful the prescribed description must add something to what was said in the 1995 Act but the description of the Schemes in the 2011 Regulations added nothing to section 17A. Therefore the 2011 Regulations were unlawful. However, given the obvious need for flexibility, the prescribed circumstances were sufficiently set out in regulation 4. Likewise, it was legitimate for the "prescribed period" to be an open-ended one (paragraphs 45 to 52);

2. no notice was served on the first respondent contrary to regulation 4(1) and 4(2). The notice served on the second respondent simply informed him that he had to perform "any activities" requested by the private company operating the CAP, without any indication of the likely tasks, hours or places of work. This was insufficient to satisfy regulation 4(2)(c). However, the letter was sufficiently detailed with regard to the consequences of failure to participate and while there may have been imperfections the second respondent was not significantly prejudiced or misled by any breach of regulation 4(2)(e) (paragraphs 54 to 57);

3. the regulations invoked a statutory power which involved a requirement to work, on pain of loss of benefits. In these circumstances fairness required that a claimant should have access to such information about the scheme as he or she might need in order to make informed and meaningful representations before a decision was made. On the facts of the present case there had been a failure to provide either respondent with adequate, accurate information about the schemes before they were informed that their participation was required. More generally, a failure to see that a claimant was adequately informed before service of a notice under regulation 4 would be likely to, but would not necessarily, vitiate the service of the notice. Flexibility is necessary in dealing with procedural errors, and the answer will depend on the justice of the particular case. If the lack of information materially affected a claimant's ability to make representations which could have made a difference, it would normally be unjust to allow the notice to stand. On the other hand, if the lack of information was immaterial on the facts then justice would not require the notice to be set aside (paragraphs 64 to 75);

4. Article 4 provided that no one should be required to perform forced or compulsory labour. However, this did not include work under normal civic obligations. The latter provision delimits, or shows the bounds of, the right conferred by the Article. Therefore, the argument, that any work done under menace of a penalty imposed by the state contravened the prohibition of forced labour under Article 4 unless it came within one or other of the paragraphs of Article 4.3, involved a wrong approach to the nature and structure of the Article. Jobseeker's Allowance was a benefit for work-seekers, and the 2011 Regulations imposed a condition on that benefit directly linked to its purpose. This came nowhere close to the type of exploitative conduct at which Article 4 was aimed. The fact that, as a matter of domestic law, the first respondent's notice was unlawful made no difference (paragraphs 78 to 83).

DECISION OF THE SUPREME COURT

Mr James Eadie QC, Ms Catherine Callaghan and Ms Amy Rogers, instructed by the Treasury Solicitors, appeared for the appellant.

Ms Nathalie Lieven QC and Mr Tom Hickman, instructed by Public Interest Lawyers, appeared for the respondent.

LORD NEUBERGER AND LORD TOULSON (with whom Lord Mance, Lord Clarke and Lord Sumption agree):

1. This is a judgment on (i) an appeal brought by the Secretary of State for Work and Pensions, against the Court of Appeal's decision in favour of Ms Caitlin Reilly and Mr Jamieson Wilson, that the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations (SI 2011/917) (the 2011 Regulations), purportedly made under section 17A of the Jobseekers Act 1995 (the 1995 Act), do not comply with the requirements of that section, and (ii) a cross-appeal brought by Miss Reilly and Mr Wilson against the Court of Appeal's rejection of two other attacks they made on the way in which the Secretary of State had caused the Employment, Skills and Enterprise Scheme (the Scheme) to be operated.

2. The Secretary of State's appeal is complicated by the fact that, since the Court of Appeal's judgment was handed down, (i) the 2011 Regulations have been repealed and replaced by the Jobseeker's Allowance (Schemes for Assisting Persons to Obtain Employment) Regulations 2013 (SI 2013/276) (the 2013 Regulations), and (ii) the Jobseekers (Back to Work Schemes) Act 2013 (the 2013 Act) has come into force, and its effect is agreed to be to validate the 2011 Regulations retrospectively. We deal with this aspect in paragraphs 33–41 below.

3. We will begin by describing the relevant statutory and regulatory provisions as they stood in 2011, and will then summarise the relevant facts relating to Miss Reilly and to Mr Wilson; after explaining the effect of the decision of the courts below, we will then turn to the effect of

the 2013 Act and Regulations; after that, we will address the four sets of issues in turn, and will end by summarising our conclusions.

The relevant statutory and regulatory provisions in 2011

4. According to its long title, one of the purposes of the 1995 Act was to provide for "a jobseeker's allowance and to make other provision to promote the employment of the unemployed". Regulations made in 1996 included (i) provision for the circumstances in which the allowance was to be paid, (ii) requirements as to availability for employment, actively seeking employment, a Jobseeker's Agreement, and (iii) sanctions in the event of non-compliance. There were subsequently many amendments to and additions to these Regulations.

5. Section 1 of the 1995 Act provides, so far as material:

> "(1) An allowance, to be known as a jobseeker's allowance, shall be payable in accordance with the provisions of this Act.
>
> (2) Subject to the provisions of this Act, a claimant is entitled to a jobseeker's allowance if he –
>
> > (a) is available for employment;
> >
> > (b) has entered into a jobseeker's agreement which remains in force;
> >
> > (c) is actively seeking employment; ….
> >
> > (e) is not engaged in remunerative work; …"

6. Sections 17A and 17B were added to the 1995 Act by section 1(2) of the Welfare Reform Act 2009. Section 17A of the 1995 Act (section 17A) is headed "Schemes for assisting persons to obtain employment: 'work for your benefit' schemes etc", and it provides, so far as relevant:

> "(l) Regulations may make provision for or in connection with imposing on claimants in prescribed circumstances a requirement to participate in schemes of any prescribed description that are designed to assist them to obtain employment.
>
> (2) Regulations under this section may, in particular, require participants to undertake work, or work-related activity, during any prescribed period with a view to improving their prospects of obtaining employment. …
>
> (5) Regulations under this section may, in particular, make provision –
>
> > (a) for notifying participants of the requirement to participate in a scheme within subsection (l);
> >
> > (b) for securing that participants are not required to meet the jobseeking conditions or are not required to meet such of those conditions as are specified in the regulations; …

> (d) for securing that the appropriate consequence follows if a participant has failed to comply with the regulations and it is not shown, within a prescribed period , that the participant had good cause for the failure; …
>
> (6) In the case of a jobseeker's allowance …, the appropriate consequence for the purposes of subsection (5)(d) is that the allowance is not payable for such period (of at least one week but not more than 26 weeks) as may be prescribed."

7. Section 17B(1) of the 1995 Act entitles the Secretary of State to do certain things "[f]or the purposes of, or in connection with, any scheme under section 17A(1)", including "(a) mak[ing] arrangements … for the provision of facilities" and "(b) provid[ing] support … for arrangements made by other persons for the provision of facilities".

8. Section 35 of the 1995 Act provides that, at least in the context of section 17A, "prescribed" means "specified in or determined in accordance with regulations".

9. The circumstances in which a jobseeker's allowance is not payable, include, according to section 19(5), cases where the claimant:

> "(a) has, without good cause, refused or failed to carry out any jobseeker's direction which was reasonable, having regard to his circumstances;
>
> (b) has, without good cause –
>
> (i) neglected to avail himself of a reasonable opportunity of a place on a training scheme or employment programme;
>
> (ii) after a place on such a scheme or programme has been notified to him by an employment officer as vacant or about to become vacant, refused or failed to apply for it or to accept it when offered to him;
>
> (ii) given up a place on such a scheme or programme; or
>
> (iv) failed to attend such a scheme or programme on which he has been given a place; ..."

10. The 2011 Regulations were purportedly made under section 17A, and they came into force in May 2011. Regulation 2 provided that "the Scheme" means "the Employment, Skills and Enterprise Scheme" and then went on to state:

> "'The Employment, Skills and Enterprise Scheme' means a scheme within section 17A (schemes for assisting persons to obtain employment: 'work for your benefit' schemes etc) of the [1995] Act known by that name and provided pursuant to arrangements made by the Secretary of State that is designed to assist claimants to obtain employment or self-employment, and which may include for any individual work-related activity (including work experience or job search)."

11. Regulation 3 of the 2011 Regulations provided:

> "The Secretary of State may select a claimant for participation in the Scheme."

12. Regulation 4 of the 2011 Regulations stated:

> "(1) Subject to regulation 5, a claimant ('C') selected under regulation 3 is required to participate in the Scheme where the Secretary of State gives C a notice in writing complying with paragraph (2).
>
> (2) The notice must specify –
>
> (a) that C is required to participate in the Scheme;
>
> (b) the day on which C's participation will start;
>
> (c) details of what C is required to do by way of participation in the Scheme;
>
> (d) that the requirement to participate in the Scheme will continue until C is given notice by the Secretary of State that C's participation is no longer required …;
>
> (e) information about the consequences of failing to participate in the Scheme."

13. Regulation 5 of the 2011 Regulations set out the circumstances in which the requirement to participate in a scheme ceases. Regulation 6 provided:

> "A claimant who fails to comply with any requirement notified under regulation 4 is to be regarded as having failed to participate in the Scheme."

Regulation 7 provided an opportunity for a claimant who fails to participate in the Scheme to show good cause for that failure.

14. The consequences of failure to participate in the Scheme were set out in regulation 8, and they are often known as benefits sanctions:

> "(1) Where the Secretary of State determines that a claimant ('C') has failed to participate in the Scheme, and C has not shown good cause for the failure in accordance with regulation 7, the appropriate consequence for the purpose of section 17A … is as follows.
>
> (2) In the case of a jobseeker's allowance …. the appropriate consequence is that C's allowance is not payable for the period specified in paragraphs (4) to (7) ('the specified period'). …
>
> (4) The period is 2 weeks in a case which does not fall within paragraph … (6). …
>
> (6) … [T]he period is 26 weeks where –
>
> (a) on two or more previous occasions the Secretary of State determined that C's jobseeker's allowance was not payable or was payable at a lower rate because C failed without good cause to participate in the Scheme, and

> (b) a subsequent determination is made no more than 12 months after the date on which C's jobseeker's allowance was not payable or was payable at a lower rate following the most recent previous determination. …"

The facts: general

15. In March 2012, jobseeker's allowance was being received by just over 1.6 million people aged over 18, of whom around 357,000 had been in receipt of the allowance for more than a year. About 480,000 were aged under 24, of whom 55,000 had been in receipt of the allowance for more than a year. Forecast expenditure on the allowance in the year 2011/12 was just under £5bn.

16. In a nutshell, the amendments to the 1995 Act effected in 2009, including section 17A, envisaged that regulations would (i) require participants to undertake unpaid work, or work-related activity, during a prescribed period, to improve their prospects of employment and (ii) impose sanctions (in particular, loss of the allowance) on those who without good cause failed to participate in such schemes. Those regulations materialised as the 2011 Regulations, which came into force on 20 May 2011, and, as explained above, provided for the Scheme.

17. A variety of "work for your benefit" programmes have been made under the 2011 Regulations. The present appeals concern two such schemes.

18. The sector-based work academy scheme (sbwa scheme) was launched in August 2011, and is administered by advisers at social security offices, or Jobcentres, which, until 2011, were run by an executive government agency under the name of Jobcentre Plus. The stated target of the sbwa scheme is those who do not have any serious barriers to finding work, but who would benefit from a short period of work-focused training and work-experience placement linked to a genuine job vacancy.

19. The Community Action Programme (CAP) was launched in November 2011, and its stated aim is to help very long-term unemployed claimants back into work. It provides up to six months' work experience, and is administered by private companies, one of which is called Ingeus Ltd (Ingeus), most of whose recruits are referred or identified by Jobcentres.

The facts relating to Miss Reilly and Mr Wilson

20. Miss Reilly was born in 1989 and first claimed jobseeker's allowance in August 2010. Three months later, she got a paid work experience placement at a museum pursuant to a Government scheme, and was paid the minimum wage subsidised by that scheme. When that placement ended, she continued to work voluntarily at the museum, with a view to pursuing a career in museums. She has always complied with the jobseeking conditions, and has been committed to seeking employment. Miss Reilly is no longer claiming jobseeker's allowance as she has obtained paid employment at a supermarket.

21. From 31 October 2011, Miss Reilly participated, albeit unwillingly, in the sbwa scheme. This involved a week's training, a two-week unpaid work placement at a Poundland store, and a further week's training. She participated in the scheme because her Jobcentre adviser informed her that her participation in the scheme was mandatory. That was wrong: it is not mandatory to take part in the sbwa scheme, although once a claimant accepts a place, she must complete the scheme. She asserts that had she been correctly informed about the scheme, she would have

exercised her right not to participate in it. Contrary to regulation 4 of the 2011 Regulations (regulation 4), Miss Reilly did not receive any written notice concerning her participation in the sbwa scheme.

22. Mr Wilson was born in 1971, and worked as a qualified Heavy Goods Vehicle driver from 1994 to 2008, since when he has been unemployed. Mr Wilson started receiving jobseeker's allowance in 2009. In August 2011 his Jobcentre adviser told him that in order for him to continue to receive his jobseeker's allowance he had to take part in a new programme that was under trial in his area. He was given a letter stating that if he did not find a job within three months he would be referred to the CAP which would "involve up to six months of near full-time work experience with additional weekly job search support requirements". The letter informed him that a refusal to participate could result in the loss of his benefit, and that, if he had any questions, he should ask his personal adviser.

23. At a meeting in September 2011, Mr Wilson's adviser gave him another letter stating that if he had not found a job in two months, the CAP would commence. Again, it informed him that he might "lose his benefit" if he did not participate in the CAP. In October 2011, at another meeting with his adviser, he was given a letter to similar effect with the period of one month being specified as the deadline.

24. In November 2011, Mr Wilson was selected to participate in the CAP. Once a person is selected in this way, participation in the CAP scheme is mandatory. On 16 November 2011, Mr Wilson received a letter from Jobcentre concerning the CAP scheme, which stated, *inter alia*:

> "At your interview today, your adviser explained that you had to take part in the [CAP] from 16/11/11. Ingeus will be in touch with you shortly to arrange this. The [CAP] will involve doing up to six months of near fulltime work experience, with some additional weekly job search support The [CAP] is an employment programme established in law under the [2011 Regulations]. To keep getting Jobseeker's Allowance, you will need to take part in the [CAP] until you are told otherwise or your award of jobseeker's allowance comes to an end; and complete any activities that Ingeus asks you to do.
>
> If you don't take part in the [CAP], under the [2011 Regulations] your jobseeker's allowance may be stopped for up to 26 weeks. You could also lose your National Insurance credits."

25. At a subsequent meeting with Ingeus's representative, Mr Wilson was told that his placement was due to begin on 28 November 2011 with an organisation that collects and renovates used furniture and distributes it to needy people, and that his participation was mandatory. He was told he would be required to work for 30 hours a week for 26 weeks or until he found employment of 16 hours a week or more. These details were not set out in writing. Mr Wilson explained that he had strong objections to being required to undertake labour unpaid and therefore "was not prepared to work for free, particularly for such a long period of time".

26. As a result of his refusal to participate in the CAP scheme, a two-week benefits sanction was imposed on Mr Wilson in early May 2012. Later the same month, it was decided to impose two further benefits sanctions as a result of Mr Wilson's successive failures to attend a job search session with Ingeus on two occasions during April 2012. In total, these second and third benefits sanctions resulted in a cessation of benefit payments for 6 months.

These proceedings

27. In early 2012, Miss Reilly and Mr Wilson issued separate claims for judicial review claims challenging the 2011 Regulations, as well as the sbwa scheme and the CAP, on four grounds:

> i) that the 2011 Regulations are *ultra vires* section 17A because they fail to prescribe (i) a description of the sbwa scheme or the PAC, (ii) the circumstances in which a person can be required to participate in those schemes, or (iii) the period during which participants are required to undertake work on those schemes;
>
> ii) that the requirement that Miss Reilly and Mr Wilson participate in a scheme was unlawful, because the notice provisions contained in regulation 4 were not complied with;
>
> iii) that it is unlawful for the Government to enforce the 2011 Regulations in the absence of a published policy as to the nature of the relevant scheme and the circumstances in which individuals could be required to undertake unpaid work;
>
> iv) that Miss Reilly had been subjected to forced or compulsory labour contrary to Article 4 of the European Convention on Human Rights (the Convention) and/or that the Regulations were contrary to Article 4.

28. The Secretary of State challenged each ground (save that he admitted a breach of regulation 4 in relation to Miss Reilly). Foskett J granted each claim on ground (ii) and dismissed them on grounds (i), (iii) and (iv): [2012] EWHC 2292 (Admin).

29. In relation to ground (ii), the judge held that the Secretary of State had breached regulation 4(2), by the failure to provide any written notice to Miss Reilly (such breach being admitted), and regulation 4(2)(e), by failing to provide "information about the consequences of failing to participate in the Scheme" to Mr Wilson. The judge also held that the consequence of the breach of regulation 4 was that no sanctions could be lawfully imposed on Miss Reilly or Mr Wilson for failure to participate in the scheme, but the failure did not make it unlawful for the Secretary of State to require an individual to participate in either scheme.

30. Miss Reilly and Mr Wilson appealed against (a) Foskett J's findings on grounds (i), (iii) and (iv), (b) in relation to ground (ii), his rejection of the contention that the written notice supplied to Mr Wilson also breached regulation 4(2)(c), and (c) his rejection of the contention that the consequence of a breach of regulation 4 is that the requirement to participate in the scheme is unlawful. The Secretary of State cross-appealed the finding of a breach of regulation 4 in Mr Wilson's case.

31. The Court of Appeal (a) allowed the appeal of Miss Reilly and Mr Wilson on grounds (i) and (ii), (b) dismissed the Secretary of State's cross-appeal, (c) quashed the 2011 Regulations, (d) declared that the Secretary of State acted unlawfully in requiring Miss Reilly to participate in the sbwa scheme, and (e) dismissed the appeal of Miss Reilly and Mr Wilson on grounds (iii) and (iv): [2013] EWCA Civ 66; [2013] 1 WLR 2239. As decided by the Court of Appeal:

a) the 2011 Regulations are *ultra vires* section 17A, as they contain insufficient details about the sbwa scheme or the CAP, and should be quashed (although the other two grounds of attack described in paragraph 27(i) above were rejected);

b) in any event the requirements of regulation 4 were not complied with in relation to Miss Reilly or Mr Wilson;

c) subject to (a), the Secretary of State was not obliged to publish his policy any more extensively than he had done in order to enforce the schemes; and

d) the enforcement of the schemes did not involve an infringement of Miss Reilly's rights under Article 4 of the Convention (Article 4).

32. The Secretary of State appeals to this court against conclusion (a) and, in relation to Mr Wilson, against conclusion (b); and Miss Reilly and Mr Wilson cross-appeal against conclusions (c) and (d).

The 2013 Regulations and the 2013 Act

33. On 12 February 2013 (the same day as the Court of Appeal handed down judgment in these proceedings), the 2013 Regulations came into force. They were proleptically drafted with a view to addressing the conclusion which was in fact reached by the Court of Appeal, namely that the 2011 Regulations were *ultra vires* section 17A, and to ensuring that the Government could continue to require claimants to participate in "work for your benefit" schemes.

34. Regulation 3 of the 2013 Regulations is headed "Schemes for Assisting Persons to Obtain Employment", and paragraph (1) states that "The schemes described in the following paragraphs are prescribed for the purposes of section 17A(1) (schemes for assisting persons to obtain employment: 'work for your benefit' schemes etc) of the Act". The following seven paragraphs of regulation 3 of the 2013 Regulations describe seven different schemes, which were the schemes which had been brought in purportedly under the 2011 Regulations, and they included:

"(4) Full-time Training Flexibility is a scheme comprising training of 16 to 30 hours per week, for any claimant who has been receiving jobseeker's allowance for a continuous period of not less than 26 weeks ending on the first required entry date to the scheme.

(6) The sector-based work academy is a scheme which provides, for a period of up to 6 weeks, training to enable a claimant to gain the skills needed in the work place and a work experience placement for a period to be agreed with the claimant, and either a job interview with an employer or support to help participants through an employer's application process.

(8) The Work Programme is a scheme designed to assist a claimant at risk of becoming long-term unemployed in which, for a period of up to 2 years, the claimant is given such support as the provider of the Work Programme considers appropriate and reasonable in the claimant's circumstances, subject to minimum levels of support published by the provider, to assist the claimant to obtain and sustain employment which may include work search support, provision of skills training and work placements for the benefit of the community."

35. Regulation 4(1) of the 2013 Regulations provides that "[t]he Secretary of State may select a claimant for participation in a scheme described in regulation 3", and regulation 5 mirrors the notice requirements contained in regulation 4 of the 2011 Regulations.

36. On 26 March 2013 (the same day as the Secretary of State sought permission to appeal the decision of the Court of Appeal), the 2013 Act came into force after having been fast-tracked through Parliament. The 2013 Act was plainly intended to "undo" the decision of the Court of Appeal, in that, pursuant to subsections (2), (3), (4)–(8), and (10)–(12) of section 1, it retrospectively validates (i) the 2011 Regulations, (ii) the programmes listed in regulation 3(2) of the 2013 Regulations, (iii) notices issued under regulation 4 of the 2011 Regulations, and (iv) the benefit sanctions imposed under those regulations in relation to the schemes. Subsection (14) of section 1 provides that "the 2011 Regulations are to be treated as having been revoked by the 2013 Regulations on the coming into force of the 2013 Regulations".

37. The 2013 Act is, we were told, currently the subject of a challenge in the Administrative Court on the ground that it does not comply with the Convention.

The issues before this Court

38. The substantive issues before us are the same as those before Foskett J and the Court of Appeal; they are set out in paragraph 27 above, and the Court of Appeal's conclusion on each issue is as summarised in paragraph 31 above. It is convenient to take each of the four points in turn.

39. However, before doing so, it is necessary to address the effect of the 2013 Regulations and the 2013 Act on this appeal and cross-appeal. On behalf of Miss Reilly and Mr Wilson, Ms Lieven QC submits that we should not consider the Secretary of State's appeal on issue (a), as that issue is now academic, because, even if the Court of Appeal was right to hold that, prior to the 2013 Act coming into force, the 2011 Regulations were *ultra vires*, Parliament has now validated those regulations through the 2013 Act.

40. The submission has obvious force as a matter of principle. This court, like other courts, is normally concerned with stating the law as it is, not as it was. Further, it is rather unattractive for the executive to be taking up court time and public money to establish that a regulation is valid, when it has already taken up Parliamentary time to enact legislation which retrospectively validates the regulation. That very point was made on behalf of Miss Reilly and Mr Wilson in order to oppose the Secretary of State's application for permission to appeal to this court, and, at least viewed from our present perspective, we consider that there was considerable force in the point.

41. However, permission to appeal has been given to the Secretary of State, the issue concerned is not the only point at stake in the appeal, the issue may be of some significance to the drafting of regulations generally, and the retrospectively validating legislation is under attack. Bearing in mind those factors, we are of the view that issue (a) should be considered, although the precise formulation of any order that is made will have to be carefully considered, bearing in mind the effect of the 2013 Act.

42. Accordingly, we turn to consider the four issues on which Foskett J and the Court of Appeal ruled, and which were argued before us.

The first issue: Were the 2011 Regulations *ultra vires*?

43. The question to which this first issue gives rise is whether the 2011 Regulations satisfied the requirements of section 17A(1), as expanded by section 35 of the 1995 Act. The principal point in this connection is whether, as the Court of Appeal held, regulation 2 of the 2011 Regulations (regulation 2) contained a sufficiently prescribed description of the sbwa scheme and the CAP.

44. To recapitulate:

> a) section 17A(1) authorised the making of Regulations which "impos[ed] on claimants in prescribed circumstances a requirement to participate in schemes of any prescribed description that are designed to assist them to obtain employment", and, by section 35, "prescribed" means "specified in or determined in accordance with regulations"; and
>
> b) regulation 2 identified the Employment, Skills and Enterprise Scheme, which "means a scheme within section 17A …known by that name and provided pursuant to arrangements made by the Secretary of State that is designed to assist claimants to obtain employment or self-employment, and which may include for any individual work-related activity (including work experience or job search)".

45. Whether one takes the Employment, Skills and Enterprise Scheme (which is really a group of schemes including the sbwa scheme and the CAP) as a single scheme, or whether, as seems more natural, one takes the sbwa scheme and the CAP as separate schemes, they were undoubtedly schemes which fell within the ambit of regulation 2. However, the question which arises is whether regulation 2 was or contained a "prescribed description" of the scheme in question. In other words, the question is whether regulation 2 could fairly be said to have been a "regulation" either (i) which "specified a "description" of (the Employment, Skills and Enterprise Scheme or) the sbwa scheme or the CAP, or (ii) "in accordance with" which (the Employment, Skills and Enterprise Scheme or) the sbwa scheme or the CAP could be said to have been "determined".

46. For the Secretary of State, Mr Eadie QC argued that the self-evident need for flexibility in the precise characteristics of any scheme introduced under section 17A renders it unlikely that Parliament can have intended much, if anything, in the way of specific information about any scheme to be included in any regulation made thereunder. The need for flexibility cannot be doubted. As Pill LJ said in the Court of Appeal, at [49], "[t]he needs of jobseekers will vary infinitely, as will the requirements of providers prepared to participate in arrangements with them". Over and above the question of flexibility, as Ms Lieven QC, for Miss Reilly and Mr Wilson, effectively accepted, once one decides that section 17A(1) requires more specific information about a scheme than what is contained in regulation 2, it is not easy to identify the precise extent of the information required.

47. However, even bearing in mind these points, it appears clear to us that regulation 2 does not satisfy the requirements of section 17A(1). The courts have no more important function than to ensure that the executive complies with the requirements of Parliament as expressed in a statute. Further, particularly where the statute concerned envisages regulations which will have a significant impact on the lives and livelihoods of many people, the importance of legal certainty and the impermissibility of sub-delegation are of crucial importance. The observations of Scott LJ in *Blackpool Corporation v Locker* [1948] 1 KB 349, 362 are in point: "John Citizen" should

not be "in complete ignorance of what rights over him and his property have been secretly conferred by the minister", as otherwise "[f]or practical purposes, the rule of law … breaks down because the aggrieved subject's legal remedy is gravely impaired".

48. More specifically, in relation to the point at issue, we cannot improve on the reasoning of Sir Stanley Burnton in the Court of Appeal, where he said this:

> "75. Where Parliament in a statute has required that something be prescribed in delegated legislation, it envisages, and I think requires, that the delegated legislation adds something to what is contained in the primary legislation. There is otherwise no point in the requirement that the matter in question be prescribed in delegated legislation. However, the description of the Employment, Skills and Enterprise Scheme in the 2011 Regulations adds nothing to the description of such schemes in the Act. ... In effect, the Secretary of State contends that any scheme he creates is a scheme within the meaning of section 17A notwithstanding that it is not described in any regulations made under the Act. Furthermore, it is not possible to identify any provision of the Regulations that can be said to satisfy the requirement that the description be 'determined in accordance with' the Regulations. …
>
> 76. Description of a scheme in regulations is important from the point of view of Parliamentary oversight of the work of the administration. It is also important in enabling those who are required to participate in a scheme, or at least those advising them, to ascertain whether the requirement has been made in accordance with Parliamentary authority. …"

49. Sir Stanley immediately went on to say, "[t]he question as to precisely how much detail must be included in the Regulations in order to comply with the requirements of the Act does not arise for consideration in this appeal, since the Regulations contain none". However, while it is a fundamental duty of the courts to ensure that the executive carries out its functions in accordance with the requirements of Parliament, as expressed in primary legislation, it is also incumbent on courts to be realistic in the standards they set for such compliance. In this case, it is not only self-evident, but it is clear from the contents of regulation 3 of the 2013 Regulations, part of which is set out in paragraph 34 above, that it is not unrealistic to hold that the Secretary of State could have done significantly more than was done in the earlier regulation 2 to describe the individual schemes such as the sbwa scheme and the CAP. It is neither necessary nor appropriate for us to decide whether regulation 3 of the 2013 Regulations complies with the requirements of section 17A: the issue is not before us, and has not been argued, and in any event it may be influenced by the provisions of the 2013 Act.

50. Given the conclusion that the 2011 Regulations are *ultra vires* because they fail to provide a "prescribed description" of any scheme, it is strictly unnecessary to consider the further grounds raised by Miss Reilly and Mr Wilson for contending that the 2011 Regulations were invalid, but we will do so briefly. Those grounds are that the Regulations fell foul of the requirements of section 17A that any regulations made thereunder must, under subsection (1), "prescribe" the "circumstances" in which, and, under subsection (2), the "period" for which, claimants may be required to participate in prescribed schemes.

51. The Court of Appeal rejected these two further grounds, and, while accepting that each ground is not without force, we agree with the Court of Appeal. The argument that the 2011 Regulations fail to prescribe the circumstances in which a claimant may be required to

participate in a scheme, was largely based on regulation 3 of the 2011 Regulations (set out in paragraph 11 above). It is said that, by merely providing that the Secretary of State may select a claimant for participation in a scheme, it suffers from the same vice as the alleged prescribed description of the schemes, in that it does no more than sub-delegate, in a completely unqualified way, the whole exercise of prescribing the circumstances to the Secretary of State. However, as Pill LJ indicated in [58] of his judgment, one must also consider regulation 4 in this context. It seems to us that, particularly given the need for flexibility, regulation 4 contains sufficient detail to justify the conclusion that the circumstances in which a claimant can be required to participate in a scheme is to be "determined in accordance with" the 2011 Regulations. The fact that the regulation is concerned with the contents of a notice is irrelevant to this issue, but the very open-ended nature of what is left to the Secretary of State by regulation 4 could well be a problem in other circumstances where flexibility was not so obviously essential.

52. Substantially the same point can be made about the statutory requirement in section 17A(2) for a period to be prescribed and the terms of regulation 4(2)(d) and 5(2) of the 2011 Regulations. Ms Lieven argued that the regulations thus provide for an "open-ended period", but we do not see why that is intrinsically incapable of being a "prescribed period". Again, we agree with Pill LJ who said at [59], that the period is "specified by way of events with which it will begin and end", and that, bearing in mind the "undoubted need for flexibility where possible", it is "a tenable specification".

The second issue: Was the notice served on Mr Wilson valid?

53. As described in paragraph 21 above, no written notice was given to Miss Reilly, contrary to regulation 4(1) and 4(2) set out in paragraph 12 above.

54. In relation to Mr Wilson, there is a dispute which falls to be determined, namely whether the letter of 16 November 2011, quoted in paragraph 24 above, complied with regulation 4(2)(c) and regulation 4(2)(e). In agreement with Foskett J, the Court of Appeal held that it did not satisfy the latter provision, but they also found that it did not satisfy regulation 4(2)(c).

55. In our opinion, there was a failure to comply with regulation 4(2)(c). The letter of 16 November 2011 merely informed Mr Wilson that he had to perform "any activities" requested of him by Ingeus, without giving him any idea of the likely nature of the tasks, the hours of work, or the place or places of work. It seems to us, therefore, that the letter failed to give Mr Wilson "details of what [he was] required to do by way of participation". Again, it is necessary to balance practicality, in the form of the need of the Secretary of State and his agents for flexibility, against the need to comply with the statutory requirement, which was plainly included to ensure that the recipient of any such letter should have some idea of where he or she stood. A requirement as general and unspecific as one which stipulates that the recipient must "complete any activities that Ingeus asks you to do", coupled with the information that the course will last about six months falls some way short of what is required by the words of regulation 4(2)(c), even bearing in mind the need for practicality.

56. The alleged breach of regulation 4(2)(e) is rather different in nature, and we have concluded that it is not made out. It arises from the fact that the letter of 16 November 2011 states that Mr Wilson would lose his benefits for "up to 26 weeks" if he did not participate in the CAP. The true position was that he risked losing his jobseeker's allowance for two weeks initially, and thereafter for a period of 26 weeks, which could potentially be continued on a "rolling" basis – see regulation 8(4) and (6) of the 2011 Regulations, set out in paragraph 14

above. We see some force in Ms Lieven's criticisms of the letter, but the question is whether they are sufficient to provide additional grounds for holding the notice invalid. The crucial issue is not so much one of contractual construction of the letter: it is whether Mr Wilson was (or perhaps whether a reasonable person in Mr Wilson's position would have been) significantly prejudiced or misled by the terms of the letter so far as any sanction was concerned.

57. Regulation 4(2)(e) required the notice to contain "information about the consequences of failing to participate", but it did not specify how detailed the information needed to be. If the letter had warned Mr Wilson in general terms that failing to participate might result in loss of benefit, we think that it would have been sufficient. The letter was more specific, in that it said that he risked losing "up to 26 weeks" loss of benefit, which was the maximum on any one occasion. This would have made it plain to Mr Wilson that he could face a lengthy period of loss of benefit if he failed to participate. Whether the issue is to be judged from the perspective of Mr Wilson or of a reasonable person in his position, we are not persuaded that the imperfections of the warning were sufficiently misleading or prejudicial that the letter should be held invalid on that account.

The third issue: The Secretary of State's duty to publish information about the schemes

58. As explained above:

> i) section 17A empowers the Secretary of State, by regulations, to require a claimant for jobseeker's allowance to participate in a scheme of any prescribed description which is designed to assist the claimant to obtain employment, and the required participation may include an obligation to undertake (unpaid) work or work-related activity;
>
> ii) under the 2011 Regulations, the claimant is to be given a written notice which must specify certain particulars – ie the date when he is required to start, details of what he is required to do, information about when the requirement will end and information about the consequences of failing to participate.

59. The question arises whether fairness to a claimant requires any (and, if so, what) other information about a scheme in which he or she may be required to participate should be made publicly available.

60. Ms Lieven's submission is that any criteria established by the Secretary of State for the exercise of the power to require a person to engage in unpaid work should be made public as a matter of fairness to individuals and as a safeguard against arbitrariness. In support of that submission, she relies on the decision and reasoning in *R (Salih) v Secretary of State for the Home Department* [2003] EWHC 2273 (Admin).

61. *Salih* was concerned with a provision of the Immigration and Asylum Act 1999 which empowered, but did not require, the Secretary of State to provide or arrange support for asylum seekers and their dependants who appeared to him to be destitute or likely to become destitute within 14 days. It was the established practice of the Secretary of State to exercise that power if an application was made by an asylum seeker, and that policy was communicated to the Refugee Council, but not to individual asylum seekers who would qualify to receive benefits under the policy. Having said at [51] that "[m]isery and suffering may be involved" and "[f]undamental human rights may be engaged", Stanley Burnton J continued in the next paragraph by stating the following principle:

> "These considerations lead me to conclude that it is not open to the Home Secretary to decide to refrain from making known his hard cases policy. On principle a policy such as that should be made known to those who may need to avail themselves of it. Leaving aside contexts such as national security, it is in general inconsistent with the constitutional imperative that statute law be made known for the government to withhold information about its policy relating to the exercise of a power conferred by statute."

62. In *R (WL Congo) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245, [36], Lord Dyson (with whom a majority of the other members of the Supreme Court agreed) endorsed Stanley Burnton J's statement of general principle. WL was a case of detention and the Court of Appeal had distinguished Stanley Burnton J's statement on that basis, but Lord Dyson did not find that a satisfactory ground for distinction. He considered that a policy relating to a scheme which imposed penalties or other detriments was at least as important as one which conferred benefits.

63. On the question how much detail needed to be conveyed, Lord Dyson said at [38]:

> "The precise extent of how much detail of a policy is required to be disclosed was the subject of some debate before us. It is not practicable to attempt an exhaustive definition. It is common ground that there is no obligation to publish drafts when a policy is evolving and that there might be compelling reasons not to publish some policies, for example, where national security issues are in play. Nor is it necessary to publish details which are irrelevant to the substance of decisions made pursuant to the policy. *What must, however, be published is that which a person who is affected by the operation of the policy needs to know in order to make informed and meaningful representations to the decision-maker before a decision is made.*" (Emphasis added.)

64. By the same token, the administration of a scheme by which a person may be required to engage in unpaid work on pain of discontinuance of benefits is a matter of considerable importance to a claimant for jobseeker's allowance. (It is also of significance to the public at large, which has a legitimate interest in the way that public funds are disbursed and in proper steps being taken to encourage and assist such claimants to obtain paid employment.) For the individual, the discontinuance or threat of discontinuance of jobseeker's allowance may self-evidently cause significant misery and suffering. The ability to appeal against a notice or a withholding of benefits (to a First-tier Tribunal of the Social Entitlement Chamber under section 12(2) of the Social Security Act 1998) is a form of protection. However, it is necessarily retrospective and, in practice, it may be small comfort to a person who is faced with an immediate termination of benefit.

65. Fairness therefore requires that a claimant should have access to such information about the scheme as he or she may need in order to make informed and meaningful representations to the decision-maker before a decision is made. Such claimants are likely to vary considerably in their levels of education and ability to express themselves in an interview at a Jobcentre at a time when they may be under considerable stress. The principle does not depend on the categorisation of the Secretary of State's decision to introduce a particular scheme under statutory powers as a policy: it arises as a matter of fairness from the Secretary of State's proposal to invoke a statutory power in a way which will or may involve a requirement to perform work and which may have serious consequences on a claimant's ability to meet his or her living needs.

66. Properly informed claimants, with knowledge not merely of the schemes available, but also of the criteria for being placed on such schemes, should be able to explain what would, in their view, be the most reasonable and appropriate scheme for them, in a way which would be unlikely to be possible without such information. Some claimants may have access to information downloadable from a government website, if they knew what to look for, but many will not. For many of those dependent on benefits, voluntary agencies such as Citizens Advice Bureaux play an important role in informing and assisting them in relation to benefits to which they may be entitled, how they should apply, and what matters they should draw to the attention of their Jobcentre adviser.

67. In his evidence, Mr Iain Walsh, a senior civil servant, explains that the main way in which information is provided to claimants about the sbwa scheme and the CAP is through personal meetings with a Jobcentre adviser prior to a referral. In relation to the sbwa scheme, there is a document entitled "Sector-based work candidates (SBWA) Adviser Guidance", which, in a section headed "Initial discussions with the claimant", sets out a list of matters about which a claimant is to be informed. The section begins with the following instructions:

> "Give the claimant full details of the sbwa. This should include as much information as possible about the course, the employer, the role etc. The customer must be given full information about the sbwa to ensure they can make an informed decision about taking part, especially as there are mandatory elements once the claimant has agreed to participate."

68. Insofar as such information is of a general kind, there can be no doubt that it is in everyone's interest that the Jobcentre adviser provides it to a claimant either in written form or via the website, with an explanation (preferably in writing) as to where and how it can be accessed. If that is not done, it may be harder evidentially for the Secretary of State to show that a claimant has been given all the information fairly required in order to be enable him or her to make an informed decision.

69. However, the critical question is whether the claimant is in fact given by one means or another all the information which is fairly and reasonably required. If the Jobcentre adviser does what the sbwa Adviser Guidance requires, the Secretary of State's public law duty will have been discharged. On the uncontradicted evidence of Miss Reilly, that did not happen in her case, but the court does not have a basis for concluding that the Adviser Guidance was routinely ignored.

70. In relation to the CAP, there is no comparable evidence about the instructions given to Jobcentre advisers at the pre-referral stage. There is some correspondence between Mr Wilson and the relevant Jobcentre personnel, but it does not take matters very far.

71. Mr Walsh has not set out or produced any document showing what instructions were given to Jobcentre advisers about any information which they were to give to a claimant regarding the CAP before serving a notice requiring him or her to take part in it. The letters produced by Mr Wilson show that he was told on a number of occasions by letter that if he wanted more information he could find it out from the adviser at the Jobcentre. However, his uncontradicted evidence is that on receipt of those letters he asked for further information from the Jobcentre adviser, who said that she was unable to give him any.

72. The nearest document corresponding to the sbwa Adviser Guidance which Mr Walsh has produced is a document issued by the department to CAP providers entitled "Community Action Programme (CAP) Provider Guidance". The document goes into considerable detail about the nature of the scheme and the provider's duties. It was published on the department's website at www.dwp.gov.uk/supplying-dwp/what-we-buy/welfare-to-work-services/provider-guidance/community-action-programme.shtnl.

73. This document recognises that, in designing a work programme, account must be taken of the personal circumstances of the claimant, such as whether he or she has caring responsibilities; but it is plain that it is left to the provider to decide the details of what the participant is to be required to do after an initial engagement meeting. The inability of the Jobcentre adviser to answer Mr Wilson's questions is readily explained by the sequence of events, whereby the service of the notice under regulation 4, which required details to be given of what a claimant was required to do, occurred at a time when those details remained to be determined by the job provider.

74. For the reasons already explained, the Secretary of State owed a duty as a matter of fairness to see that Miss Reilly and Mr Wilson were respectively provided with sufficient information about the sbwa scheme and the CAP, in order for them to be able to make informed and meaningful representations to the decision-maker before a notice requiring their participation was served on them. However, it would be wrong to be prescriptive as to how that information should be given. It is a proper matter for a court to determine whether, and if so what, information is required to be communicated by the government, and whether a particular means of communication satisfied that requirement. However, it should not, absent unusual circumstances, be for the court to prescribe a specific means of communication. In this case, it would involve the court going too far if it was to rule that descriptions of the schemes must, as a matter of law, be published to the world at large. The desirability of publication in the manner described in paragraph 65 above is obvious, but practical desirability does not equate to legal requirement. Further, as this case illustrates, Mr Wilson was none the wiser for the fact that the CAP Provider Guidance was published on the department's website.

75. A failure to see that a claimant was adequately informed before service of a notice under regulation 4 would be likely to, but would not necessarily, vitiate the service of the notice. That would depend on whether the failure was material. Public law is flexible in dealing with the effects of procedural failures. Ultimately the issue must be determined by reference to the justice of the particular case. If the effect of the lack of information given to a claimant materially affected him or her by removing the opportunity of making representations which could have led to a different outcome, it would normally be unjust to allow the notice to stand. If it was immaterial on the facts, justice would not require the notice to be set aside.

76. The respondents seek a declaration that the Secretary of State was lawfully required to publish and make available to jobseekers the terms of schemes established under section 17A. For the reasons given, that is to state the Secretary of State's duty too broadly and prescriptively. We have stated the nature of the Secretary of State's duty in paragraph 73 above and do not consider it necessary to grant relief by way of a formal declaration to that effect. On the facts of the present case, there was a failure to provide either Ms Reilly or Mr Wilson with adequate, accurate information about the schemes in relation to themselves before they were informed that their participation was required. This would have been a ground for treating the notice served on Mr Wilson as ineffective if it had otherwise complied with the requirements of the statute, but

we have already held that it was ineffective and do not consider that any further relief is required.

The fourth issue: Article 4 of the European Convention on Human Rights

77. The final point which needs to be considered is the contention that the 2011 Regulations fell foul of Article 4, and that, by requiring Miss Reilly to work pursuant to the 2011 Regulations meant that her Article 4 rights were infringed. The Court of Appeal dealt with the point somewhat delphically, essentially on the basis that it took matters no further, in the light of the decisions they had reached on the other points at issue.

78. Article 4 provides:

> "1. No one shall be held in slavery or servitude.
>
> 2. No one shall be required to perform forced or compulsory labour.
>
> 3. For the purpose of this article the term 'forced or compulsory labour' shall not include:
>
> > (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
> >
> > (b) any service of a military character or, in the case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
> >
> > (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
> >
> > (d) any work or service which forms part of normal civic obligations."

79. Ms Lieven's case that Article 4 has been infringed rests, unsurprisingly, on paragraph 2 of the Article, not paragraph 1. Further, the only basis upon which the alleged infringement of Article 4 is maintained is that the effect of the 2011 Regulations being invalid (and of her being misinformed as to her rights) is that the requirement that Miss Reilly work for Poundland as a condition of retaining her jobseeker's allowance was unlawful, and, as a result, she was unlawfully "required to perform forced or compulsory labour".

80. Ms Lieven's argument involves two steps. First, Ms Reilly's work at Poundland was "exacted … under menace of [a] penalty", ie disallowance of jobseeker's allowance, and was therefore *prima facie* forced labour, and for that she relies on the decision of the Strasbourg court in *Van Der Mussele v Belgium* (1983) 6 EHRR 163, paragraph 34. Secondly, the Secretary of State could not rely on Article 4.3(d) because the illegality of the regulations and the notice prevented the Secretary of State being able to argue that the work was part of Ms Reilly's "normal civic obligations".

81. In our judgment the argument fails at the first step. As the court noted in *Van Der Mussele* at paragraph 32, Article 4 was largely based on Convention 29 of the International Labour Organisation, the main aim of which was to stop exploitation of labour in the colonies.

Forced labour is not fully defined and may take various forms, but exploitation is at its heart. Article 4.3 contains particular instances of obligatory labour which are common features of life in democratic societies and do not represent the mischief at which the Article is aimed.

82. It is important to understand, as the court explained in *Van Der Mussele* at paragraphs 37 and 38, that Article 4.3 is not intended to limit the exercise of the right guaranteed by Article 4.2 (ie provide an exception to a right otherwise conferred by Article 4.2), but to "delimit" (ie show the bounds of) the very content of the right, and it therefore serves as an aid to the interpretation of the whole of Article 4.2. The diverse instances identified in Article 4.3 are "grounded on the governing idea of the general interest, social solidarity and what is in the normal or ordinary course of affairs". Therefore even where there exists a risk comparable to the menace of a penalty, it is necessary to consider, in the light of the underlying objectives of Article 4, whether the service required of an individual falls within the prohibition of compulsory labour. The argument advanced by Ms Lieven that any work done under menace of a penalty imposed by the state contravenes the prohibition of forced labour under Article 4 unless it comes within one or other of the paragraphs of Article 4.3, thus involves a wrong approach to the nature and structure of the article.

83. In the present case we are concerned with a condition imposed for the payment of a claim for a state benefit. Jobseeker's allowance, as its name suggests, is a benefit designed for a person seeking work, and the purpose of the condition is directly linked to the purpose of the benefit. The provision of a conditional benefit of that kind comes nowhere close to the type of exploitative conduct at which Article 4 is aimed. Nor is it to the point that according to Ms Reilly the work which she did for Poundland was unlikely in fact to advance her employment prospects. Whether the imposition of a work requirement as a condition of a benefit amounts to exacting forced labour within the meaning of Article 4 cannot depend on the degree of likelihood of the condition achieving its purpose.

84. Attempts to argue that the attachment of a work condition to the payment of state unemployment benefit contravened Article 4 have failed at Strasbourg. There are three reported instances.

85. In *X v Netherlands* (1976) 7 DR 161, the applicant was a specialised worker in the building industry. He claimed unemployment benefit and was required as a condition of payment to accept work which he considered to be unsuitable for a person with his qualifications and socially demeaning. He refused the offer and brought a complaint of a violation of Article 4. The Commission declared the complaint inadmissible, observing that it was open to the claimant to refuse the work and that its acceptance was only a condition for the grant of unemployment benefit. There could therefore be no question of forced or compulsory labour within the meaning of Article 4.

86. In *Talmon v Netherlands* [1997] ECHR 207; [1997] EHRLR 448 the applicant was a scientist. He claimed unemployment benefit and was required as a condition to accept work which he considered unsuitable. Because of his refusal to do it, his benefit payments were reduced. He complained that by having his benefits reduced he was being forced to do work to which he had a conscientious objection, contrary to Article 4. The application was declared manifestly ill-founded and inadmissible.

87. In *Schuitemaker v Netherlands* (Application No 15906/08) (unreported) 4 May 2010 the applicant was a philosopher by profession. She claimed unemployment benefit and was told that

her benefits would be reduced unless she was willing to take up a wider range of employment than she considered suitable. She complained under Article 4 that she was being forced to take up labour irrespective of whether it would be suitable for her. The court held that her application was inadmissible. It noted that the obligation of which she complained was in effect a condition for the granting of benefits, and it stated as a general principle that a state which has introduced a system of social security is fully entitled to lay down conditions which have to be met for a person to be eligible for benefits under that system.

88. *Van Der Mussele*, on which Ms Lieven relies, was a different type of case. The applicant was a trainee advocate. He was required to represent at his own expense some criminal defendants who were entitled to legal aid. The sanction if he refused to do so was that he would not be registered as an advocate. He complained of a violation of Article 4. The obvious difference between that case and the present is that it was not a simple case of a conditional benefit, where the purpose of the benefit was intended to be enhanced by the condition. Rather, it was a case of the state fulfilling its legal obligations to third parties at the expense of the applicant. The court accepted, at paragraph 32, that the menace of the penalty and the lack of voluntariness on the part of the applicant met the starting point for considering whether he had been subjected to forced labour in violation of Article 4.

89. However, that was only the beginning of the inquiry. To amount to a violation of Article 4, the work had to be not only compulsory and involuntary, but the obligation to work, or its performance, must be "unjust", "oppressive", "an avoidable hardship", "needlessly distressing" or "somewhat harassing". As we read the judgment, the court was not there setting out five different categories but was using a variety of expressions to elucidate a single underlying concept, which we have referred to as exploitation. In *Van Der Mussele*, at paragraph 40, the court concluded for a combination of reasons that there had been no forced labour within the meaning of Article 4.2, having regard to the social standards generally obtaining in Belgium and in other democratic societies. The court therefore considered it unnecessary to decide whether the work in question was in any event justified under Article 4.3(d).

90. We do not consider that the imposition of the work condition in this case, intended as it was to support the purpose for which the conditional benefit was provided, met the starting point for a possible contravention of Article 4. If it did, we do not consider that it fell within Article 4.2, having regard to the Strasbourg guidance and the underlying objective of the Article.

91. Does it make a difference to this analysis that what Ms Reilly was told about her obligation to take part in the sbwa scheme, as a condition of receiving jobseeker's allowance, was unauthorised and wrong as a matter of domestic law? The answer is no. The fact that the requirement was invalid does not of itself mean that it also fulfilled the characteristics of forced labour within the meaning of Article 4.2. The logic of the contrary argument would produce strange results. If, for example, a public sector employee were wrongly directed to do something which was in fact beyond the terms of his contract of employment, and the employee did as he was told from fear of disciplinary action, we do not accept that the invalidity of the order would of itself trigger a violation of Article 4. Equally, if the 2011 Regulations had unjustifiably discriminated between jobseekers on the ground of gender, and hence had been unlawful, it cannot be right that anyone required to work pursuant to such regulations would therefore have had their Article 4 rights infringed. Whether the requirement was invalid under domestic law and whether it involved a violation of Article 4 are different issues, and proof of the former does not of itself determine the latter.

Conclusion

92. Accordingly, were it not for the 2013 Act and the 2013 Regulations, we would have affirmed the order of the Court of Appeal.

93. In the light of the 2013 Act and the 2013 Regulations, however, a more subtly expressed form of order will be required, and we would invite counsel to try and agree the appropriate wording.